B. Woods SC 783

IN THE SUPREME COURT OF)
PAPUA NEW GUINEA)

CORAM: FROST, A.C.J.

Tuesday,
14th May, 1974.

IN THE MATTER OF APPLICATIONS BY
JOHNSON KEREMOT AND BENSON WATIR
to extend the time for appeal
against conviction by the
Supreme Court.

REASONS FOR JUDGMENT

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MORESBY
FROST, A.C.J.

This is an application for extension of time to enable each applicant to appeal against his conviction by the Supreme Court at Mount Hagen on 22 September 1972 for wilfully and unlawfully setting fire to a dwelling house contrary to Sec. 461 of the Criminal Code. Each applicant was sentenced to six months' imprisonment and the present proceedings were not instituted until immediately after the sentences had been served.

Notice of Appeal is required to be given within 40 days after the date of conviction, but the time may be extended at any time by the Full Court or a Judge. Supreme Court (Full Court) Act Section 34 (1) (2).

The reason given for the delay is that although on various occasions in October and November 1973 and later both applicants requested the Visiting Justice and also the Corrective Institution authorities to assist them in bringing an appeal, they did not receive any assistance as a result of these requests. It is plain that these requests were received and passed on to the Public Solicitor. In October 1973 the applicant, Benson Watir, had been advised by the Public Solicitor that his case was being reviewed for appeal.

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This review may have been initiated either by the Public Solicitor in the ordinary course at the conclusion of a trial in which the accused had been found guilty, or pursuant to the Visiting Justice's request. In fact the Public Solicitor did review the applications for in his letter dated 19 December 1973 he stated that no action would be taken. Whether the Visiting Justice reported the Public Solicitor's decision to the applicant is not clear. The present applications are made following representations made by the Police Chaplain to the Public Solicitor at the end of February 1974.

Mr Adams who appeared for the applicants did not assert that the actions of the Visiting Justice or the Corrective Institution officers were anything but helpful. He accepted the fact that the Public Solicitor who had arranged for the applicants to be represented at the trial reviewed the cases and took the view that they were not appropriate cases for appeal. His submission was that the applicant should have been advised that apart from the Public Solicitor's opinion each had an independent right to appeal.

However the fact is that each applicant had had the benefit of full legal advice. It is plain that some qualification must be placed upon the consideration, which I shall assume in their favour, that the applicants were unaware that they could disregard the advice of the Public Solicitor, and themselves initiate the necessary proceedings for an appeal for that consideration would apply practically to the entire indigenous population and the provision in the Act that appeals must be brought within 40 days would be rendered of no effect.

It is established that the fact that the applicants have served their sentences is not an absolute bar to applications

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of this nature. R. v. Hughes (1) and R. v. Williams (2). Indeed the fact that an applicant has served his sentence may tend to remove one well-recognized obstacle to the grant of an extension of time. Thus it is said that the Court should have regard to the fact that if the application is delayed the Crown may be at a disadvantage so far as the memory and availability of witnesses are concerned in a new trial. But as these applicants have served their sentences if the applications were granted and the appeals succeeded it is unlikely that the Court would order a new trial. However both cases cited show that special circumstances are required.

These applications are made because as a result of the convictions the applicants were dismissed from the Police Force after periods of service in which neither had suffered any convictions. Each applicant desires to clear his name with a view to being reinstated in the Police Force. However if there is to be any regularity in the administration of justice which is properly a consideration for the Court - see R. v. Hughes (3) (supra) - then in the case of an application for an extension of time after a long delay it cannot be granted merely as of course.

The considerations applicable in applications of this nature are set out in the judgment of the Full Court in the Secretary for Law v. Tisunkac Nawok Domstok also known as Bisanoga (4). The Full Court adopted the test that where there is a long delay the applicant should satisfy the court at the least that there is grave reason to apprehend that justice has actually miscarried. So the question before me is whether such a case has been shown.

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(1) (1910) N.Z.L.R. 29 P.239

(2) (1912) 8 Cr. App. R 71

(3) (1910) N.Z.L.R. 29 P.242 per Edwards, J.

(4) (Unreported Judgment F.C. No.60, 28 Mar. 1974

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Accordingly I turn to the grounds upon which it is intended to appeal. The convictions arose out of incidents when in the course of his duty each applicant was endeavouring to prevent tribal fighting between two rival clans in the Mount Hagen area. The case was heard over several days in Mount Hagen. At the end of the trial the trial judge gave a reasoned judgment but it was not later published so that there is available only counsel's notes of the judgment. Taking first the grounds of appeal relied upon by Benson Watir, the first ground is that the trial judge erred in law in admitting in evidence the applicant's statement made when during the investigation he was given the opportunity of making an explanation, "I do not wish to say anything". When this statement was tendered as part of the Crown's case it was rejected by the trial judge as being a self serving statement. However the defence was one of alibi and during the evidence of Benson Watir the trial judge allowed the statement to be put to that applicant in cross examination and acted on it as one of the reasons for rejecting the alibi. The trial judge was, of course, entitled to reconsider his earlier ruling in the light of subsequent evidence. But the applicant desires to challenge this point on appeal.

The second ground as it is put is that the trial judge erred in law in requiring, as he impliedly did, the appellant to call as witnesses four Constables if the Court was to have the benefit of their evidence. This ground is based upon the failure of the Crown Prosecutor to call four Constables as part of the Crown case although each had given evidence for the prosecution during the committal proceedings. The trial judge upheld the Crown submission that the prosecution had a discretion not to call the witnesses, but no application was made that the judge should call them of his own motion. In fact the four witnesses were then called as witnesses for the defence. Mr. Adams relied upon Ziems v. The Prothonotary of the Supreme Court of New South Wales (5)

(5) (1956-57) 97 C.L.R. 279

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in which the High Court considered the discretion of a Crown Prosecutor in the matter of calling material witnesses upon a criminal trial. Considerations concerning the exercise of this discretion are also referred to in Dallison v. Caffery (6) and Regina v. Oliva (7). However the four witnesses gave evidence supporting the alibi and nothing is put forward to indicate that the Crown Prosecutor wrongly exercised his discretion. It was not suggested that apart from the applicants being denied the right to cross examine these witnesses there were any special circumstances such as in Ziem's case (supra) (8) which would lead the Court to conclude that there was any miscarriage of justice. The third ground of appeal involves the trial judge's finding that Benson Watir was criminally responsible as a principal. The case against this applicant was that he was present encouraging the applicant Johnson Keremot who it was alleged had set fire to the houses. It was said that the trial judge acted on the view that Benson Watir had a duty to prevent the applicant Johnson Keremot from committing an unlawful act and that this consideration was taken into account as part of the evidence of encouragement. In fact that applicant was senior to Benson Watir. The remaining grounds of appeal relied upon by Benson Watir are that the verdict was against the weight of evidence including evidence as to identification and the verdict was unsafe and unsatisfactory.

No particulars of these grounds of appeal were placed before this Court and presumably they were put forward against the contingency that if the application is granted, an examination of the evidence and the judgment might possibly enable such particulars to be given.

The applicant Johnson Keremot relied only upon the grounds of appeal relating to the failure of the Crown to call

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(6) (1965) 1 Q.B. 348

(7) (1965) 1 W.L.R. 1028

(8) (1956-57) 97 C.L.R. 279

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the four Police witnesses, and to the verdict being against the weight of evidence or unsafe and unsatisfactory.

Mr Egan for the Crown submitted that the highest that the applications could be put was that arguable grounds only for appeal had been shown and the case fell short of being one in which there was shown any grave reason to apprehend that justice had actually miscarried.

On the whole I have come to the conclusion that this submission is sound.

I would therefore refuse leave for an extension of time.

Solicitor for the Appellants: G.R. Keenan, Acting Public Solicitor

Solicitor for the Respondent: P. J. Clay, Crown Solicitor