SUPREME COURT OF QUEENSLAND

CITATION:	*R v Moti* [2010] QCA 241
PARTIES:	**R** **v** **MOTI, Julian Ronald** (respondent/applicant)
FILE NO/S:	CA No 14 of 2010 SC No 1097 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Miscellaneous Application – Criminal
ORIGINATING COURT:	Court of Appeal
DELIVERED ON:	7 September 2010
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGES:	Holmes, Muir and Fraser JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The application for an indemnity certificate under s 15 of the *Appeal Costs Fund Act* 1973 (Qld) is dismissed**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – APPEAL COSTS FUND – POWER TO GRANT INDEMNITY CERTIFICATE – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL – where applicant unsuccessful on appeal in upholding a permanent stay of his indictment – where applicant sought an indemnity certificate on the basis that the Crown succeeded on a question of law – whether Crown succeeded on a question of law – whether applicant played a role in leading the learned primary judge into error – whether there were sufficient grounds for the Court to exercise its discretion and grant an indemnity certificate *Appeal Costs Fund Act* 1973 (Qld), s 15 *Acquilina v Dairy Farmers Co* [1965] NSWR 772, cited *Lauchlan v Hartley* [1980] Qd R 149, considered *Sauer v Pashley* [2000] QCA 32, cited *Vella v Larson* [1982] Qd R 298, considered
SOLICITORS:	Herdlaw Solicitors for the applicant

[1] **HOLMES JA**: On 16 July 2010, this court allowed an appeal by the Commonwealth Director of Public Prosecutions against an order staying the respondent's trial. The respondent now applies for an indemnity certificate in respect of the appeal, pursuant to s 15 of the *Appeal Costs Fund Act* 1973 (Qld), which provides:

> "(1) Where an appeal against the decision of a court—
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> (a) to the Supreme Court;
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> …
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> on a question of law succeeds, the Supreme Court may, upon application made in that behalf, grant to any respondent to the appeal an indemnity certificate in respect of the appeal …"

[2] The respondent's solicitors, in an accompanying letter, describe the application as late, but seem to be relying on a 1999 Practice Direction of the Court of Appeal, oblivious to the fact that it has twice since been replaced and that Paragraph 29 of the current Practice Direction, number 2 of 2010, allows the making of an application for an indemnity certificate within 14 days of the delivery of the Court's judgment. The result is that the respondent's application, made on 29 July 2010, is within the time stipulated by the Practice Direction.

[3] The respondent's application asserts that, the appeal having succeeded on a question of law, he has "fulfilled the conditions contained in s 15(1)". He does not go on to address to the Court any argument as to why the discretion, if it arises, should be exercised in his favour; a significant deficiency in his application. As was pointed out in *Vella v Larson:*

> "To obtain a certificate the obligation is upon the applicant to show some ground calling for the exercise of the discretion in his favour and he does not do this merely by showing that the appeal has succeeded on a question of law … ."[1]

[4] That case goes on to discuss the extent of s 15's remedial purpose:

> "The course of authority to date has noted that it is only an appeal court's reversal on a 'question of law' which can give right to apply for a certificate. This feature enabled it to be deduced that the object of our Act and its equivalents was limited to relieving against a particular and limited type of misfortune in litigation. Moffitt J. in *Acquilina v. Dairy Farmers Milk Co.* [1965] N.S.W.R. 772, at p. 774, said of the part of the legislation under consideration that it had 'as its purpose the relief of a party who incurs or becomes liable for costs not through his own decision or conduct but because of some error of law of the tribunal.' There does not appear to be any object of relieving against the ordinary risk of expense due to loss in litigation. It has been said by Maguire J. in *Palaky v. Utah Construction and Engineering Pty. Ltd.* [1966] 1 N.S.W.R. 689, at p. 695, that the objects and purposes of the legislation 'do not extend to the promotion of litigation; nor is it an Act to provide aid or legal assistance in the broad sense at the expense of the fund.'

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1 *Vella v Larson* [1982] Qd R 298 at 301.

> Not only is the subvention which the Act provides for restricted to cases where an appeal succeeds on a question of law, but since then (and, indeed, only then) the discretion applies, it may readily be inferred that even in such cases the grant of a certificate is not meant to be automatic. The Full Court of Western Australia in *Richards v. Faulls Pty. Ltd.* [1971] W.A.R. 129 emphasised the fact that an application under the Act is not routine. It did this by describing the discretion as a discretion to grant and not a discretion to refuse (at pp. 137 and 138)."[2]

[5] There is, in my view, scope for argument as to whether the appeal in this case in truth succeeded on a "question of law", as that expression is used in s 15. There may be

> "different considerations … involved in identifying an appeal which 'on a question of law succeeds' from merely satisfying oneself that something which, on conventional legal classifications, constitutes an error of law, has occurred below."[3]

It is of relevance in that regard to remember that the court is considering the payment of moneys from

> "a limited public fund which should not be diminished because of an unduly liberal interpretation of the statutory criterion."[4]

The question on which this appeal was ultimately decided was whether the evidence as to the conduct of the Australian Federal Police in paying witnesses' living expenses could support the conclusion that it amounted to an abuse of the process of the court. Although it may be possible to characterise that question as one of law, as in *Vella v Larson* it "really involved only an assessment and weighing of facts".[5]

[6] But it is unnecessary to reach a firm conclusion as to how the question resolved here should be categorised; assuming the jurisdictional basis for the application is established, the essentially factual character of the question determined on appeal remains a relevant consideration.[6] The respondent here advanced at first instance the ground which led to the conclusion found on appeal to be erroneous. That might not of itself militate against the grant of a certificate, if that ground were "fairly arguable".[7] But this case, as it seems to me, fell within the "different category of case altogether" recognised in *Lauchlan v Hartley*: this court reached

> "the view that there was no basis on which the judgment or order under appeal could properly have been made. In such a case it is material to consider the part played by the unsuccessful respondent in leading the tribunal to the decision."[8]

[7] Assuming the jurisdiction under s 15 to exist, having regard to the nature of the question on which this appeal turned, the role the respondent played in its erroneous

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2 At 300-301.
3 At 302 referring to Moffitt J in *Acquilina v Dairy Farmers Co* [1965] NSWR 772.
4 *Sauer v Pashley* [2000] QCA 32 at [22].
5 *Vella v Larson* at 303.
6 At 303; see also *Sauer v Pashley* at [22].
7 *Lauchlan v Hartley* [1980] Qd R 149 at 151.
8 At 151.

determination at first instance and the purposes of the provision as identified in *Vella v Larson*, I would exercise the discretion against the grant of an indemnity certificate.

[8] **MUIR JA:** I agree that an indemnity certificate should not be granted for the reasons given by Holmes JA.

[9] **FRASER JA:** I agree with the reasons for judgment of Holmes JA and the order proposed by her Honour.