

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Dennis, 2019 ONCA 109

DATE: 20190215

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Pepall, Trotter and Harvison Young JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Jason Dennis

Appellant

Michael S. Puskas, for the appellant

Ron Sabo, for the respondent

Heard: in writing

On appeal from the order of Justice Frederic M. Camppling of the Ontario Court of Justice, dated September 28, 2017.

REASONS FOR DECISION

[1] The threshold for awarding costs against a lawyer personally in a criminal proceeding is a high one. As stated by Justice Gascon in *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26, [2017] 1 S.C.R. 478, at para. 25, only serious misconduct can justify such a sanction. Justice Gascon

addressed the threshold for awarding costs against a lawyer personally at para. 29:

In my opinion, therefore, an award of costs against a lawyer personally can be justified only on an exceptional basis where a lawyer's acts have seriously undermined the authority of the courts or seriously interfered with the administration of justice. This high threshold is met where a court has before it an unfounded, frivolous, dilatory or vexatious proceeding that denotes serious abuse of the judicial system by the lawyer, or dishonest or malicious misconduct on his or her part, that is deliberate.

At para. 52, he noted that costs are awarded on a discretionary basis and appellate courts should only intervene when that discretion is exercised "in an abusive, unreasonable or non-judicial manner".

[2] In the case before us, the appellant had appealed from his conviction under the *Provincial Offences Act*, R.S.O. 1990, c. P.33 ("POA"). On the date scheduled for the appeal hearing, the appellant's counsel requested an adjournment of the hearing without prior notice to the Crown prosecutor. The Crown prosecutor had interrupted her vacation to attend on the scheduled date to argue the appeal, and had been inconvenienced as a result of the appellant's request for an adjournment.

[3] Of his own initiative, the appeal judge asked the Crown prosecutor if she wished to apply for costs. He observed that pursuant to s. 129 of the POA, he was empowered to make any costs order that he considered just and reasonable. He accepted that such an award should be made on an exceptional basis, but noted

that the standard in s. 129 of the POA may be a little broader than the criteria set out in *Jodoin*.

[4] In describing counsel's adjournment request, the appeal judge stated that "To wait for the other side to get to court and then notify the other side and the court that you're not ready and you need an adjournment is, in my view, reckless disregard for whoever [*sic*] is acting for the other side." He ordered the appellant's counsel to pay \$500 in costs personally.

[5] We would observe that the principles described in *Jodoin* ought to apply equally to an order under s. 129 of the POA.

[6] Here, the absence of advance notice of the adjournment request was worthy of adverse comment by the court. Whether categorized as inconsiderate or rude, counsel's conduct cannot be considered acceptable. Indeed, in acknowledgement of this, counsel apologized to both the court and to the Crown prosecutor.

[7] However, in our view, the exercise of the appeal judge's discretion was unreasonable and did not meet the threshold for an award of costs against counsel personally. Fundamentally, counsel's behaviour did not warrant the exceptional remedy of a personal costs order. Presumably in recognition of this, the respondent consented to both the appellant's request for leave to appeal, and to the appeal itself.

[8] For these reasons, the appeal is allowed and the costs award is vacated. We see no reason to order costs against the respondent as requested by the appellant.

“S.E. Pepall J.A.”

“G.T. Trotter J.A.”

“Harvison Young J.A.”