In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2017: 64

D.S (a young offender)

Appellant

-v-

THE QUEEN

Respondent

REASONS FOR DECISION

(In Court)[1]

Indemnity Costs involving a Minor in criminal appeal proceedings (RSC Order 62/16)
Unlawfulness of Indeterminate Period of Corrective Training (Young Offenders Act 1950)

Date of Hearing: 14 March 2018
Date of Judgment: 14 March 2018
Reasons: 09 April 2018

Mr. Saul Dismont, Marshall Diel & Meyers Limited, for the Appellant
Mr. Javone Rogers, Office of the Director of Public Prosecutions, for the Respondent

JUDGMENT delivered by S. Subair Williams A/J

[1] These Reasons were handed down without a hearing as indicated at the end of the costs application. The Order on costs was made ex tempore.

Introduction and Summary

1. This is a costs ruling arising out of my judgment in *DS v The Queen [2018] SC (Bda) 13 App (19 February 2018)* which resulted in the following orders of the Court:

   (i) the appeal against sentence was allowed and the sentence to corrective training was quashed; and
   (ii) a sentence of 3 months' probation was substituted

2. On 14 March 2018, the Appellant, through his Counsel, Mr. Saul Dismont, made an application for indemnity costs which I awarded *ex tempore*.

3. I indicated to the parties that I would later provide these written reasons.

The Application for Indemnity Costs

4. Mr. Dismont's application was made 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 equitable 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"

5. Mr. Dismont produced an extract of Black's Law Dictionary (10th edition) which defined the term *equitable* in the terms of being 'just', 'consistent with principles of justice' and 'right'.

6. Counsel also relied on RSC Order 62/16 (1)-(2) which specifically provides, *inter alia*, for costs claimed by a minor (ie a person who has not attained the age of eighteen years: see section 2 of the Minors Act 1950) to be awarded on an indemnity basis.

7. In the Application part of the Rules of the Supreme Court at Order 1/2 (3) it states that the Rules shall not have effect in relation to any criminal proceedings. However, Mr. Dismont referred me to RSC Order 62/2 (1) which reads:

"*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."

8. It was on this basis that Mr. Dismont submitted that RSC Order 62/16 (1)-(2) applies. It provides:

"*62/16 Costs payable to an attorney where money claimed by or on behalf of a minor or a patient*
16 (1) This rule applies to any proceedings in which-
(a) money is claimed or recovered by or on behalf of, or adjudged, or ordered, or agreed to be paid to, or for the benefit of, a minor or a patient; or
(b) money paid into court is accepted by or on behalf of a minor or patient.
(2) The costs of proceedings to which this rule applies which are payable by any plaintiff to his attorney shall, unless the Court otherwise orders, be taxed on the indemnity basis but shall be presumed-
(a) to have been reasonably incurred if they were incurred with the express or implied approval of the client, and
(b) to have been reasonable in amount if their amount was expressly or impliedly approved by the client, and
(c) to have been unreasonably incurred if in the circumstances of the case they are of an unusual nature unless the attorney satisfies the Registrar that prior to their being incurred he informed his client that they might not be allowed on a taxation of costs inter partes."

9. On Mr. Dismont's submission, the above Rule makes an order of indemnity costs the starting point once the Court has determined that a costs order involving a minor will be made.

Analysis and Decision

10. The first issue for determination was whether the *equitable* test stated in section 21 of the Criminal Appeals Act 1952 had been satisfied so to render a costs award appropriate. I found in the affirmative. While the Appellant did not pursue Ground 1 and was unsuccessful on Ground 2, the arguments made by Counsel in the appeal were centrally focused on Ground 3 on which the appeal was allowed. It is only right that costs should follow the event in these circumstances as the appeal was fully argued and decided on well-established points of law.

11. The second issue to be decided was whether the costs award should have been made on an indemnity basis. Previous decisions of this Court addressing the law on indemnity costs derived from the current RSC Order 62/29(1) (see *Corporation of Hamilton v The Ombudsman for Bermuda [2014] Bda LR 1)* and the pre-amended RSC 62/3 (4) (see *Degroote v MacMillan et al 1991 Civ. Jurisdiction No. 148*).

12. Generally, the Court's discretion to award indemnity costs is considered to be a departure from the norm. Indemnity costs are most often reserved for cases where the conduct of the paying party involves grave impropriety going to the heart of the action and affecting its whole conduct (*Degroote v MacMillan p. 23).*

13. However, the scope of the Court's discretion differed in this case because the costs award was made in favour of a minor. This created the distinction which was drawn between RSC 62/16 (1)-(2) and RSC Order 62/29(1). The former imports an indemnity costs order as the normal starting point while the latter operates from a standard costs award as its first base position.

14. On my assessment, an indemnity costs award is proper in this case. It cannot be ignored that the Prosecutor's conduct of the appeal was wholly inconsistent with the previous position reasonably taken by the Deputy Director of Public Prosecutions several months in advance of the hearing of this appeal.

15. At paragraphs 32-37 of my appeal judgment I summarized the position as follows:

> 32. *"At page 72 of the Record, there is an email correspondence from the Deputy Director of Public Prosecutions, Cindy Clarke, to the learned Magistrate's assistant dated Monday 10 July 2017 (the sentence having been passed on Friday 7 July 2017). The email reads as follows:*

"It was brought to my attention that Wor. Chin sentenced (the Appellant) to Corrective Training last Friday for "18m-3 years".

Please bring the attached case[2] to his attention for me please, and ask His Worship if it is his intention that the maximum period to serve 3 years' training (as opposed to an indeterminate sentence)

If he deems it necessary, please advise me of the date he would like to list the matter again for clarification of the sentence…"

33. *Astonishingly, by email reply dated 18 September 2017 from the learned Magistrate's assistant to the Deputy Director of Public Prosecutions, Wor. Chin replied:*

"Good Afternoon Ms. Clarke,
Firstly, we extend our sincerest apologies for the delay in getting a response to the below email. Magistrate Chin has responded as follows:-

"It should be an indeterminate sentence." "

34. *At page 74 of the Record, there is a letter dated 21 September 2017 from the Deputy Solicitor General, Shakira Dill-Francois of the Attorney General's Chambers to the learned Magistrate which reads in its most notable parts:*

"Upon receiving the attached Warrant of Commitment, the Department of Corrections queried whether the sentence contained therein was imposed in error. This is because in the case of JS (a child) v Fiona Miller [2012] BDA LR 30 (attached) the Chief Justice opined at paragraph 2 that the court is required to specify 'a period not extending beyond three years'; the Chief Justice further stated at paragraph 22 that, "in my judgment the statute requires any sentence of corrective training to specify the "maximum period of corrective training" the court is requiring the young offender to serve. Any sentence of corrective training should on its face specify what the maximum period of corrective training is.'

Recently, Corrections had been receiving Warrants of Commitment which specify a fixed period of corrective training, such as two (2) years, in accordance with the case of JS (a child). Based on the aforementioned, we are writing on behalf of Corrections to confirm whether it is the

[2] The Judgment of the learned Chief Justice, Hon. Ian Kawaley, in *JS v Fiona Miller [2012] SC (Bda) 32 App* was attached to Ms. Clarke's email to the Court

intention of the court to amend the Warrant of Commitment to reflect a fixed period in accordance with the ruling of the Chief Justice.

If it is the intention if (sic) the Court to do so, kindly contact the undersigned…so that the young offender can be brought back before the Court so that the sentence can be amended."

35. *There are no written replies disclosed in the Record which suggest that the Court replied to this letter from Ms. Dill-Francois.*

36. *It is surprising that the Court's attention was not drawn to any of these correspondences between the Magistrates' Court and the DPP's Office and the AG's Chambers during the appeal hearing.*

    *Even putting aside the email reply on behalf of Magistrate Chin seeking to clarify his 7 July 2017 sentence in this case: ("**It should be an indeterminate sentence**.") the Magistrate's failure to specify a duration of corrective training at the 7 July 2017 sentencing hearing (**The Court orders in its place a period of corrective training…**) severely cripples Mr. Rogers' attempts to distinguish JS v Fiona Miller on the basis that in JS v Fiona Miller Wor. Chin passed a sentence with no term specification: ("**The Court sentences [JS] to a period of corrective training**.")*

37. *In my judgment, the sentence passed was clearly indeterminate. Indeterminate sentences in relation to this particular form of sentence were examined thoroughly by the learned Chief Justice in JS v Fiona Miller…."*

38. It is perhaps arguable that an indemnity costs order based on the grave impropriety test would have been warranted in this case. The Prosecutor argued that a sentence of '9 months to 3 years' of corrective training was intended by the Court to be regarded as determinate maximum sentence of 3 years imprisonment. Mr. Rogers never once drew the Court's attention to Magistrate Chin's post-sentence correspondence with the DPP's office wherein the learned Magistrate expressly stated that he intended for the sentence to be an indeterminate one.

39. In my judgment, it was most unreasonable of the Crown to argue this appeal as it did. Given Ms. Clarke's earlier correspondence enclosing the decision in *JS v Fiona Miller*, the reasonable approach would have been for the Crown to simply concede Ground 3 on the basis that the sentence was unlawfully indeterminate. The feeble attempts made by the Prosecutor to concede the appeal only on the basis that Appellant had complied with his bail conditions for an extended period were improper and unreasonable on my assessment. It was indeed unfortunate that Mr. Rogers

wandered further into his abyss by challenging the relevance of *JS v Fiona Miller* in this case.

40. For these reasons, I saw no reason to interfere with the general rule stated by RSC Order 62/16 that the costs payable to a minor are to be taxed on an indemnity basis.

Conclusion

41. Costs awarded in favour of the Appellant, to be taxed on an indemnity basis.

42. It is hoped that this costs award and the judgment to which it relates will also prevent the passing of any further indeterminate prison sentences in the Magistrates' Court.

Dated this 9th day of April, 2018 _____

SHADE SUBAIR WILLIAMS
ACTING PUISNE JUDGE