NAURU COURT OF APPEAL
AT YAREN
APPELLATE JURISDICTION

Miscellaneous Appeal No. 1 of 2024
[Supreme Court Criminal Case 4 of 2022]

BETWEEN: **FOREMAN ROLAND**

APPLICANT

AND: **THE REPUBLIC**

RESPONDENT

BEFORE: **Justice C. Makail**

DATE OF HEARING: **05/08/2024**

DATE OF JUDGMENT: **06/08/2024**

CATCH WORDS: **Application for extension of time – Proposed appeal from conviction of applicant in criminal proceeding – Delay – Six and a half months of delay – Explanation for delay – Blame on trial counsel for failing to file appeal within time – Inadequate explanation – Prospect of success – Proposed ground of appeal alleged "flagrantly incompetent advocacy" by trial counsel – Conduct of trial**

counsel – Whether conduct of trial counsel resulted in miscarriage of justice – Application refused – Nauru Court of Appeal Act, 2018 – Section 36(1) & (4)

CASES CITED: **Ali v. State [2020] FJCA 11; Simpson (Earl) v. R (SCCA No: 54/1993); R v. Birks (1990) NSWLR 677; Liomauri v. R [2022] SBCA 11**

APPEARANCES:

COUNSEL for the Applicant: **Mr. R Tagivakatini**

COUNSEL for the Respondent: **Ms. A Driu**

RULING ON APPLICATION TO EXTEND TIME TO FILE NOTICE OF APPEAL

1. **MAKAIL J:** Pursuant to an application by way of a summons filed on 17 July 2024 the applicant seeks the following orders:

   1.1 the time for filing an application for leave to appeal out of time against the judgment of the Supreme Court delivered on 9 November 2023 be extended; and

   1.2 the application for leave to appeal out of time be filed within 7 days of the grant of this order.

2. At the hearing, both the learned counsel for the parties conceded that the correct wording of the orders sought in the summons is not "application for leave to appeal" but a "notice of appeal" because the applicant intends to appeal a final judgment on verdict following his sentencing on 1 December 2023.

Brief Background Facts

3. According to the applicant's affidavit in support of the summons filed on 17 July 2024 the common brief facts are:

- The applicant was charged with the offence of causing harm to a Police Officer, contrary to Section 77(a), (b) and (c) (ii) of the *Crimes Act* 2016. The allegations are from 25 March 2022.

- He engaged Mr Vinci Clodumar of Clodumar, Soriano & Associates as his legal representatives and his counsel.

- At trial, Mr Clodumar was unavailable. Mr Raynor Tom replaced Mr Clodumar and defended the applicant.

- The applicant pleaded not guilty to the charge.

- After a trial on 9 November 2023 the applicant was found guilty and convicted of the offence.

- On 1 December 2023 the applicant was sentenced to 75 months (6 years and 25 days) in prison.

- The applicant is currently serving his sentence in prison.

Time to Appeal

4. According to Section 36(1) of the *Nauru Court of Appeal Act,* 2018 (*"the Act"*) the time limited for filing an appeal to the Court of Appeal is 30 days. It follows that a party aggrieved by a decision of the Supreme Court has 30 days from the date of decision to file an appeal to the Court of Appeal.

5. In the case of an appeal from criminal proceedings, the time limitation of 30 days runs from the date of judgment on sentence: see Section 36(1) of the Act. In the present case, the judgment on sentence was delivered on 1 December 2023. The time limitation of 30 days expired on 30 December 2023.

6. The applicant did not file an appeal by 30 December 2023. He has also allowed six and a half months to go by before filing the summons on 17 July 2023 through his legal counsel from the Public Legal Defender's Office.

Explanation for Delay

7. Why the delay? Why has it taken that long for the applicant to come to the Court of Appeal?

8. According to the affidavit in support of the applicant filed on 17 July 2024 he explained that following his conviction and sentencing he contacted Mr Tom several times to lodge an appeal against his conviction. He was told the appeal papers will be filed.

9. After serving six months, he grew frustrated that no appeal was filed. In May 2024 he contacted the Office of Public Legal Defenders for legal assistance. Mr Ravu Tagivakatini informed the applicant that he will contact Mr Tom and obtain the trial notes from Mr Tom to prepare the appeal papers.

10. Subsequently, Mr Tagivakitini visited the applicant in prison and took further instructions to prepare the appeal papers.

11. However, it is important for the applicant or any aggrieved party who seeks to appeal a judgment of the Supreme Court to comply with the time limitation of 30 days prescribed by Section 36 (1) of the Act. It is a mandatory statutory prescription for there must be finality in litigation. The applicant ought to have known this mandatory statutory prescription because ignorance of the law is no excuse.

12. It is for this reason that it is critically necessary for the applicant to take steps to bring an application to extend time after the time limitation of 30 days had expired without delay under Section 36(4) of the Act. While the applicant explained why he was unable to file an appeal within 30 days of the judgment of the Supreme Court, his explanation for allowing six and a half months to lapse before filing the current application is inadequate.

13. The applicant may blame his previous counsel for failing him, but it was also incumbent on him to file the application without delay. He had the option of engaging another counsel immediately after the appeal period had expired to do that. However, he waited until May 2024 to engage the Public Legal Defenders Office to represent him. By then, five months had lapsed.

14. By the time the current application was filed, six and a half months had lapsed. If it was one week to a month after the appeal time had expired, provided there is an adequate explanation for the delay, I would accept. But six and a half months of delay and him blaming his previous counsel for it, that is a long delay with inadequate explanation. The delay operates against the applicant's prayer for extension of time.

Prospect of Success of Appeal

15. The applicant refers to the sole proposed ground of appeal in the draft notice of appeal attached to his affidavit in support (supra) which states:

> *"The trial counsel for the Appellant was inadequate and conducted 'fragrantly (sic) incompetent advocacy' during the trial, which prejudiced the Applicant's right to competent representation and resulted in an injustice."*

16. This proposed ground is premised on the claim that Mr Tom who is referred to as the trial counsel did not adequately and competently defend the applicant at the trial. The duty of counsel of this description is commonly derived from the Legal Practitioner Professional Conduct Rules in each jurisdiction to protect not only the client but also the legal practitioner. In Nauru, it is the *Legal Practitioners (Professional Conduct) Rules,* 2019 (*"the Professional Conduct Rules"*).

17. It is alleged that the trial counsel failed to uphold his duty in Rule 25 of the *Professional Conduct Rules* where amongst others, he failed to decline to represent the applicant when he knew he is newly admitted legal practitioner and not qualified to defend the applicant in a criminal proceeding (Rule 25(1)) and took up the defence case for the applicant on short notice and without adequate preparation (Rule 25(b)).

18. Given that there are different stages or layers of a criminal proceedings and trial, the specific areas which were identified at trial are, the failure by trial counsel during submission on a no case to refer to relevant provisions of legislations and case authorities, eg *The Republic v. Jeremiah* (2016) NRSC42 as authority and principles on no case submission, applicant being advised not to give evidence but to remain silent and failure to file closing submissions at the direction of the Court to assist the Court on verdict.

19. According to the applicant, these claims against the trial counsel in the conduct of the defence case at trial are reinforced by the comments by the trial judge at [4] of the judgment on verdict:

> *"The representation of the accused in this case illustrated clearly that those that are new to the legal profession should be guided by senior counsels for several years before they are given briefs to appear on their own. In particular, to represent clients in offences that carry hefty penalties. The court reminded counsel in court that even if legal representation is being offered pro bono, the court still*

expects that proper and thorough legal research are undertaken in the substantive law and in the carriage of the matter. This will ensure that the spirit of the fundamental right of accused persons provided under Article 10(3) of the Constitution are protected and observed."

20. It was submitted that the conduct of trial counsel fell short of the standard set by Rule 25 (supra) and as pointed out by the trial judge (supra) and the trial counsel is guilty of "flagrantly incompetent advocacy". Where it can be demonstrated in a proposed ground of appeal that such conduct has resulted in injustice to an accused, it is an appealable ground and time to appeal should be extended.

21. The phrase "flagrantly incompetent advocacy" is not defined but is referred to in the judgment of Prematilaka JA of the Fiji Court of Appeal in *Ali v. State* [2020] FJCA 11 cited by counsel for the applicant. It appears that where it is established that a conviction of an accused is a result of "flagrantly incompetent advocacy", it would be quashed. At [21] of the judgment, his Honour observed:

> *"Yet, O'Corner LJ said in Swain [1988] Crim LR 109 that if the court has any lurking doubt that an appellant might have suffered some injustice as a result of flagrantly incompetent advocacy by his advocate it would quash the conviction. In Boal [1992] QB 591 where the appellant pleaded guilty on the basis of his counsel's mistaken understanding of the law, despite having a defense which was likely to have succeeded, was regarded as grounds of appeal though not being a case of 'flagrantly incompetent advocacy'."*

22. In another case cited by counsel for the applicant, *Simpson (Earl) v. R* (SCCA No: 54/1993) Downer JA in the Court of Appeal of Jamaica also referred to the phrase "flagrantly incompetent advocacy".

23. However, it is important to recognise that there are different instances where conduct of counsel in litigation may be called into question. A defence counsel may be well qualified in terms of having read law and practiced in the area of law (criminal law) but on the day of trial is ill prepared to conduct the case for the client. A conviction is the result after the trial. Would the conviction be set aside on account of counsel's "flagrantly incompetent advocacy"?

24. In another case, would a conviction be quashed on the ground of "flagrantly incompetent advocacy" because the defence counsel has a reputation of

being ill-prepared over many years of practice or conversely, would a conviction be quashed because the defence counsel is recently admitted counsel to the bar, say six months into law practice? Then there are cases where the defence counsel may be well trained but due to a huge case load (briefs) and ill-preparedness, would a conviction be quashed on account of counsel's "flagrantly incompetent advocacy"? These are some but not all, the different situations where the question as to what constitutes "flagrantly incompetent advocacy" may be asked.

25. The respondent submitted, and I agree that the general rule is that the Court has power and a duty to intervene in a case of miscarriage of justice. As to the significance of counsel's competence, it is relevant and was discussed by Gleeson CJ in *Rv. Birks* (1990) NSWLR 677 at 685:

> *"1. A Court of Criminal Appeal has a power and duty to intervene in the case of a miscarriage of justice, but what amounts to a miscarriage of justice is something that has to be considered in the light of the way in which the system of criminal justice operates.*
>
> *2. As a general rule an accused person is bound by the way the trial is conducted by counsel, regardless of whether that was in accordance with the wishes of the client, and it is not a ground for setting aside a conviction that decisions made by counsel were made without, or contrary to instructions, or involve errors of judgment or even negligence.*
>
> *3. However, there may arise cases where something has occurred in the running of the trial, perhaps as a result of 'flagrant incompetence' of counsel, or perhaps from some other cause, which will be recognized as involving, or causing, a miscarriage of justice. It is impossible and undesirable to attempt to define such cases with precision. When they arise they will attract appellate intervention."*

26. The observation at [3] of the above judgment recognises the different situations that may arise because of the significant role of defence counsel in a criminal proceeding and trial, some of them I have mentioned at [23] and [24] (supra).

27. It is also important to recognise that not all jurisdictions are open to question the competence of counsel where miscarriage of justice is alleged. In Solomon Islands, the importance of a legal practitioner and a client and confidentiality that comes with it in Rule 10 of the *Solomon Islands Legal Practitioners (Professional Conduct) Rules,* 1995 is recognised.

28. It even sought to have a waiver from the client and apply for leave to give the former counsel opportunity to respond to the allegations in a case where an appeal is lodged. In *Liomauri v. R* [2022] SBCA 11 and relevantly at [17] the Court stated:

> *"17. In seeking the written waiver of privilege, it is incumbent on counsel to explain to the client the full effect of the waiver. It will allow the new lawyer access to communications between the former lawyer and his client but will also allow the respondent to the appeal to speak with the former lawyer and determine whether an application should be made to seek leave for that lawyer to give evidence on the appeal."*

29. It is suggested by counsel for the respondent that Nauru should adopt this practice because an attempt to obtain a responding affidavit from trial counsel was met with reluctance. I acknowledge the dilemma encountered by the respondent and trial counsel and it goes to highlight the delicate situation a trial counsel, the client (accused) and the respondent are in. On the one hand is the interest and right of the client to a fair trial and on the other, the interest and reputation of the trial counsel. There are wider implications in relation to trial counsel including attracting a charge of professional misconduct.

30. However, the real question is, has the applicant demonstrated a case of miscarriage of justice such that the proposed ground of appeal has a strong prospect appeal success? I agree with counsel for the respondent that the failure to cite the relevant provisions of the legislations and case authorities on the no case submission can hardly be described as incompetence by trial counsel. There must be something more to draw the attention of the appeal Court to investigate than an assertion that trial counsel did not do a well-presented argument on a no case hearing.

31. Similarly, as learned counsel for the respondent puts it in the written submissions, *".....unless the applicant can lay a sound argument to remaining silent or not calling any witness, it is not out of the ordinary for Defence Counsel to have advised him as such given that the Prosecution carries the evidential and legal burden to prove its case beyond reasonable doubt."*

32. As to the failure by trial counsel to file closing submissions on verdict, I agree with learned counsel for the respondent's submission that it, *"....is regrettable but not inexcusable given that both he and the trial prosecutor*

had in fact rendered oral closing submissions prior to the filing of any written closing submissions. It was not as if the Trial Court had not heard from both counsels as per their closing submissions."

33. In summary, there is nothing in the applicant's submissions that point to where precisely the conduct of the trial counsel altered the course of the trial that resulted in a miscarriage of justice. For these reasons, I am not satisfied that the applicant has demonstrated that by the proposed ground of appeal, the appeal has a strong prospect of success.

Other Matters

34. In his affidavit in support, the applicant brought to the notice of this Court an assertion that the trial counsel and one of the prosecution witnesses, namely the complainant in the case, are related. They are cousins. However, it was not squarely put by the learned counsel for the applicant that the relationship had influenced the way the trial counsel conducted the defence case. Significantly, that trial counsel did it on purpose to allow the prosecution to secure a conviction for the benefit of the complainant. This point was not pressed.

35. Otherwise, apart from its being an assertion of a relationship between them, it is a choice of legal counsel and representation and one for the applicant himself to make and if he knew that the trial counsel and the complainant are related, it was incumbent on him to make that decision. If he had allowed the trial counsel to conduct the trial for him and the result is, adverse to him, in my view, it is not an appealable ground.

Conclusion

36. The application for extension of time to appeal is not made out.

Order

37. The order of the Court is the application to extend time to file a notice of appeal is refused.

Ordered: 6 day of August 2024

NAURU COURT OF APPEAL

Justice Colin Makail
Justice of Appeal