

JERSEY / JUDGMENT

AG v Reis [2023] JRC 043 (16 March 2023)

[2023] JRC 043

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JUDGMENT

THE DEPUTY BAILIFF: 1. On 12 December 2022, I heard argument in relation to the defence costs in relation to this matter and reserved my decision. The legal principles 2. The power to award costs is contained in Article 2(1) of the Costs in Criminal Cases (Jersey) Law 1961 ("the Law"). Article 2(1) provides, so far is relevant: "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." ... (4) The costs of the defence payable under paragraph (1)(c) shall be such sums as appear to the court reasonably sufficient to compensate the accused for the expenses properly incurred by the accused in carrying on the defence and to compensate any witness for the defence for the expense, trouble or loss of time properly incurred in or incidental to the witness's attendance and giving evidence. (5) Notwithstanding that the court makes no order under paragraph (1)(c) for the payment of the costs of the defence, it may order the payment out of public funds of such sums as appear to the court reasonably sufficient to compensate any witness for the defence for the expense, trouble or loss of time properly incurred in or incidental to the witness's attendance and giving evidence. ... (7) Subject to Article 5A, the amount of costs ordered to be paid under this Article shall be determined by the Magistrate or the Royal Court by way of summary assessment." 3. On the face of it, Article 2 provides that if the defendant is convicted then he may be ordered to pay the whole or part of the prosecution costs, and only if he is discharged from the prosecution or acquitted may the Court order out of public funds the payment of his costs. 4. Nonetheless, this Article has been the subject of consideration by the Royal Court on a number of occasions. One such case is AG v Gouveia

[2000] JLR 324 , where Birt, Deputy Bailiff (as he then was), considered an application for costs in circumstances where the defendant pleaded not guilty to twelve counts on an indictment and on the last working day before trial offered to plead guilty to one of those counts, but to maintain their not guilty pleas in respect of the other five counts. This was accepted by the prosecution and the defendant subsequently applied for costs in respect of the counts to which they had pleaded not guilty. They argued that they had been discharged or

acquitted within the meaning of Article 2(1)(c). The defendant's application for costs was rejected. Birt, Deputy Bailiff, made some helpful observations as to his interpretation of the provisions in Article 2. At page 329, he observed that if a defendant was indicted for two counts and pleaded guilty to one count and not guilty to the other and there was a trial on that second count leading to an acquittal, then it could not be right that the Court did not have a power to award the costs of the trial to the defendant merely because the defendant had pleaded guilty to another 'perhaps unrelated and less serious charge. It would require very clear language to drive the Court to the conclusion that it did not have jurisdiction to award costs in such circumstances'. In relation to the facts of the case before him, Birt DB made the following observations at page 331 which were, in some respects, germane to this case. He said: "Exercise of discretion I turn therefore to the question of whether I should make an award of costs on the facts of this case. Mrs. Pearmain's case is simple. She points to the outcome. The five counts where his pleas of not guilty were accepted alleged serious misconduct against the defendant including beating with a belt, permitting assaults, force-feeding, etc. All of these were denied and the prosecution ultimately accepted his denial. He pleaded guilty to only one count which was the very minor offence of leaving the child unsupervised for which he was fined £100. In essence, says Mrs. Pearmain, the prosecution failed on all the charges of any note and the defendant should therefore be entitled to his costs in defending the charges which were shown ultimately to have been "wrongly" brought. Were this a case where the defendant had at all times admitted count 10 there would indeed be much force in Mrs. Pearmain's submissions; but he did not. As Mr. Costa points out, the defendant pleaded not guilty to all the counts on the indictment until the last working day before the trial. Accordingly, the fact that the costs were incurred until then was entirely the fault of the defendant in maintaining a not guilty plea to an offence to which he ultimately pleaded guilty." 5. Towards the end of the judgment, the Deputy Bailiff made some helpful comments, as follows: "Finally, in deference to Mr. Costa's argument on floodgates, it may be helpful if I make some general observations. It is often the case that, on an indictment with a number of counts, pleas acceptable to the prosecution are tendered at a reasonably early stage following indictment. This frequently follows dialogue between the Crown and the defence. I do not consider that an award of costs in respect of any not guilty pleas which may be accepted would normally be appropriate in the run of the mill case where such discussions take place and a solution acceptable to both sides is arrived at. (page 332) 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 ." (page 333 -

my emphasis) 6. Finally, the Court observed "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 its own facts". 7. In AG v Troy

[2003] JRC 099 , Sir Philip Bailhache, Bailiff, considered a costs application in circumstances where the defendant was found guilty of common assault and not guilty of a substantially more serious charge of indecent assault. 8. The Bailiff referred to previous decisions on costs including Gouveia , in particular the paragraph that I have emphasised above. At paragraphs 12 and 13 of the judgment, the Bailiff said: "12. This is not such a case. The applicant did not at 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." 9. I was also referred to the case of AG v Lyons

[2022] JRC 223 . In that case, the defendant was acquitted by the jury of four counts of grave and criminal assault but convicted of a count of common assault left to the jury by the judge in his summing up. In that case, as recorded at paragraph 8 of the judgment of Commissioner Clyde-Smith, the Crown argued that at no stage had the defendant offered a plea of guilty to common assault as an alternative to a count of grave and criminal assault. The Commissioner agreed that the defendant had offered no formal guilty plea of common assault, but his defence case statement contained an admission to that effect (paragraph 20 of the judgment). The judge concluded that it was fair for the defence to contend that the defendant had 'won on every issue in the case' and in those circumstances a defendant's costs order was made. As noted, every case is fact specific and the Court has a wide discretion on cost matters. I am not sure that I would necessarily have reached the same decision as the Commissioner did in the case of Lyons . This case 10. Be that as it may, having referred to the principal cases to which I was referred, I now turn to the facts of this case. They can be taken shortly. The Defendant was indicted on a single count alleging grave and criminal assault. The alleged offence occurred on 27 September 2021. The Defendant obtained legal aid in February 2022. 11. The Defendant offered to plead guilty to common assault on 5 April 2022. He was tried by the jury and, on 5 October 2022, the jury returned a unanimous verdict of not guilty on the charge of grave and criminal assault and delivered a unanimous verdict of guilty to common assault which

was not separately indicted but was an alternative to grave and criminal assault. He was subsequently sentenced on 15 December 2022. An application is made for his costs under Article 2(1)(c). 12. He received legal aid under the old scheme since the guilty plea to common assault was offered (on a basis) on 5 February 2022. The basis of the plea offered was a realistic one and was likely to have been the basis upon which he was convicted by the jury, namely that he delivered a single punch to the victim's face. 13. The Crown objected to an order of costs in the Defendant's favour on the footing that there was no jurisdiction for the Court to make such an order. The Defendant was not discharged nor was he acquitted. He was indicted and convicted. No guilty plea was ever entered and, indeed, owing to the emergence of a possible defence of self-defence by reason of the evidence given at trial, the jury was directed that there were three verdicts open to them: (i) Guilty of grave and criminal assault; (ii) Guilty of common assault; and (iii) Not guilty. 14. The jury rejected the plea of self-defence and found the Defendant guilty of common assault. 15. The Crown went on to say that if, contrary to its submission, the Court did have a power to make a costs order on the facts of this case then the Crown would not resist such an order from the date of the offer to plead guilty to common assault, but that an award of a percentage of the costs would be appropriate, bearing in mind the fact that the plea of self-defence was pursued by the defence at trial and that the Defendant was ultimately convicted of an offence. 16. Defence counsel said that the best the Defendant could do on the facts of this case was to offer a plea of guilty to common assault - he could not enter a guilty plea to common assault because one did not appear on the indictment. Discussion 17. The situation that arose in this case, i.e. a defendant indicted for grave and criminal assault but convicted by the jury of common assault, is not unusual. However, in most circumstances it would not, in my judgment, give rise to an application for a defendant's costs order which would have any prospect of success. 18. In two cases heard last year, the defendant was acquitted by the jury of grave and criminal assault and convicted of common assault. The first involved a case of domestic violence where the defendant was indicted on two counts of grave and criminal assault but convicted by the jury of common assault - see *AG v Williams*

[2022] JRC 103 . Later in the year, a young offender was convicted by the jury of two counts of common assault as an alternative to allegations of (inter alia) grave and criminal assault. 19. However, in neither of those cases had the defendant offered guilty pleas to common assault as this Defendant had. The Defendant offered such a plea both unequivocally and on the basis upon which he was in all probability convicted by the jury. It would not assist a defendant on a subsequent costs application to rely on an offer to plead guilty to common assault on a basis which was wholly different from that for the basis upon which he was convicted (a ruling under Article 50 of the Criminal Procedure (Jersey) Law 2018 might be required to establish this). However, in this case the Defendant offered to plead guilty at an early stage to common assault on the basis upon which he was, in all likelihood, convicted. 20. What is the correct order to make in these circumstances having regard to the principles referred to above, and the terms of Article 2? The Crown is correct

that the Defendant in this case was convicted. However, he was convicted of an offence that he had always offered to plead guilty to on a basis that was realistic. He was only unable to plead guilty to that charge because it was not contained in a separate count on the indictment and in reality in those circumstances (putting to one side the issue of self-defence) the only matter which was contested on the eve of his trial was whether or not the assault which he admitted he committed was a common or a grave and criminal one. On that issue, he was acquitted. The outcome of this case, taken overall, was tantamount to an acquittal. Accordingly, the Court's power to make a costs order under Article 2 is engaged and the question of discretion arises. Both advocates were agreed that in the circumstances of this case it was right for the Court to order that a percentage of the Defendant's costs be recovered and having regard to the Defendant's reliance on the evidence of self-defence, evidence which was explored and relied upon, albeit perhaps not foreseen, by the Defence at trial and the rejection of that defence. In the exercise of my discretion, the appropriate order is that the Defendant receive 75% of his costs incurred since 6 February 2022 from central funds to be taxed if not agreed. 21. I note under Article 2(4) that the costs of a defence payable in these circumstances shall be 'such sums as appear to the Court reasonably sufficient to compensate the accused for the expenses properly incurred by the accused...'. 22. As I said in the course of argument, the starting point for assessing what sum is 'reasonably sufficient' in the circumstances of this case might, in the exercise of the taxing officer's discretion, be the sum which is payable to defence counsel pursuant to the new legal aid guidelines which came into force on 1 April 2022. I note that under Article 2(7) of the Law, that the amount of a costs order 'shall' be determined by the Magistrate or the Royal Court by way of summary assessment. I was not invited to make a summary assessment of the costs in this case and in future the parties should have sufficient details of the costs available to the Court in order for such a summary assessment to be made at the end of the trial, although the Court may wish to delegate the summary assessment to the Judicial Greffier. I note that in relation to assessment of costs, Article 5A says that the amount awarded: "...must be reasonably sufficient to compensate the recipient for costs - (a) actually, reasonably and properly incurred; and (b) which are reasonable in amount." 23. This amendment to the Law was made in 2018 by Schedule 4 of the Criminal Procedure (Jersey) Law 2018 and subsequently implemented. These provisions were, it appears, part of the remaining uncommenced provisions of the Criminal Procedure Law which came into force on 1 October 2021. It does not appear that this amendment to the Law has received previous judicial attention. Article 5A goes on to provide at 5A(2): "(2) The court may order the payment of any of the following - (a) a proportion of the amount assessed; (b) a stated amount less than that amount; (c) costs from or until a certain date only; (d) costs relating only to particular steps taken; or (e) costs relating only to a distinct part of the case." Postscript 24. It is clear from the amendments to the Law introduced in 2018, including Article 2(7) and Article 5A that courts are encouraged to make a summary assessment of costs, and that not only do the costs that the court must find as "reasonably sufficient" need to be "actually, reasonably and properly incurred" but such costs are further potentially limited as they

must be objectively " reasonable in amount ". The clear implication is that the court should exercise its powers to ensure that only a reasonable payment, and no more, is awarded to a Defendant who is acquitted or indeed to the Crown if it seeks its costs, which it is entitled to do when a Defendant is convicted either by their own plea or after a trial. 25. What should the starting point be for assessing what is objectively reasonable? As indicated at paragraph 22 above, in the course of argument I suggested that the starting point for ascertaining what sum might be ' reasonably sufficient' for the purpose of Article 2(4) is the amount payable to defence counsel pursuant to the new legal aid guidelines. That remark was made prior to considering the relevance to the amendments to the Law made in 2018 to which I have referred above. Although I have not heard argument from the Law Society or from the Attorney General in his capacity as *partie publique* / guardian of the public interest in relation to this issue, it was difficult to identify any other appropriate starting point than the legal aid rates underpinned by the Access to Justice (Jersey) Law 2019 , and contained in the Legal Aid Guidelines made under Article 7 which were the subject of extensive consultation. Article 7(2)(G) provides that legal aid guidelines may make provision for determining the rates and amounts of payments for the provision of legal aid, which they do. If such an approach is adopted there will often, if not usually, be a shortfall between the legal fees charged to the defendant who has been acquitted and what may be recovered from central funds which, for these purposes, are the Court and case costs budget of the Judicial Greffe. Such an approach may, in the context of a privately paying client of modest means (as opposed to a wealthy defendant who has chosen to engage a team of expensive lawyers), may be thought to be unjust. However, it does not give rise to any human rights considerations as there is no right under the European Convention on Human Rights, which of course has been incorporated into domestic law by the Human Rights (Jersey) Law 2000 , to recover costs in such circumstances. This was established by the European Court of Human Rights in the case of *Masson v The Netherlands*

(1996) 22 EHRR 491 and *Ashenden v United Kingdom*

(2012) 54 EHRR 13 where it was said: "In *Masson* the point was made at [49]: "....the Court observes firstly that the Convention does not grant to a person 'charged with a criminal offence' but subsequently acquitted a right either to reimbursement of costs incurred in the course of criminal proceedings against him, however necessary these costs might have been.... Such a right can be derived neither from Article 6(2) nor from any other provision of the Convention or its Protocols. It follows that the question whether such a right can be said in any particular case to exist must be answered solely with reference to domestic law." The matter was also considered by the English High Court in *R (Henderson) v Secretary of State for Justice*

[2015] EWHC 130 (admin) which considered the position of a defendant who paid for his own lawyers when successfully defending criminal proceedings having wrongly come to the conclusion that he was not entitled to legal aid. Article 6(3)(c) of the Convention creates a

duty on states to provide legal assistance in criminal cases to those who could not afford it: "24. The argument relating to restriction of choice proceeds upon the premise that defendants should not be 'forced' to engage lawyers who accept instructions on criminal legal aid by the prospect of lack of recovery of privately incurred costs paid to their lawyers of choice. It is suggested that for many reasons a defendant might wish to engage the services of lawyers who do not accept instructions on legal aid. For example, in cases where the client judges his solicitors and advocates of choice to have expertise in a specialist field not shared by legal aid lawyers or because he has a long-standing relationship with a particular firm in whom he reposes confidence. We do not know whether the claimant would have gone to legal aid solicitors had he been correctly advised that he was eligible. But I am unable to see how this point can assist the claimant's argument. Article 6(3)(c) protects the right of a defendant to defend himself in person or through legal assistance of his own choosing; or if he has insufficient means to do so to be given free legal assistance when the interests of justice so require. In the claimant's case he defended himself with his own lawyers. He exercised the right protected by the Convention. The Strasbourg case law makes plain that the Convention does not in those circumstances guarantee to an acquitted defendant a right to recover the costs of defence." 26. In many jurisdictions, costs in favour of an acquitted defendant are either never awarded or awarded exceptionally rarely. An example of the former is Guernsey where such awards are not made and examples of the latter are Scotland where the acquitted person must prove that the prosecution was vexatious, and Canada where such orders are exceptionally rare and only, it is understood, made when a Court has found a breach of the Canadian Charter of Rights and Freedoms. 27. In England and Wales, privately funded defendants who are acquitted can only recover their legal costs to the extent that they would have received remuneration from public funds had they applied for but been refused legal aid in the Crown Court, the equivalent (for these purposes) of the Royal Court. Persons who obtain an order for payment of their costs under Section 15 of the Prosecution of Offences Act 1985 (as subsequently amended), in relation to Crown Court proceedings, only receive a payment that will not exceed the fee set out in Schedule 1 to the Criminal Defence Service (Funding) Order 2007 or Schedule 1 to the Criminal Legal Aid (Remuneration) Regulations 2013 that applied at the time the proceedings were commenced. 'Reasonable remuneration' is to be interpreted as if the determination were being conducted under the 2007 Order or the 2013 Regulations to which I have just referred. Accordingly, although the matter may need to be revisited on a subsequent occasion at a hearing to which additional parties are convened, my current view is that the appropriate starting point in order to determine objectively the costs which are 'reasonable in amount' pursuant to Article 5A (which must in any event be summarily assessed) is the sum recoverable from time to time by lawyers in receipt of legal aid under the guidelines issued pursuant to the Access to Justice (Jersey) Law 1999. 28. Nothing in this judgment affects the power of the Court to make a wasted costs order against the defence or the prosecution under Article 109 of the 2018 Law. Accordingly in the event of, say, a wholly unreasonable commencement of a prosecution / evidence of bad faith on the

part of prosecution or defence, the Court's powers to order costs would not be subject to the requirement that such costs be objectively reasonable in amount. Such orders are subject to the considerations and three stage test set out in AG v Baksa

[2021] JRC 328 . Authorities Costs in Criminal Cases (Jersey) Law 1961. AG v Gouveia

[2000] JLR 324 . AG v Troy

[2003] JRC 099 . AG v Lyons

[2022] JRC 223 . AG v Williams

[2022] JRC 103 . Criminal Procedure (Jersey) Law 2018. Access to Justice (Jersey) Law 2019. Human Rights (Jersey) Law 2000. Masson v The Netherlands

(1996) 22 EHRR 491 . Ashenden v United Kingdom

(2012) 54 EHRR 13 . R (Henderson) v Secretary of State for Justice

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