IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BELIZE

CCJ Application No BZ/A/CR2024/001
BZ Criminal Appeal No 8 of 2019

BETWEEN

TEVIN ANDREWIN **APPLICANT**

AND

THE KING **RESPONDENT**

Before: **Mr Justice Saunders, President**
Mr Justice Anderson
Mme Justice Rajnauth-Lee

Date of Reasons: **13 December 2024**

Appearances

Mr Hector D Guerra and Ms Leslie D Mendez for the Applicant

Ms Cheryl-Lynn Vidal SC and Sheiniza S Smith for the Respondent

Criminal law – Evidence – Identification evidence – Eyewitness evidence – Identification parade – Breach of police regulations.

Practice and Procedure – Extension of time – Special leave to appeal – Cogent reasons for delay – Realistic chance of success – Risk of miscarriage of justice.

SUMMARY

This was an application for an extension of time to file an application for special leave to appeal, and an application for special leave to appeal.

The applicant, Tevin Andrewin, was convicted of murder and sentenced to life imprisonment with eligibility for parole after 25 years. The conviction was based on the identification evidence of an eyewitness, Shiyana Allen and the *res gestae* evidence of the victim, Myrick Gladden, who identified Andrewin as the shooter shortly after the incident.

Andrewin's appeal was dismissed by a majority in the Court of Appeal. The majority found that the procedural flaws in the identification parade did not frustrate the purpose of the parade and that the *res gestae* evidence was convincing. The dissenting opinion argued that the errors in the identification evidence rendered the conviction unsafe.

Andrewin averred that his attorney never informed him of the delivery of judgment by the Court of Appeal and that he only became aware of it approximately one month later when he was served with it by prison officials. He made futile attempts to retain counsel to represent him until he was finally able to have an attorney represent him on a *pro bono* basis. At this time, he was already out of time to apply for special leave to appeal and was required to make an application for this Court to extend the time.

In deciding the application to extend time, this Court considered whether there was a cogent explanation as to why the applicant did not apply for special leave to appeal within the stipulated time and whether the proposed appeal had a realistic possibility of a miscarriage of justice.

The judgment of this Court was delivered by Anderson J, with whom Saunders P and Rajnauth-Lee J concurred. It was held that it was unfortunate that the delivery of the Court of Appeal's judgment was not promptly brought to Andrewin's attention and indicated that attorneys should act with greater professionalism in the discharge of their responsibilities. As Andrewin had made the application within 18 days of retaining *pro bono* counsel, it was held that the applicant had provided cogent reasons for the delay in filing its application.

In examining the realistic possibility of a miscarriage of justice, this Court considered whether the procedural flaws in the identification parade impacted the fairness of the exercise. Although it was admitted that there were difficulties with the identification evidence, the Court agreed with the assessment of such deficiencies by the courts below. The Court noted the importance of strict adherence to police regulations but found that the breaches did not significantly affect the identification process. Further, the Court found that the *res gestae* evidence provided by Gladden was powerful and unambiguous and there was no reason to interfere with the findings of the courts below.

The Court noted that the appeal on sentence was not argued before the Court of Appeal and counsel for Andrewin did not raise any arguments before this Court to warrant intervention to disturb the sentence imposed by the trial judge.

The application was dismissed on the basis that there was no realistic chance of success.

Cases referred to:

Agard v R [2016] CCJ 24 (AJ), BB 2016 CCJ 10 (CARILAW); *August v R* [2018] CCJ 7 (AJ) (BZ), [2018] 3 LRC 552; *Blackman v Gittens-Blackman* [2014] CCJ 17 (AJ), BB 2014 CCJ 5 (CARILAW); *Cadogan v R* [2006] CCJ 4 (AJ) (BB), (2006) 69 WIR 249; *Doyle v R* [2011] CCJ 4 (AJ) (BB), (2011) 79 WIR 91; *Fields v The State* [2023] CCJ 13 (AJ) (BB), (2023) 104 WIR 37; *Lovell v R* [2014] CCJ 19 (AJ), BB 2016 CCJ 6 (CARILAW); *R v Turnbull* [1977] QB 224; *Somrah v A-G of Guyana* [2009] CCJ 5 (AJ), GY 2009 CCJ 5 (CARILAW).

Legislation referred to:

Belize – Indictable Procedure Act, CAP 96.

Other Sources referred to:

Caribbean Court of Justice (Appellate Jurisdiction) Rules 2024.

REASONS

Reasons for Decision:

ANDERSON J:

[1] Tevin Andrewin ('the applicant') was convicted of murder on 23 January 2020 and was sentenced to life imprisonment with the stipulation that he serve 25 years before being eligible for parole. He appealed his conviction. The appeal was dismissed by the Court of Appeal (by majority) on 22 March 2024. The applicant became aware of the dismissal of his appeal on 29 April 2024 when he was served with the judgment by a prison official. He now applies to this Court for an extension of time to make an application for special leave to appeal and for special leave to appeal. By Order dated 22 October 2024, this Court dismissed that application with reasons to follow. These are the reasons.

Procedural Background

[2] On 25 June 2012, the applicant was arrested for the murder of Myrick Gladden. The evidence accepted by the trial judge, Williams J, was that the applicant shot Gladden at 12:20 am on 24 June 2012 whilst Gladden, his common law wife, Shiyana Allen, and her brother Richard Wade, were walking along Administration Drive in Belize City. Justice Williams accepted the identification evidence of Ms Allen as well as the *res gestae* evidence of Gladden identifying the applicant as the shooter.

[3] As regards the identification evidence, the court considered and dismissed arguments relating to the formal flaw in the proper filling out of the identification parade ('ID parade') Form in respect of particulars such as height, age, and presence/absence of tattoos. The judge accepted that the Form was not properly filled out but determined that this lapse did not invalidate the ID parade because photographs had been taken and were available of the participants in the parade.

[4] As regards the fact that Ms Allen identified the applicant immediately after the ID parade rather than in the parade room, the Court rejected the suggestion that a new ID parade should have been conducted. It was the judge's belief that a new ID parade would have been an exercise in futility because the accused wanted his mother to be there and that it was the presence of the mother that had intimidated the witness into deliberately mis-identifying the accused in the first place. To repeat the process would have likely ended in the same result. The judge found that Ms Allen had the opportunity to observe and identify the applicant as the assailant and gave her identification evidence full weight.

[5] The *res gestae* evidence by Gladden was thoroughly examined. The court accepted that the second time Gladden was shot, his assailant was but a mere two to three feet away. No argument could be made that Gladden could not have seen his assailant. The court accepted, 'beyond a reasonable doubt' that the statement by Gladden identifying the applicant as his attacker was given within 20 minutes after the incident. Gladden uttered the name 'Tevin Andrewin' three times so there was no issue of Gladden being misunderstood, there was no opportunity for concoction and there was no evidence that there was any bias against the applicant that would cause Gladden to maliciously implicate the applicant. Having accepted that Gladden's statement was contemporaneous with the incident and spontaneous, the judge reminded herself that the statement had not been given under oath and that she should be careful in considering it, weighed against the constitutional rights of the applicant. Nevertheless, in all the circumstances of the case, the judge

considered that the statement ought to be admitted pursuant to s 123 of the Indictable Procedure Act, CAP 96 and be given full weight.

[6] The Court of Appeal carefully considered the alleged flaws in the identification evidence. In dismissing the appeal, the majority found that although there had not been strict adherence to the police regulations for the conduct of the ID parade, the deviation in the process did not frustrate the purpose of the parade or the trial judge's consideration of it. This was found as there was photographic evidence submitted that the composition of the parade was compiled based on the description by name of the assailant, evidence by the Police and Justice of the Peace that Ms Allen called out the wrong number during the ID parade in fear of the presence of the applicant's mother in the room, and that the trial judge found Ms Allen to be a credible eyewitness.

[7] The majority also rejected certain inconsistencies in the identification evidence as being fatal to the conviction. These included a) the period during which Ms Allen observed the applicant, given that in her oral testimony, Ms Allen stated that she had the shooter under observation for 20 minutes, while on another occasion she claimed that she did not observe the shooter for long; b) Ms Allen's formal statement described the assailant as being red-skinned with a moustache and thick eyebrows but the person she identified in the parade did not match that description; c) During her evidence, Ms Allen did not indicate whether the assailant took off his hood while she made eye contact with him; and d) Varying accounts were given of the position of the lamp post in relation to the assailant. The majority considered that the trial judge was aware of the weaknesses of the eyewitness evidence and had nonetheless accepted it as credible and truthful having considered the guidelines set out in *R v Turnbull*[1].

[8] In relation to the *res gestae* evidence, the majority observed that the trial judge admitted the statement given by the police officer who testified that the deceased

[1] [1977] QB 224.

named the applicant as part of *res gestae* evidence. The majority disagreed with the applicant that the statement was not sufficiently spontaneous. They agreed with the trial judge that in all the circumstances, the statement could be admitted as *res gestae* evidence.

[9] The dissenting opinion considered that the errors in the identification evidence were sufficient to render the conviction unsafe.

Application to Extend Time to Apply for Special Leave to Appeal

[10] The first issue considered by this Court was the application to extend the time within which to lodge the application for special leave. Article 10.13 of the Caribbean Court of Justice (Appellate Jurisdiction) Rules 2024 ('the Rules') requires the applicant to lodge an application for special leave to appeal within 42 days of the Court of Appeal judgment. Time may be extended but the applicant must satisfy the Court that it is necessary to extend any time limit prescribed by the Rules for good and substantial reasons per r 5.4. In addition to the Rules applicable to applying for an extension of time, the CCJ jurisprudence provides a two-fold test per *Somrah v Attorney General of Guyana*:[2] the applicant must give a cogent explanation for not complying with the Rules and must demonstrate that the appeal has a realistic chance of success. Similarly, in *Blackman v Gittens-Blackman*[3] the Court held that, 'While this Court may in a proper case grant an extension of time for compliance with the Rules or excuse delay, it does so in order to avert a clear miscarriage of justice.'[4]

[11] There are two precedents from this Court that are factually relevant to the instant application. The first is *Lovell v R*[5] in which the applicant failed to file his application for special leave within the time provided for by the Rules due to awaiting the assignment of an attorney from Legal Aid. Thereafter, the attorney

[2] [2009] CCJ 5 (AJ), GY 2009 CCJ 5 (CARILAW).
[3] [2014] CCJ 17 (AJ), BB 2014 CCJ 5 (CARILAW).
[4] ibid at [6].
[5] [2014] CCJ 19 (AJ), BB 2016 CCJ 6 (CARILAW).

took about five months to personally serve the application on the respondent in accordance with the Rules in effect at the time. The applicant then sought an application to extend the time for service. The Court held that there was sympathy for the fact that time ran out due to his application for Legal Aid. However, the attorney's misapprehension accounted for some of the delay and as there was no risk of miscarriage of justice[6] or any merits in the proposed appeal[7], the Court dismissed the application.

[12] The second is *Agard v R*[8] where the Court did not find there was a reasonable excuse for delay due to the applicant's difficulty in retaining counsel after his former attorney failed to contact him following the Court of Appeal decision. The Court noted as follows at [6]:

> [6] ... Several reasons were given here for the delay in filing the notice of appeal. It would appear that Agard's former attorney failed to contact him following the Court of Appeal decision in March and this led him to secure new legal representation. Agard met with his present attorney on 29th August, 2016 and a Legal Aid Certificate was issued on 31st August, 2016. Counsel for Agard attributed the further two month delay to "in depth research" on what turned out ultimately to be an abandoned ground of appeal. Counsel also cited, as excuses for the delay, counsel's illness and her heavy travel commitments.

[13] Accordingly, the Court did not find that the reasons proffered were sufficiently cogent to excuse the non-compliance of the Rules. Notwithstanding, the Court considered the substance of the special leave application and found that there was no arguable case or that there was a risk of a miscarriage of justice.[9]

[14] In the instant application, the judgment of the Court of Appeal was delivered on 22 March 2024. The fact of the delivery of the judgment appears not to have been brought to the attention of the applicant by his lawyer. The applicant indicated that he became aware of the judgment on 29 April 2024. The applicant had difficulty in

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[6] ibid at [7].
[7] ibid at [9]-[10].
[8] [2016] CCJ 24 (AJ), BB 2016 CCJ 10 (CARILAW).
[9] ibid at [15].

retaining the services of an attorney and the prison officials were not able to assist with making of the application. The applicant obtained *pro bono* legal services on 15 June 2024 and the application was filed in this Court on 3 July 2024.

[15] If true, it is very unfortunate that the delivery of the judgment by the Court of Appeal was not brought promptly to the attention of the applicant. The general rule is that a person has notice of court proceedings through his attorney present at those proceedings. But that rule counts for little if counsel does not actually communicate relevant information from the proceedings to the client. This is particularly important where there is an opportunity for appeal or where other time sensitive steps are available and may need to be taken. It cannot be that an applicant, who is incarcerated, can be properly deprived of his opportunity to appeal because of inexplicable inaction on the part of his attorney. Attorneys should act with greater professionalism and dispatch in the discharge of their legal responsibilities.

[16] In the instant application, there was a further 18-day delay after new counsel was retained. This period may be attributed to the preparation of this application and is of relative insignificance when compared to the delay caused by attorneys in *Lovell* and *Agard*. That kind of delay has not occurred in this case. Each case turns on its individual facts and this Court finds that there was a cogent explanation, in this case, for the non-compliance with the Rules for the filing of the application.

[17] The second limb of the test for extension of time is whether the appeal has a realistic prospect of success. This limb also overlaps with the test for the grant of special leave as to whether (a) there is a realistic possibility that a (potentially) serious miscarriage of justice may have occurred, and/or (b) a point of law of general public importance is raised (that is genuinely disputable) and the court is persuaded that if it is not determined a questionable precedent might remain on the record. See: *Cadogan v R*;[10] *Doyle v R*;[11] *Fields v The State*.[12] In the present application, the

[10] [2006] CCJ 4 (AJ) (BB), (2006) 69 WIR 249.
[11] [2011] CCJ 4 (AJ) (BB), (2011) 79 WIR 91.
[12] [2023] CCJ 13 (AJ) (BB), (2023) 104 WIR 37.

only issue is whether the applicant has shown that there is a realistic possibility of a serious miscarriage of justice.

[18] The Court is not persuaded that this test has been met. The Court agrees that there were difficulties with the identification evidence for the reasons reviewed by the majority and painstakingly assessed by the minority in the Court of Appeal. It is not disputed that there were breaches in the police regulations, as addressed in the courts below. There should always be strict adherence to the police regulations for the conduct of the ID parade particularly where this is the primary evidence available against the applicant.

[19] The present concern is whether the breaches impacted the fairness of the parade in a way which raised the possibility of a serious miscarriage of justice in relation to the applicant. We do not think so for two reasons. First, the trial judge explained the discrepancies regarding the filling out of the ID parade Form and the reluctance of Ms Allen to identify the applicant in the ID parade room. The judge accepted the view of the witness that she felt intimidated. The latter finding is heavily fact based, and deference must be given to the trial judge who heard and saw the witnesses and was in the best position to gauge their truthfulness. This was essentially the position taken by the majority in the Court of Appeal and we do not dissent from it.

[20] Secondly, and more importantly, the Court cannot ignore the very powerful *res gestae* evidence of Gladden who clearly and unambiguously identified the applicant as his assailant. It should also be clarified that Gladden provided his statement identifying the applicant to Police Constable Bodden three times after he was shot, and it is accepted that those statements were so closely associated with the event as to have dominated Gladden's mind. There was no time for concoction. There was also no evidence of confusion or bias or intoxication to impair his cognitive functions at the time of the shooting. The applicant did not identify any error in law which could cause this Court to interfere with the findings of the courts below on the *res gestae* evidence.

Sentencing

[21] The sentence imposed by the trial judge was not considered or mentioned in the Court of Appeal judgment. The respondent submitted that although the severity of the sentence was a ground of appeal to the Court of Appeal, this was not argued at the hearing and therefore no arguments were put before that court to consider an appeal on the sentence. Counsel for the applicant, having not appeared before the Court of Appeal, accepted the respondent's account of the proceedings but submitted that it was open to the Court to remit that matter to the Court of Appeal as was done by this Court in *August v R.*[13] Having considered the sentence in the context of sentences in Belize for similar offences, the Court does not consider that there are grounds to disturb the sentence imposed on the applicant.

Disposition

[22] Although the Court considered that there was a cogent explanation for the applicant's non-compliance with the Rules regarding the timely filing of his application to seek special leave to appeal, the Court was of the view that such an application would have been hopeless. Accordingly, the application was dismissed.

/s/ A Saunders

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Mr Justice Saunders (President)

/s/ W Anderson

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Mr Justice Anderson

/s/ M Rajnauth-Lee

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Mme Justice Rajnauth-Lee

[13] [2018] CCJ 7 (AJ) (BZ), [2018] 3 LRC 552.