

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 119/87

BEFORE: THE HON. MR. JUSTICE ROWE - PRESIDENT
THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA

VS.

MICHAEL MITCHELL

Mrs. Benka-Coker for Applicant
Paul Dennis for Crown

July 20 and 31, 1989

ROWE P.:

The applicant was charged in the St. Ann Circuit Court for the murder of Jethro Brown and after a trial of two days before Chester Orr J. and a jury, he was convicted of murder on October 26, 1983 and sentenced to suffer death in the manner authorized by law.

There the matter rested until on July 17, 1987 when Criminal Form 2, Notice of Application for Extension of time within which to appeal, dated July 13, 1987, signed by the applicant was filed in the Registry of the Court of Appeal. In a single ground the applicant set out his reasons for the application. He said:

"I was convicted for murder in the St. Ann's Bay Circuit Court on 17.10.83 and was placed in custody there to await transportation to the Prison. On the night of the 17.10.83 there were a lot of Police there when they said that this youth isn't guilty of the offence and they are sorry for me. So during the course of the night I was set free by the Police and it wasn't until the 2.7.87 when I was held again."

These allegations prompted the Court of Appeal to enquire of the Police for their reaction. The Deputy Commissioner of Police/Crime replied to this effect:

"Investigation reveals that Michael Mitchell and others escaped from the St. Ann's Bay Police Station Lock-ups at about 3:50 a.m. on the 29.10.83, by cutting the steel bars."

Disciplinary proceedings were instituted against three policemen who were on duty at the time. There is nothing to suggest that the policemen had in any way aided and abetted their escape.

Mitchell's claim that the police released him because they felt 'sorry for him' is totally false."

For nearly four years after his conviction, the applicant was at large in circumstances wholly inconsistent with the conviction and sentence. Mrs. Benka-Coker, has, notwithstanding the applicant's escape from custody, submitted that there is an arguable ground of appeal which has a fair chance of success and consequently the Court should exercise its discretion under Rule 11 of the Court of Appeal Rules to extend the time for appealing, in the interests of justice.

Part IV of the Judicature (Appellate Jurisdiction) Act provides for appeals against conviction and sentence in the Supreme Court. Section 16(1) which is in Part IV fixes the time limited for appeals as fourteen days of the date of conviction. Generally, this period can be extended by the Court at any time. But before I turn to deal with the precise provisions of sub-section (3) of Section 16, supra, I must deal with the main argument mounted by Mrs. Benka-Coker. She relied upon Rule 11 of the Court of Appeal Rules which provide in part that:

"Non-compliance on the part of the appellant in any criminal cause or matter with these Rules or with any rule of practice for the time being in force shall not prevent the further prosecution of his appeal if the Court considers that such non-compliance was not wilful, and that it is in the interests of justice that non-compliance be waived."

It is to be observed at once that Rule 11 is confined to non-compliance with "Rules of Court" or "rules of practice" and have no relevance to statutory provisions or other rules of law. Furthermore one who wilfully refrains from complying with prescribed rules of procedure cannot rely on his own wilful default to ground an application for the exercise of the Court's discretion. The interests of justice would not be served if a convicted person who preferred the physical escape route to that of a regular appeal and had the benefit of freedom at a time when he was legally deprived of liberty, could thereafter press the Court to hear his appeal out of time on the simple basis that his appeal was meritorious.

A very strong Court decided the case of R. v. Percival Moore (1975) 19 W.I.R. 72 (Luckhoo P. (Ag.), Fox and Graham-Perkins J.J.A.). There the applicant fled custody and remained at large for six months before he was re-captured. In applying for leave to appeal out of time he said that: "I paid the policeman to let me go ...". The Court refused to grant an extension of time within which to appeal. Fox J.A. after referring to the applicant's statement as to how he came to be released from custody said:

"This is a manifestly inadequate ground for invoking the discretion of the court. The discretion is wide and unfettered, but at the same time, it is subject to the guidance of those considerations of common sense and justice which are detectable in every situation. Where failure to give notice of appeal in time is the result of the wilful act of the applicant himself an extremely strong consideration of common sense exists for withholding the discretion."

In R. v. Derrick Foster (1975) 13 J.L.R. 129, the Court cited with approval the decision in R. v. Moore (supra) and held that an applicant who had escaped from the General Penitentiary and remained at large for one year had by his own wilful act of escaping from custody frustrated the next step required to perfect his appeal. The applications for extension of time in which to appeal in both R. v. Moore and R. v. Foster were refused.

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We did not find it necessary to look at the grounds of appeal filed on behalf of the applicant as in our view where a person is convicted of murder and sentenced to death, the Court has no discretion in any circumstance, to extend the time limited within which to appeal or apply for leave to appeal.

Section 15(3) of the Judicature (Appellate Jurisdiction) Act provides:

"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."

This sub-section is in pari-materia with the exception clause to Section 7(1) of the Criminal Appeal Act, 1907 (U.K.) which received judicial interpretation in

R. v. Twynham (1921) 15 Cr. App. R. 33. There Reading L.C.J. said:

" '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 of Criminal Appeal. '

It follows, therefore, that this Court has power to extend the time within which notice of appeal or notice of application for leave to appeal may be given, except in the case of a conviction involving sentence of death; and it equally follows that in the case of a conviction of murder and a sentence to death

"this Court has no power to extend the time. There is a very good reason for the Legislature making this provision, because the mere giving of a notice of appeal or a notice of application for leave to appeal against a conviction of murder or high treason, has the effect of postponing the date of the execution. Once that notice has been given, the execution cannot take place until a certain time after the hearing of the appeal. If it were possible to extend the time, it would be open to a murderer, having failed in one appeal, to give notice asking for an extension of time in order to bring some other matter before the Court, or not give the notice until the last moment, in order to provide for a further extension of time. Consequently, the Legislature deliberately declared that an appeal from a conviction involving a sentence of death must be made within the prescribed time. Therefore, this Court has no jurisdiction to extend the time for appealing or applying for leave to appeal against such a conviction."

Nowadays persons convicted of murder in Jamaica are provided with numerous opportunities to have their cases reviewed by the Judicial Committee of the Privy Council and by international organizations to which the Government is a signatory. However, the decision of Reading L.C.J. in R. v. Twynham is applicable to the instant appeal and for the reasons which are set out in that case.

There is no jurisdiction in this Court to extend the time for lodging an appeal from a conviction of murder where the sentence pronounced is to suffer death in the manner authorised by law. For these reasons we refused the application for leave to appeal out of time.