

**THE STATE**

v.

**GAYA PRASAD**

[HIGH COURT, 1989 (Fatiaki J.) 23 October]

Appellate Jurisdiction

**A**

**B** *Appeal- criminal appeal from Magistrates' Court to High Court- application for leave to appeal out of time- how and when to be made- Criminal Procedure Code (Cap. 21) Section 310.*

**C** Preliminary objection was taken to an appeal against sentence by the DPP on the ground that the appeal had not been lodged within the appeal period and that there had been no formal application for leave to appeal out of time. The High Court allowing the objection, HELD: that while the Court had jurisdiction to hear an oral application for leave at any time such applications would only be entertained exceptionally and for "good cause" and that "good cause" did not include simply overlooking the limitation period. Neither the acceptance out of time of the petition nor the knowledge by the Court that the appellant intended to appeal could affect the mandatory provisions of the Criminal Procedure Code.

**D**

Cases cited:

*Avery v. No. 2 P.S.A. Board* [1973] 2 NZLR 86  
*DPP v. Jack Heritage* (C.A. No. 14 of 1976)  
*DPP v. Jikar Ali* 21 FLR 115  
**E** *DPP v. Jone Kari Suva* (Cr. App. 17 of 1988)

*R. Perera* for the State  
*V. P. Ram* for the Respondent

**Fatiaki J:**

**F** This is an appeal by the Director of Public Prosecutions against the leniency of a sentence imposed by the Labasa Magistrates' Court after it convicted the respondent for an offence of Official Corruption (hereafter referred to as the Director's appeal).

**G** On the 4th of July, 1989 the respondent filed a cross-appeal against his conviction for the aforesaid offence after first obtaining leave of the learned trial magistrate to appeal out of time (hereafter referred to as the cross-appeal).

On the date set down for the hearing of both appeals it was decided with the agreement of counsel that as the cross-appeal was against conviction, logically, it ought to be heard first, then the Director's reply, and finally the Director's appeal.

However before any substantive arguments could be heard, learned Counsel for the respondent raised a preliminary objection to the Director's appeal based on Section 310(1) of the Criminal Procedure Code Cap. 21 which provides :

"Every appeal shall be in the form of a petition in writing signed by the appellant or his barrister and solicitor and shall be presented to the magistrates' court from the decision of which the appeal is lodged within twenty eight days of the date of the decision appealed against: Provided that the magistrate's court or the Supreme Court may, at any time for good cause, enlarge the period of limitation prescribed by this section."

Learned counsel for the respondent submitted that the Director's appeal although in proper form had been presented outside the limitation period provided by the above section and was improperly accepted by the Labasa Magistrate's Court registry staff without leave to appeal out of time being applied for and granted to the Director of Public Prosecutions.

It is common ground that the sentence being appealed against in the Director's appeal was pronounced on the 11<sup>th</sup> of April, 1989 and therefore the 28 day appeal period expired on the 10<sup>th</sup> of May, 1989 (see: Section 51(a) of the Interpretation Act Cap. 7).

It is also common ground that the Director's petition of appeal which is dated the 11<sup>th</sup> of May, 1989 was not accepted for filing by the Labasa Magistrates' Court until the 15<sup>th</sup> of May, 1989.

Furthermore, as at the date when it was fixed to be heard by this Court namely, the 25<sup>th</sup> of August, 1989 the Director's petition was not supported by any order enlarging the period of limitation prescribed by Section 310 of the Criminal Procedure Code, nor had there been any application filed by that date seeking to regularise the matter.

Nevertheless learned state counsel who was somewhat taken by surprise made an oral application in the course of replying to the preliminary objection, for an order enlarging the 28 day limitation period based principally on grounds (a) and (d) of Section 310(2) which provides inter alia that:

..... "good cause" shall be deemed to include -

- (a) a case where the barrister and solicitor engaged by the appellant was not present at the hearing before the magistrates' court and for that reason requires further time for the preparation of the petition; and
- (d) the inability of the appellant or his barrister and solicitor to obtain a copy of the judgment or order appealed against, and a copy of the record, within a reasonable time of applying to the court therefor."

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I accept that the proviso to Section 310 provides that the courts' discretion to enlarge the limitation period of 28 days can be exercised at any time.

A These are words without limitation and when read together with Section 53 of the Interpretation Act Cap. 7 enable the court in my view to exercise its discretion even on the day when the appeal is set down for hearing.

B Learned counsel for the respondent however submits that an order enlarging the limitation period is a condition precedent to the lodging of an appeal petition and that an oral application by State Counsel from the bar table ought not to be entertained.

C Instead, it is submitted the application ought to follow past practice and be by way of an ex-parte motion supported by an affidavit setting out facts which not only explain why the appeal was not lodged within the time provided but also raises good cause for the exercise of the courts' discretion.

In DPP v. Jikar Ali 21FLR 115 Stuart, J. adverted to the practice when he said in reference to an earlier application for leave to the Magistrates' Court:

D "In this case the learned Magistrate very properly required Mr. Shankar to appear in support of his application, but I can find on the file no affidavit or other paper to lead an application by the Director of Public Prosecutions to the Magistrate. That on the part of the prosecution is the "serious and lawful approach" to which the learned judge refers. "

E However at the time of hearing that submission I had doubted its correctness. Subsequently, and with respect to the view of Stuart J. I am fortified in my view by the dicta of the former Chief Justice Grant when he said in DPP v. Jack Heritage Cr. Cause No. 14 of 1976 :

F "If a formal procedure was to be adopted it would have to be of general application, and it would be most unreasonable to expect an accused who had been committed to prison to arrange for an affidavit to be prepared and to have it sworn before a Commissioner for Oaths. No such procedure is contemplated by the Criminal Procedure Code or any rules made thereunder, and no such procedure is necessary on an application to a Magistrates' Court as distinct from the Supreme Court ..... so long as the information before the magistrate is sufficient to enable him to exercise his discretion judicially; and it would be quite wrong to place artificial restrictions in the way of a person who has good cause for appealing out of time or to allow technicalities to stand in the way of Justice. "

G In the circumstances and in light of the provisions of Order 1 Rule 8(2) of the present High Court Rules 1988, I am unwilling to lay down any hard and fast guidelines or procedure governing the making of applications to this Court for an enlargement of time to appeal under Section 310.

Nevertheless oral applications by State Counsel across the bar table will only be entertained in the most exceptional circumstances and only if the facts disclosed orally are sufficient to show "good cause".

A

In his judgment in Jikar Ali (ibid) Stuart J. disposed of an argument similar to that raised before me to the effect that the Director of Public Prosecutions (the appellant) was not represented by a barrister and solicitor at the trial (refer : Section 310 (2)(a) above). The learned judge said:

" ..... even if that were a good ground and I very much doubt if it is, seeing that the prosecution were represented by a police officer of their own choosing, it is certainly not true that for that reason the prosecution require further time for the preparation of their petition of appeal."

B

Needless to say the mere fact that a prosecution was not conducted by an officer of the DPP's office is not "good cause". It must additionally be shown to be " ..... for that reason" that an enlargement is sought before the deeming effect of Section 310(2)(a) can operate.

C

In this case it has not been shown to this court that it is "for that reason" that this application is being made.

D

Then State Counsel refers to an undated pro-forma memorandum of the Divisional Prosecuting Officer (Northern) addressed to the Senior Court Officer/Labasa Magistrates' Court referring to this case by name and number and which was received on the 13th of April, 1989 (2 days after the sentence was delivered).

The memorandum (which is attached to the front cover of the original Magistrate's Court file) declared an intention to appeal against the leniency of sentence and requested a certified copy of the court record as soon as possible.

E

By virtue of this Memorandum, it is argued that notice of the Director's intention to appeal against the leniency of the sentence had been given to the Court and coupled with the fact that a copy of the magistrate's judgment and sentence was not received by the DPP's Office until the 8th of May, 1989 (i.e. 25 days after it was sought and 2 days before the appeal period expired) is sufficient to establish "good cause" within the terms of Section 310(2)(d).

F

I accept that the length of time it has taken the DPP to receive a copy of the judgment and sentence appealed against is unreasonable when one has regard to the date when the same was applied for and the statutory limitation period within which an appeal must be presented.

G

But the fact remains that a copy of the learned trial magistrate's judgment and sentence was available to the DPP's Office shortly before the limitation period had expired and it would (or should) have been obvious to counsel in the DPP's Office who was considering the appeal, that the limitation period was "fast running

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out” to borrow the expression of learned counsel for the respondent.

- A Furthermore counsel suggests that the fact that 3 months later no application for an enlargement of time had been filed by the DPP clearly shows that the limitation period had simply been over-looked.

Needless to say the irregular administrative act of a Magistrates’ Court registry clerk accepting a petition of appeal presented out-of-time without leave cannot ever over-ride the mandatory requirements of Section 310(1) of the Criminal Procedure Code nor might I add would it be an acceptable excuse for not later making the necessary application for enlargement.

- B

As was stated by Richmond, J. of the New Zealand Court of Appeal in Avery v No. 2 P.S.A Board [1973] 2 NZLR 86 at p. 91 :

- C “When once an appellant allows the time for appealing to go by then his position suffers a radical change. Whereas previously he was in a position to appeal as of right, he now becomes an applicant for a grant of indulgence by the Court. The onus rests upon him to satisfy the Court that in all the circumstances the justice of the case requires that he be given an opportunity to attack the judgment from which he wishes to appeal.”

- D In DPP v. Jone Kari Suva Cr App 17 of 1988 I had occasion to deal with a similar application as the present and there I noted that :

- E “..... the form of the trial appealed against, the nature of the appeal and the grounds urged in support of it are all relevant considerations for the court in an application for an extension of time to lodge an appeal. In particular an appeal against conviction after a full trial on the ground that the decision is unreasonable and cannot be supported, having regard to the evidence is more likely to arise only upon or after a perusal of the complete record of proceedings than an appeal against the leniency of a sentence imposed on a plea of guilty.”

- F In this case the particular sentence sought to be appealed against is a fine of \$25 in default 25 days imprisonment coupled with an order under Section 41(1) of the Penal Code binding over the respondent in the sum of \$50 to keep the peace and be of good behaviour for a period of 6 months.

- G The offence for which that sentence was imposed by the learned trial magistrate as earlier noted was one of Official Corruption arising out of an unsuccessful attempt by the respondent to bribe a police officer who was booking him for a minor traffic violation. The sum involved was \$5. All of this was clearly set out in the particulars of the charge.

It might well be that the sentence is unduly lenient but with respect to learned State Counsel, an appeal against sentence on the ground of manifest leniency does not raise a question of law of unusual difficulty. If anything, it raises a question of sentencing policy.

A

In that regard I should point out that had the sentence been brought to the notice of this Court earlier, consideration might have been given to an exercise of this Court's powers of revision under Section 323 of the Criminal Procedure Code Cap. 21.

B

Be that as it may I do not consider that this is an appropriate case for the exercise of this Court's discretion to grant an enlargement of the time within which an appeal may be lodged. The appeal of the DPP is accordingly dismissed as being irregularly before this Court.

For the sake of completeness and as was intimated by learned counsel for the respondent, leave is granted for the discontinuance of the cross-appeal which was undoubtedly precipitated by the Director's appeal.

C

*(Appeal dismissed.)*

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