# In The Supreme Court of Bermuda

## APPELLATE JURISDICTION

2006: No. 17

**BETWEEN:**

**ANGELA COX**
**(Police Constable)**

**Appellant**

**-and-**

**ROBERT LLEWELLYN BUTTERFIELD**

**Respondent**

Dates of Hearing: 8th August 2006,1st February 2007, 11th April 2008, 30th April 2008 and 2nd May 2008.

Date of Judgment: 1st July 2008

Mr. C. Mahoney of Director of Public Prosecutions, for the Appellant;
Mr. A. Doughty of Trott and Duncan for the Respondent.

# JUDGMENT

1. This appeal made pursuant to section 6 of the Criminal Appeal Act 1952 is against an order for cost made by the learned Senior Magistrate in favour of the Respondent against the Appellate.

2. The sole ground of appeal is that the order should not have been made however in his arguments before the court counsel for the Appellant expanded on this ground to include three primary issues of law. The questions arising therefore are:

    a. whether costs were awarded according to statute, in particular with any or adequately stated reasons;

b. whether the court in ordering costs against the Appellant violated the discretion of the Director of Public Prosecutions in determining when to terminate a prosecution;

c. whether an order for cost against the Appellant is void for lack of enforceability .

**The factual background**

3. On the 8th June 2006 the Respondent appeared unrepresented before the Learned Senior Magistrate where he was charged in an information containing three offences for which he elected summary trial and pleaded not guilty. Each of the offences related to the defendant's behaviour toward a certain lady with whom he had fathered a child and had enjoyed a familiar relationship.

4. The Senior Magistrate set the matter for trial for the 27th June 2006 to be heard before him at 9:30 am. It would appear from the context of the supplemental record of appeal transcribed from the Court Smart recording of the 27th June that this early date was set because the Respondent told the Senior Magistrate that the complainant would not be appearing to give evidence against him and that she had communicated this to the police prior to that court appearance.

5. I am reliably informed by both counsel appearing in this appeal and accept as fact that it is the practice of the Senior Magistrate to set an early hearing date in cases where the charges arise in the context of a familiar relationship between the complainant and the defendant and there is an indication that the complainant will not give evidence.

6. I am informed and accept as fact that in such circumstances the Senior Magistrate asks the prosecutor for verification of the complainant's change of mind and where such cannot be immediately confirmed the Senior Magistrate places an onus on the prosecutor to seek verification from the police for exposition at the early trial date.

7. I accept as fact that this was the course taken on the occasion that the Respondent entered his not guilty plea on the 8th June 2006.

8. On the 27th June 2006, Crown counsel Miss S. Dill appeared on behalf of the Appellant and Mr. Doughty appeared for the Respondent. Miss Dill advised the Senior Magistrate that the Crown would not be offering any evidence against Mr. Butterfield.

9. Thereafter followed a more than thirty minute discussion between the Senior Magistrate, Miss Dill and Mr. Doughty concerning the issue of the Crown offering no evidence; the earliest date at which the Police were aware that they would not be in a position to offer evidence; and the issue of costs. At the end of this discussion the Senior Magistrate dismissed the information and made the order for cost in Mr. Butterfield's favour pursuant to section 28(2)(i) of the Summary Jurisdiction Act 1930.

**ARGUMENTS OF COUNSEL**

10. Mr. Mahoney for the Appellant argues that the Senior Magistrate erred in law because there was no evidence upon which he could find that the charges that the respondent faced were, as the Summary Jurisdiction Act requires, "unfounded, frivolous or made from an improper motive". Counsel also argues that the Senior Magistrate in any event failed to make any such finding in that he did not record such a finding. (***Drepaul-v-Bisrott*** (1995) 54 W.I.R. 242; ***Sylvan-v-Raqoonath and Others*** (1966) 11 W.I.R. 33).

11. Counsel for the appellant further argues that in awarding costs against the appellant the Senior Magistrate sought to penalize the Crown in its decision as to who is to be prosecuted or which prosecution should be terminated. (***Jeewan Mohit-v- The Director of Public Prosecutions of Mauritius*** Privy Council Appeal No. 31). Finally he argues that in the circumstances of the costs going against the appellant to the extent that the order is referable to the Director of

Public Prosecutions that order is unenforceable and ought not to have been made.

12. Mr. Doughty for the defendant argues that inadequacy of reasons is not a sufficient ground to allow an appeal if there are circumstances wherein the appellate court is able to discern with the assistance of counsel what the central issue of the case is. Counsel for the respondent argues that with the assistance of the Court Smart Recording the court can assess the reasoning of the Senior Magistrate. (***English-v-Emery Reimbold & Strick Ltd***., [2002] 1 WLR 2409 (CA).

13. Mr. Doughty further argues that imprisonment for non payment of an order of costs notwithstanding, the DPP as a public officer exercising statutory functions is amenable to Judicial Review and therefore is not above the law and the discretion imposed in that officer is subject to the interference of the courts. (***Froomkin-v-R***. [1990] Bda. L.R. 16; ***Jeewan Mohit*** supra).

**Whether any or adequate reasons were given for awarding costs**

14. The power in the Magistrates' Court to award costs against an informant in so far as is relevant is set out in Section 28 of the Summary Jurisdiction Act 1930 which provides:

> "(1) when a charge is dismissed, and appears to the court to have been unfounded, frivolous or made from any improper motive, the court may order the costs, or any part of the costs, to be paid by the informant, either forthwith or with in such time as the court may allow; and if such costs are not paid the court may commit the informant to prison for a term not exceeding ten days, unless such costs are sooner paid.
>
> "(2) the costs which the court may order to be paid under subsection (1) shall be such sums as may be fixed by the court in respect of-

> (i) the expenses incurred by the defendant, including fees payable to his attorney (if any), which sum shall be payable to the defendant;…".

15. It is clear from the transcript of the Magistrates' Court hearing that the Magistrate struggled with the interpretation of the phrase "appears to the court" as provided in Section 28 (1) in order to determine where his duty lay when considering the issue of costs. On page 29 commencing at line 1 the Magistrate says this of the phrase:

> "Appears that case was…"Yes this worries me, because they say if it appears that it is unfounded, and "appear" is directly related to "looking at", and when I look at it, you know, in light of what is before the Court, as you say the threshold and—and, again, I don't want to step out of bounds, I can't tell the DPP what cases to bring, who to prosecute and who not to prosecute, but if they're simply willing to say "we offer no evidence", full stop, then that is what I've got to look at".

16. It would seem that when Mr. Doughty told the Magistrate that this phrase meant a low threshold, he was suggesting that a lower standard of proof was required by Section 28 and this seems to have been accepted by the Magistrate. If such is the case Mr. Doughty's view of Section 28 of the 1930 Act was misguided.

17. Firstly, there are only two standards of proof known to the law; the criminal standard and the civil standard. The granting of costs by contrast is an exercise of discretion on the part of the court and has nothing to be concerned with the standard of proof. All that the section requires is that a Magistrate consider all of the relevant facts including the submissions of counsel and if in his judgment the facts warrant it, he may in the exercise of his discretion make an order as to costs.

18. Secondly, although this is not strictly related to the law, I think it plain from a reading of the transcript that Miss Dill offered an explanation for the

Prosecution not being in a position to offer evidence against the Respondent. The Prosecutor's position was that in so far as they were aware they had a willing witness on the date of the laying of the information in plea court. When challenged about this at plea court they could not confirm the Respondent's contention that no witness would be forthcoming as they had not received any communication from the police to that effect at the time of plea court.

19. What is more to the point of law raised on this appeal, however, is Mr. Mahoney's cogent argument that the Magistrate failed to adequately or at all state what his reasons for his decision were. The Senior Magistrate mentioned one of the three criteria in Section 28, that being "unfounded", however he did not go on to state which facts if any satisfied that criteria.

20. In any event it would seem relevant to the Magistrate's assessment of the criterion provided by Section 28 of the Summary Jurisdiction Act 1930 whether there was some material complaint amounting to a prima facie case that underpinned the information which was laid before him at plea court. The Magistrate did not mention that.

21. In this connection it is of relevance to note that the Magistrates' Court is not only a Court of summary jurisdiction but it is also a court of record. The duty of a Magistrate before giving a judgment or making an order (in this case, awarding costs) is therefore to be understood by reference to the provisions of the Summary Jurisdiction Act 1930, in particular Section 16 and 21.

22. Section 16 which pertains to the duty to take notes of evidence provides:

> "it shall be the duty of the magistrate composing a court of summary jurisdiction… to take notes in narrative form of all material evidence given in connection with a case heard before such court."

23. One question that arises from Mr. Doughty's submission is whether the reference to "evidence" is to be restricted to formal evidence in the sense of a witness's testimony. The High Court of Guyana considered the extent of the duty of a magistrate to record evidence in the case of ***Drepaul-v-Bisrott*** (1995) 54 W.I.R. 33. In that case Kennard CJ drawing support from an earlier case before that court held that it is only by the taking of proper notes of the evidence that the cause of justice may be served on a review of a magistrate's decision in an appeal. He held further that "evidence" (as used in their analogous summary jurisdiction legislation) includes facts narrated by the prosecutor.

24. Section 21 is of primary relevance to this appeal in that it concerns the recording of a judgment and provides:

> "When the case on both sides is closed the magistrate composing the court shall record his judgment in writing; and every such judgment shall contain the point or points for determination, the decision therein and the reasons for the decision, and shall be dated and signed by the magistrate at the time of pronouncing it."

25. Mr. Doughty for the Respondent argued that in Bermuda the Court Smart recording system in the Magistrates' court has superseded the requirement of a Magistrate to take a hand written note. Indeed one can surmise that the Senior Magistrate himself, cognizant of the recording, may himself have believed that because of his reference during the proceedings to the Court Smart Recording and the time and date (page 20 line 24 of the transcript).

26. Mr. Doughty is not correct on this point. Magistrates are still bound by the 1930 Act to take written notes. The initial appeal record in this case was prepared from hand written notes which were sketchy at best and difficult to read and consequently poorly transcribed by the Magistrates' clerk. The Magistrate himself it is assumed was unable to decipher the notes when requested to supplement the record since no supplemental record was received from him. In the circumstances this court had to resort to requesting that the record be

supplemented by the Court Smart recording. It is in those circumstances that this court relies on the Court Smart Recording.

27. Mr. Doughty for the Respondent contended that even if the central reasons for the decision to award costs is not readily apparent from the discussion or decision of the Magistrate the assistance of counsel can enable an appellate court to identify the issues and follow his reasoning. For this Mr. Doughty relies on ***English-v-Emery Reimbold & Strick Ltd*** supra.

28. In the ***English*** case it was held that article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms and English domestic law required:

> "the reason for an award of costs to be apparent either from reasons or by inference from the circumstances in which costs were awarded. It was further held that unless the reason for the cost decision was clearly implicit from the circumstances, the judge should explain, albeit usually briefly, why he made the order; that in practice it was only where an order was made with neither reasons nor any obvious explanation for the order that it was likely to be appropriate to give permission to appeal for lack of reasons;…"

29. In order to put the award of costs into context I think it relevant to set out some of the discussion on the point. When the Senior Magistrate pressed Miss Dill as to what she meant by offering no evidence he said to her at page 4, line 21 of the court transcript :

> *" I told you people already I am not about to play any games in these courts; if you all want to play games, you all can—with peoples positions, you all can play them in the D.P.P.'s chambers or where else; all right? But you weren't here, and I don't want you to take this personally, but let me say it publicly: Last time before this information was laid, it was set down; all right? And obviously, the D.P.P. has got a*

*right to decide who they prosecute and who they don't prosecute, but in terms of—in terms of individual rights, when it comes to me determining those rights, there may be other prosecutions, because I can simply anticipate a question of cost being raised now, and that is what I ask—that is why I am asking what do you want me to do in light of the situation."*

30. It was in that context that Miss Dill stated that she would assume that on offering no evidence the matter would be dismissed. The Senior Magistrate then went on to say( page 6 lines 1 through 9):

> *"No, let me say this: Okay, I am going to go further. Before this man was charged before the court, on the morning before the information was actually put to him, it was raised, right, that there is an indication—not that there is an indication, that there is—that the prosecution was not in a position to prosecute this man because the complainant had indicated that she does not want the matter to proceed."*

The Magistrate was clearly of the view that some one, for reasons that are not apparent from the face of the record, was playing games in prosecuting the Respondent.

31. Can it be implied that the Senior Magistrate accepted the view of the Respondent and made his decision on the basis that the prosecution was instituted from an improper motive, whether on behalf of the prosecution or the police who investigated the matter.

32. On page 8 of the record the Senior Magistrate mentions that before him at plea court the Respondent referred to the charge as a malicious prosecution.

> *"Last time the defendant present* [sic] *and raised that this prosecution was a malicious prosecution. I think that's the words that he used the last time, that with regard to the – within the Bermuda Police Force and the Department of Public Prosecutions it was known that this defendant—that there was no evidence to support these charges. All right? In that the—the complainant clearly did not intend to give evidence, yet still*

*whatever the reasons for it, they still put the defendant before the court, in the face of that."*

33. On a proper analysis of the record of proceedings it would appear that the information was sworn on the 18th day of May 2006 and the plea date was the 8th June 2006. Mr. Doughty suggested below as he did here that the withdrawal of the complaint took place before the plea date on the 8th June by way of an e-mail that was sent by the complainant to the police. Whether this was correct or not is by no means clear from the record. What is clear is that some time between the 8th June and the hearing before the Magistrate on the 27th June the complainant's letter of withdrawal of the complaint was forwarded to the Magistrates' Court.

34. However, assuming that the e-mail was sent prior to the appearance in plea court, the Magistrate rightly stated that the Director of Public Prosecutions was informed by that e-mail at the time it was received by the police. There can be no doubt that the police play a role in the Crown prosecutorial machinery. By virtue of Section 71 of the Bermuda Constitution Order 1968 as amended The Director is fixed with knowledge and responsibility for prosecutions, and no distinction can be drawn between facts which come to the knowledge of the police and the Director as declared by Ward CJ in ***Jenene Whitter-v-Director of Public Prosecutions*** [2002] Bda. LR 33.

35. There is no specific legislation in Bermuda requiring disclosure of all facts to the defence in summary proceedings; however common law rules and an established practice before these courts mentioned in paragraph 6 above recognize a duty in the prosecutor to disclose facts such as an unwilling witness as soon as is practicable.

36. It stands to reason that the police would have wished to satisfy themselves that the complainant had indicated her withdrawal of complaint willingly. The police

would have needed sufficient time to investigate the withdrawal to ensure that it had not been obtained by improper and possibly illegal means. That exercise however did not fetter the Director's right to lay the charge in the pursuit of justice in the interim nor would it amount, without more, to an indication of malice on his part for doing so.

37. Aside from the fact that Mr. Doughty's submission took no account of the practicalities mentioned above, he appears to have fallen into the same error as the Magistrate on the allegation of malice, which for our purposes, would fit into the improper motive criteria of section 28 of the 1930 Act.

38. Counsel's error lies in failing to appreciate that there is a distinction to be drawn between an allegation of malice being raised and a finding of fact justifying such allegation. An allegation of malice is a serious allegation which could have had serious legal and financial consequences for the police and the Director. On a reading of the record a bare allegation had been made by the Respondent. Such a serious allegation required the Magistrate to demonstrate through discussions in the proceedings at the least facts supporting the allegation or to state some reason for accepting the Respondent's view.

39. Mr. Doughty has relied on the authority of ***English-v-Emery*** in urging the court to glean from the record facts supporting the other two criteria contained in Section 28. I find no such support. Firstly there was a fully particularized complaint by the complainant that gave rise to the three criminal charges on the indictment. There was no finding by the Magistrate that they were unfounded in the sense that the complainant had made a false accusation against the Respondent which the police were aware was false prior to laying the charges. In the circumstances no such facts could be inferred.

40. Secondly, the Magistrate did reveal any facts in the circumstances that show that the charge was frivolous. Apart from his comment about someone playing

games, an inference of frivolity cannot be drawn from that unexplained comment or the rest of the record.

**Was the discretion of the Director violated?**

41. The essence of Mr. Mahoney's submission on this point is that section 28 of the 1930 Act was never intended to apply to the Director because it was passed in a time when the Attorney General was responsible for prosecutions and he had immunity from such orders. He contends that in its historic context the section applied to private prosecutions and to employ it against the Director would be in violation of such immunity and penalize the Director in the exercise of his discretion to stop a prosecution.

42. This argument is contrary to the authority of ***Mohit***, an appeal from Mauritius to the Privy Council cited above. In that decision Lord Bingham held that the Director could not rely on the immunity enjoyed in the past by the Attorney General of England as the Attorney's power derived from the royal prerogative and he was answerable to Parliament. Unlike England, Mauritius like Bermuda has a written constitution. By contrast the Director's discretion to grant or refuse consent to prosecution derives from statute law, and subject to certain exceptions acts of the Director are amenable to the jurisdiction of the courts.

43. Bad faith or dishonesty in the use of his powers would be reviewable by the court as would a claim of abuse of process. In the same way section 28 of the 1930 Act operates to award cost against a prosecutor where the court decides that some impropriety has occurred whether the case was unfounded, frivolous or prosecuted from any improper motive. Such a finding would only be a fetter to a capricious or ultra vires exercise of discretion.

**Whether the order is void for enforceability**.

44. Mr. Mahoney submits that the informant in the magistrates' court proceedings Ms Cox is in peril of imprisonment for non payment or, as her superior, the Commissioner of Police is. This is inconsistent with the reasoning of the court in ***Whitter*** cited above at paragraph 38. In any event The Crown Proceedings Act 1947 provides for costs orders to be made against the Crown in civil cases involving public officers acting under duty; it stands to reason that no distinction can be drawn in criminal cases.

45. Having shown above that the Director is answerable for prosecutions emanating from the police or his own chambers, and further that he has no special immunity and is therefore liable for costs orders, it is contrary to law and reason that an order for costs against the Appellant would be void for lack of enforceability.

46. For the above stated reasons the appeal is allowed. It is appropriate in such circumstances to refer the matter back to the Magistrates' Court for the award to be reconsidered according to law. Notwithstanding the delay in advancing this appeal due to lack of timeliness in completing the record, the interest of justice requires the Senior Magistrate to reconsider the matter. I so order.

Dated the 1st day of July 2008.

Charles-Etta Simmons
Puisne Judge