

JERSEY / JUDGMENT

Robert Frederick Bonney v The Attorney General

COURT

Royal Court

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Costs

[2021]JRC215

Royal Court

(Samedi)

19 August 2021

Before : J. A. Clyde-Smith O.B.E., Commissioner
sitting alone
Robert Frederick Bonney
-v-
The Attorney General
Advocate S. M. Baker for the Appellant.
Ms L. B. Hallam, Crown Advocate.

JUDGMENT

THE COMMISSIONER: 1. On 17th June 2021, the Court reversed the decision of the Magistrate not to recuse herself from presiding over the prosecution of the Appellant before the Magistrate's Court and this for the reasons set out in its judgment of that date (Bonney v AG [2021] JRC 174). 2. Advocate Baker, on behalf of the Appellant, now applies for the costs of the Appellant on the indemnity basis. The Appellant was not eligible for legal aid and has therefore funded the appeal out of his own funds. Crown Advocate Hallam, for the Respondent, accepts that the Appellant should have his costs, but on the standard basis. 3. Advocate Baker referred to the test on the award of costs on the indemnity basis in civil proceedings as set out in the decision of the Court of Appeal in C v P-S [2010] JLR 645 and submitted that the conduct of the Respondent, through the prosecuting officer, had been unreasonable, and indeed he asserted that the Respondent was in breach of his duties as a Minister of Justice by: (i) not taking a neutral stance when the application to recuse was made on 10th March 2021; (ii) failing to support the Appellant's application on 11th March 2021 that the Magistrate state a case; (iii) opposing the Appellant's application before the Royal Court on 23rd March 2021 for the Magistrate to state a case; and (iv)

belatedly taking a neutral stance at the hearing of the appeal against the case stated on 1st June 2021 and indeed in not actively supporting the position of the Appellant in that appeal. 4. Advocate Baker referred me to the correspondence that had ensued between him and the prosecuting officer in the Magistrate's Court, and with Crown Advocate Hallam, in which he had consistently pressed the prosecution to change its position. I am not going to go through that correspondence, because I do not accept that the Respondent, through the prosecuting officer, was acting unreasonably or in breach of his duties as a Minister of Justice for the following reasons put forward by Crown Advocate Hallam: (i) On the basis of the information put before the Magistrate's Court on the 10th March 2021, the prosecuting officer was entitled to take the stance he did, namely that in his view, there was no real possibility of bias. (ii) On the application for the Magistrate to state a case on 11th March 2021, the prosecuting officer did not attempt to persuade the Magistrate either way. (iii) In the judgment of the Royal Court ordering the Magistrate to state a case (*Bonney v AG* [2021] JRC 095), whilst I disagreed with the stance taken by the Respondent, the judgment fell short of a condemnation of the Respondent's position or a finding that it was unreasonable. (iv) In the substantive judgment of the Royal Court of 17th June 2021, the Court indicated that the decision taken by the Magistrate on 10th March 2021 on the evidence and arguments then before her was not *Wednesbury* unreasonable.

(v) Following receipt of the Magistrate's case stated, and on considering the new evidence and the issue of the character evidence of Mrs O'Donnell, the Respondent did change his position to one of a neutral stance, which was a reasonable stance to take as the outcome was not so obvious as to compel the Respondent to support the Appellant. 5. It is a serious matter to allege a breach of duty on the part of the Respondent as a Minister of Justice acting through the prosecuting officer, and I reject it. The Court may have disagreed with the stance taken by the Respondent at various stages, but as Crown Advocate Hallam says, that does not make the stance taken unreasonable or in breach of the prosecutor's duty as a Minister of Justice. I have no criticism of the conduct of the Respondent in this case. 6. Notwithstanding this finding, in my view the Appellant should be compensated for the costs he has incurred. The law 7. This was an appeal by way of case stated under Article 21 of the Magistrate's Court (Miscellaneous Provisions) (Jersey) Law 1949 ("the 1949 Law"). In terms of costs, Article 22 provides: "22 Procedure on consideration of appeal by case stated

(1) On an appeal by case stated under Article 21, the Royal court shall hear and determine the question or questions of law arising on the case and may reverse, affirm or amend the determination in respect of which the case has been stated, or remit the matter to the Magistrate's Court, with its opinion thereon, or may make such other order in relation to the matter, and may make such orders as to costs, as may seem fit." (my emphasis) I therefore have a wide discretion on costs in this appeal. 8. In an appeal against conviction and/or sentence under Article 17 of the 1949 Law, Article 20 is more specific in relation to orders for costs in that it provides: "(5) On any appeal under Article 17 – (a) if the appeal is successful, the Royal Court may order the payment out of public funds of such sums as appear to the Court reasonably sufficient to compensate the appellant for any expenses properly incurred

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- (i) in the prosecution of the appeal, and (ii) in the proceedings in the Magistrate's Court; or
 - (b) if the appeal is unsuccessful, the Royal Court may order the appellant to pay the whole or any part of the costs of the appeal.” 9. Article 20(5) is no doubt more specific on the issue of costs as an appeal under Article 17 against conviction or sentence would ordinarily give rise to a clear outcome, whereas an appeal on a point of law under Article 21 particularly pre-trial may not do so, hence the wider discretion on costs given to the Court under Article 22(1).
10. The Costs in Criminal Cases (Jersey) Law 1961 (“the 1961 Law”) deals with costs following a criminal trial in the Magistrates Court and the Royal Court (Article 2) and costs on an appeal to the Superior Number or the Court of Appeal (Article 3). It allows the relevant Court to order the payment to a successful defendant or appellant, consistently with Article 20(5) of the 1949 Law, such sum as appears to the Court reasonably sufficient to compensate the accused/appellant for the expenses properly incurred by the accused/appellant in carrying on the defence or appeal (Articles 2(4) and 3((2)), such sum to be ascertained by the Judicial Greffier (Articles 2(7) and 3(2)). There is a similar provision for compensation for the expense, trouble or loss of time properly incurred in or incidental to a defence witness attending and giving evidence. The 1961 Law does not apply, however, to the hearing by the Royal Court of an appeal from a decision of the Magistrate's Court (Article 2(9)).
 11. Practice Direction 05/12 deals specifically with costs orders made under the 1961 Law and with costs orders made under Article 20(5) of the 1949 Law. It does not cover costs orders made under Article 22(1) of the 1949 Law. It provides under paragraph 1.2 that the amount of costs on taxation in those proceedings it covers shall be such sums or costs as may appear “reasonably sufficient” to the Greffier. Paragraphs 1.3, 1.4 and 1.5 go on to provide as follows: “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.”
 12. In AG v Humble [2018] JRC112A, noting that no regulations had been made under Article 6 of the 1961 Law prescribing the rates or scales of any costs and the conditions under which costs may be allowed, it was contended by the prosecution that RC05/12 was ultra vires to the extent that it purports to allow costs in criminal cases to be made on the standard or indemnity basis. It was not necessary for the Court to determine the issue, but the Bailiff made these observations: “10. It may be that the answer to this point is to be found within the wording of the 1961 Law itself. As I have set out above Article 2(4) makes provision for the costs of the defence as being ‘such sums as appear to the court reasonably sufficient to compensate the accused for the expenses properly incurred...’

11. The Court therefore determines what the appropriate sums are and it is arguably acceptable, in so doing, for the Court to set out a regime for the calculation of costs and the identification of what sums appear to be reasonable. The Court may say in general terms that on some occasion it will appear to the Court to be sufficient to order costs on the basis equivalent to the standard basis and on other occasions to costs on the indemnity basis”
13. I do not have to determine that issue either because RC05/12 does not apply to costs awarded under Article 22(1) of the 1949 Law by which the Court is given an unfettered discretion. However, on looking at the costs regime in criminal cases generally, the relevant court is concerned with compensation for a successful defendant or appellant payable out of public funds, rather than the conduct of the prosecution as if they were civil litigants, and ordinarily it seems just that a person who has been acquitted of a criminal offence at trial or on appeal should receive reasonable compensation as assessed by the Court. 14. Schedule 4 of the Criminal Procedure (Jersey) Law 2018 amends the 1961 Law by the introduction of a new Article 5A in these terms: “5A Assessment of costs
 - (1) Where costs are assessed under Articles 2 and 3 and if the court to which those Articles apply makes an order for the payment of such costs, 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.
 - (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.”
 15. This amendment is not yet in force, but it supports the view that in the criminal context, the Court is concerned with assessing an amount that is reasonably sufficient to compensate for costs which have been properly incurred.
 16. I accept that in an appeal on a question of law or jurisdiction under Article 21 of the 1949 Law the outcome may not be so clear as it is on an acquittal under Article 17, but it would be wrong in my view to equate the defence and the prosecution to litigants in a civil case and to apply the same principles as to the award of costs as are applied in civil cases. The defendant is before the courts under compulsion and facing a criminal charge and the starting point should be that if he or she successfully raises a point of law that results in the Royal Court intervening with the trial before the Magistrate’s court, he or she should receive reasonable compensation. Decision

17. In these criminal proceedings, the Appellant made an application that the Magistrate recuse herself from presiding and after successfully obtaining an order from the Royal Court that the Magistrate state her case and the Magistrate having stated that case, the Court has intervened on appeal by reversing the Magistrate's decision not to recuse herself. The application raised a fundamental issue namely the fairness of his trial and I see nothing in the conduct of the Appellant to justify his receiving anything less than reasonable compensation namely such sum as appears to the Court, acting through the Judicial Greffier, to be reasonably sufficient to compensate the Appellant for the expenses he has properly incurred.
18. I therefore make an order in favour of the Appellant for the payment out of public funds of such sums as shall appear to the Judicial Greffier reasonably sufficient to compensate the Appellant for any expenses he has properly incurred in his application for a case stated, his appeal against that case and this hearing on costs.
19. Compensation in this context is not equivalent to an indemnity. It is for the Judicial Greffier to assess what is reasonably sufficient to compensate the Appellant and in carrying out that assessment the Judicial Greffier will no doubt take into account the interests of the public out of whose funds the compensation will be paid, and the nature of the work undertaken. A future Court may give guidance to the Judicial Greffier as to the carrying out of that assessment.
20. Advocate Baker asks for a payment on account of the Appellant's costs, following the procedure now well established in civil cases – see *Crociani v Crociani* [2019] JRC 013. The principle behind payments on account is that a successful party should get the fruits of a costs order as soon as possible and Crown Advocate Hallam agreed that it was difficult to see why this principle should not apply equally to costs orders made in criminal cases, the only difference being that the payment is made out of public funds.
21. I understand that currently there is a two-to-three-month delay in processing applications for assessment/taxation. I also understand that the Greffier has made payments on account of costs in other criminal cases in a sum which he is satisfied will be ordered following assessment, and rather than attempt that calculation myself, I direct the Greffier upon receipt of the Appellant's bill of costs, to pay out of public funds an amount on account which he is satisfied the Appellant will be awarded following assessment. Authorities *Bonney v AG* [2021] JRC 174. *C v P-S* [2010] JLR 645. *Bonney v AG* [2021] JRC 095. Magistrate's Court (Miscellaneous Provisions) (Jersey) Law 1949. Costs in Criminal Cases (Jersey) Law 1961. *AG v Humble* [2018] JRC112A. Criminal Procedure (Jersey) Law 2018. *Crociani v Crociani* [2019] JRC 013.

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