**[2017] JMCA Crim 4**

**JAMAICA**

**IN THE COURT OF APPEAL**

**RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO 4/2016**

**BEFORE: THE HON MR JUSTICE MORRISON P**
**THE HON MR JUSTICE F WILLIAMS JA**
**THE HON MISS JUSTICE EDWARDS JA (AG)**

**SYLVESTER STEWART v R**

**Peter Champagnie for the appellant**

**Mrs Sharon Millwood-Moore and Miss Keisha Prince for the Crown**

**23 September, 6 December 2016 and 27 January 2017**

**F WILLIAMS JA**

**Background**

[1] This matter came before us as an application for extension of time to file an appeal. On 6 December 2016 we refused the application. These are our promised reasons for doing so.

[2] The applicant was convicted in the corporate-area criminal court on information charging him with two counts of assault at common law. The facts gleaned in this matter in the absence of the notes of evidence are to the effect that, on the Crown's case, the applicant pointed his licensed firearm at and threatened two complainants. This is said to have occurred after the applicant used the motor vehicle he was driving

to chase that in which the two complainants were travelling, confronting them when they had stopped and accusing them of causing their vehicle to "splash" him, by driving through a pool of water on the road. He is said to have uttered to the complainants words to the effect that it was only the mercy of God that prevented him from shooting them when he had caught up with and confronted them.

[3] On being found guilty, he was fined the sum of $15,000.00 with the option of serving 30 days in prison. The sentence was imposed on 4 November 2002.

[4] A document headed "Notice of Intention to Appeal Sentence" was filed in the name of the attorney-at-law then representing the applicant (not Mr Champagnie) on 21 November 2002. And on 29 November 2002 a document headed "Notice and Grounds of Appeal" was filed in the name of the said then attorney-at-law, now deceased.

[5] The documents put together to form the record of appeal reveal that, since assuming conduct of the matter, Mr Champagnie has made numerous efforts to secure the relevant notes of evidence. However, this has been to no avail. When the matter first came before us on 23 September 2016, we adjourned it and directed the Registrar of this court to assist the process by trying to obtain the said notes through the relevant court administrator; as well as copies of the entries made by the learned Resident Magistrate in the court sheet relating to the trial. Thankfully, the court and counsel on both sides were provided with copies of the relevant entries in the court sheet. However, regrettably, the notes of evidence still were not produced. The court would,

therefore, have been hard pressed had it been required to give any decision based on the merits of the case.

**The law relating to the filing of criminal appeals**

[6] In the Resident Magistrates' Courts (now referred to as the Parish Courts) the requirements for appealing a criminal conviction and sentence are set out in sections 294 and 295 of the Judicature (Parish Courts) Act (as it is now known – "the Act"). The requirements for the filing of grounds of appeal are set out in section 296 of the said Act. It is necessary to set out these provisions in their entirety in order to assist with a full appreciation of the difficulty faced by the applicant in the instant case. The provisions (as amended in February 2016) read as follows:

> "**294**.--(1) Any person desiring to appeal from the judgment of a Judge of the Parish Court in a case tried by him on indictment or on information in virtue of a special statutory summary jurisdiction, shall either during the sitting of the Court at which the judgment is delivered give verbal notice of appeal, or shall within fourteen days from the delivery of such judgment give a written notice of his intention to appeal, to the Clerk of the Courts of the parish.
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> (2) Every written notice of appeal shall be sufficiently signed, if signed by or on behalf of the appellant either with his name or mark, or with the name of his solicitor, but if signed with his mark, such signature shall be attested by a subscribing witness.
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> **295.** If the appellant shall fail to give the notice of appeal as herein provided, his right to appeal shall cease and determine.
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> **296.-(1)** Notwithstanding anything contained in any law regulating appeals from the judgment of a Judge of the Parish Court 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:
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> 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.
>
> (2) The grounds of appeal shall set out concisely the facts and points of law (if any) on which the appellant intends to rely in support of his appeal and shall conclude with a statement of the relief prayed for by the appellant.
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> (3) The Court of Appeal may dismiss without a hearing any appeal in which the grounds of appeal do not comply with the provisions of subsection (2)." (Emphases added)

**Discussion**

[7] A perusal of sections 294 and 295 of the Act makes it apparent that, in order to have a valid appeal, a prospective appellant has either: (i) to give oral notice of appeal at the time judgment is given; or (ii) to file a written notice of appeal within 14 days of the said judgment. The clear meaning of section 295 is that failure to comply with either of these options leads to the result that the appeal shall "cease and determine".

[8] In relation to the grounds of appeal, section 296 of the Act also requires that they be filed within 21 days of the court's judgment. However, the proviso to this section permits this court to exercise its discretion by proceeding to hear and determine an appeal in which the grounds of appeal have not been filed within time, "in any case for good cause shown".

[9] It is important to note that this discretion that the draftsman gives to this court in section 296 is completely absent from sections 294 and 295. Considering all three provisions together, therefore, the conclusion must be that the draftsman intended for there to be strict compliance with the requirements for instituting an appeal, whilst allowing some latitude for the formulation and re-formulation of the grounds of appeal. There is, therefore, no power in this court to extend the time to file an appeal where the provisions of section 294 have not been complied with.

[10] A perusal of the certified copy of the court sheet dealing with the sentencing of the applicant does not reflect a noting of the giving of an oral notice of appeal, as is the practice in the Parish Courts. Before us, the applicant did not positively assert that his then attorney-at-law gave oral notice of appeal. This, then, cast on him the onus of establishing that the written notice of appeal was filed within 14 days of the date of verdict and sentencing on 4 November 2002 – that is, by 18 November 2002. As previously indicated, the record indicates that the said notice was filed several days late – that is, on 21 November 2002. The grounds of appeal as well, which ought to have been filed by 25 November 2002, were not filed until 29 November 2002. In order to take advantage of the proviso to section 296 of the Act and invoke the court's discretion in relation to the late filing of the grounds of appeal, the applicant would first have had to satisfy the court that notice of appeal was given in accordance with section 294 of the Act. He failed to satisfy this requirement.

[11] Had the applicant been able to satisfy the requirements of section 294 of the Act, it might have been necessary to address another issue in relation to the notice of

appeal and the grounds. This is so because, whereas the purported notice of appeal seeks to appeal against sentence only, the grounds of appeal seek to challenge certain questions of fact, and, ultimately, the conviction itself. However, it is not necessary for the court to definitively address that issue in this application.

[12] The matter of the interpretation to be given to and the effect of section 294 of the Act has received consideration by this court in a number of cases. Among them is the case of **Nicola Bowen v R** [2010] JMCA Crim 80. In that case, Morrison JA (as he then was), having reviewed cases such as: (i) **R v Byron Lewis** (RMCA No 24/1993, judgment delivered 13 December 1993); (ii) **Rex v Savage** (1941) 4 JLR 24 and (iii) **R v Bingham** (Clark's Supreme Court Judgments 1917-1932, page 130), opined at paragraph [9] of that judgment that in that case, the "appellant's right of appeal had clearly been extinguished by operation of law". This arose from that appellant's failure to comply with the provisions of section 294 of the Act.

[13] The decision in **Nicola Bowen v R** was in part based on a consideration of dicta such as that of Wolfe JA (as he then was) at page 3 of the judgment in **R v Byron Lewis** to the effect that: "failure to comply with section 294 is made fatal by section 295"; and at page 6 of the said judgment that: "no power resides in this court to enlarge time for filing notice of appeal in respect of appeals from the Resident Magistrates [sic] Court".

[14] It was for these reasons that we refused the application to enlarge time in this matter.

**The absence of the notes of evidence**

[15] Before parting with the matter, however, we must express our concern about the non-production of the notes of evidence. The reason given was that the learned Resident Magistrate's note book in which the evidence was recorded could not be found, despite numerous searches. The requirement for the preservation of the notes of trials in the Parish Courts is provided for in sections 291 and 292 of the Act as follows (so far as is relevant):

> "**291**...If the notes taken in any of the cases aforesaid are taken in a book, such book shall be preserved in the office of the Clerk, and a reference to the same shall be noted in the fold of the information or indictment; if the same are taken on loose sheets, such sheets shall be attached to the information or indictment.
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> In either case the information or indictment with the record made thereon as aforesaid, and with the notes aforesaid, shall constitute the record of the case, and each such record shall be carefully preserved in the office of the Clerk of the Courts, and an alphabetical index shall be kept of such records.
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> **292**. The entries made under section 291, or a copy thereof purporting to bear the seal of the Court, and to be signed and certified as a true copy by the Clerk of the Courts, shall at all times be admitted in all Courts and places whatsoever as *prima facie* evidence of such entries, and of the facts therein stated, and of the proceedings therein referred to, and of the regularity of such proceedings." (Emphasis added)

[16] In the instant case the matter could fairly have been dealt with on the available documents that constituted the record and on the relevant sections of the Act. However, it is not impossible that, in another case with different facts, where the notes

of evidence were absent, the absence of the notes, where no fault for their non-production could be laid at the feet of the appellant or applicant, could possibly result in a different outcome, depending on the circumstances. The delay in this application being heard, for example – due largely to the unavailability of the notes – is a cause for concern. With the sentence having been imposed on 4 November 2002 and the application having been heard in 2016, the delay amounts to some 14 years.

[17] In the case of **Melanie Tapper v Director of Public Prosecutions** [2012] UKPC 26, the Judicial Committee of the Privy Council considered the question of whether undue delay might result in a conviction being quashed. In that case, Lord Carnwath, referred to the case of ***Boolell v The State*** [2006] UKPC 46, in which Lord Carswell, giving the opinion of the Privy Council, stated the following as representing the law of Mauritius:

> "'(i) If a criminal case is not heard and completed within a reasonable time, that will of itself constitute a breach of section 10(1) of the Constitution, whether or not the defendant has been prejudiced by the delay.
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> (ii) An appropriate remedy should be afforded for such breach, but the hearing should not be stayed or a conviction quashed on account of delay alone, unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all.' (para 32)."

[18] Lord Carnwath, at paragraph 28 of the judgment, expressed the view that these paragraphs in fact summarise the law stated in the **Attorney General's Reference (No 2 of 2001)**, [2004] 2 AC 72. His lordship affirmed on behalf of the Board that both these cases reflect the law as obtains in Jamaica. Additionally, he observed that:

> " … Although those judgments were not directed specifically at the effect of delay pending appeal, the same approach applies. It follows that even extreme delay between conviction and appeal, in itself, will not justify the quashing of a conviction which is otherwise sound. Such a remedy should only be considered in a case where the delay might cause substantive prejudice, for example in an appeal involving fresh evidence whose probative value might be affected by the passage of time."

[19] The concern that naturally flows from this is whether, in the absence of notes of evidence, a court will always be able to say that a conviction is "otherwise sound". Additionally, from these dicta, a conviction could be quashed where an appellant can show that delay has resulted in "substantive prejudice". These dicta demonstrate that non-production on the notes of evidence in any case can, along with other factors, generate serious challenges in supporting convictions on appeal.

[20] Given the importance of the notes of evidence of any trial to a fair and just outcome of an appeal, it is hoped that there will be no recurrence of the factors that led to their non-production in this case; or, at the very least that those responsible for the preservation of such records will ensure that such occurrences will be kept to a minimum.