

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MR JUSTICE BROWN JA (AG)**

SUPREME COURT CRIMINAL APPEAL NO 45/2015

APPLICATION NO COA2021APP00043

DONOVAN ARCHER v R

Leroy Equiano for the applicant

Mrs Sharon Millwood-Moore and Ms Cindy-Kay Graham for the Crown

12 July 2021

BROOKS P

[1] On 26 June 2015, Mr Donovan Archer was convicted in the High Court Division of the Gun Court for the offences of illegal possession of firearm and assault with intent to rob. He was sentenced to serve the following concurrent terms of imprisonment at hard labour:

Illegal possession of firearm	-	eight years
Assault with intent to rob	-	six years

[2] He filed an application for leave to appeal against his conviction and sentence, which appeal has not yet been heard as the transcript of his trial and the learned trial judge's summation has not been produced. Accordingly, the merits of Mr Archer's application have not had the benefit of any consideration by this court, even by a single

judge of the court. (It is noted that, if the notice of application for leave to appeal is accurate, the sentence for assault with intent to rob would be in excess of the statutory limit, but that would not affect the longer sentence.) The result is that Mr Archer has spent a significant amount of time in custody without the benefit of having his application heard.

[3] Because he has sought leave to appeal, Mr Archer has, technically, not yet started serving his sentence (see paragraphs [4] to [6] of **Tafari Williams v R** [2015] JMCA App 36). Had he not filed an application for leave to appeal, Mr Archer would have been eligible for early release (pursuant to rule 178 of the Correctional Institution (Adult Correctional Centre) Rules, 1991) on 25 June 2021. That statement assumes that he has no negative considerations, which are matters for the correctional institution.

[4] Mr Archer wishes to take advantage of the privilege of early release rather than pursue his application for leave to appeal. On 22 December 2020, he filed a notice of abandonment of his application for leave to appeal. It was, however, unwise for him to have done so without first seeking this court's approbation. This is because, without the court's intervention, his sentence would be reckoned to have commenced on the date of the abandonment, as the appeal is deemed dismissed upon receipt of the notice of abandonment (see rule 3.22(3)(a) of the Court of Appeal Rules, 2002). The judgment in **Sheldon Pusey v R** [2016] JMCA App 26 and paragraphs [9] – [10] of **Tafari Williams v R** demonstrate that, in order for Mr Archer to avoid that result, the prudent course would have been for him, prior to filing a notice of abandonment, to request this court to exercise its discretion, by making an order in respect of his sentence. This discretion would be to order that his sentences be reckoned as having commenced on the date they were imposed.

[5] Mr Archer now wishes to rectify the situation caused by his failure to adopt the course set out above. He has now asked this court to:

- a. allow him to withdraw his abandonment of his appeal filed on 22 December 2020;

- b. allow him to file a new notice of abandonment; and
- c. order that, on the filing of the new notice of abandonment, his sentence should be calculated to run from the date of his sentence.

[6] He has filed an affidavit in support of his present application, which outlines the circumstances described above. He therefore wishes to abandon the application for leave to appeal.

[7] The Crown has not opposed his application.

[8] There have been previous decisions of this court approving the course of proceeding that Mr Archer has requested. The cases include **Tafari Williams v R**, **Sheldon Pusey v R** and the Privy Council decision of **Tiwari (Leslie) v The State** [2002] UKPC 29. As in those cases, Mr Archer's position is not due to any fault on his part. Accordingly, orders similar to those made in **Tafari Williams v R** and **Sheldon Pusey v R**, may be made in this case.

[9] As was said in **Sheldon Pusey v R**, it is solely Mr Archer's decision whether or not he takes the proposed course. P Williams JA (Ag), as she then was, said in that case:

"[24] The appellant's wish to abandon his appeal remains a matter entirely for him. The issue that concerned this court was whether, upon abandoning his appeal in these circumstances, it is open to us to give the directions he now seeks, which is that his sentence should be reckoned as having commenced on the date on which they were originally imposed...."

[10] As was mentioned above, the court is satisfied that this course is open to it.

Order

1. The application for leave to withdraw the abandonment of the application for leave to appeal is granted and the notice of abandonment is deemed withdrawn.
2. It is hereby directed that, upon the applicant filing a fresh or second notice of abandonment of his application for leave to appeal, his sentence shall be reckoned as having commenced on the date on which it was imposed, namely 26 June 2015.