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IN THE COURT OF APPEAL

R. M. CRIMINAL APPEAL No. 166 of 1970

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

REGINA v. VINCENT BOOTHE

Mr. Hugh Small for applicant.
Miss Hylton and Mr. Morris for Crown.

4th February, and *24th March*
1972.

GRAHAM-PERKINS, J.A.:

On the 4th February, 1972 we refused this application and promised to put our reasons therefor in writing. We do so now.

The applicant was tried and convicted by one of the Resident Magistrates for St. Andrew on November the 19th, 1970 on an information which charged him with a breach of the Vagrancy Law, Cap. 404. He was sentenced to a term of four months imprisonment with hard labour. Upon his conviction he gave verbal notice of appeal. Thereafter a rather odd series of events ensued. On December the 1st, 1970 an application for bail pending the hearing of his appeal was made by Mr. L.H. McLean of counsel on behalf of the applicant to a judge of this court. That application was refused. On December the 2nd, 1970 a written notice of appeal, dated the 26th November, 1970 and signed by the applicant in person, was filed in the office of the Resident

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Magistrate's Court, St. Andrew. On the 4th of December, 1970 grounds of appeal dated December the 2nd, 1970 were filed in the same office. These grounds were settled by Mr. Gresford Jones, the solicitor who, with Miss Sonia Jones, represented the applicant at his trial. On the 8th of December, 1970 further grounds of appeal were filed, this time by Mr. McLean. On the 9th December, 1970 a written Notice of Abandonment of his appeal, dated 4th December, 1970 and signed by the applicant, was filed in the Registry of this court. In the result the applicant served his sentence and was discharged from prison on the 22nd of February, 1971. To describe the foregoing events as odd is perhaps an understatement but we avoid further comment thereon since we are not seized of all the relevant facts surrounding the quite unusual duplication of representation.

On the 13th of April, 1971 a Notice of Motion was filed in the Registry of this court by Mr. Jones on behalf of the applicant. That motion was in the following terms:

" TAKE NOTICE that this Honourable Court will be moved for leave whereby the Appeal filed by or on behalf of the accused, Vincent Booth, and allegedly withdrawn by him on or about the 4th day of December, 1970, be heard for the reasons set out in the grounds of appeal filed herein, as also for the reasons set out in the affidavit of Sonia Jones and that of the applicant"

This motion came on for hearing on the 4th February, 1972. The applicant was represented by Mr. Hugh Small, instructed by Mr. Jones. Mr. Small dealt with the motion in this way. The notice of abandonment of his appeal filed by the appellant was, Mr. Small contended, a complete nullity as there was no provision in the Judicature (Resident Magistrates)

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Law, Cap. 179, which an appellant could call in aid to enable him to abandon his appeal when once he had invoked the provisions of that Law and appealed against his conviction by a Resident Magistrate. Once those provisions were set in motion they were required to follow their due course culminating in the determination of the appeal by this court. We regarded these submissions by Mr. Small as not a little startling and we so indicated. Mr. Small then proceeded to argue, as a necessary alternative, that the applicant should be allowed to withdraw his notice of abandonment and be at liberty to argue his appeal. We were not persuaded by any circumstance advanced that this was a proper case in which this court would have been justified in exercising its undoubted discretion in favour of the applicant.

We now return to the first limb of Mr. Small's submissions. There can be no doubt that a right to appeal is a creature of statute. "It is most elementary" said Lord Goddard, C.J., in R. v. West Kent Quarter Sessions Appeal Committee, ex p. Files (1951) 2 A.E.R. 728, at p. 730, "that no appeal from a court lies to any other court unless there is a statutory provision which gives that right of appeal. The decision of every court is final, if it has jurisdiction, unless an appeal is given by statute." The right to appeal which the applicant exercised in this case was the right given by s. 293 of cap. 179. The sections following in that part of cap. 179 under the rubric "Criminal Appeals" prescribe the several steps in the procedure to be followed by an appellant in the prosecution and exercise of his right of appeal. S. 296 (1), for example, requires an appellant "within twenty-one days after the date of the judgment to draw up and file with the Clerk of the Courts for transmission to the Court of Appeal the grounds of appeal," But the subsection in very positive terms, declares that upon

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the appellant's failure to file his grounds of appeal within the time therein prescribed "he shall be deemed to have abandoned his appeal." Clearly, the appellant may himself bring about a state of things the consequence of which is that he is deemed to have abandoned his appeal. It would, in our view, be a remarkable conclusion if it were to be held that an appellant could, by his mere failure to act, cause his appeal to be taken to be abandoned, and yet be unable to achieve that result by a deliberate and voluntary act on his part. To state the proposition in these terms is to expose its fundamental fallacy. It is of course true that no section in terms gives an appellant a "right" to abandon his appeal. It is equally true, however, that no section denies him that right. Certainly he has a statutory right to pursue his appeal. But he is not denied his right at common law not to ~~pursue~~ pursue his appeal if he so chooses. Jurisprudentially, a legal right in its strictest sense is one which constitutes the correlative of a legal duty. But legal rights are not limited thereto. There is a wider sense in which the term "legal right" is used and in which it does not necessarily correspond with duty. Legal theory recognizes the existence of legal rights of four distinct kinds. One of these is that specie which has come to be labelled "liberty and no-right".

" Just as my legal rights (in the strict sense) are the benefits which I derive from legal duties imposed upon other persons, so my legal liberties (sometimes called licences or privileges) are the benefits which I derive from the absence of legal duties imposed upon myself. They are the various forms assumed by the interest which I have in doing as I please. They are the things which I may do without being prevented by the law. The sphere of my legal liberty is that sphere of activity within which the law is content to leave me alone.

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It is clear that the term right is often used in a wide sense to include such liberty. I have a right (that is to say, I am at liberty) to do as I please with my own; but I **have** no right and I am not at liberty to interfere with what is another's. I have a right to express my opinions on public affairs, but I have no right to publish a defamatory or seditious libel. I have a right to defend myself against violence but I have no right to take revenge upon him who has injured me." See Salmon on Jurisprudence 12th Edn. at p. 42.

All these and a host of other rights or liberties are not conferred by statute. They exist to the extent that their exercise is not prohibited by statute. In this sense of a legal right recognized by the common law it is, in our view, beyond argument that an appellant has a legal right to file a notice of abandonment of his appeal and thereby determine the proceedings which he initiated. And we so held. To hold otherwise would lead to certain predictable and alarming results. Let a case be supposed where an accused on conviction on the clearest possible evidence is sentenced to a short term of imprisonment, say three months. He gives verbal notice of appeal. His application for bail pending the hearing of his appeal is refused. He knows that his appeal may not be heard for some four to six months, and that the time he spends in custody will not count toward his sentence. Two weeks after his conviction, during which time he has filed his grounds of appeal, he is persuaded, on the advice of his attorney that his chances of success in this court are very slim, or perhaps non-existent, to reconsider his decision to appeal. He very wisely decides that he wishes to commence his term of imprisonment immediately. Can it be that he is compelled to await the dismissal of his appeal by this court before he is allowed to start serving his sentence? We unhesitatingly reject any such proposition

as patently invalid and one from which reason and common sense recoil.

We turn now to the second limb of Mr. Small's submissions. This court has said more than once that it will not entertain an application to withdraw a notice of abandonment unless it is demonstrated affirmatively that something in the nature of a mistake or fraud was the operative cause of the filing of such a notice. In so holding this court chose to adopt and to follow the decisions in such cases as R. v. Sutton (1969) 1 W.L.R. 375, and R. v. Moore (1957) 1 W.L.R. 841. The affidavit put forward by the applicant and on which this court was asked to exercise its discretion in his favour disclosed that he signed the notice of abandonment in these circumstances. He had spent some considerable time in custody as an appellant before he was advised that his application for bail had been refused. It then seemed to him that he would be obliged "to spend a further substantial period in custody until the appeal was heard, and if it failed (he) would be compelled thereafter to serve the sentence, and fearing that this may happen, (he) became disheartened and being also disappointed at the refusal of the bail, (he) signed the withdrawal of appeal." In these circumstances we could not say that the applicant had shown any ground on which we would have been justified in permitting him to withdraw his notice of abandonment.

In the result we were constrained to hold:

- (1) that where a person appeals against his conviction in a Resident Magistrate's Court he is entitled thereafter, of his own volition, to abandon his appeal;

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- (2) that the applicant herein had effectively abandoned his appeal; and
- (3) that in the particular circumstances of the application herein leave to withdraw his notice of abandonment should not be granted to the applicant.