The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 5 of 2017

Between:

THE QUEEN

Appellant

-and-

JEROME BAILEY

Respondent

Before: **Baker, President**
Bell, JA
Clarke, JA

Appearances: Ms. Cindy Clarke, Department of Public Prosecutions, for the Appellant
Mr. Kamal Worrell, Lions Chambers, for the Respondent

Date of Hearing: **17 March 2017**

Date of Judgment: **24 March 2017**

JUDGMENT

Clarke, JA

Background

1 This is an application for leave to appeal against an order of the Supreme Court ordering the Crown to pay the costs of an unsuccessful application by the

Crown for the reconsideration of bail. As will become apparent the case has taken a number of wrong turnings.

2 Jerome Bailey appeared in the Magistrates' Court on 10 February 2017 on a charge of unlawful wounding with intent to do grievous bodily harm. He was sent for trial to the Supreme Court and is due to be arraigned in early April. The Magistrate granted him bail.

3 On 17 February 2017 Crown Counsel filed an application for reconsideration of Bail under section 9 of the *Bail Act 2005*. The reason for the application was because the Court did not, when it granted bail, have before it the information that the accused was subject to a two year Probation Order, having been sentenced for Affray on 25 May 2016, and had repeatedly not complied with its conditions. The information was apparently not available because it was contained in a file which was not before Crown Counsel on 10 February 2017.

4 The Magistrate declined to accept the application on the ground that the matter had already been sent to the Supreme Court. Accordingly, an application was made to the Supreme Court for such reconsideration. When the matter came before Simmons J in the Supreme Court she accepted the submission of Mr Worrell for Mr Bailey that the Supreme Court had no jurisdiction to reconsider the question of bail and ordered the Crown to pay the costs of the application to be taxed if not agreed.

Did the Supreme Court have jurisdiction to reconsider Bail?

5 I am satisfied that the Magistrate, and only the Magistrate, had jurisdiction to reconsider bail. Section 9 of the *Bail Act 2005* provides

"Reconsideration of decisions granting bail

9 (1) Where the Magistrates Court or Supreme Court has granted bail in criminal proceedings in connection with an offence, or proceedings for an offence, to which this section applies or a

police officer has granted bail in criminal proceedings in connection with proceedings for such an offence, that court may, on application by the prosecutor for the decision to be reconsidered—

(a) vary the conditions of bail;

(b) impose conditions in respect of bail which has been granted unconditionally; or

(c) withhold bail."

6 The Act makes plain that it the court that has granted bail *("that court"*) which can reconsider the decision which it has made. The only Court that has so far granted Mr Bailey bail is the Magistrate's Court and it is for that Court alone to reconsider the decision. It should not have declined to do so. Why it did so is unknown. But it may be because it was thought that section 471 of the *Criminal Code Act 1907* was still in force. That section, repealed on 15 January 2016, provided that the Supreme Court or a judge might admit to bail any person who had been committed for trial upon a charge of an indictable, offence or reduce the bail of any such person to whom bail had been granted, or impose such reasonable conditions relating to the conduct of such person while released on bail as the Court or judge might think fit.

7 Simmons J was, accordingly, right to decline to reconsider the question of bail. If the Crown seeks such reconsideration it must renew its application to the Magistrate.

Costs in the Supreme Court

8 The judge ordered the Crown to pay the costs before her on the footing that the case should be treated as coming within the spirit if not the letter of 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."

9 I cannot regard section 21 as giving the Supreme Court jurisdiction to make an order for costs in the present case. Simmons J was not hearing an appeal under the *Criminal Appeal Act* but a misguided application for reconsideration of bail under the *Bail Act*. The appellate jurisdiction of the Supreme Court in criminal matters is set out in sections 2 -6 of the former Act none of which is applicable to present circumstances.

10 The next question is whether Simmons J had any other power to order the Crown to pay Mr Bailey's costs of the abortive application. Order 1/2 of the Rules of the Supreme Court 1985 provides:

"2 (1) Subject to the following provisions of this rule, these Rules shall have effect in relation to all proceedings in the Supreme Court.

(3) These Rules shall not have effect in relation to any criminal proceedings."

11 Somewhat paradoxically Order 62/2 provides

"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".

(4) The costs of and incidental to proceedings in the Supreme Court (including any criminal proceedings to which the 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 I do not regard Order 62/ 2 (1) as providing any general power to award costs in criminal proceedings as opposed to regulating the manner in which any

such power otherwise arising e.g. under section 21 of the *Criminal Appeal Act* or sections 556 – 556B of the *Criminal Code*, is to be exercised.

13 The discussion in the two previous paragraphs assumes that an application for reconsideration of bail is or forms part of criminal proceedings. In my view, it does. Such an application is not in any sense a civil matter. Criminal proceedings begin no later than the time when the accused appears before the Magistrate and any consideration of whether and on what terms he should be given bail is a part of those proceedings.

14 The question arises as to whether the Supreme Court has. as part of its inherent jurisdiction, power to order a party, such as the Crown in the present case, which has brought an application for an order that the Court has no power to make, to pay the costs incurred by the respondent in resisting that application.

15 If it has such a power, it seems to me that the decision of the Supreme Court as to costs in the present case was a valid one. On that footing the order that it made would, in my view, be one which it was entitled to make as a matter of discretion. Whilst I can well understand why the Crown applied to the Supreme Court, after the Magistrates' Court had refused to entertain the application, the plain facts of the matter are (i) that the Crown could have gone in front of the Magistrate and shown why the Magistrate alone had jurisdiction; and (b) what it in fact did was to make an application to a court which had no jurisdiction to entertain it. In those circumstances it seems to me that it was open to the judge to order the Crown to pay Mr Bailey his costs if she had power to do so. It was no fault or responsibility of him or his counsel that the matter was brought before the Supreme Court and he has been put to expense persuading the judge, successfully, that she had no jurisdiction.

16 As it happened on 3 March 2017 in 1318847 *Ontario Limited v. Laval Tool & Mould Ltd.*, 2017 ONCA 184 (CanLII) the Court of Appeal of Ontario decided that the inherent jurisdiction of the Supreme Court of that Province to control

its own process permitted it to order that costs be paid by a non-party - in addition to a jurisdiction conferred on it by statute. The decision is some 33 pages long and considers much prior authority. In the course of it Strathy CJO said:

> "*65] Superior courts of record have inherent jurisdiction to control their own processes and protect them from abuse. This was recently described by the Supreme Court in Endean v. British Columbia, 2016 SCC 42 (CanLII), 401 D.L.R. (4th) 577, at para. 23:*
>
> > *Before inherent jurisdiction derives from the very nature of the court as a superior court of law and may be defined as a "reserve or fund of powers" or a "residual source of powers", which a superior court "may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."*
>
> *[66] In particular, apart from statutory jurisdiction, superior courts have inherent jurisdiction to order non-party costs, on a discretionary basis, in situations where the non-party has initiated or conducted litigation in such a manner as to amount to an abuse of process."*

17 I would incline to the view that the Supreme Court and this Court enjoy such jurisdiction. In my view the Court's inherent power to control its own process should extend to an ability to award costs against those who bring applications which the Court simply has no jurisdiction to hear.

18 I would decline, however, to rule on that question for three reasons. First, as will become apparent, I regard this Court as having no jurisdiction to entertain the putative appeal: so that any decision would be at best *obiter.* Second, the question has been the subject of extremely limited argument on an application which was contemplated as being very short. The parties have not addressed the Ontario case which my research discovered after the argument. Third, the question, if it arises, should be decided by the Supreme Court.

The Jurisdiction of the Court of Appeal

19 The next question is whether this Court has any jurisdiction to entertain this appeal. I have come to the conclusion that it does not. Firstly, this is not a civil matter so that section 12 of the *Court of Appeal Act 1964* is not applicable.

20 Second, the criminal jurisdiction of the Court of Appeal is contained in Part III of that Act which includes the following:

> ***"Criminal appeals***
>
> *16 (1) Subject to section 17 and any Rules, any person aggrieved by a judgment of the Supreme Court in any criminal proceeding, whether in its original or appellate jurisdiction, may appeal to the Court of Appeal; and any such appeal is hereinafter referred to as a "criminal appeal".*
>
> ***Right of appeal***
>
> *17 A person convicted on indictment, or a person convicted by a court of summary jurisdiction and whose appeal to the Supreme Court under the Criminal Appeal Act 1952, has not been allowed, may appeal to the Court of Appeal—*
>
> *(a) against his conviction in the Supreme Court, or in any other case, against the decision of the Supreme Court, upon any ground of appeal involving a question of law alone; and*
>
> *(b) with the leave of the Court of Appeal or upon the certificate of the Supreme Court that it is a fit case for appeal against conviction, upon any ground of appeal which involves a question of fact alone, or a question of mixed law and fact or on any ground which appears to the Court to be a sufficient ground of appeal; and*
>
> *(c) with the leave of the Court of Appeal, against the sentence passed on his conviction, unless the sentence is one fixed by law; and*

(d) against the refusal of the Supreme Court or a Judge thereof to release an appellant from custody under section 20 or against the conditions attached to such release.

(2) Where—

(a) an accused person tried on indictment is discharged or acquitted or

(b) is convicted of an offence other than the one with which he was charged; or

(c) an accused person tried before a court of summary jurisdiction is acquitted and an appeal to the Supreme Court by the informant has not been allowed; or

(d) an accused person whose appeal to the Supreme Court against conviction by a court of summary jurisdiction has been allowed,

the Director of Public Prosecutions or the informant, as the case may be, may appeal to the Court of Appeal against the judgment of the Supreme Court on any ground of appeal which involves a question of law alone."

21 There are further provisions granting rights of appeal but none are germane to the present case. As is apparent none of the rights of appeal granted by section 17 (1) and (2) applies in the present case. That is not surprising given that the Legislation does not envisage an application such as the present being made at all.

22 Whatever may be the extent of any inherent jurisdiction it cannot extend to giving a right of appeal where none exists by statute.

The Future

23 As I have said, any application for reconsideration must go before the Magistrate. That leaves the question of costs before the Supreme Court. That Court has made an order which remains in force. We have not heard argument on the efficacy of a judgment of the Supreme Court which was made without

jurisdiction but which has not been set aside. On one view, it is effective until that occurs. An application to the Supreme Court to set aside its order would involve more expense.

24 Now that the position in relation to applications for reconsideration of bail prior to arraignment has become clear, it seems to me highly undesirable that further time and money should be spent on arguing about the costs that have been incurred by Mr Bailey in addressing the Crown's misguided application and the extent to which the Supreme Court could have made the order that it did by another route. There is a further consideration namely that, if the Court did have an inherent jurisdiction to award Mr Bailey his costs of dealing with an application for an order which the Court had no jurisdiction to make, it would seem to follow that the Crown would have to pay his costs of resisting any future argument by the Crown that it lacked such jurisdiction; and, if the Supreme Court did not have that inherent jurisdiction, the Crown might not be able to recover the cost of resisting the argument that it did.

25 In those circumstances I would invite the Crown to honour the order made by the Supreme Court regardless of the question of jurisdiction which order for the reasons stated, seems to me to have been a fair one.

26 I would refuse leave to appeal.

Signed

Clarke, JA

Signed

Baker, P

Signed

Bell, JA