8-3-90

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO 2431 OF 1989

IN THE MATTER OF A CRIMINAL CASE TRIED IN THE SUMMARY COURT ON THE 26TH JUNE 1989 AT GEORGE TOWN, GRAND CAYMAN BEING CASE NO. 2431 OF 1989.

REGINA V. BRIAN KILCULLEN

For the applicant: Norman Hill Q.C. and Mr. D. Murray
For the Crown: Ms. J. Conolly

REASONS FOR JUDGMENT

The applicant is a licensed private aeroplane pilot who was arrested in June 1989 in connection with the discovery of 2 seeds of ganja on the aircraft of which he was the pilot when it landed in Cayman Brac.

He was charged with the offences of possession of ganja and importation of ganja and says that he was advised by counsel that in thelight of these charges it was unlikely that the Court would grant him bail. He was also advised that it was likely that the trial of the case if it were contested would not occur until some two to three months later and that the penalty for possession of two seeds of ganja would not be a custodial one.

He pleaded guilty to the charge of possession of ganja and was fined CI$1,000 on the 26th June 1989. The prosecution withdrew the other charge of importation of ganja.

The present application is based on advice which the applicant subsequently received from counsel to the effect that as a matter of law his conviction ought not to stand having regard to the evidence before the court. He says that if he had known at the time that the defence that the charge was in respect of traces which were not in law sufficient for a conviction was available to him he would not have

pleaded guilty. What he now seeks is an order that the time for filing a notice of appeal be extended under the proviso to sub-section (2) of section 159 of the Criminal Procedure Code.

That sub-section reads as follows -

> 'An appellant who has failed to give notice of appeal under subsection (2) of section 157 may within seven days after the day upon which the decision was given from which the appeal is made, serve a notice in writing, signed by the appellant or his counsel, on the other party and on the Summary Court of his intention to appeal and of the general grounds of his appeal:
>
> Provided that any person aggrieved by the decision of the Summary Court may upon notice to the other party apply to the Grand Court for leave to extend the time within which such notice of appeal prescribed by this sub-section may be served, and the court upon the hearing of such application may extend such time as it deems fit.'

The court will not extend time unless a good reason is shown why it would be just to do so and why the step was not taken in good time. See A-G of the Cayman Islands v. Wood SCA 1128 of 1987.

The first matter which I must consider is the effect of section 158 of the Criminal Procedure Code. That reads as follows -

> 'No appeal shall be allowed in a case in which the accused person has pleaded guilty and has been convicted by the Summary Court on such plea, except as to the extent or legality of the sentence.'

It was argued on behalf of the appellant that what he had to establish was a good arguable case. In support of the proposition that there was such a case he cited R. v. Worsell (1969) 2 ALL ER 1183, R. v. Carver (1978) 2 WLR Bocking v. Roberts ((1973) 3AER 962 and R. v. Boyesen (1982) 2 ALL ER 161. It is in the speech of Lord Scarman in the last of these cases that the statement of the present law in England is to be found.

In my view the test of 'good arguable case' is not the correct one to apply in this case. The question is whether the applicant's plea of guilty was a nullity, so as to take him outside the ambit of S 158 of

the Criminal Procedure Code, and that is a question to be determined now. I interpret the words "No appeal shall be allowed" in that section as meaning "there shall be no right of appeal" rather than "An appeal shall be dismissed." My task therefore is to decide whether the appeal could be entertained if leave to extend time were given. The issue as to whether or not the plea of guilty was a nullity is one which I can and should deal with now in connection with the application for leave, since if it is not the appeal cannot be entertained and the leave would not be properly given. It is to that question, therefore, to which I now turn.

This is not a case where the applicant was advised to plead guilty on the ground that he had no real chance of an acquittal. Nor is it a case where it can be said that on the admitted facts the applicant could not in law have been convicted of the offence charged. It cannot possibly be put higher than that he might not have been convicted. That is the view I take of R. v. Boyesen and the other English cases to which I have referred. His affidavit shows that the possibility of contesting the case was in his mind when his decision to plead guilty was made. He weighed the pros and cons and came to a voluntary and deliberate choice which he now feels to have been ill-advised. See R v. Peace (1976) Crim L.R. 119. His plea of guilty was not a nullity and therefore, under S. 158 of the Criminal Procedure Code, his appeal against conviction cannot be allowed. It follows from that that his application for an extension of time to pursue such an appeal must be dismissed.

In conclusion I should add that if I had come to the opposite view on the main point I would have accepted paragraphs 10 and 11 of the applicant's affidavit dated 15th December 1989 as a sufficient explanation for the delay in bringing the application.

G.E. Harre

Judge

8th March 1990