[2021] JMCA App 24

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE DUNBAR-GREEN JA
THE HON MRS JUSTICE G FRASER JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 11/2014

APPLICATION NO COA2021APP00171

DANNIE SMIKLE v R

Hugh Wilson for the applicant

Adley Duncan and Miss Monique Scott for the Crown

21 September 2021

G FRASER JA (AG)

[1] On 15 February 2010, taxi operator, Dannie Smikle ('the applicant') was involved in a confrontation with a passenger, Dave Brown. This turned out to be a deadly confrontation after Dave Brown was stabbed by the applicant. The applicant was subsequently charged on an indictment for the offence of murder.

[2] On 24 June 2013, at the start of the trial, the applicant pleaded not guilty to the offence of murder, but pleaded guilty to the offence of manslaughter. He was sentenced, on 5 July 2013, to 12 years' imprisonment at hard labour.

[3] Dissatisfied with the sentence, the applicant filed an application in this court for leave to appeal his sentence. This application was considered by a single judge of the court who refused leave to appeal. The applicant applied for a re-hearing of the application for leave to appeal before the court, as is permitted by rule 3.11(2) of the

Court of Appeal Rules, 2002 ('the CAR'). The applicant also filed a notice to argue one supplemental ground of appeal, that "[t]he sentencing judge erred in law in sentencing the [applicant] to 12 years imprisonment for the offence of manslaughter, which was harsh, unjust and manifestly excessive in the circumstances of the case".

[4] On 21 September 2021, prior to the hearing of the applicant's renewed application for leave to appeal, the applicant filed an application seeking the following orders:

> "1. The applicant be allowed to abandon his application for leave to appeal against sentence.
>
> 2. The applicant be permitted to file Notice of Abandonment of his application for leave to appeal against sentence.
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> 3. Upon the applicant filing a Notice of Abandonment of his application for leave to appeal against sentence, sentence is to be reckoned as having commenced on the date on which it was imposed, namely, July 5, 2013."

[5] Accompanying this application is an affidavit, sworn to by the applicant on 16 September 2021, stating, among other things, the following:

> "7. As a consequence of good conduct, the Department of Corrections [sic] has awarded me a one-third remission on my sentence. Therefore, my earliest possible date of release would have been on July 4, 2021. If I did not file an appeal, I would have been released on that date. I have already served nine years [sic] of my sentence.
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> 8. At the time of making this affidavit, the court of appeal has not yet heard and determined my appeal. I am still on remand pending the hearing of my appeal, although I have already served my term of imprisonment. For this reason, I intend to abandon my appeal.
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> 9. In that regard, I will seek an order or a direction from this court that upon filing a Notice of Abandonment of my application for leave to appeal against sentence, I should be released immediately from the Tower Street Adult Correctional Centre."

[6] What is now before the court is an application for directions from the court as to the date from which the applicant's sentence should be reckoned, upon the applicant filing a notice of abandonment of his application for leave to appeal.

[7] The Crown does not oppose this application.

[8] It is true that had the applicant not filed an application for leave to appeal, he would have been eligible for early release from prison, which is made possible by rule 178 of the Correctional Institution (Adult Correctional Centre) Rules, 1991. This rule allows an inmate to earn a remission of his sentence by reason of good conduct.

[9] Ironically, due to the applicant's filing of an application for leave to appeal, the possibility of him becoming eligible for an early release has been made impossible unless the court makes alternative orders.

[10] The question as to when time begins to run in relation to his sentence is governed by section 31(3) of the Act, which provides that:

> "31. …
>
> (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."

[11] In analysing this provision, Morrison P (Ag), as he then was, in **Tafari Williams v R** [2015] JMCA App 36, noted that:

> "[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. In this case therefore, the applicant's sentences would not yet have begun to run, and will not do so until his appeal has been determined, unless this court gives a contrary direction. The only guidance provided in the Act as to what factors are to be taken into account in considering whether to give directions as to the date on which sentence shall be deemed to begin to run pursuant to section 31(3) is to be found in section 31(3A), which provides that the court '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'. However, in this case, since there is no evidence that the applicant made any such election, section 31(3A) is of no assistance.
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> [7] 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. In this regard, the danger of potential injustice to applicants/appellants arising from, not only delays in the production of the transcripts of their trials, but also the sometimes unavoidable delays in the actual hearing of appeals, is not a new one."

[12] It is therefore clear that, in the absence of a direction from the court, the sentence of the applicant would begin to run from the date upon which his appeal is determined and not before. The same would be true if the applicant were to abandon his appeal, pursuant to rule 3.22 of the CAR without first obtaining a direction from the court as to when his sentence should be reckoned to have commenced. This is because upon the registrar receiving a notice of abandonment filed pursuant to rule 3.22, the appeal is deemed to be dismissed and thus, without any directions from the court, his sentence would commence upon the receipt of the notice of abandonment, this being the date upon which the appeal would have been determined.

[13] It is to be noted that the hearing of the applicant's application for leave to appeal before the court had previously been listed in July 2019. At that hearing, the court made certain orders that were complied with fairly quickly by the applicant. However, the matter was not relisted before now, and consequently there has been a delay, regrettably, in the hearing of the application for leave to appeal.

[14] We must also note that the applicant's application for leave to appeal, having been relisted, would have been heard by the court, had he not chosen the route of abandoning his appeal. Also, as is the practice of the court, his sentence would have been reckoned to have commenced on the date on which it was originally imposed, whether he was successful in having his sentence reduced or not. However, as was amply stated by P Williams JA (Ag), as she then was, at para. [24] of **Sheldon Pusey v R** [2016] JMCA App 26, "[t]he [applicant's] wish to abandon his appeal remains a matter entirely for him", and the issue concerning this court is "whether, upon abandoning his appeal in these circumstances, it is open to the court to give the directions he now seeks".

[15] In his affidavit filed on 16 September 2021, the applicant outlined that he is seeking an order or a direction from this court that upon filing a notice of abandonment of his application for leave to appeal against sentence, he should be released immediately from the Tower Street Adult Correctional Centre.

[16] The judgments of this court in **Tafari Williams v R** and **Sheldon Pusey v R** demonstrate that the court may exercise its discretion and direct that on the filing of a notice of abandonment of appeal by the applicant the sentence imposed on the applicant is to be reckoned as having commenced on the day on which it was originally imposed. We see no reason why such discretion should not be exercised in this case. What this court cannot do in this case, however, is to direct that the applicant be released immediately from the Tower Street Adult Correctional Centre. Given that the release of the applicant is premised on his earning a remission of his sentence by reason of good conduct pursuant to rule 178 of the Correctional Institution (Adult Correctional Centre)

Rules 1991, whether he is granted an early release or not is entirely a matter for the correctional institution and not for the court.

[17] Bearing in mind the danger of potential injustice that may befall the applicant if he does not obtain directions from the court in relation to the commencement of his sentence, we are minded to give a direction that on the filing, by the applicant, of a notice of abandonment of the application for leave to appeal, the sentence imposed on the applicant is to be reckoned as having commenced on the day on which it was originally imposed.

[18] It must also be noted that though the applicant has also sought orders that he be allowed to abandon his application for leave to appeal against sentence and that he be permitted to file a notice of abandonment of his application for leave to appeal against sentence, these are not orders that are required to be made by the court. It is his right to abandon his application for leave to appeal, if he so desires, pursuant to rule 3.22 of the CAR. It, however, would have been unwise for him to have done so before seeking directions from this court as to when his sentence is to be reckoned as having commenced.

Order

> It is hereby directed that, upon the applicant filing a notice of abandonment of his application for leave to appeal, his sentence of 12 years' imprisonment at hard labour is to be reckoned as having commenced on the date on which it was imposed, that is, 5 July 2013.