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IN THE COURT OF CRIMINAL
APPEAL OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. CA 3 of 1988

BETWEEN:

ALISTER JAMES TOWNS
Applicant

AND:

THE QUEEN
Respondent

CORAM: ASCHE CJ., KEARNEY & MARTIN JJ.

REASONS FOR JUDGMENT

(Delivered 21 September 1990)

ASCHE CJ.

I agree with the judgment of Martin J. and the order he proposes and have nothing further to add.

KEARNEY J.

I have had the benefit of reading the judgment of Martin J. I concur in his Honour's reasons and conclusions, and in the order he proposes, and have nothing to add.

MARTIN J.

As ultimately constructed, this is an application for an extension of time within which to make application for leave to appeal against conviction under s. 410(b) of the Criminal Code. The tortuous history of the proceedings is briefly as follows:

DATE	COMMENT
3 June 1987	Conviction for offence committed on 7 July 1985 (a)
15 June 1987	Applicant informed his then solicitors he wished to appeal and was told he had no grounds for an appeal (b)
26 June 1987	Letter from applicant to solicitors, first written evidence of applicant's complaints regarding conduct of counsel at trial (c)
2 July 1987	28 days from date of conviction (d)
3 July 1987	Solicitors reply supporting counsel's conduct at trial, advising by clear implication the time for filing notice of appeal or applications for leave to appeal does not run until after sentence (e)
17 July 1987	Sentenced (f)

20 July 1987	Applicant's letter to solicitors received by them on 23 July "I want to lodge Notice for Appeal on conviction only within the 28 day time allowance. Can you help me with that?" Further instructions as to grounds of dissatisfaction with counsel detailed (g)
22 July 1987	Court office receives letter from applicant "I wish to give notice of intention to appeal on my conviction .... I would like for you to send to me any documents needed to carry out any application for this appeal within the prescribed time period" (h)
23 July 1987	Deputy Master replies advising when sittings of Court to be held and recommending applicant obtain advice from solicitors. No response to applicant's request for forms (i)
30 July 1987	"Notice of Appeal" filed (j)
10 August 1987	Applicant's solicitor's letter referring to "complications" including as to when the time for appeal commenced to run and as to the application to extend time, "..... although it is almost certain that the Notice of Appeal against the conviction is bad because it is long out of time". Further instructions and further funds sought (k)
28 August 1987	Solicitors acknowledge receiving funds (l)

8 September 1987	Advice of Mr Tippett of counsel obtained. Advises against prospects of success (m)
11 September 1987	"Notice of Discontinuance" filed (n)
12 October 1987	Letter from Australian Legal Aid Office to applicant pointing to difficulties consequent upon discontinuance and referring to need for an application for an extension of time. Making it clear that that office was not prepared to act for him (o)
25 February 1988	"Application for Leave to Appeal" filed (p)
25 February 1988	First affidavit of applicant filed. Applicant deposes that he gave instructions to appeal, but later received advice that he had no prospects of success. Also reviews evidence including that concerning James Ramage and as to the conduct of his counsel at the trial (q)
1 March 1988	Matter first before the Court. Effectiveness of previous documents not raised, but counsel for the Crown draws attention to the Act and Rules as to the procedural and evidentiary requirements should an extension of time be sought. Hearing adjourned sine die (r)
31 August 1988	Letter from applicant to his solicitor enquiring as to progress (s)

13 September 1988	Letter from applicant to his solicitor - general outline of his complaints (t)
21 September 1988	Letter from solicitor's to applicant concerning obtaining funds to obtain opinion from senior counsel as to prospects on appeal (u)
November 1988	Applicant says he gave his solicitor a statement concerning the whereabouts of James Ramage on 7.7.85 (v)
9 December 1988	Letter from Deputy Master to applicant drawing attention to what was said by counsel for the respondent on 1.3.88 and concluding "I wish to emphasise to you that your appeal will not be dealt with until you or your legal advisers prepare an application for an extension of time" (w)
Mid December 1988	Applicant says money paid to his then solicitors to obtain opinion from senior counsel (x)
19 March 1989	Letter - applicant to solicitor complaining about lack of progress (y)
June 1989	Letter applicant to solicitor seeking information as to progress (z)
4 July 1989	Letter applicant to senior counsel enquiring as to progress (aa)
21 August 1989	Senior counsel reply to applicant saying he must go through his solicitor (bb)

23 September 1989	Letter from applicant to solicitor enquiring as to what was going on (cc)
25 September 1989	Letter from Australian Legal Aid Office to applicant advising of respondent's application to strike out appeal for want of prosecution (dd)
29 September 1989	Applicant writes to his solicitors complaining as to their failure to do as he had instructed and says he intends "to file a Late Leave to Appeal Application" himself (ee)
3 October 1989	Document headed "Application for Extension of Time within which to Appeal" filed but the document does not embody such an application. (ff)
9 October 1989	Applications before the Court. Counsel for the applicant applies for an adjournment on the grounds that he had not had adequate time to prepare since receiving instructions. Counsel for the Crown again draws attention to the "Notice of Appeal" being filed out of time and need for evidence in support of Application for Extension of Time. Matter adjourned to 16 October with directions regarding filing of any further material. (gg)
16 October 1989	Applications again before the Court. Counsel for applicant refers to problems in obtaining instructions leading to a very lengthy affidavit being filed that morning, outside time fixed by Court (hh)

16 October 1989	Long affidavit with numerous annexures sworn by the applicant filed (ii)
1 November 1989	Affidavit of David Young filed (jj)
6 November 1989	Before the Court, adjourned on application of the applicant (kk)
29 March 1990	Before the Court, first written application for an extension of time within which to make application for leave to appeal, by way of amendment to the document filed on 3.10.89. Amendment made by consent. Proposed grounds of appeal also handed up. An affidavit of the applicant sworn that morning going to a new issue was sought to be relied upon (ll)

(a) The applicant was tried before the Supreme Court on 1, 2 and 3 June 1987 for having committed a dangerous act accompanied by circumstances of aggravation on 7 July 1985 near Jabiru (s. 154(1)(4) and (5) Criminal Code) . The dangerous act alleged concerned his manner of driving a motor vehicle, and the circumstances of aggravation were the death thereby caused to a member of the public and that at the time of committing the act he was under the influence of alcohol.

The evidence at trial as to the circumstances of the incident which was the cause of the death of the person,

was that the applicant was driving a motor vehicle, that it approached a person riding a bicycle along a road at Jabiru from the rear, and that when in close proximity the applicant veered or permitted the vehicle which he was driving to veer to his left, so that it came into collision with the rear of the bicycle resulting in the death of the rider. It was common ground that there had been a collision between the near side front tyre of the vehicle driven by the applicant and the rear of the bicycle. When inspected after the accident it was noticed that that tyre was damaged and had blown out. On the evidence of Mr Moore, a person who qualified as an expert for the Crown, the damage to the tyre could have been found by the jury to have been caused by its coming into contact with a metal part of the bicycle. According to the applicant, the vehicle veered to its left without warning and without any fault on his part, that veering being caused by the tyre blowing out prior to any collision with the bicycle as a result of it having been weakened by coming into contact with rock and stones during the course of its use.

The jury returned its verdict of guilty on 3 June.

(b) The Applicant says he informed his then solicitors that he wished to appeal and was told he had no grounds for an appeal.

(c) In a letter which it appears was received by the applicant's then solicitors on 26 June 1987, he first raised, in writing at least, matters upon which he has consistently relied since. He complained of the conduct of his counsel at trial, for example, as to his cross-examination of witnesses, failure to call witnesses, his failure to qualify the applicant to give evidence in respect of the causes of damage to tyres, failure to call an experienced tyre fitter who could give evidence on the point. He asked the senior partner of the firm whether he would be prepared to handle it "on legal aid assistance, because I feel there is quite a lot of bias against me and I know I wasn't drunk and the tyre was flat before I hit the bike". Amongst the complaints he makes against his counsel was his failure to properly cross-examine Mr Ramage, though the complaints raised in that letter do not go to the allegation that Mr Ramage was not at the Club on the occasion in question, a matter to be examined later.

(d) A person convicted on indictment may appeal to this Court against his conviction on any ground involving a question of law. Leave of this Court is required for an appeal against a conviction on any ground involving a question of a fact alone or a question of mixed law and fact, and any other ground that appears to be sufficient. Leave is also required for an appeal against sentence (s. 410 Criminal Code).

At common law a person is convicted of an offence upon the return by the jury of a verdict of guilty, which verdict amounts to the conviction (Griffiths v The Queen (1977) 137 CLR 293 per Barwick CJ. at page 301; Jacobs J. at page 313 and Aickin J. at page 334). As to the distinction sometimes made between the conviction embodied in the verdict of guilty returned by the jury and the recording of a conviction, see s. 392 of the Criminal Code which shows that a person may be convicted without a conviction having been recorded and without any sentence being imposed. This view as to when a conviction takes place must, of course, always be taken subject to any statutory provisions which may modify the position at common law. I see no reason to depart from the common law position when looking at s. 417 of the Code which provides that any person convicted desiring to appeal to the Court of Criminal Appeal, or to obtain the leave of the Court to appeal from any conviction or sentence, shall give notice of appeal or notice of application for leave to appeal in the prescribed manner within 28 days after the date of such conviction or sentence. By sub-section 2 of that section the Court of Criminal Appeal may extend the time within which the notice of appeal or notice of an application for leave to appeal may be given.

Those appeal provisions came into operation in March 1986 at which time there were no rules concerning

appeals to this Court. The then Chief Justice directed, pursuant to s. 72 of the Supreme Court Act, that until Rules of Court were made, appeals to this Court would be governed by the provisions of O. 52 of the Federal Court Rules, with certain amendments which for the most part are inconsequential. The most important of those amendments was to bring the time for an appeal into line with that provided for in the Criminal Code, 28 days, as opposed to that set by the Federal Court Rules, 21 days.

(e) The solicitors replied to the applicant by letter dated 3 July 1987. They were generally supportive of counsel's conduct (counsel was an employee of the firm at the time of the trial). It was said that as the applicant had not then been sentenced "it is not a case of advising whether you should appeal" ....."if you are sentenced you have the normal time for an appeal and should you wish to do so this office will arrange for you to be put in contact with, probably, the officers of the Australian Legal Aid Office to arrange for your appeal".

(f) His Honour the trial Judge heard submissions as to sentence on 4 June, and on 17 July he formally convicted the applicant and sentenced him to 6 years imprisonment with a non-parole period of 2½ years.

(g) By letter dated 20 July, received by his solicitors on 23rd of that month he said "I want to lodge notice for appeal on conviction only within the 28 day time allowance can you help me with that?". It is plain to me that the applicant had accepted the advice that the time for appeal in respect of conviction commenced to run from the date of sentence. He went on to go over much the same ground as in his previous letter. He continued to maintain that the tyre must have blown out and caused the vehicle to veer to its left prior to the collision with the bicycle and added "the question of my criminal responsibility rested on whether I was drunk or not and witnesses who told police that they didn't think I was drunk weren't cross-examined at my trial". Drunkenness, or being under the influence of an intoxicating substance, is not an element of the offence, though it may provide an explanation of why the offence was committed. (Volz v R, Court of Criminal Appeal, 29 May 1990, unreported). It may be a circumstance of aggravation which can lead to the maximum penalty being increased. The degree to which a person may be under the influence of an intoxicating substance may well vary from minimal to considerable. There is no application for an extension of time to apply for leave to appeal against sentence. In that letter he protested that "it was a bloody accident".

(h) The applicant wrote to the Court saying "I wish to give notice of intention to appeal on my conviction I

would like for you to send me any documents needed to carry out any application for this appeal within the prescribed time period". That document appears to have been received by the Court on 22 July 1987, after the prescribed time had expired.

(i) The then Deputy Master replied the next day acknowledging the letter and noting that the applicant wished to appeal against conviction, advising him of when sittings of the Court of Criminal Appeal would be held thereafter, and strongly recommending that he engage the services of a solicitor to prepare a "Notice of Appeal" on his behalf. He added that if the applicant could not afford to engage a solicitor then he should contact the Australian Legal Aid Office "as a matter of urgency".

In his reply the Deputy Master referred to s. 426(4)(a) of the Criminal Code which provides that where an applicant is in custody the Registrar shall give reasonable notice to him in writing that if he wishes to appear in person in the Court he must seek the leave of the Court. He did not apparently take notice of s. 426(3) which requires the Registrar to furnish the necessary forms and instructions in relation to notices of appeal or notice of application to any person who demands the same and did not respond to the applicant's specific request that he be forwarded any documents needed "to carry out any application

for this appeal". A Notice of Appeal or an Application for Leave to Appeal against conviction lodged at that time would have been out of time, but the fact is that the statute requires that such forms be provided to any person who demands the same. If the Deputy Master was not the Registrar then I think it was his responsibility to draw the request to the attention of whoever was the Registrar at that time with a view to seeing that the requirements of the legislature were attended to. Upon receipt of that letter from the Deputy Master, the applicant says that he instructed new solicitors to act on his behalf. The Deputy Master's default did not contribute to the applicant's problems.

(j) A document entitled "A Notice of Appeal" was filed in the Registry of this Court on 30 July 1987 by the applicant's then solicitors. It purported to institute proceedings by way of appeal against both the conviction as shown by the jury's verdict of 3 June and the sentence imposed by His Honour the learned trial Judge on 17 July. The effectiveness of the document is in question in that insofar as the conviction is concerned it was filed about one month beyond the period of 28 days allowed, and insofar as both conviction and sentence are concerned it does not seek leave.

(k) Those solicitors wrote to him on 10 August 1987 saying they were pleased to report that they were in the process of filing and serving a Notice of Appeal against both the conviction and sentence (presumably only service had then to be attended to since the notice was filed on 30 July). They went on to discuss what they called "complications", including a discussion as to when the time for appeal against conviction commenced to run, and concluded that if he was out of time to appeal against the conviction he would have to file an application for leave to file and serve a notice of appeal against conviction out of time. They then advised him that to support such an application he would have to show special circumstances and said they had no clear instructions on what they might be "although it does seem that for some time you have been trying to appeal either against sentence or conviction or both". After further discussing the problem the solicitors confirmed that the Notice of Appeal had been filed "although it is almost certain that the Notice of Appeal against the conviction is bad because it is long out of time". They then sought further instructions:

> "1. Do you wish also to lodge an application for leave to file and serve a Notice of Appeal against the conviction and sentence out of time? This application could then proceed if your notice of appeal against the conviction is out of time.
>
> Our suggestion is that if you wish to appeal the conviction and sentence that you instruct us to file the application to file and serve the Notice of Appeal against conviction and sentence out of time, straight away.

> Our instructions from you were to proceed to the best of our ability to work out what the situation was and to file a Notice of Appeal. We have completed that, and in doing so for the reasons described above have well and truly spent more than the $1,000 left with us."

They went on to refer to a meeting between the applicant, the writer of the letter and Mr Tippett of counsel and said that further funds would be required to pay for necessary work. They said that they did not intend to file any application for leave to file and serve appeals out of time because:

"1. We have no instructions to do so.

2. We have no further funds with which to do so".

They continued:

> "If you are determined to push this matter as hard as possible we most strongly recommend that you give us the instructions to file the application for late filing and service of a Notice of Appeal against the conviction. Those instructions should include instructions about any special circumstances you rely on to explain your late application (if the application is late for the reasons described above). We think that you are out of time to appeal against the conviction and if you wish to appeal you must file the application for late filing and service of appeal against the conviction.
>
> We think that it is going to take at least another $2,000 to get your appeal or application for leave to file a late appeal properly on foot. As stated to you our policy generally is that we cannot accept instructions or further instructions without the funds at the same time. We have presently completed our existing instructions and we look forward to hearing from you."

(1) The applicant replied to that letter, but in his affidavit says that he has lost his copies. Why he did not obtain the original or a copy of the original from those solicitors is not disclosed. He does exhibit to his affidavit, however, a copy of the reply he received to the letter which he wrote. In that letter, dated 28 August 1987, the solicitors acknowledged having received $1,500 from the applicant and they say "the fact that we have received more money from you indicates that you wish us to continue to handle your appeal. As you are aware appeals of this nature always occupy amazing amounts of time and are therefore expensive." They add:

> "In discussions with you we have indicated that there may be some difficulty with the appeal against the conviction because we may be out of time to appeal against such. This difficulty would not appear to apply to the appeal against your sentence.
>
> We seek your instructions to continue with the appeal against sentence even if it is not possible to appeal against the conviction itself. It is possible to apply to the Court for leave to appeal out of time against your conviction but the result of such an application is uncertain and it will cause you to incur further costs before we actually get to the appeal itself. On that basis it may be best if we continue with the appeal that has been lodged so far. This appeal is against both the conviction and sentence on the assumption that we are within time on both counts.
>
> If this turns out not to be the case and we are out of time with the appeal against conviction then we can still proceed to appeal against your sentence. The idea behind this is to save money."

They conclude by referring to a conference which has been arranged between the solicitors and counsel and sought to be advised straight away on whether the applicant agreed with their suggested approach, that is:

> "1. We proceed with the "solid" appeal as lodged and use your money this way.
>
> 2. That we delay pursuit of an application for leave to extend time for appeal on the conviction because this pursuit may use your money chasing a phantom."

Since those solicitors have not been heard I refrain from any comment other than to observe that they had $1,500, and they and the applicant were aware that an application for extension of time may well be necessary if an appeal against conviction was to be pursued.

(m) The applicant then deposes that those solicitors had sought the advice of Mr Tippett as to whether he had an arguable appeal: "Contrary to my belief this advise was in relation to two aspects of my case only. The first, being the failure (of counsel at trial) to put my defence that the left front tyre on my motor vehicle deflated shortly prior to the collision causing the motor vehicle to veer sharply to the left thereby hitting the bicycle. The second, being against sentence. The advice of Mr Tippett was obtained on or about 8 September 1987. Mr Tippett's opinion was against my appeal on each ground". As a result of the advice

received the applicant says his then solicitors advised him to discontinue the appeal and that he accepted their advice and instructed them to withdraw it (see (n)). Annexed to his affidavit is a copy of a written authority given by the applicant to his then solicitors to withdraw the appeal. The applicant then goes on to attack his then solicitors as to the instructions which he says they gave Mr Tippett in seeking his advice in regard to the prospects of appeal.

He asserts that counsel did not have the advantage of the transcript of the trial evidence nor the statement from the applicant about the possible causes of the deflation of the tyre on his motor vehicle, nor the advantage of a report from Tyre-Lug (SA) Pty Ltd dated 7 August 1987. That is a report addressed to the applicant and it is not clear on the evidence he puts forward as to whether in fact that report had been given to his solicitors for inclusion in the brief to counsel. Assuming it was, it does not assist the applicant. It was a report which was heavily qualified, prepared without some important information to which the author draws attention, and touches upon "possible causes" of a tyre going flat. It says that it is possible that if a vehicle has been used in an off road situation, the side wall or tread area of a tyre may have been damaged and not blown out at that time, but that as soon as the tyre had generated some heat a blow out may occur. "This is quite a common thing to happen but terribly

hard to explain to people but we are always repairing tyres with side wall and tread damage". In any event, evidence as to possible causes of a tyre blowing out would have been available to be given at trial, its weight depending very much upon whether or not the person giving the evidence had seen the tyre in question and had the advantage of basing his opinion on observations rather than conjecture. In fact, prior to trial the applicant's solicitors and counsel had a detailed forensic report from Australian Mineral Development Laboratories clearly indicating that the damage to the tyre which caused it to deflate was brought about when it collided with the rear wheel gear sprocket teeth of the bicycle.

(n) On the 11 September 1987, the applicant's solicitors filed a further document entitled "Notice of Discontinuance". O. 52 r. 19 of the Federal Court Rules then in operation, provided that an applicant may at any time file and serve a Notice of Discontinuance of an appeal and upon its being filed the appeal shall be abandoned and the party filing such a notice shall be liable to pay the costs of the other party occasioned by the appeal. The document filed read "TAKE NOTICE that the abovenamed applicant wholly discontinues this action against the respondent without liability for the respondent's costs". There is no form of Notice of Discontinuance prescribed especially for O. 52 r. 19 (appeals) although there is a

general form of Notice of Discontinuance under the Rules (r. 22 & Form 29). Neither O. 52 r. 19 nor O. 22, which relates to a discontinuance generally, contain any provision which would enable an applicant to unilaterally determine that he discontinues on the basis that he will not be liable for the respondent's costs. In my opinion the so-called Notice of Discontinuance was of no effect. There was no appeal to discontinue and in the face of the rules it is not up to an applicant to say that he will not bear the consequences of his discontinuing an appeal. He either discontinues in accordance with the Rules or he does not. In this case he did not.

I would hold that the purported Notice of Discontinuance of the appeal did not amount to a discontinuance at all and thus, if there had been an appeal, it had not been abandoned as a consequence of the filing of such a notice.

I do not think it necessary to go into the question of the effect of a proper discontinuance in respect of a properly instituted appeal, nor as to the circumstances in which such a Notice of Discontinuance might be withdrawn. There was no appeal and no proper Notice of Discontinuance.

Whether Mr Tippett was fully instructed is irrelevant.

The applicant had previously clearly evinced an intention to utilise the appellate processes available to have the conviction reviewed He had made clearly known to two firms of solicitors the nature of his complaints which surrounded the conduct of his counsel at trial. He was particularly disappointed at what he perceived to be the failure of counsel to attempt to cast doubt upon the Crown evidence as to his state of sobriety when he left the Club and as to the cause of the tyre blowing out.

Upon his forming the intention to discontinue the appeal, the issue of whether or not the same was properly on foot was of no further concern. However, he had been previously advised that there was doubt about the effectiveness of the "Notice of Appeal", and that there was a potential remedy by way of an application for extension of time. The fact that there had been little attention apparently paid to the distinction between an appeal and the need to obtain leave to appeal in some circumstances is not of particular significance in relation to the question of why whatever was required was not done in time and why it took so long to do something about it.

The respondent did nothing either in relation to the purported Notice of Appeal or the purported Notice of Discontinuance. Maybe the attitude was taken that given there were indications that the applicant did not want to pursue an appeal, nothing need be done.

(o) Having perused Mr Tippett's advice, a copy of which was provided to this Court, and coming to the view that his decision to discontinue was ill-advised, the applicant then contacted the Australian Legal Aid Office which he says refused to accept his instructions. A copy of a letter from that office to the applicant dated 12 October 1987 is in evidence. There had clearly been some intervening correspondence which has not been produced, but in that letter the author particularly thanks the applicant for "the careful way in which you have tried to acquaint me with the facts of your matter", then draws attention to the discontinuance and points to difficulties with which the applicant may be faced if he then wanted to make an application for an extension of time within which to lodge a notice of appeal. The advice was that having discontinued a previous appeal the applicant would not be allowed to pursue the matter again. That Office also touched upon the applicant's prospects of success should he be given leave to appeal and made it clear it was not prepared to act further in relation to those aspects of the matter. That attitude was confirmed in further letters from the Office to Mr Towns on 14 October 1987 and 15 January 1988, having received various further letters from him.

(p) The applicant then deposes that he set about recovering his documents and papers from his former private solicitors and the Australian Legal Aid Office and getting

them in order. Amongst the evidence on this point is a letter of 27 January 1988 from the Office to Mr Towns enclosing his papers.

On 25 February 1988 a document entitled "Application for Leave to Appeal" was lodged by the applicant. Notwithstanding the heading it gave notice that he sought leave to appeal from "A verdict given by a jury" which he went on to identify as being the verdict of 3 June 1987, some 8 months earlier. There were two enumerated grounds of appeal. Firstly, "The delay between the date of the incident in respect of which the applicant was convicted and the date of the trial was such as to prejudice the applicant in the conduct of his defence" and secondly, "The failure of the applicant's solicitors and counsel to follow or comply with the applicant's instructions was such as to prejudice the applicant". I pause to note that in the original "Notice of Appeal" the ground of appeal against the conviction was that "The verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence".

In his affidavit of 16 October 1989 the applicant refers to the document dated 25 February 1988 (which is by no means an application for extension of time within which to make an application for leave to appeal against conviction) and says he was assisted to prepare it by a

solicitor from the Australian Legal Aid Office and a one time legal practitioner who was then a prisoner with the applicant. No notice had apparently been taken of the advice previously given concerning the need for an order extending time.

(q) Upon filing the document dated 25 February 1988, the applicant also filed an affidavit, sworn the same day, upon which he now relies. In it he recited the history of the matter including matters arising between himself and his then solicitor. He said he gave instructions for an appeal to be instituted as he was very dissatisfied with the verdict of the jury. He says he subsequently received advice from those solicitors that he had no prospects of success on the appeal, and acting on their advice he instructed them to discontinue it. He asserted that the Australian Legal Aid Office refused to provide him with any assistance. On the question of his intoxication, he said that evidence was given by eight named witnesses, one of whom was James Ramage. As to Ramage, he said that he was informed, and believed, that Ramage was not in Jabiru on 7 July 1985, the date of the offence, but that he was in Darwin at the time putting his wife on a plane. The applicant also deposed that one of the persons whom James Ramage alleged was with the applicant at the Club, where it was alleged he had been drinking, was one Christopher Brian Windle, that Windle was not there, and that although Windle was available to be called as a witness he was not.

The applicant, in that affidavit, goes on to say that "I instructed my solicitor and counsil (sic) to cross-examine the witness James Ramage as to the inconsistencies from his statement and committal hearing as to his whereabouts and to call the witness Christopher Brian Windle, but my instructions were ignored". If that be true then it shows that the applicant was aware, prior to trial, of the evidence which might be called from Windle. He also says that the evidence the witness "Myahoffer" (sic) gave was in conflict with that given by the witness at the committal proceedings and that he, the applicant, had instructed his counsel to cross-examine Myahoffer, but those instructions were ignored. The affidavit goes on to make a series of observations regarding evidence and instructions to counsel in respect thereof. In paragraph 20 of the affidavit the applicant says that the evidence of the witness Short at trial was to the effect that the applicant was drunk, but that at the committal proceedings he only swore to having seen the applicant have two drinks, and according to the applicant he instructed his counsel to cross-examine Short but the "whole cross-examination was a disaster and was criticised by his Honour" the learned trial Judge.

It is alleged in that affidavit that the applicant's then counsel ignored his instructions to cross-examine the witness Merkyl as to inconsistencies

between his evidence upon the committal hearing and that at trial as to the time he arrived at the Club, and his observation of the applicant. The applicant says that a witness Crone gave evidence at the trial as to his sobriety, and that counsel, acting upon the applicant's instructions, cross-examined her as to prior inconsistent statements, but that that cross-examination "was soundly attacked" by the learned trial Judge as to its form and content. The applicant observed, in his affidavit, that that "could not have done anything but create bad impression on the jury". The applicant continues to attack his counsel for failure to cross-examine a witness Hine in relation to inconsistencies between evidence at committal and that led upon trial. He says "All of the other witnesses made other minor inconsistencies between their statements to police and evidence of committal, and evidence at trial". He consistently says that instructions given to his barrister to cross-examine were ignored. On the question of his sobriety, the applicant says that one Steward, Manager of the Club, had given a statement to the police to the effect that the applicant was not drunk on the occasion in question, that he was at Court for the trial, but despite the applicant's request to his counsel to do so, that witness was not called to give evidence.

The applicant swears in that affidavit that the witness Moore, was an employee of a tyre company which had

"(A) very lucrative contract with Ranger Uranium Mines for the supply of tyres", the person who handled those contracts for Ranger Uranium Mines was the father-in-law of the deceased, and that "At the time of the trial I believe the contract was being renegotiated for further supply of tyres". No doubt the applicant has it in mind that had he known all that at trial evidence to that effect may have called the credit of the witness into question. He also criticised his counsel for failure to follow the instructions he says he gave as to cross-examination regarding the cause of the damage to the tyre. As pointed out above the applicant had obtained a detailed report prior to trial which came to the same conclusion as did the Crown's expert.

The applicant says, in that affidavit, in summary, that he believes he had been prejudiced by:

(a) the two year delay before trial which was not his fault;

(b) the failure of his barrister to follow instructions "such as to the cross-examination and calling of witnesses";

(c) the real potential of influence on the witness Moore which was not known at the trial;

(d) his inability to obtain legal assistance

(r) On 1 March 1988 the application of 25 February 1988 first came before this Court. At that time counsel appeared for the Crown and senior counsel amicus curiae. During discussion between the Court and counsel neither the question of the validity of the "Notice of Appeal" nor of the "Notice of Discontinuance" was raised. Counsel for the Crown drew attention to r. 86.19, which provides that an application under s. 417(2) of the Code for an extension of time shall be in accordance with the prescribed form and accompanied by an affidavit explaining the reason for delay. In doing so counsel clearly drew the attention of the applicant to the procedural and evidentiary requirements should he be seeking or wish to seek an extension of time within which to apply for leave to appeal, (something which was certainly not clear on the papers then before the Court). The matter then before the Court was adjourned sine die to enable the applicant to seek to obtain legal representation. It was thought that Mr Southwood might be prepared to assist him.

(s) In a letter to Mr Southwood of 31 August 1988 the applicant enquired as to progress and reiterated the nature of his complaints.

(t) He wrote to Mr Southwood again on 13 September 1988 with a general outline of his complaints.

(u) On 21 September 1988 Mr Southwood wrote to the applicant concerning prospects of financing the obtaining of an opinion from senior counsel as to the prospects of appeal. Although it is not in evidence before us, the applicant had written to the Deputy Master of the Supreme Court on 26 November 1988 seeking clarification in relation to the proceedings in the Court of Appeal on 1 March 1988.

(v) Applicant says he gave his solicitor a statement concerning the whereabouts of James Ramage on 7 July 1985 during November 1988 (see (dd)).

(w) The Deputy Master replied on 9 December 1988 drawing attention to what was then said by counsel for the Crown on 1 March 1988 as to the need for an application for an extension of time, and concluding "I wish to emphasise to you that your appeal will not be dealt with until you or your legal advisers prepare an application for an extension of time".

(x) On 12 December 1988 the applicant wrote to Mr Southwood to let him know that the money should be available during that week, and he swears that in or about the middle of December 1988 the sum of $3,000 was paid into the trust

account of his then solicitors for the purpose of obtaining an opinion from senior counsel and for any legal fees and disbursements incidental to obtaining such an opinion. He says he instructed Mr Southwood to obtain such an opinion so that if it was favourable a further application would be made to obtain legal aid for the purpose of making an application for an extension of time to appeal and hopefully for an appeal.

(y) On 19 March 1989 he again wrote to Mr Southwood complaining that it appeared that nothing had been done to obtain senior counsel's opinion.

(z) He wrote to Mr Southwood again on 18 June seeking information as to the progress

(aa) On 4 July he wrote to senior counsel whom he understood was to have been instructed to advise.

(bb) Senior counsel replied on 21 August informing him that the most he could do was to forward the applicant's correspondence to Mr Southwood and suggesting that if he was having problems with Mr Southwood he might write to a senior partner of the firm of solicitors.

(cc) The applicant wrote to Mr Southwood again on 23 September 1989 enquiring as to what was going on. It

appears from some of this correspondence that Mr Southwood had visited the applicant in jail on occasions, but the applicant does not disclose what passed between himself and Mr Southwood. The applicant had over this period of time also been doing further work on the matter, making requests for copies of statements and other papers which were held by solicitors, and working up further arguments which might be put, in particular, in relation to the evidence of Ramage.

(dd) A letter from the Australian Legal Aid Office to the applicant of 25 September 1989 informed him that the Crown had indicated that an application was to be made to strike out the proceedings for want of prosecution. (That led to the applicant arranging to file the document entitled "Application for Extension of Time within which to Appeal" on 3 October 1989. It is that application, as amended, which is the subject of these proceedings).

(ee) On 29 September 1989 the applicant wrote a long letter to Mr Southwood in which he purports to review the history of his dealings with him since 1 March 1988. He confirms that there were difficulties in relation to providing costs or security for costs but which he again asserts was overcome by the deposit of $3,000 to the solicitors' trust account in December. In that letter he observes that on the occasion when Mr Southwood saw him at the prison in November 1988 he gave him a written statement

concerning "the chief Crown witness James Ramage's whereabouts on 7 July 1985 (in Darwin)" and asserts that he had also posted a copy of that statement, presumably to Mr Southwood, on 16 November 1988. He complains that Mr Southwood failed to respond to his frequent letters and enquiries made directly of him by family and friends of the applicant, but acknowledges that Mr Southwood saw him at the prison on occasions. In that letter he clearly expressed his dismay that an application was to be made by the Crown to have his appeal struck out for want of prosecution given that he had been relying upon Mr Southwood for months to attend to the matter. For all that the applicant acknowledges in his affidavit that Mr Southwood had difficulty in locating David Young, who according to the applicant, is an extremely difficult man to contact as he is frequently working in the bush. On the date of swearing that affidavit, 16 October 1989, it was thought that Mr Young was then working in a place in the Northern Territory that could only be reached by four wheel drive vehicle.

(ff) So far as the Court was concerned nothing happened from 1 March 1988 until the 3 October 1989, 19 months later. On that date the Solicitor for the Northern Territory issued a summons directed to the applicant requiring him to attend before the Court on the hearing of an application for an order that "The within appeal be dismissed for want of

prosecution". It must have then been the view of the respondent that the "Notice of Appeal" was valid. On the same day there was received into the Registry of the Court a document which although headed "APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO APPEAL" gives "... notice of appeal (or make application for leave to appeal) on the ground set out in the accompanying affidavit". It seems this effort on the part of the applicant was prompted by the letter he received from the Australian Legal Aid Office (dd).

The rules of this Court in operation at the time that document was filed provided that an application for an extension of time must be accompanied by an affidavit of the applicant explaining the reasons for delay and furnishing the reasons why there had been delay in giving notice of application for leave to appeal. (I am not sure as to what is the difference between "explaining" and "furnishing" reasons for the delay). The first hurdle which an applicant has to overcome is to convince the Court that there is a satisfactory reason for the failure to comply with the statutory requirements in relation to the time. The Court is not justified in extending the time except upon proper material, were it otherwise a convicted person wishing to appeal or to seek leave to appeal would in effect have an unqualified right to an extension of time.

(gg) On 9 October the respondent's summons seeking an order that the appeal be struck out came on for hearing. At that time counsel for the applicant referred to the application filed on 3 October in relation to the extension of time. He sought an adjournment for the hearing of the respondent's application and the applicant's application upon the grounds that he had not had adequate time to prepare since receiving instructions from the applicant. The application for the adjournment was opposed, during argument upon which some observations and questions were raised in relation to the various documents appearing on the Court file. Counsel for the Crown on that occasion drew attention to the fact that the "Notice of Appeal" filed on 30 July 1987 was out of time, and mentioned the Notice of Discontinuance. During the course of discussion the fact that it would be necessary to explain the applicant's delay in prosecuting the appeal from 1 March 1988, when it was adjourned sine die, until 9 October 1989 when the matter next came back before the Court upon the respondent's application, was pointed out. Counsel for the applicant acknowledged that that would have to be done, but said he needed an adjournment for a week to enable him to take detailed instructions and so that an affidavit relating to the matters set out in the letter of 29 September 1989 from the applicant to his solicitors, and other matters could be put to the Court. Counsel for the applicant also referred to the need to obtain evidence in respect of matters deposed

to in the applicant's affidavit of 25 February 1988, and "new matters" which had emerged in relation to the evidence of one particular witness. Counsel for the Crown drew attention to the provisions of r. 86.19 requiring the filing of affidavits in support of an application for an extension of time for appeal if such an application were to be made. The Court considered the application for the adjournment, granted it and directed that no later than 4.00pm on Thursday 12 October the applicant file such affidavit or affidavits as he saw fit in support of his application for an extension of time. There was no document on the Court file at that stage which was clearly an application by the applicant for an extension of time within which to seek leave to appeal against his conviction.

(hh) When the matter resumed on 16 October 1989, counsel for the applicant announced that his client did not intend to proceed with any appeal in respect of sentence (not that he could have without leave), mentioned problems which had been experienced in obtaining instructions and preparing an affidavit for swearing by the applicant, leading to the fact that that affidavit had only been sworn shortly before the Court convened that morning. The Court gave leave to file the affidavit although outside the time limited by it.

(ii) The affidavit sworn 16 October 1989, and the exhibits thereto run to about 140 pages, much being closely

typed. It was no wonder that counsel for the Crown objected that since receiving it he had not had the opportunity to either completely read it or attempt to absorb its contents. He applied for an order that the further hearing of the proceedings be adjourned. Adverting to allegations in that affidavit concerning the conduct of counsel instructed to appear for the applicant upon the trial, counsel for the Crown presumed, he said, that it would be intended to place before the Court information from that counsel and/or solicitors instructing. On that day attention was again specifically drawn to the fact that the so called "Notice of Appeal" was lodged out of time and counsel for the applicant said that his primary argument would be that there was no appeal and thus the principles of abandonment surrounding the Notice of Discontinuance did not apply. He added that he also had arrangements to see counsel who was instructed on the trial later that day. He did not oppose the adjournment sought by the respondent. In granting the adjournment (which was obviously necessary) the Court indicated that the applicant should file and serve any further affidavits he may wish to rely upon in pursuance of an application for an extension of time and by way of response to the Crown's application to strike out the proceedings, within 9 days of that day. Counsel for the applicant was not sure whether that would be enough time, but liberty to apply was granted. The Court went on to indicate that the Crown should then have a further one week

within which to file any answering affidavits, also with liberty to apply. Clearly, the Court was concerned that by the time the matter was next before it it should be able to be dealt with without further delay. It was to be disappointed.

(jj) 1 November 1989 - affidavit of David Young filed.

(kk) The matter was next listed before the Court on 6 November 1989. Counsel for the applicant applied for an adjournment, this time upon the grounds that he was committed in other proceedings. The Court pointed out that unless the matter was able to progress rapidly it may not be dealt with during those sittings of the Court. Counsel for the Crown drew attention to the orders made by the Court on 16 October 1989 regarding filing of affidavits on behalf of the applicant, and that the affidavit sworn by a Mr Young, had not been filed until 1 November. Notwithstanding the default, the Crown was prepared to try and cope with the matter raised by Mr Young which went to the question of Mr Ramage's whereabouts on the day of the offence. Counsel said that the police had been instructed to make enquiries, but that might require an adjournment upon the application of the Crown. The Court directed that the matter be adjourned and placed at the bottom of the list.

(11) It was next before the Court on 29 March 1990 when, for the first time, the applicant specifically had in writing an application for an extension of time within which to make application for leave to appeal. It was handed up at the commencement of the address of counsel for the applicant by way of an amendment to the document filed on 3 October 1989. The amendment was not opposed. At the same time there was handed up written proposed grounds of appeal which read:

"1. the verdict was unsafe and unsatisfactory;

2. that in the whole of the circumstances there was a miscarriage of justice and in particular;

(a) counsel for the applicant failed, neglected or refused to follow instructions, which instructions ought to have been followed;

(b) counsel or solicitors for the applicant failed to make any, or any proper enquiries about the whereabouts of a witness, James Ramage on 6 and 7 July 1985;

(c) counsel failed to qualify the applicant as an expert on tyres and failed to give evidence proffering the applicant's own opinions;

(d) there is evidence available which had it been led at the trial would have led the jury to acquit."

In its final form then, the application before this Court is for an extension of time within which to make application for leave to appeal against the conviction of 3 June 1987, which application was filed on 3 October 1989. At the commencement of the hearing the principal evidence in support of the application was the affidavit of the applicant of 25 February 1988, his further affidavit of 16 October 1989, and that of Mr Young of 31 October 1989. The respondent had filed a number of affidavits in which the deponents set forth information directed against Mr Young's evidence. During his opening, counsel for the applicant also sought to rely on a further affidavit sworn by the applicant that day, going to an issue which had not been raised in any form before.

An application such as this may be dealt with by a single Judge of this Court in the same manner as it might be dealt with by the Court. (s. 429 Criminal Code). However, if the single Judge refuses an application the applicant is entitled to have it determined by the Court. Although it may well be most useful to have power in a single Judge to deal with matters set forth in s. 429, that utility is very much cut down by the provisions of ss. (2) which seem to

indicate that proceedings before the Court thereunder are not by way of appeal, upon which the legislature could have imposed restrictions, but by way of a new hearing. Until the matter came before the Court most recently there was not, on the face of any of the documents filed in the Court, any application which could have been dealt with by a single Judge pursuant to the powers conferred under s. 429(1). I feel constrained to say that had the Crown paid greater attention to the effectiveness of the documents periodically filed by the applicant, and promptly taken the steps open to it to have their legitimacy tested, it is more than likely that the applicant's largely futile efforts could have been dealt with, and the matter probably put on the proper footing for due consideration by a Judge or the Court at a much earlier date.

The first thing to be considered is whether or not there has been a reasonably satisfactory account for the failure of the applicant to comply with the statutory requirements in respect of his proposed application for leave to appeal against conviction.

The principles upon which an Appeal Court considers the granting of an extension of time within which to appeal or to seek leave to appeal were recently stated in this Court in Green v The Queen (1989) 95 FLR 301. In that case the Court, constituted by Asche CJ., Kearney and Rice JJ.,

took the opportunity to undertake a comprehensive review of the authorities in relation to this aspect of the law. The general principles were stated by Rice J. at p. 312 as follows:

> "(1) An extension of time within which to appeal from conviction will not be granted as a matter of course. In every case the court will require substantial reasons to be shown why an extension should be made.
>
> (2) Where an appeal is lodged after the lapse of a considerable period of time, exceptional circumstances have to be established before the Court will be justified in granting an extension of time.
>
> (3) After a lengthy delay, the court will require exceptional circumstances before granting an extension unless there has been a manifest miscarriage of justice or unless the court is satisfied that there are such merits in the proposed appeal that it would probably succeed.
>
> (4) The greater the delay which has occurred before the application is made, the more difficult becomes the task of the applicant.
>
> (5) The court itself, in the administration of justice, has its own interest in seeing that time limits are observed and that an application for the extension of time is properly justified."

The applicant was aware that he might appeal or seek leave to appeal at the latest 12 days after his conviction, because he swears that it was on 15 June 1987 that he informed his solicitors that he wished to appeal. Eleven days later he wrote to his solicitors complaining about the conduct of his counsel and by clear implication raised possible grounds of appeal. At that time the time

for appeal or for seeking leave to appeal had not expired. His then solicitors replied after that time had expired, but they had taken an incorrect view of the time from which the period of time for appeal or to seek leave to appeal commenced to run. The applicant continued to express his desire to appeal both to his solicitors and the Court, but it was not until 30 July 1987 that the "Notice of Appeal" was filed. The document suffered from two defects, it was out of time and it purported to exercise a right of appeal upon a ground in respect of which no right existed. A little later his solicitors alerted him to the fact that the appeal may be out of time. The so called Notice of Discontinuance was then filed. In October 1987 he is again advised that an application for an extension of time would be necessary. The applicant does nothing until February 1988 when he files an Application for Leave to Appeal but, notwithstanding the previous advice which he had been clearly given, no application for extension of time within which to seek leave to appeal was sought. That defect was again drawn to his notice when the matter was first before the Court on 1 March 1988 and reinforced by a letter from the Deputy Master to him late that year. The applicant continued to castigate his solicitors for their failure to do something, and eventually, on learning that an application was to be made to have his Application for Leave to Appeal dismissed, he does something himself and files a document on 3 October 1989, which although headed

"Application for Extension of Time within which to Appeal" does not embody such an application and does not touch upon the issue of an extension of time within which to seek leave to appeal. It was not until 29 March 1990 that the document filed on 3 October 1989 was amended so that it accorded with the requirements of the law in respect of such an application.

Clearly the applicant was relying upon solicitors to give him advice and to do whatever was required with a view to securing an opportunity for him to ventilate his complaints concerning the trial and consequent conviction. He blames them for the poor advice and delay. I make no findings against them since they have had no opportunity to put anything before the Court concerning their conduct and the complaints which are made, but, the basis of the application is that the applicant was badly let down by his advisers upon whom he replied. Accepting, for the purpose of this application, that the applicant had properly instructed his solicitors from time to time to advise and act on his behalf, that he was badly advised and that they failed to act expeditiously, there is no substantial reason why an extension of time should be granted. Those circumstances are not "exceptional" in the sense used in the authorities. The failures of the solicitors are the applicant's failures. It was up to him to see that the requirements of the law were met and his reliance upon

others to undertake what needed to be done on his behalf does not absolve him from ultimate responsibility.

On the grounds advanced by the applicant there has been no manifest miscarriage of justice in his case and the only thing which must now be considered is whether there are such merits in the proposed appeal that he would probably succeed.

Whether a person is intoxicated or not and, if so, the degree of intoxication, was not an element of the offence for which the applicant was convicted. Certainly it was alleged that he was intoxicated by alcohol at the time of the commission of the offence, but that only went to penalty, an increased maximum penalty being prescribed if such an aggravating circumstance is found to have existed at the time of the commission of the offence. In any event, there was ample evidence which the jury could accept or reject concerning the applicant's drinking at the Club prior to committing the offence, even leaving aside the evidence of Mr Ramage. The applicant says that Mr Ramage was not at the Club, and it is clear from his affidavit of 25 February 1988 that he was aware of that at the time of the trial, for he says that he instructed his solicitor and counsel to cross-examine Ramage on the point. As to the evidence of Mr Ramage concerning his observations of the applicant's driving shortly before the collision with the bicycle, the

cross-examination of Ramage at trial proceeded on the basis that he was mistaken as to what he had observed rather than that he was not there. It is only long after the trial that the applicant first raises matters going to the features of the roadway in existence at the time of the trial, with a view to casting further doubt upon the reliability of the evidence of Mr Ramage. If reasonable doubt had been able to be cast upon Mr Ramage's evidence as to his having observed the applicant's driving just prior to the collision then his evidence as to the manner of driving would have been of no value.

The applicant also relies on the affidavit sworn by Mr David Young on 31 October 1989 to the effect that Mr Ramage was in Darwin, not Jabiru, at the time of the accident. Mr Young says that he first became aware of the evidence given by Mr Ramage at the trial of the applicant in or about November 1988 at which time he made a note of his observations of Mr Ramage on 7 July 1985, that is, an observation of the witness Ramage on a particular date and a particular place over 3 years previously. The Crown has gone to a great deal of effort to meet that evidence of Mr Young, for what it is worth. I need not go into the details but looking carefully at the affidavit material collected by the Crown, I think it highly unlikely that even if the evidence of Young was to be admitted as fresh evidence, it would be accepted. The applicant's prospects

of success in relation to the proposed ground of appeal regarding the witness Ramage, are slight at best.

If it was the applicant's intention to introduce additional evidence regarding the possible cause of damage to the tyre which caused it to blow out, then such as has been made available to this Court for the purposes of this application is of no use to the applicant. The report available prior to the trial supports the Crown case and that obtained afterwards is worthless. The basis for the proposed attack upon the credit of Moore is far from being firmly established on the evidence before this Court. It is not fresh evidence upon which it would be likely that a new trial might be ordered since the applicant could have discovered what he says was the relationship between the witness and the other parties involved through the exercise of reasonable diligence in the preparation of his case. Most importantly it would have been quite wrong for counsel to have called his credit in question when he had in his possession a report which supported Moore's opinion.

In the case of an application for a new trial on the ground of discovery of fresh evidence, the Court should satisfy itself that the fresh evidence is likely to be believed by the jury, and is likely, having regard to other available evidence, to produce a different result from that which followed the former trial. In general terms evidence

which is "actually or constructively available" to an accused, but is not called by him, is spoken of as lacking the quality of fresh evidence. The proposed additional evidence fails to satisfy these tests. The same considerations apply to the last attempt made by the applicant to cast doubt upon his conviction, that is, the affidavit sworn by him and handed up at the commencement of hearing of his application before this Court. He says that on the first day of his trial he saw the deflated tyre from his motor vehicle in the courtroom. He did not see the tube. He goes on to say that on the second day he saw the tube brought into Court and thinks it was intended as an exhibit, but says that the tube was not the tube that was in the tyre which deflated, "the tube should have been a secondhand Dunlop tube. The tube which was brought into Court was not a secondhand Dunlop tube". At least he does not allege that his counsel failed to follow his instructions regarding that matter.

By the time he swore his affidavit of 16 October 1989 the applicant had totted up no less than 19 specific allegations of professional misconduct on the part of counsel going to his failure to follow instructions, which instructions, according to the applicant, "were relevant to the four main issues at my trial being my sobriety, the length of time I spent at the Jabiru Sports and Social Club, and what caused the tyre to deflate and my driving prior to

the collision". As was pointed out by His Honour Justice Rice in Green's case, the task of an applicant to satisfy the Court that there are such merits in the proposed appeal that it would probably succeed becomes more difficult the greater the delay which has occurred before the application is made. To that, I would add, that any such difficulty is compounded if the applicant fails to be entirely frank and open with the Court from whom he seeks an indulgence by way of the exercise of a discretion in his favour. I say that because the applicant adopted a most extraordinary attitude in relation to this aspect of his application. He made a number of serious allegations on oath against his counsel going to counsel's conduct, in the course of which he gave details of what he said were oral instructions given by him to his counsel and asserted that counsel failed to follow them. However, it was only during address in reply, at the end of about 4 days of argument before this Court, that he conceded that his counsel at trial was no longer bound by legal professional privilege in respect of those alleged communications. Notwithstanding that the applicant had chosen to disclose his version of what he said were communications between himself and his counsel, he steadfastly maintained until the last minute that there would be a breach of privilege on the part of his counsel for him to respond to what the applicant said passed between them.

Prior to the hearing the applicant had first agreed to his counsel at trial responding to the allegations made against him by communicating with the legal representatives of the Crown. When provided with a draft of an affidavit, proposed to be sworn by his counsel and placed in evidence, he reverted to a claim of privilege. Whether the claim was good or bad in law is now immaterial. However, it shows a decided lack of openness to the Court. He could have withdrawn his allegations against counsel, but did not, retreating instead into a position where he must have considered his allegations would stand and be accepted without challenge. It was only after the Court had made it abundantly clear that such behaviour could cast serious doubt upon his credit that he relented and not only permitted counsel's affidavit to be put in evidence, but called for it from the possession of counsel for the Crown and put it in his own case. His counsel at trial had given careful consideration to the allegations made against him by the applicant and answered them. It is not necessary to go into the detail, suffice it to say that the evidence of counsel cast serious doubt upon the evidence of the applicant. The two versions of what transpired between them in relation to the preparations for, and conduct at the trial, can not stand together. Since the applicant introduced his counsel's evidence into his own case there can be no question but that he has failed to establish that he would be likely to succeed on this proposed ground of

appeal. In these peculiar circumstances there is nothing to be gained by going into the law as to how a Court might resolve questions of fact arising between client and counsel where counsel's conduct is called in question.

It should be made clear that the Court did not oblige the applicant to put the affidavit of his counsel at trial in his own case. What was made clear was that his continuing objection to his counsel having the opportunity to have his version put before the Court could do the applicant no good.

I have considered whether in the interests of justice it would be appropriate to make an order extending the time to make an application for leave to appeal to the dates upon which the earlier attempts were made by the applicant, that is, 30 July 1987 and 25 February 1988. As to the first, the only ground of appeal advanced was that the verdict was unreasonable, or could not be supported having regard to the evidence. Leave is required to raise that ground and in any event it has not been pursued. As to the second, the first ground put forward went to the delay between the date of the offence and the trial and that has not been pursued either. The other ground raised the issue of the failure of counsel to follow instructions and that has been dealt with. The other matters raised in the applicant's affidavit of the same date, but not put forward

in the proposed grounds of appeal in the document their filed, have also been dealt with above.

During the course of address counsel for the applicant raised for the first time a further ground of attack upon counsel at the trial based upon part of his cross-examination of the forensic pathologist, during which the doctor ventured beyond his area of expertise. Even if it be the case that it was as a result of counsel's questions that the doctor gave opinion evidence for which he was not qualified, further questions established that he was not so qualified. Any prejudice to the applicant which might have arisen was almost immediately displaced.

The critical issue in the case was whether the vehicle struck the bicycle causing the tyre to blow out, or whether the tyre blew out causing the vehicle to strike the bicycle. The evidence of the Crown at trial was capable of being accepted by the jury and obviously was accepted. Nothing in the applicant's case then or now casts any doubt upon that finding. There was no miscarriage of justice.

I would dismiss the application.