[2016] JMCA App 18

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 130/2011

APPLICATION NO 105/2016

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

IN THE MATTER of the Mutual Assistance (Criminal Matters) Act 1995

AND

IN THE MATTER of the Mutual Assistance (Criminal Matters) (Foreign States) Order 2007

AND

IN THE MATTER of a request from the Central Authority of the Kingdom of the Netherlands for the taking of evidence of Mr Norton Wordworth Hinds, Mr Phillip Feanny Paulwell, Mr Collin Randolph Campbell, Mr Robert Dixon Pickersgill and Mrs Portia Lucretia Simpson-Miller

BETWEEN	**THE DIRECTOR OF PUBLIC PROSECUTIONS**	**APPLICANT**
AND	**NORTON WORDWORTH HINDS**	**1ST RESPONDENT**
AND	**PHILLIP FEANNY PAULWELL**	**2ND RESPONDENT**
AND	**COLLIN RANDOLPH CAMPBELL**	**3RD RESPONDENT**
AND	**ROBERT DIXON PICKERSGILL**	**4TH RESPONDENT**
AND	**PORTIA LUCRETIA SIMPSON-MILLER**	**5TH RESPONDENT**

Mrs Andrea Martin-Swaby, Ms Sheryl-Lee Bolton and Miss Kameisha Johnson instructed by the Director of Public Prosecutions for the applicant

Miss Stacy Knight instructed by Mr Seymour Stewart for the 1st respondent

Patrick Atkinson QC instructed by Knight Junor Samuels for the 2nd and 3rd respondents

Keith Knight QC, Miss Stacy Knight and Ms Bianca Samuels instructed by Knight Junor Samuels for the 4th and 5th respondents

3 and 17 June 2016

MORRISON P

[1] On 3 June 2016 the court made the orders set out by Brooks JA in paragraph [4] below. I have since had the great advantage of reading in draft the reasons for making those orders prepared by my learned brother. I am in full agreement with them.

PHILLIPS JA

[2] I too have had the opportunity to read, in draft, the reasons for judgment prepared by Brooks JA. I agree that they accurately reflect the reasoning that led to our decision, which was handed down on 3 June 2016.

BROOKS JA

[3] The Director of Public Prosecutions is the Designated Central Authority of Jamaica for the purposes of Mutual Assistance (Criminal Matters) Act. On 1 June 2016, the Director filed an application to strike out an appeal that was filed on 16 November 2011 by the respondents herein.

[4] We heard the application on 3 June 2016 and, after hearing submissions from counsel, we made the following orders:

> "1. The application to dismiss SCCA No 130/2011 is dismissed.
>
> 2. The registrar is hereby directed to fix a date in consultation with the parties for the hearing of SCCA No 130/2011 in respect of the refusal of Campbell J to grant the application for claim No 2010 HCV 05414 to be heard in Chambers.
>
> 3. All proceedings pursuant to the order granted on 17 November 2010 in claim No 2010 HCV 05414 are further stayed pending the hearing of the appeal in SCCA No 130/2011.
>
> 4. There will be no order as to costs."

The following are our reasons for that decision and those orders.

[5] The essence of the Director's application was that, despite this appeal having been filed in 2011, and the withdrawal of an appeal in a related matter, for which a stay had been granted in this appeal, the respondents had failed to prosecute this appeal. The Director contended that the failure had resulted in a situation where Jamaica had been "unable to fulfill [sic] her international obligations under the Mutual Assistance (Criminal Matters) Act 1995 and the Mutual Assistance (Criminal Matters) (Foreign States) Order 2007". The Director complained that the delay in prosecuting the matter had also resulted in prejudice to the matter at first instance as the learned judge having conduct of it in the Supreme Court was about to proceed on pre-retirement leave.

The factual background

[6] The Director files claim No 2010 HCV 05414 on 11 November 2010. By it the Director sought an order that the respondents attend court and give sworn evidence to the court in a matter pursuant to the Mutual Assistance (Criminal Matters) Act. Anderson J heard the application and, on 17 November 2010, granted the order for the respondents to attend and testify.

[7] On 9 November 2011, the respondents filed Claim No 2011 HCV 07019 (the Constitutional claim) for orders by the Constitutional Court concerning the Director's claim. They sought to challenge the Director's claim on several bases.

[8] Pursuant to the order of Anderson J, Campbell J commenced hearing testimony on 14 November 2011. On 16 November 2011, the respondents urged the learned judge to make orders (a) that the matter should be heard in chambers instead of in open court, and (b) staying the hearing before him pending the determination of the Constitutional claim. Upon the learned judge's refusal to make those orders, the respondents' further application for a stay of proceedings before him was also refused. In their notice of appeal filed that same day, 16 November 2011, the respondents sought three orders:

> "(a) That all proceedings pursuant to Claim No. 2010 HCV 05414 be stayed pending the final determination of [the Constitutional claim].
>
> (b) That all proceedings pursuant to the order granted on 17 November 2010 in Claim No. 2010 HCV 05414 be stayed pending the hearing of the appeal herein.

(c) If and when Claim No 2010 HCV 05414 is heard, that it be heard by a Judge in Chambers."

[9] On 17 November 2011, McIntosh JA made a number of case management orders. They included orders for obtaining the transcript of the proceedings before Campbell J and staying the proceedings before Campbell J, pending the hearing of the appeal.

[10] The appeal came on for hearing on 5 December 2011. After hearing counsel and considering the material, the following orders were made:

> "Appeal allowed.
>
> Proceedings before Campbell J. stayed pending determination of [the Constitutional claim].
>
> Registrar, Supreme Court directed to list the said claim during the Hilary Term 2012.
>
> No order as to costs."

[11] The Constitutional claim was subsequently heard and was not resolved in the respondents' favour. They filed an appeal against the order of the Constitutional Court. On 1 December 2014, that appeal came on for hearing but the respondents withdrew it. Mr Knight QC announced the withdrawal on behalf of all the respondents.

[12] No steps have been taken since that time to prosecute the present appeal. That failure has led to the present application. The Director has sought an order, as an alternative to the striking out of the appeal, that a date be fixed for the hearing of the appeal.

The preliminary point

[13] A preliminary point arose concerning the interpretation of the term "Appeal allowed" as set out in the order made on 5 December 2011. The essence of the point was whether the term should be treated as being limited to the specific order staying the proceedings before Campbell J, pending the determination of the Constitutional claim, or whether it meant that the appeal, including the appeal against his refusal to hear the matter in Chambers, had been allowed in its entirety.

[14] Mrs Martin-Swaby, on behalf of the Director, submitted that the order of 5 December 2011 was restricted to the stay of the proceedings before Campbell J. She submitted that that was the understanding of the parties before the Constitutional Court and that that view was reflected in the judgment of that court. Learned counsel further submitted that the parties were still of that view at the time that the appeal from the decision of the Constitutional Court was withdrawn.

[15] Miss Knight for the 1st respondent, and Mr Atkinson QC, on behalf of the 2nd and 3rd respondents, submitted that the present appeal had already been determined, and that the order made on 5 December 2011 meant that all the orders requested by the notice of appeal had been granted. Learned counsel submitted that that was the only proper conclusion to be drawn when the order was looked at in the context of what had been asked for in the notice of appeal. Miss Knight, in particular, argued that the order that the appeal was allowed could not be restricted by the orders that followed it. She

urged this court to find that the order "Appeal allowed" meant that the proceedings in the court below should be heard in chambers.

[16] Mr Knight, with commendable candour, indicated that when he withdrew the appeal against the decision of the Constitutional Court, it was his understanding that this appeal would still subsist and be prosecuted.

[17] Although there was merit to the arguments on either side as to the interpretation of the order made on 5 December 2011, it was found that other evidence suggested that a restricted interpretation should be given to the term "Appeal allowed". Firstly, the issue of whether the evidence should be taken in open court was, indeed, raised before the Constitutional Court.

[18] McDonald-Bishop J (as she then was) noted in her judgment, with which the other members of the court agreed, that this court had made orders which were restricted to staying the proceedings before Campbell J. She said at paragraph [29] of her judgment:

> "The Court of Appeal granted a stay of the [Director's] claim pending the outcome of the [respondents'] claim that was remitted to this court for hearing. **Apart from the grant of stay of the [Director's] claim, no other aspect of the [respondents'] claim was dealt with by the Court of Appeal**. It is that claim that stands to be resolved in this proceeding." (Emphasis supplied)

[19] McDonald-Bishop J also noted that, in the Constitutional claim, the respondents had included a challenge Campbell J's decision to hear the evidence in open court.

Having assessed the matter, it is instructive that the learned judge pointed out that a review of Campbell J's decision to hear the evidence in open court, was a matter for this court. She said, at paragraph [235] of her judgment, that this issue:

> "...would be a matter to be addressed by the Court of Appeal and not one that falls for determination by this court when no infringement of the [respondents'] constitutional rights has been established by the evidence as flowing from the learned judge's decision. **The appellate process is still available to the claimants to correct what they perceive to be errors of law**." (Emphasis supplied)

[20] The second point supporting the view that the parties intended, on 5 December 2011, that the appeal had been allowed only in respect of the stay pending the hearing of the Constitutional claim, was revealed by notes taken at the time of the withdrawal of the appeal in respect of that claim. The notes of one of the judges of the panel that allowed the withdrawal showed that Mr Knight QC had indicated that the appeal subsisted in respect of Campbell J's refusal to hear the evidence in Chambers. Learned Queen's Counsel, the notes revealed, indicated an intention to pursue that appeal.

[21] Based on those matters, the preliminary point was decided in favour of an interpretation that the term "Appeal allowed" was restricted to the stay of the proceedings before Campbell J, pending the determination of the Constitutional claim.

The application to strike out the appeal

[22] Mrs Martin-Swaby, on the application, stressed the lapse of time since the appeal had been withdrawn in respect of the Constitutional claim. She argued that although the transcript of the proceedings before Campbell J, had been available since 5

December 2011, no steps had been taken to prosecute the appeal. Learned counsel stressed the prejudice to the appeal, to the administration of justice and to the country.

[23] With regard to this aspect of the matter, Mr Knight submitted that the appeal had not been prosecuted because Campbell J had not provided his reasons for his decision. Learned Queen's Counsel noted that it was the learned judge's decision that the respondents had challenged and that the availability of the transcript alone could not allow the appeal to proceed.

[24] For their part, Mr Atkinson and Miss Knight pointed out that the respondents were unaware, up to the week of 30 May 2016, that the transcript was available. There was no notice by this court, learned counsel stated, that the transcript was available.

[25] A review of this court's file confirmed that there was no notice issued by the registry to the parties, as required by rule 2.5(1)(b)(ii) of the Court of Appeal Rules (CAR), that copies of the transcript were available. It seems that, by a curious twist of fate, the transcript was filed in the registry at the time that the parties were in court engaged in the arguments that led to the order of 5 December 2011. It could well be, although it is not known, that the registry did not issue the notice concerning the transcript, because of a misconception that the appeal had been determined.

[26] Whatever the explanation for the failure to issue the notice, the fact is that no notice was issued. The respondents cannot, therefore, be sanctioned for having breached the rule concerning filing their skeleton arguments in pursuance of the

appeal. The requirement to file the skeleton arguments is stipulated in rule 2.6(1) of the CAR. The rule requires an appellant to file skeleton arguments within 21 days of receipt of the notice of the availability of the transcript. The receipt of the notice is, therefore, without more, the triggering event. Other triggers, such as the provision of the transcript by the appellant, do exist. It is, however, not necessary to examine those other triggers in the circumstances of this case.

[27] It follows from that reasoning that the Director's application to strike out the appeal could not succeed. The alternative of having a date set, having regard to the hour of day that the decision was rendered, was left to be settled by the registrar of this court in consultation with the parties.

[28] It is based on that reasoning that it was decided that the application to strike out should have been refused and a date set for the hearing of the appeal. It was also necessary to further stay the proceedings before Campbell J, pending the hearing of the appeal.

[29] In addressing Mr Knight's submission that the appeal cannot properly be heard without Campbell J's reasons for his decision, Mrs Martin-Swaby argued that the learned judge's reasons are contained in the transcript. It was therefore unnecessary, she argued, to await formal reasons.

[30] If the transcript does reveal the learned judge's reasons then it, indeed, would be unnecessary to await a formal presentation of those reasons. Even if it does not

disclose the reasons, their absence would not preclude this court from hearing the appeal, which is said to be a procedural appeal, and therefore does not necessarily require the reasons for decision from the court below (see rules 1.11 and 2.4 of the CAR). In any event, while it is always helpful to have reasons from the lower court this court has, in the past, heard appeals in the absence of reasons, and is prepared to do so in this case.

Summary and conclusion

[31] The term "Appeal allowed", in the order made on 5 December 2011 was found to be restricted to the order for stay of proceedings, which followed it. This was determined to have been the understanding and intention of the parties as indicated by the proceedings in the Constitutional Court and later in this court, in the withdrawal of the appeal from the order of the Constitutional Court.

[32] The application to strike out the appeal failed because the respondents had not been found to be guilty of a breach of the relevant rules of the CAR. They could not, therefore, be properly accused of failing to prosecute the appeal.

[33] It is for those reasons that I agreed with the orders mentioned at paragraph [4] above.