



In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2017: No. 024

ART SIMONS

Appellant

- and -

FIONA MILLER
(POLICE SERGEANT)

Respondent

EX TEMPORE JUDGMENT

(in Court)

Appeal against conviction filed prior to sentencing hearing—automatic stay under Criminal Appeal Act 1952 section 11(1)—failure to diligently prosecute appeal—conflict between section 11(1) and Court’s duty to give cases a fair hearing within a reasonable time under section 6(2) of Bermuda Constitution—proper construction of Criminal Appeal Act section 11(1)

Date of hearing: 7th of June 2017

The Appellant did not appear

Ms. Jaleesa Simons, Office of the Director of Public Prosecutions, for the Respondent

Introduction

1. The Appellant in this matter was charged on the 27th of February 2015 with three offences. The first two offences were possessing cannabis and cannabis resin. The

third offence was attempting to introduce contraband into a prison contrary to section 26 (a) of the Prisons Act 1979. All offences were alleged to have been committed on the 11th of January 2015, over two years ago.

2. There was a trial (before the Wor. Archibald Warner) which concluded with judgment being delivered on the 15th of November 2016. Before sentence could be imposed, the Appellant filed a Notice of Appeal. This on its face does not disclose an arguable ground of appeal. The ground of appeal is as follows:

“The learned trial judge erred in law applying the wrong burden of proof to the determination of a primary fact.”

The directions hearings before the Registrar

3. The appeal record was prepared and the matter was brought before the Learned Registrar pursuant to a Notice of Hearing dated the 24th of April 2017, returnable for the 4th of May 2017 at 11:00 am.
4. The purpose of this hearing following a new practice by the Registrar is to smooth out the wrinkles and kinks in the appellate process as regards magisterial appeals. Had the Appellant appeared at that hearing as the Respondent did, then any issues such as the need for further particularization of the ground of the appeal could have been dealt with. However, with no explanation that was communicated to the Court, as far as I can see from the file, the Appellant’s counsel simply did not attend.
5. The matter was adjourned to the 11th of May before the Registrar and on that occasion the Appellant’s counsel Mr. Richardson again failed to attend. Despite best efforts to clarify whether Mr. Richardson had notice of that second directions hearing, I am bound to give him the benefit of the doubt because it seems clear that the Court failed to notify him of that date-at least by any writing that was placed on the Court file.
6. On 11th May 2017 the Registrar, seeking to ensure that the appeal was dealt with in an expeditious manner, made the following Order:

“Whereas sentence in Magistrates court has been stayed pending appeal and the Appellant is on bail (see page 79 of the Record of Appeal) this matter is fixed for hearing on 7 June 2017 at 2:30 pm.

Any attempts to further delay the hearing of this appeal will have to be done by adjournment request directly to the Court. This matter will not be delisted notwithstanding any agreement between counsel.”

7. The purport of that Order was communicated to Mr. Richardson, counsel for the Appellant, because on the Court file appears an email from Ms Nicole Smith (Senior Crown Counsel (Administration) in the DPP’s Office). On 15th May at 1:12 pm she advised Mr. Richardson that the appeal hearing had been scheduled for 7th June 2017 and that the Registrar was concerned about its vintage and the non-appearance of Mr. Richardson at the previous directions hearings.
8. There was a very brief response from Mr. Richardson to Ms. Smith copied to the Court which response merely said this: *“I will not be in the jurisdiction between May 31st and June 8th”*. That was responded to the following day by the Registry advising Mr. Richardson as follows:

“Please confirm counsel that will be holding for you on the 7th of June 2017 at 2:30 pm as you know that based on the order of court by the Registrar this matter will not be delisted”.

The substantive appeal hearing

9. The Appellant’s counsel has elected not to instruct counsel to hold for him or even to make an application for an adjournment.

Section 11(1) of the Criminal Appeal Act and its misuse

10. The conduct of this appeal brings into focus the difficulties with section 11(1) of the Criminal Appeal Act 1952. That section provides an automatic stay of any sentencing proceedings once a Notice of Appeal has been filed. It causes a considerable mischief, delay and, more significantly still, a dilution of the constitutional rights of complainants in criminal cases to a fair hearing in a reasonable time for an appellant to be able to file a Notice of Appeal which does not even disclose an arguable ground of appeal and delay the sentencing process.
11. In this particular case the charges are serious and there is a considerable public interest in expedition because the charges represent an attempt by the Commissioner of Prisons to ensure that illicit material is not smuggled in to the prisons or

correctional facilities by prison officers. An inability to bring to justice a prison officer who has been tried and convicted for smuggling drugs into a prison for prisoners undermines the authority of the Commissioner of Prisons and undermines his efforts to hold his officers to proper standards of discipline.

12. Section 11(1) of the Criminal Appeal Act reads as follows:

“(1) Where notice of appeal has been duly given by an appellant under this Act all further proceedings shall, subject to this section, be stayed and accordingly after notice of appeal has been given, no sentence shall be opposed or order made pending the determination or as the case may be the abandonment of the appeal.”

Construing section 11(1) so as to conform to section 6(1) of the Constitution

13. This provision (section 11(1) is found in a 1952 Act which predates the Bermuda Constitution Order 1968. Section 5 of the Bermuda Constitution Order provides that existing laws shall be read subject to such adaptations, modifications and qualifications as are required to bring them in to conformity with the Constitution¹. It seems to me that section 11(1) of the Criminal Appeal Act 1952 cannot properly be read consistently with section 6(1) of the Constitution² if it is read as giving persons who are convicted an unfettered right to file a notice of appeal and postpone indefinitely the sentencing process.

14. In my judgment, Section 11(1) must be read as being subject to a proviso to the following broad effect. The entitlement of an appellant to the benefit of the automatic stay will only crystallize when (1) there is some good reason³ for filing an appeal before the sentencing hearing takes place and provided that (2) any arguable appeal is prosecuted in a diligent manner.

¹ Section 5(1) provides:

“Subject to the provisions of this section, the existing laws shall have effect on and after the appointed day [2 June 1968] as if they had been made in pursuance of the Constitution and shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.”

² Section 6 of the Constitution provides:

“(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.”

³ Section 7(2) of the 1952 Act provides that time for appealing a conviction runs from any later date of sentence, so the legislative scheme does not envisage that appeals against conviction should be heard in advance of sentence in the ordinary course.

Conclusion: disposition of the present appeal

15. In the circumstances of the present case the Appellant has not filed an appeal which is arguable on its face and has not prosecuted the appeal in a diligent manner. In those circumstances, in my judgement the only appropriate Order to make in the present circumstances is to dismiss the appeal.
16. I accept that the practice of the Court has hitherto been somewhat relaxed. The Defence Bar may well have been given the impression that it is possible to file notices of appeal and simply obtain the benefit of a lengthy stay. In these circumstances, because this Court is adopting a new approach, I dismiss the appeal without prejudice to the right of the Appellant to file a fresh Notice of Appeal against conviction together with any appeal against sentence-after the sentencing hearing.
17. That hearing has been postponed, as far as the Court can see, without just cause for several months now.

Dated this 7th day of June, 2017

IAN R.C. KAWALEY CJ