[2014] JMCA Crim 48

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO 33/2007

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MRS JUSTICE McINTOSH JA
THE HON MR JUSTICE BROOKS JA

HUGH RICHARDS v R

Leroy Equiano for the appellant

Ms Sasha-Marie Smith for the Crown

2 October and 21 November 2014

BROOKS JA

[1] Mr Hugh Richards was wrongly convicted on 31 August 2007. The conviction followed a trial in which no evidence had been properly adduced against him. It seems that the learned Resident Magistrate who tried the case had improperly relied on statements made by Mr Richards' co-accused. Those statements implicated Mr Richards in a scheme to illegally import firearms and ammunition into the island. His problems were not, however, limited to the wrongful conviction.

[2] He sought to appeal against his convictions and the sentences, totalling four years imprisonment at hard labour. He signed and delivered a notice of appeal to the prison authorities in good time. The authorities, however, failed to lodge it with the

court within the time stipulated for so doing. The main question for this court is whether his right to appeal should be deemed as having been terminated by virtue of the delay.

[3] When we heard this appeal on 2 October 2014, we allowed it, quashed the convictions, set aside the sentences and entered judgments and verdicts of acquittal in their stead. We then promised to put our reasons in writing and we now fulfil that promise.

The factual background

[4] Mr Richards and two other persons were convicted in the Resident Magistrates' Court for the Corporate Area. The convictions arose from the discovery of a cache of firearms and ammunition at Kingston Wharves on 15 February 2005. He was sentenced to serve two years imprisonment on each of the three counts on which he was indicted. Two of the sentences were to have run concurrently while one should have run consecutively to the others.

[5] After sentence was imposed, Mr Richards was taken to the Tower Street Adult Correctional Centre where he signed a notice of appeal form on 5 September 2007 and handed it to the authorities to be filed. The form was not filed until 27 September 2007, that is, after the time allowed for notices of appeal to be filed. In addition, it was not filed in the Resident Magistrate's Court, as it should have been, but rather in the registry of this court. In October 2008, an attempt was made to cure the erroneous filing, when an application for extension of time within which to appeal, was signed by

Mr Richards and filed in this court. In February 2009, the Registrar of this court sent the original notice of appeal to the clerk of the Resident Magistrate's Court.

[6] There was a further delay in having Mr Richards' appeal brought on for hearing. The delay was due to the Resident Magistrate's Court in which he was convicted, failing to produce, in good time, the notes of the proceedings. He remained in custody until July 2009, when he was granted bail by this court. The notes were not produced until July 2014.

[7] When Mr Richards' appeal was fixed for hearing, the Crown initially filed submissions pointing out that the effect of the provisions of the Judicature (Resident Magistrates) Act would be that the appeal was to be deemed terminated. To be fair to the Crown's position, it was not advocating the application of the provisions of the statute but was, instead, seeking the court's guidance in respect of the issue. The cat was, however, out of the bag. The issue became a live one:

> Should an obviously meritorious appeal be deemed terminated due to a late filing, although the delay was not due to any fault of the appellant, but rather the default of the prison authorities?

[8] The issue has particular importance for convictions in the Resident Magistrates' Court as there is no provision allowing for the extension of time for the lodging of notices of appeals against convictions and sentences in that court.

The submissions

[9] Mr Leroy Equiano, on behalf of Mr Richards, stressed the fact that the delay in filing the notice of appeal was not Mr Richards' fault as he was in custody and could not have filed the documents himself. Learned counsel submitted that as it was the duty of the prison authorities to have submitted the notice of appeal, their failure cannot properly be visited on Mr Richards. The essence of learned counsel's further submissions is that the date that an inmate of a correctional institution lodges a notice of appeal with the prison authorities should be regarded as the date of the filing in court of the notice of appeal.

[10] Learned counsel submitted that there was persuasive authority for adopting such a stance. He cited **Houston v Lack** 487 US 266 (1988) as authority for that principle. Mr Equiano argued that Mr Richards should be allowed to pursue his appeal.

[11] Although Ms Smith, for the Crown, agreed in principle with Mr Equiano's submissions, she submitted that the issue raised is not without difficulty. Ms Smith pointed out that applications for extensions of time within which to file notices of appeal in criminal matters, were only made available in respect of convictions and sentences handed down in the Supreme Court. She noted that section 295 of the Judicature (Resident Magistrates) Act, referred to hereafter as "the Act", dealing with appeals from convictions and sentences from those courts, did not contain a similar provision.

[12] Learned counsel enquired whether, despite the effect of section 295, the court would be inclined to waive the non-compliance by the exercise of the discretion given to it by rule 3.2(1) of the Court of Appeal Rules (CAR). She pointed out that it appears that the non-compliance in this case was not wilful, on the part of Mr Richards. She also submitted that Mr Richards should be allowed to pursue his appeal.

Analysis

[13] The starting point of analysing the issue of whether Mr Richards should be allowed to pursue his appeal, is the consideration of the statutory provisions. Section 294 of the Act stipulates that any person wishing to appeal against the judgment of a Resident Magistrate who has tried a case on indictment, should give notice of his intention to appeal. The notice may be given either verbally during the sitting of the court at which the judgment is delivered, or in writing, within 14 days of the judgment. The written notice is to be given to the "Clerk of the Courts of the parish".

[14] Section 295 of the Act stipulates the consequences of failing to comply with section 294. Section 295 states:

> "If the appellant shall fail to give the notice of appeal as herein provided, **his right to appeal shall cease and determine**." (Emphasis supplied)

The provision leaves no room for the exercise of discretion by this court.

[15] That inflexibility is unlike the situation in appeals from judgments in some other matters. In the decisons of Resident Magistrates in civil cases, the time to file a notice of appeal may be extended in certain circumstances. Section 266 of the Act authorises

the extension of time if the late filing was not deliberate and if the justice of the case requires it. The section states:

> "The provisions of this Act conferring a right of appeal in civil causes and matters **shall be construed liberally in favour of such right**; and in case any of the formalities prescribed by this Act shall have been inadvertently, or from ignorance or necessity omitted to be observed it shall be lawful for the Court of Appeal, if it appear that such omission has arisen from inadvertence, ignorance, or necessity, and if the justice of the case shall appear to so require, with or without terms, to admit the appellant to impeach the judgment, order or proceedings appealed from."

[16] Section 12 of the Judicature (Appellate Jurisdiction) Act also allows this court to extend the time in which appeals in civil cases from Resident Magistrates' Courts may be filed. Those provisions were extensively examined in **Ralford Gordon v Angene Russell** [2012] JMCA App 6.

[17] There is, however, no equivalent provision in either Act regarding appeals in criminal cases decided in the Resident Magistrates' Court. The flexibility afforded to litigants in appeals in civil cases has not been extended to criminal cases emanating from those courts. It is to be noted however, that there is a discretion given to this court for extending time in cases emanating from convictions in the Supreme Court. The time for filing notices of appeal, in respect of appeals from convictions in the Supreme Court, may be extended if allowed by this court (see section 16(3) of the Judicature (Appellate Jurisdiction) Act).

[18] The position taken by this court in respect of late filings of notices of appeal from convictions in the Resident Magistrates' Courts, has consistently been that the court has no jurisdiction to hear the appeal. In **R v Savage** (1941) 4 JLR 24, the notice of appeal was filed out of time. It was held that the court of appeal had no jurisdiction to hear the appeal. In **R v Dussard** (1964) 8 JLR 595, the notice of appeal was not signed by the appellant but rather by counsel who had appeared for him at the trial. This court held that the notice did not comply with the provisions of section 294 and therefore it had no jurisdiction to hear the appeal. Those cases, of course, predated the advent of the Court of Appeal Rules 2002 (the CAR).

[19] The provisions of the CAR must, therefore, next be considered. As Ms Smith submitted, the CAR does allow this court, in certain circumstances, to waive non-compliance with its rules. Rule 3.2(1) of the CAR is the relevant provison. It states:

> "Where –
>
> (a) an appellant fails to comply with **these Rules**; and
> (b) the court considers that such non-compliance was **not wilful**,
>
> the court may –
>
> (i) waive such non-compliance if it considers that it is just so to do; and
> (ii) give such directions requiring the appellant to remedy the non compliance as it thinks fit." (Emphasis supplied)

[20] Rule 3.4 of the CAR provides for appeals against conviction or sentence in the Resident Magistrate's Court. The import of its relevant provisions is very similar to section 294 of the Act. Rule 3.4 states, in part:

> "A person who wishes to appeal from conviction or sentence by a Resident Magistrate's Court does so by –
>
> (a) (i) giving oral notice of appeal during the sitting of the court at which that person was convicted; or
>
> (ii) filing with the clerk written notice of his intention to appeal within 14 days of his conviction or sentence; and
>
> (b) ..."

[21] Although rule 3.2 allows the waiver of non-compliance with rule 3.4, it cannot authorise waiver of non-compliance with section 294. The CAR cannot override the provisions of the statute. That principle was affirmed by the decision of this court in **Clarke v The Bank of Nova Scotia Jamaica Limited** [2013] JMCA App 9. It necessarily follows that, to the extent that rule 3.4 duplicates section 294, compliance with its provisions cannot be waived by this court. In other words, this court cannot ignore the requirements of section 294 when it considers the waiver of the requirements of rule 3.4.

[22] It is next necessary to examine Mr Equiano's submission concerning the role of the prison authorities in the context of section 294, and learned counsel's reliance on the stance of the Supreme Court of the United States of America.

[23] In **Houston v Lack**, Mr Houston acted on his own behalf in filing an appeal from a refusal of his petition for writ of *habeas corpus*. As in this country, such petitions are treated as civil cases. Mr Houston was, of course, in prison. He therefore handed the notice of appeal to the prison authorities for delivery to the court. The documents were recorded by the district court as having been received a day after the expiry of the time allowed for such notices to be filed. The Court of Appeals ruled that his appeal was out of time. He then appealed to the Supreme Court of the United States.

[24] The Supreme Court recognised the stringency of the relevant statutory provision that established the time restriction for filing appeals. That provision was 28 USC 2107. The provision stated, in part:

> "[N]o appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is **filed**, within thirty days after the entry of such judgment, order or decree" (Emphasis supplied)

The court noted that the statute did not define the term "filed", as used in the provision.

[25] The court held that the issue turned on the effect of two Federal Rules of Appellate Procedure. Rule 3(a) addressed the method of initiating an appeal. It stated:

> "An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4."

[26] Rule 4(a)(1) dealt with the time limit for the filing of the notice of appeal. The rule stated, in part:

> "In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from..."

[27] The majority of the Supreme Court ruled that although the general rule required delivery of the notice of appeal to the clerk of the district court, that rule should not apply to persons who are in the custody of prison authorities. The court ruled that "the notice of appeal was filed at the time [the] petitioner delivered it to the prison authorities for forwarding to the court clerk" (page 276).

[28] The rationale for that ruling was that the appellant who acts for himself, and is in custody, has no control over the filing process. He should therefore not be held responsible for defects in that process. The majority said, in part, at pages 271-2:

> "Unskilled in law, unaided by counsel, and unable to leave the prison, his control over the processing of his notice necessarily ceases as soon as he hands it over to the only public officials to whom he has access – the prison authorities – and the only information he will likely have is the date he delivered the notice to those prison authorities and the date ultimately stamped on his notice."

[29] The majority judgment relied on a number of previous decisions in which there was some relaxing of the stringency of the statute. Among those decisions were cases in which it was "held that receipt by a District Judge, **Halfen v United States** 324 F 2d 52 54 (CA 10 1963), or at the former address for the District Court Clerk, **Lundy v**

Union Carbide Corp 695 F 2d 394, 395 n 1 (CA 9 1982), can be the moment of filing" (page 274).

[30] A powerful dissenting judgment penned by Justice Scalia, with whom three other justices agreed, suggested that the majority ruling would result in "wasteful litigation". Justice Scalia opined that the statute erected a jurisdictional bar and that the court had no power to waive it, "no matter what the equities of a particular case" (page 281).

[31] It is to be noted that, in a manner similar to the United States statute, section 294 does not define the term "give" in respect of the notice to the clerk of the court. The relevant part of section 294 states:

> "Any person desiring to appeal…shall either during the sitting of the Court at which the judgment is delivered give verbal notice of appeal, or shall within fourteen days from the delivery of such judgment **give** a written notice of his intention to appeal **to** the Clerk of the Courts of the parish." (Emphasis supplied)

In one sense the latter use of the term "give" implies an interaction with the clerk of courts, and does not admit of the intervention of a substitute for the clerk. In Stroud's Judicial Dictionary 5th Ed, the learned editors quote from the judgment of Martin CJS in **Zrok (Shukin Estate) v Shukin (No 2)** (1948) 1 WWR 724, as originally requiring such an interpretation:

> "'Give.' The primary meaning of the word appears to have **been the placing of a material object in the hands of another person**; the usual sense now, however, is that of freely and gratuitously conferring on a person the ownership of something as an act of bounty." (Emphasis supplied)

In the sense of service, the learned editors of Stroud's cite the decision in **Re 88 Berkley Road, Rickwood v Turnsek** [1971] Ch 648 as defining the term "Give...notice in writing", as used in section 36(2) of the Law of Property Act, as meaning the same as "serve" and "posting", as used in section 196(4) of the same Act.

[32] The use of the term "give", in the context of section 294 of the Act, would seem to suggest the primary meaning mentioned by Martin CJS in the quote above. In the absence of any other decision in this jurisdiction, which would allow for other than a direct filing with the clerk of court, it would seem that that should be the interpretation given to it.

[33] There does not seem to be any other statute or regulation which assists this analysis. The Corrections Act, which governs the operations of the prisons, does not assist. It contains no provision that addresses assisting inmates of correctional institutions with the preparation or lodging of their court documents. Neither is there any provision in the Correctional Institution (Adult Correctional Centre) Rules 1991 which is relevant to this issue.

[34] This court is therefore not inclined to agree with Mr Equiano in respect of his interpretation that the term "give...to the Clerk of the Courts", as used in section 294, could include delivery to the prison authorities. It is recognised that our interpretation may have grave results. It is also recognised that Mr Richards' case may not be unique. It would seem, therefore, that the situation requires statutory intervention.

[35] Although there is an absence of strict statutory assistance for Mr Richards, it appears that his appeal should still be considered. Despite, or perhaps because of, the fact that it took the Resident Magistrates' Court seven years to produce the notes of the proceedings in this case, the notes were incomplete. They end with a recording of the proceedings, or at least a part thereof, on 28 August 2007. There is no record of the decision of the learned Resident Magistrate or, significantly, whether verbal notice of appeal was given. The absence of these aspects of the record was said to be due to the relevant notebook, in which they are contained, being lost.

[36] In the absence of that record or any indication to the contrary, and in the other circumstances of this case, this court is prepared to proceed on the basis that Mr Richards gave verbal notice of appeal and that his appeal was, therefore, preserved for the purposes of section 294. It is significant that at the trial, each of the four accused, including Mr Richards, was represented by counsel. The liberal construction to be applied in considering the right to appeal in civil cases from the Resident Magistrates' Court, and the justice of the case, contemplated by rule 3.2(1) of the CAR, suggest that the court should give the benefit of any doubt to a deserving appellant. Mr Richards' clear lack of culpability in the delayed filing, and his meritorious grounds for complaint against his conviction, impel us to take this stance.

[37] Although, based on the factual background set out above, Mr Richards would have filed his grounds of appeal after the expiry of the 21 days allowed by section 296 of the Act he will not "be deemed to have abandonded the appeal", as section 296

would have required. This court is authorised by the proviso to section 296 to hear the appeal, "notwithstanding that the grounds of appeal were not filed within the time" prescribed. It will exercise that discretion in favour of Mr Richards.

Conclusion

[38] There was no dispute in this case about Mr Richards having been wrongly convicted. Ms Smith readily conceded that that was so. The issue was whether Mr Richards had a subsisting appeal. We find, in the circumstances of this case, that he did. We do not accept, however, that his delivery of a notice of appeal to the prison authorities, may be considered as giving it to the clerk of courts for the Resident Magistrates' Court, so as to satisfy the requirement of section 294 of the Act. Parliament should perhaps consider the matter of the giving of notice of appeal by persons who are in custody, having been convicted in the Resident Magistrates' Court.

[39] It is for those reasons that we made the orders mentioned in paragraph [3] above.