

CITATION *Brown v O'Neill* [2017] NTSC 84

PARTIES: BROWN, Lianna Kim Georgie

v

O'NEILL, Wayne

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING APPELLATE
JURISDICTION

FILE NO: LCA 6 of 2017 (21628128)

DELIVERED ON: 21 November 2017

DELIVERED AT: DARWIN

HEARING DATE: 9 October 2017

JUDGMENT OF: SOUTHWOOD J

APPEAL FROM: FONG LIM J

CATCHWORDS:

CRIMINAL LAW – APPEAL – EXTENSION OF TIME – Whether the Court should dispense with non-compliance of conditions precedent to right of appeal – grounds upon which Court may extend time to institute an appeal – remoteness from Court not a cause of delay – appellant had not done all that was reasonably necessary – application refused – appeal dismissed.

Local Court (Criminal Procedure) Act (NT) s 165, s 171, s 171(1), s 171(2)

Federal Commissioner of Taxation v Arnhem Air Engineering Pty Ltd (1987) 90 FLR 140; *Potter v Neave* [1994] SASR 19, followed.

REPRESENTATION:

Counsel:

Appellant:	P Bellach
Respondent:	R Murphy

Solicitors:

Appellant:	Piper's Barristers and Solicitors
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	Sou1706
Number of pages:	12

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Brown v O'Neill [2017] NTSC 84
No. LCA 6 of 2017 (21628128)

BETWEEN:

LIANNA KIM GEORGIE BROWN
Appellant

AND:

WAYNE O'NEILL
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 21 November 2017)

Introduction

- [1] On 22 March 2017 the appellant was convicted by the Katherine Local Court of one count of aggravated assault contrary to s 188(1) and (2) of the *Criminal Code* (NT). She was released on a six months good behaviour bond and ordered to pay a victim levy of \$150. The appellant wishes to appeal against her conviction on the ground that the finding of guilt was unsafe and unsatisfactory. However, her notice of appeal was filed two days late. The time for filing the Notice of Appeal expired on 19 April 2017. The appellant filed her Notice of Appeal on 21 April 2017.

[2] On 9 October 2017, I dismissed the appellant's applications under s 165 and s 171(2) of the *Local Court (Criminal Procedure) Act* (NT)¹ to dispense with compliance with the 28 day time limit for filing a notice of appeal. I did so on the basis that remoteness was not a cause of any delay and, in the circumstances of this case, it was not unreasonable to insist on exact compliance with the time limit. The appellant consciously abandoned her right to appeal within the time limit for filing the notice of appeal. That she later changed her mind out of time is to no avail.

[3] When I dismissed the appellant's applications I said I would publish written reasons later. Following are my reasons for refusing to dispense with compliance with the requirement under s 171(2) of the Act to file a notice of appeal within 28 days from the date of conviction.

Principles

[4] It is well established that the requirement to file a notice of appeal within 28 days is a condition precedent to the institution of an appeal from a conviction of a crime by the Local Court.² There are only two grounds upon which this Court may dispense with that time limit. First, where a Judge of this Court is of the opinion that it is reasonable to grant an extension of time by reason of remoteness of the place of conviction from this Court, the Judge may extend time for a period not exceeding three months.³ Although, under s 171(2) of the Act, counsel for the appellant raised remoteness as a

¹ Hereafter the Act.

² *Federal Commissioner of Taxation v Arnhem Air Engineering Pty Ltd* (1987) 90 FLR 140 at [142].

³ *Local Court (Criminal Procedure) Act* (NT) s 171 (2).

reason for extending time, there was no evidence before this court that the delay in lodging the appeal was in any way caused by the distance between Katherine and Darwin. In the circumstances, it was unreasonable to extend the time for filing the notice of appeal on this basis.

[5] Secondly, under s 165 of the Act, the Court may dispense with compliance with any condition precedent of the right of appeal if, in its opinion, the appellant has done “whatever is reasonably practicable to comply with the Act.”⁴ This section gave rise to the main issue in the applications which was, did the appellant do all that was reasonably practicable to comply with the time limit.

[6] In *Potter v Neave*⁵ Mayo J said:

“It is for the person whose proceedings are defective, and who desires the benefit of s 165, to show by evidence or by admitted facts, that him and his agent, that is the solicitor (if any) by whom he is represented, have done “whatever is reasonably practicable.” ... whether everything reasonably practicable has been essayed, must be tested by the circumstances of the intending appellant and his accessibility to means for completing and lodging the initial documents. ‘Practicable’ may possibly be paraphrased in the context of s165, as ‘capable of being done or accomplished with the available resources whatever they may be.’ I apprehend, it is unnecessary to show that compliance with the procedure laid down was quite impossible, but, be that so or not, it must at least be demonstrated as unreasonable to expect in the particular circumstances that exact compliance should be insisted upon.”

The evidence of the appellant

[7] In support of her applications the appellant relied on an affidavit she made on 21 April 2017. The appellant deposed that she tried to contact her

⁴ *Local Court (Criminal Procedure) Act* (NT) s 165.

⁵ [1994] SASR 19 at [21].

solicitor, Mr Hubber, by telephone at 2.17 pm on 23 March 2017 for the purpose of obtaining his advice about an appeal against her conviction but he did not answer. Mr Hubber returned her call seven minutes later but when the appellant answered there was no response.

- [8] On 4 April 2017, the appellant emailed Ms Opie at Katherine Legal Aid and asked about an appeal. Ms Opie advised her that Legal Aid could provide her with a referral letter to Mr Hubber seeking advice about an appeal, and informed her of the time limit for lodging an appeal. On the same day, Ms Grace Day-Hadley, an Administrative Assistant with Legal Aid in Katherine, emailed the referral letter to the appellant and advised her that the original would be posted to Mr Hubber. The referral entitled the appellant to a 20 minute advice session. On 5 April 2017, the appellant sent Mr Hubber a text message requesting that he contact her. He did not do so. At 10.14 am on 6 April 2017 the appellant called Mr Hubber again. He did not answer or return her call. At 11.56 am the same day, the appellant emailed Ms Day-Hadley requesting that she make an appointment for her with Mr Hubber. Ms Day-Hadley emailed Mr Hubber and advised him that the appellant wished to lodge an appeal and attached the referral letter. He then contacted Legal Aid. Ms Day-Hadley advised the appellant that Mr Hubber had contacted Legal Aid that day and said that he would call her. He did not call her and the appellant did not attempt to contact Mr Hubber or Legal Aid again from 6 to 20 April 2017.

[9] The appellant's reasons for not contacting either Mr Hubber or Legal Aid between 6 and 20 April 2017 were that on 10 April 2017 she was "put off work" and asked to provide her employer with a written explanation about why she should not be suspended or lose her job in light of her conviction for aggravated assault. She stated that this was a "time-consuming and stressful" exercise. From 13 to 16 April 2017 she was at Nathan River assisting her husband with data collection for his job and there was no mobile reception or internet connection in that area. On 15 April 2017 her step-father's father passed away. The appellant stated that she was close to him and assisted with his funeral. The appellant stated that on that day her 19 month old baby also became sick with an infection, and on 16 and 20 April 2017 she had to take her baby to the medical clinic.

[10] In summary, the effect of the appellant's affidavit was that between 23 March 2017 and 6 April 2017 she had tried on a number of occasions without success to contact her solicitor, first directly and then through Legal Aid. She then waited for him to contact her. She was overwhelmed by having to provide written submissions to her employer to maintain her job and had spent considerable time attending to this during the relevant period. She had then gone out of town with her husband to assist him with his work. This put her out of telephone reception and internet connection and prevented her from pursuing her appeal from 13 to 16 April 2017. When she returned her daughter was ill and her time was consumed by taking her to the clinic, caring for her, and making funeral arrangements between 15 and 19 April 2017.

[11] In the circumstances, it was submitted that the appellant had done all that was reasonably practicable to commence the appeal within time.

[12] However, under cross-examination on 9 October 2017, the appellant conceded that on 6 April 2017 Mr Hubber verbally advised Legal Aid that the appellant's case had no merit on appeal and this advice was passed on to her by Ms Day-Hadley. When this occurred, Legal Aid told her they were not going to fund the appeal and the appellant "gave up". That is, she consciously abandoned her appeal. However, the appellant changed her mind after she spoke to a friend who assisted her with her show cause letter to her employer. Unfortunately for her, by then, the time for filing an appeal had expired.

[13] During her cross-examination, there was the following exchange between the appellant and counsel for the respondent.⁶

Counsel: Now before you had that conversation with Andrew, did you contact Legal Aid and ask, "What is going on? How come this is taking so long?"

Appellant: I think just when somewhere in between like, I have booked an appointment and I thought, you know, making an appointment that was going to be you know something you know, put in cement that I could actually talk to.

Counsel: And when was that appointment?

Appellant: Can't remember the date.

⁶ The exchange records how the appellant spoke during her evidence.

Counsel: Can't remember the date. Did you keep the appointment?

Appellant: I was waiting for a phone call.

Counsel: You were waiting for a phone call, so you have made an appointment?

Appellant: Yeh.

Counsel: Okay and you were waiting for a telephone call?

Appellant: Because he said he was going to call.

His Honour: Who said he was going to call?

Appellant: Mr Hubber.

Counsel: You never spoke to Mr Hubber did you?

Appellant: Only Grace did ... through Legal Aid.

Counsel: This is Grace Day-Hadley who you have referred to in your affidavit?

Appellant: Yep.

Counsel: Did Legal Aid ever contact you and say, "Look, we are not taking your case on because it has no merit"?

Appellant: I don't know if it – I think Mr Hubber said something that there wasn't merit, but it was in regards to ... It wasn't going to be looking good or something.

Counsel: And this on your appeal?

Appellant: Yep.

Counsel: Okay and when did he tell you this?

Appellant: I think that was through, when Grace spoke to him. I never spoke with him after.

Counsel: And that is when Grace told you that Legal Aid wouldn't be doing your case for you?

Appellant: I don't think – I don't know if they said that. Yeah, I don't ...

Counsel: Well, is it the case that Legal Aid said they are not going to do the appeal for you and then after that, you were speaking to Andrew and that is how you ended up being in contact with Mr Bellach and said, "Well Legal Aid are not going to do it. I will do it out of my own pocket." Is that what happened?

Appellant: I think after what Grace said, when Hubber said it wasn't, you know, going to look or anything like that, I just that was a stage ... I think when I kind of have given up.

Judge: So is this your evidence, that you gave up after it was reported to you that Mr Hubber's view was that your appeal had no merit?

Appellant: I think it was at that stage. But ...

Counsel: And it was after that you decided to pay for your own legal defence and contact Mr Bellach wasn't it?

Appellant: Well I thought you know it wasn't very fairly supported on my behalf through the court anyway.

Counsel: [...] My question to you is, after you were told that your case did not have any merit or

Mr Hubber said your case did not have any merit, then you have decided, “Okay, I will have to pay for my own legal advice or my own legal representation”, and it was then that you contacted Mr Bellach. Is that right?

Appellant: No, I still was not adamant that my – it was not supported. So even if I – like when I heard from Grace that Hubber said that it was not going to be a good outcome or didn’t look good, I wasn’t – still unsure.

Counsel: Alright, well I am going to suggest that you said, and you tell me if I am right or not, okay? What I suggest to you is that when you were told of that, you have gone, “Well that is it. I give up.” Is that right?

Appellant: Yeah.

Counsel: Okay, and it was only after you spoke to Andrew and he started saying, “No. I have got a really good lawyer for you. I will give him a call,” that you thought, “Okay, may be it is good,” is that right?

Appellant: Sitting down and talking to him, I know like I have felt the whole time that I wasn’t fully supported on my behalf and that is why I wanted to appeal it. And considering everything I was going through, by then, like yeah, I wanted to give up because what is the point.

Counsel: And then you spoke to Andrew. He was the one that supported you and you thought, “Okay, I will fight this.” Is that right?

Appellant: Yeah, after considering everything I was going through, yes.

Counsel: And then having made that decision, that is when you contacted Mr Bellach, wasn’t it?

Appellant: Yep.

[14] During her cross-examination the appellant also conceded that she did not know whether she actually needed to go to Nathan River with her husband. She stated that she “wanted to be there to help him.”

[15] In my opinion, it would have been more practical if the appellant had stayed in Katherine to lodge her appeal. There was no need for her to assist her husband. There is no reason why she could not have stayed in Katherine if, indeed, that was what she wished to do. While counsel for the appellant submitted it should be inferred that between 15 and 19 April 2017 the appellant was looking after her sick child and making arrangements for her step-grandfather’s funeral, this did not preclude her from pursuing an appeal. On 20 April 2017 she was able to take her sick child to the clinic, care for her, and also make a phone call to Mr Bellach seeking his services. This could have been done on the days prior to the time period expiring. The appellant was capable of making a phone call to her solicitor, or Legal Aid, or another solicitor on any of those days while caring for her child. Further, during her oral evidence the appellant accepted that the only arrangements that she made for the funeral included speaking to her step-father about preparing the food for the funeral when he visited her residence on a few occasions, and making phone calls and speaking to his sisters and niece.

[16] The appellant was able to complete and provide written submissions to her employer showing cause as to why she should not lose her position within the 14 day timeframe she was given. She faced the same stresses and

hardships while completing those submissions and was able to complete them on time. Her ability to do this, while facing the same personal circumstances, is inconsistent with her assertion that it was not reasonably practicable for her to file the Notice of Appeal within 28 days. There was opportunity to file a Notice of Appeal before 19 April 2017 had the appellant done all that was reasonably practicable to institute the appeal.

[17] Further, the appellant's affidavit is deficient. She fails to state in her affidavit that on 6 April 2017 she was informed by Legal Aid that Mr Hubber had advised them that her appeal had no merits. Nor did the appellant state that she only changed her mind when her friend, who assisted her prepare the letter to her employer, urged her to do so and referred her to Mr Bellach.

[18] The evidence in the appellant's affidavit is of an entirely different kind. Her evidence in her affidavit of 21 April 2017 is that she continued to pursue her appeal the whole time, and she was waiting for her solicitor to reply to her calls. That she was unable to chase things up because she had other personal problems in her life. In light of her oral evidence, this version of events cannot be accepted.

Consideration

[19] In my opinion, in the circumstances, it was not unreasonable to hold the appellant to the time limit of 28 days.

[20] I find that prior to the time limit expiring the appellant elected not to pursue her appeal. On 4 April 2017 the appellant was made aware of the time limit for filing an appeal. She made efforts to institute an appeal on 4, 5 and 6 April 2017. She then made a deliberate and informed decision to abandon any appeal after she received the advice of Mr Hubber that her appeal had no merits. She did so despite the fact that she had some reservations as to whether her case had been adequately presented at trial. However on 20 April 2017, after speaking to her friend, she then changed her mind and attempted to get an appeal underway. She only did so on the urging of her friend, after the appeal period had expired. Had the appellant not “given up” on her appeal, there were reasonable steps she could have taken to pursue her appeal within time. She had ample time to either chase up Mr Hubber, ask Legal Aid to retain another lawyer for her, or retain a lawyer herself as she ultimately did.

[21] It is for these reasons that the application to dispense with the failure to comply with the requirements of s 171(2) of the Act was refused and the appeal was dismissed.
