Case Name:

# R. v. Higgs

Between
Puritan Higgs, Jason Francis, appellants, and
The Crown, respondent

[2001] TCA J. No. 7
Nos. CR/APM - 6 and 7/95

**Turks & Caicos Supreme Court**
**Criminal Division**
**Ground C.J.**

June 22, 2001.
(8 paras.)

The following judgment was subsequently overturned on appeal, but the Court of Appeal did not give written reasons.

**Counsel:**

Mr. Cullen, for the Crown.
Mr. Rodney for the appellants/respondents to the application.

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JUDGMENT

¶ 1 **GROUND C.J.**:— These appeals come before me on the Crown's application to strike them out for want of prosecution.

¶ 2 The Appellants were convicted on 31st August 1995 before the then Magistrate, who is no longer in the jurisdiction, on various charges relating to the controlled drug, Cocaine, and they received substantial prison sentences and fines. They appealed, and those appeals are recorded in the Supreme Court ledger as having being lodged on 1st September 1995. There is no further official record of these appeals, and no surviving file. There are amended Notices of Appeal, dated 5th September 1995, but they have been provided recently by the Appellants' counsel. The amended Notices rely, inter alia upon an alleged failure of the Magistrate to warn herself of the dangers of convicting on the uncorroborated evidence of an accomplice, and on her hearing part of the case on a day when counsel could not attend.

¶ 3 It is common ground that the appeals never came on for hearing. It is accepted that the appellants were released on bail, and it is not said that they have served their sentence or paid the fines. It is

accepted that they entered into recognizances under s. 163 for the due prosecution of the appeals, and in any event they must have done that to secure bail, but those documents are not preserved.

¶ 4 Beyond the requirement for a Notice of Appeal and the giving of security for its due prosecution, there is no statutory procedure for appeals from the Magistrate's Court and no Rules. The practice now is that appeals are listed for the next Callover. In the meantime the Supreme Court produces a record from the Magistrate's notes, and a date for the hearing of the appeal is then set when the matter comes up at Callover. It is likely that something like that prevailed in 1995. But that is not required by the Ordinance. Indeed, the Ordinance, rather than requiring the Supreme Court to produce a record, simply gives the appellant the right to a copy of the Magistrate's notes of evidence upon request: see s. 167. Although Mr. Rodney says that such a request was made, there is nothing in the evidence to indicate that, and even if it was it could never have been actively pursued.

¶ 5 I consider that there is a positive duty on an appellant to pursue his appeal actively. It is, after all, his appeal. Moreover, such a duty is implicit in the requirement that an appellant give security for the due prosecution of his appeal, and explicit in the recognizance that he enters into before the Magistrate. If no date is assigned for the hearing of an appeal, a simple request to the Registrar for a date would probably suffice to obtain one, but if necessary an appellant could attend at any Callover to set his appeal down for hearing. The dates of Callover, which occurs at the commencement of each session, are Gazetted (see s. 15 of the Supreme Court Ordinance), and in any event are well known to practitioners. It is not open to an appellant, who is enjoying the privilege of bail, simply to let his appeal drop or to acquiesce in an administrative oversight, and thus avoid the consequences of his conviction.

¶ 6 However, in this case I find that that is exactly what the appellants have done. They have wholly failed to bring their appeal on for a period of nearly 6 years. In the circumstances I strike out these appeals for want of prosecution. If it is necessary for me to find a constructive abandonment of them in order to do that, I have no hesitation in doing so.

¶ 7 I have considered the alternative of simply listing the appeals for hearing now, but I have rejected that. It is 6 years since the trial, and the notes of evidence are imperfectly preserved. The Magistrate who heard the case is long gone. In those circumstances it would now be very difficult to deal with the appeals properly. The difficulties illustrate why an appeal should be brought on promptly, and the appellants should not be able to benefit from them.

¶ 8 The appeals being at an end, the decision of the learned Magistrate must stand, and I confirm it. I would welcome the assistance of counsel on the appropriate procedure, given that the appellants are not before the Court. Should I inform the Chief Magistrate of my decision with a view to him issuing a warrant of commitment for the execution of the original decision, as envisaged by section 177 of the Magistrate's Court Ordinance, or can this Court simply make an order of commitment, and issue the warrants to enforce it, as sought in the application?

GROUND C.J.

qp/d/qlafr