

JERSEY / JUDGMENT

Manning -v- AG [2009]

JRC 012 (27 January 2009)

[2009] JRC 012

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judgment

the COMMISSIONER: 1. This is an appeal brought by way of case stated under Article 21(1) of the Magistrate's Court (Miscellaneous Provisions)(Jersey) Law 1949 ("the Magistrate's Court 1949 Law") and concerns the power of the Magistrate to determine the basis upon which costs awarded in criminal cases are ascertained. 2. Article 21(1) of the Magistrate's Court 1949 Law is in the following terms:- "Any person who was a party to any proceeding before the Magistrate's Court or is aggrieved by the conviction, order, determination or other proceeding of the Magistrate's Court may question the proceeding on the ground that it is wrong in law or is in excess of jurisdiction, by applying to the Magistrate to state a case for the opinion of the Royal Court on the question of law or jurisdiction involved..." Background facts 3. On 12 th June, 2008, the appellant was acquitted of an offence under Article 23(3) of the Police Force (Jersey) Law 1974 , namely that not being a police officer he had in his possession an article of police uniform. The offence incurs a maximum penalty of £20. 4. The Magistrate awarded the appellant his costs pursuant to Article 2(4) of the Costs in Criminal Cases (Jersey) Law 1961 ("the Costs 1961 Law"), but declined to order that those costs should be awarded on any basis other than that set out in Article 2(4), and in particular on a full indemnity basis as urged by Mr Blakeley, representing the appellant. The Costs 1961 Law 5. The material provisions of Article 2 of the Costs 1961 Law are as follows:- "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 - (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. (7) the amount of costs ordered to be paid under this Article shall be ascertained as soon as practicable by the Judicial Greffier." Magistrate's case stated 6. In his statement of case dated 25 th June, 2008, the Magistrate submitted as follows:- (i) The Magistrate's Court had no inherent power in relation to costs. (ii) The power to award costs is contained in Article 2(1)(c) of the Costs 1961 Law, the taxing officer is set out in Article 2(7) and the criteria for taxation are set out in Article 2(4). (iii) He did

not have any power to order costs on any basis other than that set out in the Costs 1961 Law and in particular did not have the power to award costs on either a standard or indemnity basis as set out in Rules 12/4 and 12/5 of the Royal Court Rules 2004 . (iv) He explained that having made his award as to costs he did in Court express the view that the basis of taxation set out in Article 2(4) of the Costs 1961 Law lay somewhere between the standard basis and indemnity basis. He did this to assist the taxing officer but it was not strictly speaking part of his decision. (v) As a consequence, he did not go on to consider how he would have exercised his discretion if he had the power to order costs on either a standard or indemnity basis. First Hearing 7. The matter first came before the Court on 18 th August, 2008. Mr Blakeley for the appellant accepted that whilst he had sought an order for costs on a full indemnity basis, he had made it clear to the Magistrate that he was using those terms by way of assistance but that what was being sought was compensation for the appellant's costs in full. Giving the words of Article 2(4) their natural meaning, the Magistrate had the power to order:- "...such sums as appear to the Court reasonably sufficient to compensate the accused for the expenses properly incurred ...". He argued that on the facts of this case, the Magistrate could have ordered that all of the appellant's costs should be paid. 8. Mr Pedley submitted that in making the order the Magistrate was ensuring that "reasonably sufficient " compensation for "expenses properly incurred " should be paid to the appellant and was therefore acting within the Costs 1961 Law. In doing so and in the absence of any other judicial authority, his decision cannot be described as " wrong in law ". The issue as presented by Mr Blakeley to the Magistrate was that he had the power to award " full indemnity costs " but this phrase did not exist in the Costs 1961 Law - it is a term used in civil proceedings. 9. This issue has not been addressed by the Court before. In *Jordan v Attorney General*

[2005] JRC 61A, the Court was concerned with an appeal against the taxation of costs awarded in a criminal trial in the Royal Court. The Court explained by way of background (paragraph 2) that an order for costs of this nature was governed by Practice Direction 99/5 (the precursor to Practice Direction RC 05/12 which is set out in full below) and that accordingly an order for costs is an order on the standard basis with any doubts being resolved in favour of the paying party. *Jordan* and Practice Direction RC 05/12 were not cited either to the Magistrate or to us at the first hearing. 10. Neither counsel was able to assist the Court on how in practice the Judicial Greffier carried out his task under Article 2(7) of the Costs 1961 Law and the matter was therefore adjourned for further research to be undertaken. Practice Direction RC 05/12 11. The Crown filed a report by the Deputy Judicial Greffier dated 26 th August, 2008, which explained that orders for costs made by the Magistrate under Article 2(1) of the Costs 1961 Law were taxed by the Judicial Greffier under Practice Direction RC 05/12 . We set out below the relevant provisions of that Practice Direction:- " Royal Court of Jersey RC 05/12 Taxation of Costs - Costs in Criminal Proceedings 1.

Introduction

1.1 This Practice Direction issued pursuant to Rule 12/3 of the Royal Court Rules 2004 and repeats the provisions of former Practice Direction 99/5 which had the effect of assimilating the procedure method of assessment of costs in criminal proceedings as those for costs in civil proceedings. 1.2 On a taxation of costs pursuant to an Order of Court under: (a) Paragraph (1) of Article 2 of the Costs in Criminal Cases (Jersey) Law, 1961. (b) Paragraph (2) of Article 3 of the Costs in Criminal Cases (Jersey) Law, 1961; and (c) Sub paragraph (a) of paragraph (5) of Article 17 of the Magistrate's Court (Miscellaneous Provisions)(Jersey) Law, 1949; the amount of costs on taxation in criminal proceedings that shall be allowed shall be such sums or costs as may appear "reasonably sufficient" to the Greffier. 1.3 Where a determination is made on taxation under paragraph 1.2 of this Practice Direction, the costs that a party shall be entitled to recover is the amount allowed after taxation on the standard basis unless it appears to the Court to be appropriate in the circumstances to order an award of costs on the indemnity basis. 1.4 The terms "standard basis" and "indemnity basis" shall have the same meaning as that under Part 12 of the Royal Court Rules 2004. 1.5 For the sake of completeness Part 12 of the Royal Court Rules 2004 has and shall continue to have full force in relation to taxation matters and procedure for costs awarded in criminal proceedings. 2. AMOUNT OF COSTS ON TAXATION: DETERMINATION OF THE TOTAL SUM FOR FACTOR 'A' AND THE FACTOR 'B' UPLIFT. In exercising his discretion as to what is "reasonably sufficient" the Greffier shall: (a) For Factor 'A' apply the hourly expense rate for the grade of fee earner as set by the Full Court; and (b) In determining the total sum for Factor 'A' and the Factor 'B' uplift, have regard to all the relevant circumstances, and in particular to those matters identified in Practice Direction 05/11 at paragraph 2." 12. As can be seen this Practice Direction makes it clear that costs in criminal proceedings can be awarded on either a standard or indemnity basis, expressions that are deemed to have the same meaning as under Part 12 of the Royal Court Rules 2004 . Indeed Part 12 of the Royal Court Rules is deemed under paragraph 1.5 to have full force in relation to taxation in criminal proceedings. 13. Practice Direction RC 05/12 superseded Practice Direction 99/2 , which is in very similar terms. This followed the Royal Court (Amendment No. 13) Rules 1999 which, following English practice, replaced Fixed Scale Taxed Costs with a new standard and indemnity basis for taxation of costs in civil proceedings. Second Hearing 14. At the second hearing on 23 rd September, 2008, Mr Pedley, on the strength of the Deputy Judicial Greffier's Report and of Practice Direction RC 05/12 , conceded that the Magistrate was wrong not to have exercised his discretion to award either indemnity or standard basis costs. Both parties agreed that rather than remit the matter back to the Magistrate's Court, the Magistrate having retired, the Court should decide, pursuant to Article 22(1) of the Magistrate's Court 1949 Law , whether the appellant should be awarded costs on the standard or indemnity basis. The remainder of the hearing was concerned with that matter. The Court reserved its decision. 15. However in considering the matter following the second hearing, it was not clear to the Court that Practice Direction RC 05/12 does extend to orders

made by the Magistrate. It is headed "Royal Court of Jersey" and it could be argued that it only extends to orders made by that Court. It certainly makes no express reference to orders by the Magistrate. If it does extend to orders made by the Magistrate, a number of issues arose. Under paragraph 1.1, the Direction is purported to be issued under Rule 12/3 of the Royal Court Rules 2004, but that Rule does not empower the Greffier to issue Directions. Rule 12/14 of the Royal Court Rules 2004 does give the Greffier the power to issue Directions but only in relation to taxation practice under Part 12 of the Royal Court Rules. The numbering of the Royal Court Rules has not changed following the 2003 revision of laws. It was unclear as to the basis upon which Practice Directions had been issued in relation to taxation practice within the Magistrate's Court. The Court therefore invited the further assistance of counsel. Practice Direction RC 05/12 16. Mr Pedley submitted further written submissions which can be summarised as follows:- (i) The manner in which rates or scales should be applied to costs awarded by either the Royal Court or the Magistrate's Court was to be governed by regulations (not Practice Directions) made by the States under Article 6 of the Costs 1961 Law which is in the following terms:- "6 Regulations The States may make Regulations generally for carrying this Law into effect and, in particular, may by such Regulations prescribe the rates or scales of payment of any costs payable out of public funds under this Law and the conditions under which such costs may be allowed." No regulations have been made. (ii) Article 13 of the Royal Court (Jersey) Law ("the Royal Court 1948 Law"), a Law introduced to modify the constitution of the Royal Court, is the primary legislation which enables the Superior Number of the Royal Court to create rules of court. This includes the Royal Court Rules 2004. (iii) Article 13 empowers the Superior Number to make Rules applying to the Royal Court but not to the Magistrate's Court. The only exception is within Article 13(1)(n) which allows Rules to be made "for regulating and prescribing in relation to the Petty Debts Court" which is a purely civil jurisdiction of the Magistrate. Apart from this, the Royal Court 1948 Law does not empower the Superior Number to make Rules of Court in relation to the Magistrate's Court. (iv) It would therefore be ultra vires for the Rules made by the Superior Number under the Royal Court 1948 Law to purport to relate to criminal matters in the Magistrate's Court and accordingly the Royal Court Rules 2004 as a whole, including Part 12 and the references to standard and indemnity costs, do not apply (by virtue of this Practice Direction) to criminal matters in the Magistrate's Court. 17. In the premises, Mr Pedley submitted that Practice Direction RC 05/12 has no application to costs awarded by the Magistrate in criminal proceedings. Mr Blakeley, whilst taking issue with a number of points put forward by Mr Pedley, agreed with this central conclusion. 18. We agree with both counsel that Practice Direction RC 05/12 has no application to orders for costs made by the Magistrate under Article 2(1) of the Costs 1961 Law either because it does not by its terms extend to such orders or, if it does purport to do so, it is ultra vires. 19. As a consequence, Mr Pedley reverted to his original submissions that the Magistrate was correct in stating that he had no power to order costs on either an indemnity or standard basis. 20. Although this appeal concerns an order for costs made in the Magistrate's Court, it is relevant to note that in the Crown's view, whilst the Superior Number had power under the Royal Court 1948 Law to make rules of court governing all proceedings including criminal proceedings, this power

was eclipsed by the 1961 Costs Law in so far as any further revision or evolution of the Costs 1961 Law could only be done by the States through regulations under Article 6. Thus Practice Direction RC 05/12 (issued after 1961) is ultra vires in its purported application to the Royal Court as well as to the Magistrate's Court. 21. Mr Blakeley doubted that this was the case pointing out that the wording of Article 6 was permissive. Mr Pedley responded by submitting that public policy issues arose. The Royal Court cannot seek to do that which the States has expressly reserved to itself - it is the States that may or may not make regulations governing taxation of costs orders made under the Costs 1961 Law - no-one else. The issue does not fall within our remit to determine but the view of the Crown is clearly of significance. Power of the Magistrate 22. Thus we arrive at the position where there are no valid Practice Directions in force and no regulations prescribing the rates or scales of payment of costs have been made. What therefore are the powers of the Magistrate under Articles 2(4) of the Costs 1961 Law? 23. Mr Pedley submits that the Magistrate has no discretion over the basis on which costs are ascertained. If he uses his power to order payment of costs then they must be "reasonably sufficient to compensate the accused for the expenses properly incurred by the accused in carrying on the defence". There is no provision for the payment being on any other basis. However the words ".... such sums as appear to the Court reasonably sufficient" (our emphasis) indicate that the Court is involved in an assessment of what is reasonably sufficient. 24. Some guidance can be gained by comparing the position under English law. The test for awarding costs in criminal cases under the Prosecution of Offences Act 1985, Section 16 is similar to that adopted in Jersey, namely :- "(6) A defendant's costs order shall, subject to the following provisions of this section, be for the payment out of central funds, to the person in whose favour the order is made, of such amount as the court considers reasonably sufficient to compensate him for any expenses properly incurred by him in the proceedings." 25. However, Section 16 goes further than the equivalent Jersey legislation by providing as follows:- "(7) Where a court makes a defendant's costs order but is of the opinion that there are circumstances which make it inappropriate that the person in whose favour the order is made should recover the full amount mentioned in subsection (6) above, the court shall - (a) assess what amount would, in its opinion, be just and reasonable; and (b) specify that amount in the order. .. (9) Subject to subsection (7) above, the amount to be paid out of central funds in pursuance of a defendant's costs order shall - (a) be specified in the order, in any case where the court considers it appropriate for the amount to be so specified and the person in whose favour the order is made agrees the amount; and (b) in any other case, be determined in accordance with regulations made by the Lord Chancellor for the purposes of this section." 26. Thus, under the English regime, it would appear that if the Court makes an order as to costs then the defendant receives the full amount (i.e. a sum that is reasonably sufficient to compensate him) which under subsection (9) can either be specified in the order if agreed by the defendant or determined under the regulations. If the Court is of the view that an order in the full amount is inappropriate, then under subsection (7) it can itself assess the amount and specify that amount in the order. 27. The Costs in Criminal Cases (General) Regulations 1986 provide at Section 7 as follows:- "Determination of costs 7.-(1) The

appropriate authority shall consider the claim, any further particulars, information or documents submitted by the applicant under regulation 6 and shall allow such costs in respect of - (a) such work as appears to it to have been actually and reasonably done; and (b) such disbursements as appear to it to have been actually and reasonably incurred, as it considers reasonably sufficient to compensate, the applicant for any expenses properly incurred by him in the proceedings. (2) In determining costs under paragraph (1) the appropriate authority shall take into account all the relevant circumstances of the case including the nature, importance, complexity or difficulty of the work and the time involved. (3) When determining costs for the purpose of this regulation, there shall be allowed a reasonable amount in respect of all costs reasonably incurred and any doubts which the appropriate authority may have as to whether the costs were reasonable incurred or were reasonable in amount shall be resolved against the applicant." 28. There are further provisions for appeals if the recipient is unhappy with the amount determined by the appropriate authority but the basis for the determination is the same namely the amount the appropriate authority considers reasonably sufficient to compensate the defendant. The reference in sub section (3) to any doubts being resolved against the recipient is equivalent to the standard basis. As we understand it, English law at that time had a standard/indemnity basis civil taxation regime which Jersey subsequently followed. In effect all costs in criminal cases in England, at least from 1986, are assessed on the equivalent of the standard basis. 29. Unlike English law, the Costs 1961 Law does not expressly provide for the Magistrate to stipulate a sum (if agreed) failing which the matter is referred to the Judicial Greffier. Is it the case therefore that in Jersey the Magistrate, when making a costs order, must there and then stipulate the amount of costs to be paid to the defendant as the express wording of Article 2(4) appears to indicate? That would be to render the role of the Judicial Greffier under Article 2(7) redundant. If the Magistrate does not state a sum to be paid and the matter is then referred to the Judicial Greffier, on what basis does he ascertain the costs? 30. Mr Blakeley argued that it is the Magistrate alone who can conduct the assessment. In the event of the expenses being known at the time of the hearing he could determine the sum there and then. If not then in remitting the ascertainment of those costs to the Judicial Greffier, the Magistrate could (and in the instant case should) have directed the Judicial Greffier that all of his client's expenses properly incurred should be paid. The role of the Judicial Greffier would be purely administrative in collating and adding up the expenses claimed. 31. This approach appears to us to be misconceived in that it ignores the clear requirement of Article 2(4). Whoever ascertains the costs must firstly know the amount of expenses properly incurred and then decide what sum will be reasonably sufficient to compensate the defendant for those expenses, an exercise that is necessary to protect the interests of the public as the paying party. That exercise cannot be undertaken until the amount of the expenses is known. Thus if the Magistrate knows the amount of the expenses incurred he can conduct the exercise but, if not, the matter is then referred to the Judicial Greffier who must conduct the exercise. The Magistrate cannot direct the Judicial Greffier to pay all the expenses of the defendant out of public funds, in ignorance of what those expenses are. 32. It would be tempting to hold that the Magistrate could assist the Judicial

Greffier by inviting him to apply the civil taxation regime in the Royal Court. That would be the necessary implication of the Magistrate making a reference to either the standard basis or indemnity basis as these are defined terms under Part 12 of the Royal Court Rules used for the purpose of the civil taxation regime. This is of course precisely what RC 05/12 purported to do. Helpful as that would be to the Judicial Greffier it would displace the basis of assessment expressly set out in Article 2(4). 33. In 1961 the concept of standard and indemnity costs was not known, certainly in Jersey. The basis for assessing costs in criminal cases is expressly set out in Article 2(4) of the 1961 Costs Law and it is that basis which is to be applied - not the civil regime subsequently adopted by the Royal Court. 34. The onus is upon the defendant to satisfy the Magistrate or the Judicial Greffier that any expense claimed has been properly incurred but that will be upon the civil burden of proof namely on a balance of probabilities. To suggest that any doubts should be resolved against the defendant effectively imposes on him the criminal burden of proving that expenses have been properly incurred namely beyond reasonable doubt. We see no justification in law or otherwise for imposing such a burden on an innocent person who has been acquitted or discharged from criminal proceedings. 35. A defendant in civil proceedings can elect, however strong his defence, to settle the action brought against him and in any event any judgment made against him will not lead to a conviction. Criminal proceedings are brought by the public authorities and a defendant in criminal proceedings is faced with the possibility of a criminal conviction. Even in a case where the maximum penalty is as low as £20, a defendant may quite reasonably feel he has no option other than to defend the proceedings in order to protect his good character and to engage a lawyer for that purpose. 36. In *Evans v Attorney General* (2002/31) the Court overturned the decision of the Magistrate to award a defendant who had been acquitted one half of his costs on the grounds that it was only in exceptional circumstances (as set out in *Romeril -v-AG* (2001/71) that a defendant who had been acquitted should be deprived of his costs. 37. In our view if a defendant is acquitted or discharged, he is innocent of the offence and assuming he is awarded his costs, (i.e. that the exceptional circumstances referred to in *Romeril* do not apply), he should not be further prejudiced by having imposed upon him the burden of proving the incurring of expenses beyond doubt. It is of course open to the States through regulations to determine otherwise. 38. To the extent that expenses have been properly incurred, applying the civil burden of proof, it is then a matter of judgement for the Magistrate or the Judicial Greffier to determine what sum appears to them reasonably sufficient to compensate the defendant for those expenses. 39. Interpreting the 1961 Costs Law to the best of our ability we conclude that when the Magistrate awards a defendant costs under Article 2(1)(c):- (i) The Magistrate can stipulate, pursuant to Article 2(4), the actual sum to be paid to the defendant which he determines is reasonably sufficient to compensate the defendant for expenses properly incurred in carrying out the defence, assuming those expenses are known. This will only occur in simple cases where no detailed assessment of the costs claimed is required. (ii) If the Magistrate does not stipulate a sum to be paid, then the amount shall be ascertained by the Judicial Greffier under Article 2(7) who will apply the test set out in Article 2(4) and not the civil taxation regime, namely such sums as appear to

the Judicial Greffier reasonably sufficient to compensate the defendant for the expenses properly incurred in carrying out the defence. (iii) The Magistrate or the Judicial Greffier as the case may be will exercise their own judgement as to what is reasonably sufficient. In exercising that judgement they will no doubt have regard to the relevant circumstances of the case including the nature, importance, complexity or difficulty of the work and the time involved. (iv) The onus will be upon the defendant to satisfy the Magistrate or the Judicial Greffier as the case may be, applying the civil burden of proof, that any expenses claimed have been properly incurred. 40. In the premises we find that the Magistrate did not err in law and the appeal therefore fails. Authorities Magistrate's Court (Miscellaneous Provisions) (Jersey) Law 1949. Police Force (Jersey) Law 1974. Costs in Criminal Cases (Jersey) Law 1961. *Jordan v Attorney General*

[2005] JRC 61A. Practice Direction 99/5. Practice Direction RC 05/12. Royal Court Rules 2004. Royal Court (Amendment No. 13) Rules 1999. Royal Court (Jersey) Law 1948. Prosecution of Offences Act 1985. Costs in Criminal Cases (General) Regulations 1986. *Evans v Attorney General* (2002/31). *Romeril -v-AG* (2001/71). Page Last Updated: 28 Jul 2016 BAILII: [Copyright Policy](#) | [Disclaimers](#) | [Privacy Policy](#) | [Feedback](#) | [Donate to BAILII](#)

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