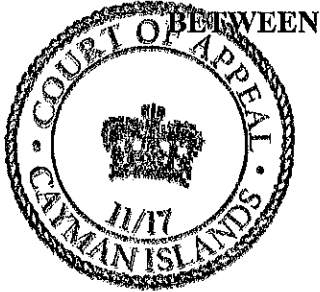


IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Criminal Appeal 27 of 2017
IND 0053/2016
SC302469/2016



BETWEEN

MICHAEL FERNANDO JEFFERSON

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

BEFORE:

The Rt. Hon Sir John Goldring President
The Hon Sir Richard Field, JA
The Hon Dennis Morrison, JA

Written Submissions in relation to the question of costs were received from Mr. Philip Rule of Samson Law Associates for the Appellant and Mrs. Nicole Tyson-Petit for the Crown.

Ruling Delivered: 5 February 2019

RULING ON COSTS

1. In a decision given on 29 August 2018, we allowed the appellant's appeal against two convictions in the Grand Court for offences under the *Firearms Act*. Pursuant to the provisions of section 9(2) of the *Court of Appeal Law (2011 Revision)*, we quashed the convictions, but ordered that, in the interests of justice, the appellant should be tried again at the earliest convenient date.¹
2. When these orders were made, Mr Rule for the appellant indicated that he wished to make submissions in writing to the court on the question of the costs of the appeal. Accordingly, in submissions filed on 31 August 2018, Mr Rule invited the court to

¹ The reasons for this decision were subsequently reduced to writing and issued on 14 September 2018.

make an order for payment of the appellant's reasonable costs of the appeal, such costs to be taxed if not sooner agreed.

3. The application was explicitly based on the provisions of section 24(3) and (5) of the *Judicature Law (2017 Revision)*, which provides that:

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

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

4. Mr Rule submitted that, on this basis, costs should follow the event in the usual way in this case. An order for costs in the appellant's favour is in the interests of justice and fairness and consistent with the presumption of innocence. Such an order would also be consistent with the principle of equal footing for the parties by ensuring equality of access to legal representation, as envisaged by *Article 7 of the Bill of Rights*².
5. For the Crown, Mrs Tyson-Petit's response³ was direct: firstly, section 24(3) and (5) of the *Judicature Law* covers civil proceedings in the Court of Appeal; and secondly, the relevant provision in relation to criminal appeals is section 18(1) of the *Court of Appeal Law*, which provides that –

“On the hearing and determination of an appeal, or any proceeding preliminary or incidental thereto under Part III, no costs shall be allowed on either side.”

6. On the strength of this provision, Mrs Tyson-Petit submitted that the application for costs should be dismissed.
7. Perhaps recognising the force of this submission, Mr Rule next proceeded to file an expansive reply⁴. In essence building on his initial reference to Article 7 of the *Bill of Rights*, he directed us to Article 25, which obliges the court to interpret legislation which is “*unclear or ambiguous*” in a manner that is consistent with the rights

² Schedule 2 Part One of the Constitution of the Cayman Islands, SI 2009/1379)

³ Crown's submissions filed on 10 September 2018

⁴ Appellant's Reply Submissions filed on 14 September 2018

enshrined in the *Bill of Rights*. In the alternative, it was submitted⁵ that section 18(1) of the *Court of Appeal Law* should be read in such a way as to include a power to order costs “*in cases where not to make such an award prejudices the fair trial rights of an appellant who faces retrial for example*”. In the further alternative, the court should have regard to English practice, pursuant to section 36, which permits recourse to English rules where no other provision is made. And, in the yet further alternative, the court should declare the provision in section 18(1) unconstitutional on the basis of Article 23 of the *Bill of Rights*, which allows the court to make declarations of incompatibility in cases in which primary legislation is found to be incompatible with the *Bill of Rights*.

8. Notwithstanding Mr Rule’s energetic efforts, we are quite satisfied that Mrs Tyson-Petit’s submissions are to be preferred. In the first place, it is clear from section 24(1) of the *Judicature Law* that the power to award costs given to the Court of Appeal by section 24(3) is intended to apply to civil proceedings only. Section 24(1) provides that –

“Subject to the provisions of this or any other Law and to rules of court, the costs of and incidental to all civil proceedings in –

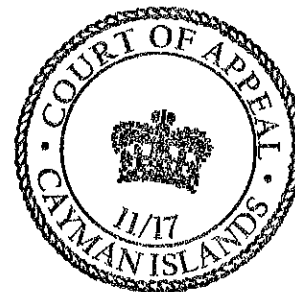
*(a) the Court of Appeal; and
(b) the Grand Court,*

shall be in the discretion of the relevant court.” (Emphasis ours)

9. On this basis alone, it is therefore clear that the stated basis of the appellant’s application for an order for costs falls away completely.
10. But further, the criminal appellate jurisdiction of this court is contained in Part III of the *Court of Appeal Law*. This appeal was brought and disposed of under the provisions of that Part. In these circumstances, as it seems to us, there can be no question that the appeal is caught by the provision of section 18(1), which is that, “[o]n the hearing and determination of an appeal, or any proceeding preliminary or incidental thereto under Part III, no costs shall be allowed on either side”.

⁵ At para 9

11. In our view, in the light of this completely unambiguous provision, no question arises of interpreting it in such a manner as to revise or defeat the clear intention of the legislature in this regard. Nor, for the same reason, is there any basis for invoking section 36 of the *Court of Appeal Law*, which only permits recourse to the law and practice of Jamaica or England in cases in which “*no special provision is contained in this or any other law, or rules of court*”.
12. And finally, as regards the submission based on the supposed incompatibility of section 18(1) with the fair trial guarantees set out in the *Bill of Rights*, we would be loth to embark on such an enquiry without full argument, involving all relevant parties (such as the Attorney General) on all aspects of the matter. We would only add that, in any event, Article 23 of the *Bill of Rights* makes it clear that (i) “[a] declaration of incompatibility made under subsection (1) shall not ... not affect the continuation in force and operation of the legislation or section or sections in question”⁶; and (ii) [i]n the event of a declaration of incompatibility made under subsection (1), the Legislature shall decide how to remedy the incompatibility”⁷. In other words, even this court were to make a declaration of incompatibility, the prohibition in section 18(1) of the *Court of Appeal Law* against making an order for costs on the determination of a criminal appeal would remain in force unless and until otherwise dealt with by the Legislature.
13. For these reasons, we consider that the appellant’s application for the costs of the appeal must be refused, on the basis that this court has no power to make such an order in these proceedings.



⁶ Article 23(2)

⁷ Article 23(3)