The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 19 of 2015

Between:

THE QUEEN

Appellant

-v-

KAMAL WORRELL

Respondent

Before: **Baker, President**
Bell, JA
Bernard, JA

Appearances: Mr. Carrington Mahoney, Ms. Larissa Burgess, Department of Public Prosecutions, for the Appellant
Mr. Arthur Hodgson, Apex Law Chambers, for the Respondent

Date of Hearing & Decision: **31 October 2016**

Date of Reasons: **14 November 2016**

REASONS

Costs against the Crown in the Supreme Court and Court of Appeal – whether statutory power to award or inherent jurisdiction – high threshold – no improper conduct on part of Crown.

PRESIDENT

1. Kamal Worrell seeks an order for costs against the prosecutor both in the Supreme Court and the on appeal to us. These are our reasons for refusing an order.

2. In the Supreme Court after a lengthy trial Mr Worrell was acquitted on the direction of the judge, Simmons J at the conclusion of the defence case of three

offences, conspiracy to defeat justice, fabricating evidence and perjury. The facts appear in the judgment of this Court of 17 June 2016, and it is unnecessary to repeat them. Mr Worrell made no application for costs to the trial judge.

3. Unlike in Great Britain there is no power in Bermuda to order a defendant to recoup his cost from central funds.

4. It is first necessary to ascertain what if any power there is to make an order for cost against the Crown. Mr Hodgson, who appeared for Mr Worrell, submitted that there is a statutory power or alternatively that the court has inherent jurisdiction to make such an order.

5. As to statutory power, we were first referred to the Criminal Code Act 1907 as amended. Section 555 makes provision for payment of costs by a private prosecutor. There is, however, no comparable provision for the payment of costs by the Crown. Section 556 provides for what is to happen when an order for costs has been made. It is procedural and does not itself confer any power to order costs. Section 556A provides for wasted costs orders against barristers and attorneys. The section is, however, dealing with individual representatives rather than the Crown. In any event this is not a case involving wasted costs. The fact that the Code makes provision for the payment of costs against a private prosecutor but no provision for the payment of costs against the Crown strongly suggests that there is no such power. Further, if there is such a power in the Supreme Court and the Court of Appeal it is surprising that there is no indication of it ever having been exercised.

6. Mr Hodgson next referred us to s. 21 of the Criminal Appeal Act 1921 contending that this together with s. 8(1) of the Court of Appeal Act 1964 gave the Court the necessary jurisdiction. Section 8(1) gives the Court of Appeal all the powers and duties conferred or imposed on the Supreme Court in the exercise of its original or appellate jurisdiction.

7. Section 21(1) provides that the Supreme Court, on determination of an appeal from the Magistrates' Court, may order the appellant or the respondent to pay all or any part of the cost of the appeal. Section 21(2)(a) provides that the cost of appeal includes preparing copies of documents, stating a case, preparing affidavits, appearance and examination of witnesses and the inquiry and report of a special commissioner. Section 21(2)(b) provides that any order by the Supreme Court as to the cost of an appeal may direct all or any part, being costs otherwise failing to be met out of public funds to be paid into the consolidated fund.

8. Mr Hodgson submitted that the word " includes" in s. 21(2)(a) indicates that "cost of appeal" is not limited to those categories of cost described in this subsection and includes, for example, the cost of legal representation. It is clear, however, that s. 21 applies only to the Supreme Court's appellate jurisdiction. It does not cover, for example, the cost of a trial on indictment or indeed any aspect of its original jurisdiction. Mr Hodgson is seeking an order both for the costs of an appeal and for those in the Supreme Court.

9. Section 21 provides the Supreme Court with costs jurisdiction in respect of appeals from the Magistrates' Court. We would read the reference in s. 8 to "appellate jurisdiction" as giving the Court of Appeal the same power as the Supreme Court but only in these cases that originate in appeals from the Magistrates' Court to the Supreme Court and thence to the Court of Appeal. The Supreme Court has no power to order costs against the Crown in its original jurisdiction and we do not think appellate jurisdiction should be construed so widely as to cover appeals from the Supreme Court in its original jurisdiction. The point, however is somewhat academic since the Court of Appeal has, as we shall explain, inherent jurisdiction to order costs against the Crown and, whatever the source of the power, the authorities make clear that it can only be exercised in very limited circumstances.

Inherent Jurisdiction

10. It would be surprising if the Court had no jurisdiction to make an order for costs against the Crown whatever the circumstances and indeed Mr Mahoney accepts that the Court has inherent jurisdiction although he submits it should be sparingly exercised.

11. In *Berry v British Transport Commission* [1961] 3 All ER 65, Devlin LJ pointed out that in criminal cases a successful defendant had no *prima facie* entitlement to an award of costs as the prosecution was brought in the public interest. He said at page 75:

> "A plaintiff brings an action for his own ends and to benefit himself; it is therefore just that if he loses he should pay the costs. A prosecutor brings proceedings in the public interest, and so should be treated more tenderly."

12. Mr Hodgson relied strongly on the United Kingdom Practice Direction (Crime Cost in Criminal Proceedings) (No2) 5 October 1999 where it is stated by Lord Bingham CJ:

> "Where a person was not tried for an offence for which he had been indicted or committed for trial or had been acquitted on any count in the indictment, the court might make a defendant's costs order in his favour.
>
> Such an order should normally be made whether or not an order for costs *inter partes* was made, unless there were positive reasons for not doing so, as where for example, the defendant's own conduct had brought suspicion on himself and had misled the prosecution into thinking that the case against him was stronger than it was"

13. Mr Hodgson's reliance is however misconceived because Lord Bingham was referring to defence costs from central funds rather than against the prosecutor and there is no comparable rule for recovery by a defendant in Bermuda.

14. In my view assistance is to be found in the Canadian authorities. In *R v Robinson* [1999] ABCA 367 McFadyen JA said in paragraph 29 :

> "While costs may be awarded against the Crown in the exercise of the court's general jurisdiction, the clear rule has been that such costs will only be awarded where there has been serious misconduct on the part of the Crown. (See *R v Pawlowski*, (1993) 79 C.C.C. (3d) 356; *R v.M, C.A.* [1996] 1 S.C.R 500; *Berry v British Transportation Commission,* [1961] 3 All ER 65 (CA).) The reasons for limiting costs are that the Crown is not an ordinary litigant, does not win or lose criminal cases, and conducts prosecutions and makes decisions respecting prosecutions in the public interest. In the absence of proof of misconduct, an award of costs against the Crown would be a harsh penalty for a Crown officer carrying out such public duties."

15. More recently in *R v Tremble*, [2010] ONSC 3434 in the Superior Court of Ontario, Fragomini J said:

> "I am not satisfied that the Crown has engaged in any conduct that would merit sanctions in the form of an award of costs against the Crown. The Crown appeal was unsuccessful. Although the appeal was unsuccessful, I cannot say that in proceeding with the appeal the Crown acted in an improper way. The Crown was unable to persuade this Court that the learned trial judge erred, however, there is nothing to support a finding that the Crown's conduct was improper, oppressive or high handed."

16. It is true that *Tremble* was a case involving a statutory provision entitling the Court to make any order with respect to costs it considers just and reasonable. However, its importance is that it emphasises the high threshold that must be crossed before a successful appellant can recover his costs from the Crown.

17. In the present case the learned judge had taken the unusual step of stopping the case after the defence evidence, having concluded at the close of the Crown's case that the respondent had a case to answer. There were issues of law whether the judge was entitled in law and on the facts to have done so. There were important issues that the Crown was entitled, indeed many would say obliged, to raise before the Court of Appeal. Whilst the Crown's appeal did not succeed there is nothing to suggest they acted improperly in bringing the appeal and the high threshold for making a costs, order against them is not met.

18. The other aspect of the present application relates to the costs in the court below. No application was made to the trial judge. Had one been it would in our view have failed. It was only after the judge had heard Mr Worrell's evidence that she felt obliged to stop the case. It is unnecessary to go again into the facts which are set out in our judgment on the appeal. Suffice to say that on any view he was sailing very close to the wind. He chose to give a "no comment" interview with the consequence that his full defence only became apparent when he gave evidence. He was of course entitled not to answer questions in interview but, as Mr Mahoney pointed out, it is a relevant matter on costs.

Baker, P

Bell, JA

Bernard, JA