CRABBE V THE QUEEN

Court of Criminal Appeal of the Northern Territory of Australia

Asche CJ, Martin & Angel JJ

10 and 12 September 1990 at Darwin

APPEAL - Application for extension of time within which to appeal - guidelines provided in summary of authorities by Rice J. in Green v R (1989) 95 FLR 301 @ 312, followed

EVIDENCE - "fresh evidence" must be based on more than mere speculation - previous availability to be considered

Cases applied:

Green v R (1989) 95 FLR 301
Gallagher v R (1986) 160 CLR 392
Mickelberg v R (1989) 63 ALJR 481

Cases referred to:

Crabbe v R (1984) 56 ALR 733
Stafford v Luvaglio (No. 1) (1968) 53 CAR 1
Crabbe v R (1985) 156 CLR 464

Cases followed:

Green v R (1938) 61 CLR 167

Counsel for Appellant:	Represented himself
Counsel for Respondent:	T. Pauling QC with W.J. Karczewski
Solicitors for Respondent:	Solicitor for the NT

jasc90011
IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. CA 2 of 1990

ON APPEAL FROM THE
SUPREME COURT OF THE
NORTHERN TERRITORY

No. SCC 155-159 of 1983

BETWEEN:

DOUGLAS JOHN EDWIN CRABBE

Appellant

AND:

THE QUEEN

Respondent

CORAM: ASCHE CJ, MARTIN & ANGEL JJ.

REASONS FOR JUDGMENT
(Delivered the 12th day of September 1990)

THE COURT: The applicant was convicted on 7 October 1985 on five (5) counts of murder and sentenced to life imprisonment on each count. The act which resulted in his conviction was the act of driving a large prime mover and trailer into a bar, killing five people. He now wishes to appeal.

He has filed a document which is correctly headed "Application for Extension of Time within which to Appeal". The body of the document, however, is irregular and purports to give Notice of Appeal or make application for leave to

appeal. We appreciate that the applicant prepared and filed these proceedings himself and obviously used some pro forma document inappropriate to these proceedings. We are prepared to treat the material before us as an application for extension of time within which to appeal.

The application was filed on 15 February 1990 so that the delay over the time required by the Rules is more than 4 years.

The applicant appeared in person before us and did not have legal assistance. Nevertheless he makes plain enough the basis upon which he seeks the extension of time. In effect he says that, after first resigning himself to life in gaol, he came to a gradual realisation that there was an explanation for his conduct which could have led to his acquittal. He says in his written statement to the Court, "Although I did not realise it at the time of my offence, I had a drug dependency and was an alcoholic. I believe this to be a contributing factor to my irrational behaviour". Later he says, "At the time just before driving the truck into the bar I believe myself to be suffering from a drug induced psychotic episode". He maintains that he did not then realise the extent of his drug dependency nor the effects of that dependency, and that he now believes that the drugs he had been taking, combined with alcohol and fatigue, could produce a psychotic episode affecting his

state of mind at the time. He explains the delay in his application by the fact that it took him quite some time to understand these matters and that subsequent delays occurred because his wife had to make researches into the situation, and that it has taken her over 12 months, to gather the information and opinions needed to substantiate the application. He says further that it was not until early in 1990 that he was able to read the case file formerly held by his solicitor. Having read it he feels that the question of his drug addiction was not adequately investigated.

He refers to a letter written on 12 March 1984 by his solicitor to the Australian Legal Aid Office. That letter discussed certain psychiatric evidence and raised the suggestion of a fresh CT scan (there apparently had been one already done). It had been suggested by a psychiatrist that a careful examination might show deformities of the culci indicating a tendency to irrational and impulsive behaviour "and also if the abnormality was marked it might lead to behaviour coupled with alcohol and drugs where Mr Crabbe might not be aware of what he was doing". It does not appear that a further CT scan was taken.

The applicant has also provided us with various definitions taken from books of reference, including definitions of drug dependency, automatism and psychosis. He has also put before us a sworn statement of an

experienced truck driver, that "overtiredness, alcohol, pep pills and frustration can cause acts that are totally foreign to normal behaviour and not remembering what you did is a common occurrence".

The applicant's submission is that these matters are matters of sufficient importance to warrant leave to appeal being granted despite the substantial delay. He submits that the material indicates that, when the event occurred, he was suffering a psychotic episode brought on either from withdrawal symptoms from a long time drug addiction plus alcohol and fatigue, or from a combination of drugs, alcohol and fatigue, and that his actions were independent of his will, his mind and body being in a state of automatism. He submits that, while evidence of his drug usage was available at the time of his trial the evidence of drug dependency was not; mainly because, being himself unable to recognise his drug dependency at that time, he was in no condition to disclose it to others.

The applicant says that he was examined by persons whom he describes as psychiatrists and psychologists. He names a Dr Bartholomew and a Dr Wahr as psychiatrists and whom this Court accepts as such. He mentions two other persons who are probably psychologists. He says that he did tell these persons or some of them that he had taken pills earlier but he gave no further information i.e., he did not

tell them of his drug dependency. He says he may have mentioned to one of these persons that he had been taking drugs for some years. No evidence was given about drugs at the trial. No tests were taken to determine whether he had a substantial substance abuse disorder. He believes there was a misdiagnosis on the basis that he was asked to diagnose himself, and his own diagnosis was accepted.

The first and most obvious comment about the applicant's case is that it is really no more than speculation. The applicant is not a psychiatrist, psychologist or a medical man. With the aid of some textbooks he has undertaken a self-analysis unsupported by any expert evidence. Plainly enough the conclusions he draws from the matters he puts before this Court would be inadmissible, coming from him. We appreciate the obvious difficulties of the applicant in obtaining expert evidence but we must proceed only on what is put before us and not, ourselves, indulge in speculation. On this ground alone the application cannot succeed.

We would not, however, wish these remarks to be construed by the applicant as an invitation to seek out expert evidence consistent with his hypothesis and then make some further application. We would not, and indeed cannot, prevent him pursuing such inquiries, but we feel bound to say that there are a number of other factors which constitute severe obstacles in his path.

For instance, he concedes that he revealed his drug taking to at least one of the psychiatrists or psychologists who interviewed him. Even if he had not done this, it would be surprising if the matter had not been explored by Dr Bartholomew and Dr Wahr. The distinction he makes between admitting to taking drugs but not admitting a drug dependency would surely not have been overlooked by an experienced psychiatrist. Indeed the letter from his solicitors to the Australian Legal Aid Office indicates clearly that there was an awareness of drug use as a possible factor in his behaviour. We note that the letter requesting a second CT Scan was written on 12 March 1984 very shortly before his first trial, which resulted in convictions which were set aside on appeal and a new trial ordered. Crabbe v R (1984) 56 ALR 733. If it is a fact that no second scan was then taken, his legal advisors on the second trial, which did not commence until 30 September 1985, must certainly have known of this. We do not know what steps were taken in preparation for the second trial but it is quite obvious that the question of psychiatric evidence must have loomed large in the considerations of the applicant's legal advisors; and it is equally plain that a conscious decision was made not to call such evidence - just as a conscious decision was made not to call the applicant in the second trial. The applicant cannot suggest that what he now puts before this Court is fresh evidence, not available at the time of the second trial.

The learned Solicitor-General refers us to principles governing an application for an extension of time. He refers us particularly to the summary of the authorities made by Rice J. in Green v R (1989) 95 FLR 301 at 312. His Honour's summary, which we adopt, is this:-

> "What emerges from these authorities by way of general principles is that:
>
> (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 learned Solicitor-General first points to the obviously very considerable delay. He submits further that no exceptional circumstances have been disclosed. We agree. It is not, in our view, an exceptional circumstance that the applicant now believes that if his case had been conducted in a different way it would have been more successful.

Nor are we satisfied that there are such merits in the proposed grounds of appeal that it would probably succeed. Indeed we are satisfied that it would not, for the reasons we have already given namely the speculative and unproven nature of the matters upon which the applicant relies. Nor are we satisfied that the matters upon which the applicant relies could not with reasonable care and diligence have been discovered previously; as to which see Green v R (1938) 61 CLR 167: Gallagher v The Queen (1986) 160 CLR 392. We note also the warning given by Edmund Davies L.J. in Stafford v Luvaglio (No 1) (1968) 53 C.A.R. 1 at 3 where he says:-

> " Public mischief would ensue and legal process could become indefinitely prolonged, were it the case that evidence produced at any time will generally be admitted by the court when verdicts are being reviewed."

Even if the evidence which the applicant wishes to adduce could be considered in the category of fresh evidence (and we do not so find) it would not, in our view, meet the tests proposed by Gallagher v The Queen (1986) 160 CLR 392 that an appellate court will conclude that the unavailability of fresh evidence at the time of the trial involved a miscarriage of justice only if it considers that there is a significant possibility that the jury, acting reasonably, would have acquitted the accused of that charge if that evidence had been before it (per Gibbs C.J. at

p.399: Mason & Deane JJ at p.402). See also Mickelberg v The Queen (1989) 63 ALJR 481 at 498 (per Toohey and Gaudron JJ).

Assuming what is not presently apparent, that the evidence which the applicant wishes to adduce could be brought into admissible form, it would no doubt go towards a defence that the Crown had not proved beyond reasonable doubt that when he did the acts alleged he intended to kill or to cause grievous bodily harm or that he realised that it was probable that his acts would cause death or grievous bodily harm. Crabbe v The Queen (1985) 156 CLR 464. Yet the evidence given by the applicant at the first trial and read to the jury at the second trial, (when the accused did not give evidence), was to the effect that he had no recollection of the events. The question of intoxication was raised by the defence (see e.g. pp.373 and 375) and dealt with by the learned trial judge at pp.466-469. If we may say so with respect, His Honour correctly instructed the jury on that issue, and had the question of a drug induced automatism been raised the issues would be similar. There was before the jury sufficient evidence based on the actions demeanour and statements of the applicant to establish that the applicant was capable of forming and did form the intent to kill or cause grievous bodily harm, or was capable of knowing and knew that it was probable that his act would cause death or grievous bodily harm. In the light of that

evidence of intent or realisation and in the light of the direction on intoxication there is nothing to suggest that the jury would have come to a different verdict given similar direction on drug induced intoxication.

We are not satisfied that any miscarriage of justice occurred as the result of failure to call evidence of the nature now suggested by the applicant.

The application for leave to serve Notice of Appeal out of time is dismissed.