[2011] QCA 268

COURT OF APPEAL

CHESTERMAN JA
WHITE JA
McMEEKIN J

CA No 158 of 2011
DC No 263 of 2009

THE QUEEN

v

CHARLES GENE BANHELYI **Applicant**

BRISBANE

DATE 05/10/2011

JUDGMENT

McMEEKIN J: The applicant seeks an extension of time in which to appeal his conviction and apply to appeal his sentence on a count of dangerous operation of a motor vehicle causing death and grievous bodily harm whilst speeding. He also seeks leave to call fresh evidence on any such appeal.

The issue at trial was whether the dangerous driving occurred whilst the applicant was suffering from an epileptic fit. The fresh evidence is said to come from an eyewitness who claims to have seen the applicant slumped over his steering wheel before the relevant collision has occurred. A brief statement of the witness has been provided by the applicant. His evidence plainly would have been helpful to the applicant at his trial.

The application to call fresh evidence is made against a background of a contention that the prosecution were in possession of a statement of the eyewitness but his existence was not revealed to the applicant.

The Crown contend that the application to lead fresh evidence should be left to any appeal, by which time a record book will be available to put the evidence in context and the prosecution in possession of instructions as to whether a statement of the witness was indeed in the possession of the police. That seems appropriate. Given the obligation on the prosecution imposed by section 590AB(2)(b) of the *Criminal Code* to make disclosure of any such eyewitness evidence, the applicant would have a strong case that he is yet to have a trial according to law if his claim is made out. *The Queen v Hau* [2009] QCA 167 at paragraph 13 per Justice Keane. It is important that the prosecution's position be made clear.

As to the extension application, the applicable principle and factors relevant were explained in *The Queen v Tait* [1998] QCA 304 and [1999] 2 Qd R 667. The Court will consider whether there is any good reason shown to account for the delay and whether it is in the interests of justice to grant the extension. Relevant factors can include the length of the delay, any prejudice to the respondent and whether the applicant has a viable case on appeal. Here, the relevant applications were filed on 15 June 2011, about six weeks late, a relatively short delay. No prejudice is alleged. Numerous grounds of appeal are alleged but they were prepared without legal assistance. At this stage, the prosecution cannot submit that the case on appeal is not a viable one.

The explanations for the delay that are offered include the shock and disorientation of incarceration, a lack of knowledge as to his rights, combined with a lack of advised information from the trial lawyers, and impecuniosity requiring an application for legal aid, which application was made reasonably promptly.

In all the circumstances, it is appropriate the application to extend in which to appeal and apply for leave to appeal the sentence be granted.

The orders should be as follows:

(1) That an extension of time to file an appeal against conviction be granted.

(2) That an extension of time to apply for leave to appeal the sentence be granted.

(3) That the applicant have leave to amend the notice of appeal and application for leave to appeal filed on 15 June 2011, such amendments to be filed within 28 days after receipt of the Appeal Book. The extension of time should be until 15 June 2011.

CHESTERMAN JA: I agree that those are the orders the Court should make and I agree also with Justice McMeekin's reasons.

WHITE JA: I agree also.

CHESTERMAN JA: Orders accordingly.