IN THE SOLOMON ISLANDS COURT OF APPEAL

NATURE OF JURISDICTION:	Appeal from Judgment of the High Court of Solomon Islands (Naqiolevu, J.)
COURT FILE NUMBER:	Criminal Appeal Case No. 9 of 2009 (On Appeal from High Court Criminal Case No. 327 of 2005)
DATE OF HEARING:	21 July 2009
DATE OF JUDGMENT:	23 July 2009
THE COURT:	Goldsbrough, AP McPherson JA Williams, JA.
PARTIES:	**Regina** Appellant -V- **Alex Barlett** Respondent
ADVOCATES:	
Appellant:	R Barry
Respondent:	K Anderson
KEY WORDS:	Criminal law – time for giving notice by Director of appeal against acquittal – Sections 20, 21 and 26 Court of Appeal Act considered.
EX TEMPORE/RESERVED:	
ALLOWED/DISMISSED:	Dismissed.
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JUDGMENT OF THE COURT

As a result of events which occurred on or about 25 July 2000 the respondent was charged with arson (s.319 Penal Code) and attempting to procure another to commit arson (s.381 Penal Code).

The information was presented in 2004 but the trial did not commence until 18 August 2008. After nine prosecution witnesses were called defence counsel made a submission on 15 September 2008 of no case to answer. The trial judge reserved his decision on that question and delivered his reasons on 14 November 2008 for concluding there was no case for the respondent to answer. In consequence he acquitted the respondent. The reasons for that ruling were immediately available to counsel on either side.

Relying on s.21 of the Court of Appeal Act the Director of Public Prosecutions filed a notice of appeal against acquittal on 8 July 2009, almost 8 months after the acquittal was entered.

No reasonable explanation has been put forward for the delay. If, as contended for by counsel for the Director, there were serious errors in the reasons they must have been obvious immediately. All that was said by way of explanation for the delay was;

> "The Director of Public Prosecutions, after initially considering the matter and at a time after the trial prosecutor had left the jurisdiction, sought further advice and further considered the merits of an appeal. Hence the appeal."

In the view of the court that does not constitute reasonable excuse for the delay. A change of mind on the part of the Director will not ordinarily constitute good reason for extending time in which to appeal. (R –v- Adair (1997) QCA 185).

Counsel for the Director relied primarily on the fact there is no time limit expressly provided by the statute for an appeal pursuant to s.21. That section entitles the Director to appeal under Part IV of the Act against an acquittal "on any ground of appeal which involves a question of law only" and also to appeal against a sentence he considers manifestly inadequate. The Court of Appeal may deal with such an appeal in the ways provided by sub-section (2).

A convicted person is given a right of appeal against conviction and by leave an appeal against a sentence: section 20. Relevantly a convicted person seeking to appeal pursuant to that section must give notice within 30 days of the date of conviction; section 26. Then section 35 recognises a power in the Court of Appeal to extend the time for appealing.

As the Act is silent as to the time for appealing pursuant to S.21 regard may be had to s.54(1) of the Interpretation and General Provisions Act; it provides:-

> "Where no time is specified in an Act for the doing of any act or thing, it may or shall be done, as the case may be, with all convenient speed and as often as the occasion arises."

That is not all that helpful. Convenient is not a term which is readily definable in that context. It cannot, for example, mean without causing undue concern to the other party. Probably the best construction is to say the act should be done with such speed as is appropriate given all the circumstances of the case.

In a case such as this a range of factors would impact on the decision as to the time in which the appeal should be lodged. The factors would include, but may not necessarily be limited to, the following:-

(i) the seriousness of the offence;
(ii) the fact it is an appeal from an acquittal;
(iii) the explanation for the delay;
(iv) other time limits provided in similar appeals;
(v) the overall interests of justice;
(vi) prejudice to the acquitted person.

In the present case the respondent points in particular to the time limit in s.26 of the Court of Appeal Act and the fact that the respondent was acquitted. In the latter regard reference was made to s.10 (5) of the Constitution, which relevantly provides:-

> "No person who shows that he has been tried by a competent court for a criminal offence and ... acquitted shall again be tried for that offence... save upon the order of a superior court in the course of appeal... relating to the ... acquittal."

Counsel made it clear that the intention of the Director was to again prosecute the respondent if successful on the appeal; it was not a case of the Director merely wanting a clear decision from the Court of Appeal on an important question of law.

The common law recognized that judicial determinations should be final and conclusive, and unless set aside or quashed on appeal were determinative of rights. That was particularly so in relation to an acquittal. Without statutory intervention the principle is that an acquittal is binding and the citizen cannot be put in jeopardy again for the same offence. That is the principle enshrined in s.10 (5) of the Constitution. In so far as the Constitution recognizes the legislation might provide otherwise, such legislation provisions should be construed strictly against the Director and liberally in favour of the subject. In R –v- Faulkner (no.2) (1983) SBHC 18 Daly C.J. said:

> "I would also add that, where the appeal sought to be brought is an appeal by the prosecution against an acquittal, the court must scrutinize most carefully the grounds advanced for an extension of time. This arises from the general principle that no person should be put in jeopardy twice unless the law clearly so permits, or the interests of justice clearly so require."

Sitting in the Court of Appeal of Samoa (Police –v- Faasola [2001] WSCA 6) Sir Ian Barker, Sir Ian McKay and Robertson J said in similar circumstances to which the court is now concerned;

> "Any process which seeks to challenge an acquittal of a person who has been tried for any offending must be strictly adhered to in all its facets.
>
> ...in a case where there was an acquittal more than a year ago, it would be unconscionable to permit the continuation of a process which challenges that conclusion."

Such considerations are also reflected in the reluctance of members of the High Court of Australia to order a retrial where an offender was acquitted and there were errors of law in the summing up, notwithstanding legislative provisions enabling a retrial to be ordered in such circumstances. (Vallance –v- the Queens (1961) 108 C.L.R. 56).

As sections 20, 21 and 26 are all in Part IV of the Court of Appeal Act, and the appeal pursuant to s.21 is said to be under Part IV, one can readily infer that, though not expressly stated, the time limit in s.26 is relevant to an appeal pursuant to s.21. So much was in effect said by the Supreme Court of Fiji (Soronaivalu –v- State (1998) FJSC 10.) in circumstances where the statutory provisions were identical in all relevant respects with those now under consideration. Sir Timoci

Tuivaga, Lord Cooke and Sir Anthony Mason noted that it had "been assumed on all hands" that the time limited for an appeal by an accused against conviction applied to State appeals against acquittals. They then said: "We accept the common assumption as correct."

Against all that background the basic position must be that the Director appealing pursuant to s.21 should give notice of appeal within 30 days. The Director would have to discharge the heavy onus of showing good cause in order to prosecute an appeal against acquittal lodged after that time.

In the circumstance of this case the Director has not discharged the onus of showing that the appeal should be allowed to proceed notwithstanding a delay of 8 months between acquittal and lodging its notice of appeal, particularly where no satisfactory explanation for that delay has been advanced. It would be unconscionable to allow the appeal to proceed.

It has not been necessary for the court to consider the merits of the ruling made on 14 November 2008 and caution should be taken in following it until the issues raised therein have been further considered.

The appeal should be dismissed.

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Goldsbrough AP
Acting President

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McPherson JA
Member

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Williams JA
Member