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CR 02483

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN on the information of Constable Thomas Arthur Caverly, a Peace Officer

Appellant

- and -

RORY GILLIES

Respondent

Application to award costs against the Crown granted. Costs of the appeal and of this application fixed at $2500.

Heard at Yellowknife on the 22nd day of August 1994.

Judgment filed: September 6th 1994.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE M.M. de WEERDT

Counsel for the Crown (Appellant): Leslie A. Rose, Esq.

Counsel for the Accused (Respondent): Gerald D. McLaren, Esq.

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REASONS FOR JUDGMENT

Costs of this appeal in proceedings governed by Part XXVII of the *Criminal Code* are sought by the successful respondent against the appellant Crown.

At issue are two points:

1. Should costs be ordered against the Crown in the circumstances of this appeal?

2. If so, what amount would be just and reasonable in the circumstances?

1. Should costs be ordered?

(a). The circumstances

The respondent was acquitted of sexual assault following his trial before a Territorial Judge in summary conviction proceedings pursuant to Part XXVII of the *Criminal Code*. The Crown appealed, as provided by that Part, against the acquittal; and the appeal was dismissed.

Two issues were raised by the Crown in the appeal, both of which were fully argued. The details are set out in my reasons for judgment dismissing the appeal. As mentioned there, the trial judge erred in the procedure followed at trial with respect to the admission of certain evidence contrary to s.276 of the *Criminal Code*. And he also erred in point of law regarding his assessment of the appellant's credibility. Nonetheless, neither of these errors went to the roots of the acquittal. In judicial parlance, this did not amount to "reversible error". That being so, the appeal was perforce dismissed.

In reaching my decision on each of those two issues, I did not accede to the principal submissions advanced by the respondent in argument at the hearing and in the written material filed. Those submissions were, in effect, for the most part rejected - as was the ultimate submission made on behalf of the appellant Crown. The respondent did, indeed, succeed in persuading me of the untenable position taken by the Crown in its ultimate submission, given the unusual circumstances at trial; and, more especially, the Crown's position on the issue of credibility of the complainant and the right of the respondent to test her credibility notwithstanding his failure to comply with s.276 of the *Criminal Code*.

(b) The exercise of judicial discretion

6 Section 826 of the *Criminal Code* states:

> 826 Where an appeal is heard and determined or is abandoned or is dismissed for want of prosecution, the appeal court may make any order with respect to costs that it considers just and reasonable.

7 As Crown counsel correctly conceded at the hearing of this application for costs, it is now well established that the Crown may be ordered to pay costs pursuant to s.826 of the *Criminal Code*: *R. v. Ouellette*, [1980] 1 S.C.R. 568, 52 C.C.C. (2d) 336, 15 C.R. (3d) 372.

8 It is equally well established that an award of costs under s.826 is discretionary. The wide discretion granted by that section is not to be fettered unduly by the laying down of rigid rules governing the exercise of that discretion: *Trask v. R.* (1987), 37 C.C.C. (3d) 92, 59 C.R. (3d) 179 (S.C.C.).

9 In *Trask* the Supreme Court of Canada rejected submissions to the effect that costs should be allowed to all successful accused appellants in summary conviction matters and that solicitor-client costs should follow where an infringement of a Charter right has been found. In the present case, the Crown was the appellant, not the accused person. And no question of any Charter infringement arose. On its facts therefore, the present application is distinguishable from those before the court in *Trask*. No costs were awarded to the successful appellant accused in that case.

10 Costs are nevertheless from time to time awarded against the Crown where it has unsuccessfully pursued a summary conviction appeal. See *Trask* at p.95 (C.C.C.) and p.182 (C.R.). That is the situation in the matter now before the Court.

11 There was nothing particularly remarkable about this appeal. It was not a case where the Crown's conduct of the appeal itself is to be faulted, though it is apparent (if only in hindsight) that the appeal was bound to fail in view of the trial judge's perfectly reasonable assessment of the lack of credibility of the complainant in giving her evidence at the trial. Furthermore, the conduct of the prosecution by Crown counsel at trial gave rise to much of the difficulty which apparently led the Crown then to appeal.

12 While this is not a case such as *R. v. Dostaler*, unreported, June 29th 1994 (CV 02448), in which costs were awarded against the Crown on a solicitor-client basis in circumstances disclosing a violation of the accused's constitutional rights, it is a case in which the respondent accused was needlessly brought back before a court to answer the Crown's unmeritorious appeal of his acquittal. An award of costs against the Crown is therefore only "just and reasonable" in this instance.

2. What amount is just and reasonable?

13 The respondent asks for solicitor-client costs amounting to $10,000. If such costs are to be awarded, the Crown asks that the respondent's solicitors' bill first be taxed.

14 This is not an appropriate case for the imposition of solicitor-client costs

against the unsuccessful appellant Crown. No oblique motive nor any abuse of the Court's process on the part of the Crown is revealed in the record; and none is suggested by the present applicant. The Crown bears a heavy responsibility in relation to the prosecution of criminal offences in the public interest. A similar consideration must be weighed in the balance where the Crown appeals against an acquittal. While the Crown must guard against abusing its powers, including those of prosecution and appeal, a court should be slow to equate lack of judgment by Crown counsel in such matters with the type of conduct which amounts to an abuse.

At the same time, an accused who has been acquitted following a trial should not be made subject to appeal proceedings except in a case where there is clear merit on the side of the Crown. This was not such a case, even if it reflected certain inconsequential errors made at trial by the presiding judge. Appeals are not to be used merely to expose errors of that nature with a view to overruling the trial judge on points which make no change to the final result. A fair measure of compensation deserves to be awarded in the form of party-and-party costs, in an amount which is "just and reasonable", in cases such as this.

Having heard the submissions of counsel and having read all the material filed, I am of the view that the costs should be fixed, in this case, at $2,500. An order shall issue requiring the Crown to pay that amount, which includes an allowance for the costs of the present application.

In fixing the costs in this amount, I have taken into consideration the implications (for the appeal) of the course taken by Crown counsel at the trial.

M.M. de Weerdt
J.S.C.

Yellowknife, Northwest Territories
September 6th 1994

Counsel for the Crown (Appellant): Leslie A. Rose, Esq.

Counsel for the Accused (Respondent): Gerald D. McLaren, Esq.

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