SHAHEED MOHAMMED A

v.

REGINAM

[COURT OF APPEAL, 1964 (Adams J.A., Marsack J.A.), 12th, 26th February] B

Criminal Jurisdiction

Criminal law—practice and procedure—application for extension of time to appeal to Court of Appeal—grounds for application—Court of Appeal Ordinance (Cap. 3) ss.6(2), 18(1), 21(1). C

Criminal law—practice and procedure—vexatious, scandalous or oppressive matter in application—striking out.

The general rule to be applied by the Court of Appeal in deciding whether to grant an extension of time within which notice of appeal against a conviction may be given may be stated as being simply that strong grounds must be given before the court will exercise this power. D

Semble: The proposition stated in *Archbold's Criminal Pleading, Evidence and Practice* (35th Edition) para. 871, that "substantial grounds must be given for the delay before the Court will exercise its power to extend the time", may be too narrow.

Passages in an application for extension of time for appeal struck out on the ground that they were vexatious, scandalous or otherwise oppressive. E

Case referred to: *R. v. Leckey* [1944] 1 K.B. 80; [1943] 2 All E.R. 665.

Application for extension of time for appeal. F

R. A. Kearsley for the applicant.

J. Lewis, Attorney-General for the Crown.

Judgment of the Court: [26th February, 1964]—

This is an application under Section 21 (1) of the Court of Appeal Ordinance (Cap. 3), for an extension of the time (30 days) within which notice of appeal might be given. On 14th December, 1962, the applicant was convicted before the Supreme Court of Fiji on four charges of fraudulent conversion, and was sentenced to imprisonment for eighteen months on each charge concurrently. Taking into account remission of time, the sentence had been almost completely served when this application was filed in December, 1963; and since then, it has been completely served, and the applicant has been duly released. At the hearing on 12th February, 1964, the Court intimated that the application would be dismissed, and that our reasons for so doing would be given in writing. G H

The President of this Court having certified, in pursuance of Section 6 (2) of the Court of Appeal Ordinance (Cap. 3), that it was, in his opinion, impracticable to summon a Court of three judges, the Court consisted of only two judges.

There was a preliminary motion by the learned Attorney-General for an order striking out certain passages in the application on the ground that they were vexatious or scandalous or otherwise oppressive. Mr. Kearsley, appearing as counsel assigned by the court at the request of the applicant, tendered his client's most humble apology for the writing of a certain letter and the reference thereto in the application, and also for the inclusion of certain other passages in the application. It is unnecessary, and in view of their nature undesirable, that we should comment upon these passages, but we desire to express our sense of the candour with which Mr. Kearsley with the full concurrence of his client, tendered this apology, and agreed to the deletion of the objectionable passages.

While the motion was under discussion, Mr. Kearsley also intimated his client's decision not to rely on various other matters alleged in the application; and in the result a formal order was made (Mr. Kearsley not opposing and expressing his client's concurrence) in terms of the learned Attorney-General's motion except only for the addition, in paragraph (d) of the motion, before the words "in paragraph 14," of the words "the first two quotations made,". The result of this and of certain further argumentative concessions made by Mr. Kearsley was that the grounds on which the application was finally based were reduced to the following:

"8. That the learned defence Counsel advised me after the conclusion of the trial not to appeal.

13. That there is a substantial question of law to be argued and it is in the interest of the general public that the question of law should be decided.

14. That during the course of the trial the learned trial Judge made the following adverse comments:
"The accused had the opportunity to disclose his defence in the lower Court."

"You had an opportunity to disclose your defence at the Court below, but you did not—did you?"

The mischief caused by such adverse comments was incurable and that the prejudicial effect of it could not be removed from the minds of the assessors and the trial Judge."

Once again, the Court desires to express its indebtedness to Mr. Kearsley for the candour and property with which he proceeded, and gladly records his intimation that all he did in this connection was done with the full concurrence of his client, who was in fact present in Court at the time.

In respect of the application reduced to the narrow dimensions explained above, Mr. Kearsley conceded that it was necessary for him to show

(a) a reasonable explanation of the delay and

(b) a reasonable likelihood of success in the appeal.

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In regard to (b), he expressed himself as being prepared to argue that the convictions on all four counts were unreasonable and could not be supported, and that, if this court was satisfied that the learned Chief Justice had made the remarks attributed to him, the convictions must be quashed. He did not, however, submit arguments in support of (b), for the reason that it became abundantly clear, as he himself frankly admitted, that he was unable to meet requirement (a).

B

On authorities there cited, it is stated in *Archbold's Criminal Pleading, Evidence and Practice,* 35th Edition, paragraph 871, that "substantial grounds must be given for the delay before the Court will exercise its power to extend the time." We suspect that this proposition may be too narrow, and that there may well be cases where the delay is inexcusable but other circumstances are so strong as to justify an extension of time. It may be sufficient to state the general rule as being simply that strong grounds must be given before the Court will exercise this power; and the rule so stated is sufficient for present purposes.

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In the present case it is clear that there was a decision by the applicant, acting on the advice of counsel, not to appeal against his conviction; and this fact renders it all the more necessary that strong grounds should be shown for permitting an appeal to be brought out of time. As Mr. Kearsley very properly conceded, the applicant was himself a barrister and solicitor, with sufficient knowledge of the law to be acquainted with the necessity for appealing within the proper time. Had fresh and sufficiently significant evidence been available, Mr. Kearsley said he could have argued the case on that basis, as this would have afforded reasonable ground for a change of mind on the part of the applicant. But the applicant now conceding, and his counsel admitting, that there is no material evidence now available that was not within his cognisance at the time of his trial, it was impossible for Mr. Kearsley to put his case on this ground. He frankly admitted in the end that he could point to no sufficient explanation for the failure to appeal within the proper time.

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Though Mr. Kearsley did not address us in detail on the question whether there was a reasonable prospect of success in an appeal, we are clearly of opinion that there is here no prospect of success such as might outweigh the complete failure to give any, let alone any adequate, excuse for the delay; and, in order to avoid any semblance of dealing with this case on merely technical grounds, we think it proper to add that, so far as we can see, success in an appeal was extremely unlikely in view of what was said in *R. v. Leckey* [1944] 1 K.B. 80, to which we drew Mr. Kearsley's attention in the course of the argument. Moreover, even if Mr. Kearsley had been able to make good his suggestion that the remarks of the learned Chief Justice were improper, the case appears to be one in which the proviso to Section 18 (1) of the Court of Appeal Ordinance (Cap. 3) would almost certainly have been applied on the ground that no substantial miscarriage of justice had occurred.

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The Court did not call upon the Attorney-General for argument, and, for the reasons given, the application is dismissed.

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Application dismissed.