REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. No. 1358 of 2004

BETWEEN

Aaron Karim **Applicant**

and

The Attorney General of Trinidad and Tobago **Respondent**

Appearances:

Mr. Seepersad and Mr. Ramdeen for the Applicant
Mr. Byam for the respondent

Before the Honourable Mr. Justice Ibrahim

Date Delivered: Thursday October 19th, 2006

JUDGMENT

At the conclusion of the hearing of this matter on October 5, 2006, I gave judgment for the applicant in terms of paragraph (5) of the reliefs claimed with costs to be taxed in default of agreement. I further ordered that the matter be referred to the Master for the determination of the claim for damages. I said then that I would give my reasons at a later date. I do so now.

2. The applicant was convicted for the offence of larceny at the Port of Spain Magistrate's Court on July 8, 1999 and was sentenced to a term of imprisonment of six (6) years with hard labour. The applicant immediately gave verbal notice of appeal and the court refused bail. The applicant was then taken to the Port of Spain prison at Frederick Street where he was interviewed by a prison officer. The officer asked the applicant whether he intended to appeal and the applicant said "yes". The officer then took out a number of printed forms and requested answers from the applicant to the questions in the form. The officer told the applicant that the form was a Notice of Appeal which had to be taken to the Clerk of the Peace of the court where he was convicted and it had to be lodged with the Clerk of Peace within seven (7) days from the date of conviction. The applicant inquired from the officer how the form would reach the Clerk of the Peace and the officer told him that the prison service would deliver the form to the Clerk of the Peace. The officer then told the applicant to sign the form and he did so. The officer then inserted the date 8th July, 1999 on the form. The form was eventually received by the Clerk of the Peace on July 20, 1999, some five days after the last date for lodging with the Clerk of Peace. The applicant was placed in a cell in the prison in the remand section where convicted persons are kept awaiting the hearing and determination of their appeals. There is another section in the prison referred to as the convicted section where other convicted persons are kept. This section is for convicted persons who have not appealed their conviction and those who have appealed but the appeal is dismissed and the sentence of imprisonment is affirmed by the Court of Appeal or the Privy Council.

3. The applicant on several occasions requested from the officers the status of his appeal but on each occasion the request was met with an unfavourable response. In April, 2003 some three years and nine months after the conviction, an officer informed the applicant that the appeal would be heard on May 27, 2003. On that date the applicant was taken to the Court of Appeal at the Hall of Justice where the court informed him that the appeal was filed out of time and he

had no effective appeal before the court. In a letter from the Clerk of Appeals to the Clerk of the Peace, the Clerk of Appeals stated the result of the appeal and he made a note that the applicant "returned to prison". The applicant was returned to prison from where these proceedings were filed.

4. The applicant alleges that his rights under sections 4(a) and 4(b) and 5(2)(h) of the Constitution had been infringed as a result of the failure and/or omission and/or neglect of the prison service to deliver his Notice of Appeal to the Clerk of the Peace, Port of Spain Magistrate's Court within seven days from the date of his conviction and the unlawful and wrongful detention at prison that resulted therefrom.

5. The applicant sought two main reliefs namely:

(a) *A declaration that the failure and/or neglect and/or omission of the State, its servants or agents more particularly the Commissioner of Prisons to lodge with the Clerk of the Peace, Port of Spain Magistrate's Court, the applicant's Notice of Appeal on or before the expiration of the seventh day after the order for his conviction and sentence was made on July 8, 1999 by Her Worship Magistrate Gail Gonzales, was unconstitutional and in breach of the applicant's fundamental rights as guaranteed and enshrined under sections 4(a), and 4(b) and 5(2)(h) of the Constitution namely the right not to be deprived of his liberty and security of person except by due process of law the right to equality before the law and the protection of the law and the right to such procedural provisions as are necessary for the giving effect and protection to the rights and freedoms under section 4.*

(b) *An order that monetary compensation including aggravated and exemplary damages be paid to the applicant for the above unconstitutional action and for all consequential loss suffered by the applicant as a result thereof.*

(c) *Costs.*

6. On May 8, 2006 this court granted leave to the respondent to file an affidavit in reply to the affidavit of the applicant that was filed on May 18, 2004 in support of the motion. The court also granted leave to the applicant to file an affidavit in reply to the respondent's affidavit, if necessary, on or before May 31, 2006. Notwithstanding the orders made on May 8, 2006, no affidavit was filed on behalf of the respondent. The facts contained in the applicant's affidavit, therefore, stood unchallenged.

7. At the hearing, the Court requested the parties to identify the issues in the case and record them in writing. This the parties did. Five issues were identified.

They are:

1. *Whether there is evidence that the Notice of Appeal was delivered late?*

2. *Whether as a matter of law there is any duty on the Commissioner of Prisons and/or any other prison officers to deliver the Notice of Appeal within seven (7) days from the date of conviction, once signed?*

3. *What is the effect in law of the applicant signing the Notice of Appeal within seven (7) days of conviction and delivering same to a prison officer and the prison officer delivering the Notice of Appeal late?*

4. *Whether the State is liable for the action or omission of the prison officer.*

5. *What remedy is the applicant entitled to?*

The first issue:

8. There was an abundance of unchallenged evidence that the Notice of Appeal was delivered to the Clerk of the Peace out of the prescribed time. The applicant had sworn to an affidavit in support of the motion and he attached

several documents in proof of the factual matters contained therein. With respect to the Notice of Appeal the applicant attached a copy of the indictable information that was laid which had at the back thereof the appropriate court records and the relevant endorsements of the progress of the matter. The penultimate record reads "Notice of Appeal at Port of Spain Magistrate's Court on July 20, 1999 received, no bail. To appear and prosecute appeal". That endorsement was made by the trial Magistrate. Then there was the Notice itself. It bears two stamps on it: one was a stamp indicating the date of receipt of the notice, that is 20 July, 1999 and the other is a stamp at the foot which reads inter alia: "Notice of Appeal filed at Port of Spain Magistrate 20 July, 1999 received." This information is authenticated by the signature of the presiding Magistrate. There was also a letter from the Acting Clerk of Appeals to the Clerk of the Peace, Magistracy county of St. George West, Port of Spain. That letter reads:-

> *"I am to inform you that the above mentioned appeal "[that is, the appeal of Aaron Karim vs Wendell Lucas P.C. No. 13375] against a certain conviction and sentence under the hand of Her Worship Ms. G. Gonzales, Magistrate for the County of St. George West at Port of Spain and bearing date 8th July, 1999 came on for hearing on the 27th May 2003.*
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> *The Court of Appeal deemed the said Appeal to be out of time and as a result there is no appeal before the Court. The appellant was returned to prison."*

9. Mr. Byan submitted that the matters contained in paragraph 16 of the applicant's affidavit do not assist the applicant because he merely states what he was told by the Court. He also submitted that the documentary evidence filed by the applicant in support of the motion ought not to be looked at and considered by the court because the facts contained therein are hearsay and inadmissible. Paragraph 16 of the applicant's affidavit stated what the applicant was told by the judges of the Court of Appeal when his appeal was called before that court. Mr. Byam further submitted that the stamps on the notice of appeal and the recordings on the stamps are hearsay. Further, the applicant has given no notice that he intended to use those documents at the trial and as a result he is not

entitled to use them at the hearing of the case. In support of these submissions Mr. Byam referred to several authorities on the question of the use in court of hearsay evidence. He referred to re *Koscot Interplanetary (UK) Ltd re Koscot* AG (1972) 3 ALL ER 829. That was a case of the winding up of a company and the issue was whether certain documents were admissible. The court held that other than the two exceptions to the rule in the Companies Act 1967 and the Winding Up rules 1949 which made specific hearsay evidence admissible there was no general rule that hearsay evidence was admissible on a petition for the winding-up of a company because there was no open license to admit hearsay evidence generally. Further, a letter was not admissible for it did not appear that the writer had first hand knowledge of the facts stated in the letter. Also, a summary was not admissible for it had to be established that the summary formed part of a record compiled by a person acting under a duty and there was no evidence as to who that person was or that he was subject to such a duty. Mr. Byan also referred to the case re *Ventouris v Mountain* (No 2) The Italia Express (1992) 3 ALL ER 414 to establish the rule that an out of court statement made orally is admissible only if proved by direct oral evidence of the speaker.

10. The authorities quoted by Mr. Byam are wholly irrelevant because the documentary evidence in this case are official records of the facts contained and made by the persons authorized to make those statements therein and the statement of the Court of Appeal is not an out of court statement. I hold that the evidence that is objected to is admissible.

11. Sec. 130 of the Summary Courts Act Chap. 4 No. 20 reads thus –

> *(1) An appeal shall be commenced by the appellant giving to the Clerk notice of the appeal, which may be verbal or in writing, and if verbal shall be immediately reduced to writing by the Clerk and signed by the appellant, or by his counsel or solicitor if he has appeared by counsel or solicitor.*

(2) The notice of appeal shall be given in every case before the expiration of the seventh day after the day on which the Court has made the order or given the refusal appealed against.

(3) Such notice shall be in the form set out as Form 1 and 2 in the Fourth Schedule.

12. The records show that the applicant gave verbal notice of appeal immediately after the decision by the Magistrate but the Clerk did not comply with the provisions of section 130 (1) because the Clerk did not immediately reduce it into writing and require the applicant to sign it. That is a very serious breach of a statutory duty on the part of the Clerk. If the Clerk had complied with section 130 (1) then the applicant would have had a valid appeal made. Also, the prison at Frederick Street is not a place which merely has forms for distribution to convicted persons or to the public generally who wish to appeal. The prisoners are incarcerated there and such persons do not have the freedom to go to the relevant office of the Clerk of the Peace to lodge their written notice of appeal. It is for that reason that the prison provides the service that is required to have the notices of appeal of convicted persons duly delivered to the Clerk of the Peace. In respect of this applicant the prison officer on the very day of his conviction recorded the particulars on the form and undertook to have it duly sent to the Clerk of the Peace. The failure to transmit it is entirely the fault of the Commissioner of Prisons. Even though he is not statutorily obliged to transmit the form to the Clerk of the Peace, he has an implied duty to do so, such a duty arising from the fact that the officer gave an undertaking to the applicant that the form would be duly lodged and even if he had not given that undertaking he filled out the form for the applicant and after the applicant signed it he kept the form and did not return it to the applicant for transmission by the applicant to the Clerk of the Peace. This is not the first case in which that breach of duty had occurred resulting in injustice to convicted persons who had appealed their convictions. In Magisterial Appeal No. 293 of 2001, three appeals were heard together because there was a point of law that was common to all of them. That point was similar

to the point in this case. The learned Chief Justice in delivering the judgment of the Court said at paragraph 1-

> "In every case the appellants signed notices of appeal on the very day on which they were convicted by the Magistrate, but they were in custody, having all been sentenced to terms of imprisonment. It, therefore, was the responsibility of the Prison authorities to transmit the signed notices of appeal to the respective Clerks of the Peace at the Magistrates' Courts where the convictions were recorded. Unfortunately there was a delay by the Prison authorities in forwarding the notices of appeal, as a result of which the notices were received by the Clerk of the Peace outside the period of seven days, which represents the time within which appeals must be commenced."

13. The Court of Appeal identified the question of law to be whether the court has jurisdiction to entertain those appeals. The court held that because the appeals were out of time they were wholly ineffective and the sentences imposed are to run from the dates of their respective convictions.

14. In the course of his judgment, the Chief Justice said this at page 3 –

> *"In October of 1999, in giving judgment in the case of Kendall Welch v. P.C. Jordan, a Magisterial Appeal, I pointed out that the Prison authorities might well be guilty of infringing the constitutional right of a prisoner to due process, if having received from him for transmission to the Clerk of the Peace a signed notice of appeal, they failed to transmit it within the prescribed time-limit. I pointed out in that judgment that such a default on the part of the Prison authorities might involve the State in liability to the person affected, but it would appear that although we have been informed by Mr. Dolsingh that the warning which I gave then was brought to the attention of the Prison authorities, no steps were taken to prevent a similar default recurring. These cases show that the situation up to at least the middle of 2001, had not been remedied, so that the prisoners' notices of appeal continued to be submitted late."*

15. Mr. Byam stated that he was not denying that the sending of Notices of Appeal to the Clerk of the Peace is a service that the prison authorities perform

but that service is gratuitously undertaken and done and it does not impose any duty on the authority in the performance of that service. I do not agree that that service is gratuitous since, having regard to the facts of the case, the service, even though it did not arise from a duty statutorily imposed nevertheless, it arose from a duty implied. I hold therefore, that there was evidence that the Notice of Appeal was delivered late and on the second issue I hold that there was a duty on the Commissioner of Prisons to deliver the Notice of Appeal within seven (7) days from the date of conviction.

16. No submissions were made by Mr. Byam with respect to the third, fourth and fifth issues. With respect to the third issue the effect in law of the Prison Authorities delivering the notice late is that the Prison Authorities were guilty of infringing the constitutional right of the applicant to due process. I have come to that conclusion notwithstanding the facts that the learned Chief Justice in his judgment in the Bernard case (supra) had said that the Prison Authorities might well be guilty of infringing the constitutional right of a prisoner to due process by such failure to deliver.

17. The fourth issue in my opinion is that the State is liable to the applicant for breach of his constitutional rights by virtue of the failure to deliver the notice within the prescribed time because it is a default by the executive arm of the State to carry out its duties that were undertaken by the Commissioner of Prisons. Again I have come to this conclusion even though in his judgment in the Bernard case, (supra) the Chief Justice was cautious in expressing the opinion that the default might involve the State in liability to the person affected.

18. The remedy is that the applicant is entitled to aggravated and exemplary damages and the further order in part is that the matter is referred to the Master for his determination of the quantum of damages.

19. I wish to draw to the attention of the Attorney General the effect of the continued default by the Commissioner of Prisons at least up to the middle of 2001 in failing to prevent similar defaults occurring with the inevitable consequence that such appellants are denied their statutory right of appeal. In such circumstances their convictions are affirmed notwithstanding the fact that they may have a good arguable appeal. I must add, however that no evidence was placed before me to show whether the default is still occurring.

M. Ibrahim
Judge