

IN THE HIGH COURT OF BELIZE, A.D. 2023

CRIMINAL JURISDICTION

CENTRAL DISTRICT

INFERIOR COURT APPEAL: #IC20190032

ELECK MCKOY

APPELLANT

v.

WPC 1498 KISHANA MCFIELD

RESPONDENT

BEFORE: The Hon. Mr. Justice Nigel Pilgrim

APPEARANCES: Mr. Norman Rodriguez for the Appellant

Ms. Romey Wade for the Respondent

DATES OF HEARING: 3rd April, 2023 and 21st April, 2023

**RULING ON AN APPLICATION MADE PURSUANT TO RULE 5(2A) OF
ORDER LXXIII INFERIOR COURTS (APPEALS)**

1. Eleck Mckoy ('the Appellant') was tried and convicted on the charge of burglary on the 29th November, 2019 in the Belize Judicial District and was sentenced to a term of imprisonment of eight years. The Appellant duly appealed his conviction and sentence on 31st November, 2019, two days later.
2. On 22nd July, 2022, the Appellant applied to the High Court for certain reliefs, namely, a declaration that until the Clerk of the Court of the Belize Judicial District ('the Clerk') has complied with Rule 5(2) of Order LXXIII Inferior Courts (Appeals) ('the Rules') his time for filing grounds of appeal has not

started to run and that this Court orders, in summary, the Clerk to serve the notice required by Rule 5(2) of the *Rules*.

3. The Appellant also listed the general grounds for his application. He has pleaded that it was being made pursuant to Rule 5 of the *Rules*. He has pleaded that non-compliance was not his fault and that he had a good explanation for not filing. He has also pleaded that he would face undue hardship if the application is not granted, and that it is in the interests of justice to grant it. The Appellant also pleads that “this application” has a good prospect of success, by which the Court presumes he means that the appeal has a good prospect of success.
4. The Appellant has supported his application by an affidavit sworn on 18th July, 2022 and filed on 22nd July, 2022. In his affidavit, the Appellant deposes that, after filing his appeal, he made several attempts to ascertain its status. The Appellant states at paragraph 9 of his affidavit that to this date he has not received any notice either verbally or in writing from the Clerk of the availability of the copy of proceedings pursuant to Rule 5 of the *Rules*.
5. The Respondent, in written submissions, has opposed the application without filing any affidavit or other evidence. The Respondent submits that the record which the Appellant is requesting to be ordered by the Court has been publicly available, filed in the General Registry of the High Court, since 12th February, 2021, and, presumably, time for the preparation of the grounds of appeal by the Appellant should have run since its publication. The Respondent submits that the Appellant could have applied for an order ex parte from the High Court long before this application to order the production of the learned Magistrate’s reasons and the record generally. The Respondent also submits that the appeal has no prospect of success.

LAW

6. The first question, in the Court’s view, is what is the law governing this application. This is due to the subsequent passage of the *Senior Courts Act, 2022* (‘the SCA’) on 15th November, 2022, after the filing of this appeal, which now governs inferior appeals. This question arises in the Court’s mind owing to the presumption of statutory interpretation that procedural amendments are retrospective, as noted by our Court of Appeal in *Thurton v R [2018] 2 LRC 125*¹. The answer is to be found at section 131 of the SCA:

¹ Para. 20

“131. Nothing in this Act shall affect any appeals from inferior courts to the Court pending at the commencement of this Act.”
(emphasis added)

7. The Supreme Court (Inferior Courts Appeals) Rules 2021, which is saved by section 245(4) of the SCA², is also inapplicable in the Court’s view owing to Rule 19 of those Rules:

“19.-(1) Order LXXIII and Appendix O of the Supreme Court Rules is repealed.

(2) Notwithstanding sub-rule (1), every appeal commenced before the entry into force of these Rules³ shall be continued and dealt with in all respects as if these Rules had not come into force.”
(emphasis added)

8. The Court construes these provisions as meaning, in the context of this case where the appeal was filed in 2019, that the regime for treating with this application is pre-SCA law and pre-2021 Rules, which would be the Supreme Court of Judicature Act, Cap. 91, of the Substantive Laws of Belize 2020 (‘the SCOJA’). This would also make the operative rules governing this application the *Rules* made under that Act.

9. The *Rules* provide, where relevant, as follows:

*“1.-(1) in this Order-
‘clerk’ means the clerk of the court of the judicial district from which an appeal is brought and, if there is no clerk, includes a magistrate;*

2.-(1) The party desiring to appeal shall-

...

(b) within twenty-one days after the pronouncing of the decision, lodge with the clerk a written notice of appeal in Form 1, and serve a copy thereof upon the opposite party.

...

4. Immediately on receiving a notice of appeal or notice of the grounds of appeal, or on any security being given, the clerk shall make an entry of the fact and the time of the receipt in a record book to be kept for that purpose, available to inspection by the magistrate or by the either party to an appeal or his Attorney-at-Law.

² 245(4) Notwithstanding the repeal of the Supreme Court of Judicature Act and the Court of Appeal Act, all Regulations, By-laws, Rules, Orders, Practice Directions and other subsidiary laws made under the repealed Acts, shall, to the extent they are not inconsistent with this Act, continue in force until repealed by Regulations, By-laws, Rules, Orders, Practice Directions and other subsidiary legislation made under this Act.

³ These Rules came into effect on 26th June, 2021.

5.-(1) On compliance by the appellant with the requirements of Rules 2 and 3 of this order the magistrate shall draw up a formal conviction or order and a statement of his reasons for the decision appealed against.

(2) The statement shall be lodged with the clerk, within one month of compliance by the applicant with Rules 2 and 3 of this order, and the clerk shall within fourteen days of the receipt thereof, prepare a copy of the proceedings including the reasons for the decision, and when the copy is ready he shall notify the appellant in writing and, on payment of the proper fees, deliver the copy to him.

(2A) If within one month of compliance by the appellant with Rules 2 and 3 of this Order, the magistrate shall fail to draw up a formal conviction or order or shall fail to draw up a statement of his reasons for the decision appealed against, either party to the appeal may by himself or his Attorney at Law apply ex parte on affidavit to a Judge in chambers for an order directing the magistrate within such time as the judge shall think fit to draw up a formal conviction or order or, as the case may be, a statement of his reasons for the decision appealed against or both and upon such application the judge may make an order to that effect.

...

(3) The appellant shall, within fourteen days after receipt of the notice, draw up a notice of the grounds of appeal in Form 3, and lodge it with the clerk and serve a copy thereof on the opposite party.” (emphasis added)

ANALYSIS

10. The process that should have occurred in this matter under the quoted *Rules*, in the view of the Court, should have been as follows: (i) a notice of appeal should have been lodged with the Clerk; (ii) the statement of reasons for decision and the formal conviction should have been drawn up by the learned Magistrate within one month from the notice of appeal and lodged with the Clerk; (iii) the Clerk should have within fourteen days of the receipt of the former documents prepared a copy of the proceedings; and (iv) the Appellant, pursuant to Rule 5(2), should have been notified in writing by the Clerk that the copy was ready.
11. In the Court's view, it is when the Clerk notifies the Appellant in writing of the availability of a copy of the proceedings that the requirement to provide grounds of appeal arises, pursuant to Rule 5(3) of the *Rules*.
12. Section 124 of *SCOJA* also provides:

“124. Any notice or other document required to be served or transmitted under this Act relating to appeals from inferior courts may be served or transmitted by registered post or may be served by delivering or leaving it at the last known place of abode of the party to be served.” (emphasis added)

13. There is no evidence in this matter that the Appellant was served with a notice of the availability of a copy of the proceedings by the Clerk. Indeed, the evidence on sworn affidavit by the Appellant, to which there has been no response by way of an affidavit in opposition by the Respondent, is that he was not notified. In that regard, the evidence of the Appellant not being inherently implausible nor inconsistent, the Court finds that he was not notified by the Clerk as required by Rule 5(2) of the *Rules*.

14. In this regard the Court reminds itself of two things. Firstly, by operation of the *Interpretation Act, Cap. 1 of the Substantive Laws of Belize 2020* (‘the IA’) the *Rules* are subsidiary legislation⁴ and the effect of that is as follows:

“22. Subsidiary legislation shall have the same force and effect and be as binding and shall be construed for all purposes as if it had been contained in the Act under which it was made.”
(emphasis added)

15. Therefore, the *Rules* have the full force and effect of an Act of the National Assembly.

16. Secondly, the directions to the Clerk by the *Rules* for the service of the notice in writing on the Appellant by Rule 5(2) contains the verb “shall” and by virtue of section 58 of the IA:

“58. In an enactment “shall”, shall be construed as imperative and the expression “may” as permissive and empowering.” (emphasis added)

17. In the Court’s view the result of all these provisions is that the Clerk must serve the notice. That is a statutory requirement which must be followed. Whether or not the proceedings became subsequently publicly available, the trigger for the requirement of serving grounds of appeal by the Appellant is the service of the Rule 5(2) notice in the manner prescribed by section 124 of *SCOJA*. The Court notes, in passing, that though proceedings may be available to professional court users on electronic databases there may be unrepresented litigants who may not have the wherewithal to access that information, hence

⁴ “3(1) In this and in any other Act, unless the contrary intention appear...“subsidiary legislation” means any proclamation, regulation, rule, order, resolution, rule of court, by-law, or other instrument made under or by virtue of any Act and having legislative effect...” (emphasis added)

the legislature in its wisdom provided for the means of service it did in the *Rules* and in *SCOJA*. The service of the copy of the proceedings is fundamental to the preparation of grounds which go to the root of the appeal.

18. The Court also bears in mind the principle of statutory construction that a party is not to be lightly deprived of his right of appeal. In this regard the Court relies on the views of the editors of the renowned text, *Bennion, Bailey and Norbury on Statutory Interpretation (2020)* at section 27.8:

"It is presumed that a party is not to be deprived of a right of appeal or hindered in a right of appeal." (emphasis added)

19. The Court is of the view that apart from Rule 9 of the *Rules*, which permits applications for special leave to appeal when appellants have been "unavoidably prevented" from filing their appeal in the manner or time required, it has no power to enlarge time if the Appellant has not filed grounds of appeal in accordance with Rule 5(3). Non-compliance with Rule 5(3) of the *Rules* in the Court's view would very likely have caused the death of the appeal. In this regard, the Court relies on the views of our apex court, the Caribbean Court of Justice (the CCJ) in *Deane v Allamby (2016) 89 WIR 193*. In that case from Barbados, the CCJ considered the powers of a court when statutes prescribed time limits without giving that court a power to extend time, per Byron P:

"[9] The rules governing magisterial appeals are set out in the Magistrate's Court Act, Cap 116A, ss 238 to 267. These rules make provision for persons who are dissatisfied with a conviction, decision, judgment or order of a magistrate to have a right of appeal and set out the procedures to be followed. The time limited for appealing is fixed by s 240(2) which prescribes that notice of appeal must be given within seven days after the order against which it is intended to appeal was made. The statute does not make any provision for granting extensions of time.

[10] Goodridge JA relied upon a judgment she had previously given in Maloney v Commissioner of Police (Magisterial Appeal No 6 of 2014, unreported), as well as the judgment of Wooding CJ in the Court of Appeal of Trinidad and Tobago in Stanley v Andrews. These cases elucidate the well-established principle that powers conferred by statute must be read subject to the limitations and conditions prescribed by statute; and that where a time limit is prescribed by a statute, the court does not have power to extend the time unless the statute gives it the power to do so.

[11] We confirm that there is no statutory power to extend the seven-day time limit prescribed by s 240(2) of the 1996 Act." (emphasis added)

20. In light of the Court's finding that the Appellant was never notified by the Clerk and that the time did not begin to run for the preparation of grounds of appeal which is prefaced on the notification, the Court is of the view that the Respondent's submissions that the Appellant is out of time are without merit. The Appellant was entitled to require service which the law dictated. Consequently, the Court is also of the view then that the principles with regard to the extension of time and prospects of success in the authority of *Dominga Catmela Rax Fernandez aka Yanita Escobar, Claim 308/09*, which are the same to be found in *Deane*⁵, do not arise.
21. This is not the end of the matter though. The Court is empowered by Rule 5(2A) of *the Rules* only to direct, "the magistrate within such time as the judge shall think fit to draw up a formal conviction or order or, as the case may be, a statement of his reasons for the decision appealed against or both". The Court is of the view that it is not empowered by the *Rules*, at Rule 5 or anywhere else, to make declarations of the kind requested by the Appellant, however the Court has already stated its opinion on the operation of the *Rules*.
22. The Court also takes judicial notice of the fact that both the formal conviction and reasons have already been prepared by the learned Magistrate.
23. Counsel for the Appellant has, in the interests of justice and in the highest traditions of the bar, today waived service of those documents, and has agreed to allow time for the filing of grounds of appeal run from today.
24. The Court in those circumstances does hold that the Appellant has 14 days from today's date to file his grounds of appeal.



NIGEL C. PILGRIM
JUDGE OF THE HIGH COURT OF BELIZE

⁵ Para. [13]

