

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MRS JUSTICE GEORGIANA FRASER JA (AG)**

SUPREME COURT CRIMINAL APPEAL NO 23/2016

APPLICATION NO COA2022APP00073

ANDREW WILLIAMS v R

Ms Zara Lewis for the applicant

Mrs Sharon Millwood-Moore, Ms Alexia McDonald and Ms Tashell Powell for the Crown

13 June 2022

BROOKS P

[1] On 27 November 2015, Mr Andrew Williams was tried and convicted in the High Court Division of the Gun Court, before Dunbar-Green J, as she then was, sitting alone, for the offences of illegal possession of firearm and robbery with aggravation. He was sentenced, on 5 February 2016, to serve seven years' imprisonment in respect of the former, and 11 years in respect of the latter offence. She ordered that the sentences run concurrently.

[2] He filed an application for leave to appeal against the convictions and sentences. On 27 November 2020, a transcript of the trial was produced for the purpose of considering the application. It was considered by a single judge of this court, who, having reviewed the transcript, opined, on 22 February 2021, that Mr Williams had no

real prospect of succeeding on appeal. He applied for this court to consider the application and the application was scheduled for hearing by the court today.

[3] Counsel for Mr Williams was informed, by letter dated 26 October 2021, of the scheduled date for the hearing of the application. On 31 May 2022, just two weeks before the scheduled hearing of the application, Mr Williams, through his counsel, filed an application requesting permission to abandon his appeal. He also asked the court to direct that upon the filing of the notice of abandonment, his sentences should be reckoned as having commenced on the date of their imposition.

[4] In an affidavit supporting his application, Mr Williams stated that he is almost at the end of his sentences and wishes to take advantage of the privilege of early release rather than pursue his application for leave to appeal. Although the appeal may now be heard, Mr Williams has said "I unequivocally state that I am no longer interested in challenging my conviction or sentence".

[5] Because he sought leave to appeal, Mr Williams has, technically, not yet started serving his sentences (see paragraphs [4] to [6] of **Tafari Williams v R** [2015] JMCA App 36). Had he not filed an application for leave to appeal, the time for his early release (pursuant to rule 178 of the Correctional Institution (Adult Correctional Centre) Rules, 1991), when the relevant date arrives, would be a matter of consideration for the correctional institution's management.

[6] Since the transcript is available, counsel for Mr Williams and the Crown were informed that they should come prepared for the application for leave to appeal, to be heard. Mr Williams' response was to file a fresh application for leave to abandon his appeal. He supported this application with an affidavit giving details of the circumstances of his incarceration but repeated his desire to abandon his application for leave to appeal, despite his confidence that he has "valid grounds of appeal".

[7] The nub of his reasons for his wish to abandon his application for leave to appeal may be seen in the following paragraphs of his affidavit filed on 10 June 2022:

"9 If I had begun serving my sentence I would become eligible for parole or early release for good behaviour in a couple of years.

10. 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 all the time I have spent in custody towards my sentence.
11. 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 times.
12. I am asking the Court of Appeal to exercise its discretion and make and [sic] order that upon the abandonment of my appeal I will have the benefit of the time served and afford me the benefit of an early release."

[8] Mr Williams' motivation reveals that there may be a misunderstanding of this court's approach to applications for leave to abandon appeals and applications for leave to appeal. It also demonstrates that it is necessary to restate the court's approach to orders regarding the commencement of sentences upon the dismissals of appeals and refusals of applications for leave to appeal.

[9] Firstly, an application for leave to declare the date of the commencement of a sentence upon the abandonment of an application for leave to appeal lies at the discretion of the court. The applicant has to justify the basis for the court adopting such a course.

[10] Secondly, since 2013, this court has adopted the Privy Council's approach used in **Carlos Hamilton and Jason Lewis v The Queen** [2012] UKPC 37 (which is an appeal from this court), in declaring the commencement date for sentences for unsuccessful appeals and applications for leave to appeal. In such cases, the court,

except in an extraordinary case, will order that the commencement date for the sentence is the date of the sentencing following the trial.

[11] Thirdly, although regrettably, in recent times, there have been several applications for leave to abandon appeals, in almost every such case the transcript of the trial was not available. In **Lenroy Lawrence v R** [2020] JMCA App 27 the transcript was available but the application for leave to appeal did not come on before the court before Mr Lawrence's early date for release and he applied for permission to abandon his application for leave to appeal.

[12] Bearing in mind those principles and in the circumstances of this case, learned counsel for Mr Williams, Ms Lewis, was, therefore, asked if there was any reason that the application for leave to appeal should not be heard. She indicated that she could add nothing to what Mr Williams had said in his application and affidavit.

[13] We cannot agree with Mr Williams' approach. His case is different from the majority of cases in which applications to abandon, have been filed. In his case, the transcript is available. His early release date has not yet passed, nor is it imminent. There is, therefore, no reason for the court not to hear his original application for leave to appeal, since he would not be prejudiced if it were heard.

[14] Even if the application for leave to appeal was refused, the practice of this court mentioned above, when applied, would mean that the court would declare that his sentence would commence on 5 February 2016. That sentence date is the result that he seeks by filing his application for leave to abandon his application for leave to appeal. He is, therefore, better served by having his application for leave to appeal heard, where he may stand a chance of success, if, as he contemplates, he has "valid grounds of appeal".

[15] It was for those reasons that his application for leave to abandon, on conditions, his application for leave to appeal, was refused, and the court heard his application for leave to appeal.

[16] The evidence at the trial was that on 23 December 2014, at about 5:20 pm, Ms Shanice Morgan was standing at the corner of Hector Street and Camp Road in the parish of Kingston, when two men passed her and one called to her. She saw them coming back toward her and one of them, who was armed with a gun, accosted her, pointed the gun to her side and robbed her. The man with the gun took \$2,000.00 cash from her (\$500.00 from her hand and \$1,500.00 from her purse) as well as a cellular telephone valued at \$20,000.00. She focussed on his face during the robbery and noticed that he had a scar across his forehead. Having robbed her, the men ran away. A week later, she saw the gunman again. She identified him by the scar on his forehead. He was at the time acting as a conductor on a bus in Cross Roads. She went to the Cross Roads Police Station and a policeman accompanied her to where she saw the bus. There, she identified the man to the police officer, who took the man, Mr Williams, into custody.

[17] Mr Williams' defence at the trial was an alibi. In his unsworn statement, he denied knowing or having robbed Ms Morgan and said that at the time of the robbery he was working as a conductor on the same bus that he was attending to when he was arrested.

[18] The learned trial judge properly identified the issues that arose in the trial, namely identification, credibility and alibi. She gave herself the appropriate directions in respect of each. In particular, she gave herself a standard **Turnbull (R v Turnbull and Another** [1977] QB 224; [1976] 3 WLR 445) direction. She considered a complaint by defence counsel, that Ms Morgan's pointing out of Mr Williams was a case of unacceptable confrontation identification, and she rejected that submission. She also rejected Mr Williams' defence and found that the prosecution had proved its case against him so that she was sure of his guilt.

[19] There is no basis for disagreeing with the learned judge's assessment and determination of the issues and therefore the convictions should stand.

[20] On considering the relevant sentences, the learned judge utilised the guidance provided by the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines') and imposed sentences that are consistent with the usual sentences imposed for the offences for which Mr Williams was convicted.

[21] Ms Lewis conceded that there was no error in the learned judge's approach to either conviction or sentence.

[22] Counsel for the Crown also submitted that there was no basis for granting leave to appeal in this matter.

[23] We agree with those submissions.

[24] During the submissions the court brought to counsel's attention that there was an inconsistency in the dates specified in the particulars of offence as stated in the indictment. Count one states the date of the offence as 30 December 2014, while count two states the date of the offence as 23 December 2014. Counsel for the Crown, Ms McDonald submitted that this was the type of error contemplated by section 61 of the Criminal Justice (Administration) Act ('CJAA'), which allows this court to amend indictments where the justice of the case requires it and there is no prejudice to the appellant or applicant for leave to appeal. She applied for count one of the indictment to be amended so that the date in the particulars of offence for count one, reads "23 December 2014" instead of "30 December 2014". Ms Lewis did not oppose the application.

[25] We agree with Ms McDonald's submission that section 61 of the CJAA is applicable in this situation. The section states:

"The Court of Appeal may, if it shall think fit, amend all defects and errors in any indictment or proceeding brought before it under this Act, whether such amendment could or could not have been made at the trial, and all such amendments as may be necessary for the purpose of

determining the real question in controversy shall be so made."

[26] All the evidence in the case pointed to these offences having been committed on 23 December 2014. There is no evidence of any firearm being found on Mr Williams on 30 December 2014. We, therefore, ordered that the indictment be amended in accordance with Ms McDonald's application.

[27] Based on all the above, the orders are:

1. The particulars of offence as it appears in count one of the indictment shall be amended to delete the date 30 December 2014 and to substitute for it the date 23 December 2014.
2. The application for permission to abandon the application for leave to appeal is refused.
3. The application for leave to appeal is refused.
4. The sentences shall be reckoned as having commenced on 5 February 2016.