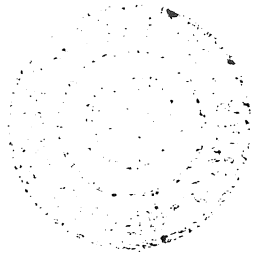


Sept 93

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

SCA. 148/92



FERNANDO PENNESI
V
REGINA

Mr. John Furniss of Ritch & Conolly for the appellant
Mr. Samuel Bulgin Crown Counsel, for the Crown

CORAM: SMELLIE J

JUDGMENT

The appellant was convicted before the Summary Court on the 24th September 1992 for the offence of Indecent Assault.

He was sentenced to six months' imprisonment suspended for two years and fined \$1000.00 or 4 months imprisonment in default of payment. The learned magistrate also recommended deportation.

The incident which is the subject of the charge involved a female employee at a local hotel where the incident occurred and where the appellant, a visitor to the Islands, was vacationing with his family.

Mr. Furniss, who also represented the appellant at the trial, has advised this court that the appellant paid the fine and shortly departed the Islands not under compulsion of deportation, but voluntarily.

It appears from the transcript that the appellant resides in Italy.

On 1st October 1992 the appellant, through his attorneys, filed notice

of his intention to appeal against his conviction and sentence and on 6th October 1992 his attorneys gave a form of recognisance for the execution of the appeal, purportedly on behalf of the appellant.

The grounds of appeal were filed with the notice of appeal. Thus, it appears, the necessary formalities were complied with.

On the 17th July 1993 when the appeal came on for hearing, Mr. Furniss appeared to represent the appellant but the appellant was absent and remained outside the jurisdiction of the court.

On that occasion the Court, of its own accord, raised the question whether it should hear the appeal with the appellant being outside the jurisdiction and therefore unamenable to any order which the Court might make apart from one simply allowing or dismissing his appeal.

Mr. Furniss submitted that the appellant was entitled to be heard as he was present by his attorney, but conceded he could find no authority for that proposition.

Mr. Bulgin shared the Court's concerns that the appellant would not be amenable.

Counsel both agreed that the statutes are silent on the point and stated they were unable to find any recorded decision of the local courts dealing with the right of an appellant to have his appeal heard, in absentia.

On hearing appeals from the Summary Court the jurisdiction and powers of this court are entirely statutory, the relevant provisions being set out in sections 38 of the Summary Jurisdiction Law and 23 of the Grand Court Law respectively, as taken with Part IX of the Criminal Procedure Code.

My own research has only confirmed the result of counsel's which is that the statutes are silent on the consequences of an appellant's

failure to attend to prosecute his appeal.

I have concluded that this matter can only be resolved by reference to the Court's inherent jurisdiction which it no doubt has to prevent an abuse of its process.

As to the inherent power of the Court to prevent abuse of its process in criminal matters, the leading authorities were comprehensively reviewed by this Court in Fiallo and Santiago v. Regina (1987) CILR 253.

Although there has been no record of judicial pronouncement on the point, I understand this is the approach which has been taken in the past in circumstances where appellants have been absent. The most recent instance was on the hearing of the appeal in Leigh Ritch v. Regina SCA. #326A/86.

The approach I take therefore is to consider whether the hearing of this appeal might amount to an abuse of the process of the court.

Having given the matter full consideration I am of the opinion that it would not.

On the hearing it is not at all likely that the court would exercise its power given by section 172 of the Criminal Procedure Code (as amended) to impose a more severe sentence.

In this matter, the appellant having paid the fine, there is no aspect of the sentence passed in respect of which it can be said he has not complied.

There is therefore no real risk of non-compliance with an existing order or an order which could be made by the Court, notwithstanding that the appellant is beyond its jurisdiction.

Mr. Furniss has advanced the appellant's reasons for pursuing the

appeal which include the important consideration that he would wish and should have the right to have the blot of a criminal conviction removed from his record, if there is found to be merit in his appeal.

With the foregoing in mind and in the particular circumstances of this case, I am of the view that the appellant should be allowed to have his appeal presented and heard on the merits notwithstanding his absence from the jurisdiction of the court.

I emphasise that I see this as a matter for the exercise of the Court's discretion in the absence of any statutory provision one way or the other. It follows that a further important observation in favour of the appellant is that there is nothing which expressly requires his presence. As he was neither in custody nor bailed to appeal on his appeal, it essentially was a matter of whether he chose to come or not, subject of course to whether his absence might hamper the proper disposition of the matter.

He has chosen to be represented by counsel so that his appeal can be heard and I have already expressed my view that the matter might be properly disposed of in that way.

I should state that in taking that view of the matter I have not overlooked the provisions of section 169 of the Criminal Procedure Code which read^s in part:

"At the hearing of an appeal on motion
(which this is) the appellant shall,
before going into the case, state all the
grounds of appeal on which he intends to
rely..."

That passage does not by itself imply that the appellant must be present in person. In practice we know that the appellant's attorney, if one is engaged, presents the appeal and far from being intended to address the issue with which we are now faced, the section is intended

to be purely procedural.

Apart from the points which exist here in favour of permitting the hearing of the appellant's case there are other considerations which would set this apart from many other cases.

In a typical case the appellant might either be in custody or on bail pending appeal.

If, while on bail pending appeal, an appellant does not appear on the date notified for hearing because he has absconded within or beyond the jurisdiction, it would be doubtless appropriate in the exercise of its discretion for the Court to refuse to hear the appeal notwithstanding that counsel might appear to present it.

The court might take a different view if the appellant is absent but profers an acceptable excuse.

In other Commonwealth jurisdictions to which we often refer for persuasive guidance, the sort of problem presented by the instant matter could be resolved by reference to statutory provisions.

In England and Wales, the relevant provisions are to be found in section 79 (3) of the Supreme Court Act 1981 which refers to "the customary practice and procedure" with respect to appeals to the Crown Court from magistrate's courts, the parallel jurisdiction to that being exercised in the instant matter.

It is clear from that customary practice and procedure that an appellant who was neither in custody nor bonded to appear on his appeal could appear by his counsel if he wished and was under no strict legal obligation to be present in person.

See Regina v. Crown Court and Croydon,

ex parte Clair (1986) 2 ALL. E. R. 716 at page 719.

In Jamaica, the relevant statute is more explicit in Section 297 of the Judicature (Resident Magistrates) Act and provides for an appellant who is in custody and who has given notice of appeal under recognisance

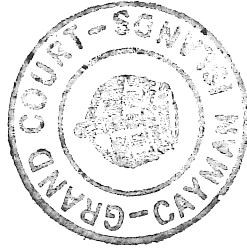
"... to attend the Court of Appeal personally or by his counsel on the hearing of the appeal, and (in the event of the Court of Appeal dismissing the appeal) to surrender himself forthwith into custody to undergo the term of imprisonment adjudged, and in the meantime not to leave the Island.

Provided always, that if an appellant fails to attend personally or by counsel at the hearing of his appeal, the appeal shall be dismissed, unless the court is satisfied that his non-appearance is not due to wilful default."

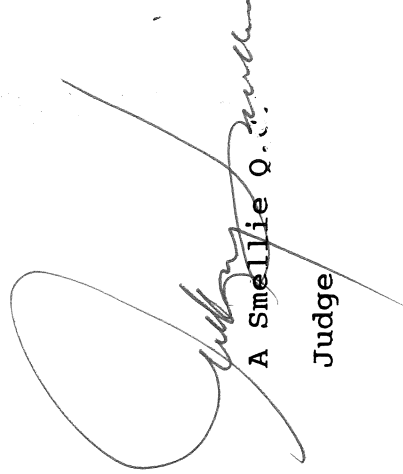
The effect of those provisions were pronounced upon by the Court of Appeal of Jamaica in R v. Thompson (1964) 6 W.L.R. 381.

Some provision is necessary for inclusion in the local Criminal Procedure Code to clarify the extent of the Court's jurisdiction to deal with appeals in the absence of appellants.

For all the foregoing reasons the Court will hear the appeal, in this matter in the absence of the appellant, to be presented on his behalf by his attorney and his attorney may proceed to have the matter relisted in the Registry for hearing.



14th September 1993


A Smellie Q.C.
Judge