

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MR JUSTICE F WILLIAMS JA  
THE HON MISS JUSTICE P WILLIAMS JA  
THE HON MR JUSTICE BROWN JA**

**SUPREME COURT CRIMINAL APPEAL NO 73/2012**

**APPLICATION NO COA2023APP00017**

**TIMOY RATTIGAN v R**

**Miss Tamika Harris for the applicant**

**Mr Jeremy Taylor KC for the Crown**

**20 February 2023**

**ORAL JUDGMENT**

**F WILLIAMS JA**

[1] By notice of application dated 19 January and filed 20 January 2023, the applicant seeks the following orders:

1. "That upon the applicant filing a Notice of Abandonment of Appeal, his sentence is to be reckoned as having commenced on the date on which it was imposed, that is, 9<sup>th</sup> December 2011.
2. Leave be granted to the applicant to abandon all further proceedings in relation to his appeal against conviction and sentence.
3. Such other relief as the court deems fit."

## **Background**

[2] Following on his plea of guilty to the offences of robbery with aggravation, illegal possession of firearm and illegal possession of ammunition, the applicant was sentenced in the High Court Division of the Gun Court for the Corporate Area on 9 December 2011. For the offences of robbery with aggravation and illegal possession of firearm, he was sentenced to 15 years' imprisonment on each; and for the offence of illegal possession of ammunition, he was sentenced to one year's imprisonment. The sentences were ordered to run concurrently.

[3] In his affidavit in support of his application sworn on 19 January and filed on 20 January 2023, the applicant sets out the background to this application. He avers that on 18 July 2012, he filed an application for leave to appeal against his sentences. A perusal of his form B1 shows that he did so on the basis that the sentences were harsh and excessive.

[4] He further deposes that he has not been able to advance his application for leave to appeal in any way. The reason for this is that, despite the more than 11 years that have passed since he was sentenced, and the filing of his application for leave to appeal, the transcript of his arraignment and sentencing that is necessary for his application to be reviewed by the single judge; and, if necessary, referred to the court, if that first application proves unsuccessful, has not been produced.

[5] He exhibits to his affidavit as "TR 1", a copy of a letter dated 22 June 2022, from the Department of Correctional Services (and more specifically, the Tower Street Adult Correctional Centre, where he is serving his sentences) which confirms his averment in his affidavit that, had he not appealed, his earliest date of release would be 8 March 2023.

[6] He wishes to avail himself of this earliest release date. He states at paras. 11 and 12 of his affidavit as follows:

“11. In the circumstances, I am no longer interested in the appeal process and would prefer to abandon my appeal.

12. I would like to take advantage of the opportunity and privilege of an early release rather than to pursue my application for leave to appeal.”

## **Submissions**

### For the applicant

[7] On behalf of the applicant, Miss Harris submitted that, with his application for leave to appeal pending, the applicant is unable to take advantage of his earliest release date. Even if he should now file a notice of abandonment of his application for leave to appeal, without directions from the court as to the date on which his sentences should be reckoned as having commenced, his sentences would run from the date on which the notice was filed.

[8] Miss Harris referred to the cases of (i) **Tafari Williams v R** [2015] JMCA App 36; (ii) **Sheldon Pusey v R** [2016] JMCA App 26; (iii) **Leroy Shaw v R** [2017] JMCA App 13; and (iv) **Donovan Archer v R** [2021] JMCA App 20, urging this court to give directions mainly that, upon the filing of the notice of abandonment of the appeal, the applicant’s sentences be reckoned as having commenced on the date on which they were imposed.

### For the Crown

[9] On behalf of the Crown, Mr Taylor KC, in para. 1 of his skeleton arguments, indicates that the Crown is not opposing the application. In fact, in his para. 23, he states the following:

“The prosecution requests that the Applicant’s application be granted if it [that is, this court] finds that he is in compliance with the procedures laid down by this Honourable Court and grant the direction he has prayed for in paragraph [14] of his affidavit.”

[10] In his skeleton arguments, Mr Taylor also decries what he describes as “a pervasive and deep rooted systemic failure of the processes of the Supreme Court...”. The delay in producing transcripts, he observes has caused “undue and untenable delay” in the hearing of appeals.

## **Discussion**

[11] It appears to us that, as a first step, the applicant needed to apply for an extension of time within which to apply for leave to appeal by filing a form B2. This is so as, by the time that he filed his application for leave to appeal on 18 July 2012, his time for doing so had expired, he having been sentenced on 9 December 2011. By section 16 of the Judicature (Appellate Jurisdiction) Act, he was required to file his application for leave to appeal in form B1, within 14 days of pleading guilty or of the sentences being imposed. That section reads as follows:

“16. (1) Where a person convicted desires to appeal under this Part to the Court or to obtain the leave of the Court to appeal, he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by rules of court **within fourteen days** of the date of conviction.” (Emphasis added)

[12] A perusal of the file shows that, at the time of filing his form B1, the applicant also filed a completed form B2. In that form, he indicates that it was a lack of knowledge that he could have filed an appeal on his own and without the assistance of an attorney-at-law that caused him not to have filed his form B1 earlier. He learnt that he could file his own form B1 shortly before filing his documents. This, to us, seems to be a reasonable explanation for the delay and we are minded to grant him an order extending the time for him to apply for leave to appeal.

[13] With regard to the substantive application, we observe that this application covers what is now becoming well-trodden ground. As Mr Taylor has pointed out, many appellants have been taking this route as a result of the non-production of the transcripts of their trials or sentencing. This systemic shortcoming has generated a number of cases, some of which were referred to by both Miss Harris and Mr Taylor in their written

submissions. Until the delay in the production of transcripts has been effectively addressed, there are likely to be many more.

[14] Directions similar to the ones being applied for in this case have been given in those cases with lengthy periods of delay as follows:

(i) **Tafari Williams v R** – eight years;

(ii) **Donovan Archer v R** – six years;

(iii) **Sheldon Pusey v R** – seven years.

[15] The non-production of the transcript compounds for the applicant the challenge created by section 31(3) of the Judicature (Appellate Jurisdiction) Act. That provision states as follows:

“(3) ...subject to any directions which the Court of Appeal may give to the contrary on any appeal, the time during which the appellant, if in custody, is specially treated as an appellant under this section, shall not count as part of any term of imprisonment under his sentence, and, in the case of an appeal under this Act, any imprisonment under the sentence of the appellant, whether it is the sentence passed by the court of trial or the sentence passed by the Court of Appeal shall, subject to any directions which may be given by the Court as aforesaid, be deemed to be resumed or to begin to run, as the case requires, if the appellant is in custody, as from the day on which the appeal is determined...”

[16] Mr Taylor reminded us of the provisions of section 31(3A) of the Act, which reads as follows:

“(3A) The Court of Appeal in considering whether to give directions as to the date on which sentence shall be deemed to be resumed or to begin to run pursuant to subsection (3) shall take into account any election made by the appellant under the rules under the Corrections Act to forego [sic] any special treatment accorded to the appellant pursuant to those rules.”

[17] There is no evidence before us of the applicant having made any such election.

[18] In the case of **Sheldon Pusey v R**, the transcript was eventually produced some seven years after the applicant was sentenced. In that case, the directions sought were granted. In this case there is an even longer period of delay and there is no information as to when (or even if) the transcript will ever be produced. None of this delay can be attributed to the applicant.

[19] In **Tafari Williams v R** at para. [8], Morrison P (Ag, as he then was) made the following observation:

“[8] There can be no question, in our view, that the circumstances of this case are such as to fully entitle the applicant to whatever favourable consideration the court is able to afford him at this time. By any standard, the delay of over eight years in producing the transcript of the applicant’s trial in the Gun Court can only be described as outrageous. There is absolutely no suggestion that any part of this delay has been attributable to any fault of his. The result of this is that he has been denied his right to a fair consideration of his application for leave to appeal.”

[20] Of course, with the greater period of delay affecting this applicant, these comments apply with even greater force to his application. The main order that he seeks in relation to the time at which his sentences are to be reckoned as having commenced, are quite in keeping with this court’s current practice, when dismissing appeals, as cases such as **Tafari Williams v R** show. The other orders being sought seem to us to be unnecessary, as, once the notice of abandonment is filed, his application for leave to appeal ceases in its entirety. We are therefore minded, in all the circumstances, to exercise our discretion in the applicant’s favour and grant the application in the following terms:

1. The applicant is hereby granted an extension of time within which to appeal against the sentences imposed in the High Court Division of the Gun Court on 9 December 2011.
2. Upon the applicant’s filing a notice of abandonment of appeal, his sentences are to be reckoned as having

commenced on the date on which they were imposed, that is, 9 December 2011.