

**JAMAICA**

**IN THE COURT OF APPEAL**

**RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO 32/2011**

**BEFORE: THE HON MR JUSTICE MORRISON JA  
THE HON MR JUSTICE DUKHARAN JA  
THE HON MR JUSTICE BROOKS JA**

**ALEXLEY SMITH v R**

**Robert Fletcher for the appellant**

**Jeremy Taylor and Mrs Lori Ann Cole-Montaque for the Crown**

**8 November 2012 and 30 January 2015**

**DUKHARAN JA**

[1] On 8 November 2012 we heard arguments in this matter and ruled that Mr Alexley Smith's appeal should be deemed to have been abandoned. We promised then to give our reasons in writing at a later date. This is a fulfillment of that promise. We sincerely apologise for the delay in giving our reasons.

[2] The appellant was tried and convicted before Her Honour Mrs S Jackson-Haisley in the Corporate Area Resident Magistrate's Court on 16 November 2010 of two counts

of unlawful wounding. On 26 May 2011, he was sentenced on each count to two years imprisonment with the sentences to run concurrently and suspended for two years.

[3] The brief facts are that on 13 March 2007, the complainants were on the road, in the vicinity of Majestic Gardens, St Andrew. A police service vehicle approached when the appellant, who was then a police officer, came out of the vehicle with a rifle in his hands. He went towards the complainants and made enquiries. He spoke to a man by the name of Clive. The appellant held the gun across his chest and shortly after, there was a loud explosion. Both complainants realised that they were injured. The appellant told his colleague that he fired accidentally. Both complainants were taken to the Kingston Public Hospital where they were treated for gunshot wounds.

[4] The appellant admitted that a shot was discharged from his gun accidentally as he was trying to apprehend a man while he manoeuvred backwards in response to a crowd converging on him. He, however, in asserting that, did not concede that his shot injured the complainants.

[5] The appellant was subsequently arrested and charged for unlawful wounding.

[6] The grounds of appeal were filed some months after the date of conviction and are as follows:

- “(a) The Learned Magistrate had no basis in fact to find that the requirement in section 22 of the Offences Against the [Person] Act that the act be malicious as well as unlawful was satisfied.

- (b) In drawing the inference that the appellant fired the shot that wounded the complainants the learned magistrate ignored important evidence and gaps and by so doing denied him careful consideration of an aspect of his defence.
- (b) The sentence is manifestly excessive.”

[7] When the matter came on for hearing, on a point *in limine*, Mr Taylor for the Crown submitted that the grounds of appeal were filed over 13 months after the date of conviction and that section 296 (1) of the Judicature (Resident Magistrates) Act had not been complied with. Section 296 (1) states:

“Notwithstanding anything contained in any law, regulating appeals from the judgment of a Magistrate in any case tried by him on indictment or on information by virtue of a special statutory summary jurisdiction the appellant shall within twenty-one days after the date of the judgment draw up and file with the Clerk of the Courts for transmission to the Court of Appeal the grounds of appeal, and on his failure to do so he shall be deemed to have abandoned the appeal:

Provided always that the Court of Appeal may, in any case for good cause shown, hear and determine the appeal notwithstanding that the grounds of appeal were not filed within the time hereinbefore prescribed.”

[8] Mr Taylor further submitted that good cause had not been shown by the appellant for the delay in filing the grounds of appeal; therefore the appellant is deemed to have abandoned the appeal and the decision of the Resident Magistrate ought to stand. Counsel made reference to the cases of **Rex v Mills** (1941) 4 JLR 55 and **Regina v Wilson** (1994) 31 JLR 554.

[9] Mr Fletcher for the appellant submitted that the affidavit of the appellant explaining the delay did not disclose a disinterest in the matter. The appellant did his best to bring the matter before the court. Counsel further submitted that the determination of the matter was critical to the status of the appellant in the police force and asked the court to find that there was sufficient cause to hear the matter.

[10] It is clear from the provisions of section 296(1) of the Act that an appellant shall within 21 days after the date of the judgment draw up and file with the clerk of the courts for transmission to the Court of Appeal the grounds of appeal. Upon failure to do so, the appellant shall be deemed to have abandoned his appeal. This court, however, can exercise its discretion if good cause is shown, notwithstanding that the grounds of appeal were not filed within the prescribed time. The crucial question arises: has the appellant shown good cause?

[11] Two affidavits were filed on 2 and 7 November 2012 respectively. The first one was sworn to by Miss Dionne Cruickshank, the attorney-at-law appearing for the appellant at the trial and the other by the appellant himself.

[12] The affidavit of Miss Cruickshank states as follows:

- "1. That I am an Attorney at law practicing [sic] in Jamaica with offices at No. 7 Duke Street, Kingston and 4 Kirk Street Port Maria in the parish of Saint Mary.
2. That I had represented Alexley Smith who was charged with two counts of Unlawful Wounding in the Resident Magistrate's Court for the Corporate Area.

3. That he was tried before Her Hon Mrs. Stephanie Jackson - Haisley and found guilty on the 27<sup>th</sup> day of April, 2011 and sentenced on the 26<sup>th</sup> day of May, 2011 to two years of imprisonment at hard labour, both sentences to run concurrently.
4. That between the 27<sup>th</sup> day of April, 2011 and the sentencing on the 26<sup>th</sup> day of May, 2011 I meet [sic] with Attorney Mr. Robert Fletcher and indicated to him that upon sentencing I would be referring the client to him because the client wished to appeal.
5. That he instructed me that at the end of the sentencing I was to give verbal notice of appeal and further that the grounds of appeal had to be filed within fourteen (14) days in the Resident Magistrate's Court.
6. That on the day of the sentencing and after I had giving [sic] the verbal notice I met with Mr. Smith and informed him that he was to attend on the office of Mr. Fletcher urgently as Mr. Fletcher would be conducting the appeal.
7. That I further informed him that time was limited and that he only had fourteen (14) days to get the appeal process completed at the Resident Magistrate's Court.
8. That he understood and agreed and that was the last contact that I had with him or the matter until Mr. Fletcher spoke with me during the course of this week."

[13] The affidavit of the appellant states as follows:

- "1. That I am a Police Officer and the Appellant herein.
2. That I was tried and convicted of Unlawful Wounding in the RM Court for the Corporate Area and sentenced on the 11<sup>th</sup> January 2010.

3. That I was represented at the trial by Attorney Ms Dionne Cruickshank.
4. That on the day of the sentencing I heard my attorney inform the Resident magistrate [sic] that I intended to appeal the conviction and sentence.
5. That I was granted bail pending the appeal.
6. That after the sentence my Attorney spoke to me and told me that I had somewhere between 14-21 days to file the grounds and that it was therefore urgent that I act quickly to get another Attorney as she would not be doing the appeal.
7. That she gave me the number and address of attorney Mr Robert Fletcher and told me to get in touch with him quickly.
8. That about two days later I met with Attorney Robert Fletcher, [sic] discussed fees and the urgency of the procedure.
9. That at the time of the meeting with Attorney Fletcher I did not have the financial means to immediately retain him so I went to the Police Federation and requested assistance and explained the urgency of the matter.
10. That I expected that they would have facilitated the initial retainer so that I could retain the Attorney.
11. That I visited the Offices of the Federation everyday but they seemed unable to move their processes along with sufficient speed to enable me to act.
12. I attempted to borrow initial sums from friends and family but was unsuccessful as I realized that time was running out on me.
13. That about two days before the deadline someone from the RM Court called and reminded me about the deadline.

14. That I attempted to get both Attorney [sic] Fletcher and Cruickshank to ask them if they would file the grounds for me in the interim but both were out of office for extended periods and would not be back in time.
15. That I returned to the Federation and learned that the meeting to approve disbursements would not be held until way after the deadline had passed and so I realized that as frustrating and depressing as it was, there seemed to be nothing that I could do.
16. That sometime In [sic] June 2012 I received notification from the Court of Appeal that the Notes of Evidence were available and that the appeal was being set.
17. That I renewed my efforts to get assistance from the Federation and they directed me to go to Attorney Christopher Townsend and to ask him to send them an invoice since a decision had been made to assist me.
18. That I attended on his office and made the arrangements and he sent the invoice.
19. That to my certain knowledge a percentage of his fees were sent to him and I met with him to arrange payment of the remainder.
20. That I then realized that I would be unable to meet the fees that had been charged even with the help of the Federation and had to discontinue the arrangement.
21. I returned to the Federation and to Attorney Robert Fletcher and have been able to retain him to appear in the matter.
22. That It [sic] is neither, disrespect, disinterest or negligence on my part which caused me to miss the deadline for the grounds at the RM Court.

23. That while I was on trial I was receiving reduced pay and when I was convicted my pay ceased immediately at a time when all my expenses were increasing especially those concerning the birth of my first child shortly after my conviction.
24. I therefore ask this Honourable Court to take account of the fact that I made every effort possible within my means but was unable to meet the deadline of the RM Court.
25. That I also ask the Court to hear my matter.”

[14] It can be seen from the affidavit of Miss Cruickshank in paragraphs 5 to 8 that she outlined the urgency of the situation to the appellant. She informed him that time was limited and that he only had 14 days to get the appeal process completed at the Resident Magistrate’s Court. She indicated that he understood and agreed.

[15] The appellant in his affidavit admitted that his attorney at the trial told him of the urgency to file the grounds of appeal within the specified time. He also admitted in paragraph 13 of his affidavit that he was contacted by the Resident Magistrate’s Court and told of the deadline. He stated also that in June 2012 he received notification from the Court of Appeal that the notes of evidence were available and that the appeal was being set for hearing.

[16] It seems clear to us that from what we have gleaned from the affidavits, the appellant made no real effort to meet the deadline or so soon thereafter. Despite the fact that he was told of the urgency of the situation, he waited until over one year had passed before anything was done in respect of the grounds of appeal. He could have



sought legal aid, since he said he had financial difficulties. In our view, good cause had not been shown to trigger the proviso to section 296 and for this court to exercise its discretion to hear the matter.

[17] Based on the foregoing and as stated, we dismissed the appeal.