[2001–02 Gib LR 100]

R. v. SHIMIDZU

SUPREME COURT (Schofield, C.J.): November 2nd, 2001

Criminal Procedure—bail—bail pending trial—removal of recognizance from bail on committal for trial (to allow possibility of costs on acquittal) improper circumvention of statutory scheme—limited opportunity for defence costs on acquittal permitted by Criminal Procedure Ordinance, s.232(2) not to be extended by court by removing recognizance under inherent jurisdiction to vary terms of bail

The applicant was committed for trial on charges of assault occasioning actual bodily harm and obstructing and resisting a police officer.

The Stipendiary Magistrate granted the applicant bail on a recognizance for his attendance in court. The applicant applied for the recognizance to be removed so that he would fall within s.232(2) of the Criminal Procedure Ordinance and enable the Supreme Court to order the prosecutor to pay his costs, should he be acquitted after trial.

The applicant submitted that since failure to surrender to custody after bail constituted an offence punishable by imprisonment and fine, that provided a sufficient guarantee of his attendance, or alternatively, conditions could be imposed (such as the requirement for sureties or a cash deposit) to provide such a guarantee. The court should exercise its discretion under s.55(4) of the Ordinance to vary the terms of bail to remove the requirement for a recognizance.

The Crown submitted in reply that (a) the legislature contemplated that costs could be awarded on acquittal under s.232(2)(a) only where the

prosecutor by-passed the committal proceedings completely and preferred a voluntary bill of indictment, which was not the case here; and (b) the court's powers of variation under s.55(4) should not be exercised in such a way as to circumvent the statutory scheme.

Held, dismissing the application:

Although the court's inherent jurisdiction to grant or vary bail was preserved by s.55(4) of the Criminal Procedure Ordinance, it should not be exercised so as to circumvent the statutory scheme restricting the award of costs in favour of a defendant acquitted at trial. Section 232 of the Ordinance regulated these circumstances strictly: sub-s. (2)(a) *prima facie* denied the applicant's right to costs in the present circumstances (and only implicitly allowed such an award if committal proceedings were by-passed—which was not the case here) and sub-s. (2)(b) and (c) recognized only limited additional exceptions. There was considerable inequality between the statutory rights of the defence and the prosecution to obtain costs, but it was for the legislature and not for the court to redress this imbalance. The application would therefore be dismissed (para. 12; paras. 14–16).

Legislation construed:

Criminal Procedure Ordinance (Supplement No. 6, L.N. 81/1999), s.55: The relevant terms of this section are set out at para. 10.
s.56(2): The relevant terms of this sub-section are set out at para. 11.
s.104: The relevant terms of this section are set out at para. 8.
s.130: The relevant terms of this section are set out at para. 5.
s.232(1): The relevant terms of this sub-section are set out at para. 2.
s.232(2): The relevant terms of this sub-section are set out at para. 2.

D. Hughes for the applicant;
C. Pitto, *Crown Counsel*, for the Crown.

1 **SCHOFIELD, C.J.:** The applicant, Takashashi Shimidzu, was on June 1st, 2001 committed for trial to the Supreme Court on charges of assault occasioning actual bodily harm, obstructing a police officer and resisting a police officer. The learned Stipendiary Magistrate granted the applicant bail in his own recognizance of £100 for his attendance on arraignments day, October 9th, 2001. On October 2nd, 2001, the applicant made an application to me to vary the conditions of bail, so as to remove the recognizance. I denied this application and these are my reasons for so doing.

2 The purpose behind the applicant's application was to preserve his right to seek costs against the Crown in the event of his acquittal. As the law stands, where a person is tried on indictment he may be ordered to pay the costs of the prosecution if he is convicted. If he is acquitted, however, there are very limited circumstances in which he may be

awarded his defence costs. Section 232 of the Criminal Procedure Ordinance deals with the question of costs in the Supreme Court. Sub-sections (1) and (2) of s.232 read:

> "(1) The Supreme Court may, if it thinks fit, order any person convicted before it to pay the whole or any part of the costs incurred in or about the prosecution and conviction, including any proceedings before the examining justices.
>
> (2) Where any person is acquitted on indictment, then, if—
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> (a) he has not been committed to or detained in custody or bound by recognizance to answer the indictment; or
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> (b) the indictment is for an offence under the Merchandise Marks Ordinance;
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> (c) the indictment is by a private prosecutor for the publication of a defamatory libel or for any corrupt practice within the meaning of the House of Assembly Ordinance,
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> the Supreme Court may order the prosecutor to pay the whole or any part of the costs incurred in or about the defence, including any proceedings before the examining justices."

3 This provides an inherently imbalanced regime of costs. The Criminal Procedure Ordinance creates a clear distinction between those who are to be tried on indictment and those tried summarily. By s.229 of the Ordinance, on the summary trial of an information the magistrates' court may order the defendant to pay the prosecutor's costs on conviction and may order the prosecutor to pay the defendant's costs on acquittal. It is also noteworthy that by s.229(3), however, when the magistrates, as examining justices, determine not to commit a person for trial, they may only award him his costs if they are of the opinion that the charge was not made in good faith.

4 Mr. Hughes, for the applicant, sought to persuade me that I should remove the requirement of the applicant being bound by a recognizance so that he falls within s.232(2)(a). This would enable the Supreme Court to order the prosecutor to pay his costs, should he be acquitted after trial.

5 The powers of the magistrates' court on inquiring into an offence as examining justices is contained in s.130 of the Criminal Procedure Ordinance in the following terms:

> "(1) Subject to the provisions of this Ordinance and any other law relating to the summary trial of indictable offences, if the magistrates' court inquiring into an offence as examining justices is of opinion, on consideration of the evidence and of any statement of

the accused, that there is sufficient evidence to put the accused upon trial by jury for any indictable offence, the court shall commit him to the Supreme Court for trial and, if it is not of that opinion, it shall, if he is in custody for no other cause than the offence under inquiry, discharge him.

(2) The court may commit a person for trial—

(a) in custody, that is to say, by committing him to custody there to be safely kept until delivered in due course of law; or

(b) subject to the provisions of section 47, on bail, that is to say, by taking from him a recognizance, with or without sureties, conditioned for his appearance at the time and place of trial and at every time and place to which the trial may from time to time be adjourned,

and may, instead of taking recognizances in accordance with paragraph (b), fix the amount of the recognizances with a view to their being taken subsequently in accordance with section 104 and in the meantime commit the accused to custody in accordance with paragraph (a).

(3) Where the court has committed a person to custody in accordance with paragraph (a) of subsection (2) then, if that person is in custody for no other cause, the court may, at any time before his trial, release him on his entering into such a recognizance as is mentioned in paragraph (b) of subsection (2)."

6 Section 47 of the Ordinance relates to the grant of bail in a case of treason.

7 On committing a person for trial in the Supreme Court, therefore, the magistrates' court may either—

(a) commit him in custody;

(b) commit him on bail by taking from him a recognizance, with or without sureties; or

(c) commit him on bail, fixing the recognizances with a view to their being taken subsequently in accordance with s.104.

8 Section 104 of the Ordinance reads:

"(1) Where the magistrates' court has power to take any recognizance, the court may, instead of taking it, fix the amount in which the principal and his sureties, if any, are to be bound, and thereafter the recognizance may be taken by any such person as may be prescribed.

(2) Nothing in this section shall enable the magistrates' court to alter the amount of a recognizance fixed by the Supreme Court."

9 There is no power in the magistrates' court to commit a person for trial in the Supreme Court other than in custody or by binding him by recognizance.

10 Mr. Hughes argues that this restriction does not prevent the Supreme Court from using its powers to remove the recognizance. The powers of this court to vary the terms of bail granted by the magistrates' court are contained in s.55 of the Criminal Procedure Ordinance, which reads:

"(1) Where in connection with any criminal proceedings an inferior court has power to admit any person to bail, but either refuses to do so, or does so or offers to do so on terms unacceptable to him, the Supreme Court may admit him or direct his admission to bail or, where he has been admitted to bail, may vary any conditions on which he was so admitted or reduce the amount in which he or any surety is bound or discharge any of the sureties.

(2) The conditions as to the time and place of appearance of a person admitted to bail under this section which are to be included in a recognizance entered into by him shall be such conditions as the inferior court had power to impose.

(3) In this section 'inferior court' means the magistrates' court or the juvenile court or the coroner.

(4) The powers conferred on the Supreme Court by this section shall not prejudice any powers of the Supreme Court to admit or direct the admission of persons to bail.

(5) Subsections (2) and (3) of section 56 shall apply in relation to the powers conferred by this section."

11 For the sake of completeness I ought to recite sub-s. (2) of s.56; sub-s. (3) is not relevant.

"(2) The Supreme Court may, in exercising any power conferred upon it by this section to release a person from custody, direct that a recognizance shall be entered into or other security given before the magistrates' court or a justice."

12 It would seem that s.55, by reserving in sub-s. (4) the court's inherent power to grant bail, gives the Supreme Court unlimited powers to vary the conditions of bail granted by the magistrates' court, which would seem to include the removal of a recognizance.

13 Should I then exercise my discretion to remove the requirement of a recognizance in this case? Of course the court should never vary terms of bail so as to defeat the purpose of those terms, which is to secure the

attendance of the defendant at court. The court would have to be satisfied that the varied terms would achieve the defendant's attendance at court. In this case, Mr. Hughes argues that there may be no need for me to fix any terms of bail because I could consider that the terms of s.61 of the Criminal Procedure Ordinance, which provides that failure to surrender to custody after bail has been granted constitutes an offence punishable by imprisonment and fine, would provide a sufficient guarantee of the applicant's appearance on arraignment. Alternatively, Mr. Hughes suggests that I could impose conditions such as the requirement for sureties or a cash deposit. He further argues that s.232(2) of the Criminal Procedure Ordinance clearly contemplates that there will be occasions when a defendant will neither be held in custody nor bound by a recognizance to answer the indictment and this is a case in which I should follow the course of removing the recognizance, so as to preserve the applicant's right to seek costs, should he be acquitted.

14 Mr. Pitto, for the Attorney-General, argues that the only occasion contemplated by the legislature, when s.232 was framed, in which a defendant would not be held in custody or bound by a recognizance, is when the prosecutor by-passes the committal proceedings and prefers a voluntary bill of indictment. In those circumstances the prosecutor opens himself to an award of costs. In this, I consider Mr. Pitto is correct. Section 232(2) creates, in sub-paras. (b) and (c), two exceptional cases in which costs may be awarded on a defendant's acquittal. In all other cases which take the normal route of committal by the magistrates' court, then, costs cannot be awarded on acquittal. However, s.232(2)(a) allows for a case where there has been no committal for trial, *i.e.* where a voluntary bill has been laid. In such a case, costs may be awarded on the acquittal of a defendant.

15 It seemed to me that if I were to grant the application, I would be lending myself to a device to circumvent the clear intention of the legislature, which is to restrict an award of costs in the event of an acquittal on indictment to cases which fall into any of the three categories set out in s.232(2). This would be an improper use of my discretion to vary terms of bail under s.55. The court may be uncomfortable with the restrictions placed on the award of costs, particularly as they do not provide for equality between defence and prosecution, but the matter is really one for the legislature to remedy and not for the court to circumvent by a strained use of its powers.

16 In the circumstances, I denied the application.

Application dismissed.