

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Magisterial Application No. 6 of 2014

BETWEEN:

OSCAR MALONEY

APPLICANT

AND

COMMISSIONER OF POLICE

RESPONDENT

**Before: The Hon. Sherman R. Moore CHB, The Hon. Sandra P. Mason
and The Hon. Kaye C. Goodridge, Justices of Appeal.**

2014: October 15, November 13

2015: June 11

Mr. Andrew Pilgrim QC for the Applicant.

Ms. Krystal Delaney for the Respondent.

DECISION

GOODRIDGE JA

Introduction

- [1] This is an application for an extension of time within which to file a notice of appeal against convictions recorded by the magistrate of the District "A" Traffic Court.

The Facts

[2] On 5 March 2014 the applicant appeared in the District "A" Traffic

Court where he pleaded not guilty to the following offences:

- (i) that on 24 September 2013 being the driver of route taxi ZR 58, he allowed the motor vehicle to stand on Cheapside Road so as to cause unnecessary obstruction of the road; and
- (ii) that on the said date he drove route taxi ZR 58 along Cheapside Road, a road other than that specified in the permit granted under regulation 51 of the Road Traffic Regulations 1984.

[3] The matter was adjourned until 6 March 2014 and after a trial he was found guilty by the magistrate who imposed fines amounting to \$1,000 to be paid forthwith with the alternative of a total of 100 days in prison.

[4] The fines were not paid and the applicant was incarcerated. He was subsequently released from prison on 23 June 2014.

The Application

[5] On 29 August 2014, the applicant filed a "notice of motion for leave to appeal" in which he sought an order that (i) he be granted special leave to appeal against the magistrate's decision; and (ii) the time for appealing the said decision be extended as the Court sees fit and that directions be given as to service of the notice of appeal. The

application was supported by the affidavits of the applicant and his attorney-at-law filed on the same date.

- [6] According to the affidavit of the applicant, he conducted his own defence because he could not afford an attorney-at-law. He deposed that the magistrate did not allow him to read from his 2012/2013 permit which permitted him to travel along Cheapside Road, St. Michael.
- [7] The applicant also deposed that after the forthwith fines were imposed he requested time to pay the fines but his request was refused by the magistrate and he was incarcerated. He only became aware that he had a right to appeal when he was so informed by an inmate during the sixth week of his incarceration.
- [8] The applicant acknowledged that he has numerous traffic convictions for similar offences over a period of 25 years. The reason for the delay in bringing the application was due to his financial situation which prevented him from securing the services of an attorney-at-law. He subsequently spoke to Mr. Pilgrim QC who agreed to assist him *pro bono*.
- [9] In his affidavit Mr. Pilgrim QC stated the brief facts and then set out at paragraph 9 the chief grounds of appeal which are:

- “(i) That the Applicant as an unrepresented accused was not given reasonable time to prepare his defence.
- (ii) That the Applicant who was unrepresented was not informed of his right to Appeal even though he requested time to pay the fine and it was clear that he was not in a position to do so.
- (iii) That the Applicant was not allowed to produce any evidence and was not guided through the correct process to do so.
- (iiii)(sic) That the Applicant was convicted of the offence at paragraph 4(b)(sic) although his permit shows Cheapside Road to be a road on which he is allowed to travel.”

The Issue

[10] The issue which arises for this Court's determination is whether this Court has discretion to extend the time for filing an appeal from a decision of a magistrate and, if so, whether the Court should exercise that discretion in favour of the applicant. We begin our consideration of this issue by setting out the legislative provisions relating to appeals from the Magistrate's courts.

The Law relating to appeals from the Magistrate's Courts

[11] **Section 59 of the Supreme Court of Judicature Act, Cap. 117A (Cap. 117A)** states:

“**59.** Subject to rules of court, the provisions of the *Magistrate’s Courts Act* regulating appeals apply in respect of appeals under that Act or under any other enactment to which the procedure in respect of appeals under that Act is applied.”

[12] A person who is dissatisfied with a decision, judgment or order of a magistrate may appeal to this Court. **Section 238 of the Magistrate's Courts Act, Cap. 116A (Cap. 116A)** provides, inter alia:

"**238.** (1) Subject to this Part,

(a) where a magistrate dismisses an information or complaint or refuses to convict or make an order, the informant or complainant may appeal to the Court of Appeal;

(b) where a magistrate convicts or makes an order, the person convicted or against whom the order is made, may appeal to the Court of Appeal against such conviction or order;

(c) where a magistrate gives judgment or makes an order in exercise of his civil jurisdiction, either party to the action in which such judgment was given or order made may appeal to the Court of Appeal.”

[13] The procedure for initiating an appeal is set out in **section 240 of Cap. 116A**. That section provides:

- “**240.** (1) An appeal shall be commenced by the appellant giving to the clerk notice of such appeal, which may be verbal or in writing in the prescribed form, and if verbal shall be forthwith reduced to writing in the prescribed form by the clerk and signed by the appellant or by his attorney-at-law.
- (2) The notice of appeal shall, subject to subsection (3), be given in every case within 7 days after the day on which the magistrate dismissed the information or complaint, convicted or made the order or refused to convict or make the order or give his judgment or decision.
- (3) Where the magistrate has adjourned the trial of an information after conviction, the notice of appeal shall be given within 7 days after the day on which the magistrate sentences or otherwise deals with the offender.....”

[14] According to **section 242**, an appellant is required to give grounds of appeal as follows:

"**242.** An appellant shall, either at the time of giving notice of appeal or at any time within 14 days of the giving of such notice, serve a written notice of grounds of appeal upon the clerk."

[15] Further, a recognizance is required for the due prosecution of an appeal. In this regard, **section 245** provides that:

- "**245.** (1) An appellant shall, within 3 days after giving notice of appeal, enter into a recognizance in the prescribed form for the due prosecution of the appeal, unless he remains in custody under section 247.
- (2) A recognizance entered into under this section shall be in an amount not exceeding \$500 with or without a surety, except that a magistrate may, in lieu of a surety, accept a deposit equal to the amount of the recognizance."

[16] Finally, **section 260 of Cap. 116A** empowers the Court to dispose of an appeal by affirming, modifying or reversing the conviction, order or decision; referring the case back to the magistrate or making any such other order for disposing of the case as justice may require.

Submissions of Counsel

[17] Mr. Pilgrim QC, counsel for the applicant in his oral and written submissions stated that, pursuant to **sections 52, 53 and 54 of Cap. 117A** and its inherent jurisdiction, this Court is empowered to grant leave to appeal and to extend the time within which a notice of appeal may be given in respect of any judgment or decision. He pointed out that **section 19(2) of the Criminal Appeal Act, Cap. 113A (Cap. 113A)** gives similar powers to the Court in respect of appeals from convictions on indictment. He submitted that guidance could be taken

from the Court's approach in the Civil Division and to criminal appeals from the Supreme Court.

[18] Mr. Pilgrim QC submitted also that the overriding principle which must guide the Court in considering whether to grant an extension was that justice must be done. It was therefore important to examine the reasons for the applicant's delay in filing his notice of appeal, the prospect of success and the prejudice to the applicant. He identified these reasons as (i) lack of knowledge and understanding; and (ii) impecuniosity. He submitted that in light of material irregularities in the sentencing process, the applicant's appeal had a reasonable likelihood of success.

[19] Counsel submitted further that the question is whether this Court, albeit a statutory court, has certain inherent powers which are designed specifically to avoid injustice and whether in this particular case there is the possibility of such injustice arising. However, he noted that that inherent power is sparingly exercised by the Court. In support of his submissions, Mr. Pilgrim QC relied on the cases of **Cadogan nee Broomes v Banfield, Civil Appeal No 18 of 2009** and **Zaoui v Attorney General [2005] 4 LRC 557** a decision of the Supreme Court of New Zealand.

[20] Counsel contended that in this particular case, the magistrate sentenced the unrepresented applicant to a forthwith fine and, having been made aware of his inability to pay that fine, was under a duty to inform the applicant of his right to appeal. The failure to do this was an instance of the delay essentially being the fault of the magistrate. The applicant had provided the Court with justifiable reasons for his delay in appealing and this was an appropriate case for the Court to exercise its inherent power in the applicant's favour.

[21] In response, Ms. Delaney, counsel for the respondent submitted that the time limit of seven days for giving notice of appeal specified in **section 240 of Cap. 116A** was mandatory, applying **section 37 of the Interpretation Act, Cap. 1**. Since that time limit had expired, the applicant had lost his right of appeal.

[22] It was counsel's further submission that the Court was created by the Constitution and its jurisdiction to hear magisterial appeals was derived from **Cap. 116A**. In the absence of any provision in **Cap. 116A** giving the Court the discretion to extend time in which to appeal, the Court had no such discretion. She relied on the cases of **Francis v Ward, decision of 20 February 1959** and **Gurney (H.M.I.T) v Petch [1994] 3 All ER 731 (Gurney)**.

[23] While Ms. Delaney accepted that this Court does have inherent jurisdiction to ensure that its processes are not abused, she submitted that this jurisdiction cannot be exercised so as to conflict with a statute or rule. Ms. Delaney cited the following authorities in support of this submission: **Montreal Trust Co v Churchill Industries (Manitoba) Ltd 21 DLR 75** and **Steven Buchan v Moss Management Inc. 2010 BCCA 393**.

[24] Counsel stated that **Cap. 116A** does not provide for the extension of time within which to appeal. She submitted that this Court cannot purport to exercise an inherent jurisdiction to extend time in the absence of such discretion given by **Cap. 116A**. To do so, she stated would be to exercise a discretion in conflict with the provisions of statute.

Discussion

[25] It is accepted that there is no right to appeal a decision of a court unless such right is given by statute and that right must be exercised in accordance with the statutory provisions.

[26] Therefore a person wishing to appeal a decision, judgment or order of a magistrate must file a notice of appeal within 7 days of the decision, judgment or order (**s.240**). An appellant is also required to enter into

a recognizance within 3 days after giving notice of appeal and to provide written grounds of appeal within 14 days after the notice has been filed.

[27] However, there is no statutory provision in either **Cap. 116A** or **Cap. 117A** which gives this Court the discretion to extend the time within which a person may appeal a decision of the Magistrate's court. This position is to be contrasted with **section 19** of **Cap. 113A** which gives the Court the discretion to extend the time for giving notice of appeal or of an application for leave to appeal in respect of criminal appeals from the High Court.

[28] In the absence of such a provision, does this Court have an inherent jurisdiction to extend the time for appealing decisions emanating from the Magistrate's courts?

[29] In seeking to answer this question, we consider it pertinent to examine the statutory provisions relating to the establishment, jurisdiction and powers of the Court .

Establishment, Jurisdiction and Powers of the Court of Appeal

(1) Establishment of the Court

[30] **Section 80** of the **Constitution** states:

"80. (1) The Supreme Court shall consist of the Court of Appeal and the High Court, and shall have such

jurisdiction, powers and authority as may be conferred upon these courts respectively by this Constitution or any other law.

(2)

(3)

(4) The Supreme Court shall be a superior court of record and, save as otherwise provided by Parliament, shall have all the powers of such a court."

[31] Further, **section 85(1)** of the **Constitution** provides:

"**85.** (1) Subject to the provisions of subsection (2), the Court of Appeal established by Part 1 of this Chapter shall be constituted by not less than three Judges sitting together."

(2) Jurisdiction and Powers of the Court

[32] **Section 3** of **Cap. 117A** states:

"**3.** The Supreme Court of Judicature consisting of the High Court and of the Court of Appeal, as they are constituted under sections 4 to 6, shall, subject to section 52(2)(b), continue to have and exercise the jurisdiction, powers and authority heretofore vested in those Courts, and any other jurisdiction, powers and authority conferred respectively on those Courts by this Act or by any other Act."

[33] **Section 52** of **Cap. 117A** provides:

"**52.** (1) Except as otherwise provided in this or any other enactment, the Court of Appeal has jurisdiction

to hear and determine, in accordance with the rules of court, appeals from any judgment or order of the High Court or a judge thereof.

(2) Subject to this Act, the Court of Appeal may exercise

- (a) all such jurisdiction as was heretofore capable of being exercised by the former Court of Appeal;
- (b) all such jurisdiction as was heretofore capable of being exercised by the Divisional Court of the High Court;
- (c) such other jurisdiction as is conferred by this Act or by the *Criminal Appeal Act*, or by any other Act.

(3) The Divisional Court of the High Court ceases to exist on 4th November, 1991, and any reference in any enactment in force before 4th November, 1991 to the Divisional Court is to be construed as a reference to the Court of Appeal."

[34] By **section 61** of **Cap. 117A**, the Court has, in addition to all other powers exercisable by it, all the jurisdiction of the original court and may make such other order as is necessary for the due determination of an appeal.

[35] It is clear from the above that the Court is a creature of statute and therefore can only exercise such jurisdiction, powers and authority as are expressly conferred on it by statute.

[36] Prior to 4 November 1991, appeals from decisions of magistrates were determined by a division of the High Court styled the Divisional Court which consisted of two judges. See section 27 of the *Supreme Court of Judicature Act, Cap. 117* (now repealed). Since that date this Court has acquired the jurisdiction formerly exercised by the Divisional Court of the High Court to hear and determine appeals from the Magistrate's courts. This jurisdiction was expressly conferred by statute.

The Inherent Jurisdiction of the Court

[37] Mr. Pilgrim QC's argument is that this Court, in the absence of express statutory provision, can use its inherent jurisdiction to extend the time for appealing.

[38] The "inherent jurisdiction" of the court is a concept which was discussed by IH Jacob in his article *The Inherent Jurisdiction of the Court (1970) Current Legal Problems 23*. There Jacob opined at p 27:

"For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process

being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute. Without such a power, the court would have form but lack substance. The jurisdiction which is inherent in a superior court of law, is that which enables it to fulfil itself as a court of law. The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner."

[39] In **Connelly v DPP [1964] 2 All ER 401 at 409**, Lord Morris of Borth-y-Gest stated that:

"There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process."

[40] The term "inherent jurisdiction" was also described in *Halsbury's Laws of England Vol 37 (4th ed)* at para 12 as follows:

"The term 'inherent jurisdiction' is not used in contradistinction to the jurisdiction of the court exercisable at common law or conferred on it by statute or rules of court, for the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or rules of court. The jurisdiction of the court which is comprised within the term 'inherent' is that which enables it to fulfil, properly and effectively, its

role as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is a part of procedural law, both civil and criminal, and not a part of substantive law... The inherent jurisdiction of the court enables it to exercise (1) control over process by regulating its proceedings, by preventing the abuse of process and by compelling the observance of process....

In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them."

[41] In **Gurney**, a taxpayer who was dissatisfied with the special commissioner's decision in respect of appeals against income tax assessments failed to comply with the time limit imposed for the filing of a case stated in his appeal to the High Court. Harmon J struck out the taxpayer's appeal. On appeal to the Court of Appeal Millett LJ expressed the following view:

"No power is conferred on the Court to extend the time limits laid down by the Section. The taxpayer sought to invoke the inherent jurisdiction of the Court, or alternatively the power contained in RSC Order 3 Rule (1). Neither can avail him. The first is defeated by a logical difficulty: the Court cannot assume a jurisdiction

to waive or vary a statutory requirement upon which the very existence of its jurisdiction depends.....

Unless the Court is given a power to extend the time, or some other and final mandatory time limit can be spelled out of the statute, a time limit cannot be relaxed without being dispensed with altogether; and it cannot be dispensed with altogether unless the substantive requirement itself can be dispensed with."

[42] The case of **Taylor v Lawrence [2003] EWCA 90 (Taylor)** is also instructive. In **Taylor**, the claimants brought proceedings against the defendants for trespass in respect of a wall built on land to which the claimants claimed they had title. At the trial the claimants were represented by counsel but the defendants acted in person. The judge informed the parties that the claimants' solicitors had drafted his will but no one objected to him continuing to hear the matter. Judgment was given against the defendants and they appealed on the ground, inter alia, that there was an appearance of bias because of the judge's relationship with the claimants' solicitors. It was then disclosed to the defendants that the judge and his wife had used the services of the claimants' solicitors to amend their wills the night before judgment was given. The appeal was dismissed. The defendants learnt subsequently that the judge did not pay for the services provided by

the solicitors. The defendants applied for permission to reopen the appeal.

[43] According to Lord Woolf CJ who delivered the judgment of the court, the application raised two important issues: (i) whether the Court of Appeal has power to reopen an appeal after it has given a final judgment and that judgment has been drawn up (the jurisdiction issue); and (ii) as to the circumstances that are capable of giving rise to the possibility of bias on the part of a judge (the bias issue).

[44] In its consideration of the jurisdiction issue, that court examined the statutory provisions which established the court of appeal and emphasised that there is a distinction between the question whether a court has jurisdiction and how it exercises the jurisdiction which it has been given by statute.

[45] At para 17, Lord Woolf CJ expressed the view that a “court does not need to be given express power to decide upon the procedure which it wishes to adopt. Such power is implicit in it being required to determine appeals....These powers to determine its own procedure and practice which a court possesses are also referred to as being within the inherent jurisdiction of the court, and when the term

“inherent jurisdiction” is used in this sense, the Court of Appeal, as with other courts, has an inherent or implicit jurisdiction.”

[46] Having regard to the above, we are of the opinion that this Court, as a superior court, is invested with an inherent jurisdiction which it can exercise to ensure that its authority is upheld, its ability to administer justice is not compromised and its processes and procedures are not obstructed or abused. However, as attractive as Mr. Pilgrim QC’s argument might be, we are not persuaded that this Court, in the absence of express statutory authority, and under the guise of exercising its inherent jurisdiction, can give the applicant the relief which he seeks.

[47] In our view, it is first necessary for the Court to have jurisdiction, whether given by statute or by rules of court, to deal with a particular matter, before it can draw on its inherent jurisdiction. We do not consider that a Court’s inherent jurisdiction can be relied upon to help to create a jurisdiction which does not exist.

[48] The filing of a notice of appeal within the prescribed period is an essential prerequisite which gives the Court jurisdiction to hear an appeal. If no notice is filed, then there is no appeal before the Court.

[49] In view of the foregoing we have concluded that this Court cannot rely on its inherent jurisdiction to enable it extend the time within which the applicant can file a notice of appeal. It is our judgment that the application ought to be dismissed.

Disposal

[50] The application for an extension of time to appeal is dismissed. There is no order as to costs.

Justice of Appeal

Justice of Appeal

Justice of Appeal