

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 32/2009

APPLICATION NO 141/2016

**BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE WILLIAMS JA
THE HON MISS JUSTICE WILLIAMS JA (AG)**

SHELDON PUSEY v R

Miss Jacqueline Cummings for the appellant

Miss Kerri-Ann Kemble and Mr Leighton Morris for the Crown

4, 7, 26 July and 30 September 2016

P WILLIAMS JA (AG)

[1] On 19 January 2009, Mr Sheldon Pusey, the appellant, was arraigned on an indictment for the murder of Mr Peter King, the deceased, in the Home Circuit Court in Kingston. On 16 March 2009, following the trial before M McIntosh J and a jury, he was found not guilty of murder but guilty of manslaughter. On 1 April 2009 he was sentenced to imprisonment for 15 years at hard labour.

[2] The appellant's application for leave to appeal was considered and granted by a single judge of this court on 20 October 2010. The matter first came on for hearing on 7 February 2011. The transcribing of the notes of evidence was not completed at that

time and the matter had to be adjourned pending the availability of the full transcript of the trial.

[3] The transcript was ready in January 2016 and the matter set for hearing on 4 July 2016. When the matter commenced on that date, Miss Cummings appearing for the appellant indicated to this court that the appellant did not wish to pursue his appeal but did not want to "lose the time already spent in custody".

[4] This court took the view that there needed to be affidavits and submissions properly placed before us for a consideration of the appellant's request. This was deemed necessary given what was considered an unusual situation that the appellant was seeking to have this court consider. In the circumstances of the appellant maintaining that he had potentially successful grounds of appeal, the appellant was seemingly giving up his chances for an immediate release and even if he was not successful in his appeal, the time spent in custody would be factored into his sentence since the practice of this court in recent times has been to reckon the sentence as having commenced from the date it was imposed.

[5] The matter was next before the court on 7 July 2016 when the affidavits filed proved to be insufficient and the matter was again adjourned. On 26 July 2016 following discussions and submissions before this court, a notice of application on behalf of the appellant was filed seeking the following orders:

- "1. The Appellant be heard on an application for leave to abandon his appeal.

2. This Honourable Court exercise its discretion, on the filing of his notice of abandonment, to make his sentence run from the date of conviction and sentence which is the 1st day of April 2009.
3. Such other relief as this Honourable Court deems just."

[6] At the conclusion of the hearing this Court made the following orders:

- "1. Leave is granted to the appellant to abandon all further proceedings in relation to this appeal.
2. The Court hereby exercises its discretion and directs that on the filing of a notice of abandonment of appeal by the appellant the sentence imposed on the appellant of 15 years imprisonment at hard labour be reckoned as having commenced on the day on which it was imposed namely 1st April 2009."

These are our promised reasons for that decision.

[7] In the circumstances, only a brief statement of the facts of the case is necessary. The appellant was taken to the home of the deceased on the evening of 19 March 2006. Other visitors to the home at the time testified to seeing the appellant there, watching the television, using the computer and eating a meal.

[8] On the morning of 20 March 2006, the body of the deceased was discovered lying naked in a pool of blood and covered with a sheet on the floor of his bedroom. The door to that room was locked. The sheet covering the deceased's body was soaked with blood. The post mortem examination subsequently done on the body revealed four chop wounds to the neck, four stab wounds to the chest area and 22

other wounds to the face, forearm, hand, elbow as also the chest and neck. The chop and stab wounds to the chest and neck were determined to be the fatal wounds.

[9] There were no eye witnesses to the murder of the deceased. There was evidence that a fingerprint found on a Guinness bottle recovered in the bedroom of the deceased belonged to the appellant. Further, there was blood on a towel found on the balcony of the bedroom in which the body was found. This blood was subsequently attributed to the appellant, by way of a matching DNA profile. Sperm was also found on the towel with a DNA profile matching the deceased.

[10] The appellant was arrested in March of 2007. He gave evidence at the trial and told of the circumstances that led to his being at the home of the deceased and admitted to "stabbing and cutting" the deceased.

[11] He was visiting these premises of the deceased for the first time on the evening of 19 March and had been sent there for the purposes of having someone there assist him in getting a job. Having been allowed in by the deceased, the appellant was invited to watch television and then to use a computer until they could talk. It was not until sometime after 10:00 pm that the appellant was able to speak to the deceased about getting assistance to find employment. The appellant, upon complaining of feeling hungry, was given something to eat and then a bottle of Guinness to drink by the deceased.

[12] The appellant said he felt dizzy after having the drink. He said the deceased led and dragged him into a nearby bedroom and proceeded to rub him down - putting

hands on his face, chest and shoulder. Despite his efforts to push the deceased off, the appellant said the deceased managed to push him down. The deceased then took off his clothes and then began to take off the appellant's. The appellant described how he started to fight off the deceased who was a "much bigger" person than he was. During the ensuing struggle the appellant said he was able to get hold of something sharp and he then started "to ease off" the deceased with it meaning he started to stab the deceased with it. He explained that the only thing he wanted at that time was to get away.

[13] After awhile, the appellant said the deceased "ease off" him and he was able to get up and run downstairs. He was however unable to get out that way so he returned to the bedroom and jumped over the adjoining balcony. The appellant said he went to visit his baby mother and family in St Mary on 24 March and remained there until he was apprehended by the police.

The proceedings before this court

[14] In the affidavit sworn to by the appellant he prayed to be allowed to withdraw his appeal and asked the court to exercise its discretion in his favour to give him the benefit of the time spent in custody. He outlined the following:-

- "9. At all material time since the date of my arrest for this offence on the 5th day of March 2007 I have been in custody and have never been offered or granted bail pending the trial of the matter nor pending my appeal.
10. I am now in custody at the Tower Street Adult Correctional Centre.

11. While in custody I was locked up in a small concrete cell with several other persons every day and are [sic] only allowed outside of our cell for limited periods. The cell is unhygienic and cramped with several crawling insects and rodents running around and stagnant water on the floors and corridors.
12. Had I been serving a sentence I would have been eligible to participate in the work and training program which are offered at the prison and which would have eased the conditions of my incarceration.
13. I have spent 7 years incarcerated awaiting the hearing of his [sic] appeal which is almost ½ of my sentence. I know that I have valid grounds of appeal but would prefer to abandon my appeal.
14. If I had begun serving my sentence I would become eligible for parole or early release for good behaviour in a couple of years.
15. My sentence is closer to being at an end and I would prefer to avail myself of the time I have spent in custody and obtain an early release. However, I wish to get credit for the time I have spent in custody toward my sentence.
16. If I were to abandon my appeal entirely, my attorneys have credibly advised me that the law requires that my sentence would only commence from the date of my abandonment, but a different approach has been taken by the Court in recent time [sic]."

The appellant attached a copy of the notice of abandonment of appeal that he said he asked his attorneys to file on his behalf.

[15] In submissions made on his behalf, Miss Cummings contended that the provisions of section 31(1) of the Judicature (Appellate Jurisdiction) Act in essence state that while his appeal is pending "time does not count as part of any term of imprisonment." She urged this court to allow the appellant to get the benefit of time served following the principles established in the cases of **Tafari Williams v R** [2015]

JMCA App 36, **Tiwari (Leslie) v The State** [2002] UKPC 29 and **Kumar Ali v Trinidad and Tobago** [20005] UKPC 41.

[16] Miss Cummings maintained that the appellant had "good grounds of appeal and his appeal is not devoid of merit". However, she urged that this court grant the appellant the opportunity to withdraw his appeal and declare that his sentence run from 1 April 2009.

[17] In submissions made by the respondents Miss Kemble indicated that the Crown did not object to the appellant's application. She too relied on the decision of this court in **Tafari Williams v R** and that of the Privy Council in **Kumar Ali v Trinidad and Tobago**. Ultimately, she commended the methodology utilised by this court in **Tafari Williams v R**, which is to treat the application as an application for a direction from the court as to the date from which the appellant's sentence should be reckoned, consequent upon the determination of his appeal brought about by his abandonment of it.

Discussion

[18] In **Tafari Williams v R**, this court considered an application similar to this one arising from slightly different circumstances. In that case the applicant had waited for over eight years for the production of the transcript of his trial so that he could pursue his application for leave to appeal. He had been convicted of the offences of illegal possession of firearm and shooting with intent for which he was sentenced to terms of imprisonment of seven and 12 years respectively and the sentences were ordered to

run concurrently. If he had commenced serving his sentence from 13 September 2007, the date on which they were imposed, he would have become eligible for release from prison on 12 September 2015.

[19] He therefore sought to abandon his application for leave to appeal and to avail himself of the facility for early release. However, Morrison P (Ag) as he then was, in delivering the decision of this court, recognised that the applicant was faced with an obstacle. He stated at paragraphs [5] and [6].

'[5] ...Having filed an application for leave to appeal and having remained in custody, he was subject to section 31(1) of the Judicature (Appellate) Jurisdiction Act (the Act) which provides that, pending the determination of his appeal, an appellant must 'be treated in such manner as may be directed by the [rules]'. The result of this is that, as provided for by rules 189-199 of those rules, the applicant fell to be accorded special treatment within the correctional institution. Accordingly, the question of when time begins to run in relation to his sentence is governed by section 31(3) of the Act, which provides as follows:

'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.'

[6] The upshot of all of this is that, in the absence of a direction from the court the sentence of an appellant is deemed to begin to run as from the date upon which his appeal is determined and not before... ."

[20] Further at paragraph [7] Morrison P, had this to say:

"Accordingly the question whether to give directions as to the date on which sentence shall be deemed to begin to run pursuant to section 31(3) in a particular case and, if so, what directions should be given, remains a matter entirely for the discretion of the court."

[21] In the instant case, the appellant is in a slightly different and perhaps better position than the applicant in **Tafari Williams v R**. The appellant here has already been granted permission to appeal and indeed maintains that his appeal is not devoid of merit. The delay in the production of the transcript of the evidence of the trial is however of the same effect of having had him remain in custody for seven years during which time his sentence would not have begun to run.

[22] In the circumstances, the decision of the appellant to abandon his appeal may well be viewed as curious in light of his maintaining that it is not devoid of merit. He is effectually to be viewed as giving up his opportunity to be released immediately if his appeal is successful. If the appeal is dismissed, the current practice of this court is to order that his sentence would run from the date of sentencing, hence his concern of losing the time spent in custody would be of no moment.

[23] In abandoning his appeal, pursuant to rule 3.22(3)(a) of the Court of Appeal Rules 2002, upon receipt of a notice of abandonment filed pursuant to the rule "the appeal is

deemed to be dismissed". Without the intervention of this court, his sentence would commence upon the receipt of the notice, it being the date upon which his appeal is determined.

[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. While the circumstances in this case may not be considered as special as those in **Tafari Williams**, they are none the less such that we were of the view that nothing prevented us from making the orders sought. Hence we made the orders as set out in paragraph [6].