[2024] JMCA Crim 1

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE HARRIS JA
THE HON MRS JUSTICE G FRASER JA (AG)

PARISH COURT CRIMINAL APPEAL NO COA2022PCCR00007

MICHAEL IRVING v R

O'Neil Brown instructed by O'Neil Brown & Co for the appellant

Miss Natallie Malcolm and Sean Nelson for the Crown

29 November 2023 and 19 January 2024

Criminal Law –Whether notice of appeal filed within time – Whether single holding ground of appeal as filed is defective – Failure to set out facts and points of law – Ground of appeal stated in very wide terms – Whether good cause shown to hear and determine appeal - Sections 294, 295 and 296 of the Judicature (Parish Courts) Act

BROOKS P

[1] I have had the privilege of reading, in draft, the judgment of my learned sister, G Fraser JA (Ag). Her reasoning concurs with that which caused me to agree with the orders that were made.

HARRIS JA

[2] I too have read the draft judgment of G Fraser JA (Ag) and agree that it reflects my views on the case.

G FRASER JA (AG)

[3] On 29 November 2023, after hearing counsel's oral arguments and having digested the written submissions of the Crown and other material provided, we made the following orders:

> "1. The appeal is dismissed.
>
> 2. The convictions and sentences of the learned Parish Court Judge, His Honour Mr Steve Walters, imposed on 23 September 2020, are affirmed.
>
> 3. The sentences are deemed to have commenced on 23 September 2020."

At the time of making the foregoing orders, we promised to give brief written reasons for our decision. These are our promised reasons.

Background

[4] Mr Michael Irving, the appellant, on 23 September 2020, was convicted in the Westmoreland Parish Court of the offences of false imprisonment and indecent assault after a trial before His Honour Mr Steve Walters ('the Parish Court Judge'). He was sentenced to six months' imprisonment at hard labour, which was suspended for one year for the offence of false imprisonment and nine months' imprisonment at hard labour, which was suspended for three years for the offence of indecent assault. The sentences were to run concurrently.

[5] The offences were committed against a female complainant, who lived in the same area as the appellant. She had known him all her life. The incident occurred on 9 June 2018 at the home of the appellant. The complainant had attended a wake in the district of Belvedere in the said parish, where the appellant was also in attendance. On leaving the wake at about 3:00 am, the appellant offered the complainant a ride home, which she accepted. Instead of taking the complainant to her home, the appellant diverted the car to his house, where he pulled her inside and proceeded to lock the door. While the appellant forcefully kissed the complainant and got on top of her, she was able to dial

her mother's phone number. The complainant resisted all advances by the appellant during his attempts to pull down her underwear. The appellant's actions were foiled by the complainant's mother's voice coming over the phone, and he thereupon ceased his unwanted attentions and allowed her to go home with the parting shot, "make sure you nuh tell". He repeated this admonition and left her. Although the complainant had promised to keep her silence, on her arrival at her home, she made an immediate report to her mother and subsequently reported the incident at the Bethel Town Police Station on 9 June 2018 at about 7:13 am.

[6] After many unsuccessful attempts by the police to find the appellant, on 29 June 2018, he voluntarily attended at the Bethel Town Police Station and submitted himself to their custody. He was accompanied by his counsel, Mr O'Neil Brown. The appellant was informed by the police of their investigations into the offences of forcible abduction and assault with intent to rape. He was subsequently arrested and charged with those offences. When cautioned, he made no utterances.

[7] The prosecution had presented an indictment for the offences of assault with intent to rape, false imprisonment, and indecent assault, thereby bringing the matter within the trial jurisdiction of the Parish Court Judge. It is noted that the order of indictment signed by the Parish Court Judge relative to these same offences was dated 7 July 2020, the same day the trial commenced.

[8] The appellant at trial gave evidence on oath. He denied the complainant's allegations that he had attempted to assault her with the intent to have sexual intercourse with her. He further denied falsely imprisoning the complainant. His case was that she willingly entered his home and made the first overture of kissing him and had, of her own free will, removed her underwear. Following the trial, which occupied a space of some four days, the appellant was found guilty of false imprisonment (count two) and indecent assault (count three).

[9] On 1 October 2020, the appellant signed and filed a Criminal Form B1 ('B1 form') seeking to appeal against his convictions and sentences. On page two of the B1 form, the appellant indicated his grounds of appeal in terms "that the verdict of the Learned Trial Judge is unsupported by the evidence". Subsequently, the notes of evidence and findings of fact were prepared by the Parish Court Judge and certified by the Clerk of the Courts on 14 July 2022. The record of proceedings was received on 19 July 2022.

[10] The Crown contended that if the B1 form is accepted by this court as having been filed on the date on the form, 1 October 2020, then the written notice of appeal would have been filed within time. The Crown further contended that the single ground of appeal (mentioned in para. [9] above), as filed, is defective. The two defects, according to the Crown, are (i) it failed to set out the facts and points of law on which the appellant sought to rely in support of his appeal and (ii) that single ground of appeal was formulated in very wide terms.

[11] Counsel, Mr O'Neil Brown, who is on record representing the appellant, has briefly submitted that the non-compliance with section 296(1) of the Judicature (Parish Courts) Act ('the Act') was not fatal as the appellant could have made an application to file supplemental grounds of appeal. He, however, has frankly admitted that he was unable to secure the necessary instructions from the appellant and was, therefore, not able to advance any useful arguments before the court. He, also sought to challenge the decision of **Rex v Archibus Mills** (1941) 4 JLR 55 as being authority for the argument advanced by the Crown that the solitary ground of appeal that was filed can be regarded as frivolous because it is bereft of substance and particularity.

Discussion

[12] We found the material outlined in the Crown's submissions to be very helpful and will adopt such portions of it as are relevant to the discussion. The vital issue for deliberation is whether at the time of hearing there was any existing appeal before us. In making that assessment, regard must be had to the provisions of the JPCA, which guides the procedure when appealing from the judgment of a Parish Court Judge

exercising his or her special statutory summary jurisdiction or jurisdiction of trial on indictment in a criminal case.

[13] We commence the discussion by examining the procedure to be utilized by an appellant who is convicted in the Parish Court and make a comparison with the procedure used by the appellant herein. We register that pursuant to section 293(1) of the JPCA, there is no obligation on an appellant to seek leave to appeal the convictions and/ or sentences imposed by a Parish Court Judge. However, according to the dictates of the said JPCA, when a convict is appealing his convictions and/ or sentences, the proper procedure for doing so is that contained in sections 294, 295 and 296.

[14] Since references will be made to section 294 of the JPCA, it is convenient at this time to set out that provision 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.
>
> (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."

[15] To initiate the appellate process from a judgment of a Parish Court Judge, an appellant is obliged to give a notice of appeal in accordance with section 294(1) of the JPCA and may do so by communicating the notice orally at the time of the Parish Court Judge's pronouncement of guilty or at the time the sentence is imposed. If the appellant had not exercised his verbal option, then he must, within 14 days after the delivery of the "judgment" (which is inclusive of sentence), lodge a written notice of appeal with the Clerk of the Courts of the parish where he was convicted. The requirement here is

mandatory, and further, neither the Parish Court Judge nor the Court of Appeal has any jurisdiction to extend time within which to give notice of appeal. It, therefore, behoves an appellant to keenly observe this provision; otherwise, "[i]f the appellant shall fail to give the notice of appeal as herein provided, his right to appeal shall cease and determine" (see section 295 of the JPCA).

[16] In this case, the procedure that obtained was that the appellant completed and executed a B1 form and thereafter filed it at the Westmoreland Parish Court, as indicated by the court stamp on the face of the document. It is to be noted that the use of the B1 form is usually appropriate when the criminal trial was conducted either before the High Court Division of the Gun Court or the Circuit Court Division of the Supreme Court. In this appeal, the use of that form and the procedure adopted by the appellant is, thus, highly unusual but does not go against the requirement of the law governing appeals from the Parish Courts. The procedure that was utilized by the appellant, although unusual, is therefore not a breach of the legislation because it was in keeping with sections 294(1) and (2) of the JPCA. Having assessed that form, we say the appellant was compliant because the notice was in writing; it was signed by the appellant, and it was within time (less than 14 days after sentencing) and was filed at the parish court where he was convicted. Since the B1 form is deemed acceptable by this court, the appellant had overcome the first hurdle in the appeal process.

[17] We note also that, pursuant to section 296 of the JPCA, an appellant is required to file his grounds of appeal. That section provides that:

> "**296** - (1) Notwithstanding anything contained in any law regulating appeals from the judgment of a Magistrate 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:

> 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.
>
> (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)."

[18] This requirement is also time sensitive since this task must be accomplished by the appellant within 21 days "after the date of the judgment". This means that after the judgment is handed down, the appellant must draft and file his grounds of appeal with the Clerk of the Courts in the relevant parish within 21 days after the date the judgment was given (whether there is verbal or written notice of appeal).

[19] Sub-section (2) dictates that the grounds of appeal must contain concise facts and any law the appellant intended to rely in support of his appeal and should conclude with a statement of the relief sought. In the circumstances of how this appeal unfolded, the appellant filed his B1 form and took no further steps in the appeal process. No compliant grounds of appeal were ever received by this court. Given their absence, we conclude that no effort was made by the appellant before or since July 2022 to file grounds of appeal in fulfilment of the statutory requirements. Based on the state of the records, the only "ground of appeal" filed is that which is endorsed on page two of the B1 form.

[20] Crown Counsel made a preliminary objection based on defects that existed in the ground of appeal as it was stated on the B1 form. It was contended that the construct of that sole original ground of appeal is contrary to the guidance by Furness CJ as adumbrated in the decision of **Rex v Archibus Mills**. Crown Counsel further submitted that the shortcomings in the procedure utilized by the appellant amounted to a defect and was, moreover, fatal to the appeal. Therefore, this court should dismiss the appeal

without a hearing. Crown Counsel also focused the court's attention on the provisions of section 296(3) of the JPCA, which imbued the court with the discretion to dismiss an appeal where the grounds of appeal are not in compliance with subsection (2). The case of **Jerome Graham v R** [2023] JMCA Crim 8 ('**Jerome Graham**') was cited by the Crown in support of this contention.

[21] We agree with the Crown that there is a strong basis for dismissing the appeal without a hearing where an appellant is non-compliant in relation to the provisions of the JPCA relative to criminal appeals. We are particularly mindful of the enunciations of Brooks P in **Jerome Graham** that the requirement of section 296(3) is for the avoidance of frivolous appeals. We totally agree that the appellant's action of filing a single broad ground of appeal without more is of no value to this court and the determinative issues it must contemplate.

[22] Section 296(1) of the JPCA is the facility afforded to an appellant and which allows this court to accommodate an appeal, even when strict compliance with the law is not adhered to. This proviso allows the court to, "in any case for good cause shown, hear and determine the appeal". This provision had also been the subject of judicial pronouncement by our apex court in the recent decision of **Ray Morgan (Appellant) v The King (Respondent) (Jamaica)** [2023] UKPC 25 ('**Ray Morgan v The King**'). In that case, an appellant who was incarcerated and serving a sentence relative to the conviction he was appealing against had failed to file his grounds of appeal with the Clerk of the Courts as required by the JPCA and was deemed to have abandoned his appeal. Unfortunately, Mr Morgan was not informed of the mishap that brought about this situation, which was a result of an administrative error on the part of the prison authorities, who had sent the grounds of appeal to the registrar of the Court of Appeal instead of to the Clerk of the Courts for the relevant Parish Court. To compound the sad situation, Mr Morgan was also not informed of the proviso (now subsection 299(2) of the 2021 amendment to the JPCA), which would have afforded him a hearing if he could show good cause as to why the appeal requirements were not adhered to. Lord Stephens

took the view that even if the formalities in the JPCA are not observed, this does not prevent the Court of Appeal from entertaining an appropriate criminal appeal.

[23] The question now is whether this court should exercise its discretion and entertain Mr Irving's appeal. The first consideration is whether "good cause" has been shown by the appellant so as to trigger the exercise of the discretion. We would hasten to point out that the situation in which the appellant, Ray Morgan, found himself was not of his own making and entirely different to the case at bar. This appellant was always at liberty because his sentences were of a non-custodial disposition. His notice of appeal had been filed within time by counsel who represented him and was lodged with the appropriate court officer. The record of appeal had been prepared and made available to him.

[24] The appellant would have been alerted that the Crown had taken issue with the "defective" procedure adopted by him, as demonstrated in their written submissions filed on 23 February 2023, highlighting that these shortcomings existed. The appellant has made his situation even more egregious because some nine months after the Crown's submissions were filed and before the hearing of the appeal, he made absolutely no effort to attempt to correct the lacunae or comply with the law. Although it was open to him to have sought leave to extend the time for filing his grounds of appeal or to file supplemental grounds of appeal, he took no action. Ultimately, no compliant grounds of appeal exist before this court, save and except for the original holding ground, "that the verdict of the Learned Trial Judge is unsupported by the evidence", which we say is nebulous. Additionally, no submissions were filed to assist this court in appreciating the appellant's prospective complaints. What, then, would the court be entertaining as an appeal in the absence of any grounds and submissions filed? Such grounds and submissions would have established the parameters of the appellant's complaints with respect to the law and/or findings of fact that the learned Parish Court Judge made which he is alleging to be erroneous. Without such parameters to hone the court's focus, the court would be operating like a rudderless ship, floundering in a quagmire of uncertainty and conjecture.

[25] While we acknowledge the decision of the Privy Council in **Ray Morgan v The King** and its pronouncement that the court should exercise its discretion in an appropriate case, to hear an appeal, where the procedural requirements in section 296(1) of the JPCA are not met, we are of the view that the standard that must be considered in so doing, is whether good cause was shown by the appellant. Lord Stephens, at para. 66 of the judgment, opined as follows:

> "66. The proviso confers a wide general discretion on the Court of Appeal to hear and determine an appeal notwithstanding that the grounds of appeal were not filed within time. In exercising its discretion, the Court of Appeal balances the respects, if any, in which the applicant has shown 'good cause' for the appeal to be heard and determined against any countervailing criteria, such as finality, which would lead to the conclusion that the appeal should not be heard and determined. The proviso does not identify what constitutes 'good cause' nor does it identify what criteria are to be taken into account in the exercise of discretion. Rather, it has been left to the Court of Appeal to develop a principled approach in order that discretion may be exercised consistently and fairly."

[26] The Board approved several criteria identified by the Court of Appeal as capable of constituting "good cause", including whether the appellant had a meritorious appeal. In this instance, we were unable to measure whether there was any merit in this appeal since the appellant had not identified for the court's scrutiny and assessment any errors in the Parish Court Juge's findings of fact or his application of the relevant law. Other useful criteria that could be considered in the circumstances of this case are the period of delay and the extent to which the appellant is to blame. We are of the view that an inordinate period of time has elapsed since the appellant filed his notice of appeal (on 1 October 2020), over two years prior to the scheduled hearing date of the appeal. In as much as the appellant cannot be faulted for the time lapse for the preparation of the notes of evidence and other documents, nor indeed the time it took for the appeal to be scheduled for hearing, nonetheless he was not obliged to await the happening of these events and was always entitled to file compliant grounds of appeal well before then. The

appellant, therefore, cannot avoid the consequences of his inertia and must take responsibility for the present situation. It would lie ill in his mouth to complain that he has suffered injustice because his appeal is not heard. Unlike Mr Ray Morgan, it cannot be said that the justice system has failed Mr Irving.

[27] We have also considered the submissions of counsel, Mr Brown, including his complaint that the Crown's reliance on **Rex v Archibus Mills** was inappropriate. For our part, we fail to see how counsel can argue with the pronouncement made by this court as long ago as 1941. We might have been inclined to use a less stinging adjective than frivolous, but our views of the matter are the same.

Conclusion

[28] There exists before us not one scintilla of information on which we could determine whether the appellant has good cause to be heard despite the defects in the process he utilized. Furthermore, there is no information before us as to the basis he wishes to impugn the convictions and sentences imposed by the learned Parish Court Judge. Despite the passage of nine months since the Crown had filed their preliminary objections, the appellant has not seen fit, even at this late stage, to seek leave to put before the court, clinical and meaningful grounds of appeal or other information, such as written submissions, from which to decipher and determine the merit of his appeal.

[29] It was for these reasons, that we dismissed the appeal and made the orders at para. [3] above.