In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2014: CRIMINAL APPEAL NO: 38

BRUCE COLIN MENZIES

Appellant

-v-

THE QUEEN

Respondent

RULING
(In Chambers)

Date of Hearing: May 28, 2015
Date of Ruling: June 11, 2015

Ms. Auralee Cassidy, Kairos Philanthropy, for the Appellant
Ms. Nicole Smith, Office of the Director of Public Prosecutions, for the Respondent

Background

1. On January 6, 2014, the Appellant's former attorneys filed a Notice of Appeal against the decision on December 18, 2013 of the Magistrates' Court (Worshipful Khamisi Tokunbo) convicting him of doing grievous bodily harm contrary to section 306(a) of the Criminal Code.

2. The appeal was filed before sentencing with the unhappy result that all proceedings were stayed pending appeal. Section 11(1) of the Criminal Appeal Act imposes an automatic stay of proceedings once a notice of appeal against conviction is filed. This enables convicted persons, wherever the Magistrate adjourns following entering a conviction after a trial, to delay the sentencing hearing until the appeal is heard, should they elect to appeal conviction before sentencing takes place. Hopefully the

Legislature will consider remedial action to prevent the duration of proceedings in the Magistrates' Court being subject to prolongation in this manner[1].

3. On November, 2014, the Registry asked counsel for the Appellant to confirm that the appeal record which had been made available was complete and to confirm that it was still proposed to proceed with the appeal. A request was made by counsel to supplement the record although it was pointed out that he was no longer retained. Once the Appellant's contact details were obtained by the Court, a Notice of Hearing for March 31, 2015 was sent out on or about February 10, 2015. On March 24, 2015, one week before the scheduled hearing, the Appellant acting in person filed a Notice of Abandonment of Appeal.

4. On April 2, 2015, the Magistrates' Court very promptly proceeded with the stayed sentencing hearing and the Appellant was sentenced to six months' imprisonment. On April 20, 2015, he applied by Summons in the abandoned appeal proceeding for an order restoring the previously abandoned appeal.

5. The application to restore was heard on May 28, 2015 and a reserved judgment to afford the Crown the opportunity to file written submissions, if so advised, on or before June 5, 2015. Ms. Smith had not had an adequate opportunity to consider the Crown's position. In the event no submissions were filed by the Crown.

Factual basis of application

6. The Appellant deposed in his Affidavit sworn on April 15, 2015 most significantly as follows:

> "*8. THAT subsequent to filing my Supreme Court Appeal I was told by other and non-legal parties that by filing an appeal I was at risk of receiving a higher sentence at sentencing if the appeal was not successful…*
>
> *10. THAT based on the information I received suggesting I would receive a higher sentence in Magistrates' Court and the decline of my Legal Aid application, I felt hopeless and lost in not knowing how to conduct an appeal.*"

7. The appeal was said to have been abandoned due a combination of advice from non-lawyers (which was manifestly legally wrong) and a sense of "hopelessness" due to the absence of legal representation on the part of an offender who had been legally represented at trial. This evidence was uncontradicted.

[1] Similarly inconvenient automatic stay provisions may be found in the Civil Appeal Act 1971, section 8. These provisions were subject to adverse judicial comment in *Hollis-v-Frith and Frith* [2015] SC (Bda) 9 App (21 January 2015).

Principles applicable to setting aside the abandonment of an appeal

8. Neither I nor counsel was aware of any prior local considered judgment dealing with the legal principles governing an application to restore an appeal which has been abandoned.

9. Ms. Cassidy referred the Court to case notes set out in '*Banks on Sentence*' (August 2014 No.1) which elucidated the Australian and England and Wales position. In *R-v-Gardiner* [1970] VR 278 at 281, such an application would only be granted if the choice was influenced by "*fraud or mistake or any other factor which would justify the Court in saying that the notice was a nullity*". A similar test is applied in England with a seemingly liberal view being adopted, with applications being granted where there was no legal advice at all (*R-v-Taylor*[2014] EWCA Crim 1208) or bad legal advice (*R-v-Livesey* [2013] EWCA Crim 1913). There is no suggestion that the merits of the appeal itself are relevant to the merits of the restoration application.

10. In *Taylor*, Elias LJ (delivering the judgment of the English Court of Appeal) opined as follows:

> "*2. In the recent case of Smith [2013] EWCA Crim. 2388 , Jackson LJ giving the judgment of this court considered some of the earlier authorities, including the leading case of Medway [1976] QB 779 and extracted the following principles (see paragraph 58):*
>
> > *i) A notice of abandonment of appeal is irrevocable, unless the Court of Appeal treats that notice as a nullity.*
> >
> > *ii) A notice of abandonment is a nullity if the applicant's mind does not go with the notice which he signs.*
> >
> > *iii) If the applicant abandons his appeal after and because of receiving incorrect legal advice, then his mind may not go with the notice which he signs. Whether this is the case will depend upon the circumstances.*
> >
> > *iv)Incorrect legal advice for this purpose means advice which is positively wrong. It does not mean the expression of opinion on a difficult point, with which some may agree and others may disagree."*
>
> *We pause to note that in this case the advice given was wrong. It cannot be said that there was a strong possibility that he would end up with additional time in custody. Very exceptionally this court may add a little to the sentence where the appeal was plainly and obviously hopeless. That is not in fact the position here.*
>
> *3. In Smith itself the court referred to three cases: Offield [2002] EWCA Crim. 1630 , Elrayess [2007] EWCA Crim. 2252 and RL [2013] EWCA Crim 1913 , in each of which an applicant was allowed to withdraw a notice of abandonment where it had been made after the applicant had been given erroneous advice that his sentence might increase if the application were to be refused. In each of those cases the court concluded that the applicant's mind did not truly go with the abandonment. In our judgment, the most helpful case on this point is Offield in*

which the court cited the case of Sutton 53 Cr.App.R 269 in which Edmund Davies J (as he then was) said that the court would entertain a request where it was result of "bad advice given by some legal adviser which has resulted in an unintended, ill-considered decision to abandon the appeal." In this case it was not of course a legal adviser, but we see no reason for drawing a distinction between the advice given by such an adviser and advice given by prison colleagues, particularly where the recipient of the advice is young and ignorant of the procedures.

4. Although none of these courts has provided any guiding principles as to when it can be said that the mind has not truly gone along with the abandonment, it seems to us that where, but for the bad advice, there would have been no abandonment then a court can readily infer that is the position. Here, on the basis of the uncontradicted evidence, the applicant did abandon the appeal solely because of the erroneous advice. In the light of the authorities we are satisfied that we ought to allow him now to withdraw that abandonment."

Disposition of application

11. Ms. Cassidy submitted that applying the governing legal principles, the abandonment of the appeal ought to be set aside. I accept this submission, which the Crown has not positively opposed. The Appellant's uncontradicted evidence shows that his mind did not truly go with the abandonment, which took place because of a combination of incorrect advice and the loss of his trial lawyer.

12. The abandonment of the appeal is hereby declared to be a nullity and the appeal is restored. Because the Appellant is serving a short sentence and remains in custody the appeal should be listed for hearing as a matter of urgency.

Dated this 11th day of June, 2015 _____
IAN R.C. KAWALEY CJ