

LUBESHA v THE PEOPLE (1965) ZR 82 (CA)

COURT OF APPEAL

BLAGDEN CJ, DENNISON AND WHELAN JJ

16th June 1965

Flynote and Headnote

[1] Courts - Court of Appeal - jurisdiction - appeal from High Court's refusal to extend time for appeal - section 13 (1) of Court of Appeal Ordinance construed:

The Court of Appeal lacks jurisdiction to entertain an appeal from the High Court's refusal to extend the time for appeal on the substantive merits of the case.

[2] Criminal Procedure - Appeal in general - application to extend time in which to appeal conviction - no appeal from High Court's denial of application - section 13 (1) of Court of Appeal Ordinance construed:

See [1] above.

Case cited:

Ralph v R: [1960] E.A. 310.

Statute construed:

Court of Appeal Ordinance (Cap. 12), s. 13 (1).

In person, for the appellant

Loe, for the respondent

Judgment

Blagden CJ: In this case the appellant was convicted by the Senior Resident Magistrate at Lusaka of stock theft and sentenced to three years' imprisonment.

On the 22nd January of this year he made application to the High Court for an extension of time in which to appeal against that conviction and sentence. He was then some three weeks or so out of time. On 12th February Mr Justice Charles refused to grant any extension and the applicant is now before us appealing against that decision of Mr Justice Charles.

[1] The immediate question that arises for decision is whether or not that decision of Mr Justice Charles is appealable. For the People, Mr Loe has argued that there is no right of appeal here as the circumstances do not bring the matter within either section 12 (1) or section 13 (1) of the Court of Appeal for Zambia Ordinance (Cap. 12) of those two provisions the only one which could possibly be applicable is the latter which gives a right of appeal in certain circumstances to 'any party to an appeal to the High Court'. It is Mr Loe's submission that the appellant here never was a party to an appeal to the High Court. The matter seems to me to be covered by a decision of the East Africa Court of Appeal: *Ralph v R* which is reported in [1960] E.A. 310. That was an application for leave to appeal out of time which arose in these circumstances: the applicant was convicted by a Magistrate's Court in Kenya and some four months after his release from prison he applied to the Supreme Court of Kenya for leave to appeal to that Court out of time. His application was refused. He then sought to appeal against that order of refusal, and the point in issue before the East Africa Court of Appeal was whether an order of the Supreme Court of Kenya refusing to admit an appeal was itself appealable. The relevant provision was section 360 (1) of the Criminal Procedure Code of Kenya, the opening words of which are not dissimilar to section 13 (1) of the Court of Appeal for Zambia Ordinance here:

' Any party to an appeal from a subordinate court may appeal against the decision of the Supreme Court in its appellate jurisdiction to the Court of Appeal on a matter of law (not including severity of sentence) but not on a matter of fact.'

The East Africa Court of Appeal held [Headnote, page 310]:

'The order of the Supreme Court refusing to admit an appeal out of time, though made in pursuance of powers incidental to the appellate jurisdiction of the Supreme Court was not itself the decision of an appeal but was the refusal of an application to extend time and did not fall within s. 360 of the Criminal Procedure Code.'

Gould, JA, in delivering the judgment of the Court put it this way, at page 311:

' The order from which appeal is now sought is not therefore appealable as falling within the primary scope of s. 360; nor does it, in our opinion, fall incidentally within the wording of the section so as to render it appealable.'

Subsection (1) indicates that an appeal to this court may be brought by "any party to an appeal from a subordinate court". The appellant is not and never has been a party to such an appeal, as there never has been such an appeal in existence. He sought leave to institute an appeal out of time and, had he obtained leave, he would have become a party to it, and as such entitled to bring a further appeal on a matter of law if he was dissatisfied with the decision of the Supreme Court. The proceeding in the Supreme Court to which the appellant was a party was not an appeal but an application, which was refused, to extend time.'

It seems to me that the exact situation is reproduced here. The proceeding in the High Court to which this appellant was a party was not an appeal, it was an application to extend time, and it was refused. In my view we have no jurisdiction to entertain this appeal.

Appeal dismissed

Judgment

Dennison J: I agree.

Judgment

Whelan J: I also agree.