JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 44/2012

APPLICATION NO COA2019APP00124

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

TOUSSAINT SOLOMON v R

Ms Melrose Reid for the applicant

Mrs Christine Johnson-Spence and Mrs Kamiesha Johnson-O'Connor for the Crown

16, 19 December 2019 and 21 February 2020

MORRISON P

[1] We heard this application on 16 December 2019 and, on 19 December 2019, we made the following orders:

1. Application to reinstate application for leave to appeal granted.

2. Application for leave to appeal granted in relation to sentence only.

3. The hearing of the application treated as the hearing of the appeal.

4. Appeal allowed and the sentence of 15 years' imprisonment imposed by the sentencing judge for the offence of robbery with aggravation on 27 April 2012 is set aside.

5. The court substitutes therefor a sentence of seven years' imprisonment, taking into account the period of one year spent by the applicant in custody pending trial.

6. The sentence of seven years' imprisonment for robbery with aggravation is to be reckoned as having commenced on 27 April 2012.

[2] These are the promised reasons for the court's decision.

[3] This matter comes before the court in unusual circumstances which it may be helpful to rehearse in broad outline. On 22 March 2012, the applicant and his brother, Curtis Grey (Mr Grey) were convicted of the offences of illegal possession of firearm (counts 1 and 5), illegal possession of ammunition (counts 2 and 6), robbery with aggravation (count 3), shooting with intent (count 4) and assault (count 7). On 27 April 2012, they were each sentenced to concurrent sentences of 10 years' imprisonment at hard labour on counts 1 and 5, five years' imprisonment at hard labour on counts 2 and 6, 15 years' imprisonment at hard labour on counts 3 and 4 and three years' imprisonment at hard labour on count 7.

[4] The sentencing judge considered that, as regards the counts charging the applicant and Mr Grey with shooting with intent and robbery with aggravation (counts 3 and 4 respectively), he was bound by law to impose a prescribed minimum sentence of 15 years' imprisonment. It is now common ground that, while he was correct in relation

to the offence of shooting with intent[1], he was in error in relation to the offence of robbery with aggravation. In other words, he was bound by law to sentence the applicant and Mr Grey to the prescribed minimum of 15 years' imprisonment in respect of the former offence; but, in relation to the latter, he was at large, subject only to the statutory maximum sentence of 21 years' imprisonment[2].

[5] Both the applicant and Mr Grey applied for leave to appeal against their convictions and sentences. On 11 and 12 April 2017, their applications were considered on paper and refused by a single judge of this court, who took the view that the sentences imposed by the sentencing judge were within the established ranges for similar offences.

[6] As required by rule 3.11(1) of the Court of Appeal Rules 2002 (the CAR), the registrar accordingly notified the applicant and Mr Grey of the single judge's decision by way of Criminal Form B5, the form prescribed by the rules for this purpose. Thereafter, as required by rule 3.11(2) of the CAR, Mr Grey signified his intention to renew the application for leave to appeal before the court, by signing the required form[3] within the 10 day period allowed for this purpose by rule 3.11(3). However, the applicant did not do so. Instead, he signed the Form B5 to indicate that he accepted the decision of the

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[1] See section 20 of the Offences Against the Person Act, as amended by the Offences Against the Person (Amendment) Act, 2010.
[2] See Section 37(1) of the Larceny Act
[3]Criminal Form B6

single judge. The consequence of this was that, in his case, the decision of the single judge became, as rule 3.11(3) declares, "final".

[7] In the meantime, both the applicant and Mr Grey applied to a judge of appeal to reduce the prescribed minimum sentence of 15 years' imprisonment for shooting with intent. This application was made pursuant to the limited jurisdiction conferred on a judge of appeal by section 42L(1) of the Criminal Justice (Administration) Act (as amended in 2015) ('the CJAA'). Pursuant to this section, a judge of appeal was empowered to review a prescribed minimum sentence imposed at trial on the ground that, having regard to the circumstances of the particular case, "the sentence imposed was manifestly excessive and unjust"[4].

[8] These applications succeeded. In a decision given on 12 October 2018, the judge of appeal determined that the sentence of 15 years' imprisonment imposed by the sentencing judge was indeed manifestly excessive and unjust. Accordingly, in Mr Grey's case, the sentence for shooting with intent was reduced to 10 years' imprisonment; while, in the case of the applicant, it was reduced to eight years' imprisonment. The judge of appeal explained the sentencing differential on the basis of the sentencing judge's "clear view of the differing culpability of the applicants"[5].

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[4]The basis of the jurisdiction is explained in the judgment in of the single judge of appeal in **Curtis Grey & Toussaint Solomon v R** [2018] JMCA App 30

[5] At para. [36]

[9] The next step in this history was that Mr Grey's renewed application for leave to appeal against his conviction and sentences was heard and considered by the court in January of this year. In a decision given on 17 January 2019, the application for leave to appeal against sentence was granted, the hearing of the application was treated as the hearing of the appeal and the appeal against the sentence of 15 years' imprisonment for robbery with aggravation was allowed. In place of the sentence imposed by the sentencing judge, the court substituted a sentence of eight years' imprisonment at hard labour, after giving Mr Grey credit for the one year spent by him in custody while awaiting trial.

[10] In arriving at this sentence, the court accepted 10-15 years' imprisonment as the usual range for robbery with aggravation, with a usual starting point of 12 years. Beyond the intrinsic seriousness of the offence of robbery committed with a firearm in which a shot was fired, the court considered that there were no unusual aggravating factors to justify moving Mr Grey's sentence to the top of the usual sentencing range. As for mitigating factors, the court took into account the fact that no one, apart from Mr Grey himself, received any serious injury, the sum involved was small and it did not appear that the robbery was as a result of a pre-planned venture. Given Mr Grey's age at the time of the offence (27 years) and the positive character evidence given on his

behalf, among other things, the court considered that he had some "capacity for reform"[6].

[11] Mr Grey did not appeal against the sentence of three years' imprisonment which the sentencing judge imposed on him for assault. However, of its own motion, the court took the point that, because the maximum sentence for common assault by virtue of section 43 of the Offences Against the Person Acts in fact one year's imprisonment, the sentence for assault could not stand. The court accordingly substituted a sentence of nine months' imprisonment in its stead.

[12] It is against this background that, by notice of application filed on 17 June 2019, the applicant now seeks an order permitting him to reinstate his appeal against sentence. The stated basis of the application is that the applicant failed to appreciate that, by not having given notice in form B6 of his intention to renew his application for leave at appeal after it was refused by the single judge, the decision of the single judge would be deemed to be final. In his affidavit in support of the application, the applicant therefore moves the court to permit him to withdraw his acceptance of the single judge's decision, "and to grant me the opportunity and hear my appeal and kindly please reduce my sentences to that of my brother's Curtis Grey … determined on the 14th and 17th of January 2019"[7].

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[6]**Curtis Grey v R** [2019] JMCA Crim 6, para. [23]
[7]Affidavit of Toussaint Solomon filed on 4 April 2019, para. 34.

[13] Ms Reid submitted that the applicant's acceptance of the single judge's decision was based on a misunderstanding. In this regard, she described the sentence review process introduced by section 42L of the CJAA as a unique intervening factor which was apt to confuse, and did in fact, confuse the applicant. She pointed out that neither Form B5 nor B6 states clearly that the effect of doing so is tantamount to an abandonment of the appeal. Nor does either of them alert the applicant to the fact that acceptance of the single judge's decision will have the result that that decision is final. She submitted finally that the applicant's appeal against the sentence of 15 years' imprisonment for robbery with aggravation stood a good chance of success, bearing in mind the court's decision on Mr Grey's appeal and the desirability, where possible, of achieving parity in the sentences of offenders being sentenced for like offences. Against this background, Ms Reid asked us for an order in terms of the application.

[14] Mrs Johnson-O'Connor for the prosecution agreed in principle with Ms Reid's submissions. She therefore quite properly accepted that the applicant's appeal against the sentence for robbery with aggravation had not been determined on its merits. On this basis, she considered that justice demanded that the application should be granted and the applicant sentenced in conformity with the sentence which this court imposed on Mr Grey.

[15] In agreement with counsel, we fully accept that the applicant's failure to signify his intention to renew the application for leave to appeal before the court within 10 days of receiving notice that the single judge had refused it had to have been the result

of an unfortunate lack of understanding on his part. Accordingly, we also accept that he at all times remained committed to challenging his sentence. It is reasonable to assume that he was quite likely misled by the fact that his application for a review of the sentence under section 42L of the CJAA was, at round about the same time as his application for leave to appeal against conviction and sentence, wending its way through the Court of Appeal along a parallel stream. Although in the experience of all members of the court the senior staff of the correctional institutions have traditionally provided a great service by ensuring that prisoners are not only aware of their rights in this regard, but also ensure their compliance with the applicable time requirements, it is clear that the process simply did not work in his case.

[16] So the question is whether this court has the jurisdiction to do anything about this and, if so, what?

[17] Beyond asking the court to reinstate the application for leave to appeal, Ms Reid was not able to point to any specific provision in either the Judicature (Appellate Jurisdiction) Act or the CAR that might be of assistance in this regard.

[18] However, Mrs Johnson-O'Connor commended to our attention the decision of this court in **Steven Grant v R**[8], in which it was held that, in exceptional circumstances, the court has the jurisdiction to reopen a determined appeal where it is shown that there might otherwise be a likelihood of a substantial injustice to the

[8][2018] JMCA App 13

appellant. In an admirable judgment, after a detailed review of the relevant authorities, Edwards JA (Ag) stated the principle in this way[9]:

> The general principle therefore, subject to the limited exceptional circumstances, is that an appellate court has no authority to review its own decision pronounced after a hearing inter-partes where the decision has passed into a judgment which is formally drawn up. This principle is one that is strictly enforced and is deviated from, in limited exceptional circumstances only. The applicant must not only place himself in one of the limited exceptional circumstances but the injustice which would be meted out to him if his appeal is not reopened must be so substantial as to far outweigh the public interest in the finality of litigation."

[19] In the result in that case, after detailed consideration of the appellant's complaints in the context of the entire proceedings at his trial, the court found that no exceptional circumstances had been shown and accordingly declined to reopen the appeal.

[20] **Steven Grant v R** was a case in which the appellant was seeking to reopen an appeal which had already been heard *inter partes* and determined by this court on its merits. Although neither counsel suggested that it might on that basis be distinguishable from this case, it nevertheless seems to us that it may well be, given the fact that in this case there has been no determination of the applicant's application for leave to appeal on its merits after an *inter partes* hearing by the court itself. It therefore seems to us to be at least arguable that the high bar of exceptionality set in

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[9]At para. [60]

that case may not necessarily be the relevant test to apply in this case, in which the application for leave was determined purely as a result of the applicant's misunderstanding of the legal process.

[21] It seems to us that this case may in fact bear closer analogy to the kind of case in which this court has had to consider the circumstances in which an appellant might be permitted to withdraw notice of abandonment of an appeal duly given by him. One such is **Lloyd Cole v R**[10], in which the applicant signed a notice abandoning his appeal against a conviction in the Resident Magistrate's Court[11] in the prescribed form[12]. He then sought leave of the court to withdraw the notice on the ground that the act of abandonment of the appeal was a nullity, as had been improperly advised and persuaded by his attorney-at-law to abandon the appeal.

[22] In considering the application, the court reviewed a number of previous decisions in which the same issue had arisen and stated the general principle applicable to such applications in the following way[13]:

> "The general principle which emerges from the authorities is therefore that leave to withdraw will only be granted if it is shown that the applicant's abandonment of his or her appeal was not the result of a deliberate and informed decision. While it is not possible – or desirable - to make an exhaustive list of the types of case in which leave will be granted, matters such as fraud, mistake or bad legal advice may always be relevant considerations."

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[10][2015] JMCA App 31
[11]As it was then known
[12]Criminal Form B15 (rule 3.22(1))
[13]Per Morrison JA, as he then was, at para. [43]

[23] The application for leave to withdraw the notice of abandonment failed in that case because the court considered that (i) because the principal issues at the trial turned on questions of credibility, the applicant was correctly advised that his appeal stood very little chance of success; and (ii) the suggestion that the applicant's signing of the notice was the result of intimidation or duress of some kind had not been made good. The court accordingly concluded that there was no question in that case of the applicant's mind not having gone with the notice of abandonment which he signed and therefore refused him leave to withdraw it.

[24] In this case, to the contrary, we were fully persuaded by the very special circumstances which we have described that the applicant's mind did not go with his apparent decision not to renew the application for leave to appeal, certainly as regards sentence. It is for this reason that we came to the conclusion that the application to reinstate the application should be granted and made the orders set out at paragraph [1] above.

[25] As regards the actual length of the sentence to be imposed on the applicant for robbery with aggravation, we took the view that, save in one respect, the circumstances surrounding the applicant's commission of the offence were virtually indistinguishable from those in relation to Mr Grey. He therefore fell to be sentenced in like manner. The single difference between the cases related to what the judge of

appeal described as the sentencing judge's "clear view of the differing culpability" of the applicant and Mr Grey in the commission of the offence[14]. It is therefore on this basis that we imposed a sentence of seven years' imprisonment for robbery with aggravation, after giving the applicant credit for the one year spent by him in custody while awaiting trial.

[14]See para. [8] above