

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

**Criminal Appeals Nos. 6, 9 and 10 of 2009
2 of 2010**

BETWEEN:

ROHAN SHASTRI RAMBARRAN **Appellants**
GAVIN WAYNE GREENE
LEMME MICHAEL CAMPBELL
SOMWATTIE PERSAUD

AND

THE QUEEN **Defendant**

(DECISION NO. 2)

Before: The Hon. Sir Marston C.D. Gibson, K.A., Chief Justice; The Hon. Sherman R. Moore, CHB; and The Hon. Sandra P. Mason, Justices of Appeal

2015: March 13 & 24

Sir Richard Cheltenham, K.A., Q.C., Miss Shelly-Ann Seecharan with him for the Appellant Rambarran

Mr. Marlon Gordon and Miss Safiya Moore for Appellants Greene and Persaud

Mr. Arthur Holder and Mr. Kendrid Sergeant for Appellant Campbell

Mr. Charles Leacock, Q.C., Mr. Lancelot Applewhaite with him for the Respondent

DECISION

Introduction

[1] **MOORE JA:** On 13 instant we held that this Court was *functus officio*, had no jurisdiction to entertain these applications and we denied them. We promised to give our

reasons today. We now do so.

[2] On 2 December 2014, in his usual robust style and in plain and unambiguous language, Sir Richard Cheltenham, K.A., Q.C. (Sir Richard) argued eruditely that there was no need for Rambarran to apply for an extension of time to file a notice of appeal or an application for leave to appeal against conviction in accordance with **section 19** of the **Criminal Appeal Act, Cap. 113A (Cap. 113A)**. Sir Richard's argument was in response to the preliminary point taken by Mr. Charles Leacock, Q.C., Director of Public Prosecutions (DPP), on 23 September 2014, that the appellant, among others, had filed his notice of appeal out of the time prescribed by **section 19** of **Cap.113A** for filing such a notice and therefore had no valid appeal before this Court.

[3] Having had time for reflection, and seemingly persuaded that his argument was without merit, Sir Richard made a *volte face* and applied for an order to extend the time for filing an application for leave to appeal on the eve of our decision. That application was supported by affidavit.

[4] On 9 February 2015, on behalf of Persaud and on 10 February 2015, on behalf of Green, Mr. Gordon filed applications for an extension of time in which to apply for leave to appeal against conviction in the case of Green and conviction and sentence in the case of Persaud. These applications were also supported by affidavits.

[5] It is with the propriety of those applications for extension of time that we are here engaged.

Submissions of Counsel

[6] On 13 instant, Sir Richard submitted that this Court was not *functus officio* and should, therefore, grant the order sought in the application filed on 4 February 2015 on behalf of

Rambarran.

[7] The DPP contended that this Court having held on 5 February 2015:

- (a) that **section 19 of Cap. 113A** requires that notice be given within the time limit of 21 days for the filing of an application for leave to appeal or notice of appeal against conviction or sentence, as the case may be; and
- (b) that none of the purported appellants had a valid appeal against conviction before this Court.

this Court is *functus officio*, without jurisdiction and cannot entertain the present applications.

[8] We must, therefore, now consider whether this Court has jurisdiction to entertain the present applications.

Is This Court *Functus Officio*?

[9] The Fifth Edition of Black's Law Dictionary defines *functus officio* thus:

"Having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority. Applied to an ... agency, etc., which has fulfilled the purpose of its creation, and is therefore of no further virtue or effect."

[10] When a judge finally disposes of the matter before him he is *functus officio* and neither he nor any other judge of equal jurisdiction may vary that order: *Re VCM Holdings Ltd. [1941] 3 ALL ER 417, R v British Coal Cooper (No.2), ex p Price [1993] COD 323*. If the Court has discharged all judicial functions in a matter it is said to be *functus officio*: *R v Camberwell Green Magistrates' Court ex p Brown [1983] 4 FLR 767*.

[11] In the High Court of Australia in *Bailey v Marinoff* (1971) 125 CLR 529 Barwick CJ said at 531:

"Once an order disposing of a proceeding has been perfected by being drawn up as the record of a Court, that proceeding apart from any specific and relevant statutory provision is at an end in that court and is in its substance, in my opinion, beyond recall by that court. It would, in my opinion, not promote the due administration of the law or the promotion of justice for a court to have a power to reinstate a proceeding of which it has finally disposed. In my opinion, none of the decided cases lend support to the view that the Supreme Court in this case had any inherent power or jurisdiction to make the order it did make, its earlier order dismissing the appeal having been perfected by the processes of the Court. I would add that, however hard the case might seem for the would-be appellant the loss of its right of appeal derived from its own conduct or from that of persons for whom it must take responsibility. The finality of the order dismissing the appeal does not seem to me to partake of injustice in the circumstances or to call for any departure from well settled principles, themselves essential in my opinion to the due administration of our system of law."

[12] The policy of the law is that there should be finality in litigation. Finality is a requirement of good administration because people who are affected, directly or indirectly, need to know where they stand. Accordingly, the general rule is that a court has no power to set aside its own final judgment once it has been passed and entered. However, an order is ordinarily effective from the moment of its pronouncement. Authority for that proposition, if needed, may be found in the following statement of Lord Westbury L.C. in **Re Risca Coal & Iron Co., Ex parte Hookey (1862) 4 De G. F. & J. 456 at pg. 460:**

“The theory of judicial procedure is that the cogent and binding effect of the order begins immediately from the time when the order is pronounced by the lips of the judge, and if that could be done physically which legally is supposed to be done, and which one would desire to be done if it were possible, every order would be completed on the spot, written out by the judicial officer and in curia before the court rises, and delivered to the parties. That is the unquestionable theory of judicial procedure, and in conformity with that theory that is the time when the order is made, for the two words must be considered as equivalent and capable of being substituted the one for the other. The mere defining of the words

of the court by writing and reducing them into a form in which they can be evidence is a ministerial operation which, according to the true theory, succeeds the delivery of the order by the judge, and must be in point of fact nothing in the world more than the physical embodiment on the spot by the court of the words which the judge has used.”

[13] A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined circumstances. That tenet finds reflection in rules concerning the bringing of an action to set aside a final judgment on the ground that it was procured by fraud ... and in doctrines of *res judicata* and issue estoppel. The principal qualification to the general principle of finality is provided by the appellate system. The principle of finality of litigation “serves not only to protect parties to litigation from attempts to re-agitate what has been decided, but also has wider purposes”. One of those wider purposes is that “the principle of finality serves as the sharpest spur to all participants in the judicial process, judges, parties and lawyers alike to get it right the first time”: *Burrell v R (2008) 238 CLR 218*. The re-agitation or re-opening of final judgments especially in criminal cases should be avoided, “lest it encourage carelessness by a party's legal representatives and expose to risk the public interest in finality of litigation”: *Gould v Vaggelas (1985) 157 CLR 2155*. These principles apply with equal or perhaps even greater force to the failure to comply with time limits.

[14] Sir Richard contended that this Court was not *functus officio* but he never presented any authority in support of his contention. Rather, he returned to his assertion made on 4 December 2014 and 5 February 2015 that a rule of practice had grown up whereby it was the norm for appellants to ignore the clear and unambiguous words of **section 19** of **Cap.**

113A.

[15] That contention has no factual basis. Prior to 15 May 2000, the date of commencement of the **Penal System Reform Act, Cap. 139 (Cap. 139)**, sentence almost always followed immediately upon conviction. There were occasions when the prisoner or counsel, as the case might have been, sought an adjournment in order to call a witness as to character or to obtain a probation report. Those instances were easily accommodated in the system then prevailing and thus the period between conviction and sentence was very short. However, since 15 May 2000 the period between conviction and sentence has been slowly increasing and that period can sometimes be significant because of the inordinate demand for pre-sentencing reports and the dire shortage of probation officers. That circumstance has brought into sharp focus the need for compliance with **section 19 of Cap. 113A**. Such compliance is in the interest of the prisoner because a successful appeal against conviction would negate sentence and hence an anxious wait between conviction and sentence.

[16] The absence of the practice contended for by Sir Richard is also illustrated by the case of **Martin Robert Glenn v The Queen, Criminal Appeal No. 15 of 2000 (unreported)** (a decision of this Court, the transcript of which appears in the proceedings of Wednesday 28 March 2007), an application for an extension of time for leave to file an appeal, in which **Sir David Simmons CJ** refusing the application said:

"We allowed affidavits to be filed to explain the reason for non-compliance with the time limit imposed by criminal appeal rules."

[17] Sir Richard is approbating and reprobating. Before our decision of 5 February was known he had filed the present application. He has also now distanced himself from his

own submissions so clearly and so well articulated on 4 December 2014 and 5 February 2015 and asserted that they were taken out of context. In the course of his argument the following exchange ensued:

“**MOORE, JA:** Sir Richard, I think we gave a decision in this Court on the 5th February. Your – against the background of a point taken by the Director of Public Prosecution (sic) on the 23rd September last year and your response, I believe, on the 2nd December last year; that you had appealed on behalf of your client out of time. You contended before this Court that you need make no application for an extension to file, to apply for an extension for leave to appeal out of time. In the face of this Court’s decision and in the face of the position you took then, what authority does this Court have to hear your application this morning, to entertain your application this morning?”

Sir Richard: I think with the greatest respect, Sir, that I don’t know whether you speak for the Court or for yourself, but my remarks are totally taken out of context. I recall precisely what took place. I was making the case that the appeal was in time. There was a voice or two from the Court, one I believe suggesting that it might not be in time and my learned friend, Mr. Gordon, thought it useful, if not wise, to ask on his feet for an enlargement of time. I thought that until the arguments were completed and ruled upon that that would be the time, because I didn’t refuse to apply for an enlargement of time, I thought that the time had not yet come since the appeal was not determined. My friend in the mist (sic) of the appeal and before it was determined in the mist (sic) of the argument indicated that he would like an enlargement of time. But until the arguments were completed I thought that the time had not yet come for that and so I deferred my application until a little later.”

[18] The present application must have been made in anticipation that our decision of 5 February might have been unfavourable to the appellant. Even though the present application is different in its terms from the notice of appeal, the purpose of the two applications was identical. They were each intended to facilitate the appeal process. So in essence the present application was aimed at re-agitating or re-opening the issue upon which this Court had ruled on 5 February 2015.

[19] This being an intermediate court, counsel ought to have awaited the decision of 5

February 2015 and then appeal that decision rather than file anticipatory process on 4 February 2015. Mr. Holder informed this Court that he has appealed that decision. It is our view that he acted correctly.

Conclusion

[20] Time limits are fixed by statute to ensure that convicted persons' appeals are dealt with in a timely manner and that those persons are not left to languish in prison or have convictions hanging over their heads for undue periods of time.

[21] The question raised by these applications was impliedly answered by our decision of 5 February 2015 and cannot alter that decision. When the purported appellants filed notices of appeal they ought instead to have sought an extension of time.

[22] The failure or refusal of would be appellants or their counsel to comply with statutory time limits cannot establish a rule of law or of practice that can supplant the plain and unambiguous language of a statute. If that were so it would make a mockery of statute law and deprive the convicted person of one of the protections accorded by law, that is to say, to have his appeal brought before the Court of Appeal at the earliest possible date after conviction.

[23] Breaches of the plain and unambiguous language of a statute cannot make the statute unenforceable. There is no doctrine of desuetude in English law.

[24] Having regard to what we have said above, the authorities there cited and our decision given on 5 February 2015 we hold that:

- (a) this Court is *functus officio* and without jurisdiction to entertain these applications;

- (b) it would not, in our view, be to the due promotion of the administration of the law or justice for this Court to reinstate proceedings of which it has finally disposed;
- (c) however hard this might seem for the would be appellants they have only themselves and their counsel to blame for this result;
- (d) the would be appellants have suffered no injustice in the circumstances;
- (e) there is no need for departure from well settled principles, which, in our view are essential to the due administration of our system of law and in this case are asserting the integrity of **Cap. 113A**, and
- (f) the present application is an abuse of the process of the Court.

Disposal

[25] The applications for extension of time are denied. Applicant Persaud is granted leave to file an amended application for an extension with respect to sentence only on or before 17 March 2015.

Chief Justice

Justice of Appeal

Justice of Appeal