A determination to help the profession "generally"

On 21 February 2003 in the Supreme Court of the NT, Justice Dean Mildren delivered his judgment in the matter of *Stephen Michael Barr v The Queen,* involving an application for leave to appeal against conviction. Although His Honour was not required to give reasons for refusing the application, he nevertheless did so *"for the assistance of the applicant and of the profession generally".* After an approach by Deputy Director of Public Prosecutions Jack Karczewski QC, *Balance* agreed to publish His Honour's *Reasons for Judgment* to bring his remarks to the attention of the profession. They are published in full here.

[1] This is an application for leave to appeal against a finding of guilt given by a jury on 26 November 2002 at a trial presided over by Bailey J in Alice Springs. The application, which was filed on 7 January 2003, is supported by the affidavit of RussellGoldflam, a solicitor employed by the Northern~~ Territory Legal Aid Commission, affirmed on 6 January 2003 and also filed in the Registry on 7 January.

[2] Section 417(1) of the Criminal Code requires an application for leave to appeal against a finding of guilt to be filed within 28 days of such finding. In this case, the finding of guilt was made on 26 November 2002. Consequently, the present application should have been filed by no later than 24 December 2002 and is out of time. The applicant has submitted that the time does not begin to run until a conviction is recorded. Formerly s 417(1) provided that applications for leave to appeal were required to be filed within 28 days of conviction. Section 417(1) was amended by Act 17/96 to change "conviction" to read "finding of guilt". This was no doubt because a conviction does not automatically flow from a finding of guilt as it once did; the Sentencing Act, s 7, envisages a number of sentencing orders which may be made with or without the recording of a conviction. The contention of the applicant must be rejected.

[3] Section 417(2) of the Criminal Code permits the Court to extend the time within which an application for leave to appeal may be brought. The power to extend is not limited to applications brought before time expires: the Court may extend the time "at any time".. An application to extend time is required to be brought in accordance with r 86.11 which requires an application to be made in accordance with Form 86L, accompanied by an affidavit stating the reasons for the delay. No application for an extension of time has been made so far. In any event, an application for an extension will be refused if leave is required and would not be granted.

[4] The affidavit in support of the application for leave is deficient because it does not comply with r 86.10(2) which requires the affidavit to state the nature of the appeal, the questions involved and the reasons why leave should be given. Mr Goldflam does not state in his affidavit what the proposed grounds of appeal would be. The applicant only instructed him that he wanted to appeal on 23 December, the day before time expired under s 4 17(1). The following day Mr Goldflam attempted to instruct the applicant's trial counsel but was unsuccessful. He unsuccessfully attempted to do so again on "31 January 2002" (sic). I expect 31 December 2002 is meant. There is no other information in the affidavit. Even if I were minded to treat Mr Goldflam's affidavit as an application for an extension of time and excuse non-compliance with r 86.11(1), it would not avail the applicant as no grounds are shown and no information is given in support of the reasons why leave should be given. In order to obtain leave, the applicant must show that he at least has an arguable case: see *Rostron v The Queen* (1991) 1 NTLR 191 at 196.

[5] Following the filing of an affidavit by Mr Karczewski on behalf of the respondent pursuant to r 86.13, the matter was referred to me for consideration pursuant to r 86.14E. As there was no affidavit of service of Mr Karczewski's affidavit, I caused my Associate to enquire of the applicant's solicitors whether or not they had received Mr Karczewski's affidavit.
This led to a further affidavit being filed on behalf of the applicant by a Mr John Kelly, another solicitor employed by the Northern Territory Legal Aid Commission.
Mr Karczewski has indicated that he objects to my considering that affidavit because the time for the filing of an affidavit in reply under r 86.13(3) had already lapsed.

[6] The material contained in Mr Kelly's affidavit is not sufficient for me to determine whether or not the applicant has an arguable case. The matters therein agitated are dealt with too briefly for me to form any view one way or the other. I note there is no suggestion that counsel's opinion has been obtained, or even that he has been briefed. On the contrary, Mr Kelly refers to the fact that a copy of the summing up of the learned trial judge has not yet been obtained, although it has been ordered and that it is the intention of the applicant to brief counsel to settle the notice of appeal after it arrives. I am therefore not inclined to exercise the powers which I have vide rr 82.02, 2.01(1) and (2) to dispense with non-compliance.

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[7] The course which the applicant has so far adopted is justified by Mr Kelly on the basis of the decision of Martin CJ in *Spencer v The Queen* [2001] NTCCA 7 (unreported). In that case the applicant for leave filed his application within time, but with a supporting affidavit which was deficient in not providing any reasons as to why leave should be given. The supporting affidavit indicated that particulars of the ground relied upon and further grounds would be provided once counsel's opinion was obtained. Subsequently, that applicant filed a second application for leave properly supported by an affidavit in accordance with the Rules, as well as an application for an extension of time. His Honour in that case was prepared to extend the time for the filing of the second affidavit and indicated that the second application for leave was unnecessary. There are significant differences between that case and this in that the original application in this case is out of time, no application is made to extend time and there is still no affidavit upon which the application could succeed.

[8] I draw the applicant's attention to the observations of this Court in *Fittock v The Queen* (2001) 11 NTLR 52 at para [2] to [9].
Non-compliance with the Rules will not be excused unless there are proper grounds.
I think the best course is, (1) to refuse an extension of time to file the affidavit of Mr Kelly and, (2) to refuse the application for leave. If and when the applicant is in a position to properly mount his application, he can begin again with further applications for leave and with an application for an extension of time. As there are no grounds before me, the applicant is not able to proceed via r 86.14B(2) and must start again. The respondent submitted that I should strike out the application. I am unable to see any power for me to do this in the Criminal Code or the Rules and no authority was cited in favour of that proposition.
However, in the circumstances of this case, the effect of refusing leave is the same as if the application had been struck out as incompetent.

[9] Although not required to give reasons (see r 86.14(4)), I have decided to provide reasons in this case for the assistance of the applicant and of the profession generally. I offer the following guidance to practitioners who find themselves in the situation where a convicted person wishes to appeal but there is insufficient time to obtain counsel's advice, or to prepare the necessary application for leave and supporting affidavit.
The Court has power to extend time vide s 4 17(2) of the Criminal Code and this power can be exercised by a single Judge at any time vide s 417(2) and s 429(1) of the Criminal Code.
(Order 86 is designed to ensure that in the first instance, such applications are dealt with by a single Judge, but preserve the right to apply to the Court constituted by three Judges in the event of refusal.)
As I have said before, such applications require an explanation for the delay, as well as establishing an arguable case.
Leave is most unlikely to be refused where there is an arguable case, particularly where the applicant has sought legal assistance before the expiration of the relevant time limits.
Rather than lodging applications like the present which serve no purpose, it would be wise for notice to be given to the Director of Public Prosecutions of the situation by letter as soon as possible.
If and when an application is able to be properly mounted, it can be filed, accompanied by an application for leave to extend time.

Appellant:	NT Legal Aid Commission
Respondent:	Director of Public Prosecutions
Judge:	Mildren J

Oh to be Attorney-General

The *Alternative Law Journal* is inviting contributors to indulge in some creative and forward thinking by taking up the challenge of the theme for its August edition – *If I were Attorney-General.*

The August edition of the bi-montly journal will be co-produced by committees in the NT and ACT.

The contributions can be between 1000 and 4000 words. They wil be refereed by one independent reviewer as well as the editor.

Articles should be sent to the NT Committee no later than 31 July C/O Samantha Willcox on email: samantha.willcox@ntlac.nt.gov.au or via fax: 89993099

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