[2021] JMCA App 15

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE STRAW JA
THE HON MISS JUSTICE EDWARDS JA

APPLICATION NO COA2021APP00082

RAY MORGAN v R

Terrence Williams instructed by John Clarke for the applicant

Mrs Tracy-Ann Robinson and Dwayne Green for the Crown

7 and 21 June 2021

BROOKS P

[1] Mr Ray Morgan's case was recently before a single judge of appeal, who considered and refused his application for bail, pending the hearing of his appeal (**Raymond Morgan v R** [2021] JMCA App 8). The reason for the refusal was that Mr Morgan did not have a pending appeal before the court. The ruling at that time was that any appeal that Mr Morgan had, would have been deemed abandoned. Mr Morgan has since been released from prison. He, however, wishes to have his appeal reinstated, with a view to having it heard and determined. He wishes for his conviction quashed as redress for what, he says, is a breach of his constitutional rights, which included the right to have his appeal heard within a reasonable time.

[2] We heard the application on 7 June 2021, but refused it. The order made was:

> "The application for this court to hear and determine an appeal from the conviction and sentences imposed on 7 February 2011 in the Resident Magistrate's Court holden at Half Way Tree in the parish of Saint Andrew, is refused."

We promised at that time to put our reasons in writing. This fulfils that promise.

Background

[3] The background to Mr Morgan's case may be set out by quoting from the judgment in his previous application:

> "[2] On 7 February 2011, Mr Morgan was convicted of four counts of the offence of obtaining money by false pretences. He was, on the same day, sentenced to three years' imprisonment in respect of each count. The learned Resident Magistrate ordered that the sentences should run consecutively. The result would be that Mr Morgan would serve 12 years' imprisonment, subject to any administrative procedure under the Corrections Act that would benefit him.
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> [3] Mr Morgan states that he gave verbal notice of appeal at the time of his sentence. He also states that he completed a formal notice of appeal and grounds of appeal against the convictions and sentences (Form B1) and submitted it to the prison authorities. The Form B1, upon which he relies, is dated 12 February 2011.
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> [4] …[Thereafter the] following missteps took place:
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> a. the Form B1, which should have been filed at the Resident Magistrate's Court by 28 February 2011, was, instead, presented to the registry of this court on 7 March 2011, that is, outside the 21-day period allowed for grounds of appeal from convictions in the Resident Magistrate's Court…;
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> b. the registry of this court did nothing about the filing until 9 February 2012, when it sent the Form B1 to the Senior Resident Magistrate for the Resident Magistrate's Court for the Corporate Area; and

c. presumably because the Form B1 was late, nothing was done by the Resident Magistrate's Court, which neither replied to this court nor informed Mr Morgan of its stance in relation to his proposed appeal."

[4] In considering Mr Morgan's present application the court has to consider:

a. if Mr Morgan ever had an appeal;

b. if so, the present status of that appeal; and

c. if the appeal has been deemed abandoned, whether it should be reinstated.

Did Mr Morgan ever have an appeal?

[5] This question needs no extensive analysis. As there is no record from the court below, Mr Morgan will be taken at his word, for these purposes, that he did give verbal notice of appeal at the time that he was convicted. He would, therefore, have complied with section 294 of the Judicature (Resident Magistrates) Act, which was later renamed the Judicature (Parish Courts) Act. The legislation will be referred to herein as 'the Act'. Section 294 of the Act stipulates that for an appeal to be initiated, the convicted person should either give a verbal notice of appeal at the time of conviction, or file a written notice of appeal within 14 days of the date of conviction. Based on the premise that Mr Morgan did give verbal notice of appeal, therefore, he, initially, would have had an appeal in place.

What is the present status of that appeal?

[6] Section 296(1) of the Act requires that an appellant should file his grounds of appeal within 21 days of his conviction. The subsection states; in part:

"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**…" (Emphasis supplied)

[7] Mr Morgan's grounds of appeal were filed after the stipulated 21 days. His appeal is therefore deemed to have been abandoned. The fact that he delivered it to the prison authorities within the stipulated time, does not avail him (see **Hugh Richards v R** [2014] JMCA Crim 48 at paragraph [38]). That was the finding on Mr Morgan's application for bail.

[8] That finding led the single judge of this court to refuse Mr Morgan's application for bail. It also led to Mr Morgan's release from prison, since he had already served 10 of the 12 years' imprisonment that had been, effectively, imposed by the learned Resident Magistrate (as the judicial officer was then called).

Should the appeal be reinstated?

[9] Mr Williams, appearing for Mr Morgan, submitted that the standard is that this court should reinstate the appeal once there is good cause shown and there is good cause in this matter. Mr Williams also submitted that Mr Morgan had satisfactorily explained the delay in making the application and the reasons for the delay. Learned counsel pointed to the fact that Mr Morgan was in prison, but despite his incarceration, had made several, though unsuccessful, efforts to identify the status of his appeal. He argued that if the statutory time limit is inflexible, it may be unconstitutional.

[10] Despite an appeal having been deemed abandoned, this court may apply the proviso to section 296(1) of the Act. The proviso mitigates the effect of the subsection. The proviso states:

> "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." (Emphasis supplied)

[11] One basis for the court hearing an appeal pursuant to the proviso is that the applicant has a meritorious appeal. Another basis would be that justice demands the hearing of the appeal. Either of those would constitute "good cause" to merit the hearing of Mr Morgan's appeal.

Does Mr Morgan have a meritorious appeal?

[12] Mr Morgan's ill-fated notice and grounds of appeal should be the starting point of the analysis of this issue. Although the notice of appeal challenged both Mr Morgan's conviction and sentence, the grounds of appeal were restricted to the issue of sentence. The grounds filed are:

> "(1) Unfair Trial – That based on the evidence as presented the sentences are harsh and excessive and cannot be justified under law.
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> (B) [sic] That the actions of the Court is [sic] unlawful under law, with the sentences of Four (4), Three…(3) years consecutive sentences.
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> (2) That the Learned Trial Judge did not temper justice with mercy as she failed to recognised [sic] and taken [sic] into consideration the two (2) years spent awaiting Trial.
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> (3) That the Manifestation of the Sentences are [sic] reflected in [the] manner in which the learned Trial Judge read her own view into the Law and based on her utterances reflected in the severity of the sentences when she said 'you should not see the Light of day'. This utterances [sic] prejudice the sentencing policy of the Court and the circumstances therefor." (Underlining as in original).

[13] Mr Williams submitted that, among other possible defects, the sentences seem to breach the totality principle in sentencing. Learned counsel cited, among others, **Kirk**

Mitchell v R [2011] JMCA Crim 1 in support of those submissions. Learned counsel also pointed to Mr Morgan's affidavit evidence, filed on 4 June 2021, in which Mr Morgan deposed that on the day of the commencement of the trial, the learned Resident Magistrate permitted Queen's Counsel, who had been representing Mr Morgan, to withdraw from that representation. The learned Resident Magistrate, Mr Morgan asserts, then refused Mr Morgan's application for the case to be adjourned to allow for new counsel to be retained. That action, Mr Williams submitted, breached Mr Morgan's constitutional right to counsel of his choice.

[14] Whereas the complaint about sentence does seem to have merit, there are two issues to be considered. The first is that this court does not have the learned Resident Magistrate's reasons for imposing consecutive sentences. The second issue is that even if the grounds were successful, and Mr Morgan's sentences were adjusted, for example, to change the consecutive element to concurrent, or to take into account the two years he says that he spent on remand awaiting trial, the fact is that he has already served the sentences. Mr Morgan would receive no benefit from the exercise. It would be a purely academic one.

[15] A similar comment may be made about the absence of the record as it affects the issue of representation in the court below. Efforts by the Crown to obtain the record have so far proved unsuccessful.

[16] Mr Williams' response to that situation is that, by section 299 of the Act, the clerk of courts should have produced the record of proceedings even before the expiry of the deadline for the filing of the grounds of appeal. The State, in those circumstances, he argued, cannot rely on the absence of the record.

[17] The difficulty with Mr Williams' submissions is the fact that there is no record and that the likelihood is that there will be no record produced. Mr Morgan's assertion that he wants to clear his name has to be considered in that context. The fact remains that he did not initially indicate any ground of appeal attacking his conviction. In addition to

the obstacle of the absence of a record of proceedings, there are other practical difficulties. Mr Morgan's case was dealt with over 10 years ago. The learned Resident Magistrate is no longer at that court. She is now a judge of the Supreme Court.

Does the justice of the case require an appeal to be heard?

[18] Mr Williams argued that there are serious constitutional issues that arise in this matter, namely, the constitutionality of section 31 of the Judicature (Appellate Jurisdiction) Act ('the JAJA'), Mr Morgan's right to have a review of his conviction and sentence, and Mr Morgan's claim for redress under section 19 of the Constitution. That redress, learned counsel argued, arose from the State's authorities' failures, which led to Mr Morgan's appeal being deemed abandoned. Learned counsel argued that one means of granting Mr Morgan redress for the breach of his constitutional right to a hearing within a reasonable time, is for his convictions to be quashed. Learned counsel cited **Darmalingum v The State** [2000] 1 WLR 2303 ('**Darmalingum'**) as authority for those submissions.

[19] Mrs Robinson for the Crown, in respect of the issue of constitutional redress, submitted that the appropriate forum for that remedy is the Supreme Court, which is the court to which section 19 of the Constitution refers.

[20] Section 31 of the JAJA speaks to the calculation of time that an appellant spends serving a sentence. The section states, in part:

> "(1) An appellant who is not granted bail shall, pending the determination of his appeal, be treated in such manner as may be directed by rules under the Corrections Act.
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> …
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> (3) The time during which an appellant, pending the determination of his appeal, is released on bail, and subject to any directions which the Court of Appeal may give to the contrary on any appeal, the time during which the appellant, if in custody, is specially treated as an appellant under [this] section, **shall not count as part of any term of**

> **imprisonment under his sentence**, and, in the case of an appeal under this Act, any imprisonment under the sentence of the appellant, whether it is the sentence passed by the court of trial or the sentence passed by the Court of Appeal shall, subject to any directions which may be given by the Court as aforesaid, be deemed to be resumed or to begin to run, as the case requires, if the appellant is in custody, as from the day on which the appeal is determined, and, if he is not in custody, as from the day on which he is received into a correctional institution under the sentence.
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> (3A) The Court of Appeal in considering whether to give directions as to the date on which sentence shall be deemed to be resumed or to begin to run pursuant to subsection (3) shall take into account any election made by the appellant under rules under the Corrections Act to forego any special treatment accorded to the appellant pursuant to those rules." (Emphasis supplied)

[21] Learned counsel argued that this court should consider the constitutionality of the provisions of section 31(3) of the JAJA, which stipulates that an appellant's time in custody "shall not count as part of any term of imprisonment under his sentence". But for that section, the submission ran, Mr Morgan would have been released from prison much earlier than he eventually was.

[22] Mr Williams set out an interesting outline of the law regarding the privileges that an appellant was said to have, as compared to prisoners who were serving sentences. Those privileges, it was said, justified the exclusion, from the sentence, of their time as an appellant. Learned counsel cited the decision of the Privy Council in **Kumar Ali v The State**; **Leslie Tiwari v The State (Trinidad and Tobago)** [2005] UKPC 41; (2005) 67 WIR 309 ('**Ali v The State**').

[23] Before November 2013, this court gave effect to section 31(3) of the JAJA in two ways. Firstly, a single judge, when refusing an application for leave to appeal, would have ordered the sentence to be reckoned as having commenced six weeks after the original date of sentence. Secondly, when the court refused the application or appeal,

it would have specified the commencement date as three months after the original date of sentence.

[24] The Privy Council, in **Ali v The State**, questioned a departure from the principle of sentences commencing on original date of sentencing. Their Lordships ruled that the Court of Appeal should not use a standard formula, in deciding the time from which a sentence should run. There should, their Lordships said, be a considered approach in each case. The Privy Council confirmed this stance in **Carlos Hamilton and Jason Lewis v The Queen** [2012] UKPC 37, which was an appeal from this court. In **Jason Lawrence v R** [2014] UKPC 2, the Privy Council stated that were it to have considered sentence, it would have stipulated the original date of sentence.

[25] This court discontinued its previous practices after the Privy Council provided guidance on the point. Since that time, this court had generally ordered that the date, at which sentences are to be calculated, should be the original date of sentence. If Mr Morgan's appeal had been heard and a sentence of imprisonment, either confirmed or modified, the court would, most likely, have made an order in accordance with the present practice.

[26] The question, therefore, of whether section 31(3) of the JAJA is unconstitutional is not a necessary question in Mr Morgan's complaint against his sentences, bearing in mind the facts of his case, and particularly the fact that his sentences have been served.

[27] Mr Morgan's right to have his conviction and sentences reviewed was lost when his appeal was deemed abandoned. The loss of that right was by way of operation of the relevant statute. There is no constitutional issue raised by that situation. The submissions in this regard are without merit.

[28] In considering Mr Williams' submissions that this court could consider a claim by Mr Morgan for constitutional redress, it is noted that there have been decisions of this court granting constitutional redress for long delayed appeals. **Curtis Grey v R** [2019]

JMCA Crim 6, **Techla Simpson v R** [2019] JMCA Crim 37 and **Alistair McDonald v R** [2020] JMCA Crim 38 are among those decisions. That redress has been granted by way of reductions of sentence, and has, largely, been based on the guidance of the Privy Council, given in **Melanie Tapper v Director of Public Prosecutions** [2012] UKPC 26. In **Tapper v DPP**, the Privy Council disapproved of a quashing of a conviction, as representing the "normal remedy" for granting redress for breaches of constitutional rights, in criminal cases. Their Lordships said, in part, at paragraph 28 of their judgment:

> "In the light of these cases the significance of *Darmalingum* as authority has been reduced almost to vanishing-point. At most it is a case on its own facts…" (Italics as in original)

[29] Accordingly, Mr Williams' reliance on **Darmalingum**, as authority for a quashing of Mr Morgan's conviction, is not well founded.

[30] On that analysis, even if this court were minded to grant Mr Morgan redress, it would not be able to do so by reducing Mr Morgan's sentence.

[31] The result is that there is no basis to reinstate Mr Morgan's appeal.

[32] That decision does not leave Mr Morgan without a means of seeking a remedy for the administrative flaws in his case. Other remedies exist apart from the reduction of a sentence. Mr Morgan is entitled to pursue his remedy by virtue of section 19 of the Constitution. That, however, as Mrs Robinson submitted, should be before the Supreme Court. Section 19(1) of the Constitution states:

> "If any person alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress."

Conclusion

[33] Mr Morgan has not demonstrated that it is necessary to reinstate his appeal. He has not demonstrated any merit in his appeal against his conviction, but his substantive complaints about the handling of his case in the court below, which are in relation to the sentences that were imposed, show some merit. However, he, essentially, has already served those sentences. It would not be in the in the interests of the administration of justice, bearing the time that has passed since his case was determined in the court below, to attempt to unearth it from that court, in order to pursue an academic exercise.

[34] Similar considerations apply to attempting to deal with Mr Morgan's complaint about his legal representation at the trial. The exercise, after this lengthy passage of time, to find the documents in the court below and to have the learned Resident Magistrate, as she then was, formulate her reasoning, at the time, would be too onerous in the circumstances.

[35] The constitutional issues, which Mr Morgan's counsel assert may arise in respect of his case, cannot be based, therefore on any substantive issue that may be placed before this court. Mr Morgan, however, if he is so minded, may still pursue the matter of constitutional redress in the Supreme Court, as the Constitution stipulates.

[36] It is for those reasons that we made the orders set out above.