

APPELLANT

RESPONDENT

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3. He now seeks to appeal by way of case stated against the decision of the Magistrate and is met by two points of objection in law, taken *in limine* by Mr. Masters.
4. The first point is that the Hon. Magistrate lacked the jurisdiction to make an award of costs against the prosecution and so although refusing, in any event could not have properly made such an award. The second point is that even if, contrary to the first point, the Hon. Magistrate was seized of jurisdiction, the exercise of jurisdiction by the Hon. Magistrate in refusing the application for costs was an exercise based upon the Hon. Magistrate's assessment of the factual circumstances of the case and so was an exercise of jurisdiction that cannot give rise to a right of appeal by way of case stated which is limited to an appeal on point of law alone.
5. I will return below to consider each of these two objections *in limine*, in turn.
6. A description of the factual circumstances and of the basis of the prosecution's concessions leading to Harris' acquittal is necessary. I take the description of the factual circumstances from the prosecution's summary of facts as presented to and accepted by the Hon. Magistrate without demurrer from Harris:

"On Tuesday 26th August 2008, Senior Constable #274 Mark Miller was on duty fully dressed in uniform working the 8am to 4pm shift.

While Constable Miller was on patrol in a marked patrol car along the Frank Sound Road, he observed two male persons riding on a bicycle, one sitting on the seat pedaling and the other sitting on the handle bar.

The officer pulled up beside these two people and asked the rider to put the other person off the handle bar, the rider replied "Why should I do that I am very verse with the law?" The officer informed him that it was unsafe for them. The rider continued riding; he pulled into Rossini Street along the said Frank Sound Road.

Officer Miller pulled into the said road ahead of the bicycle and exited the patrol car, and once again requested for the rider to put the other person off the handle bar, the rider repeated himself saying, "I am very verse

with the law and I do not need to talk to you." The other man jumped off the handle bar and the rider stopped the bicycle. While Officer Miller was speaking to them concerning safety, the rider became very disgruntled. Officer Miller requested the rider's name but he refused by saying, "You can't question me, number one you are not fully dressed in uniform, you didn't properly identify yourself, and I'm very verse with the law and I don't have to speak to you."

Officer Miller informed the rider that he was under arrest for the offence of refusing to give his name. The officer tried to take hold of the accused and he slapped the officer's hand away into the side of the police car [(causing the damage to his watch)].

The accused began to resist and a struggle ensued. Shortly after PC McIntosh was passing, saw Officer Miller struggling with the accused, stopped and rendered assistance. The accused continued resisting; however he was subsequently subdued and was placed into the back seat of the police vehicle and transported to the Bodden Town Police Station. This incident occurred at 12:55 pm. Officer Miller noticed that the face of his black Fossil men's watch was damaged; the value of the watch is CI one hundred and fifty dollars. Officer Miller is requesting compensation. At the station the accused was further charged for the offences in which he is charged. At the Station Officer Miller learnt that the accused is one Andreel Hanstel Harris age 17, a student of the John Grey High School."

7. Against that factual background, when the matter finally came on for trial before the Hon. Magistrate on 11th May 2010, Crown Counsel Ms. Candia James is recorded as submitting to the court as follows:

"Section 31 of the Police Law, Law 5 of 1976 (2007 Revision) creates the offence of refusing to give one's name and address. That section requires that the police officer must be acting in the execution of his duty. Having read the statement of the complainant [(that is: Officer Miller)] in this matter, it appears that there is insufficient evidence to establish that at the time the request was made to provide his name that Officer Miller was acting in the execution of his duty. The Crown accordingly offers no evidence in charge (1) Refusing to give one's name and address. The

other three charges flow from that charge. We also offer no evidence on the charges (2) Assaulting Police; (3) Resisting Arrest; and (4) Damage to Property."

8. The applicant having been acquitted by the Court following on those submissions, on applying for his costs Mr. Dixie submitted to the Hon. Magistrate as follows:

"Mr. Harris was cycling near his home. His brother was riding on the handlebars. His brother had tightness of his chest. The police officer Mr. Miller was in a vehicle and instructed Mr. Harris to stop. There was a conversation between them.

The Crown has conceded that there is insufficient evidence that when Mr. Miller called Mr. Harris over, he was acting in the execution of his duty. There has to be a reason for demanding a suspect's name. What flowed was Mr. Harris not giving an answer to the officer's satisfaction.

It does follow that the arrest was unlawful and the subsequent prosecution also unlawful. Being a young man still in school these proceedings weighed heavily on him.

He is a young man of excellent character with excellent references. He has never exhibited delinquent behaviour and is an example to the others of his age. He has incurred costs which should not have been incurred. The basis on which the Crown dismisses these charges is a legal basis.

Section 33(5) Summary Jurisdiction Law provides that costs may be awarded to or against the Crown. I make the application against the Crown generally.

*In (2004) 2 All E.R. 1070 is found the Practice Direction of Lord Woolf. They are helpfully summarised in **Blackstone's Criminal Practice**.*

*In **Blackstone** there is a Summary and there are other authorities cited.*

*The authority on defence costs in the Grand Court is Voiculescu v R SCA – a transcript of a ruling by **Henderson, J.** On Section 33(5) Summary Jurisdiction Law; there are no local Practice Directions. The Practice Direction promulgated by **Lord Woolf** sets up a complete regime.*

The defendant who is successful in criminal proceedings should normally be awarded his costs. The principle is in favour of costs.

Such an order should normally be made except where a defendant's own conduct has brought suspicion on himself. The award of costs should be sufficient to compensate for the amounts incurred but does not include loss of earnings or expenses related to the proceedings indirectly. The rationale or reasoning there can be applied to this jurisdiction.

The principle is in favour of costs being awarded i.e. they normally should be awarded. They should not be awarded when there are clear reasons for not doing so e.g. where the defendant has misled the prosecution, or if somebody lies in his interview to police authorities, or if somebody gives a misleading statement to the police. There are all sorts of examples where defendants are acquitted where they might have been guilty of another offence.

Here the officer was upset because he concluded he wasn't being treated with the appropriate respect by the defendant. The officer thought that

what the defendant said was rude and obnoxious. That is why the Crown has not proceeded with the matter. This is not a Police State where an officer can simply require a name and then arrest someone when that name is not forthcoming. And flowing for that incident he was to be charged with charges of assaulting police etc. This is a matter of some generality. For the defendant to recover his own costs in the prosecution leveled against him is the very least that can be expected."

9. On 19th August 2010, the Hon. Magistrate delivered this ruling:

"RULING ON RECOVERY OF DEFENCE COSTS"

On Tuesday 26th August 2008 Constable Mark Miller observed defendant riding a bicycle carrying another male on the handlebars. The Police Officer, who was in a vehicle, ordered defendant to stop. Defendant continued riding and turned into a side street where he stopped the bicycle. Officer Miller then requested the defendant to provide his name which defendant declined to do declaring that he was well-versed in law and that it was his right not to do so.

Ms. James for the Crown advised the court that Section 31 of the Police Law, Law 5 of 1976 (2007 Revision) which creates the offence of refusing to give one's name and address requires that the police officer must be acting in the execution of his duty at the time the request is made. Crown Counsel submitted that it appeared that there was insufficient evidence to establish that at the time the request was made for defendant to provide his name and address that Officer Miller was acting in the execution of his

duty. The Crown accordingly offered no evidence on the charge of refusing to give one's name and address. This charge was dismissed. Since the other three charges flowed from the charge of refusing to give one's name address, the Crown also offered no evidence on the other three charges which were also dismissed.

Mr. Dixey then applied under Section 33(5) Summary Jurisdiction Law for the defence costs to be awarded against the Crown since it was a legal basis on which the Crown had dismissed the charges. Reference may be made to the decision of Marius Voiculescu v R (2009). In this case Henderson J. sought guidance from the U.K. Practice Direction of Lord Woolf in 2004. According to that Practice Direction, a defendant who is successful in criminal proceedings should normally be awarded his costs. However the Practice Direction makes an exception for cases ending in acquittal where it would not be appropriate to award a defendant his costs. This court is of the view that this is such a case where defendant should not be awarded his costs because it was defendant's own conduct which brought suspicion upon himself. It appears that the officer was upset because he concluded that he was not being treated with the appropriate respect by defendant, and further thought the defendant's words not only to be rude but was also acting in the belief that defendant was committing an offence in failing to provide his name and address. This failure to provide the name and address would have operated in the mind of the officer as a sufficient basis for the legal charge.

In all the circumstances of the case this court concludes that it was the defendant's own conduct which served to bring suspicion on himself. Accordingly, the court declines to make the award of defendant's costs. The application for defence costs is therefore dismissed."

10. I now turn to points of objection *in limine*, in turn.

Lack of Jurisdiction to award Costs

11. In short, Mr. Masters' submission here is that the Summary Court (and therefore the Magistrate) has no jurisdiction to award costs, other than wasted costs.

12. For his submission he relies on Section 33 subsections (1) to (4) of the Summary Jurisdiction Law as qualifying subsection 33(5) of that Law. I find myself unable to agree with Mr. Masters' construction. In my view, the provisions speak for themselves so as clearly to vest the jurisdiction. They are as follows:

"33(1) Subject to this or any other Law and to rules of cost, the costs of and incidental to all civil proceedings shall be in the discretion of the court.

(2) Without prejudice to any general power to make rules of court, such rules may make provisions for regulating matters relating to the costs of those proceedings including, in particular, the entitlement to costs, the assessment or taxation of costs, the powers (if any) of taxing officers and the powers of magistrates to review decisions of taxing officers.

(3) The court shall have full power to determine by whom and to what extent the costs are to be paid.

(4) In any criminal or civil proceedings, the court may disallow or order the legal practitioner concerned to meet the whole of any wasted costs or such part of them as may be determined in accordance with the rules of court.

(5) Costs, including wasted costs, may be awarded to or against the Crown”
(emphasis added).

13. The basis of Mr. Master’s argument is what he describes as the “*generally recognised rule at common law*” that the Crown neither pays nor receives costs in criminal proceedings; citing *AG of Queensland v Holland (1912) 15 CLR 46 at 49.*
14. But even in that early 20th Century case one sees dictum to the following effect declaratory of a principle that has since become widely accepted in the context of modern litigation (at page 5):

“...the question, arising under particular statutes whether the Crown is liable to pay costs in legal proceedings, was considered in Afflick v The King 1912. St. R. Qd 1, where the Chief Justice, again delivering the judgment of this Court, said: -

“There is no doubt that at common law the Crown is by its prerogative exempt from the payment of costs in any judicial proceeding, and that this right cannot be taken away except by Statute. The words of the Statute need not however, be express: It is sufficient if the abolition of the privilege appears by necessary implication.””

15. Here, the meaning of section 33(5) (above) is not merely implicit but express and clear:
“Costs including wasted costs may be awarded to or against the Crown”.
16. Those words embody precisely the kind of statutory abolition of the Crown’s privilege of immunity from costs of which the case law speaks.

17. There is no basis for confining their meaning to costs in civil proceedings as Mr. Masters also argued by reference to the fact that subsection (5) follows on from subsection (1) to (3) which, in their terms, deal only with costs in civil cases. Subsection (4) expressly includes costs in criminal cases. Had the intention been to exclude costs in criminal cases one would expect subsection (5) which follows immediately, to be qualified in those terms. No such qualification is placed upon it.
18. Nor can Mr. Masters' further submission that subsection (5) must take its meaning from subsection (4) which give the Court only the more limited power to award wasted costs and such that under subsection (5) the Court can make an award for wasted costs only.
19. Here again subsection (5) speaks in categorical terms – costs including wasted costs may be awarded.
20. In coming to the conclusion that she was seized of jurisdiction to determine Harris' application in this matter, the Hon. Magistrate was guided by the decision of Henderson J of this Court in Marius Voiculescu v Regina (above). While in that case Henderson J was seized of an application for costs by a successful appellant appealing against a Summary Court conviction, Henderson J expressed the view that the jurisdiction vested by section 33(5) of the Summary Jurisdiction Law in the Summary Court to award costs is clear.
21. He went on to hold that:

“The Jurisdiction with respect to costs in a criminal appeal is found in S.182 of the Criminal Procedure Code which says:

“The court in hearing any appeal may make such order as to costs to be paid by either party as it may think just.”

22. Both aspects of Justice Henderson's holdings and are in my view, incontrovertible, and the Hon. Magistrate was correct in following his decision as it was applicable to the issue of her jurisdiction to award costs at first instance.
23. Section 182 of the Criminal Procedure Code and Section 33(5) of the Summary Jurisdiction Law are in *pari materia*: the former vesting jurisdiction in this court to award costs depending on the outcome of a criminal appeal from the Summary Court and the latter vesting the like jurisdiction in the Summary Court dealing with such matters at first instance.
24. There is no reasonable basis for a construction of the statutes read together that would hold that liability in the Crown for costs could exist at the appellate stage but not at first instance. The contrary construction – that taken by Henderson J. – avoids absurdity.
25. I conclude that the Hon. Magistrate was correct in her assumption of the jurisdiction to deal with the application for costs.
26. The second point can be dealt with more briefly. It turns upon the meaning of section 172 of the Criminal Procedure Code where it gives the right to appeal by way of case stated against the decision of a Magistrate.
27. Section 172 reads in relevant part as follows:

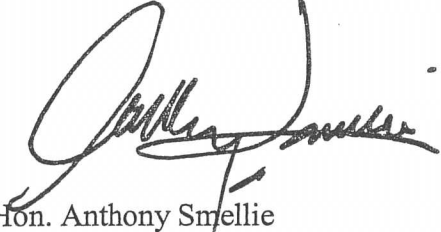
“(1) Save as hereafter in this code provided any person who is dissatisfied with any judgment, sentence or order of the Summary Court in any criminal cause or matter to which he is a party may appeal to the Grand Court against such judgment, sentence or order; either by motion on matters of law or fact (or both) or by way of case stated on a point of law only as hereafter provided:

Provided that in no case shall the complainant appeal from a decision dismissing a complaint except by way of a stated case on a point of law.”

28. This being an appeal arising from complaints (charges) which have been dismissed, it is framed in terms of a notice of application to the Summary Court to state a case, in relation to its decision delivered per the Hon. Magistrate on 19th August 2010, refusing Harris an award of costs against the Crown.
29. The written ruling containing her reasons for decision given by the Hon. Magistrate on 19th August is, of course, tantamount to the “statement of case” to which the appellant would be entitled, had no such reasons already been given. Indeed, there was no suggestion that any further statement of case should be given in order for the appeal to proceed.
30. Against this background, the difficulty the appellant faces becomes obvious: the Hon. Magistrate’s reasons (stated case) for refusal of his application for costs is one that turns upon the patent exercise of discretion by the Hon. Magistrate.
31. Her decision does not turn upon a point of law alone, or at all.
32. She refused the application because, on her view of facts, the appellant by his conduct “brought suspicion upon himself.” That being her view of the matter, she exercised her discretion to refuse an order for costs. Whether or not the Officer had reasonable grounds for perceiving that the appellant had committed an offence (a point not conceded by Mr. Masters notwithstanding the Crown’s concession in offering no evidence on all charges); the Hon. Magistrate felt that the appellant by his conduct induced a belief in the mind of the Officer “*that the defendant was committing an offence in failing to provide his name and address*”. That assessment of the factual circumstances led her to refuse the application leading her to refuse the award of costs.

33. Hers therefore was plainly not a determination based on point of law. Whatever view this court may be inclined to take as to the correctness of her conclusion could not alter its essential characteristics as one based on fact in the exercise of discretion.
34. It is therefore not a conclusion that is justiciable on appeal by way of case stated pursuant to section 172 of the Criminal Procedure Code.

This point of objection *in limine* therefore succeeds and the appeal is dismissed.


Hon. Anthony Smellie
Chief Justice

August 29 2011

