

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
CRIMINAL SIDE**

**SCA No.: 1/2016
CASE No.: 01168/2012**

FLOYD VASHNI BUSH

V

REGINA

Appearances:

Mr. Clyde Allen for the Appellant

**Mr. Patrick Moran, Deputy DPP, for the
Respondent**

Before:

Mr. Justice Malcolm Swift Q.C. (Actg.)

Heard:

29th – 30th June 2016



RULING

1. At the end of oral argument, the Appellant withdrew his appeal. As a result of the matters raised in the case, I have decided to give this Ruling for the assistance of those involved in Summary Court appeals in criminal cases.
2. On the 10th March 2016, Acting Magistrate Hernandez ruled that the Summary Court had jurisdiction to hear the case against the Appellant on the basis that the charges against him were brought within the statutory time limit. The following Ruling does not affect that decision.

3. On the same day the Appellant gave notice of appeal against that Ruling and in consequence the Magistrate adjourned further consideration of the case until the outcome of the appeal was known. The Magistrate also advised that the matter should be proceeded with in an efficient and timeous manner. Bail was extended.
4. The right of appeal is provided by s.165(1) of the Criminal Procedure Code (2014 Revision):-

"165. (1) Save as hereafter in this Code provided, any person who is dissatisfied with any judgment, sentence or order of the Summary Court in any criminal cause or matter to which he is a party may appeal to the Grand Court against such judgment, sentence or order either by motion on matters of law or fact (or both) or by way of case stated on a point of law only as hereafter provided."



5. The Ruling of the Magistrate is clearly a 'judgment' or 'order' of the Summary Court. Section 165(1) clearly states that the appeal lies "only as hereafter provided" and the only procedural provisions in the body of the Code governing Summary Court appeals relate to appeals by way of Case Stated and appeals on Motion where a case has proceeded to conviction and/or sentence or there has been a terminating ruling. I entertain serious doubt as to whether this interlocutory ruling of the Magistrate (not being a terminating ruling) was of itself susceptible to appeal until such time as the Appellant is convicted and sentenced.
6. I would however comment that there was in fact no reason for the Magistrate to 'stay' the Summary Court process pending the resolution of the appeal against her Ruling as it was not a terminating ruling and any challenge to it could form part of any appeal following conviction and sentence and because an acquittal on the charges subject to this appeal would have rendered the appeal otiose. In fact s.168(1) provides as follows:

“168. (1) *An appeal shall not in itself have the effect of suspending the execution of the decision appealed and shall be on motion or by special case stated as hereafter in this Code provided.*”



7. The ‘execution of the decision’ would in the present case mean the continuation of the trial and the Magistrate was, it seems to me, entitled, if not obliged, to continue with the trial notwithstanding the oral notice of appeal against her interlocutory ruling. However my attention has been drawn to the decision of the Chief Justice in *Miller v. Summary Court ex parte Attorney General*¹ which makes clear that judicial review is available in very rare and limited circumstances in the course of a summary trial. Accordingly continuing with the trial will be subject to any application for judicial review. I would add that there are very serious costs implications for Defendants who initiate proceedings for judicial review if the application fails.
8. The provisions of the Criminal Procedure Code (2014 Revision) are strict. If an appeal is not notified on the day of the decision appealed against, the Appellant has only seven (7) days in which to lodge a notice of appeal (s.168(2)). Beyond that period the leave of the Court is required to proceed with an appeal out of time (Proviso to s.168).
9. Of more importance to the present case are the requirements of S169:

“169. *The appellant shall, within three days after the day on which he gave or served notice of his intention to appeal, enter into a recognizance before the Clerk, with or without sureties as the Clerk may direct, conditioned to prosecute the appeal to judgment thereon of the court, and to pay such costs as may be awarded by it or, if the Clerk thinks it expedient, the appellant may, instead of entering into recognizances, give such other security by deposit of money with the Summary Court or otherwise as the Clerk deems sufficient.*” [emphasis added]

¹ [1994-5] CILR 417

10. It should be noted that the requirements of s.169 are obligatory and that there is no corresponding proviso (equivalent to that set out in s.168) permitting an appeal to proceed out of time once the time limit set out in s.169 has expired.
11. Furthermore, the terms of s.170 mean that an appeal cannot be transmitted from the Summary Court for hearing in the Grand Court until s.169 has been complied with. The relevant part of s.170 provides as follows:



"170. As soon as the appellant has given or filed the notice of appeal and has complied with section 169, the Summary Court shall without delay transmit to the Grand Court a copy of the conviction, order or judgment and all papers relating to the appeal."

12. Also the combined effect of s.168(2) and s.169 is that the maximum time available to an Appellant to give notice of appeal (7 days) and to enter into a recognizance or to give security (3 days) so as to ensure transmission of an appeal to the Grand Court for hearing is 10 days. This is of course subject to the application of the proviso in s.168.
13. It follows that failure to comply with s.169 will result in the appeal notice lapsing, the effect of which is that the appeal cannot then be transferred to the Grand Court. The whole purpose of s.169 is to ensure that the appeal process is dealt with expeditiously and that Appellants are immediately made aware of their financial obligations if their appeal fails. One of those purposes is defeated if Appellants are able to pick and choose the timing of their compliance with s.169, with the effect of prolonging an outcome (if, for example, any part of a sentence or order was suspended pending the outcome of the appeal).

14. There is no difficulty in compliance with s.169. Section 166(1) provides that:



"166. (1)

When any person is convicted by a Summary Court, the magistrate shall inform him, at the time when the sentence is passed, of his right of appeal and the steps which must be taken by a party wishing to appeal and a note shall be made at the time by the magistrate that such information has been given by him to such person and such note shall be conclusive as to this section having been complied with." (emphasis added)

15. Therefore each sentenced Defendant is informed by the Magistrate of the right to appeal and of the requirements of s.169. If oral notice of appeal is given, s.169 may be complied with there and then.

16. It has been submitted to me that, in the experience of counsel, Magistrates in the Summary Court invariably advise a sentenced Defendant of his right to appeal but do not always advise of the 'steps to be taken by a party wishing to appeal'. Whether or not this submission is correct, clearly Defendants should be informed of their right to appeal, of their obligation under s.169 and of their duty to lodge and serve an appeal notice under s.170 not less than 3 days before the appeal hearing.

The fact that such information has been given to the Defendant must be noted as required by S166.

17. Defendants on bail may comply with s.169 in person with or without their attorney present. Defendants in custody may do so with or without the assistance of their attorney and the Court, on receiving a notice of appeal, frequently arranges for such Defendants to be brought to court from prison for that purpose. It follows that one aspect of the attorney's role is to assist in compliance with s.169 and to ensure that the Appellant is aware of the consequences of non-compliance. Unrepresented Defendants must realize that, if they wish their Summary Court appeals to proceed, they too are bound to comply with s.169 and copies of this ruling should be made available to persons in custody who may wish to commence the appeal process.

18. In the present case, the Defendant had not been sentenced so that the Magistrate was not obliged to comply with s.170 at the stage reached in the proceedings. However, he was represented and gave oral notice of appeal so that I must assume that he was properly advised by his attorney of his obligations once the notice had been given. After oral notice of appeal had been given on the 10th March 2016, the court file shows that on the 31st March 2016, Mr Allen (representing the Appellant), on receiving an enquiry from the Summary Court, said that he believed the appeal had been "lodged" but he would check his file. A written but undated version of the Notice of Appeal was subsequently lodged at court on the 5th April 2016. At a mention on the 2nd May 2016, Mr Allen being noted as unavailable (he was unwell), the Appellant was directed to sign an "SCA Bond" and on the 10th May 2016 the court file records that the Appellant advised that he had signed the SCA Bond. I shall assume for the purposes of this Ruling that the Appellant signed a Bond as required by the Clerk of the Criminal Registry on some date after the 2nd May 2016, almost 2 months after the ruling was delivered and 1 month after the written notice of appeal was lodged.



19. Therefore, whether or not the notice of appeal was given at the correct time in the proceedings, the Appellant has failed to comply with s.169. The result is that the appeal notice is deemed to be void and has lapsed and, in consequence, has today been withdrawn.
20. The late acceptance of the recognizance does not lend validity to the appeal process. The appeal was wrongly transmitted to the Grand Court and I have no jurisdiction to hear it. The Summary Court must immediately proceed to deal with the outstanding issues in the case.
21. In the event of conviction in the Summary Court, the Defendant is entitled to include in any subsequent Notice of Appeal a challenge to the Ruling of Magistrate Hernandez.
22. Finally this may be a timely opportunity to remind Defendants contemplating appeals against conviction and/or sentence that s.181 of the Criminal Procedure Code empowers the Grand Court Judge who hears the appeal, even in cases where no appeal against sentence is pursued, to review the sentence imposed and to pass another sentence (either more or less severe) if necessary.

Dated this the 30th June 2016



**Honourable Mr. Justice Malcolm Swift Q.C. (Actg.)
Acting Judge of the Grand Court**

