In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2020: 33

Fiona Miller (Police Sergeant)

Appellant

-v-

Ryan North

Respondent

JUDGMENT

Appeal against Senior Magistrate's decision to award Costs against the Crown in criminal proceedings – Statutory Framework and Legal Principles applicable to Costs in Criminal Proceedings – Jurisdiction and Powers of the Magistrates' Court to make costs awards - Section 58 of the Criminal Jurisdiction and Procedure Act 2015

Date of Hearing: 14 July 2021
Date of Judgment: 02 August 2021

Appellant Ms. Cindy Clarke, the Director of Public Prosecutions
Respondent Mr. Jonathan White, Marshall Diel & Meyers Limited

JUDGMENT delivered by Shade Subair Williams J

Introduction

1. This appeal was brought by the Director of Public Prosecutions under section 6(a)(i) of the Criminal Appeal Act 1952 in complaint of the decision of the Senior Magistrate, Mr. Juan Wolffe, to award costs against the Crown for non-disclosure of evidence in respect of a speeding offence contrary to section 7 of the Road Traffic Act 1947.

2. The impugned costs order was made in favour of an application brought by the Respondent in the lower Court. However the Respondent, wanting to avoid the incurrence of further legal fees, refrained from participating in these appeal proceedings. No doubt, that decision was aided by the Crown's undertaking to the Respondent not to pursue the recovery of any monies payable to the Respondent in the event of a successful appeal.

3. At the 14 July 2021 appeal hearing, I received written and oral submissions from the Director of Public Prosecutions, Ms. Cindy Clarke, before reserving judgment which I now provide together with these written reasons.

Factual Background

4. The Respondent was charged on Information 20TR02723 with a traffic offence of speeding ("the speeding ticket"). On 27 October 2020 Mr. North first appeared in the Hamilton Magistrates' Court and pleaded not guilty to the speeding offence charged. On 16 November 2020, Mr. North reappeared before a magistrate for disclosure to be made at the hearing. All of the Crown's used material was served but the prosecutor informed the Court that it was awaiting receipt of a witness statement from the police officer who operated the laser machine ("the laser operator").

5. At a subsequent disclosure hearing two weeks later on 30 November, Defence Counsel, Mr. White, forewarned that he would make a costs application if he was not served with a statement from the laser officer by the next Court appearance. According to the Record of Appeal, the Senior Magistrate noted [p.14]; "*Still awaiting statement from officer who did lazer. Client has appealed costs – request costs*." The matter was then

adjourned to 4 December 2020 when the prosecutor clarified that the awaited statement was unused material but that it would be offering no evidence in any event. As Mr. North was also before the Court on other traffic offences, the prosecutor confirmed its decision to proceed on the other Information before the Court.

6. In the written submissions of the DPP these facts were narrated as follows [3-4]:

"*The brief facts are that the Respondent appeared before the Magistrates' Court at a Disclosure and Directions Hearing for 2 matters: 20TR02723 which alleged speeding, and 20TR02671 which alleged impaired driving. The prosecutor offered no evidence in respect of 20TR02723 (the speeding matter) at the hearing.*

The Respondent asked for disclosure of a witness statement from 20TR02723, and the prosecution explained that the statement had not been provided, and was not being relied upon for the prosecution."

7. The Senior Magistrate thereupon ordered costs against the Crown and delivered a written ruling stating his reasons.

The Senior Magistrate's Ruling

8. The Senior Magistrate's written ruling dated 4 December 2020 provided as follows:

"*Mr. White submits that the Defendant should be awarded his costs for the 30th November 2020 and the 4th December 2020 on the basis that the statement of the witness for the speeding offence (20TR03723) had not disclosed his statement. On the 30th November 2020 Mr. White put the Court on notice that he would make the application today if the disclosure is not made. Ms. Sofianos explained that she was not aware of cost application they made, and from her notes she cannot say why the statement is not available.*

The speeding matter is a simple one, and one would have thought that the statement would have been easily available, especially since it has been since 27th October 2020 that a not guilty plea has been entered. The police must do better. The required statement, on the face of it, would be a simple one and surely would not take a lot of

time to put together. The fact that it is not done portrays a nonchalant attitude towards keeping the wheels of justice moving at a reasonable pace. This cannot take place and if the court is able to register its concern about non-disclosure it shall do so by way of a cost[s] order.

In the circumstances, I will accede to the Defendant's application for costs. But not for the entire time that he requests as some of that time would have been in respect of case number 20TR03671.

I therefore grant costs to the Defendant for 1 hour of Mr. White's time as taxed or agreed.

Trial- 29th January 2021 at 11:00am, Court 1. Bail extended."

Overview of the Statutory Framework for Costs in Criminal Proceedings

9. The law on costs in civil proceedings is well-established and prominently features in routine civil practice and procedure before the upper and lower Courts. However, in criminal proceedings, the law on costs is not given such regular attention for reasons which I shall come to consider further below. Accordingly, proper scrutiny of any particular aspect of the law on costs in criminal proceedings is contingent on a wider appreciation of the powers of both the Supreme Court and Magistrates' Court.

The Supreme Court's Statutory Powers to order Costs in Criminal Proceedings

10. Order 1/2(3) of the Rules of the Supreme Court ("RSC" / "the Rules") states that the Rules shall not have effect in relation to any criminal proceedings. However, as I observed in *D.S (a young offender) v R* [2018] SC (Bda) 33 App (9 April 2018), RSC Order 1/2(3) is subject to Order 62/2(1) which provides:

"*62/2 Application*

2 (1) In addition to the civil proceedings to which this Order applies by virtue of Order 1, rule 2(1) and (2), this Order applies to any criminal proceedings in the Court in respect of which costs are awarded."

11. RSC Order 62/2 (2)-(4) confer a wide discretionary power on the Supreme Court to order costs:

" *(2) No party to any proceedings shall be entitled to recover any of the costs of those proceedings from any other party to those proceedings except under an order of the Court.*

(3) If the Court in exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.

(4) The costs of and incidental to proceedings in the Supreme Court (including any criminal proceedings to which this Order applies) shall be in the discretion of the Court, and that discretion shall be exercised subject to and in accordance with this Order."

12. Under paragraph (5) it is expressly stated that paragraph (3) above does not apply to proceedings under the Matrimonial Causes Act 1974. Fair to say, the draftsman was clear in stating that the scope of application of these provisions together with the Court's power of discretion to award costs, applies to both civil and criminal proceedings but not matrimonial proceedings which are governed by the Matrimonial Causes Act 1974 and the Matrimonial Causes Rules 1974.

13. The governance of RSC Order 62 over costs awards in criminal proceedings held in the Supreme Court at first instance is perhaps reinforced by the absence of any provision on costs under the Criminal Procedure Rules 2013 which applies to the Supreme Court's original jurisdiction.

14. The DPP referred this Court to the principles approved by the Court of Appeal in *R v Worrell (Costs)* [2016] Bda LR 103 where the Court was assessing the statutory powers of the Supreme Court as a Court of first instance. Conspicuously, it does not appear that the Court of Appeal were invited to (and in fact did not) consider the Supreme Court's statutory powers to award costs under RSC Order 62. This is evident on the face of the judgment of the Court [5] and [10]:

"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.*

…

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."

15. Notwithstanding, the general legal principles and approach approved by the Court of Appeal are binding on this Court in any event as the upper Court proceeded on the basis that the Supreme Court had an inherent power to award costs against the Crown. Against that background the Court of Appeal stated [11-16]:

"*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 CCC (3d) 356; R v M, CA [1996] 1 SCR 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."

16. The Supreme Court, in exercise of its appellate jurisdiction, is statutorily empowered to make a costs award against the Crown pursuant to section 21 of the Criminal Appeal Act 1952 which provides:

"*Cost of appeal*

21 (1) Upon the determination of an appeal under this Act, the Supreme Court, if it appears in the circumstances <u>equitable</u> to the Court to do so, may make an order requiring the appellant or the respondent to pay all or any part of the costs of appeal.

(2) For the purposes of this section-

(a) "costs of appeal" includes any costs-

(i) in respect of the preparation of copies of any documents required to be transmitted to the Registrar or to any other person in connection with the appeal;

(ii) in respect of the stating of a case in connection with the appeal;

(iii) in respect of the preparation of any affidavits made in connection with the appeal;

(iv) in respect of the appearance and examination of any witness upon the hearing of the appeal; and

(v) in respect of the enquiry and report of a special commissioner appointed under section 16(2)(f); and

(b) any order made by the Supreme Court as to the payment of the costs of appeal may direct all or any part of the costs of appeal, being costs otherwise falling to be met out of public funds, to be paid into the Consolidated Fund"

17. In *D.S (a young offender) v R* I accepted that the term *equitable* was interchangeable with '*just*' and '*right*' and consistent with the principles of (natural) justice. The question as to what is just and right, in the context of a costs application against the Crown, should also be approached in a way which is consistent with the principles approved by the Court of Appeal in *R v Worrell*.

18. That all being said, the broad scepticism required of a Supreme Court judge in its approach to awarding costs against the Crown serves, in a comparative sense, as a sound indication that a magistrate's powers to make costs orders against the Crown in criminal proceedings is limited and restrictive.

The Magistrates' Court's Statutory Powers order Costs in Criminal Proceedings

19. While the Senior Magistrate did not expressly cite the statutory provision under which he made the Costs Order, the DPP referred me to section 58 of the Criminal Jurisdiction and Procedure Act 2015 ("CJPA") and section 556A of the Criminal Code in pinning the four corners of the Magistrates' Court's statutory powers to award costs.

20. Section 556A of the Criminal Code, which is the result of an amendment to the Criminal Code pursuant to section 18 of the Disclosure and Criminal Reform Act 2015, concerns wasted costs orders. Both the lower and upper Courts are statutorily empowered to make a wasted costs order against a defendant's representative and under section 556B costs may be awarded against a third party if the specified conditions have been satisfied. However, the subject of wasted costs orders under section 556A is wholly irrelevant to this case.

21. The relevant provision with which I am concerned is section 58 of CJPA which provides:

"***Costs against informant***

58. (1) When a charge is dismissed, and appears to the magistrates' 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 magistrates' court may allow.

(2) If such costs ordered to be paid under subsection (1) are not paid, the magistrates' court may commit the informant to prison for a term not exceeding ten days, unless such costs are sooner paid.

(3) The costs which the magistrates' court may order to be paid under subsection (1) shall be such sums as may be fixed by the court in respect of the expenses incurred by the defendant, including fees payable to his barrister and attorney (if any), which sum shall be payable to the defendant."

22. Pursuant to section 59 a magistrate may also award costs against a defendant. There is a notable difference between the test for awarding costs against the Crown and the test for ordering a Defendant to pay costs. Under section 58 a real degree of misconduct is required before the Crown can be properly penalised by a magistrate with a costs order. Section 58 is triggered only when the relevant charge is dismissed and when the magistrate finds that the charge itself (i.e. the bringing of the charge) was unfounded, frivolous or made from any improper motive. However, under section 59 a magistrate

has broader discretionary powers and may order a defendant to pay such sum towards the costs of the prosecution as is deemed reasonable. Section 59 provides:

Prosecution costs

59 The magistrates' court may award and order, in and by the conviction or order, the defendant to pay such sum towards the costs of the prosecution as to the court seems reasonable.

23. The difference in approach between sections 58 and 59 clearly conveys that the Legislature intended for the Magistrates' Court to be very restricted in its powers to make costs orders against the Crown, so much so, that the wording of section 58 cannot be interpreted as aiding a magistrate to penalise the Crown for the manner of its prosecution of a case. A claim for relief in respect of the latter would likely require an aggrieved defendant to make an application for abuse of process or to issue civil proceedings (e.g. constitutional claim; judicial review, malicious prosecution etc.) in the Supreme Court.

24. Another contrast may be seen between section 58 and a magistrate's statutory power to make costs orders in civil and family proceedings. For example, Order 19 under the Magistrates' Court Rules 1973 confers the summary Courts with a discretionary power to not only order costs but to also tax costs in civil proceedings. Section 12(11) of the Magistrates Act 1948 entitles a Special Court to make such order as to the payment of costs as appears to it to be just. The discretionary power given to a magistrate in civil proceedings to make costs awards is seemingly unfettered; however, section 58 of the CJPA does not employ any such wording where a magistrate is concerned with costs against the Crown in criminal proceedings. This all points to Parliament's intention for costs orders under section 58 to be made only under the gravest of circumstances for the reasons outlined by the Court of Appeal in *R v Worrell*.

Analysis and Decision

25. This Court is empowered under section 6(a)(i) of the Criminal Appeal Act 1952 to review an order of costs made by a magistrate in criminal proceedings where the ground for appeal involves a question of law alone. Section 6 of the 1952 Act provides:

"***Order for payment of cost; appeal***

6 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*."

26. While the impugned cost order was undoubtedly intended by the Senior Magistrate to be a means to ending reoccurring non-disclosures by the Crown, the question of law for this Court is whether it was within the jurisdiction of the Senior Magistrate to make the costs order and, if so, what legal principles ought to have guided his decision to order costs against the Crown.

27. The crucial starting point is that the powers of a magistrate are wholly and exclusively statutory. Section 3(1) and 3(3) of the Magistrates Act 1948 provides:

"*Powers and duties of magistrates*

3 (1) A magistrate shall have the powers and shall discharge the duties conferred or imposed upon a magistrate by or under this or any other Act; and subject to section 5 may exercise such powers and discharge such duties in any place in Bermuda.

(2) A magistrate by virtue of his office shall be a Justice of the Peace.

(3) The Senior Magistrate shall have such additional powers and shall discharge such additional duties as are conferred or imposed upon the Senior Magistrate by or under this or any other Act.

28. This means that the Magistrates' Court does not have the inherent jurisdictional powers vested in the Supreme Court by section 12 of the Supreme Court Act 1905. (See my earlier judgment in *Minister of Health et al v M Seaman* [2018] SC (Bda) 62 Civ (31 July 2018) on the inherent jurisdictional powers of the Supreme Court).

29. Senior Magistrate Wolffe did not expressly rely on any particular provision of statute in making the costs order. However, I am satisfied that it would have been proper for the magistrate in hearing the costs application to address his mind to section 58 of the CJPA. Section 58 is operational only in cases where the charge in question has been dismissed. I should note hear that I reject the submission made by the DPP that section 58 is not triggered under circumstances where the Crown offers no evidence. The notion that a charge is not formally dismissed upon the Crown offering no evidence is misguided and plainly wrong. So, in this case, it would have been appropriate for the Senior Magistrate to consider the merits of the costs application in accordance with section 58 of the CJPA. A proper construction of section 58 is thus key to determining the scope of the Senior Magistrate's power to award costs against the Crown.

30. Section 58 is concerned with the wrongfulness of the charge(s) brought before the Court rather than the manner by which the Crown thereafter prosecutes those same charges. It thus follows that the Senior Magistrate was duty-bound to ask himself whether the charge was unfounded. (There is no basis upon which it could be said by this Court that it was open to the Senior Magistrate to find that the charge was frivolous or supported by an improper motive.)

31. On the face of the speeding ticket before Senior Magistrate Wolffe, it was alleged that on 11 September 2020 the Respondent was driving a grey Peugeot motor car, registration number 35817, at a speed of 82 kilometres per hour, contrary to section 7(2)(a) of the Road Traffic Act 1947 which provides:

"*7 (2) Subject as hereinafter provided, no vehicle shall be driven on any highway, estate road or naval or military road—*

(a) *outside the municipal area of the Town of St. George at a speed greater than 35 kilometres per hour*…"

32. In this case, the speeding ticket was issued by a police constable (ID No. 2123) whose statement appears to have been served on the Defence. Ultimately, however, a witness statement from the laser operator was either never prepared or one was prepared but was not placed into the hands of the prosecution. That being said, the Senior Magistrate would have been aware that the speeding charge against Mr. North was purported by the Crown to have been founded on the evidence on which the Crown previously intended to rely. The fact that any such evidence did not later prove to be sufficient or available to support a prosecution through to conviction does not necessarily mean that the speeding charge itself was unfounded in the first instance.

33. It is not lost on this Court that the DPP may decide to withdraw a prosecution for reasons other than the sufficiency or quality of the evidence underpinning the decision to charge in the first place. For example, a key witness who was initially available may later prove unattainable. In any case, the burden of proving that the charge was unfounded for the purpose of an application under section 58 was on the Defendant in making the application for costs. So, in the end the Senior Magistrate would have had to have been satisfied on the facts established before him that the evidence culminating in the charging of the Accused was such that he would have reasonably concluded that the charge itself was unfounded. No assessment of these facts appears to have been undertaken by the Court below.

34. Any conceded failure by the Crown to secure or disclose a witness statement does not establish a factual basis for finding that the speeding charge in question was unfounded for the purpose of section 58. After all, the recording of evidence in the form of a

witness statement is merely preparatory to the prosecution of the charge, not the initial decision to charge. Witness statements are not required to charge a person; they are required to carry out a prosecution. Any failure by the Crown to secure and/or to serve a witness statement on which it intends to rely may lead to a consequential refusal by the Court to admit the evidence to which the missing statement relates. Where the undisclosed evidence is within the class of unused material, the Court may be invited to consider whether the non-disclosure warrants a stay of proceedings on the grounds of abuse of process. Either way, non-disclosure of evidence is not a ground on which a costs order may be made against the Crown under section 58 of the CJPA.

35. Employing an alternative analysis, I have addressed my mind as to whether it would have been at all reasonable for the Senior Magistrate to penalise the Crown with a costs order, supposing for a moment that he had a wide and unfettered power of discretion to do so, which he did not.

36. Fair to say, the Crown offered no evidence in advance of the setting of a trial date and it had served all of the material on which it proposed to rely before the costs order was made. Further, the Senior Magistrate had no information before him to suggest that a statement from the laser officer had even been prepared. More so, the reasoning provided in the magistrate's judgment was made on the basis that a statement had not been prepared. So, it begs to question whether the Crown was under any duty to direct that such a statement be prepared, particularly since it would have only stood as unused material.

37. The obligation owed by the Crown to the Defence was to ensure that the fact of the laser evidence was made known to the Defence. In criminal cases, generally, there is no property in a witness and it would have been open to the Defence to conference with the laser officer prior to trial and to even summons the laser officer to attend Court to give evidence for the Defence, if desired. For these reasons, I find that it would have been unreasonable of the Senior Magistrate, even if empowered with an unfettered power of discretion, to order costs against the Crown for non-disclosure of unused material which was not confirmed to be in existence.

38. Of course, section 58 does not operate to confer an unfettered power of discretion on a magistrate to award costs against the Crown. It is restrictive on its face which calls for a sparing approach which is consistent with the general principles outlined by the Court of Appeal in *R v Worrell,* an authority which regrettably does not appear to have been cited to the Senior Magistrate.

39. For all of these reasons, I am bound to conclude that the costs order made by the Senior Magistrate was both unlawful and unreasonable under all of the circumstances.

Conclusion

32. The appeal is allowed and the order of costs made by the Senior Magistrate on 4 December 2020 against the Crown is set aside.

Dated this 2nd day of August 2021

THE HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE