

SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Doncaster, 2013 NSSC 357

Date: 20131108
Docket: Hfx. No. 409789A
Registry: Halifax

Between:

Ralph Ivan Doncaster

Appellant

v.

Her Majesty The Queen

Respondent

Decision as to Costs

Judge: The Honourable Justice Patrick Duncan

Heard: By correspondence

**Final Written
Submissions:** October 7, 2013

Written Decision: November 8, 2013

Counsel: Ralph Doncaster, Self-represented Appellant
Alex Keaveny, for the Respondent

By the Court:

[1] Following a trial in Provincial Court, the appellant, Ralph Doncaster, was found guilty of two counts of breaching a condition of an Undertaking by having unlawful contact with Christina Knol-Gillespie, and so committing offences contrary to section 145(3) of the **Criminal Code**. Mr. Doncaster filed an appeal against the convictions.

[2] In an oral judgement delivered on April 26, 2013, I granted the appeal and ordered a new trial for the reason that the learned trial Judge erred in law by failing to advise the appellant, as required by section 530(3) of the **Criminal Code of Canada**, that he could apply to have his trial in either official language.

[3] Mr. Doncaster has recently filed written submissions seeking that he be awarded costs as the successful litigant in the appeal.

[4] Costs in a summary conviction appeal are governed by the provisions of section 826 of the **Criminal Code**:

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.

Doherty J.A. in *R. v. Garcia* (2005) 195 O.A.C. 64 summarized the state of the law as follows:

12 It is beyond dispute that the broad discretion described in s. 826 extends to the making of costs orders against the Crown, even if the Crown is successful on the summary conviction appeal: *R. v. Ouellette* (1980), 52 C.C.C. (2d) 336 (S.C.C.) at 344. It is also clear that despite the broad language of s. 826, an award of costs for or against the Crown in summary conviction appeal matters will be the exception and not the rule: *R. v. M.* (C.A.) (1996), 105 C.C.C. (3d) 327 (S.C.C.), at 376-77. There are strong policy reasons which dictate that the court should be reluctant to grant costs for or against the Crown in criminal proceedings: see *R. v. Robinson* (1999), 142 C.C.C. (3d) 303 (Alta. C.A.), at 315-16.

13 The cases in which costs have been awarded against the Crown in summary conviction appeal proceedings fall into two broad categories. The first, and by far the largest, category consists of cases where the conduct of the prosecution is said to merit sanction in the form of an award of costs against the Crown. The second category consists of cases where there is no Crown misconduct, but other exceptional circumstances exist such that fairness requires that the individual litigant not carry the financial burden flowing from his or her involvement in the litigation: *R. v. Trask* (1987), 37 C.C.C. (3d) 92 (S.C.C.), at 94-95; *Laval (Ville) c. Gagnon* (2000), 147 C.C.C. (3d) 184 (Que. C.A.), at 190; *R. v. Veri*, [2000] O.J. No. 384 (Ont. C.A.).

[5] In considering this application I have considered the cases cited above in *Garcia*, as well as the review set out in paragraphs 60-62 of *R. v Rhynes* 2004 PEISCAD 15.

[6] Mr. Doncaster suggests that there is an onus upon the Crown to remind the trial judge to fulfill the requirements of section 530 of the **Criminal Code**. That section does not create such a duty. While it may have negated the successful basis of the appeal if the Crown reminded the judge to do so, the **Code** places no such burden upon the Crown.

[7] The Crown cannot bear responsibility for the trial court's failure to fulfill a duty that is imposed solely upon it by the **Code**. In the result, the Crown and Mr. Doncaster are left in the same position, that is, both are subject to the inconvenience and costs associated with the appeal and retrial arising from the trial court's error.

[8] The reason for ordering a new trial was not related to the merits of the judge's finding of guilt. A review of the trial record shows that there was evidence which could support the formation of reasonable and probable grounds to believe the alleged offences were committed. I would go further and say that there was sufficient evidence to satisfy the test for committal to trial after a preliminary inquiry. i.e., that a properly instructed jury, acting reasonably, could find the

accused guilty. Whether the evidence satisfies the standard of proof beyond a reasonable doubt is for resolution in the new trial.

[9] The Crown conceded the trial judge's error but sought a different result, arguing that the error should not result in a setting aside of the conviction. The appellant also advanced ten other grounds of appeal, which the Crown responded to in the appeal. I concluded that the failure to comply with Section 530 was determinative of the appeal and that the remaining arguments, even if successful, could not support a more favorable conclusion for the appellant.

[10] There is nothing to support a conclusion that the Crown conduct in defending the appeal fell within the realm of recklessness, conscious indifference to duty, or a marked and unacceptable departure from usual and reasonable standards of prosecution. There is nothing to indicate that the prosecution of the charges was motivated by an improper purpose, or that the opposition to the appeal was unreasonable.

[11] In the circumstances, I conclude that there is nothing in the conduct of the prosecution that merits sanction in the form of an award of costs against the Crown.

[12] The second basis of awarding costs to Mr. Doncaster is if “... fairness requires that the individual litigant not carry the financial burden flowing from his or her involvement in the litigation.”

[13] Mr. Doncaster submits:

My financial situation is such that I should not carry the financial burden of having defended myself against the charges in the matter. My total income for the tax year 2011 was \$8640. My income for the tax year 2012 was \$7200. I currently have no income...

[14] He then outlines various details of his financial circumstances. As to his total costs in this matter he says “...gas, court fees, transcript fees, document preparation, etc. are approximately \$1000.” Of this amount, the trial transcript, he says, was \$605. The respondent has not challenged these figures, but I do not have receipts supporting the claim either.

[15] The appellant was self-represented at both trial and on appeal. He did not carry the costs of legal representation. The appeal hearing was not lengthy. There were no unique legal issues and no matters of public interest engaged by the appeal. He frames the argument as an "access to justice" issue, that is, his ability to access justice is impeded by the overbearing costs incurred as relative to his income.

[16] Prosecuting this appeal did incur some costs that were generated without fault on Mr. Doncaster's part and which were necessary to his success on appeal. I am satisfied that "fairness" requires that he should have some reimbursement of his expenses.

[17] I am troubled by some of Mr. Doncaster's representations. He claims "court fees" but the file indicates he received a waiver of payment of court fees. He submits that his 2011 income was \$8640. His tax return filed with his application for waiver of court fees shows his income to have been \$9640. He says that his 2012 income was \$7200. It appears that he has a base income from investments of \$720 per month which equates to \$8640 per year. These points do not undermine the conclusion that he has limited income against which to meet the

costs, but do speak to the reliability of the information he has put forward in support of the quantum sought.

[18] I have considered the totality of the circumstances and direct the respondent to pay to the appellant the cost of the trial transcript filed on this appeal, an amount estimated to be \$605. As a precondition to receiving payment from the respondent, Mr. Doncaster must provide the respondent with a receipt showing that he paid for the transcript. I note that the transcript was prepared by Verbatim Inc., which is a well recognized service that should be able to provide the details of payment.

[19] In summary, the appellant's motion for costs is granted in part. The respondent shall pay the appellant the cost of the trial transcript, upon being provided with proof of payment by the appellant.

[20] Order accordingly.

Duncan J.