In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2012: NO. 28

JULIAN WASHINGTON

Appellant

-v-

J. ADRIAN COOK
(Police Sergeant)

Respondent

EX TEMPORE J U D G M E N T

(In Court)

Date of hearing: May 3, 2013

Mr. Dante Williams, Mussenden Subair, for the Appellant
Mr. Carrington Mahoney, Deputy Director of Public Prosecutions (Administration), for the Respondent

Introductory

1. In this case the Appellant appeals against the refusal by the Learned Senior Magistrate of an application for costs under section 28 of the Summary Jurisdiction Act 1930 on June 22, 2012. The Appellant was charged on an information dated May 14, 2012 with the following offence. That he :

> "*1. On or about the 8th day of January 2012, in Pembroke Parish, without lawful authority, knowingly handled ammunition, namely a .45 calibre cartridge.*
>
> *Contrary to section 19A(1) of the Firearms Act 1973…*"

The proceedings before the Magistrates' Court

2. At the preliminary inquiry before the Learned Senior Magistrate, Mr. Mussenden, who appeared below, submitted that the evidence against the Appellant was insufficient to support a committal. The Learned Senior Magistrate agreed. The principal evidence against the appellant was that his DNA was found in a mixed sample on the bullet casing which was found at the scene of a double shooting which resulted in the death of one of the victims. The conclusion set out in the Statement of Candy L Zuleger was that:

> "*…the combined frequency of occurrence of the mixed DNA profile for unrelated individuals in the following populations is approximately:*
>
> *1 in 46,000,000 (46 million) for the Black Bermuda Population*
> *1 in 173,000,000 (173 million) for the Bermuda White Population…*"

3. The Learned Senior Magistrate ruled as follows:

> "*Having heard Counsel for the Crown and having heard Counsel for the Defendant in relation to evidence submitted to the Court pursuant to Section 10 of the Indictable Offences Act I am of the view that no reasonable Jury could convict on such evidence. I rule that there is no case to answer. Consequently, Information 12CR000343 is dismissed. The Defendant Julian M. Washington is discharged.*"

4. The Defence then made an application for costs which the Learned Senior Magistrate was clearly surprised by. The unofficial transcript prepared to supplement the Appeal Record in this case records the beginning of the submissions as follows:

> "*Counsel: Your Worship, thank you very much. Your Worship, we would like to make an application for costs against the Crown for this matter. I don't know if Your Worship wants to proceed with this at this minute.*
>
> *Court: No. Just go away and be happy.*
>
> *Counsel: Your Worship this is a serious application.*"

5. There was then a debate about the provisions of the Summary Jurisdiction Act 1930 and the Learned Senior Magistrate rejected the application on the grounds that the facts of the case did not come within the relevant section. Section 28 (1) of the Act reads as follows:

"***Costs against informant***

28 (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 within 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; and

(ii) *the witness money payable under section 11, which sum shall be payable into the Consolidated Fund.*"

Jurisdiction to entertain appeal by a successful defendant against the refusal to award costs

6. At the commencement of the appeal the Respondent through Mr. Mahoney raised a preliminary objection to the jurisdiction of this Court to entertain this appeal. Referring to section 6(b) of the Criminal Appeal Act 1952[1], it was submitted that an acquitted person had no right to appeal against a refusal of costs.

7. Mr. Williams for the Appellant conceded that on a literal reading of this statutory provision it seemed clear that no right of appeal existed. However, he suggested the Court should consider taking a more purposive approach to the construction of the section taking into account, in effect, the principle of equality of arms under section 6 of the Bermuda Constitution and the fact that the relevant section did not confer equal rights with respect to appealing orders of costs.

8. It was common ground that where there is a refusal to award an informant costs a right of appeal exists.

9. As I indicated in the course of the hearing, it is possible that there may be a constitutional argument for reading the Criminal Appeal Act in the way that was

[1] Section 6 of the Criminal Appeal Act 1952 provides as follows: "*Notwithstanding anything in sections 1 to 5, a person convicted of an offence by a court of summary jurisdiction, or a person who was the informant in respect of a charge of an offence heard before and determined by a court of summary jurisdiction, shall each have a right of appeal to the Supreme Court in the manner provided by this Act, upon a ground which involves a question of law alone— (a) where an order for the payment of costs was made by the court of summary jurisdiction— (i) then against the making of the order; or (ii) against the amount of the sum required to be paid under the order; or (b) where the making of an order for the payment of cost was refused by the court of summary jurisdiction, then against the refusal to make such an order*" [emphasis added].

suggested. That is because the Bermuda Constitution Order provides that "*existing laws*", in other words laws that were passed before the 1968 Constitution, should be read subject to such adaptations, modifications and qualifications as may be required to bring them into conformity with the Constitution[2].

10. I do not consider that it would be appropriate to make such a determination in the context of the present appeal because the matter was not fully argued and the point is of sufficient importance for the Attorney-General to be given an opportunity to respond to it.

11. Instead, as I indicated in the course of argument, this Court is the Court to which an application for judicial review could be made. And, under the inherent jurisdiction of the Court, I would be inclined to treat the present application as an application for to judicial review, to grant leave and to hear the application on its merits, such as they are.

Grounds of complaint

12. The grounds of complaint advanced by Mr. Williams fell into two categories.

13. Firstly, he sought to rely without any prior notice to the Respondent on the alleged misconduct of the Police in the lead up to the date when the charge was laid against his client. He complained that his client was arrested on multiple occasions including on one occasion prior to an interview which his counsel had arranged for him to attend at a time when he was on Police bail. It was suggested that he was being harassed by the Police because they believed he was a member of a gang.

14. That complaint was then linked to the second complaint which was, in essence, that there was no evidence to support an essential element of the offence charged (namely the element of knowledge) and the Prosecution ought to have known this. When the alleged Police harassment and the laying of the "unfounded" charge are taken together, it was suggested that the Court could infer that the charge was not only unfounded but also improperly motivated.

15. As far as the improper motive argument is concerned, in my view that inference is impossible to draw in the absence of positive evidence of the DPP's Office conspiring with the Police to lay a charge against someone they know is not guilty of it. The reason why that argument has no substance is that the complaint about the charge itself being unfounded in my judgment has no substance.

---

[2] Section 5 of the Bermuda Constitution Order provides: *"(1) Subject to the provisions of this section, the existing laws shall have effect on and after the appointed day [2 June 1968] as if they had been made in pursuance of the Constitution and shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.*"

16. Section 28 of the Summary Jurisdiction Act gives the Magistrates' Court an exceptional jurisdiction to award costs against the Prosecution when there is no reasonable basis to a charge at all. Examples of situations which might attract a costs order would include cases were somebody has been the subject of a complaint which is found to be entirely fabricated due to ill-will on the part of a complainant. Equally, there might be cases where a charge is laid against an accused person in circumstances where there is absolutely no evidence whatsoever.

17. In this case I am satisfied (and Mr. Mahoney reinforced my provisional views in this regard) that, depending on the view that the Court took of the evidence, a committal might well have taken place. As it happens, the DNA evidence was not found by the Learned Senior Magistrate to reach the necessary threshold, standing by itself, to potentially support a conviction. But this case was, in my view, very far removed from a charge that was unfounded and there is no material properly before the Court to suggest that the charge was frivolous or improperly motivated.

18. The Appellant put before me two emails relating to the complaints made by his lawyers about his pre-charge treatment by the Police. I took those matters into account and, having considered them, rule that they are not properly before the Court. All they demonstrate is that the Appellant, if everything said on his behalf is correct, may have a civil claim against the Police for any unlawful detention or arrest which may have occurred.

19. Clearly, those matters fall outside the parameters of an application for costs in the Magistrates' Court which is primarily concerned with the laying of a charge by an independent Director of Public Prosecutions, albeit that an information in the Magistrates' Court is nominally laid by a Police Officer.

Conclusion

20. And so for those reasons I find that the appeal should be dismissed.

Dated this 3rd day of May, 2013 _____

IAN R.C. KAWALEY CJ