

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CRIMINAL APPEAL NO. 24/93

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A. (Ag.)

REGINA vs. BYRON LEWIS

Ian Ramsay for appellant

Dr. Diana Harrison, Deputy Director of
Public Prosecutions, for Crown

November 17 and December 13, 1993

WOLFE, J.A.:

Byron Lewis was convicted in the Resident Magistrate's Court holden at Montego Bay on June 1, 1993, by His Honour Mr. Neville Sang, Resident Magistrate for the parish of St. James. He was ordered to pay a fine of \$4,000 in default of which he was to be imprisoned for six months at hard labour. The fine was duly paid.

On June 18, 1993, Lewis lodged a "Notice of Appeal" with the Clerk of Courts for the parish of St. James appealing against the conviction recorded against him on June 1, 1993.

By Notice of Motion dated November 15, 1993, he sought to move the court to grant him an extension of time in which to file Notice of Appeal. We denied the Motion and we now put in writing our reasons for so doing.

The Resident Magistrate's Court is a creature of statute and, therefore, its authority and procedure are governed by the Judicature (Resident Magistrates) Act. With respect to the giving of Notice of Appeal, sections 294(1) and 295 of the Judicature (Resident Magistrates) Act declare:

"294(1) Any person desiring to appeal from the judgment of a Magistrate 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.

295. If the appellant shall fail to give the notice of appeal as herein provided, his right to appeal shall cease and determine."
[Emphasis supplied]

This "would-be appellant" was tried, convicted and sentenced on June 1, 1993. He failed to give verbal notice of appeal, as provided for in section 294(1), so as of that date time began to run and would have expired on June 15, 1993. In accordance with section 295 the right to appeal ceased and determined after June 15, 1993. So on June 18, 1993, when the "would-be appellant" lodged his notice of appeal with the Clerk of Court for the parish of St. James his right to appeal had ceased and determined. Mr. Ian Ramsay, who appeared, was constrained to make this concession in the face of well-established authorities of this court which I will refer to notwithstanding the concession made by counsel.

In R. v. Dussard [1964] 7 W.I.R. 91 the appellant having been convicted in the traffic court, a written notice of appeal was filed, signed by his counsel on his behalf. (It must be noted that at the time of this decision the profession had not yet been fused).

"Held: the words of s. 294(2) of the Judicature (Resident Magistrates) Law, Cap. 179 [J.] were perfectly clear and did not permit counsel to sign a notice of appeal on behalf of an appellant. The notice of appeal was therefore not in a form which accorded with the law, and in the light of the provisions of s. 295, *ibid*, the court had no jurisdiction to entertain the appeal.

Appeal dismissed."

It is, therefore, plain from this dicta of the court that failure to comply with section 294 is made fatal by section 295.

In Rev. Jim Maslanka [1971] 12 J.L.R. 843, the appellant was on December 31, 1971, convicted on two informations which respectively charged him with attempting to export ganja and being in possession of ganja. Following upon his convictions his counsel, on his behalf, gave verbal notice of appeal. On January 3, 1972, he was transferred to the General Penitentiary. Two days later, on January 5, he 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. The notice was filed in the Office of the Resident Magistrate's Court on January 7. On that same day the appellant signed a document in which he gave notice of his desire to appeal against his convictions and sentences. On January 8 he signed a letter addressed to the Clerk of Courts in which, after referring to the verbal notice of appeal given on his behalf, he stated that he "had abandoned same on the 5th instant and I have found it necessary to reopen the said appeal."

Fox, J.A., in a very well-reasoned judgment at page 844, said:

"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 court's office prior to the expiration of fourteen days from the date of conviction, the applicant had in fact given effective notice of appeal within the period prescribed by s. 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 (ss. 293 to 305). By s. 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' (s. 295).
There is no power whereby it may there-
after be revived." [Emphasis supplied]

In the instant case the inchoate right was not developed in accordance with section 294 and was, therefore, caught by the provisions of section 295. It has perished. It has ceased to be. It is determined.

Faced with this insurmountable hurdle, Mr. Ramsay ingeniously sought a way around it by submitting that this court had a discretion to extend the time in which the notice of appeal could be filed. In other words, the court without being so authorised by Parliament could negate the plain and unambiguous words of a statute enacted by Parliament.

In support of this proposition, counsel relied upon Law 21 of 1961 made on August 17, 1961.

Section 3(1): "There is hereby established a committee to be known as the Rules Committee of the Supreme Court."

Section 4(1): "It shall be the function of the Committee to make rules (in this law referred to as 'rules of court') for the purposes of the Judicature (Civil Procedure Code) Law, the Judicature (Appellate Jurisdiction) Law, 1962, the Judicature (Supreme Court) Law, Additional Powers of the Registrar Law, the Justices of the Peace (Appeals) Law, the Indictments Law and any other Law or enactment for the time being in force relating to or affecting the jurisdiction of the Supreme Court or the Court of Appeal or any Judge or office of such respective court."

On July 15, 1963, the Rules Committee of the Supreme Court, in exercise of the powers conferred on it by the Judicature (Rules of Court) Law, 1961, and the Judicature (Appellate Jurisdiction) Law, 1962, made the following rule:

"Rule 9 of the principal Rules is hereby revoked and the following rule substituted therefor:

9. Subject to the provisions of section (3) of section 15 of the Law and to rule 23 of these Rules, the court shall have power to enlarge or abridge the time appointed by these rules, or fixed by an order enlarging time, for doing any act or taking any proceedings, [Emphasis supplied]

" upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until expiration of the time appointed or allowed, or the court may direct a departure from these Rules in any other way where this is required in the interests of justice."

Section 15 referred to in rule 9 is now section 16 of the current law. Reliance on this rule, in support of the argument that this court can extend the time for giving notice of appeal in respect of appeals from the Resident Magistrates Court is, in our view, wholly misplaced. This rule deals specifically with the enlargement or abridgement of time appointed under the said Rules and not under any other enactment.

Significantly, under Part IV of the Judicature (Appellate Jurisdiction) Act, dealing with Appellate Criminal Jurisdiction (Supreme Court), section 16(3) enacts as follows:

"Except in the case of a conviction involving sentence of death, the time within which notice of appeal or notice of an application for leave to appeal may be given, may be extended at any time by the court."

However, under Part V of the said Act, which deals with Appellate Criminal Jurisdiction (Resident Magistrates' Courts), section 22 enacts as follows:

"Subject to the provisions of this Act, to the provisions of the Judicature (Resident Magistrates) Act, regulating appeals from Resident Magistrates in criminal proceedings and to rules made under that Act, an appeal shall be to the court from any judgment of a Resident Magistrate in any case tried by him on indictment, or on information in virtue of special statutory summary jurisdiction."

Section 22 makes it abundantly clear that in respect of appeals originating from the Resident Magistrates Court the power of this court is subject to the provisions of the Judicature (Resident Magistrates) Act, which regulates appeals from that court, namely sections 293 to 295 as also the provisions of the Judicature (Appellate Jurisdiction) Act regulating appeals from

the Resident Magistrates Court, namely, sections 22 and 23. Section 23 is of particular interest as it stipulates what powers this court may exercise in respect of appeals originating from the Resident Magistrates Court, that is, the powers and authorities conferred on the court by subsection (3) of section 14.

The provisions of section 14(3) empowers this court to quash a sentence not being a mandatory sentence passed by the trial court and to substitute therefor such other sentence warranted in law by the verdict. Section 23 makes no mention of section 16(3) which vests this court with the authority to extend the time for filing notice of appeal in criminal cases originating from the Supreme Court.

We are firmly of the view that no power resides in this court to enlarge the time for filing notice of appeal in respect of appeals from the Resident Magistrates Court. We must, therefore, decline the offer of that jurisdiction which Mr. Ramsay seeks to confer upon us as only the legislature can so empower us.

For the aforementioned reasons, we hold that the right of appeal has ceased and determined and that the matter is not properly before us.

Before parting with this appeal, we wish to bring to the attention of Resident Magistrates and Clerks of Courts the provisions of section 11 of the Judicature (Resident Magistrates) Act, which states:

"For every court there shall be a seal of the court and all summonses and other process issuing out of the court, shall be sealed or stamped with such seal."

Jowitt's Dictionary of English Law defines process as "the proceedings in any action or prosecution, real or personal, civil or criminal, from the beginning to the end."

None of the pages of the Record of Appeal bore the seal of the court. We trust that in the future section 11 of the Judicature (Resident Magistrates) Act will be complied with.

It has also been observed that the practice has developed of notices issuing from the court and notice filed, rather than bearing the official date stamp of the office, have the dates written in without any signature. This undesirable practice should also be discontinued.