Privy Council Appeal No. 3 of 1987

Aiden Richard Sherry *Appellant*

v.

The Queen *Respondent*

FROM

THE ROYAL COURT OF THE ISLAND OF GUERNSEY

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH FEBRUARY 1989

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD GRIFFITHS
LORD ACKNER
LORD GOFF OF CHIEVELEY
LORD LOWRY

*[Delivered by **Lord Lowry**]*

This is an appeal by special leave as a poor person from (1) an Act of Court of the Royal Court of the Island of Guernsey dated 20th May 1980 dismissing the appellant's appeal against a conviction on 29th February 1980 by the Magistrate's Court for assault and (2) an Act of Court of the Royal Court dated 19th June 1984 dismissing the appellant's petition by way of requete civile to reopen the said appeal.

The present appeal, like the petition which was dismissed by the Royal Court, was founded on the appellant's factual contention that he received no notice of the hearing of his appeal to the Royal Court, coupled with a legal submission (the only point with which their Lordships have had to be concerned) that the purported service on him of notice of the appeal, by leaving the relevant documents at the address for service given by the appellant to the Magistrates' Court, was not valid service.

The appellant was charged that about 6.30 p.m. on 9th January 1980 at No. 53 Victoria Avenue, St. Sampson's he did assault Janet Avril le Cheminant. He pleaded not guilty and on 29th February was tried by the Acting
[7] Magistrate, found guilty and sentenced to three months'

imprisonment. On 5th March 1980 the appellant appealed against his conviction on the ground that "the said conviction was against the weight of evidence and the prosecution police witness evidence was incorrectly obtained contrary to Judges Rules laid down in 1978 and therefore inadmissible". Thereupon the Magistrate's Court ordered that the notice of appeal be recorded and that the appellant be remanded in custody pending the hearing of the appeal.

On 11th April 1980 the appellant applied to the Magistrate's Court and was granted an open remand pending appeal and was released from prison on condition that he should not leave the Island until his appeal had been heard. On 18th April he was granted permission by the Magistrate's Court to go to England for a court hearing from 20th to 28th April, the appellant having taken an oath to return and having at the instance of the Magistrate's Court given an address for service on the Island of Guernsey at 26A Paris Street in the parish of St. Peter Port.

Her Majesty's Procureur the Bailiff appointed 20th May 1980 for the hearing of the appeal and on 17th May 1980 Her Majesty's Sergeant served on the appellant a summons giving notice of the appointed date together with certain copies of Acts of Court and a certified transcript of the record of the trial in the Magistrate's Court by leaving the documents at 26A Paris Street, the address furnished to the Court by the appellant. He marked the summons '"A' Address for Service".

On 20th May 1980 the appeal came before the Bailiff and eleven jurats sitting in the Royal Court. The appellant did not appear and was not represented and the Royal Court, noting that the Acts of Court and the record of the proceedings had been annexed to the summons and had been served on the appellant, unanimously dismissed the appeal for want of prosecution and ordered that the appellant be apprehended on his return to the jurisdiction and serve the sentence of three months' imprisonment imposed on him by the Magistrate's Court less the period of five days already served.

On 21st May the appellant, having learnt that his appeal had been dismissed, left the Island of Guernsey and did not return there. Consequently, except for the period of five days when he was undergoing sentence, he has not served the sentence imposed on him by the Magistrate's Court. According to the law of Guernsey the time spent by the appellant awaiting trial (from 19th to 29th February) and the time spent on remand in custody pending appeal (from 5th March to 11th April) does not count towards sentence.

On 19th August 1983 the appellant presented a petition to the Royal Court in which he set out the facts recited above and averred that at no time prior to the dismissal of his appeal was he aware that his appeal had been set down for hearing. He further stated that at all times prior to the dismissal of his appeal he "took all reasonable and/or diligent and/or possible steps" to pursue his appeal. The petition contained the following averments (omitting immaterial words):-

(a) the only occasion on which the appellant was asked to furnish an address for service was on 18th April 1980;

(b) he left the Island on 20th April 1980 and returned on 28th April 1980, expecting to attend the hearing of his appeal after receiving notice thereof;

(c) on 14th April 1980 he instructed Advocate Perrot to represent him on the appeal and gave him his telephone number;

(d) on at least two occasions after his release on 11th April 1980 the appellant attended at the offices of H.M. Law Officers to ask if a date had been fixed for the hearing of the appeal and was informed that no date had been fixed;

(e) at no time did he receive a message on his "Ansaphone" from his advocate, a Court officer or any other source concerning the date and time of hearing;

(f) although there was an "A" certificate of service "(this averring or suggesting that a Summons ... had been duly served in person on your Petitioner)", no such personal service was ever in fact effected;

(g) the manner of service of the summons was by leaving it at 26A Paris Street, St. Peter Port, "which premises were then unattended";

(h) "for reasons which are obscure to your Petitioner, he never saw or heard of the said summons left at No. 26A Paris Street as aforesaid at any time prior to the said hearing, nor has he seen it at any time since the same".

Paragraphs 11 to 15 of the petition contained the appellant's submissions, which may be summarised as follows:-

1. He never received any notice of the date of his appeal and was therefore effectively denied the opportunity of arguing his case and he remains desirous of doing so, since he contends that he is not guilty.

2. In a criminal case an "A" certificate of service can only be construed as a certificate that service was effected by handing the summons personally to the intended recipient.

3. The appellate court acted properly on the information before it, but would not or should not have dismissed the appeal if it had known the "true facts - namely that your Petitioner had not received notice or service of the said summons" by personal delivery or at all; accordingly the dismissal of the summons was "void and/or liable to be rescinded, reviewed, set aside or quashed".

4. The appellant was prevented by factors beyond his control from prosecuting his appeal, which amounted to the denial of a basic right and a breach of natural justice.

5. In the alternative the dismissal of the appeal was void because:-

"(i) by Article 13 of the Ordinance entitled 'Ordonnance ayant rapport au style de proceder, 1836' it is provided that: 'en Jugement, tant en amiraute qu'autrement, les Ajours seront servis Quatre Jours avant celui auquel la Cause devra passer'.

(ii) the Royal Court sitting as an Appellate Court under the provisions of the Police Court Appeals Law 1939 is sitting 'en jugement' for the purposes of the said Ordinance of 1836;

(iii) in order to validly serve the summons requiring your Petitioner to attend before the Appellate Court for the hearing of his said appeal, Her Majesty's Sergeant or his Deputy should accordingly have served the same on him not less than four week days before the said hearing;

(iv) in the event such alleged service of the said summons as in fact took place (id est the mere leaving of it at the said address for service) was effected no more than two week days before the said hearing, that is to say on Saturday the 17th day of May 1980 for appearance before the Court on Tuesday the 20th day of May 1980."

The petition went on to say that the appellant had, since becoming aware of the dismissal of his appeal, made consistent efforts "by consulting and/or instructing legal advisers both in the United Kingdom and in the Island of Guernsey" to obtain the avoidance of the dismissal, but that he had been prevented from taking effective action by conflicting advice and

opinions. He had "left the Island only upon becoming aware of such dismissal" and was "prevented from returning ... by reason of the threat of immediate arrest and imprisonment".

The Royal Court heard the petition on 7th June 1984 and on 19th June 1984 made the following order:-

> "THE COURT, having heard Her Majesty's Procureur and Advocate L. Le R. Strappini, Counsel for the Petitioner, DISMISSED the petition, with costs, the Deputy Bailiff having delivered his judgment in the terms appended hereto."

As their Lordships have noted, the decision of this appeal depended on whether the service effected by Her Majesty's Sergeant on 17th May 1980 was good service. The appellant's argument, as initially drawn up, was as follows:-

1. His nomination of an address for service was ineffective because it was made in purported compliance with section 4(2)(i) of the Police Court Appeals Law 1939 after his notice of appeal had been given and recorded by which time the effect of section 4(2)(i) had been spent.

2. The purported service of 17th May 1980 was invalid because -

   (a) it was not personal service;

   (b) in the alternative, since the appellant's nomination of an address for service was ineffective, service effected by leaving the documents at that address was bad.

3. In any event, having regard to the nature of the proceedings, at least four days' notice was required and that length of notice had not been given.

Mr. Jubb, whom their Lordships would commend for his frank and admirably clear presentation of the appellant's case, came quickly to the point by conceding that, if the appellant's nomination of an address for service was, contrary to his contention, effective, then personal service was not required and the service actually effected was good. He also expressly abandoned the argument, which Advocate Strappini had declined to advance on the hearing of the petition, that four days' notice was required by law. Their Lordships have no doubt that these concessions on the part of counsel were not only proper but, in the circumstances, inevitable. Accordingly, the only matter for decision was the question of statutory interpretation which is raised by the appellant's first argument.

For the purpose of considering and resolving this question the following provisions of the Police Court Appeals Law 1939 ("the law of 1939") are relevant:-

Section 2, which, subject to certain provisions, gives to a convicted person a right of appeal from the Police Court (which is the statutory description of the Magistrate's Court) to the Royal Court against his conviction or sentence or both and to the prosecution against an acquittal;

Sections 3, 4 and 5, which, so far as material, provide as follows:-

> "3.- LIMITATIONS ON RIGHT OF APPEAL.- (1) No right of appeal shall arise under this Law -
> ...
>
> (c) against the sentence pronounced against any person, where the punishment awarded does not exceed one or more of the following penalties:-
>
> [(i)-(v)]
>
> (d) against the conviction of any person, if the punishment awarded in respect of such conviction does not exceed one or more of the penalties mentioned in clause (c) of this Section unless, upon the application of the person convicted, the Police Court gives a direction that there be made in the record of the case an entry to the effect that there was in contest in the case a question of law or of mixed law and fact which it would be proper and desirable to have decided by the Appellate Court: or
>
> (e) against the acquittal of any person, unless upon the application of the prosecution, the Police Court gives a direction for the making of such an entry as is mentioned in clause (d) of this Section.
>
> (2) Upon the Police Court giving a direction for the making of such an entry as is hereinbefore mentioned, notice of appeal shall be deemed to have been given by the person making application for the giving of such direction and a record shall be made accordingly.
>
> 4.- NOTICE OF APPEAL.- (1) Notice of appeal shall be given and application for the giving of such direction as is mentioned in Section 3 of this Law shall be made to the Police Court at the sitting at which the conviction or acquittal or sentence appealed from occurred or was pronounced or at any sitting occurring within seven days thereafter. ...

(2) The Police Court shall not give such a direction as is mentioned in Section 3 of this Law nor shall the giving of notice of appeal be effectual or be recorded unless and until the person applying for the giving of such a direction or giving notice of appeal has -

(i) if so required by the Police Court, elected and named an address in this Island at which summonses and notices respecting such appeal may be validly served on him:

(ii) given or found, within such period following the date of the application for the giving of such a direction as aforesaid or of the giving of notice of appeal, not exceeding seven days, as the Police Court may prescribe, such security payable in ready money to the Greffier as to the Police Court may seem proper and, in addition or in substitution for such security, bound himself by oath thereupon to be administered to him, that he will remain in this Island, if so required by the Police Court, until the appeal has been disposed of and that he will attend before the Appellate Court at the hearing of the appeal;

(iii) taken such oath, given such undertaking or given or found such security payable in ready money to the Greffier as the Police Court may require that he will not consort with or molest any designated person or persons pending the disposal of the appeal.

Provided that the above conditions shall not be required to be fulfilled in any case where the prosecution is the appellant.

...

5.- EFFECT OF NOTICE OF APPEAL.- Upon notice of appeal being given or being deemed to have been given by a convicted person and upon compliance by that person with the conditions contained in Section 4 of this Law, the sentence pronounced upon that person shall be suspended until the disposal of the appeal and, if that sentence be a sentence of imprisonment with or without hard labour, without the option of a fine, that person shall be set at liberty unless the Police Court directs that he be retained in custody. ..."

Their Lordships have not been told, although the point was raised during the hearing, of any statutory

provisions, other than the Law of 1939, which might bear on the question at issue. It appears moreover, that in the Island of Guernsey, just as in other jurisdictions with the laws of which their Lordships are familiar, the powers exercisable by an inferior court must be derived exclusively from statute. Therefore both the action taken by the Magistrate's Court on 18th April 1980 and the response given by the appellant, in demanding and furnishing respectively an address for service, must purport to have been taken and given under the Law of 1939.

The importance of this point clearly appears from the affidavit of Mr. Peter Laine Ogier, which had been adduced in support of the appellant's petition for leave to appeal to this Board and was again, with the respondent's consent, put before their Lordships by counsel for the appellant. Paragraphs 4, 8 and 9 are in point:-

> "4. Section 4(2) of the Police Court Appeals Law 1939 provides that before a notice of appeal can be recorded and be effectual an Appellant if required by the Magistrates Court shall name an address at which summonses and notices respecting the appeal may be validly served upon him. If this statutory provision was applicable in any particular appeal, the practice which I have described in paragraph 3 above would not apply.
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> ...
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> 8. If at the time of the recording of Mr. Sherry's notice of appeal on 5th March 1980 he had been required to give and had given an address in accordance with section 4(2)(i) of the 1939 Law, then H.M. Sergeant would have been entitled to mark the Cause with an "A" with the addition of the words "Address for Service".
>
> 9. If, however, this statutory provision did not apply, an "A" marking was not appropriate because it should have been taken to mean that the summons had been served personally upon Mr. Sherry."

On this basis, which their Lordships accept as correct, if the appellant properly gave an address for service pursuant to section 4(2)(i), service was good, but not otherwise.

The crucial provision is section 4(2)(i):-

> "The Police Court shall not give such a direction as is mentioned in section 3 of this Law nor shall the giving of notice of appeal be effectual or be recorded unless and until the person applying for the giving of such a direction or giving notice of appeal has -

(i) if so required by the Police Court, elected and named an address in this Island at which summonses and notices respecting such appeal may be validly served on him;"

Mr. Jubb contended that the words of this provision contemplated that the appellant's acts in compliance with paragraphs (i) to (iii) of section 4(2) must be done, if done at all, before the notice of appeal could be effectual or could be recorded and that they could not validly be done at any time thereafter: on 5th March 1980 the notice of appeal was effectual (because the Magistrate's Court had by then imposed no requirements under those paragraphs) and it had also been recorded; therefore any purported act of the appellant thereafter was of no effect because there was no statutory authority for it; accordingly, the furnishing of an address for service on 18th April 1980 was ineffective and so was the purported service on 17th May 1980.

If this is right, it follows that, where an appellant gives notice of appeal, or is deemed under section 3(2) to have done so, and the Magistrate's Court has directed under section 5 that the appellant be retained in custody, the Court, if it later decides to free the appellant, and perhaps also to let him leave the Island, has no power to impose a requirement under paragraph (i), (ii) or (iii).

So unreasonable - and so potentially restrictive of the liberty of appellants pending appeal - did that consequence appear that their Lordships have concluded that the words "be effectual" must be taken to mean "be or remain effectual" and should not be regarded as the mere equivalent of "become effectual".

The argument against this construction is to say that the words "unless and until" must be read together, with a temporal significance creating a "once and for all" situation, so that, when the notice of appeal has once been recorded, the Court is *functus officio* and cannot impose any further requirements. This approach seems also to imply that the Court, having once directed the appellant to be retained in custody, cannot change its mind in any circumstances.

It appears, however, to their Lordships that, whatever its grammatical attractions, they must reject this interpretation which, in their view, is fallacious because it involves a refusal in every eventuality to entertain a disjunctive construction of the words "be effectual or be recorded". Admittedly, even on the construction suggested by the appellant, the word "or" is justified by the preceding negative, but it seems more reasonable to say that section 4(2) on the one hand gives guidance as to when the notice of appeal shall not be recorded- and that is not unless and until the requirements, if

any, already laid down by the Court pursuant to paragraphs (i) to (iii) have been complied with - and on the other hand also gives guidance (which may be separate guidance) as to when a notice of appeal shall not be or shall not remain effectual - and that (in the latter instance) is not unless any new or additional requirements laid down by the Court have been complied with.

Their Lordships have therefore concluded, in agreement with the Deputy Bailiff who heard the appellant's petition, (1) that the Magistrate's Court could properly grant the appellant's application to leave the Island, subject to his electing and naming an address for service, and (2) that he validly did so elect under section 4(2)(i).

The appellant advanced a further argument in his printed case by reference to the fact that the Magistrate's Court could have required him to name an address for service on 5th March 1980, when he appealed, or on 11th April 1980, when the Court granted him an open remand. Nothing turns on this, having regard to their Lordships' view of the law.

In his judgment the Deputy Bailiff observed that on 18th April 1980 the appellant applied to the Magistrate's Court to alter the condition imposed under section 4(2)(ii) and that the Court was entitled to do this, subject to the applicant's submitting to a new condition under section 4(2)(i). This statement is clarified by paragraph 4 of the respondent's case, which was accepted as correct before their Lordships and which showed that, when granted an open remand on 11th April 1980, the appellant took an oath not to leave the Island pending appeal and not to communicate with two of the prosecution witnesses. Of course, if the contention of the appellant was correct, these requirements of the Magistrate's Court under paragraphs (ii) and (iii) and the appellant's compliance therewith were also ineffective.

Their Lordships finally advert to another point which was dealt with in the Deputy Bailiff's judgment. For the purpose of argument, although no oral or affidavit evidence had been tendered in support, he assumed the truth of the averment in the appellant's petition that he received no notice of the hearing of his appeal. The Deputy Bailiff also entertained the possibility that, if this had happened without fault of the appellant, a way might have been found to re-open the proceedings. But the Deputy Bailiff said:-

> "The truth is that Sherry had the opportunity to be heard but, by failing to supervise the receipt of process, he himself threw away his opportunity. He was the author of his own misfortune."

Making the same assumptions in favour of the appellant as those adopted by the Deputy Bailiff, their Lordships have no reason to reach a different conclusion.

Accordingly, for the reasons already stated in this judgment, their Lordships will humbly advise Her Majesty that this appeal ought to be dismissed on both points.