

KANESHIMA v. TRUST TERRITORY

III. A statute of limitations must appear on the face of the complaint to be subject to attack by a motion to dismiss.

The motion employed was for summary judgment, not to dismiss. There is a significant difference between the two.

IV. Whether wrongful conduct which has been relied upon gives rise to estoppel precluding employment of the time bar.

No conduct was shown which appellant relied upon to justify its failure to bring suit. Whatever appellee said, did or thought, if any, to mislead appellant it did not relate to appellant's delay in filing suit.

V. Whether the limitation upon suit for "loss or damage" prevented claim for refund of unearned prepaid freight. Loss or damage applies to all claims under the contract including a payment of alleged unearned prepaid freight, if any. Aside from pleading the point, no facts were presented to substantiate the pleader's conclusion.

The Judgment below was correct as a matter of law. It is Affirmed.

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YUSHIN KANESHIMA, Appellant

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee

Criminal Appeal No. 31

Appellate Division of the High Court

May 4, 1970

*Trial Court Opinion—4 T.T.R. 340*

Appeal from conviction of unlawful entry into Trust Territory waters and unlawful removal of marine resources. The Appellate Division of the High Court, Robert K. Shoecraft, Chief Justice, H. W. Burnett, Associate Justice, held that appellant's absence from the jurisdiction precluded court's consideration of his appeal.

Appeal dismissed.

**1. Courts—Jurisdiction**

Once an appeal is taken, jurisdiction is transferred to the appellate court where it remains until the appellate proceeding terminates.

**2. Courts—Jurisdiction**

A simple return of the file of a case by the clerk of the Appellate Division to the Trial Division is not sufficient to re-invest the trial court with jurisdiction.

**3. Criminal Law—Sentence—Motion for Reduction**

A motion for reduction of sentence is essentially a plea for leniency, and presupposes a valid conviction.

**4. Appeal and Error—Abandoning Appeal—Generally**

An appeal will be considered as, or presumed to be, abandoned where appellant does an act inconsistent with its prosecution, such as making application to the trial court for relief.

**5. Appeal and Error—Abandoning Appeal—Absence From Jurisdiction**

Absence of appellant from court's jurisdiction is a compelling reason for holding his appeal abandoned.

**6. Courts—Jurisdiction**

Party's departure from the jurisdiction effectively removed him from the reach of any order the court might make.

*Counsel for Appellant:*

WILLIAM E. NORRIS, ESQ.,  
*Assistant Public Defender*

*Counsel for Appellee:*

DOUGLAS F. CUSHNIE, ESQ.,  
*District Attorney*

Before SHOECRAFT, *Chief Justice* and BURNETT, *Associate Justice*

BURNETT, *Associate Justice*

OPINION OF THE COURT

Appellant, Yushin Kaneshima, an Okinawan national, was convicted on two counts of unlawful entry into Trust Territory waters, and one count of unlawful removal of marine resources. On April 17, 1969, he was sentenced to two years imprisonment, 4 T.T.R. 340, suspended upon the condition that he not illegally enter Trust Territory waters during such period, and to pay a fine of \$6,000.00 on each

of the three counts. Immediately upon imposition of sentence, counsel moved for reconsideration; this motion was taken under advisement, and had not been disposed of at the time this appeal was taken.

As security for payment of the fine imposed, the court further ordered that defendant, his crew and his vessel remain in custody until such time as the fines were paid. Prior to certification of the record on appeal, the commitment order was amended to release the crew, no charges having been filed against any of them.

The record was certified on appeal on June 17, 1969, and the entire Trial Division file sent to the Clerk of the Appellate Division of the High Court on June 25.

It is at this point that a certain measure of confusion is encountered. Notwithstanding the appeal, and with no remand appearing in the record, the trial court entered its order July 16, 1969, amending the Commitment Order to release appellant from custody and to permit him to leave the jurisdiction.

[1] It should be noted initially that the trial court was without jurisdiction to enter its order of July 16. Once an appeal is taken, jurisdiction is transferred to the appellate court where it remains until the appellate proceeding terminates. (See 4 Am. Jur. 2d, Appeal and Error, § 352.) (See also Rule 31d, Rules of Criminal Procedure.)

[2] As noted, appellant's motion for reconsideration, i.e., reduction of the sentence, had not been dealt with when the appeal was taken. The only manner in which the trial court could regain jurisdiction was through application to the Appellate Division for remand for the purpose of ruling on the motion. Instead we find what appears to have been a purely clerical exercise, in the apparent assumption that a simple return of the file by the Clerk of

the Appellate Division was sufficient to re-invest the trial court with jurisdiction. This obviously cannot be.

Yet, while we are clear that the court's order releasing the appellant from custody was without jurisdiction, and thus a legal nullity, we are faced with the reality that he was released pursuant to that order, and consequently is no longer within our jurisdiction.

This entire matter was briefed and argued by counsel without mention of the amendment of the Commitment Order, nor was there any supplemental certification of the record to bring it specifically to our attention. The Order, and a variety of other documents in support, was included in the file returned to the Clerk of this division; we need not close our eyes to that which is before us, even though it should not be.

[3, 4] We consider first the effect of appellant's renewal of his motion for reconsideration of sentence in the trial court, an action which appears to me to be entirely inconsistent with the appeal. See *Poole v. United States*, 250 F.2d, 396, 401, holding that a motion for reduction of sentence is "essentially a plea for leniency, and presupposes a valid conviction."

"An appeal will be considered as, or presumed to be, abandoned where appellant does an act inconsistent with its prosecution, such as . . . making application to the trial court for relief . . . ." 5 C.J.S., Appeal and Error, 1388.

[5] Further, more compelling, reason for holding this appeal abandoned is found in the absence of appellant from our jurisdiction. In a similar situation, where appellant had escaped from custody, the Supreme Court said, in *Smith v. United States*, 94 U.S. 97, "Under such circumstances we are not inclined to hear and decide what may prove to be only a moot case."

More recently, in *Eisler v. United States*, 338 U.S. 189, 69 S.Ct. 1453, where Eisler fled the country after the Su-

preme Court granted certiorari and after submission on the merits, the cause was removed from the docket "since petitioner may have rendered moot any judgment on the merits." The writ was subsequently dismissed.

[6] We note also that appellant, an Okinawan national, is an alien, and consequently not free to come and go in the Trust Territory as he chooses. Under such circumstances, what purpose could be served by either affirming or reversing his conviction? His departure from the jurisdiction effectively removed him from the reach of any order this court might make.

It is unfortunate that this matter comes before us in such a state, since a number of vexatious questions, needful of ultimate resolution, were involved on trial. We would not, however, be justified in examining and deciding questions which have become academic, no matter how interesting they might be.

This appeal is, therefore, dismissed.

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UCHELIEI GIBBONS, Appellant

v.

OWANG LINEAGE, et al., Appellees

Civil Appeal No. 39

Appellate Division of the High Court

May 22, 1970

*Trial Court Opinion—3 T.T.R. 560*

Appeal on action for ejectment. The Appellate Division of the High Court, Robert K. Shoecraft, Chief Justice, held that as an action of ejectment could not be considered as a substitute for an appeal from a land title determination, trial court was without jurisdiction to consider the action as an independent action for relief from judgment or to make a finding as to determination of ownership.

Judgment modified and affirmed.