PARTIES:	EDRICK, Kenny
	v
	NAYDA, Wayne
TITLE OF COURT:	SUPREME COURT (NT)
JURISDICTION:	ORIGINAL JURISDICTION, application for extension of time within which to institute appeal
FILE NO:	219 of 1994
DELIVERED:	22 DECEMBER 1994
HEARING DATE:	2 NOVEMBER 1994
JUDGMENT OF:	MARTIN CJ.

CATCHWORDS:

Criminal Law - Appeal - Appeal against sentence - Application for extension of time to institute an appeal - Grounds upon which court may extend time -

Justices Act, ss171 and 165 -

Federal Commissioner of Taxation v Arnhem Aircraft Engineering Pty Ltd (1987) 47 NTR 8, applied.
Potter v Neave [1944] SASR 19 at 21, applied.

REPRESENTATION:

Counsel:

Plaintiff: Mr Howse
Defendant: Mr Wilde QC

Solicitors:

Plaintiff: KRAALAS
Defendant: DPP

Judgment category classification: B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 219 of 1994

BETWEEN:

KENNY EDRICK
Plaintiff

AND:

WAYNE NAYDA
Defendant

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 22 December 1994)

This is an application for an extension of time within which to institute an appeal from a sentence of 12 months imprisonment imposed upon the plaintiff by the Court of Summary Jurisdiction sitting at Katherine on 27 July 1994.

The plaintiff is an aboriginal and was represented before the Court when he was convicted and sentenced by a solicitor employed by the Katherine Regional Aboriginal Legal Aid Service Inc. During the period of one month during which the appeal should have been instituted (*Justices Act* s171(2)), the plaintiff did nothing in regard to it, he did not seek

advice or give any instructions. But on 29 August, his solicitor formally sought advice from another solicitor, then employed at the office of the North Australian Aboriginal Legal Aid Service, with whom there had apparently been some informal discussion about the case. As the solicitor from KRALAS said in his letter: "I probably should have lodged an appeal as soon as I got it, just to preserve Kenny's position, but I'm simply not sure of whether or not an appeal would be worth tackling", and he acknowledge that the time limit for the institution of the appeal had then run out. It is not clear on the evidence before me as to when any advice was received from NAALAS, but on 5 September, the solicitor who had previously been dealing with the matter, Mr Dalrymple, placed the matter in the hands of Mr Howse, another solicitor employed by KRALAS. Two days later Mr Howse ordered a transcript of the proceedings of 27 July, he was advised on 21 September that the transcript was available and he picked it up from the Katherine Courthouse on the same day. The transcript was read and the position considered during the period up until 5 October, when Mr Howse spoke to Mr Dalrymple and it was decided that an appeal against sentence should be instituted. It is not clear whether specific instructions were sought from the plaintiff, but, recognising that the time for institution of the appeal fixed by the statute had by then expired, an originating motion seeking the extension of time was filed in the Supreme Court Registry at Darwin on 6 October. In an affidavit filed in the proceedings and sworn by him on 20

October, Mr Howse said:

> "No appeal was instituted in this matter within the time limit referred to as it was believed by the plaintiff's legal advisers that an appeal would not have merit. However, the matter has been given further consideration in consultation with solicitors at North Australian Aboriginal Legal Aid Service and it has been subsequently decided that an appeal pursuant to section 171 Justices Act would have merit."

There are only two grounds upon which this Court may extend the time for the institution of an appeal such as this. Where a Judge of this Court is of the opinion that, by reason of the remoteness from the seat of the Court of Appeal of the place at which the conviction, order, determination, or adjudication was effected or made, an extension of the time within which notice of appeal from the conviction, order, determination, or adjudication may be given is reasonable, he may extend that time for such period, not exceeding 3 months, as he thinks fit (s171(2)). Whatever may have been the utility of this provision in times past and in relation to sittings of the Court of Summary Jurisdiction in remote areas of the Territory, I doubt that it can be of any application in 1994 in relation to the sittings of that Court at Katherine. In this case, there is no evidence that the delay in instituting the appeal was in any way caused by the distance between Katherine and Darwin.

The Court may also dispense with compliance with any condition precedent to a right of appeal under the *Justices*

Act if, in its opinion, the appellant has done whatever is reasonably practicable to comply with the *Act* (s165). There is no evidence that either the appellant or those representing him did anything to comply with the *Act* within the time limit. What must be done if the Court is to give consideration to an application pursuant to s165, is something which is reasonably practicable to comply with the *Act*, and in a matter like this, what must be sought to be complied with this is the requirement that an appeal be instituted within one month from the date of the determination of the Court of Summary Jurisdiction.

The requirements of s171(1) and (2) as to the institution of an appeal within the time limit is a condition precedent to the institution of the appeal; see Asche J. *Federal Commissioner of Taxation v Arnhem Aircraft Engineering Pty Ltd* (1987) 47 NTR 8 at p10 and see the cases there referred to. As to s165, in *Potter v Neave* [1944] SASR 19, Mayo J. had this to say at p21:

> 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 he, and his agent, that is the solicitor (if any) by whom he is represented, have done "whatever is reasonably practicable." If grounds, on which an affirmative opinion to that effect can properly be based, are not shown, the proceedings remain inchoate, they do not reach the stage of being an instituted appeal. 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 s. 165, 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 on (*Ex parte Jenkins* ((1871) 10 SCR (NSW) 138 at pp141, 142; 18 Aust Digest 950); *Strawbridge v. Mason* ((1939) 58 NZLR 877, Myen CJ., at p888)). Before an appeal is launched, that course must be decided on, and often further consideration of the questions involved will be first required. Thereafter a surety or sureties must be found and the necessary documents prepared, completed, served and lodged. These activities may take some time, and in unusual circumstances peculiar difficulties may be present. But these difficulties can be described and explained as grounds why it has not been reasonably practicable to give notice and enter into a recognizance within the prescribed month. They are not to be assumed unless disclosed."

It is for these reasons that the application was dismissed.