J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 76/1972

BEFORE: The Hon. Mr. Justice Luckhoo, P. (Ag.)
The Hon. Mr. Justice Fox, J.A.
The Hon. Mr. Justice Smith, J.A.
The Hon. Mr. Justice Edun, J.A.
The Hon. Mr. Justice Graham-Perkins, J.A.

R. v. WALBERT SPENCE

M. Tenn with I. Ramsay for the Applicant.

C. Orr, Q.C., and G. Andrade for the Crown.

April 12, 13, May 18, 1973

LUCKHOO, P. (Ag.):

This is an application by way of motion to re-list for hearing an application for leave to appeal against conviction and sentence in the St. James Circuit Court. The matter came before the Court comprising three judges on March 16, 1973, when Attorney-at-Law for the applicant Walbert Spence intimated to the Court that he proposed to adduce certain arguments in support of the motion which would call into question the procedure which the Court, since its constitution in 1962, has been following in relation to the hearing and determination of applications for leave to appeal against conviction and sentence where on making such applications applicants signify their desire to be present when their applications are being considered and determined. The Court considered that in those circumstances the matter should be

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heard by a bench of five judges.

The appelicant and one Cebert Lewis were convicted on April 19, 1972 on an indictment containing four counts charging them with shooting with intent and wounding with intent. They were sentenced to imprisonment for a term of 12 years at hard labour on each count, the sentences to run concurrently. No question arises on this application in respect of the prisoner Cebert Lewis. The applicant on April 25, 1972 applied to the Court of Appeal (on the prescribed form - Form 1) for leave to appeal against his convictions and sentences on grounds worded as follows -

"(1) Verdict unreasonable having regards the evidence adduce by the Crown.

(2) Conflicting and contrary evidence to warrant a conviction.

(3) Sentence excessive and harsh."

In his application the applicant stated that he desired the Court to assign him legal aid but he did not answer the questions contained therein relating to his occupation and means. He also stated that he desired to be present when the Court considered his appeal. These applications were considered by a single judge of the Court acting under the provisions of s. 29 (1) of the Judicature (Appellate Jurisdiction) Law, 1962 which empower any judge of the Court inter alia to give leave to appeal, to assign legal aid to an appellant and to allow the appellant to be present at any proceedings in cases where he is not entitled to be present without leave, in the same manner those powers may be exercised by the Court and subject to the same provisions. The single judge on July 15, 1972 refused to give leave to appeal against conviction and sentence.

On July 19, 1972, the Registrar of the Court of Appeal notified the applicant (on the prescribed form - Form 5) that his applications for -

"(a) leave to appeal against conviction and sentence;

(c) permission to be present during the

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hearing of any proceedings in your appeal;

(d) legal aid"

had been refused by a single judge of the Court and informed him that if he desired to have the abovementioned applications determined by the Court he should fill up the enclosed form 6 and return it to him (the Registrar) within 5 days. On July 20, 1972, the applicant gave "notice of appeal from the refusal of the single judge" on form 6 asking that his applications -

"(a) leave to appeal against conviction and sentence;

(b) legal aid"

should be considered and determined by the Court and stating "that as I am not legally representend I desire to be present at the hearing of my said applications," (those words appearing in the printed form and not being deleted by the applicant).

By notice dated August 16, 1972 the applicant was informed by the Registrar that his appeal would be placed on the list for the Court commencing on September 25, 1972 and that subject to any order the Court might make would be heard as soon as it should be reached. On September 25, 1972, the Court considered the applicant's applications and as the minute of its judgment records refused the applications; the Registrar, thereupon, on September 26, 1972 notified the applicant on the appropriate prescribed form - Form 18 - that the Court had considered the matter of his applications for -

"(a) leave to appeal to the said Court against conviction and sentence;

(c) permission to be present during the proceedings in your appeal;

(d) legal aid"

and had finally determined the same and had given judgment to the effect following -

"25th September, 1972

Application refused."

/On September .....

On September 28, 1972, there was filed in the Registry of the Court the present application by way of motion dated September 26, 1972, that the matter be re-listed for hearing by the Court on a number of grounds reference to which will be made when dealing with the arguments which have been advanced before us by Mr. Tenn.

No criticism has been made before us in relation to the way in which the single judge of the Court dealt with the applicant's application for leave to appeal against conviction and sentence. Complaint is made only in respect of what occurred after the Registrar of the Court received the applicant's request in Form 6 to have the Court consider the applicant's several applications including his application for permission to be present during the hearing of his applications. Mr. Tenn has submitted that the Court was in error in dealing with all of those applications at one sitting and in the absence of the applicant or of a legal representative on his behalf. He contended that the Court ought first to have considered the applicant's request for permission to be present during the hearing of his applications and if that request were refused, as it was in this case, to have allowed the applicant an opportunity to have a legal representative appear before the Court on his behalf when the other applications were being considered. That Mr. Tenn urged could have been done by setting down the other applications for hearing at a later date. The Court's failure to follow such a procedure deprived the applicant of a fundamental right guaranteed him by s. 20 (6) (c) of the Constitution of Jamaica to defend himself in person or by a legal representative and was also in breach of the provisions of rule 54 (2) of the Court of Appeal Rules, 1962. The proceedings in the Court were therefore a nullity. The order refusing the applicant's applications should be set aside and the applications should be re-listed for hearing. Mr. Tenn did not seek to pursue as a ground of the present application that

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notification of hearing of the several applications on September 25, 1972 was not sent to Mr. Ian Ramsay, Attorney-at-Law who had since May 29, 1972 written the Registrar of the Supreme Court informing that officer that he had been retained by the applicant for the purpose of his appeal and requesting a copy of the transcript of the trial, and of the judge's summing-up therein. Mr. Ramsay did not inform the Registrar of the Court of Appeal of his interest in the matter and indeed the applicant by his request to be assigned legal aid seemed to indicate that he had not retained the services of a legal representative in respect of his application to the Court of Appeal. There was thus no failure on the part of the Registrar of the Court of Appeal to give the appropriate notices of the hearing of the applications by the Court on September 25, 1972.

The right of an appellant (which term includes a person who has been convicted and desires to appeal) to be present at the hearing of his appeal before the Court is provided by s. 20 (1) of the Judicature (Appellate Jurisdiction) Law, 1962 (No. 15) -

> "(1) An appellant, notwithstanding that he is in custody, shall be entitled to be present, if he desires it, on the hearing of his appeal, but, on an application for leave to appeal and on any proceedings preliminary or incidental to an appeal, shall not be entitled to be present, except where rules of court provide that he shall have the right to be present, or where the Court give him leave to be present."

So far as an application for leave to appeal is concerned an appellant has no <u>right</u> to be present. He may only be present when the Court grants him leave to be present or where rules of court provide that he shall have the right to be present. The only rule which so provides is rule 66 (9) of the Court of Appeal Rules, 1962 which relates to the examination of a witness in the Court.

/Section 20 (1).....

Section 20 (1) of the Judicature (Appellate Jurisdiction) Law, 1962 does not infringe the provisions of s. 20 (6) (c) of the Constitution of Jamaica. The latter relates to the trial of charges for criminal offences and not to applications for leave to appeal against conviction or sentence. On an application for leave to appeal there is no question of the appellant defending himself on a criminal charge. Indeed the right to defend oneself in person or by a legal representative of his choice guaranteed by s. 20 (6) (c) of the Constitution is to be distinguished from the right of an accused person to be present at his trial on a charge for a criminal offence which is not so guaranteed. However an appellant, if he has not obtained leave to be present before the Court, is entitled to make his application in writing. This is recognised by the provisions of r. 54 (3) of the Court of Appeal Rules, 1962, and indeed a printed note in form 1 informs the appellant that he can, if he wishes, set out, in addition to this reason, his case and arguments fully. An appellant can do so whether or not a legal representative appears on his behalf at the hearing before the Court.

The question then is - did the Court in the particular circumstances of the case fail to observe the requirements of r.54 (2) of the Rules of the Court of Appeal, 1962 when the applicant's several applications were considered and determined at one sitting on September 25, 1972? To determine this question it is necessary to examine the provisions of the relevant rules which relate to the making of applications to the Court. Rule 43 of the Court of Appeal Rules, 1962 provides that where a person desiring to appeal to the Court against conviction or sentence requests to be present at the hearing of his appeal the answers given in support of that request - such answers relate to the grant of legal aid - shall be deemed to be applications to the Court. So that the single judge in this case had to consider applications for leave to appeal against conviction and sentence, for the grant of legal aid and for permission to be present at the hearing of his appeal. Rule 54

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prescribes the procedure to be followed on decision of applications by a single judge. That rule provides as follows -

"54. (1) Where any application has been dealt with by a single Judge, the Registrar shall notify the decision to the appellant by causing Form 5 in Appendix C to be served upon him. In the event of such Judge refusing all or any of such applications, the Registrar on notifying such refusal to the appellant shall forward to him Form 6 in Appendix C. If the appellant does not desire to have the said application or applications determined by the Court as duly constituted for the hearing of appeals under the Law or does not within five days of service of the said form return to the Registrar Form 6 duly filled up by him the refusal of his application or applications by such Judge shall be final. If the appellant desires that his said application or applications shall be determined by the Court as duly constituted for the hearing of appeals under the Law and is not legally represented he may, if the Court give him leave, be present at the hearing and determination by the Court of his said application or applications:

Provided that an appellant who is legally represented shall not be entitled to be present without special leave of the Court.

(2) When an appellant duly fills up Form 6 and returns it within the prescribed time to the Registrar expressing a desire to be present at the hearing and determination by the Court of applications mentioned in this rule, such form shall be deemed to be an application by the appellant for leave to be so present. The Registrar, on receiving the said form, shall take the necessary steps for placing the said application before the Court. If the said application to be present is refused, the Registrar shall notify the appellant and if the said application is granted, the Registrar shall notify the appellant and the officer in charge of the prison wherein the appellant is in custody, as provided by these Rules. For the purpose of constituting a Court the Judge who has refused any such application may sit as a member of such Court and take part in determining such applications.

(3) Except where otherwise provided in these Rules any application to the Court may be made by the appellant

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or respondent, or by counsel on their behalf, orally or in writing; but in regard to such applications, if the appellant is unrepresented and is in custody and is not entitled or has not obtained leave to be present before the Court, he shall make any such application by forwarding the same in writing to the Registrar who shall take the proper steps to obtain the decision of the Court thereon.

(4) In all proceedings before a Judge under Section 29 of the Law and in all preliminary and interlocutory proceedings and applications except such as are heard before the Court, the parties thereto may be represented and appear by a solicitor alone."

Under that rule an appellant may seek the determination of the Court of the applications or any of them considered and refused by the single judge. If he is not legally represented he may, if the Court gives him leave, be present at the hearing and determination by the Court of his application or applications and if he is legally represented special leave must first be obtained to enable him to be present. In order to seek the determination of his application or applications by the Court an appellant must first fill up Form 6 and return it to the Registrar within the prescribed time. Where an appellant on that form expresses a desire to be present at the hearing and determination by the Court of the application or applications he requests the Court to determine, such form shall be deemed to be an application by the appellant to be so present. It is evident from the terms of r.54 (2) that the Court must consider whether or not an appellant's request to be present at the hearing of the applications he wishes the Court to determine should be granted. To do this the Court must first form a view as to whether there is any matter of substance for its consideration in the application for leave to appeal against conviction or sentence. If it takes the view there is not then there would be no point in granting the appellant's request to be present nor indeed in assigning him legal aid (if he has requested such assignment) and where, as here, he has indicated that he is not legally represented any adjournment to a later date would be

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pointless. If the Court takes the view that there is some matter of substance for its consideration in the application for leave to appeal against conviction or sentence it may wish to assign legal aid in which case there would necessarily be an adjournment of the matter for the purpose of having the assignment of legal aid made and the appellant would not be permitted to be present when his application for leave to appeal against conviction or sentence is being considered, unless the Court should give him special leave to be so present. Or the Court may consider there is some matter of substance for its consideration and that the presence of the applicant would be of assistance in that regard in which case the Court would grant him leave to be present at the consideration of his applications. In all of these cases the Registrar is required by r. 54 (2) to notify the appellant of the decision of the Court on his request for permission to be present when his applications are being considered and to notify the appropriate prison authority. Where the Court takes the view that there is no substance for its consideration in the application for leave to appeal the Court's refusal of the appellant's request to be present when his applications are being considered by the Court will conveniently be notified to the appellant along with the refusal of the other applications he has made in form 6.

Mr. Tenn's contention as to the proper construction to be put upon the provisions of r. 54 (2), if correct, would have the result that an appellant would be in a less advantageous position were his applications to be placed in the first instance before the Court rather than before a single judge. Clearly this cannot be so. In the result we hold that the appellant's several applications were considered and determined by the Court on September 25, 1972 in accordance with r. 54 of the Court of Appeal Rules, 1962.

For these reasons the application is refused.