



## **DECISION**

### **Introduction**

- [1] **MOORE JA:** We have before us four appeals against conviction and sentence. On 4 June 2009, before **Goodridge J** and a jury, the appellants and two other persons who were jointly charged were each convicted of six offences relating to the importation and possession of, and trafficking in, 91.3 kilogrammes of cannabis and 119.4 kilogrammes of cocaine, contrary to the provisions of the **Drug Abuse (Prevention and Control) Act, Cap. 131**. On 11 December 2009 they were each sentenced to various terms of imprisonment: the sentences to run concurrently.
- [2] On 9 July 2009 Rambarran filed an appeal against conviction and on 30 December 2009 he filed an appeal against sentence; on 16 December 2009 Greene filed an appeal against conviction and sentence; on 21 December 2009 Campbell filed an appeal against conviction and sentence; and on 5 January 2010 Persaud filed an appeal against conviction and sentence.
- [3] After a number of adjournments were granted by this Court at the request of Sir Richard Cheltenham, QC, (Sir Richard), this matter finally came on for hearing on 23 September 2014. The Director of

Public Prosecutions (DPP) craved leave to take a point *in limine* and the Court granted leave.

[4] On that date, Sir Richard, on grounds of ill health, was again absent from the proceedings. Appellant Rambarran was represented by Miss Seecharan, Sir Richard's junior. She invited the Court to defer the response on behalf of Rambarran until Sir Richard was available. The matter was accordingly adjourned and responses on behalf of Rambarran, Greene, Persaud and Campbell were deferred to 2 December, 2014. The Registrar of the Supreme Court (Registrar) made copies of the transcript of the day's proceedings, which included the DPP's submissions, available to all parties.

[5] On 2 December, 2014 the DPP was absent. The Crown was represented by Mr. Elwood Watts and Miss Krystal Delaney. Sir Richard for Rambarran, Mr. Gordon for Greene and Persaud, and Mr. Holder for Campbell, responded to the DPP's submissions which had been made on 23 September, 2014.

### **Counsel's Submissions on Point *In Limine***

#### *The DPP's Submissions*

[6] We set out below, verbatim, some of the salient features of the DPP's submissions:

“May it please you, My Lords, My Lady, this appeal in which these four persons have been convicted were actually as a matter of record. They were convicted on the 4<sup>th</sup> of June 2009. They have been in custody now, from since from that date to now and that makes it well over 5 years, 3 months and today makes it 19 days.

My Lords, section 19 of the Criminal Appeal Act provides as follows:

Section 19: Subject to subsection 2 a person who wishes to appeal to the court or to obtain leave to appeal must give notice of appeal or his application for leave to appeal and the matter provided by rules of court within 21 days of the date of conviction, verdict or finding.

The record shows that ... Appellant Greene, appealed on the 16<sup>th</sup> of December 2009. Lemme Campbell appealed on the 21<sup>st</sup> of December 2009. Rambarran gave notice on the 9<sup>th</sup> of July 2009.

Somwattie Persaud gave notice of appeal sometime after all of that. This is the submission of the Prosecution, of the Crown.

...

Rambarran was convicted on the 4<sup>th</sup> of June. The 21 days for expiration of the notice to give appeal was on the 25<sup>th</sup> of June. On 11<sup>th</sup> of December he was sentenced and the expiration of the appeal time for appealing against sentence was the 1<sup>st</sup> of January. He filed the appeal on the 9<sup>th</sup> of July 2009, 14 days after the expiration of the 21 days; that's 35 days after the period of the date of his conviction. That now makes it, My Lords some -- and to this date no application for leave to extend the time has been made and it is now 5 years, 3 months and 19 days have elapsed. It is therefore the submission of the Prosecution that there is no

appeal against conviction before this Court that this court can hear.

The Jurisdiction of the Court of Appeal, unlike the jurisdiction of the Supreme Court is statutory. You are a creature of statute and you have no power to gel the law, to make the law or the extend in such circumstances.

...

The appeals against sentence are all in order, except for the case of Somwattie Persaud. They were all made within the 21 days of sentence. Somwattie Persaud’s was 4 days out. ... Suffice it to say that none of these matters before the Court for application against for leave to appeal to a conviction is valid and is properly before the Court.

Now, how what is the law on the matter? The Criminal Appeal Act section 19 expressly provides you must give notice or seek leave to appeal within 21 days. The Court of Appeal can extend the time, at any time if substantial grounds are shown for the delay.

No application has been made or let me put it delicately. No application for an extension has been served on me as at today: 5 years, 3 months, 19 days after conviction”.

.....

Now, there are three valid appeals against sentence, and those you must hear. Those are made by Mr. Rambarran, who was sentenced on the 11<sup>th</sup> of December 2009 and he filed his notice of appeal against sentence on the 30<sup>th</sup> December of 2009, so he is within the 21 days, so you must hear him on sentence.

Garvin Greene, was sentenced on the 11<sup>th</sup> of December 2009 and he filed his appeal against sentence on the 16<sup>th</sup> of December, 2009, he is well within the 21 days. He has a valid appeal against sentence.

Lemme Campbell, was sentenced on the 11<sup>th</sup> of December, 2009. He filed his appeal on the 21<sup>st</sup> of December, 2009. He has a valid appeal against sentence.

Somwatti Persaud was sentenced on the 11<sup>th</sup> of December, 2009. She filed her appeal on the 5<sup>th</sup> of January, 2010 outside the period prescribed by law, four days after the expiration of the appeal against sentence. She does not have a valid appeal against conviction, nor sentence. So based on the record that you are bound by, there is only three valid lawful appeals in this matter before the court and those valid lawful appeals are by in respect of sentence only by Rambarran, Mr. Gavin Greene and Mr. Lemme Campbell”.

- [7] Among the authorities cited by the DPP in support of his submissions were **Walker v Government of USA (1990) Barb. LR 463**; and **Andrew Leroy Lovell v The Queen CCJ Appeal No. BBCR 2014/006 (Lovell)**.

*Sir Richard's Submissions*

- [8] Sir Richard met the DPP's submissions head on in clear and unambiguous language, the salient features of which bear repetition:

“Yes, my Lords, My Lady, I want at the outset, sir, to respond to what I understand is the substance of the

submissions made by the learned Director of Public Prosecutions on the 23<sup>rd</sup> of September, last 2014.

It is my understanding, sir, I was not present in court. The Director argued that by way of a preliminary submission that in the instant appeal, Rambarran is outside of the 21 day period in filing an appeal against his conviction. That 21 day period as we all know, sir, is set out at section 19 of the Criminal Appeal Conviction (sic) Act 113A of the Laws of Barbados.

I think we need to remind ourselves, sir, of the facts as it relates to this point before the Court.

On the 4<sup>th</sup> of June 2009, Rambarran was found guilty of several offences related to the importation and trafficking of prohibited substances. He was immediately remanded to Her Majesty's Prison and appealed on the 9<sup>th</sup> of July 2009 and relied on substantial grounds of appeal which are before the Court. At that point most important, Rambarran had not been sentenced. He was subsequently sentenced on the 11<sup>th</sup> of December 2009. There was a gap of some six months between the verdict of the jury and the sentencing of Rambarran and other co-accused. And he did file an appeal against that second stage of sentencing on the 30<sup>th</sup> of December 2009. I am advised that there is no quarrel that that second filed appeal is in order.

The appropriate question in my respectful submission, is when does time begin to run, in the instant case given the facts and the break between the verdict of the jury and the sentencing of the judge? We say, sir, that the learned Director is wholly wrong in assuming that time began to run as far as the appeal was concerned after Rambarran was found guilty by the jury.

We say at that point that conviction was incomplete, because conviction has two components to it: the verdict of the jury and the sentencing of the Court; until the sentencing of the Court the conviction is not complete,

because it has two components. Both the conviction, the verdict of jury and the sentencing of the Court. So that time never began to run in the Rambarran's case until after the learned trial judge had in December some six months after the verdict of the jury, declared the sentencing of the Court.

The reason why my learned friend had not been able to provide any relevant authority is because it is settled point to two centuries, and so you can't find a single case in Barbados that had dealt with it, dealt with it, and that is not a matter of surprise".

- [9] Sir Richard then referred to the following statement appearing at pp 292 and 293 of Dana Seetahal's *Commonwealth Caribbean Criminal Practice and Procedure, Volume one* (sic). He probably meant the Third Edition of that work. Sir Richard said: "And she goes straight to the point:

"In order to activate the appellate process, an appellant must either file a notice of appeal, notice of application for leave to appeal or notice of application for extension of time to appeal. In whichever instance, the notice must be filed within 14 days (or 21 days in the Bahamas and Barbados) of the conviction and or sentence. If the sentence is on a different date from the finding of guilty", exactly on all fours with the present situation. The finding of guilt took place in June, 4<sup>th</sup> of June, 2009 and the sentence took place in December of the said year, almost a six months difference. If the sentence is on a different date from the finding guilt, the time must be counted from the date of sentence".

"That is the statement of the law that is based on the only relevant case which we could find, which is a case of almost 200 years. That case is the case of *Richards v. The Queen* [1992] 41 WIR. ...

If the Dana Seetahal's formulation is correct and we urge the Court that it is correct, there is no question that Rambarran's appeal is in time. If I could be permitted to say this, the only reason that it was separated as an appeal filed against conviction and then later against sentence, was because within days of the conviction the verdict of the jury, the partial conviction I had worked on the appeal. I kept it for a short while just to make sure that I was happy with it, and then said look, this is a busy chamber, when the time comes, we could well be so consumed with other things or even having to respond to obligations abroad, let us get it in the court. But I believe that our filing at this time had let the Director of Public Prosecutions to say, but this is not within 21 days, this is late; but time had not begun to run, that is the important submission. Time had not begun to run and to that extent it was perfectly in order. So there is no question that there is any obligation on Rambarran now to file an application for an enlargement of time. Time had not begun to run, it is quite contrary to what the learned Director seemed to have felt when Rambarran first filed his appeal. It is a matter of convenience to the counsel and out of -- and a safeguard too, because when you have several things going on, time may just run against you. So I say no, it has no rightful place in the chamber now, let's get it in court. But time never began to run in the Rambarran's case until sentenced was pronounced some six months after the verdict of the jury".

[10] Sir Richard then discussed the meaning of the word, "conviction" and referred to **Hale's Pleas of the Crown [1778], Volume 2 Chapter 32 page 251**. He also relied on **Richards v The Queen (1992) 41 WIR 263**. In our opinion those authorities do not advance the issue before the Court and we say no more about them.

[11] Further in his argument Sir Richard said:

“We are not in a situation we contend where we have to ask the Court for an enlargement of time. We say that we were always within time, and all that remains in Rambarran’s case, is for the appeal to be heard. We agree with the cases that say, but if indeed as is provided for, you are making an application for an enlargement of time, you would have to justify the late application and part of the justification must rest on the likelihood of the outcome, the merits of the case, but that is fortunately not the position in which we find ourselves here this morning.

So we are saying that this matter is so far as it relates to Rambarran should cause the Court no difficulty, because even though the appeal was filed in two stages, the appeal was always in time, because time did not begin to run until sentencing was pronounced, sentence was pronounced and that was in December; and that is when part two of the case was filed, but it is only after the sentencing that time began to run, so Rambarran’s appeal is wholly in time and we ask the Court quite respectfully to so find”.

[12] It must have escaped Sir Richard that the statement which appears at pp 292 and 293 of Dana Seetahal’s work referred to above is impliedly contradicted at p 295 by the following statement made in relation to **Sahadath Ali v R (1969) 15 WIR 399:**

“In that case, the applicant was convicted in May for unlawful wounding and gave notice of appeal against conviction on the same day as conviction. Six months later, in October, he sought to appeal instead against sentence. He applied for extension of time to file a notice of application for leave to appeal against sentence and gave as the main reason for his delay the fact that he was unrepresented and did not appreciate the difference. The Court of Appeal, holding that substantial grounds must be given for delay to cause it to intervene, stated that such intervention would occur where the

judge had exceeded his jurisdiction in imposing a sentence. In this case, he had not done so, therefore no extension of time to appeal against sentence would be granted”.

*Mr. Gordon's Submissions*

[13] Mr. Gordon on behalf of Persaud submitted that she had been sentenced on 11 December 2009 and signed her application for leave on 31 December 2009. Her application reached the Registrar on 5 January 2010. Mr. Gordon then said:

“Now, if it is that the Court to the strict letter of the rule applied the 21 days, we are asking then under section 19(2) that the Court use its discretion to extend the time, if it is that there is any need for such, so that she would not run afoul of the appellate process, because it is not seven years. It is not four years; it would only be a matter of days and no injustice I think would be done because of what is at issue”.

[14] The following exchange then ensued between Mr. Gordon and the Court:

**Gibson CJ:** So should we treat this as your application

--

Mr. Gordon: Yes sir --

**Gibson CJ:** -- for an extension with regard to the sentence?

Mr. Gordon: I would be very grateful for that, my Lords. I have no difficulty with the Court giving us that”.

*Mr. Holder's Submissions*

[15] Mr. Holder adopted Sir Richard’s argument wholesale.

### **Procedure for Appealing and for Obtaining Leave to Appeal**

[16] The procedure for appealing and for obtaining leave to appeal is set out in **section 19** of the **Criminal Appeal Act, 1981 (Act 1981 – 14)** now **Cap. 113A (Cap. 113A)**. **Subsection (1) (a)** of that **section** is relevant to the instant appeals. It provides:

“19(1) Subject to subsection (2), a person who wishes to appeal to the Court, or to obtain the Court’s leave to appeal, must give notice of appeal or his application for leave to appeal, in the manner provided by rules of court within 21 days of the date of the conviction, verdict or finding appealed against, or,

(a) in the case of an appeal or application for leave to appeal against sentence, other than a sentence of death, within 21 days of the date on which sentence was passed”.

[17] **Subsection (2)** of that **section** contemplates that for some good and sufficient reason an appellant might be dilatory in making his application and empowers the Court, in such an eventuality, to extend the time for giving notice of appeal or application for leave to appeal.

[18] **Section 19** of **Cap. 113A** is a clone of *section 18* of the *Criminal Appeal Act 1968* of England, the relevant parts of which provide:

“18(1) A person who wishes to appeal under this Part of this Act to the Court of Appeal, or to obtain the leave of that court to appeal, shall give notice of appeal, or, as the case may be, notice of application for leave to appeal, in such manner as may be directed by rules of court.

(2) Notice of appeal, or of application for leave to appeal, shall be given within 28 twenty-eight days of the conviction, verdict or finding appealed against, or in the case of appeal against sentence, from the date on which sentence was passed ...”.

## **Discussion**

[19] The statutory provisions set out above are clear and unambiguous that conviction and sentence are separate transactions. They are clearly disjunctive and, in the case of Barbados, “sentence” is dealt with separately in paragraph (a). The stark reality of the two separate transactions comes into focus when a pre-sentencing report is ordered by the court and sentence is deferred until sometime after conviction in order to await the preparation of the pre-sentencing report. In the instant case a period of six months elapsed between the date of conviction and the date of sentence.

[20] Under the English provision it has been held that for the purposes of an appeal against conviction, time runs from the date of the conviction (i.e. the verdict) not from the date of sentence, if later: **R v. Long, [1998] Cr. App. R. 326 (Long)**.

[21] In the case of **Long** which was decided by the Court of Appeal of England and Wales, that court interpreting the very provision which

was the source of **s.19 of Cap. 113A**, Lord Bingham CJ, in dismissing the application for leave to appeal against conviction, said:

“We should mention at the outset one matter to which our attention has been drawn. In accordance with what has, we understand, become a prevailing practice, counsel did not give notice of application for leave to appeal within 28 days of conviction, believing that it was appropriate to delay making application until sentence had been passed. The statutory provision which governs this matter is section 18(2) of the Criminal Appeal Act 1968 which reads:

‘Notice of appeal, or of application for leave to appeal, shall be given within 28 days from the date of conviction, verdict or finding appealed against, or in the case of appeal against sentence, from the date on which sentence was passed or, in the case of an order made or treated as made on conviction, from the date of the making of the order.’

It appears to us that the language of that subsection is quite unambiguous and requires notice of application for leave to appeal against conviction to be given within 28 days of conviction. If, as is not infrequently the case, there is a lapse of time between conviction and sentence, then nonetheless time begins to run on the date of conviction and not on the date of sentence.”

[22] While **Lovell** was not decided on **section 19** of **Cap. 113A**, the principle adumbrated there is highly relevant. In **Lovell**, the **Caribbean Court of Justice (CCJ)** held that the applicant, whose appeal had been dismissed by this Court on 23 October 2013 and who on 15 May 2014 filed applications for special leave to appeal and leave to appeal as a poor person in that Court, was out of time because

under the relevant rule his applications ought to have been filed within 42 days of the dismissal of his appeal by this Court.

[23] Sir Richard was adamant and, Mr. Holder with him, that the appeals had been filed within time and there was no need to seek an extension of time. On the other hand, Mr. Gordon, having seemingly recognised the flaw in Sir Richard's argument, abandoned his embrace thereof and, *ex abundante cautela*, craved leave of the Court to grant appellant Persaud an extension of time within which to file an application for leave to appeal against sentence. He stated that Persaud, like all other appellants, was sentenced on 11 December 2009. She signed her application for leave on 31 December 2009 but it did not reach the Registry of the Court of Appeal until 5 January 2010. Mr. Gordon cites the reasons for delay as being the intervening New Year holiday and weekend, and Persaud having to rely on the Superintendent of Dodds Prison, in which she was then resident, to transmit her application to the Registry.

[24] In light of all that we have said before and in view of the highly persuasive authority of **Long** and, more particularly, the binding authority of **Lovell**, we hold that **section 19** of **Cap. 113A** as it stands, is quite clear and unambiguous and requires notice to be given within the time limit of 21 days for the filing of an application for leave to

appeal or for filing of an appeal against conviction or against sentence, as the case may be. Accordingly none of the purported appellants has a valid appeal against conviction before this Court.

**Disposal**

[25] The appellants Rambarran, Campbell and Greene have valid appeals against sentence and may proceed with those appeals if they so wish. In view of Mr. Gordon's oral application in respect of appellant Persaud, leave is granted for her to file an application for an extension of time for leave to appeal against sentence only. That application must be filed on or before 9 February 2015.

Chief Justice

Justice of Appeal

Justice of Appeal