

IN THE COURT OF APPEAL

ST. VINCENT

Motions Nos. 1 & 2 of 1972.

BETWEEN: NICHOLAS ANTHONY FULLER Appellant/Respondent

V

MARY ENA EUSTACE	}	Respondents/ Applicants
LEAH EUSTACE		
JOHN PARMENAS EUSTACE		
JOSEPH LAMBERT EUSTACE		
SARAH ANN EUSTACE		
RUTH VICTORIA EUSTACE		
DAVID LLOYD EUSTACE		

Before: The Honourable The Chief Justice
The Honourable Mr. Justice Cecil Lewis
The Honourable Mr. Justice St. Bernard

E. Robertson for Appellant /Respondent

St. John, Q.C. for Respondents/Applicants,
Mary Ena Eustace, David Lloyd Eustace,
Leah Eustace, Sarah Ann Eustace,
Ruth Victoria Eustace, & J.L. Eustace.

E. Stephens with him.

A. F. Williams for J.P. Eustace

1972, May 16.

JUDGMENT

The judgment of the Court was delivered by -

LEWIS, C.J.

This is an application to strike out an appeal for undue delay in the prosecution of same. Notice of appeal was filed on the 9th June 1971 and the time for filing the record expired on the 21st of July, 1971. It was not until the 16th September, 1971 that any application was made for extension of time. The

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application was granted and an order was made extending the time of filing the record to the 28th of October, 1971. That time was allowed to expire, and on the 29th of October another application was filed and time was extended to the 19th of November, 1971.

Further extensions were given and according to the affidavit time was further extended to the 13th of March, 1972. This application was filed on the 10th of May 1972 and thereafter a summons was filed and put before the High Court Judge in Chambers on the 13th of May. This Court was due to come here for this sitting, which is a scheduled sitting of the Court, and I think it is desirable to say for the benefit of the members of the profession who do not seem to understand the rules that the High Court Judge only has power to deal with an application to the Court of Appeal where the Court of Appeal, or a member of the Court of Appeal, is not due to be in the State for some time; and, strictly speaking, before a High Court Judge deals with a matter like this, he ought to be satisfied that no member of the Court will be available to take the matter. But, certainly, when there is a scheduled sitting of the Court in the following week no application of this nature should be put before a High Court Judge. Well, the High Court Judge quite properly declined to hear the summons and this Court was prepared to deal with the matter this morning; but when the matter was called on counsel for the plaintiff/appellant, who had filed an affidavit in the summons, informed the

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Court that he wished to withdraw the summons and that summons was accordingly withdrawn. Thereafter, it appeared that counsel was under the impression that because he said that the record was ready to be filed and had deposited it at the office of the Registrar, that that amounted to filing the record out of time and that no leave was required - a most extra-ordinary conception.

Notwithstanding this, the Court has looked at the affidavit which was filed in connection with that summons to see whether there was anything in it that would warrant the Court's refusal to accede to the application which is before it. The Court was anxious to know whether the undue delay in filing the record was due to failure to obtain the notes of evidence in time, having regard to the difficulty that this Court has itself had in obtaining notes of evidence in criminal matters, but no such allegation has been made, and, indeed, counsel for the appellant/respondent in addressing the Court this morning on the motion has not made any such allegation.

The result is that this appeal has been pending for nearly a year now - very nearly a year - there has been no satisfactory explanation as to why there has been such a long delay why the record has not been filed in time and the Court sees no reason to refuse the application of the respondents/applicants. The Court will accordingly order, under Order 64 Rule 13 (2) that this appeal be dismissed for want of

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prosecution.

The appellant/respondent must pay the costs of this application.

Allen Lewis, C.J.