

JERSEY / JUDGMENT

AG v Lyons [2022] JRC 223 (19 October 2022)

[2022] JRC 223

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JUDGMENT

THE COMMISSIONER: 1. The Defendant applies for his costs following his trial by jury in which he was acquitted of the four counts of grave and criminal assault contained in the Indictment, but convicted in the alternative of one count of common assault put to the jury by the trial judge in his summing up. He was sentenced to 100 hours' community service and the facts and general background are set out in the sentencing judgment of the Court of 16 th June 2022 reported as AG v Lyons

[2022] JRC 133 , which I will not repeat. The prosecution resist the application. 2. All of the charges related to the events of the late afternoon of 4 th August 2021 in the Defendant's flat, but the prosecution obtained leave to adduce bad character evidence of an incident which had taken place some four weeks earlier, which the victim had recorded in sound. It raised concerns over the Defendant's attitude to women and was admitted as important background evidence as to the relationship between the Defendant and the victim. 3. An issue arose between the prosecution and the defence as to the facts upon which the Defendant should be sentenced in relation to the one conviction of common assault which related to the first part of the incident on 4 th August 2021, the prosecution arguing that the Defendant should be sentenced on the basis of the victim's account of that part of the incident. The matter was referred to me pursuant to Article 50 of the Criminal Procedure (Jersey) Law 2018 ("the 2018 Law"), and I ruled that the Defendant should be sentenced on his account, an account which was consistent with what he had admitted in his defence case statement of what had taken place. In so ruling, I accepted that the jury must have rejected the evidence of the victim and accepted the Defendant's account of the whole incident. 4. The power to award costs is contained in Article 2(1) of the Costs in Criminal Cases (Jersey) Law 1961 , which is in these terms: "2 Power of Royal Court or Magistrate's Court to award costs (1) Subject to the provisions of this Article, where any person is prosecuted or tried before a court to which this Article applies, the court may - (a) If the accused is convicted, order the accused to pay the whole or any part of the costs incurred in or about the prosecution and conviction; (b) Order the payment out of public funds of the costs of the prosecution; (c) If the accused is discharged from the prosecution or acquitted, order the payment out of public funds of the costs of the defence." 5. The issue

of how the Court should approach costs when there are convictions on some counts and acquittals on others was considered in *AG v Gouveia*

[2000] JLR 324 . In that case, the Defendant had pleaded not guilty to six counts, five of which alleged serious misconduct in relation to a child, including beating with a belt, committing assaults and force feeding. The day before the trial, the Defendant offered and the prosecution accepted a plea of guilty to the one count of a minor offence of leaving a child unsupervised, for which he was fined £100. The other counts were not pursued. The Court said this at page 333: "Where there is a trial with a number of counts and there are convictions on some and an acquittal on others, an award of costs would be unlikely to be appropriate in the ordinary case where the evidence was found sufficient on some but not on others. But if, for example, in the case of an assault, the defendant pleaded guilty at an early stage to common assault but the Crown insisted on proceeding on a count of grave and criminal assault which was not ultimately successful (either because of an acquittal following a trial or a late decision to accept the not guilty plea), justice would be likely to demand that the defendant should be awarded his costs, because they would have been incurred only because of the decision of the prosecution to go ahead on that single issue. Ultimately the court has a discretion and, as was said in *McMahon* (2), the court must make whatever order seems just having regard to the relative importance of the charges and the conduct of the parties generally. Nothing in this judgment is to be taken as suggesting that the discretion of the court is in any way fettered. Each case must be judged on his own facts. Nevertheless, I do not consider that the decision in the present case will open the floodgates to awards of costs where the prosecution choose not to proceed on some counts in the light of guilty pleas to other counts." 6. On the facts of that case, costs were denied to the Defendant because he had pleaded not guilty to all of the counts against him, right up to the last working day before the trial, requiring both sides to prepare for the trial and incur the costs of so doing. The suggestion that the prosecution should have approached the defence to indicate that it would accept a plea of guilty to this one count was rejected. There is no onus on the prosecution to initiate any such discussion. 7. The guidance in *Gouveia* was applied in the case of *AG v Troy*

[2003] JRC 099 , in which the Defendant had been charged with indecent assault and stood trial. Following his trial, he was acquitted of indecent assault, but was convicted of common assault. Rejecting the Defendant's application for costs, the Court said this at paragraphs 12 and 13: "12. ... The applicant did not any stage offer a plea of guilty to the count of assault. It is true, as submitted by Counsel for the applicant, that if the count of indecent assault had not been brought the applicant might well have been tried by the Magistrate on the charge of assault, and not committed for trial by this Court, but that is in my judgment immaterial. The applicant did not offer a plea and the Crown was entitled to proceed to trial on the whole indictment. 13. Viewing the matter in the round it seems to me that there is a positive reason for not making an order in favour of the applicant in this case. That positive reason is essentially that set out in the judgment of the Deputy Bailiff in *Attorney General v Gouveia*. I agree that in an ordinary case where an accused is acquitted

on some counts but convicted on others an award of costs is unlikely to be appropriate. The underlying rationale is that the criminal process was properly engaged and the applicant was ultimately convicted of an offence. The applicant had at no time accepted any criminal liability nor offered a plea to any offence." 8. Crown Advocate Thomas points out that at no stage had the Defendant in this case offered a plea of guilty to common assault as an alternative to the first count of grave and criminal assault and the prosecution proceeded as it was entitled to do. The criminal process was properly engaged, and the Defendant was ultimately convicted of an offence. 9. Crown Advocate Thomas submitted that there was a further aspect of the case which militated against an award of costs. The defence case statement dealt with what happened in the Defendant's flat on 4 th August from which it was implicit that he did not accept the evidence of the victim. No reason was offered as to why the victim might have given an untrue account in her witness statement. Just prior to cross examination of the victim, the Defendant produced over 100 pages of text messaging, which the Court was told he had managed to retrieve from his social media account held in "Cloud" storage. This was in the context of at least one interlocutory hearing shortly before the trial, when the Defendant challenged the adequacy of the prosecution's disclosure in respect of his mobile telephone, which was in the possession of the police. Having allowed the prosecution time to review this messaging, large amounts were put to the victim in cross-examination, with the intention of inviting the jury to disbelieve her on oath on the basis that the messages were inconsistent with other aspects of her evidence. It is a reasonable interpretation of the jury's verdict that this material had an impact on her credibility in the eyes of the jury. 10. Article 84 of the 2018 Law sets out what should be included in a defence statement: "84 Content of defence case statement (1) As defence case statement is a written statement which - (a) sets out the nature of the defence, including any particular defences on which the defendant intends to rely; (b) indicates the matters of fact on which the defendant takes issue with the prosecution; (c) sets out, in the case of each such matter of fact, why the defendant takes issue with the prosecution; (d) sets out particulars of the matters of fact on which the defendant intends to rely for the purposes of his or her defence; and (e) indicates any point of law (including any point as to the admissibility of evidence or an abuse of process) which the defendant wishes to take, and any authority on which he or she intends to rely for that purpose." 11. Crown Advocate Thomas argued that the Defendant had the opportunity to produce, or at least refer to, some of this messaging relied on at trial in an amended defence case statement, at the very least setting out in high level terms that there would be a root and branch challenge to her credibility. That would have given the prosecution the opportunity to assess the nature of the material that was intended to be put to her, and its potential impact on the case. 12. Article 83(8) of the 2018 Law sets out a defendant's ongoing duty in relation to the defence case statement: "(8) The defendant shall be under a continuing duty to disclose any material change to any matters set out in the defendant's defence case statement, or change in the defence relied upon, until the trial of the defendant's case is concluded either by way of the defendant's acquittal or conviction, or the proceedings having otherwise been - (a) discontinued

under Article 80; or (b) halted by the court." 13. Instead of filing an amended defence case statement, the Defendant chose to "ambush" the prosecution with this material, no doubt said Crown Advocate Thomas, with a view to achieving complete acquittals on all counts. It was a tactical decision, he said, not to reveal the text messaging until part way through the trial, which meant that it was inevitable that there had to be a trial of this matter. The prosecution being "ambushed" by the nature of the defence was a reason for refusing a defence costs order and he referred to this passage from *In R (Rees) v Snaresbrook Crown Court*

[2012] EWHC 3879 (Admin) at paragraph 9: "9 There are two aspects of the decision not to order costs which need to be considered: first, whether the case came within the class of cases where the defendant should be deprived of his costs, despite his acquittal; and, secondly, whether the court infringed the principle that there should be no suggestion that the defendant was guilty of the criminal conduct which was charged. So far as the first point is concerned, it is important to bear in mind that the relevant question is whether there are positive reasons for depriving a defendant of his costs. One example is given in the practice direction, indeed it is the only example, and, in relation to this example, there are a number of cases which make it clear that the two conditions of disentitlement to costs are to be read conjunctively. The defendant's own conduct must have brought suspicion on himself. He must have misled the prosecution into thinking that the case was stronger than it was, see *R (Spiteri) v Basildon Crown Court* [2009] 5 Costs LR 771 at paragraph 9 and *Dowler v Merseyrail*

[2009] EWHC 558 at paragraph 10. However, I do not regard this example as being exhaustive of circumstances in which costs might be refused. Subject to a matter that I will come to, a court might, for example, decline to order costs in a case in which the court was sure that a defendant had perjured himself or where the prosecution has been ambushed by the nature of a defence." 14. Advocate Steenson rejected the suggestion of ambush. Prior to the trial, he had been critical of the lack of disclosure made by the police, who had possession of the Defendant's mobile telephone and, as I understand it, access to it. He said the obligation was on the prosecution to disclose these text messages, of which they had only disclosed some. 15. Advocate Steenson was under no duty he said, to provide the text messages which his client had provided to him. The police accessing the Defendant's mobile telephone was particularly important, in that the victim had refused to hand her own mobile telephone to the police, and this in a case in which the prosecution had brought fully into play, through the bad character application, their relationship, which inevitably these days would have been conducted through social media. 16. It was untrue, Advocate Steenson said, that the prosecution would have given any serious consideration to a guilty plea to common assault, on the basis advanced by the Defendant in his defence case statement. The prosecution failed to persuade the jury in relation to any of the counts on the indictment, and the Defendant was merely convicted out of his own mouth. He won every matter that was in issue, and the prosecution objection to the application for costs is merely redolent of sour grapes. The Defendant neither caused his own

prosecution nor did he do anything, just the reverse, to encourage the prosecution or the police to believe that their case was better than it was. 17. The Defendant suspected that the prosecution's opposition to costs largely derived from the fact that he had been previously acquitted of similar charges in which the desperation of the prosecution for conviction was reflected in the inappropriate attempt by an officer of the Crown to speak to the Relief Magistrate in private during the currency of that trial. The Defendant believes that the prosecution lacks objectivity in respect of this application. Advocate Steenson stressed that these allegations did not relate to Crown Advocate Thomas, but to those in the Law Officers' Department instructing him. Decision 18. I exclude from my consideration the personal criticism made by the Defendant of those in the Law Officers' Department instructing Crown Advocate Thomas, not least because they have not had an opportunity to respond. I accept Crown Advocate Thomas' submission that the prosecution's resistance to costs is made on a principled basis. 19. Advocate Steenson informed me that the Defendant, who had now left the Island, had paid his firm £15,000 prior to the trial, but his firm's work in progress currently amounted to some £100,000. It was clear from this that if no order for costs was made in favour of the Defendant, it would be Advocate Steenson's firm that would suffer financially from costs that would be irrecoverable from the Defendant. However, as the Court of Appeal made clear in *Flynn v Reid* [2012]

- (2) JLR 226 at paragraph 39: "... The court, in making an award of costs, is concerned with the interests of the parties only and not with those of their legal representatives. The fact that, because of the operation of the Legal Aid scheme, a particular award of costs to one party may benefit only that party's advocate (without, I should add, disadvantaging that party) is no reason for not making an order which is otherwise justified....." 20. It is true that the Defendant offered no formal plea of guilty to common assault, but his defence case statement filed on 18 th October 2021 contained an admission to that effect; indeed, it contained an account of the events of 4 th August 2021 that the jury must have accepted. The 2018 Law was not in force at the time of the Gouveia decision, so there was no requirement then for the filing of defence case statements. 21. I can understand the concern on the part of the prosecution over the way these texts were produced shortly before the cross-examination of the victim and they must have taken the prosecution by surprise. In my view, they seriously impacted the credibility of the victim. 22. I do not interpret Article 84 of the 2018 Law as placing an obligation upon the Defendant to give the prosecution notice of all of the evidence upon which he was intending to rely at the trial going to the credibility of the victim, but the purpose of the 2018 Law is to do away with trial by surprise and I accept that the existence of these texts was a matter which should have been drawn to the attention of the prosecution through an amended defence case statement. However, I would not go so far as to describe the conduct of the defence as an ambush, because of the factors to which I refer below. 23. The overriding objective under Article 2 of the 2018 Law is to ensure that cases in criminal proceedings are dealt with justly and under Article 3(1)(b), that entails dealing fairly with both the prosecution and the defence. Was it fair for the defence to take

the prosecution by surprise by producing these texts during the trial without first drawing the attention of the prosecution to the same through an amended defence case statement? It is the case that these texts were very difficult to reconcile with what the victim said about her relationship with the Defendant. 24. There are a number of factors to consider in the context of fairness and to weigh against the general principle that costs should not be awarded to the Defendant where the criminal process was properly engaged, and the Defendant was ultimately convicted of an offence: (i) The defence case statement did set out the nature of the defence and indeed, it contained a complete statement as to what happened on 4 th August which, by necessary implication, meant that the victim was lying. Her credibility was central to the defence case. (ii) It was the prosecution that through its bad character application opened out the case to a wider examination of the relationship between the Defendant and the victim for which communications between them through social media would inevitably be a central feature; (iii) The victim had declined to allow the police to examine her mobile telephone which should have put the police on notice as to its possible contents; (iv) The police had possession of the Defendant's mobile telephone and, as I understand it, access to it. I have no information as to why the Defendant's communications with the victim as held on or through his mobile telephone were not accessed by the police. 25. As the Court said in *Gouveia* each case must be judged on its facts and there is nothing in that case suggesting that the discretion of the Court is in any way fettered. Standing back, it is the case that the Defendant was acquitted of all of the charges against him as set out in the Indictment and that the jury therefore accepted his account and rejected the account of the victim. 26. The Defendant was convicted on the alternative charge, put to the Jury by the trial judge, on the basis of his account that was set out in his defence case statement. It is fair for Advocate Steenson to say that the Defendant won on every issue in the case. This was not a case in which the evidence of the prosecution (in essence the evidence of the victim) was found sufficient on some charges but not on others. It was insufficient on all the charges in the indictment. The Defendant was convicted of this one lesser offence on his own admission contained in his defence case statement. 27. In these circumstances it would not be just for the Defendant to be deprived of his costs. 28. I therefore order the payment of the Defendant's costs out of public funds, and, pursuant to Article 2(5) of the Costs in Criminal Cases (Jersey) Law 1961 , in such sums as the appear to the Judicial Greffier to be reasonably sufficient to compensate the Defendant for the expenses he has properly incurred in carrying on the defence. *Authorities AG v Lyons*

[2022] JRC 133 . Criminal Procedure (Jersey) Law 2018. Costs in Criminal Cases (Jersey) Law 1961. *AG v Gouveia*

[2000] JLR 324 . *AG v Troy*

[2003] JRC 099 . *In R (Rees) v Snaresbrook Crown Court*

[2012] EWHC 3879 (Admin) . *Flynn v Reid*

[2012] (2) JLR 226. Page Last Updated: 01 Dec 2022 Back to top About JLIB Accessibility Contacts Disclaimer Feedback Privacy policy Site map © Jersey Legal Information Board 2001- This website is not compatible with your web browser. You should install a newer browser . If you live in Jersey and need help upgrading call the States of Jersey web team on 440099. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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