



IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 19/2019

IND. 96/2016

SC#04427/2016

BETWEEN:

Her Majesty the Queen

Applicant

- and -

ERRINGTON ALBERT WEBSTER

Respondent

BEFORE:

**The Rt. Hon Sir John Goldring, President
The Hon John Martin QC, Justice of Appeal
The Hon. Sir Richard Field, Justice of Appeal**

Date of Hearing: 23rd April 2021

Appearances: Mr. Jack Taylor, Office of the DPP for Appellant
Mr. Jonathan Hughes of Samson Law for the Respondent

JUDGMENT

Transcript of oral judgment dated 23rd April 2021 and Approved for Release 20th May 2021

Goldring J, President:

1. In this unusual application, Mr Taylor, on behalf of the Director of Public Prosecutions, submits that the failure of the sentencing judge in this case to make an order for costs against the Respondent constitutes an unduly lenient sentence in accordance with Section 30 of the *Court of Appeal Act (2011 Revision)*, requiring the court to make such an order.

The factual background

2. On the 20th of June 2017, following a trial before Mr Justice Quin and a jury, the Respondent was convicted of a series of serious offences of Indecency against a 13 year old girl. It is, for present purposes, not necessary to go into their detail. The evidence against him was overwhelming. The

victim had recorded the events on her mobile phone. The defence was far-fetched. It was the Respondent's case that he committed the acts of indecency when suffering from automatism as a result of the consumption of a preparation to treat his fat condition allied with blood pressure. He called expert evidence to support this account. The Crown was driven, in the circumstances, to instruct its own expert to provide evidence to rebut that of the Respondent. The costs in doing so amounted to some US \$24,147. In addition, there were the normal prosecution costs of \$2,700 for a trial which lasted longer than six days.

3. On 6th of March 2018, Mr Justice Quin sentenced the Respondent to a total of six years' imprisonment. The question of costs was adjourned. Unfortunately, before the learned judge could deal with costs, he died. So it was that on the 23rd of August 2019, in what the transcript suggests was a lengthy hearing in respect of what in essence was a straightforward matter, Mr Justice McMillan found that it would be wrong in principle to order the Respondent to pay any costs. On 7th January 2020, the judge set out a written ruling containing his reasons.
4. We should add this. At the time of trial, the Respondent was funding his defence privately. His defence counsel ceased to act when the Respondent could no longer pay him. Mr Hughes now represents the Respondent on Legal Aid.

The statutory background

The Penal Code

5. *Part II of the Penal Code [2019 Revision]* is entitled "*punishments*". Section 21 sets out "*Different kinds of punishments*". Specifically mentioned are imprisonment, fine, compensation, the finding of security to keep the peace, liability to probation, forfeiture and attendance orders. Sub paragraph (h) states:

"... any other punishment provided by this or any other law".

6. Section 34 of the Penal Code states:

"Subject to limitations imposed by any law, a court may order any person convicted of an offence to pay the costs of and incidental to the prosecution or any part thereof".

The Court of Appeal Act

7. By section 30 of the Court of Appeal Act:

"(1) If it appears to the Director of Public Prosecutions —

(a) that the sentencing of a person in a proceeding in the Grand Court has been unduly lenient or wrong in law; and

(b) that the case is a case in which sentence is passed on a person for an offence triable on indictment,

he may, with the leave of the Court, refer the case to it to review the sentencing of that person; and on such a reference the Court may —

(c) quash any sentence passed on the person in the proceeding; and

(d) in place of it, pass such sentence as they think appropriate for the case and that the court below had power to pass when dealing with the accused."

8. Section 2 of the *Court of Appeal Act* defines "sentence" broadly. It "*includes any order of any court ... consequent upon or in connection with a conviction which is subject to the jurisdiction of the Court*".

9. Mr Hughes, in his written submissions, submitted that sentence was passed on 6th March 2018 when the Respondent was sentenced to a total of six years' imprisonment. The question of costs, submitted Mr Hughes, was not part of the sentence. Section 30 of the *Court of Appeal Act* cannot therefore apply. The Applicant's appeal, he submitted, fails at the first hurdle.

10. Although we see the force of Mr Hughes' submissions, we cannot agree. Firstly, an order for the defendant to pay some or all of the costs of the prosecution is set out in that part of the Penal Code which is plainly intended to apply to punishments. Moreover, it is, in everyday language, part of the sentence passed. Secondly, the definition of "sentence" in the *Court of Appeal Act* is very wide. An order for costs plainly falls within that definition. That is not surprising. For there can be no argument that a defendant against whom a costs order is made may appeal in respect of it.

11. In our judgment, therefore, this case does fall within section 30(1)(a) and (b) of the *Court of Appeal Act*. The Director of Public Prosecutions may seek leave to appeal it. The court may quash the sentence imposed and substitute what it considers to be an appropriate sentence.

Mr Justice McMillan's ruling

12. Although it makes no material difference, the argument before Mr Justice McMillan proceeded on the erroneous basis that the relevant provision was section 24(5) of *Judicature Act (2007 Revision)* which provides, among other things, that costs may be awarded to the Crown. Before Mr Justice McMillan, the Crown's submissions were substantially advanced on the basis that counsel then representing the Respondent, and the defence expert, Dr Lockhart, were substantially to blame for advancing this hopeless defence. Their egregious conduct was an element to be taken into account, argued the Crown, when awarding costs. Those submissions in part led the judge to lose sight of the real issues in this application. Having said he was not in a position to assess the allegedly egregious conduct, the judge said (paragraph 31 of his written reasons):

"In my view this [that is to say, the submissions made by the Crown] is an entirely erroneous and misguided approach to the matter. The jurisdiction of the court in awarding costs should only be exercised where it is clearly appropriate to do so with regard to the position of the defendant's own conduct and not simply in regard to matters over which the defendant may ultimately have no control at all, in the terms of the expertise provided by Dr Lockhart and in terms of the way in which counsel may or may not have conducted matters on his behalf. The defendant is no more a lawyer than he is a doctor."

13. The judge finally, in paragraph 36:

"It would ... be entirely wrong to utilise these powers [to award costs] in a manner which no matter how unintentionally could inhibit or defer any defendant from exercising his or her right to a fair trial under section 7 of the Constitution of the Cayman Islands. There are occasions when the court must protect the guilty as well as the innocent. That is why Justice is said to be blind."

14. In short, the judge exercised his discretion not to award the prosecution any costs, because, firstly, he could not conclude that the egregious conduct alleged took place, or, if it did, the Applicant had

any responsibility for it; and secondly, to make a costs order could inhibit a defendant from exercising his right to a fair trial.

How the case is now put by the Applicant

15. The Director is not now seeking to advance his submission on the basis that either counsel or Dr Lockhart were to blame for the way the defence below was conducted. The submission is that it was the Respondent himself who sought to rebut the prosecution case in a wholly unreasonable and far-fetched way, which necessarily involved the Crown, that is to say the public, in incurring significant costs to meet it. In such circumstances, no judge could reasonably conclude that the Respondent should not pay or make a contribution to those costs, provided he has the means to do so.

Our analysis

16. There is no dispute but that in deciding whether or not to make an order for costs, the judge is exercising a discretion. There is no Cayman guidance regarding this exercise. In England and Wales, section 18 of the Prosecution of Offences Act 1985 concerns the making of costs orders by a defendant to the prosecution. While that Act plainly does not apply in the Cayman Islands, it states that a court:

"may make such an order as to the costs to be paid by the accused ... as it considers just and reasonable". (Our emphasis)

17. That, as it seems to us, is a sensible and fair approach for the court to take in this jurisdiction when deciding whether or not costs should be awarded in any given case. It inevitably leads to the court considering all aspects of the case before it, including the means of the defendant.
18. Moreover, we have no doubt the conduct of the defence is capable of having a bearing on whether it is just and reasonable to award costs against the defendant. The matter is set out in the current edition of *Archbold* at paragraph 6. 42, where it states:

"In Mountain ... Lawton LJ referred to the principle that an order to pay the costs of the prosecution should not be imposed merely because a defendant has elected trial on indictment. He said that one relevant consideration was the conduct of the defence. Where that was of the type which involved allegations that everyone

except the defendant was telling lies and the case against him was fabricated, an order for costs might well be appropriate.

It is not the case of every defendant who is convicted after a plea of not guilty should be ordered to pay the costs of the prosecution, but there is a discretion which the judge can exercise if he takes into account such matters as the fact that the defendant had chosen to contest a strong case against him or the fact that the defendant must have known the real truth of the matter. If the defendant, knowing his guilt, has elected trial by jury, it is permissible, if the trial judge decides on all the facts that the costs ought to be paid, to refer to the waste of time and money when passing sentence"

19. In the present case, as Mr Taylor has submitted, it was the Applicant himself who chose to plead not guilty to this overwhelming case, and to seek to hoodwink the jury by advancing the most spurious of defences. In the final analysis, it was not Dr Lockhart or counsel who were responsible, but the Respondent. It was his case they were seeking to advance. He is responsible for it. The Crown necessarily incurred expense in meeting that case.
20. In our judgment, on these facts it was unarguably just and reasonable for the Respondent to pay some or all those expenses, his means permitting. We cannot accept, as the judge said, that to make such an order would inhibit or deter a defendant from exercising his right to a fair trial. The judge, in the circumstances erred in principle in the exercise of his discretion in finding to the contrary.

The position now

21. As Mr Hughes points out, several years have now passed since Mr Justice Quin imposed the sentence of imprisonment. The Respondent has been serving that sentence. He has not been earning a living. He is due before long to be considered for release. There is some dispute about his current means. It seems to us that too long has now passed for us to consider making an order for costs.
22. In the circumstances, we think it right to grant the Director of Public Prosecutions leave under section 30 of the *Court of Appeal Act*; however, we do not think it appropriate to interfere with the sentence which was imposed having regard to the length of time which has now elapsed.