RECENT CASES

R. v. GARDINER[1]

Criminal procedure; withdrawal of abandonment of appeal

Can an appellant who has appealed, withdraw his appeal and then seek to continue his appeal? That is to say, can he have a second change of mind and go ahead with his appeal after all? The Supreme Court of Victoria is doubtful whether the Court has power to grant such an application. Briefly the facts in *Gardiner* were that the appellant was convicted on June 19 of two charges of (i) cattle killing and (ii) unlawfully and maliciously wounding a pig. He appealed on June 27. On September 10 the appeal came up for hearing and he filed a late notice of abandonment. On November 3 he sought leave to withdraw the notice of abandonment. The Court refused leave to withdraw. Winneke C.J. observed[2] that

> it appears to have been the practice for some years in England, where a rule in similar terms to the Victorian rule is in operation, to assume the power in appropriate circumstances to grant leave to withdraw a notice of abandonment. . . . Whether the Court has power to grant such an application is a matter, we think, of some doubt. In a case such as this where there has been a deliberate choice by the applicant based upon legal advice to abandon the appeal, a choice not influenced either by fraud or mistake or any other factor which would justify the Court in saying that the notice was a nullity, we are of opinion that no such special circumstances exist as would justify the Court, even assuming it has power to do so, in giving leave to withdraw the notice of abandonment.

The English Court of Criminal Appeal (and its successor the Court of Appeal) has consistently rejected applications to withdraw notices of abandonment. In *Sloan*[3] it was conceded that there might be exceptional circumstances where it would be appropriate to grant leave to withdraw but it was neither desirable nor even possible to enun-

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1 [1970] V.R. 278.
2 Id. at 279, 281.
3 (1923) 39 T.L.R. 173.

ciate those circumstances. In *Pitman*[4] such circumstances were found not to exist where the applicant gave notice of abandonment because he thought that as his friends were unable to assist him financially it was impossible for him to continue with his appeal as he desired. Nor did special circumstances exist in *Van Dyn*[5] where an applicant abandoned his appeal on the receipt of a letter from one of the witnesses he wished to call who said that if she gave evidence she would lose her post and her mother would go mad. Lord Goddard C.J. made it clear in *Moore*[6] that the Court would not entertain any such application for leave to withdraw a notice of abandonment unless it was shown affirmatively that something amounting to a mistake or fraud existed, with a solid foundation for the allegation.

Yet applications continued. Lord Parker C.J. said in *Downes*[7] that the Court had no jurisdiction to grant an application to withdraw unless the notice of abandonment is a nullity. He explained in *Bridgeman*[8] that the Court would not allow the abandonment of an appeal to be withdrawn unless it could be said to be a nullity in the sense that the applicant's mind did not go with his signature or his signature had been obtained by fraud. Refusing to yield yet again in *Kempson,*[9] where the applicant abandoned his appeal because he thought wrongly that there was power to increase his sentence, the Court held that it did not consider that such a misapprehension of the law came within the category of that sort of mistake which would entitle the court to give leave.

The Court of Appeal budged a little in *Lowbridge*[10] and gave leave to withdraw a notice of abandonment, there being evidence that the applicant was in a highly disturbed mental state when he signed and

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4 (1916) 12 Cr.App.R. 14.

5 (1932) 23 Cr.App.R. 150.

6 [1957] 1 W.L.R. 841, 2 All E.R. 703n; followed in Wickham, [1957] Crim.L. Rev. 804 and by the Supreme Court of New South Wales in Cornwall, (1957) 74 W.N. (N.S.W.) 483.

7 [1962] Crim.L.Rev. 541.

8 [1964] Crim.L.Rev. 119; also Lord Parker C.J. in R. v. Essex Quarter Sessions, ex p. Larkin, [1961] 3 All E.R. 930, 932: 'For my part, approaching this as a matter of first principles, it seems to me that no court, whether the Court of Criminal Appeal, the Courts-Martial Appeal Court or the appeal committee of quarter sessions, can, in the absence of express statutory power, deal with an appeal once it is abandoned'.

9 [1967] Crim.L.Rev. 230.

10 [1967] Crim.L.Rev. 656; cf. Healey, (1956) Cr.App.R. 40, where leave was refused where the applicant, convicted of wounding his wife with intent to murder, said that his state of mind was such that he could not tolerate the anxiety of five days more until the appeal was to be heard.

might have done so mistakenly, not fully understanding what he was doing. But in *Sutton*[11] Winn L.J. expressed impatience and said that there were far too many applications in modern times and the Court would not entertain an application for leave to withdraw unless it was apparent on the face of such an application that some grounds existed for supposing that there may have been either fraud or at any rate bad advice given by some legal adviser, which resulted in an unintended, ill-considered decision to abandon the appeal.

The codes are silent on this matter. Some do not even provide for a notice of withdrawal of appeal. Neither the Indian Criminal Procedure Code, the Northern Nigeria Criminal Procedure Code nor the Queensland Code mention the matter. The Uganda Criminal Procedure Code provides for an abandonment of an appeal but not for the withdrawal of the abandonment. In *Serisite Luyomba*[12] the Court of Appeal for Eastern Africa held that the appellate courts in Uganda have an important jurisdiction to allow an abandoned appeal to be restored, if it can be shown that the notice of abandonment was given by mistake or fraud such as to involve a possible failure of justice in the event of an appeal not being restored. Unlike the Supreme Court of Victoria, the Court was not in any doubt that, although *functus officio,* it had jurisdiction to declare the notice of abandonment a nullity.

The Canadian Criminal Code is likewise silent but in *Way*[13] two accused were convicted of possessing stolen cheques. They both appealed but the second accused abandoned his appeal. The first accused's conviction was subsequently quashed on the ground that there was no evidence of the theft of the cheques. The second accused then filed a notice submitting that his convicion should be quashed also. The Court of Appeal of Alberta treated this as an application for leave to appeal but dismissed it, holding that it had no jurisdiction to entertain the abandoned appeal. The Court suggested a possible alternative under section 596(b) which gives the Minister of Justice discretion to 'refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person'.[14] This was done and the Minister referred the matter to the Court of Appeal whereupon the Court quashed the appellant's conviction.

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11 [1969] 1 All E.R. 928.
12 [1965] E.A. 698.
13 (1966) 48 C.R. 383.
14 Under s. 21 of the Criminal Code of Western Australia the Attorney-General has a similar power to refer a case to the Court of Criminal Appeal.

A similar cumbersome solution occurred in *Griffin*.[15] The Court of Appeal held that the fact that a co-appellant had been granted a re-trial did not afford a ground for the applicant being allowed to withdraw his notice of abandonment. At the re-trial, the applicant's co-appellant (his father) had been convicted of assault occasioning actual bodily harm instead of causing grievous bodily harm with intent. The applicant's case was referred to the Secretary of State who referred the matter to the Court of Appeal. The Court then held the safest course was to quash the conviction for causing grievous bodily harm with intent and substitute a conviction for assault occasioning actual bodily harm.

The situation does not seem to have arisen in South Africa where appellants may not withdraw an appeal in the first place without leave of the Court.[16] If the Attorney-General gives notice that he intends to apply for an increase in sentence it would seem an appellant cannot withdraw his notice of appeal.[17] Thus the possibility of wishing to continue the appeal is less likely to arise.

The Supreme Court of Victoria has come close to ruling out the possibility of exercising its discretion in exceptional circumstances.[18] But possibly it has kept its options open and so perhaps will the other Supreme Courts in Australia, in order to avoid the tedious procedure adopted in *Way* and *Griffin*.[19]

D.B.

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15 [1967] Crim.L.Rev. 230, 474.

16 Mabbongo, 1969 (3) S.A. 388.

17 Nunkan, 1945 N.P.D. 221 and Jurgens, 1953 (2) S.A. 383; but it seems he can in Southern Rhodesia—Cook, 1965 (4) S.A. 53.

18 Cf. Cornwall, (1957) 74 W.N. (N.S.W.) 483, where the Supreme Court of New South Wales held that once an appeal has been abandoned it is dismissed and there is no power in the court to allow the abandonment to be later withdrawn and the appeal later reinstated. This case was not considered in Gardiner; only Moore, see n. 6, and Sutton, see n. 11, were considered.

19 In Griffin, [1969] N.S.W.R. 497 the Court of Criminal Appeal of New South Wales observed that it had always taken a stern view that it had no jurisdiction to entertain an appeal subsequent to that notice but had always held that there must be some qualification to that result so that if in rare cases a person signs a notice of abandonment without the fullest appreciation of its significance it would then go behind it to allow an appeal to continue in certain special circumstances. In this case the Court allowed the applicant to continue his appeal because he was in a very depressed state and did not appreciate the full significance of what he was doing.