

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 111/73

BEFORE: The Hon. Mr. Justice Edun, J.A.(Presiding).
The Hon. Mr. Justice Robinson, J.A.
The Hon. Mr. Justice Zacca, J.A.(ag.).

REGINA v. DERRICK FOSTER

Miss J. Bennett and R.A. Stewart for the Crown.

December 11, 1974
March 21, 1975

ZACCA, J.A.(ag.):

The applicant was convicted in the Home Circuit Court on June 22, 1973 on an Indictment containing six counts and was sentenced to imprisonment for a total of 15 years hard labour.

It is not necessary to set out the facts of the case as the argument adduced before the Court related to a preliminary point taken by the Crown. It was contended by the Crown that the Criminal Form 6 is out of time and therefore the applicant cannot now be heard.

It will therefore be necessary to set out the order of events since his conviction. On July 3, 1973 the applicant filed a notice of appeal by completing and signing Criminal Form 1. On May 7, 1974, application for leave to appeal was refused by a single judge. The Registrar of the Court of Appeal on May 7, 1974 caused to be sent to the applicant at the General Penitentiary Criminal Form 5 which advised him of the refusal of leave to appeal by the single judge. The applicant was supposed to be at the General Penitentiary on this date as Bail had not been granted the applicant. The Registrar also forwarded Criminal Form 6 to the applicant on May 7, 1974. The next step was that the applicant, if he wished his application to be determined by the Court, should complete Criminal Form 6 and return it to the Registrar within five days.

However as events turned out the applicant escaped from the custody of the General Penitentiary on October 23, 1973 and was not recaptured until one year later on October 30, 1974.

Thereafter a second Criminal Form 5 was sent to the applicant at the General Penitentiary on November 4, 1974 together with a Criminal Form 6. On November 6, 1974, the applicant completed Criminal Form 6 and returned it to the Registrar. It is on the basis of the Criminal Form 6 dated November 6, 1974, that this application for leave to appeal was listed for hearing before the Court.

It is clear from the events which are set out above that the applicant did not receive Criminal Form 5 dated May 7, 1974 as by then he had by his own wilful act escaped from custody.

The question to be decided is whether the applicant can be said to have been served with Criminal Form 5 dated May 7, 1974 and not having completed Criminal Form 6 within five days of that date can he now be heard on this application. In other words can he now be heard on the application having completed and returned Criminal Form 6 dated November 6, 1974.

Rule 54 (1) of the Court of Appeal Rules 1962 states:-

"Where any application has been dealt with by a single Judge, the Registrar shall notify the decision to the appellant by causing Form 5 in Appendix C to be served upon him. In the event of such Judge refusing all or any of such applications, the Registrar on notifying such refusal to the appellant shall forward to him Form 6 in Appendix C. If the appellant does not desire to have the said application or applications determined by the Court as duly constituted for the hearing of appeals under the law or does not within five days of service of the said form return to the Registrar Form 6 duly filled up by him the refusal of his application or applications by such Judge shall be final"

The applicant by completing Form 1 set in motion the machinery for appealing against his convictions and sentences.

The case of Regina v Percival Moore S.C. C.A. 37/1971, may be of some guidance. In that case the applicant had failed to set in motion the machinery for appealing and subsequently made an application to the Court for extension of time within which to do so. This failure on the

part of the applicant was as in the instant case, as a direct result of the wilful act of the applicant in escaping from custody. The application was refused by a majority decision of the Court. In his judgment Fox J.A., as he then was, stated: "In this matter, the failure to appeal in time was the direct result of the wilful act of the applicant in escaping from custody at a time when he knew that the final word upon the justice of his case had not been spoken by the law. He had given instructions to invoke that final word but was not prepared to await its utterance. He was unwilling to rely upon the procedures prescribed by law. Instead he sought to ensure his liberty by action entirely outside the law. As a consequence, an essential step required by the law for the perfecting of his appeal was frustrated. It would require the most weighty considerations of Justice to overbalance those considerations against the exercise of the discretion which arise out of the deliberate act of escaping from the custody of the police."

Can the applicant in the case before us now be heard to say "I was not served with Criminal Form 5 dated May 7, 1974 and therefore I could not have completed Form 6 within five days of that date. I was only served with Criminal Form 5 dated November 4, 1974 and I completed Form 6 on November 6, 1974 within the required five days. I am therefore entitled to have my application determined by the Court."

By his own wilful and unlawful act of escaping from custody, the applicant frustrated the next step required by law for the perfecting of his appeal. In our view he cannot now be heard to say that he was not served with Criminal Form 5 dated May 7, 1974. His failure to complete Form 6 within five days after May 7, 1974 determined the appeal finally. The completion of Form 6 dated November 6, 1974 by the applicant cannot now come to the rescue of the applicant.

There are, however, provisions in the Court of Appeal Rules whereby the applicant might make an application to the Court for an extension of time within which to perfect the hearing of his appeal. (See Rules 9 and 11). No such application is before this Court.

The attempt to perfect the appeal is without merit and the refusal of his application for leave to appeal by a single Judge is therefore final.