

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**COURT OF APPEAL**

**Magisterial Appeal No. 1 of 2015**

**MICHAEL MAYERS**

**APPELLANT**

**-AND-**

**COMMISSIONER OF POLICE**

**RESPONDENT**

**Before the Hon. Sir Marston C.D. Gibson, Chief Justice; the Hon. Sandra Mason, and the Hon. Andrew Burgess, Justices of Appeal.**

**2015: January 15**

**February 26**

**2017: November 1**

**Mr. Andrew Clarke for the Appellant**

**Ms. Krystal Delaney for the Respondent**

**DECISION**

**GIBSON CJ:**

[1] This is an application to extend the time for leave to appeal against the decision of the Magistrate for District 'A' Criminal Court (Traffic) who, on 22 December 2014, convicted the applicant of two offences under the **Road Traffic Act Cap 295**, and ordered him to pay two fines of \$1,000 and \$475.00 respectively. Some 18 days later, on 9 January 2015, the applicant filed a

Notice of Application in which he sought leave in this Court to appeal out of time against the Magistrate's decision.

### **Appellant's Supporting Affidavits**

#### **Affidavit of Mr. Clarke**

- [2] Mr. Andrew Clarke deposed that he was the applicant's counsel before the learned Magistrate on 22 December 2014. He stated candidly that, at the time of the order, he was under the erroneous impression that the seven days given to appeal the Magistrate's Order did not include Saturday. He was 'retained' on 30 December 2014 by the applicant and proceeded on the basis that 5 January 2015 was the final day to file the Notice of Appeal.
- [3] Mr. Clarke further deposed that on 5 January 2015 when he went to file the appeal he was told that the time had expired. After conducting his own research, he concluded that there was no statutory provision for leave to appeal out of time after the expiration of seven days. It was his view, however, that Parliament could not have intended that recourse to the courts would be barred by such a strict and narrow interpretation of the law and, further, that to allow the appeal would not prejudice the respondent since the applicant was doing all that was necessary to prosecute the matter.

### **Affidavit of Michael Mayers**

- [4] The applicant, Mr. Michael Mayers, (“Mr. Mayers”) filed two affidavits.
- [5] In the first affidavit filed on 8 January 2015 the applicant deposed that he was convicted of two offences and ordered to pay fines for each offence. It was his understanding that the conviction was wrong in law and should not have been entered and he stated equally candidly that he was told specifically by his attorney that he had seven days in which to appeal the order. He stated that on 30 December 2014, he instructed his attorney to commence the appeal and he paid in his funds to the attorney on 31 December 2014 only to be told on 5 January 2015 that the time had expired for same.
- [6] The second affidavit filed on 12 January 2015 outlined what happened in the Magistrate’s Court on the day in question.

### **Submissions**

- [7] Mr. Andrew Clarke, counsel for the applicant, submitted that there were three factors to be taken into account when determining whether applications of this nature should be granted. He referred the Court to the High Court decision of *Credit Agricole Indosuez v The Owners of the Vessel European Vision et al* **decided 23 September 2004 in which Simmons CJ**, made reference to the three factors which are regarded as central to the disposition of the matter, namely (i) the length of delay and the reason for said delay; (ii) the chances

of success of an appeal; and (iii) any prejudice to the respondent which might result from the grant of leave at this stage.

- [8] Ms. Krystal Delaney, counsel for the respondent, submitted that the **Magistrate’s Court Act (Cap 116A)** did not give the Court of Appeal discretion to extend the time in which a convicted person can appeal. She stated further that the substantial requirement of filing a notice of appeal could not be dispensed with altogether when that is the statutory requirement upon which the jurisdiction of the court depends. In relation to the inherent jurisdiction of the court, Ms. Delaney submitted that the Court lacked jurisdiction to extend time contrary to the provisions of **Cap. 116A** and further that the inherent jurisdiction of the Court could not be exercised so as to conflict with a statute or rule.

## **Discussion**

- [9] **Section 240 of Cap 116A** provides at **subsections (1) and (2)** as follows:

- “(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 gave his judgment or decision.”

[10] It is clear from the provisions of the statute that the applicant must have filed his Notice of Appeal within seven days after the decision of the Magistrate which by our calculation means by 29 December 2014, including both weekend days of Saturday and Sunday. As to those weekend days, the **Interpretation Act, Cap 1, section 39(3)** provides that “[w]here in an enactment a period of time is expressed to begin on, or to be reckoned from, a particular day, that day shall not be included in the period.” This would accordingly require the exclusion of 22 December 2014, the day of the conviction and the computation would therefore commence on the following day, 23 December 2014.

[11] However, **section 39(6) of Cap. 1** provides that “[w]here a period of time prescribed by an enactment for the doing of anything does *not* exceed six days, Sundays and public holidays shall *not* be included in the computation of the period.” Therefore, if the time period expressed for doing anything is six days or less, then Sundays and public holidays are to be excluded from the computation.

[12] But it must also follow that where the time period exceeds six days, Sundays and public holidays must be included. Much was made during argument concerning the weekend day of Saturday which intervened, and Mr. Clarke states in his affidavit that he assumed, he admits erroneously, that Saturdays

were to be excluded. But the section does not mention Saturdays – indeed, it states in terms “Sundays and public holidays” - and it is clear, at the very least on the strength of the rule of interpretation *expressio unius est exclusio alterius* (see *Bennion The Interpretation of Statutes*) that, in any event, Saturdays were never intended to be excluded from, but were always included in, the computation of days within to complete an act.

[13] Turning to the facts of our case, how does this law apply? The seven-day period for filing the appeal commenced on 23 December 2014 and ended on 29 December 2014 and, since the period of time in **section 240(2) of Cap. 116A** does indeed exceed six days, Saturdays and Sundays have to be included in the computation.

[14] What this means is that on 30 December 2014 when the appellant retained Mr. Clarke to prosecute the appeal, the time period for filing the appeal had already elapsed the day before, on 29 December 2014 and, as Ms. Delaney quite properly argued, this Court, as a creature of statute, lacks the jurisdiction to extend time contrary to the provisions of the **Cap. 116A**.

[15] This issue has arisen and been definitively settled in other jurisdictions. Fifty-four years ago, in the 1963 decision of **Stanley v Andrews (1963)5 WIR 457**, the Court of Appeal of Trinidad and Tobago was faced with the construction of section 129(1) and (2) of the Summary Courts Ordinance of Trinidad and

Tobago, provisions *in pari materia* with **section 240(1) and (2) of Cap. 116A.**

The facts bear repetition here. On 19 March 1962, the appellant was convicted by a magistrate and sentenced to a period of incarceration. He immediately gave verbal notice of appeal which was reduced to writing the same day, but the appellant did not sign it until 19 September 1962, some six months later.

[16] Section 129(1) of the Summary Courts Ordinance provided that an appeal from a magistrate's court "shall be commenced by the appellant giving to the clerk notice of such appeal, which may be verbal or in writing, and if verbal, shall be forthwith reduced to writing by the clerk and signed by the appellant or by his counsel or solicitor." Subsection (2) stated that "[t]he notice of appeal shall be given in every case before the expiration of the seventh day after the day on which the court has made the order or given the refusal appealed against."

[17] The Court of Appeal held that the law required that a verbal notice should be reduced to writing and signed by the appellant as a necessary condition of its efficacy; and as he had failed to sign it within the time prescribed by the statute, there was no appeal before the court. On the issue whether the court possessed the power to extend the time to appeal, Wooding CJ stated at p. 458:

“There is no provision in the Ordinance anywhere that we have been able to discover whereby the time can be extended beyond the seven days specifically allowed for giving notice of appeal. Moreover, since appeal from decisions of magistrates’ courts derive their authority from the provisions of the Ordinance itself, these provisions must be read subject to such limitations or conditions as the Ordinance prescribes and, if those limitations or conditions are not observed, the consequence is that the right of appeal may be lost. Undoubtedly, in some cases, this may cause hardship to an appellant who gives verbal notice and who is not required by the clerk to sign the formal notice, or whose verbal notice the clerk fails to reduce to writing in due form. But the law requires that the reduction of the verbal notice to writing and the signing of it by the appellant be done as a necessary condition of the efficacy of the notice.

As a consequence of the conclusions which we have reached, it follows that this ‘appeal’ in the circumstances in which it is now before us is really not an appeal. The proceedings so far are really a nullity. There is nothing, therefore, for us either to confirm or to set aside.”

[18] Ms. Delaney referred the Court to two Canadian decisions which are also apposite. In **R v Bogdane** (unreported decision 5 June 1962), the Saskatchewan Court of Queen’s Bench pointed out that,

“an appeal is not a general or common law right. It is an exceptional provision enacted by statute, and to be availed of, the conditions imposed by the statute must be strictly complied with. They and all of them are conditions precedent.”

[19] Further, in **Steven Buchan v Moss Management Inc. 2010 BCCA 393**, the Court of Appeal of British Columbia observed that,

“the inherent jurisdiction is not a panacea for the parties...Where a party has failed to avail itself of the proper procedures of the court, a judge will not exercise inherent jurisdiction to skirt the rules.”

[20] It follows that, in the absence of statutory authority, this Court is without jurisdiction to grant leave to extend the time to file what is, in effect, a nullity.

There never was an appeal and so the application must be dismissed.

**Disposal**

[21] Accordingly, the application is dismissed.

Chief Justice

Justice of Appeal

Justice of Appeal