JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 31/04

COR: **THE HON. MR. JUSTICE P. HARRISON, J.A.**
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MRS. JUSTICE McCALLA J.A. (AG.)

R. v. BRADLEY GRIFFITHS

Frank Phipps Q.C. & Robert Fletcher for Applicant

David Fraser, Snr., Ag. Deputy Director of Public Prosecutions and Mrs. Shelly-Ann Beckford-Louden Ag. Crown Counsel for Crown

10th, 11th, 15th, March & May 20, 2005

HARRISON, J.A:

This is an application for extension of time within which to appeal pursuant to Rule 3.3(2) of the Court of Appeal Rules, 2002. On 15th March 2005 we heard the arguments of counsel and refused the application, we being of the view that no good reason was shown for the delay. However, because of the nature of the medical evidence, we granted leave to appeal against sentence, granted the extension of time to appeal against sentence and ordered that notice of appeal should be filed within seven (7) days thereof. These are our reasons in writing.

The applicant was convicted in the Trelawny Circuit Court on 24th June 2003 for the offence of buggery and sentenced to six (6) years imprisonment.

The evidence in support of the conviction is that the complainant E.S. a female, was sitting on a chair on the beach of Silver Sands in the parish of Trelawny at 5.45 a.m. on 11th April 2003 when the applicant emerged from the sea where he had been swimming, naked, and with his penis erect. He patted and greeted her. She got up, screamed and attempted to run. He held her and she hit him with her camera on his temple. She bit the finger of his hand which was over her mouth. She struggled and he pulled off her shorts and swim suit bottom and forced her face down onto the sand. He inserted his penis into her vagina, according to the complainant "...just a bit." He slipped it out and then "slid it" into her anus and had anal intercourse. During the act he said:

> "This is what you wanted isn't it, ... like it?"

The complainant was screaming. A prosecution witness, a security guard came up, saw the applicant totally nude lying on the back of the complainant with "his lower body in motion, a circular motion thrusting up and down...". He said:

> "Bradley, what are you doing"?

The applicant got off the complainant, and said to the guard:

> "Take care of this for me. I don't want to hear anything,"

and walked away towards the villa where he was staying. The complainant was hysterical. The witness escorted her to her villa where the complainant spoke to

her husband. The police and other security officers were called. They went to the applicant's villa and held him. He said:

> "I have not done anything wrong; I thought it was my girlfriend, me and my God will talk."

At the Falmouth Hospital the complainant was examined by Dr. Terrence Morris, who found that her anus was swollen and purple and the muscles thereof lax. Anal swabs and a blood sample were taken. The doctor also took swabs from the applicant's penis and blood samples of the applicant's blood and pubic hair. The forensic evidence disclosed matching DNA characteristics, between anal samples taken from the complainant and the samples taken from the applicant. In an unsworn statement, at the trial, the applicant stated, that it was the complainant who beckoned to him and said "Come let's have some fun." She consented to his putting his penis in her vagina and his fingers in her anus. They had vaginal sex. The guard called his name and he got up and went to his villa. No force or violence was used by him. The defence, therefore, was that the complainant consented to sexual intercourse, per vaginam.

The jury retired for thirteen (13) minutes and returned a unanimous verdict of guilty.

The report given to the Court of the antecedents of the applicant was compiled from information provided by his parents and from persons in Jamaica who knew him. He was born in the United States of America to Jamaican parents. He was a laboratory assistant trained by his father, an immunologist/microbiologist and Director of the Medical Diagnostic Laboratory in

Mobile, Alabama, USA. The applicant had no previous convictions and was described as "... responsible, respectful and protective of others in need ... trusting of others, which has contributed to his financial loss."

Mr. Headley Cunningham, learned Queen's Counsel who at the trial appeared for the applicant, in his address to the Court in mitigation, referred to the applicant's impeccable character, the general comments contained in the said report and pleaded for leniency and mercy. No character evidence nor any other evidence was called on behalf of the applicant prior to sentence.

Mr. Phipps, who did not appear at the trial, in his application for extension of time within which to appeal, submitted that during and after the trial the applicant was under the influence of "mind altering drugs ordered by a court," which condition was not made known to the court for a determination as to his fitness to follow the proceedings. The applicant's counsel did not consult with him after conviction "to advise and receive instructions for appeal." While still on medication and in custody the applicant was unable to seek and obtain legal assistance. The application for extension of time was filed on 6th February 2004 and therefore the delay is not inordinate. There is merit in the appeal. Time should therefore be granted.

Mr. Fraser for the Crown submitted that no good or substantial reasons for the delay were given by the applicant. His condition was diagnosed and treated by medical personnel. The Court merely directed the applicant to continue his medication as a condition of his bail. Affidavit evidence of Dr.

Goulbourne and records from University Hospital reveal that the applicant responded favourably to medication and treatment. No basis existed for the trial court to be advised that the applicant, being on medication, was unable to participate in his trial. Learned Queen's Counsel at the trial interacted easily with the applicant and received his instructions. The presumption of normality existed. The applicant's mother, his agent, was in continuing contact with his counsel, and she was advised by learned Queen's Counsel although no duty existed for him to do so and she told the applicant, of his right to appeal. The applicant chose not to do so. There is no merit in the appeal. The application ought to be refused.

The right and the time within which to appeal from a conviction and sentence in the Circuit Court is statutorily conferred by Section 16 of the Judicature (Appellate Jurisdiction) Act ("the Act") which, inter alia, reads:

> "16. (1) – Where a person convicted desires to appeal under this Part to the Court or to obtain the leave of the Court to appeal, he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by rules of court within fourteen days of the date of conviction."

The governing Rule in the Court of Appeal Rules reads:

> "3.3 (2) An application for extension of time within which to appeal must be in Form B2..."

The Court, in its discretion may extend the time within which Notice of Appeal or Notice of Application for leave to appeal may be filed (Section 16 (3) of the Act (See also ***R. v. Rhooms*** (1966) 10 W.I.R1.).

However, the cases demonstrate that the person applying for such extension must (a) give a good reason for the delay (***Paul Nigel Hawkins*** [1997] 1 Cr. App. R. 234) and (b) show that there is merit to the appeal. In ***R. v. Moore*** (1972) 12 JLR 809, although there was an arguable point in the appeal, the Court of Appeal refused the application for extension of time due to the fact that the applicant himself was at fault by absconding and thereby was unable to comply with the rule within the prescribed time.

In the instant case, in support of his application for extension of time, the applicant Bradley Griffiths, in his affidavit dated 9th February 2004, referring to the period immediately after he was convicted on 24th June 2003 inter alia said:

> "(3) That when I was carried to St. Catherine District Prison it took me almost one month to be able to function. I had been wrongly diagnosed as psychotic for vehemently protesting my innocence before the preliminary hearings and placed on Risperdal, Taroctil and other drugs. This was done despite my parents' protestations that there was nothing wrong with me. I went through the trial with only brief periods where I understood what was going on.
>
> (4) That when I went to prison I was taken off the drugs and it took me some time to return to normal and when I asked my parents about appealing they told me that the lawyer had said no because my sentence might be increased among other reasons but that they were still seriously looking into it.
>
> (5) That around August 2003 I was discussing the possibility of appealing with a senior warder at the prison and when I told him what I had heard that the lawyer had said he advised me to get in touch with my parents and

> inform them that they should seek other advice on the appeal.
>
> (6) That I did speak to my mother on one of her visits and she told me that they had actively begun looking at appealing and that I should leave things to them."

The appellant's father Bertie Griffiths in his affidavit dated 5th February 2004 said that on 4th July 2003 he spoke to Mr. Headley Cunningham, Q.C. the applicant's attorney at the trial, and the latter told him that he would not recommend an appeal, it would take up to three years and the applicant's "chances of success were slim."

The applicant's mother Barbara Griffiths, in her affidavit dated 5th February 2004, inter alia, stated:

> "(4) That immediately after the conviction at the end of June 2003 I asked about appealing and was told by our Attorney that he would not advise it and if we appealed he would not do it.
>
> (5) I informed my husband Bertie Griffiths what the Attorney had said and together on July 4, 2003 we spoke with him. I left with the clear impression that an appeal was futile and any effort to do so would place my son at risk of an increased sentence and a waste of resources."

She further stated that she told the applicant "what the attorney had said"; and

> "... in August my son informed me that Prison Officers had told him that the advice given by the Attorney was not sound."

Learned Queen's Counsel, Mr. Cunningham, in his affidavit dated 2nd March 2005, did not admit that the applicant was "wrongly diagnosed as

psychotic, and denied that during the trial, the applicant only had brief periods when he "understood what was going on." In paragraph 5, he said:

> "5. That contrary to what Bradley Griffiths has stated he appeared at all times to be clear of mind, lucid in thought and acutely aware of what was happening at all stages of the trial. He was able to give me full instructions prior to and all throughout the trial proceedings, including but not limited to his account of what had happened at the time of the incident, which jurors should be challenged, and after considering my advice, that he would make an unsworn statement."

He denied that he had advised Barbara Griffiths against appealing and stated that he "advised her that they were free to appeal, but that they would have to get another attorney as I would not have anything further to do with the matter." Counsel also exhibited pages from his Jamaican Passport which showed that he left Jamaica and was in Antigua on 3rd July 2003 until 15th July, 2003, as proof that he did not speak to the applicant's parents on 4th July 2003, as alleged.

Mr. Fraser, for the Crown, referred this Court to the Rules of the St. Catherine Adult Correctional Centre dated 11th January 2000 which he submitted are required to be "read to all prisoners within twenty-four (24) hours of admission," and which contains the right to appeal. The principle omnia praesumuntur rite esse acta applies.

We agree with the submission of Mr. Fraser and we are satisfied that the applicant knew of his right to appeal within the prescribed time to appeal and

specifically, that his agent Barbara Griffiths, his mother, was told of this right by his attorney-at-law.

No satisfactory reason has been advanced by the applicant to explain his delay in not filing his application to appeal within the prescribed time, in accordance with Section 16 of the Act.

Additionally, on our examination of the record of the evidence and the directions of the learned trial judge to the jury, we are of the view that the learned trial judge identified the main issues and gave to the jury the proper directions in law. The jury was correct to reject the statement of the applicant. We saw no merit in the appeal. For those reasons we refused the application for extension of time within which to file the application for leave to appeal against the conviction.

However, from the documentary material in support of the application we noted the circumstances under which the applicant was sentenced.

Exhibited by the applicant, before this Court was a letter dated 16th June 2003 from Dr. Terrence Morris, Medical Officer at the Falmouth Hospital, Trelawny, stating that on 11th April 2003 (the date of the offence) at 3.45 p.m. he examined the applicant who was brought to the Hospital, in handcuffs by the police. Dr. Morris said:

> "There was difficulty obtaining a history from the patient as he was disoriented (oriented to person and place but not to time). He confessed to having forceful unprotected, anal intercourse with the woman but said that he thought she was his girlfriend. He reported 'cleaning himself off with soap and water' afterwards

> and also reported using ganja and alcohol earlier that week."

Dr. Morris gave him "antitetanus prophylaxis" and transferred him to the Psychiatric Department of the Cornwall Regional Hospital "for further evaluation and management."

Dr. Kevin Goulbourne , a Consultant Psychiatrist attached to the Cornwall Regional Hospital, in his affidavit dated 3rd March 2005, stated that the applicant was a patient at the Hospital between 11th April 2003 and 28th April 2003. Dr. Goulbourne, at paragraph 5 said:

> "5. That his main presenting features to me were as follows:
>
> (a) he was talkative with pressure of speech i.e. his speech was rapid and he spoke a lot;
>
> (b) he had flight of ideas i.e. there was rapid, continuous verbalizations and a constant shift from one idea to another though the ideas tended to be connected;
>
> (c) he had grandiose ideas as he asserted that i) his Dad was famous and they owned all the hotels and chain stores in Jamaica, and ii) he Bradley is a doctor with a PhD. in Microbiology, Psychiatry and Finance; and
>
> (d) he had paranoid delusions saying that people wanted to harm him for money."

The applicant gave a history of "marijuana (ganja) and alcohol use" and his urine tested positive for ganja. Dr. Goulbourne, consequently made a diagnosis that the applicant:

> "... was suffering from a psychotic disorder caused or complicated by substance abuse."

and treated the applicant with haloperidol and chlorpromazine (taroctyl) to treat the psychosis and benztropine to counteract the "side effects of the anti-psychotic medication." Dr. Goulbourne said further:

> "12. That a few days later I subsequently spoke to Bradley's mother Barbara Griffiths and his father Bertie Griffiths. I asked them about the claims that Bradley had made. It was confirmed that the claims he made about himself and his family outlined in paragraph 5 c of this affidavit were untrue.
>
> 13. That his parents gave a history that suggested that Mr. Bradley Griffiths may have previously had hypomaniac symptoms. This history concerned his increase in goal directed behaviour relating to his discontinuing college and pursuing business.
>
> 14. That after observing him for a few days and after having spoken to his parents I made a differential diagnosis of bipolar disorder in manic phase." (Emphasis added)

He was also of the view that the applicant may have had previous hypomanic symptoms, judging from a later history given by relatives. Dr Goulbourne said that the applicant "over the time" showed improvement, in that "... the mood disturbance subsided and he showed normal range of mood. Psychotic symptoms also subsided and by the time of his discharge on the 28th day of April 2003, he was not displaying any grandiose or paranoid ideas/delusions". He recommended that the applicant continue outpatient treatment "to monitor his psychiatric condition and review treatment."

The medical records of the University Hospital of the West Indies reveal that the applicant attended a clinic of that institution as an outpatient on 29th April 2003, having been referred from the University of the West Indies to Cornwall Regional Hospital accompanied by both his mother and his girlfriend.

The applicant was found to have grandiose delusions and persecutory delusions and spoke with a "mildly pressured speech." The earlier diagnosis was confirmed, namely, that he was suffering from a bipolar disorder, in the manic phase. He confessed to the use of ganja and alcohol and was subject to financial stressors. His medication was continued. The applicant was again assessed on 13th May 2003, and his speech was found to be less pressured and his delusions less fixed. He was described as "improved". On 27th May 2003, the applicant was again assessed. He was found to be talkative, but with "no flight of ideas," his delusions were minimal. He was described by the doctor as improved, his medication of depakote and risperdal was continued and he was directed to return to the clinic at the Hospital one month thereafter.

The appellant was tried and convicted on 24th June 2003.

The mental condition and the clinical history of the applicant, although known was not relied on by the applicant in advancing his defence at the trial.

Significantly, the said medical records from the University of the West Indies, in relation to the applicant revealed that on 8th April 2003, three days before the alleged offence, the applicant's parents spoke to him at Silver Sands by telephone from the United States of America and were alarmed when the

applicant stated that "he was the richest man in the world and had a lot of money." As a consequence, his mother asked one of her brothers in Jamaica to take the applicant to the University of the West Indies "for evaluation." This was presumably not done.

At the time of his sentencing no reference was made of the applicant's mental condition, nor of his psychiatric history.

The sentencing process requires that the ultimate aims of retribution, deterrence, reformation and the protection of society, or any of such goals, are identified, in respect of the particular offender under consideration, and achieved. A sentencing court must be given all the material relevant to an offender to be sentenced, in order that that court may be properly able to determine the appropriate sentence in respect of that particular offence.

In ***Paul Nigel Hawkins*** (supra) application for extension of time and leave to appeal against conviction were refused but leave to appeal against sentence was granted because incorrect information had been given to the trial judge which was relied on in imposing the sentence.

We are of the view that the medical evidence and records disclosed to this Court are of such that had they been made available by learned counsel at the trial, they would have assisted the learned trial judge in her imposition of the appropriate sentence.

In all the circumstances and in the interest of justice, we granted leave to appeal against the sentence only.