SUPREME COURT OF QUEENSLAND

CITATION:	*R v BBV* [2010] QCA 61
PARTIES:	**R** **v** **BBV** (applicant)
FILE NO/S:	CA No 3 of 2010 DC No 672 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Conviction)
ORIGINATING COURT:	District Court at Cairns
DELIVERED EX TEMPORE ON:	22 March 2010
DELIVERED AT:	Brisbane
HEARING DATE:	22 March 2010
JUDGES:	McMurdo P and Muir and Fraser JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**Application for an extension of time refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – where the applicant was found guilty of rape, assault with intent to commit rape and attempted rape – where the applicant applied for an extension of time to appeal conviction – where the applicant contended that the DNA evidence was not properly tested or considered – where the delay in applying for an extension was lengthy and the reasons given unconvincing and unsupported – where the Crown case was strong – whether it is in the interests of justice to grant the extension *R v Tait* [1999] 2 Qd R 667; [1998] QCA 304, cited *R v Twidale* [2009] QCA 200, cited
COUNSEL:	C Heaton for the applicant M B Lehane for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant Director of Public Prosecutions (Queensland) for the respondent

THE PRESIDENT: Justice Fraser will deliver his reasons first.

FRASER JA: On 22 April 2009 after a trial in the District Court, the applicant was found guilty by a jury of one count of rape, one count of assault with intent to commit rape and one count of attempted rape. On the same day, he was sentenced to imprisonment for five years in respect of the offence of rape and to shorter concurrent terms for the other offences.

On 5 January 2010 the applicant filed an application for an extension of time within which to appeal against his convictions. At the hearing of the application the Court had the benefit of helpful submissions by Mr Heaton of counsel for Legal Aid on behalf of the applicant.

In deciding whether to exercise the discretionary power to extend the time for appealing the Court examines whether there is any good explanation for the delay and the Court considers overall whether it is in the interests of justice to grant the extension: see *R v Tait* [1999] 2 Qd R 667 at 668. Relevant factors in the exercise of the discretion include the viability of the proposed appeal, where that is practicable to be assessed, and the length of the delay: see *R v Twidale* [2009] QCA 200. Here the delay is lengthy extending over some seven months. By way of explanation for the delay, the applicant stated in his application that his lawyers had advised him after he was convicted that if he appealed, his sentence would be increased. He contends that he cannot read or write well, did not understand what his lawyers said to him and did not understand that he could appeal against his conviction only. He then states that on 18 December 2009 he was advised by a Legal Aid lawyer that if he appealed against his conviction only, his sentence would not be considered. This unconvincing explanation is verified only by a hearsay affidavit by a Legal Aid lawyer.

As to the viability of the proposed appeal, the grounds stated in the notice of appeal are

that the verdict was unsafe and unsatisfactory and that the DNA evidence against the applicant was not properly tested or considered. The respondent supplied the Court with the transcript of day 1 and day 2 of the trial and a transcript of the summing-up given on the third day. From this material, it appears that the Crown case was that the applicant attacked his 30 year old cousin after agreeing to drive her home from a party. Ms Kingsburra was in the car for a short part of the journey and Ms Nicholas and Mr Sands were in the car for part of the journey. When only the complainant remained in the car, the applicant stopped to enable her to go to the toilet but he then assaulted her and digitally raped her. She fought back and eventually rendered the applicant unconscious by hitting him on the head with something. She then made her escape. There was evidence that the complainant had promptly complained to Ms Patterson and Ms Barlow and when the complainant was taken home to her mother. The terms of her complaints were broadly consistent.

The applicant's case, as it was put in cross-examination of the complainant was that he did not see the complainant after he left the party. However, the complainant's evidence to the contrary was corroborated by Ms Kingsburra, Ms Nicholas and Mr Sands. The complainant's account was also corroborated by the medical evidence of her injuries consistent with the alleged offences, and by medical evidence, that upon examination the applicant was found to have had recent scratches and contusions to his neck and recent scratches to his wrist and hand, and by the finding of some of the complainant's belongings at the crime scene. In addition, the prosecution relied upon DNA analysis of material found under the complainant's finger nails where such material might expect to be found consistently with the complainant's account. According to the evidence of the Crown scientific witness, Ms Quartermain, putting aside the possibility that the applicant had an identical twin, there was about a one in 900,000 chance that this could be the DNA of a person other than the applicant. The DNA evidence was given in the form of a statement. Defence counsel did not require the scientist for cross-examination. It is therefore right to say, as the applicant contends, that the DNA evidence was not tested, but

there is nothing to suggest that cross-examination of the scientist or any other form of testing would have been to the applicant's advantage. We have today been given a copy of the report of the DNA evidence and it contains in it nothing helpful for the applicant's contention.

In summing-up the trial judge gave the jury directions about the DNA evidence. The trial judge explained the process of identification by DNA profiling; that the matching of the profiles did not establish that the material of unknown origin came from the applicant, that the material could have come from an identical twin, although there was no evidence of the existence of an identical twin and that apart from the special case of identical twins if the statistics were reliable the chances of someone having a matching profile would be very small. The applicant's counsel did not identify any arguable error in those directions. The applicant did not give or call evidence.

The applicant's counsel did not elaborate upon the applicant's contention that the verdict was unsafe and unsatisfactory. The Crown case seems to have been a strong one and the applicant has not shown that there is any arguable ground for thinking that the verdict was unreasonable.

In summary there was a lengthy period between the conviction and the application for an extension of time, the applicant's explanation for his delay in appealing is unconvincing and is unsupported by persuasive evidence, the Crown case was a strong one and the applicant has been unable to articulate any reasonable argument in support of his proposed appeal.

In these circumstances, I would refuse the application for an extension of time.

THE PRESIDENT: I agree.

MUIR JA: I agree.

THE PRESIDENT: The order is, the application for an extension of time to appeal is refused.

Mr Heaton, thank you very much for your assistance in this case. The Court appreciates it.