JAMAICA

IN THE COURT OF APPEAL

R.M. CRIMINAL APPEAL No. 20/72

BEFORE: The Hon. Mr. Justice Fox, Presiding
The Hon. Mr. Justice Graham-Perkins, J.A.
The Hon. Mr. Justice Robinson, J.A.

R. v. JIM MASLANKA

Ian Ramsay for applicant.

Jim Kerr Q.C. (D.P.P.) and Courtney Orr for the Crown.

Heard:- May 22, 26, 1972

FOX, J.A.

The applicant, Maslanka, is an American. He arrived in Jamaica by air on December 3, 1971. He and Cleveland Bedassie, a fisherman of Santoy in Hanover were found guilty by the Resident Magistrate Hanover on informations charging them with offences on December 5, 1971 of (a) attempting to export ganja from Jamaica; and (b) unlawful possession of ganja. At the trial Mr. L. Wolfe and Mr. Watt of counsel appeared on behalf of the applicant. Mr. B.A. Clare of counsel represented Bedassie. The convictions were recorded at Lucea on December 31, 1971. Verbal notices of appeal were immediately given on behalf of the applicant and Bedassie by counsel. The applicant was transferred from Lucea and was received in the General Penitentiary, Kingston on January 3, 1972. On January 5 the applicant signed a notice in which he stated that he did not intend to prosecute his appeal but that he thereby abandoned all proceedings in regard thereto as from that date. This notice was filed in the office of the R.M. Court, Hanover on January 7.

On January 6, Mr. Gresford Jones, an attorney at law of 5 Duke Street, Kingston, interviewed the applicant at the Penitentiary. On January 7 the applicant signed a document in which he gave notice of his desire to appeal against conviction and sentence. On January 8 the applicant signed a letter to the clerk of courts, Lucea, in which, after referring to the verbal notice of appeal given in his behalf, he stated that he "had abandoned same on 5th inst. and I have found it necessary to reopen the said

appeal". This letter also submitted grounds of appeal. The document and the letter were filed in the R.M. Court Hanover on January 12.

On April 6, 1972, by a notice of motion filed in this court by Mr. Jones on behalf of the applicant, the court was asked for declarations,-

1) that the appeal was properly before the court;

2) that the notice of abandonment purported to be given on January 5 was effectively rescinded by the subsequent written notice of appeal dated January 7.

Alternatively, the court was asked to exercise a discretion to hear the appeal for reasons stated under four heads in the notice of motion.

In support of the proposition that the appeal was properly before the court, Mr. Ian Ramsay of counsel who appeared for the applicant submitted that since the notice of abandonment on January 5, and the written notice of appeal on January 7 had been filed in the courts office prior to the expiration of fourteen days from the date of conviction, the appellant had in fact given effective notice of appeal within the period prescribed by section 294(1) of the Judicature (Resident Magistrates) Law, Cap.179. This notice was valid and the appeal was therefore properly before the court.

This contention is founded upon a fundamental misconception of those sections of the Judicature (Resident Magistrates) Law which regulate criminal appeals from judgments of magistrates. (sections 293 to 305). By section 293, a convicted person is given a right of appeal to the court of appeal. This is an inchoate right. If it is not developed it will perish; it will "cease and determine". (section 295). There is no power whereby it may thereafter be revived. The way in which the right may be developed is set out in section 294. A convicted person "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 court of the parish". Upon giving a proper notice of appeal, the inchoate right of appeal conferred by the law is transformed into an actual appeal. The notice brings the appeal into being. The convicted person now has, not a mere right to appeal, but an appeal in esse. He becomes an appellant. In pursuing his appeal he must comply with the further provisions of the law. Grounds of appeal must be drawn up and filed with the clerk of the court for transmission to the court

of appeal "within 21 days after the date of the judgment ... on his failure to do so he shall be deemed to have abandoned his appeal" (section 296(1)). A proviso enables the court to hear and determine the appeal "for good cause shown" notwithstanding that the grounds of appeal were not filed in time. When the appeal is "perfected", it may be considered by the court and disposed of on the merits.

This is not the only way in which an appeal in esse may be disposed of. Such a result may also occur if the appellant abandons the appeal. It is then brought before the court and dismissed on that ground. Abandonment of an appeal may be effected in one of two ways (a) by operation of law; or (b) by act of the appellant: (a) occurs when (as indicated above) the appellant fails to file his grounds of appeal in time and is deemed to have abandoned it. (b) happens when the appellant signifies by a sufficient notice his voluntary intention to abandon his appeal.

In the light of the foregoing, the essential fallacy of Mr. Ramsay's argument is plain. There are two mistakes. Firstly, there is the mistake of failing to appreciate that a convicted person is given by the law, one right of appeal only and not two, three, four, or so many rights of appeal as are numerically capable of development within fourteen days after a conviction, and following upon successive abandonments of appeals in esse. The right of appeal is indivisible. When exercised it is expended; but not extinguished, because arising from the exercise are those procedures precisely described in the law whereby the appeal will eventually be terminated by being allowed or dismissed. The second mistake results from a misapprehension of the legal consequences of the deliberate abandonment of an appeal in esse. By that act of abandonment, an appellant determines in fact the proceedings which he initiated, and unless leave is given to withdraw the notice of abandonment, this court will formally dismiss the appeal and in this way effect its determination in law. Following abandonment of an appeal these procedures are imperative and inescapable.

As attractive therefore as Mr. Ramsay's arguments were on this limb, they are invalid and must be rejected. Prima facie, the appeal was effectively abandoned when the applicant signed the notice to that effect on January 5. For all practical purposes, the appeal was at an end as from that date. It cannot be started all over again by giving a fresh notice of appeal.

But despite the abandonment, the appeal may be reinstated with the leave of the court. The principle which guides the court is well understood. The court will not entertain an application for leave to withdraw a notice of abandonment, "unless it is shown affirmatively that something amounting to mistake or fraud can be shown, with a solid foundation for the allegation". R. v. Sutton [1969] 1 All E.R.928. ✓

In support of his submissions on this limb, Mr. Ramsay referred to affidavits filed in this court, one by Mr. Jones on March 23, 1972, and one by the applicant on April 10, 1972. In his affidavit, the applicant said in paragraph 2 that when he arrived at the Penitentiary late on the afternoon of January 3 he was "placed in a building along with prisoners who did not appeal." His hair was cut, blood was taken from him, and he was relieved of his personal effects. The appellant said further that he was informed "that this is inconsistent with what normally happens in the case of other appellants." The applicant did not give the source and the time (the date) of this information. Neither was its causal relationship (if any) to the abandonment of the appeal explained. It seems certain that the alleged treatment of the applicant on the day of his arrival at the Penitentiary had no direct bearing upon the abandonment of the appeal for the reason that (1) the applicant did not specifically assert this in his affidavit; and (2) he admitted that he was removed to the appellant section of the prison on the following day.

In addition to the allegations in paragraph 2, the applicant swore to a number of startling pieces of information which he received whilst he was at the Penitentiary and which he said caused him to sign the notice of abandonment of his appeal:

(a) he had only two days within which to file documents in connection with his appeal (paragraph 3)

(b) it would not be possible for his appeal to be heard within nine months; this time would not count towards his sentence, and during that period he "would be placed in solitary confinement in a very dark cell and only permitted to see 3 hours of sunlight per day, and after that, my food would be delivered by being pushed under a door in the cell." (paragraph 4).

(c) If the document withdrawing the appeal were not signed by 5th January, 1972, "the consequences as set out herein would immediately be put into effect." (paragraph 5); which continued; "It was therefore in these circumstances that I on the 5th January, 1972 signed a document prima facie withdrawing my appeal and/or purporting to abandon same."

The strange feature of these allegations which immediately comes to notice is the indirect manner in which they are framed. "Enquiries made by me disclosed," (paragraph 3) "I was informed" (paragraph 4) "It was brought to my attention"; (paragraph 4) "I was also further led to believe" (paragraph 5). As to the identity, the number, and the character or position of his informant or informants, the applicant was silent. When he made his affidavit of April 10, he had been in the Penitentiary for over three months. It is beyond belief that within that period he remained incapable of distinguishing persons of authority from other persons with whom he may have come in contact. Further, all the documents which he signed on the 5th, 7th and 8th January were witnessed by Mr. A.V. Sinclair, a warder at the penitentiary. The document of the 5th was signed also in the presence of Mr. K.W. Jackson, an assistant superintendent at the prison. If appropriate representations had been made to these officers, it is inconceivable that some attempt would not have been made to identify the applicant's informants (if more than one), and highly probable that, if undertaken, any such attempt would have produced helpful results. As it is, the willingness of the applicant to allow the source of his information to remain anonymous raises up a distinct suspicion as to the authenticity of the statements in his affidavit. The affidavit of Mr. Jones does nothing to allay this suspicion. The general statements of the applicant are uncritically accepted, and no attempt was made to dispel the vagueness as to the source of the applicant's information.

A second feature of the applicant's allegations which presents itself for scrutiny is the attempt to relate the decision to abandon the appeal to lack of the benefit of legal advice after the conviction. In paragraph 3, the applicant stated;

> "I was not informed that I had the right to seek the benefit of legal advice. Between the day of my conviction and the 4th January aforesaid, I did not have an opportunity either of seeing or speaking with Mr. Lensley Wolfe the Attorney at my trial, or any other Attorney-at-law."

It is certain that Mr. Wolfe could not have taken the course of giving verbal notice of appeal without instructions to that effect from the applicant, or, at the lowest without his concurrence. Consonant with his particular duty to the applicant, and with his wider duty to assist in the proper and responsible administration of justice in the country, counsel would have been bound to consider the possibility of success on appeal and to give to the applicant the benefit of his advice in this respect. Counsel would also have been under an obligation to explain to the applicant the implications of giving verbal notice of appeal, and to indicate the requirements of those relevant procedures prescribed by the law for perfecting the appeal. It is therefore fair to assume that the applicant must have had some understanding of the details of those consequences which would result from giving verbal notice of appeal. Nothing in the affidavits rebuts this assumption, and this is a relevant point to bear in mind when assessing the significance of the alleged denial of legal advice after the conviction.

Balanced against the claim of the applicant that he had abandoned his appeal as a result of misleading information given to him at the penitentiary is the clear inference arising from the act of signing the notice of abandonment. This inference is the absence at the time of the signing of a serious and continuing intention in the applicant to pursue the appeal. The material adduced in support of the applicant's claim is palpably unsatisfactory. On the other hand, the inference is confirmed by the affidavits of staff warder C.A. Brown who received the applicant at the penitentiary on 3rd January; of warder A.V. Sinclair who dealt with the applicant's requests to abandon and then reopen his appeal, and of assistant superintendent K.W. Jackson to whom the applicant signified his intention to abandon his appeal. These affidavits show that from the time of his admission at the penitentiary the applicant was treated as an appellant, and the abandonment of the appeal was voluntary. We conclude that the applicant has altogether failed to show that the notice of abandonment should be treated as a nullity. Leave to withdraw the notice is therefore refused. The appeal is dismissed.

Before parting with the appeal we wish to record our gratitude to Mr. Ramsay and to Mr. Kerr for their helpful submissions on an interesting point.