

J A M A I C A

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 103/70

BEFORE: The Hon. Mr. Justice Henriques, President
The Hon. Mr. Justice Fox
The Hon. Mr. Justice Perkins

R E G I N A v. SELVYN WHITE

Mr. E.P. DeLisser for the Appellant

Mr. C. Patterson for the Crown.

11th June, 1971

PRESIDENT:

The applicant was convicted on the 14th day of December, 1970 in the Home Circuit Court of the offence of sacrilege and sentenced to a term of 18 months hard labour. He applied for leave to appeal against his conviction and sentence on the 15th of December, 1970. On the 21st day of April, 1971, according to an affidavit which he has filed, not having heard anything from his counsel who had defended him at the trial, he filed a Notice of Abandonment of his appeal. He subsequently, on the 22nd day of April, learnt that he had been granted leave to appeal and assigned counsel. This was done by a single Judge of this court on the 19th of April, 1971, but not communicated to the applicant until the 22nd of April, 1971.

He now seeks leave to withdraw his Notice of Abandonment of appeal and have the matter reinstated. The principles which should govern a matter of this kind are enshrined in Rule 59 of the Court of Appeal Rules (1962) which is to the following effect:

"An applicant at any time after he has duly served notice of appeal or of application for leave to appeal or of application for extension of time within which such notice should be given, may abandon his appeal by giving notice of abandonment thereof on Form 15 of Appendix C to the Registrar, and upon such notice

being given the appeal should be deemed to have been dismissed by the Court."

The applicant alleges that had he known at the time when he was about to file his Notice of Abandonment of Appeal that he had been granted leave to appeal he would not have set in motion the abandonment of his appeal.

The principles which should guide the Court in determining a matter of this kind are set out in the decision of the Court of Criminal Appeal in England in *R. v. Moore* to be found at 41 C.A.R., p. 179. The Lord Chief Justice, Lord Goddard, in his judgment in that case had this to say:

"The Court wants to take this opportunity of saying what is their view with regard to withdrawal of Notice of Abandonment. The Act says nothing about prisoners who have once abandoned their appeals having a right to apply for leave to withdraw the Notice of Abandonment. Rule 23 of the Rules, which are statutory rules, provides that on Notice of Abandonment being given the appeal is deemed to be dismissed. This appeal, therefore, has accordingly been dismissed.

"There have been from time to time, indeed from quite early days in the history of the Court, applications for leave to withdraw a Notice of Abandonment, considering that by the Rules, which have the force of a statute, the appeal has been dismissed. An examination of the cases has shown that the Court has allowed Notices of Abandonment to be withdrawn only if they are satisfied that there has been some mistake, though in one case it would appear that the Court thought they had a wider power; *Pitman's* (1916), 12 C.A.R., 14; but this was only a dictum. No doubt, if a case could be made out that a prisoner had in some way or another be fraudulently led or induced to abandon his appeal, the Court in the exercise of its inherent jurisdiction would say that the Notice was to be regarded as a nullity; but where there is a deliberate abandonment of an appeal, in the opinion of the Court, there is no power or right to allow the Notice of Abandonment to be withdrawn and the

appeal reinstated, because the appeal having been dismissed, the Court has exercised its powers over the matter and is functus officio. Accordingly, the Court is not going to entertain applications for the withdrawal of Notices of Abandonment unless, as I say, something amounting to mistake or fraud is alleged, which, if established, would enable the Court to say that the Notice of Abandonment should be regarded as a nullity."

Applying the principles enunciated in that case to the facts of the instant case, we are unable to say that the existing facts come within the ambit of them. The application is accordingly refused.

The sentence will therefore run from the 21st of April, 1971.