The Independent State of Papua New Guinea v. James Robert Colbert

Supreme Court
Kapi Dep. C.J.; Bredmeyer and Amet J.J.
5 August 1988

Constitutional law—inherent powers of the Supreme Court—review of judicial acts of the National Court—civil jurisdiction—failure of lawyer to lodge appeal within time—Supreme Court Act (Ch. No. 37) s. 17—Constitution, s. 155(2)(b).
Administrative law—judicial review—application to review judicial acts of National Court in the civil jurisdiction—failure by lawyer to lodge appeal within time—nature of application—principles applicable—Constitution, s. 155(2)(b).

The respondent was employed by the applicant, the State, as a teacher at the Port Moresby Technical College at Idubada. He resided on the college campus in an institutional house provided by his employer, the State. On the evening of 10 June 1983, there was a disturbance in a neighbour's house; the respondent went to investigate, and was struck on the head by a stone thrown by an intruder and consequently suffered serious personal injury. The respondent then successfully sued the State for negligence at common law in that it failed in its duty as an employer to protect its employee, the respondent, from necessary risk of injury by third persons by failing to adopt adequate security measures which were readily available. Due to incompetence and negligence on the part of the State's lawyer, its right to appeal was lost when the appeal period ran out.

On an application by the applicant, the State, to seek leave of court to invoke the Supreme Court's inherent powers to review the decision of the National Court in its civil jurisdiction under section 155(2)(b) of the Constitution.

HELD:

(1) By virtue of section 155(2)(b) of the Constitution, the Supreme Court has inherent power to review all judicial acts of the National Court but that the power should only be exercised in circumstances where:
   (a) not to do so will result in substantial injustice to the applicant;
   (b) there are cogent and convincing reasons and exceptional circumstances where some substantial injustice is manifest or the case is of special gravity; and
   (c) there are clear legal grounds which merit a review of the decision.
   Avia Aihi v. *The State* [1981] P.N.G.L.R. 81 and *Danny Sunu and Others* v. *The State* [1984] P.N.G.L.R. 303 adopted and followed.

(2) The reasons for the failure to lodge a notice of appeal within time and the merits of the case sought to be argued are relevant matters to be taken into account in deciding whether there are cogent and convincing reasons. *Avia*

Aihi v. *The State* [1981] P.N.G.L.R. 81 and *Danny Sunu and Others* v. *The State* [1984] P.N.G.L.R. 303 followed.

(3) The onus is on the applicant to satisfy the Court that the grounds for the exercise of its discretionary powers under section 155(2)(b) of the Constitution exists.

(4) (Amet J. dissenting) Unless there are exceptional circumstances beyond a lawyer's control, negligence or incompetence on the part of a lawyer in not protecting and ensuring the right of appeal of a client in a civil case does not amount to cogent and convincing reason or an exceptional circumstance and therefore is not a valid ground for exercising the power of judicial review under section 115(2)(b) of the Constitution. In the circumstances of the case where the failure to lodge a notice of appeal within time and a six months' delay in bringing the application were attributable to negligence on the part of the lawyer for the applicant State, the onus has not been discharged and judicial review should be refused.

(5) Per Kapi Dep. C.J. "The fact that someone has lost a right of appeal under the Supreme Court Act is no guarantee that an application made under section 115(2)(b) of the Constitution will be successful. The nature of the application must be carefully assessed. The grounds for an application under section 115(2)(b) are very restricted".

Cases referred to in judgment:

Avia Aihi v. *The State* [1981] P.N.G.L.R. 81
Avia Aihi v. *The State (No. 2)* [1982] P.N.G.L.R. 44
Danny Sunu and Others v. *The State* [1984] P.N.G.L.R. 305
Green and Co. Pty. Ltd. v. *Green* [1976] P.N.G.L.R. 73
Houghton v. *Hackney Borough Council* 3 (1967–68) Knights Industrial & Commercial Reports [1967–68] 615
In re Placer Holdings Pty. Ltd [1982] P.N.G.L.R. 326
Nadan v. *The King* [1926] A.C. 482
R. v. *Bertrand* (1867) 4 Moo. N.S. 460; 16 E.R. 391
Secretary of Law v. *Tisunkac Nawak Domstock* [1974] P.N.G.L.R. 246

Legislation referred to in judgment:

Claims By and Against State Act, chapter 297
Constitution of Papua New Guinea, chapter 1, sections 155(2) and 155(2)(b), schedule 2.1
District Courts Act, section 231
National Court Rules, order 2, rule 12: 016 and rule 4
Supreme Court Act, section 17

Other source referred to in judgment:

Practice Note, (1932) 48 T.L.R. 300 (P.C.)

Application for review:

Due to incompetence and negligence by its lawyer, the applicant lost its right to appeal when the appeal period expired. The applicant then sought to seek leave of court to invoke the Supreme Court's inherent powers to review decision of the National Court under section 155(2)(b) of the Constitution.

Counsel:
L. Kari for the applicant
T.J. Glenn for the respondent

KAPI Dep. C.J.:

Judgment:

James Robert Colbert was a teacher employed at the Port Moresby Teachers College. He was accommodated on the premises of the college. On the evening of 10 June 1983 there was a disturbance in the neighbour's residence. Mr. Colbert went to investigate.

As he was moving across to investigate, he was struck by a stone on the head. Apparently criminals, who were trying to break into the residence, threw the stone. He sustained injuries as a result.

The State was sued for damages in common law on the ground that the State had failed to provide adequate security measures to ensure safety and had failed to provide safe premises or both. A judgment was given for Mr. Colbert and a sum of K488,711 awarded in damages. The judgment was given on 28 October 1987.

The time allowed for appeal to the Supreme Court under the Supreme Court Act (Ch. No. 37) expired on 7 December 1987. The State attempted to file a notice of appeal on 8 December 1987 and this was rejected by the Registrar as being out of time.

The State took no further substantive action in the matter until 29 December 1987 when an application to extend time in which to appeal was filed in accordance with the Supreme Court Act. This application was totally misconceived and this was brought to the State lawyer's attention by lawyers for Mr. Colbert in a letter dated 3 March 1988. The lawyers pointed out that the application was misconceived and would not succeed. They were also advised that the appropriate action that should be taken was under section 155(2)(b) of the Constitution. The State lawyers took no notice and proceeded with the application to extend time.

That application came before the Supreme Court on 21 March 1988. Of course, the Supreme Court dismissed the application as the Supreme Court has no discretion to extend time for applications which are made outside the forty-day time-limit.

On 21 April 1988 the State filed an application under section 155(2)(b) of the Constitution. It is this application which is now for consideration by this Court. One would have thought that by this time they would have got the law right! The application seeks leave to file a notice of appeal out of time. That, in substance, is different from a judicial review under section 155(2)(b) of the Constitution. Again this matter was correctly pointed out by the lawyers for Mr. Colbert in a letter dated 29 April 1988. And again the State lawyers took no action and have made no attempt to amend the present application. Strictly speaking, I could dismiss this application on this basis alone. However, that would be a very narrow basis upon which to determine this application.

The basis of a section 155(2)(b) application is to be found in the pioneering cases of *Avia Aihi* v. *The State* [1981] P.N.G.L.R. 81 and *Avia Aihi* v. *The State (No. 2)* [1982] P.N.G.L.R. 44. The true nature of this application is to be found in the judgment of Kearney Dep. C.J. in the first case. In *Avia Aihi* v. *The State* [1981] P.N.G.L.R. 81 at 92 he said:

I consider that it is a truly discretionary jurisdiction, of much the same type as that of the Privy Council in exercising what the common law recognises as its inherent prerogative to grant special leave to appeal, though an applicant has no right by statute to appeal.

At 93 he said:

Some guide perhaps may be obtained from a consideration of the grounds upon which the Privy Council grants special leave to appeal in criminal cases pursuant to the inherent prerogative power . . .

In *Attorney-General (N.S.W.)* v. *Bertrand* (1867) 4 Moo. N.S. 460 at 474–475; 16 E.R. 391 at 397, in considering the prerogative power, the Privy Council said:

but the exercise of this prerogative is to be regulated by a consideration of circumstances and consequences; and interference by Her Majesty in Council in criminal cases is likely in so many instances to lead to mischief and inconvenience, that in them the Crown will be very slow to entertain an appeal by its Officers on behalf of itself or by individuals. The instances of such appeals being entertained are therefore very rare. . . . [T]he result is, that any application to be allowed to appeal in a criminal case comes to this Committee labouring under a great preliminary difficulty—a difficulty not always overcome by the mere suggestion of hardship in the circumstances of the case; yet the difficulty is not invincible. It is not necessary, and perhaps it would not be wise, to attempt to point out all the grounds which may be available for the purpose; but it may safely be said, that when the suggestions, if true, raise questions of great and general importance, and are likely to occur often, and also where, if true, they show the due and orderly administration of the law interrupted, or diverted into a new course, which might create a precedent for the future; and also where there is no other means of preventing these consequences, then it will be proper for this Committee to entertain an appeal, if referred to it for its decision.

In *Nadan* v. *The King* [1926] A.C. 482 at 495:

It has for many years past been the settled practice of the Board to refuse to act as a court of criminal appeal, and to advise His Majesty to intervene in a criminal case only if and when it is shown that, by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done.

In (1932) 48 T.L.R. 300, the Privy Council gave the following practice note:

Their Lordships have repeated *ad nauseam* the statement that they do not sit as a court of criminal appeal. For them to interfere with a criminal sentence there must be something so irregular or so outrageous as to shake the very basis of justice. Such an instance was found in *Dillet's* case ((1887) 12 App. Cas 459), which has all along been held to be the leading authority in such matters.

The proper principles to be applied from these authorities have been further clarified in the case of *Danny Sunu* v. *The State* [1984] P.N.G.L.R. 305, where at 306–307, Pratt and McDermott J.J. said:

> At the outset it is desirable to attempt some clarification of terminology. The use of terms more appropriate to an appeal tend not only to confuse but to have achieved that very result in the present case. It is disconcerting to say the least for an Appeal Court to find that although it has before it a document entitled "Appeal Book", complete with Supreme Court appeal number, it is not the intention of counsel to argue an appeal at all, but instead to make an application for review under the Constitution. Whilst the majority view on matters of principle is clear enough in *Avia Aihi* v. *The State*, there is an inherent conflict in the terminology used by Kidu CJ and Andrew J on the one hand, and that of Kearney Dep CJ and Kapi J (as he then was) on the other. With great respect, it seems to us that an adoption of the views of the former will eradicate the present confusion. . . .
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> We consider that, as an extension of the reasoning of the Chief Justice and Andrew J, any reference to an appeal or leave to appeal should be studiously avoided. Of course what *Avia Aihi* v. *The State* [1981] P.N.G.L.R. 81 did was to break new ground completely. Just how new can best be gauged by the strong dissenting judgment of Greville-Smith J. The case clearly established not only that a right of judicial review is given to a citizen quite apart from the right to appeal in the ordinary accepted sense of that word, but further established the principles upon which such a right may be exercised.

At page 307 they continue:

> It is equally clear that such power will be exercised only 'in exceptional circumstances where some substantial injustice is manifest, or the case is of special gravity', (per Kearney Dep CJ in *Avia Aihi* v. *The State* [1981] P.N.G.L.R. 81 at 93), or that there are 'cogent and convincing reasons and exceptional circumstances' (per Kidu CJ and Andrew J in *Avia Aihi* v. *The State (No. 2)* at 47). The principle is that the discretion will be exercised only where it is in the interests of justice, and the Court is satisfied that there is 'grave reason to apprehend that justice has actually miscarried, that is to say, that the conviction was contrary to the truth and justice of the case': see Kidu CJ and Andrew J in *Avia Aihi (No. 2)* at 46 adopting what the pre-Independence Full Court said in *The Secretary of Law* v. *Tisunkac Nawak Domstock* [1974] P.N.G.L.R. 246 at 248. In determining whether or not there are 'cogent and convincing reasons' we agree with the approach of Kapi J in *Avia Aihi (No. 2)* at 61, that the merits of the application, or perhaps rather more specifically, the merits of the case to be argued must form part of the 'cogent and convincing reasons'. After all, if the matter, the subject of the application has no merit whatsoever, it is impossible to see how there could be any cogent or convincing reasons for granting a review.

Once the true nature of this application is appreciated, there will be very few cases that will come before this Court. The fact that someone has lost a right of appeal under the Supreme Court Act is no guarantee that an application made under

section 155(2)(b) of the Constitution will be successful. The nature of the application must be carefully assessed. The grounds for an application under section 155(2)(b) are very restricted.

In applying the principles to the facts of the case, the delay by the lawyer for the applicant is a relevant consideration to be considered together with the merits of the grounds upon which the judicial review is based.

The lawyer's explanation for the period of inaction was the non-payment of counsel's fees by the Department of Finance. In cross-examination, Mr. Lambu could not substantiate this. In fact, it was established that counsel's fees were paid on 4 November 1987. There is no suggestion that counsel insisted on the fees being paid before giving further advice.

The lawyer further explained that he had made an honest mistake in that he believed the last day would expire on 8 December, a day after the appeal period expired. How he came to this mistaken belief was not explained but, assuming that it was a genuine mistake, it does not explain the failure on his part to make an application to the court for extension of time in which to file a notice of appeal. Indeed, counsel advising the applicant expressed his concern for the inaction of the lawyer for a month and advised in no uncertain terms in a letter dated 25 November 1987: "In the circumstances, no time should be lost in moving to seek an extension of time within which to appeal and in lodging the appeal".

Mr. Lambu was cross-examined on this and his explanation was that he read the letter quickly; he did not notice this advice. That is not an acceptable explanation.

But even without this advice from counsel, he ought to have taken steps in the circumstances to extend time. On 3 December 1987, Mr. Lambu sent a letter to counsel with a draft notice of appeal for advice. He received no reply from counsel until 2.30 p.m. on 7 December 1987. Time was quickly running out and he showed no concern whatsoever that he should make an application for extension of time. He had no belief that he would receive a settled notice of appeal by 8 December 1987. His failure to file an application for extension of time before 8 December is not excusable and this inaction in the end result has proven fatal to his client. This is negligence.

Mr. Lambu was specifically advised to file an application to extend time and he took no action at all. He gave no explanation for this failure. The only explanation which may be credible is the fact that his wife was sick. I have no doubt she was sick. But that is no reason why the matter could not be handled by another lawyer in the State Solicitor's Office.

We know that there is a civil litigation section in the office, with a Principal Legal Officer. If he was unable to handle this matter because of his wife's illness, the matter could have been brought to the attention of the Principal Legal Officer and the State Solicitor.

I agree entirely with Bredmeyer J. that the responsibility in this case must rest with the State Solicitor. He has covered this aspect of the case more fully than I have; I simply adopt his reasons.

This is not the end of the matter as far as the conduct of lawyers for the State is concerned. This application was filed six months from the date of judgment. The only explanation for the delay is the lawyer's lack of appreciation of the nature of judicial review under section 155(2)(b) of the Constitution. There is no excuse. The law in this respect has been in the law reports since 1981 and the principles have been settled since 1984.

In addition, the lawyers for the respondent had the decency to point out the correct position in law. This matter could have been disposed of in the March sittings of the Court had the lawyers for the State acted on the advice of the respondent's lawyers.

When dealing with the fault of lawyers, the Supreme Court made a distinction between civil and criminal cases. In *Danny Sunu* v. *The State* at 308, Pratt and McDermott J.J. said:

> Consequently, had this Court been concerned with advice given in civil proceedings, there might well be *no justification whatsoever for granting a review as another remedy is available to the party wronged.* [Emphasis added]

At 312 Woods J. said:

> On the first step, the facts are quite clear. The applicants failed to appeal. This failure was an admitted mistake by the applicant's legal advisers on the effects of the reference from the National Court. *A mistake by a legal adviser is not in itself a convincing reason for a court to exercise a discretion. In civil proceedings, the applicants would have a remedy in damages against the legal adviser.* However, in the case before us, we are dealing with the liberty of the applicants and no action for damages against the legal advisers can compensate for deprivation of liberty. [Emphasis added]

I agree entirely with the views expressed by the Supreme Court in the judgments referred to. It is for the appellant to bring his application within "exceptional circumstances" for the Court to exercise its discretion to review.

There may be circumstances in which a fault of a lawyer may be excused. For example, a sole practitioner may have been seriously ill and there was no one to attend to the matter.

Having regard to all the matters I have dealt with, the appellant's lawyer has failed to give cogent and convincing reasons for his failure to protect his client's right of appeal.

On the merits, the applicant relies on four grounds of review. These grounds are as follows:

1. his Honour erred in fact and/or in law in holding that the decision of the applicant to allocate relevant funds for security was not a decision of a governmental character at a "planning" level and in holding that it was a decision for which the applicant could be liable to the respondent;
2. his Honour erred in fact and/or in law in not holding that the decision of the applicant not to allocate relevant funds for security was not justiciable;
3. his Honour erred in fact and/or in law in finding any act or omission of the applicant was one of non-feasance and hence an act or omission for which the applicant should not be liable in damages to the plaintiff;
4. his Honour erred in fact and/or law in holding that the applicant was liable in damages to the plaintiff in that the relevant fund for security was not justiciable.

These grounds are drafted in the alternative in that they all are based on either error in findings of fact or alternatively error in findings of law. These are legitimate

grounds in an appeal. Judicial review under section 155(2)(b) cannot be used as a back-door method of raising these issues.

The grounds must show "some substantial injustice is manifest" or the case is "of special gravity", or "grave reason to apprehend that justice has actually miscarried". The applicant has the onus of satisfying the Court.

This was an action based on the common law—employers' duty to employees to protect them from the unnecessary risk of injury.

The common law is applicable as part of the underlying law under schedule 2.1 of the Constitution. The trial judge addressed this question in his judgment. No significant questions of law are raised on this point in the proposed grounds of review.

In dealing with the law the trial judge posed the important issue:

> Does the duty to protect an employee from unnecessary risk or injury, include the duty to protect the employee from the risk of injury intentionally caused by a third party?

His Honour then discussed the common law cases which establish the liability of the employer. He discussed English cases as well as Australian cases. It is not necessary for me to deal with the cases here as they are adequately dealt with by the trial judge in his judgment. After having set out the law, he then discussed the question of the test of whether there is a breach of duty. He adopted the words of Diplock J. in *Houghton* v. *Hackney Borough Council* (1961) 3 K.I.R. 615 at 618:

> The test must be: has the employer taken reasonable care, paying proper attention to the risk and paying reasonable attention to the other circumstances?

The trial judge further dealt with the liability of the State through the provisions of the Claims By and Against the State Act (Ch. No. 30) and the Wrongs (Miscellaneous Provisions) Act (Ch. No. 297).

The grounds raised in the review do not challenge the propositions of law as stated. As far as I can see, the principles of law dealt with in this case are fairly well settled at common law and there is no departure from those principles in this case. The applicant has failed to discharge the onus.

On the other hand, the respondent has waited too long and every delay does not improve his health or his scarce financial position. The lawyers for the respondent have taken every step each time to finalize this matter. If the matter had been handled competently by the State, the matter may have been resolved by now.

Having regard to the delay and the merits of the case the applicant has failed to satisfy this Court that it should exercise its discretion to review the decision in question. I would dismiss the application.

BREDMEYER J.:

I agree with the orders proposed by Kapi Dep. C.J. and generally with his reasons on the delay factor, but desire to add something of my own.

By section 17 of the Supreme Court Act (Ch. No. 37) an appeal has to be lodged within forty days after the date of the judgment or within such further period as is allowed by a judge upon application made to him within that period of forty days. It

was the firm intention of Parliament in enacting that section not to allow an appeal out of time, whether it was one day late or one month late. *Avia Aihi* v. *The State* [1981] P.N.G.L.R. 82 decided that, by virtue of section 155(2) of the Constitution, the Supreme Court has an inherent power to review all judicial acts of the National Court but that the power should only be exercised in "exceptional circumstances where some substantial injustice is manifest" or where there are "cogent and convincing reasons and exceptional circumstances".

In this case Cory J. delivered his decision on 28 October 1987. Mr. David Lambu, for the State Solicitor, attempted to file an appeal about 15 minutes late on the fortieth day, 7 December 1987. The Registry closed at 3.30p.m. and Mr Lambu arrived with his appeal notice at about 3.45 p.m. He attempted to file it on 8 December and was told that he was a day late. The State Solicitor filed his application under section 155(2) to this Court on 21 April 1988.

Why did the proposed appeal get out of time? We have received oral and affidavit evidence on this from Mr. David Lambu; we have not heard any evidence from the State Solicitor. From the evidence before us the State Solicitor took no personal or supervisory interest in the lodging of the appeal. He left that job to Mr. Lambu, a junior lawyer in the State Solicitor's Office. Mr. Lambu made a number of mistakes, which are outlined below. Mr. Lambu said that during the critical appeal period his wife was sick in hospital and he spent much of his time visiting her and tending to the needs of his children at home. He said he did not take leave; had he done so he would have lost pay. So rather than do that he continued on the payroll and called into the office when he could to do his work. He said he did that with the full approval of his superiors. Had he taken leave, he would have handed the file to someone else.

I believe that too much sympathy and attention should not be focused on Mr. Lambu. A junior, inexperienced lawyer can make mistakes—and the miscalculation of the forty-day period was an understandable one—but the State Solicitor is the lawyer on the record. He had the carriage of the matter. He is an experienced lawyer in charge of a large legal office. It was a most important case both for the issues of law involved and the large sum of money at stake, yet, on the evidence before us, he left it all to Mr. Lambu.

Let me spell out the mistakes made and incompetence involved. First, a competent lawyer would have mailed the judgment to counsel to advise on an appeal within a day or two of the judgment being delivered. Instead the judgment was delivered on 28 October and typed reasons handed down that day; yet it was not mailed to Mr. White in Brisbane until 23 November, a delay of twenty-five days. The reason for the delay offered by Mr. Lambu was not a good one and reflects his inexperience. He said he was embarrassed to ask Mr. White to advise on the appeal because his fees for arguing the case had not been paid. It is normal practice for Australian counsel to wait for up to five or six months for fees from a large client like the Government without making any demand for payment. Argument concluded on 11 September so, as at the date of judgment, his fees were outstanding six weeks. It is normal too for counsel having argued a case to advise on the appeal whether or not he has been paid for the trial. If the State Solicitor was in any doubt whether Mr. White would advise on the appeal, he could have phoned him in Brisbane and asked him if he would accept a brief to advise on the appeal. If he said "No", another barrister could have been briefed.

Secondly, given that twenty-five-day delay and the tight forty-day appeal period, it would have been wise for the letter to counsel to have asked: (1) if he

recommended an appeal; and (2) if so, to draft the grounds of appeal. This would have saved precious time. Instead the letter was sent to advise on the appeal and, when that was received, a later letter was sent to counsel to settle the grounds of appeal.

Thirdly, the State Solicitor erred when he ignored Mr. White's advice to seek an extension of time. Mr. White noted in his letter of 25 November that almost a month had elapsed since the judgment was given and that no time should be lost in getting an extension of time.

Fourthly, I consider the State Solicitor negligent in that he ignored the advice contained in Mr. White's letter of 7 December 1987, a letter which was faxed and received the same day. It was a one-and-a-half page letter which attached a settled notice of appeal. In it he pointed out clearly and at length that the appeal period "expired today" (7 December) and that the notice of appeal had to be filed today. This advice was correct; forty days from 28 October came to 7 December 1987 and was contrary to Mr. Lambu's view contained in his letter to counsel dated 4 December 1987 that the time-limit expired on 8 December 1987. Mr. White's letter of 7 December was addressed to Mr. Pomat P. Paliau, Acting State Solicitor, but there is no evidence before us that he saw it. Mr. Lambu said that he received the letter, turned it over without reading it in order to look at the attached appeal notice. Thus he remained ignorant of Mr. White's advice that the appeal period expired on the seventh. The State Solicitor is responsible for the acts of his staff, and his failure to read and heed Mr. White's advice as to the last day is a grave error and an act of incompetence.

The fifth act of incompetence is that, when Mr. Lambu arrived at the registry to file the notice of appeal at about 3.45 p.m. on 7 December, after the registry had closed, he failed to get the registry opened. The appeal period expired at midnight on 7 December; the registry closed at 3.30 p.m.. A party may ask to have the registry opened after registry hours on payment of a fee of five kina (K5) under the National Court Rules (Order 2, rule 12). This rule allowing the opening of the registry after hours is especially designed to avoid serious risk or prejudice to any person. The State Solicitor, through his employee Mr. Lambu, was ignorant of the rule; or—being unaware that he was on the last day—unconcerned about having to return to file the document on 8 December.

The failure to lodge an appeal within the time-limit was due to neglect and incompetence by the State Solicitor, and the delay of nearly six months in making the present section 155(2) application was due to the same reasons. I consider that neglect and/or incompetence of a party's lawyer in a civil case does not amount to "exceptional circumstances" and does not amount to "cogent and convincing reasons" why we should grant this application.

The National Court frequently has to consider the question of delay by a party which arises in a number of contexts. For example the period for an appeal from the District Court to the National Court is one month but this may be extended under section 231 of the District Courts Act (Ch. No. 40). Then an application for judicial review should be made within four months of the decision challenged, but this too can be extended under the National Court Rules (Order 16, rule 4). Then again in another context, there is no express time-limit in applying to set aside a default judgment of the National Court, but the application should be made promptly and delay can be a factor in refusing relief: see, e.g., *Green and Co. Pty. Ltd.* v. *Green* [1976] P.N.G.L.R. 73 at 77.

The courts' experience in exercising these jurisdictions is that delay in filing an appeal notice, or applying for judicial review, or applying to set aside a default judgment, is frequently caused by the lawyer's inadvertence, carelessness, neglect, or incompetence. An example of this is *Re Placer Holdings Pty. Ltd.* [1982] P.N.G.L.R. 326. I believe that, far from being an exceptional circumstance, delay through legal neglect, incompetence etc., is a common occurrence.

So turning to the facts of this case, the delay in lodging the appeal within the appeal period and in applying for this review was due to the neglect and incompetence of the State Solicitor. It was not an exceptional circumstance. I believe that the State in this case has not shown us "exceptional circumstances" or "cogent and convincing reasons" why we should entertain this application. The *Avia Aihi* cases (Nos 1 and 2) proclaimed the section 155(2) review jurisdiction of this Court and allowed a convicted woman who was in custody and without ready access to a lawyer to seek review thirteen months after the appeal period had expired. The following case, *Danny Sunu* v. *The State* [1984] P.N.G.L.R. 305, was also a criminal case. Special considerations apply in applications for constitutional review of criminal cases. The liberty of the subject is involved and a prisoner who has clearly instructed his lawyer to appeal should not be penalized for the delay and fault by his lawyer. Damages against his lawyer for professional negligence are a small consolation if the prisoner is still in gaol.

This is the first section 155(2) application, so far as I know, in a civil case and different considerations should apply. Here we have a client, in this case, the State, who is not ignorant of the law, not uneducated, not unrepresented, not penniless, and not in custody away from phones, typists, and the like. It can instruct the lawyer of its choice, it can prompt or prod its lawyer to act promptly. It too can sue its lawyer for damages for professional negligence. It is true that the principle of law decided by Cory J. is important, and the award of damages was large—and they are factors which support the application—but in my view they are heavily outweighed by the cause of delay. As I have said, I find nothing exceptional, no exceptional circumstances, in the cause of the delay. Negligence or incompetence by a lawyer should never be a basis for a section 155 application in a civil case. I can conceive of some instances where a default by a lawyer, for other reasons, in a civil case could amount to an exceptional circumstance. For example, a lawyer in a one-man firm instructed to appeal, may be run over by a bus before he lodges the appeal. The lawyer's failure, in that case, is not caused by incompetence but by an event outside of his control.

I do not believe that section 155(2) of the Constitution was designed to protect civil lawyers from suits for professional negligence. If we were to allow a section 155 application in this case where the delay was due to the lawyer's negligence we would drive a horse and carriage through section 17 of the Supreme Court Act (Ch. No. 37) which provides that the appeal must be commenced within forty days of the judgment or with such further period as is allowed by a judge upon application made to him within that period of forty days. If we were to allow a review application where the lawyer got out of time to appeal through negligence, the effect would be to reinterpret section 17 to mean "within 40 days or within such further period as the court may allow". This interpretation I have adopted balances section 17 of the Supreme Court Act and section 155(2) of the Constitution. It gives effect to the plain intention of Parliament in section 17 and, at the same time, gives effect to the superior law of section 155(2). The forty-day time-limit of the Supreme Court Act

can be side-stepped under section 155(2) in exceptional circumstances. Without purporting to give an exhaustive list of examples, it can be side-stepped in a criminal case where a defendant has been unable to get a lawyer or to get one to carry out his instructions competently; in a civil case where through some act outside the control of the client or lawyer the appeal period has expired; and in a criminal or civil case where something important occurs after the judgment and outside the appeal period. For example, where it is discovered that the case was won on perjured evidence, or where a third person confesses to the crime.

AMET J.:

This is an application by the State pursuant to section 155(2)(b) of the Constitution seeking leave of the Court to invoke the Court's inherent discretionary jurisdiction to review a decision of the National Court.

The summary of the facts and circumstances giving rise to this application are as follows.

The respondent, James Robert Colbert was a teacher, employed by the State at the Port Moresby Technical College at Idubada. He resided on the college campus in an institution house. He was seriously injured when he was struck on the head by a stone thrown by an intruder when he left his house and went out to investigate some noise at a neighbour's residence at night-time. The respondent was required by the nature of his employment to supervise various student activities outside normal hours. There was at that time no fencing to individual premises and inadequate lighting provided to the residences.

The respondent sued the State as employer, for negligence in failing in its duty to protect the respondent from unnecessary risk of injury by third persons, in that it failed to adopt security measures readily available, namely, either floodlighting at the rear of the premises and/or individual fencing of the premises.

The National Court delivered written judgment on 28 October 1987 finding in favour of the plaintiff/respondent and awarded damages against the State in favour of the respondent in the total sum of K448,711.

Both parties were represented by Australian lawyers. Mr. David Lambu from the State Solicitor's Office assisted Mr. Michael White from Brisbane for the State.

This application became necessary because the applicant State had failed to file notice of appeal within the forty-day appeal period. It had also failed to seek an extension of time within the forty days allowed to file the notice of appeal, by section 17 of the Supreme Court Act (Ch. No. 37).

The circumstances leading to these failures as deposed to by Mr. David Lambu were as follows.

When written judgment was handed down on 28 October 1987, Mr. David Lambu read and considered it immediately on the possibility of lodging an appeal, but he had difficulty in attempting to work out the appropriate grounds on both liability and quantum. He did not contact Mr. White in Brisbane immediately because his trial fees had not yet been paid by the State. Mr. White's fees were in fact paid on 4 November 1987. On 23 November 1987, Mr. Lambu sent by urgent mail, a copy of the judgment to Mr. White to advise on possible grounds of appeal. Mr. White replied promptly on 25 November 1987 by facsimile, advising that the State should appeal against the judgment on the question of liability, the grounds of which he would be pleased to settle if he were given instructions. He noted that almost a

month had run since judgment and so in the circumstances no time should be lost in moving to seek an extension of time within which to appeal and in lodging the appeal.

Mr. Lambu finalized a draft notice of appeal on 3 December 1987 and transmitted it to Mr. White via facsimile machine at 1.30 p.m. on 4 December 1987 from the Department of the Prime Minister. Mr. Lambu stated in the covering letter with the draft notice of appeal that: "The time limit for filing expires on 8 December 1987".

Mr. White transmitted the settled notice of appeal via facsimile on 7 December 1987 at 11.25 a.m. through the Waigani Post Office. Mr. Lambu did not receive it until about 2.30 p.m.. He immediately caused the settled notice of appeal to be reproduced for the purpose of filing. Mr. Lambu hurried to the National Registry to file the notice of appeal at about 3.30 p.m. but found it already closed at 3.30 p.m. He returned to his office. Early the next morning on 8 December 1987, Mr. Lambu returned to the Registry and filed the notice of appeal. Later that day however, he was advised by the Registrar that the filing of the notice of appeal was one day out of time. Mr. Lambu was surprised. He immediately made arrangements with the Registry to make application for extension of time before a Supreme Court judge. At about 2 p.m. on the same day 8 December 1987, Mr. Lambu appeared before Hinchliffe J. in Chambers to make the application for extension of time. He was advised to file the necessary documents and give notice to the respondent.

On 29 December 1987 the applicant State filed application for extension of time. That application was dismissed by the Supreme Court on 21 March 1988. This present application was then filed on 21 April 1988.

The application is wrong in form in that it purports to seek "leave to file a notice of appeal out of time". That quite clearly is misconceived, but I do concede that this has been contributed to by use of the same expressions as used by the Court in *Avia Aihi* v. *The State (No. 1)* and *(No. 2)*. However, the substance of the application is in effect to seek leave of the Court to invoke the Court's inherent discretionary jurisdiction to review the decision of the National Court of 28 October 1987.

The Constitution, section 155(2)(b), provides that:

The Supreme Court—

(b) has an inherent power to review all judicial acts of the National Court.

The case of *Avia Aihi* v. *The State* [1981] P.N.G.L.R. 81 established that section 155(2)(b) invested the Supreme Court with "an unfettered discretionary jurisdiction" to review all judicial acts of the National Court although the applicant has lost all statutory right to appeal or to apply for leave to appeal. It was further held that "the discretion should be exercised only in exceptional circumstances where some substantial injustice is manifest, or the case is of special gravity, the onus being on the applicant".

I find the restatement of these principles by Pratt and McDermott J.J. in *Danny Sunu* v. *The State* [1984] P.N.G.L.R. 305 at 307 to be useful:

> It is clear from the format of our appeal legislation with its hierarchy of courts, from the wording of the Constitution, and especially from the judgment of their Honours in the *Avia Aihi* cases that any applicant for a review under s 155(2)(b) must first and foremost convince the court, despite a failure to exercise a right to appeal against the decision which is disputed, that it should exercise its inherent and discretionary power in favour of the application. It is equally clear that such

power will be exercised only in "exceptional circumstances where some substantial injustice is manifest, or the case is of special gravity" (per Kearney Dep CJ in *Avia Aihi* v. *The State* [1981] P.N.G.L.R. 81 at 93) or that there are "cogent and convincing reasons and exceptional circumstances" (per Kidu CJ and Andrew J in *Avia Aihi* v. *The State (No. 2)* at 47). The principle is that the discretion will be exercised only where it is in the interests of justice, and the court is satisfied there is "grave reason to apprehend that justice has actually miscarried, . . .": see Kidu CJ and Andrew J in *Avia Aihi (No. 2)* at 46 adopting what the pre-Independence Full Court said in *The Secretary of Law* v. *Tisunkac Nawok Domstock* [1974] P.N.G.L.R. 246 at 248.

In determining whether or not there are "cogent and convincing reasons" we agree with the approach of Kapi J in the *Avia Aihi (No. 2)* at 61, that the merits of the application, or perhaps rather more specifically, the merits of the case to be argued must form part of the "cogent and convincing reasons". After all if the matter, the subject of the application has no merit whatsoever, it is impossible to see how there could be any cogent or convincing reasons for granting a review. Therefore, the first thing to be decided by this Court, is whether the applicants have made out sufficient reasons and exceptional circumstances for the court to grant a hearing.

Expressed more simply, this means that this inherent discretionary power to grant a review of a decision of the National Court under section 155(2)(b) of the Constitution should be exercised only where:

1. it is in the interests of justice, the court being satisfied that there is grave "reason to apprehend that justice has actually miscarried";
2. there are "cogent and convincing reasons and exceptional circumstances . . . where some substantial injustice is manifest or the case is of special gravity"; and
3. there are clear legal grounds meriting a review of the decision.

Further, in deciding whether there are cogent and convincing reasons, the following are relevant factors to be taken into account:

1. the reasons for failing to appeal within time;
2. the merits of the case to be argued.

When all these relevant factors to be considered are expressed in this order and viewed in their proper perspective, it becomes evident that the factor of "reasons for failing to appeal within time" (which has received much prominence and criticism and indeed considerable overemphasis) is only one of two factors to be taken into account in one of three principal bases for the grant of review. It is an important factor, but it is not the sole and conclusive factor. It is my view that it is not necessarily fatal to an application that the reasons for failing to appeal within time are not wholly satisfactory or acceptable. It is only one of two factors to be considered in the third major factor whether there are cogent and convincing reasons.

I propose to deal with this application under the various heads of factors to be taken into account. It would be convenient to deal with the factual circumstances first under (2).

I. Cogent and Convincing Reasons and Exceptional Circumstances

A. *Reasons for Failing to Appeal Within Time*

The principal reason for the applicant's lawyer, Mr. David Lambu, failing to file the notice of appeal within time is simply that he quite honestly miscalculated the forty-day time-limit within which to file the appeal. I have no doubt that this was a genuine and honest mistake. It is not necessarily being careless in the professional discharge of duty. On 4 December 1987 when he transmitted a draft notice of appeal by facsimile to Brisbane, Australia, to Mr. White, he was under the mistaken belief that, "the time limit for filing expires on 8 December 1987". He stated so in the covering letter to Mr. White. When Mr. Lambu received the settled notice of appeal at 2.30 p.m. on 7 December 1987, he believed he had until the end of 8 December 1987. That is again evident by his subsequent actions. He did his best to file the notice of appeal by the end of 7 December 1987. He caused the immediate reproduction of the transmitted settled notice of appeal into form for filing. He hurried out to the National Court Registry to file it by 3.30 p.m. but unfortunately he was just a little late. He did not believe that was fatal. He still believed he had until the end of the next day, 8 December 1987. He went back to his office. He went and filed the notice of appeal on the morning of 8 December 1987. He deposed in evidence in Court that if he believed 7 December 1987 was the expiry date, he would have requested the Registry be opened so he could file the notice of appeal. But he returned first thing on the morning of 8 December 1987 to file the notice of appeal. When he was advised by the Registry that the filing of the notice of appeal was out of time by one day he immediately made efforts to seek an extension of time, albeit erroneously.

In my respectful view, these circumstances are quite exceptional and most distinguishable from any others. Mr. Lambu had not simply done nothing until the appeal period expired. Immediately upon being advised of his miscalculation he endeavoured to obtain reprieve from the courts. He went about the applications by the wrong method. The State had not simply allowed weeks or months to go by past the expiry date before making this application. I agree that Mr. Lambu had not been diligent in pursuing the appeal earlier in time within the time-limit or to seek an extension of time within the time-limit. It would not have occurred to him as being necessary when he received the settled notice of appeal on 7 December 1987. He obviously must have been somewhat relieved that he had until the end of 8 December 1987 to file the notice of appeal.

In my view, notwithstanding Mr. Lambu's failure to act more promptly earlier within the forty-day time-limit, there could be no more exceptional circumstances than those I have described above and earlier in the statement of the facts. On the afternoon of 7 December 1987 he would have been late by a matter of minutes to fifteen or thirty minutes at the most, from close of registry at 3.30 p.m.. He returned early the next morning. Technically, one can argue that the filing was late by a matter of hours. More importantly, had he been aware that 7 December 1987 was the last day, I believe he would have requested the Registry to be opened after 3.30 p.m. so he could file the notice within time.

B. *Merits of the Case to be Argued*

This is the second factor to be considered under the main head of "cogent and convincing reasons". If, in a consideration of the merits of the case, some substantial injustice is manifested or it is apparent that the case is of special gravity, then these are additional circumstances that may provide the cogent and convincing reasons

why the jurisdiction should be exercised.

How does the Court ascertain or determine whether there are any merits in the case to be argued in the review? This is an extension of the other of the three principle factors—whether there are clear legal grounds meriting a review of the decision.

690 In the criminal appeals which involve issues of facts which require leave of the Court, the practice has been accepted that the question of leave is heard together with the substantive appeal, because the grounds for seeking leave involve the same examination of facts as do the substantive argument on the merits. The same practice obtains in civil Supreme Court appeals involving questions of facts which require leave of the Court.

In relation to application for review under section 155(2)(b) of the Constitution, Pratt and McDermott J.J. said (at 309) in *Danny Sunu* v. *The State* that:

> Unlike *Avia Aihi* the merits of the matter for review have been argued along with the arguments in favour of the exercise of the discretion to entertain the review.
> 700 The procedure in *Avia Aihi* was one which emerged out of the special circumstances of that case and was largely dictated by the fact that until then no decision had been made as to whether or not a right of review, as distinct from or in addition to a right of appeal, existed at all. A similar procedure should not be following in succeeding cases.

In this application there was no reference book. The judgment sought to be reviewed was appended to the actual application. There was no transcript of evidence. Included in the application document were the proposed grounds of review and the grounds for the delay in filing the notice of appeal.

This Court did not have the benefit of the transcript evidence upon which the
710 judgment was based. The Court did not have the benefit of counsel addressing on the proposed grounds of the review in relation to the judgment and the evidence. Though the judgment was appended, counsel did not examine it in relation to the proposed grounds of review. In these circumstances I find great difficulty in determining whether the substantive case to be argued in the review has any merits. I do not believe it is sufficient simply to rely on what counsel state in submissions without the Court being taken through the judgment and the evidence. Quite simply there just was not the kind of substantive addressing of this aspect as was suggested by the Court in *Danny Sunu* and as indeed this Court is accustomed to in Supreme Court appeals.

720 I consider that the proposed grounds of review sufficiently raise issues of policy, constitutional precedents, and underlying common law for the judgment and the authorities to have been examined together at this juncture together with the application for leave. This just was not done. With great respect, I think the Court proceeded with much haste and overly dwelt on the reasons for delay in filing the notice of appeal out of time.

I cannot say, without benefit of full address by counsel on the law, with reference to the judgment, case authority, and the transcript of evidence, whether or not there are merits on legal grounds meriting a review.

I am of the strong opinion that the additional factors, as to whether some
730 substantial injustice is manifested or whether the case is of special gravity, cannot properly be determined without a full and proper examination of the judgment, the

law, and the evidence. This, the Court did not have the benefit of doing.

II. Interests of Justice

The Court being satisfied that there is grave reason to apprehend that justice has actually miscarried.

Again in relation to this factor, I am not properly able to be satisfied whether or not there is grave reason to apprehend that justice has actually miscarried, to consider whether or not in the interests of justice, leave should be granted. I have not had the benefit of examining the transcripts of evidence with the judgment, nor heard any arguments on the law.

There are several features of this application and the judgment sought to be reviewed which are novel and deserve special consideration and which may amount to exceptional circumstances. First, this is the first civil case sought to be reviewed under section 155(2)(b) of the Constitution, akin to *Avia Aihi* being the first criminal case. Secondly, it is the first case in Papua New Guinea under the adopted common law in the area of employers' liability for the safety of employees from risk of injury caused intentionally by third parties. A very large amount in damages is involved and questions of public policy and general importance of the development of the underlying law in Papua New Guinea *vis-à-vis* possible conflicts, inconsistency, inapplicability, and inappropriateness of English common law precedents to Papua New Guinea situations have been raised.

In these circumstances, it is in my view imperative that the more important factors, as to whether there were merits in the case to be argued, whether there were clear legal grounds meriting a review, and whether it was in the interest of justice that leave be granted, are addressed more fully by a proper examination of the judgment, the transcript of evidence, and the law, both the adopted common law and the Constitution in relation to the applicability of the adopted common law.

In the end result, in relation to the reason for failing to appeal within time, I am satisfied there were exceptional circumstances for not having filed the appeal within time. If this were the only factor I would grant leave now. However, this is only one of a number of important factors to be taken into account. In the circumstances, however, my view is that the applicant should be directed to prepare a full reference book containing the judgment and the transcript of evidence and for justice to be done to the application, for both parties to be permitted to argue fully the merits of the case to be reviewed in the way this Court requires of any application for leave in a criminal appeal and as strongly suggested by the Court in *Danny Sunu*.

I have adopted this course because without a full and proper address by parties I am not in a position to say that there are no merits in the case to be argued on review, or that there are no clear legal grounds meriting a review of the decision. I cannot therefore say that there are no cogent and convincing reasons and exceptional circumstances, or that no substantial injustice is manifest, or that the case is of no special gravity. I cannot, in the final analysis, say that there are no interests of justice which warrant grant of review.

Application dismissed

Reported by L.K.