Neutral Citation Number: [2023] EWHC 13 (Admin)

Case No: CO/4511/2020

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
DIVISIONAL COURT

Cardiff Civil Justice Centre,
CF10 1ET

Date: 10th January 2023

Before :

THE PRESIDENT OF THE KING'S BENCH DIVISION

MR JUSTICE HILLIARD

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Between :

Matthew Hargreaves	**Appellant**
- and -	
Powys County Council	**Respondent**

- -
- -

Simon Farrell KC and Ellis Sareen (instructed by **Cunninghams Solicitors**) for the **Appellant**
Jonathan Rees KC (instructed by **Powys County Council**) for the **Respondent**

Decision on written submissions without a hearing

Approved Judgment on costs

This judgment was handed down remotely at 4pm on 10th January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Introduction

1. The substantive judgment of the court at [2022] EWHC 3176 (Admin) was handed down on 12th December 2022. The appellant's appeal by way of case stated was dismissed.

2. At the conclusion of the proceedings, the respondent applied for its costs in the sum of £59,719.40 inclusive of VAT against the appellant and for summary assessment.

3. We have dealt with this issue by way of written submissions and are grateful for the assistance which we have received.

4. This is the judgment of the court.

The competing submissions

5. The appellant submits that on an appeal by way of case stated in a criminal cause or matter, the court has no power to order the person who was the defendant at first instance to pay a respondent prosecutor's costs. It is argued that when the High Court hears an appeal by way of case stated, two different costs regimes may be engaged. One regime derives from the general discretion as to costs pursuant to s.28A(3) of the Senior Courts Act 1981 which provides that after hearing and determining the question arising where a case is stated for the opinion of the High Court, the High Court may make such other order in relation to the matter (including costs) as it thinks fit. The other regime is created by Part II of the Prosecution of Offences Act 1985.

6. The relevant sections of the 1985 Act are as follows. Section 16(5) provides that where any proceedings in a criminal cause or matter are determined before a Divisional Court, the court may make a defendant's costs order in favour of the accused. By s.16(6), a defendant's costs order is for the payment out of central funds of such amount as the court considers reasonably sufficient to compensate the accused for any expenses properly incurred by him in the proceedings. Section 16A was inserted by para.2(3) of Schedule 7 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and provides that subject to certain exceptions, a defendant's costs order may not include legal costs. By s.17(1)(b), in any proceedings before a Divisional Court in respect of a summary offence, the court may order the payment out of central funds of such amount as the court considers reasonably sufficient to compensate the prosecutor for any expenses properly incurred by him in the proceedings. By s.17(2), no order may be made in favour of a public authority which includes a local authority. Section 18(1) provides for awards of costs against an accused in favour of the prosecutor following conviction in the magistrates' court, after the Crown Court dismisses an appeal against conviction or sentence in the magistrates' court, or after conviction in the Crown Court. Section 18(2) provides for an order for costs against an accused in the Court of Appeal. There is no provision in the 1985 Act for an accused to pay a prosecutor's costs in the Divisional Court.

7. Reliance is placed by the appellant upon *Murphy v Media Protection Services Limited* [2013] 1 Costs LR 16, where a Divisional Court considered which of the regimes to apply in the context of an appeal by way of case stated against a criminal conviction which was ultimately quashed after a reference to the European Court of Justice.

Application was made by the successful appellant for the payment of her costs both in the High Court proceedings and in the criminal proceedings in the magistrates' court and (on appeal) in the Crown Court. The court referred in its judgment to the absence of any guidance as to the criteria to be applied when considering whether to make an order under the criminal or the civil costs scheme. At para.15, the court said: "*Clearly, save in exceptional cases, prosecutions and appeals in criminal cases should be and will be subject to the criminal costs regime. However, the present case is unusual*." The court went on to identify a number of reasons why the case was exceptional, and made an order under the civil costs scheme in respect of the appellant's legal costs at all stages of the proceedings.

8. It is pointed out that in subsequent cases, including *Lord Howard of Lympne v DPP* [2018] EWHC 100 (Admin), the High Court (in the context of applications for judicial review and case stated appeals) has relied on *Murphy* to restrict former defendants to costs under the criminal regime when they have succeeded on appeal.

9. Reference is made to *London Borough of Barking and Dagenham v Argos Limited* [2022] EWHC 2466 (Admin). A local authority applied for a summons against Argos, initiating a prosecution for the offence of selling a knife to a person under 18 years of age. A District Judge declined to issue the summons on the grounds that the prosecutor had not sufficiently demonstrated that the application was made in time and that the summons was therefore a nullity. Both parties appealed by way of case stated; the prosecutor against the finding of nullity and Argos against a decision of the District Judge to decline jurisdiction to hear an abuse of process argument. Argos also made an application for judicial review in connection with this alleged abuse, asking the High Court to determine this application itself in its favour.

10. The appeal by way of case stated brought by Argos was conceded by the prosecutor prior to the hearing in the Divisional Court. However, the prosecutor's appeal and the application for judicial review were fully argued, with the prosecutor succeeding on both, and obtaining an order that the case should be remitted to the magistrates' court for trial. The prosecutor did not, however, apply for a costs order, taking the view that the *Murphy* principle as applied in *Lord Howard of Lympne* meant that the criminal costs regime applied and that the Divisional Court had no power to award costs against Argos. Instead, the prosecutor asked the Divisional Court to express a view that Argos ought to pay the costs, if convicted, of the appeal and claim for judicial review, with the intention of relying on this view in an application in due course to the magistrates' court pursuant to s.18 of the 1985 Act. Argos on the other hand argued that it followed from *Lord Howard of Lympne* that the magistrates' court would not be able to take account of costs incurred by the prosecutor in the Divisional Court proceedings in any order under s.18 of the 1985 Act.

11. At para.3 of the court's judgment, Edis LJ said: "The parties are agreed that the criminal, and not civil, costs regime applies. We are content to accept that position." At para.12, he continued:

> "The prosecutor is not seeking an order for costs, merely indicating that it intends to seek one in the event that Argos is convicted and seeking some observations from this court which may help it in that later process. We should, however, resolve

some of the issues which have been raised by Argos in its submissions to us, because this explains why we simply note the prosecutor's position and make some limited comments about these proceedings.

13. Paragraph 5 of the Defence submissions on costs states:

"However, properly analysed, it is contended that *Lord Howard of Lympe* goes further than this and acts as a barrier to the prosecutor recovering its costs of these proceedings against Argos. In *Lord Howard of Lympe*, a successful appellant (defendant in the criminal proceedings) could not recover his costs of an appeal by way of case stated because the criminal costs regime (Part II Prosecution of Offences Act 1985), as opposed to the civil costs regime (s.28 Senior Courts Act 1981), was held to be applicable."

14. We do not accept this. The Divisional Court in that case decided that a defendant's costs were not recoverable because part of the criminal costs regime, paragraph 2(2) of Schedule 7 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012, removed any entitlement of a defendant to legal costs. Beyond its finding that the criminal costs regime applies to these proceedings, it is therefore irrelevant. We are not concerned with a defendant's ability to recover costs from central funds, but with a prosecutor's ability to recover costs from a convicted defendant. There are no restrictions on that discretion under s.18 Prosecution of Offences Act 1985. The CrimPR do contain a "general rule" which governs the exercise of the discretion, but not in a way which is helpful to Argos. CrimPR Rule 4.5(3)(b) says "the general rule is that the court must make an order if it is satisfied that the defendant can pay." Argos can pay.

15. Section 18 of the Prosecution of Offences Act provides that the magistrates may make whatever order they find "just and reasonable". The ambit of the section is not limited to matters which have taken place before those magistrates."

12. In this case, the appellant has submitted that if the position adopted by the parties and accepted by the court in *Argos* is correct, the criminal regime applies. Since this regime does not contain any provision for costs against an 'accused', it is said that no costs order can be made against this appellant. *Argos* is a decision of a Divisional Court and should, it is submitted, be followed. It is however acknowledged that the point accepted by the court in *Argos* was conceded, not argued. If *Argos* is wrong and the civil regime may nonetheless be applied in this case, the appellant says that the court should exercise the discretion conferred by the civil regime as though it were making an order pursuant to s.18 of the 1985 Act, for the following reasons:

(1) Whilst it is right that Civil Procedure Rule (CPR) 44.2(2)(a) provides that the 'general rule' is that costs follow the event, CPR rule 44.2(2)(b) provides that 'the court may make a different order.'

(2) There is no doubt that, save in exceptional circumstances, a successful defendant/appellant in a case stated appeal in a criminal cause or matter would not be able to obtain costs from the respondent. CPR rule 1.1(2)(a) enjoins the court to deal with the parties on an equal footing. For this reason, and as a matter of basic principle, the court should not without justification impose obligations on an unsuccessful defendant/appellant that it would not impose on an unsuccessful prosecutor/respondent.

(3) CPR rule 44.4(3)(c) requires the court to have regard to the importance of the matter to all parties. An appellant/defendant in a criminal cause or matter may well be arguing questions that have a bearing on his liberty, a matter of considerable importance to him. To apply without modification the usual civil regime for costs would be to erect a significant barrier to defendants who wish to argue that they have been wrongly deprived of their liberty. This point may be of particular importance where, as here, there is no alternative remedy for the 'accused' of appeal to the Crown Court.

(4) Only by applying the criminal scheme, or an analogue of it, can the court take into account wider considerations that are of relevance in criminal, but not civil, justice. These include the importance of not unnecessarily impeding an offender's rehabilitation, and of not 'setting an offender up to fail' by imposing orders that cannot realistically be complied with.

13. Thus, if we should decide that there is power to order the appellant to pay the respondent's costs, the appellant submits that the court should exercise its discretion as to costs in conformance with the scheme in criminal cases, and have regard to the appellant's means. The appellant submits that in May 2018, a confiscation order was made in the available amount which was the sum total of the appellant's assets. Interest has since accrued on the outstanding amount and his assets have not increased in value beyond this. The appellant is now in custody and effectively has no means. In any event, it is said that the costs claimed are excessive. In particular, £40,000 plus VAT is too much for counsel for one ineffective and one day-long hearing, with a relatively short skeleton argument.

14. The respondent submits that the court has a discretion to make an order that the appellant pay its costs pursuant to s.28A(3) of the Senior Courts Act 1981. In addition, rule 44.2(2)(a) of the CPR provides that the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. The respondent submits that the absence of any alternative power of the court to make an order for the respondent's costs does not displace the power of the court to make an order for costs inter partes pursuant to s.28A(3). The respondent accepts that the exercise of the discretion under s.28A(3) encompasses consideration of the appellant's means, acknowledging that CPR rule 44.2(4) provides that in deciding what order (if any) to make about costs, the court will have regard to all the circumstances.

15. As to the figure claimed, the respondent submits that the appellant has significant means available to him and that the appellant's own costs exceed the amount of costs incurred by the respondent which, it is argued, are reasonable in all the circumstances.

Discussion and conclusions

16. *Murphy* was concerned with the costs of a person who had been a defendant in criminal proceedings, including the costs of proceedings in the Divisional Court. In such a case, there are indeed two different possible regimes for payment, with the scheme pursuant to s.28A(3) being potentially much more generous than the scheme under the Prosecution of Offences Act because it allows for the possibility that legal costs can be recovered. At para.14 of its judgment, the court in *Murphy* noted that neither party had been able to make any submissions as to the criteria to be applied for the purpose of deciding whether to apply the civil costs regime or the criminal costs regime. It was in those circumstances that the court concluded that save in exceptional circumstances, prosecutions and appeals in criminal cases should be subject to the criminal costs regime.

17. The instant case concerned whether a term of imprisonment should be imposed in default of payment of a confiscation order. We are satisfied that the proceedings are properly described as criminal in nature. In *Government of the United States of America v Montgomery* [2001] UKHL 3, the House of Lords concluded that an order made in the High Court under Part VI of the Criminal Justice Act 1988 restraining assets in this jurisdiction, in aid of enforcement of a confiscation order obtained in the United States following a conviction for fraud, was not a criminal cause or matter. Lord Hoffmann, with whom all the other members of the committee agreed, observed that ordinarily the enforcement of an order obtained in criminal proceedings would be considered part and parcel of those proceedings, and thus a criminal cause or matter. However, he concluded that enforcement proceedings under the 1988 Act were essentially civil in character. He considered it significant that the powers were conferred upon the High Court rather than the Crown Court or magistrates' court. The powers either mirrored or were expressed by reference to the civil jurisdiction for recovery of debt and determination of proprietary disputes. However, the order appealed in the present case was an order in the magistrates' court for committal to prison following the failure to meet a confiscation order made in the Crown Court. The proceedings are therefore criminal in nature.

18. In *Darroch v Football Association Premier League Limited* [2014] EWHC 4184 (Admin), the approach adopted in *Murphy*, and the test of exceptionality, was followed by a Divisional Court, with the court concluding that there was nothing exceptional about the case on an appeal by way of case stated and that the criminal costs scheme would therefore apply.

19. The unsuccessful applicant then appealed against the refusal of his application for a civil costs order pursuant to s.51 of the Senior Courts Act 1981 against a non-party in relation to the proceedings in the magistrate's court. The case is reported at [2017] 4 WLR 6. The court identified an issue as to whether it had jurisdiction to hear the appeal and held that it did not. Burnett LJ, with whom Hallett LJ and Sir Brian Leveson P agreed, went on to make some observations about *Murphy* in a part of his judgment which he recognised as being obiter:

> "25. Having accepted that there was a power to make the order sought, the Lord Justice formulated a test of exceptionality which governed its exercise. I have come to the conclusion, in

> respectful disagreement with Stanley Burton LJ, that the Divisional Court has no power under section 51 of the 1981 Act to make the order for which the appellants contended in that case in respect of the costs below.
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> 26. In my judgment section 51 of the 1981 Act does not empower the High Court, on an appeal by way of case stated, or a claim for judicial review that seeks to quash convictions, to make a civil costs order in respect of costs incurred in the underlying criminal proceedings in the Crown Court or magistrates' court."

20. In the *Lord Howard* case, on an appeal by way of case stated, a Divisional Court again adopted the *Murphy* approach when considering an application for costs on behalf on an appellant who had successfully appealed against his conviction in the magistrates' court. The case fell under the criminal costs regime, there were no exceptional circumstances and there was no basis for awarding the appellant his costs.

21. The authorities were considered in *R(Bahbahani) v Ealing Magistrates Court* [2019] EWHC 1385 (Admin) on an application for costs on behalf of a person convicted in the magistrates' court. At para.100 of its judgment, the court said:

> "The approach laid down in Murphy [2013] 1 Costs LR 16 has been followed by the Divisional Court on at least two occasions. The decision of the Court of Appeal in Darroch CA [2017] 4 WLR 6 is of course binding on us, and we would not follow the previous decisions of the Divisional Court if the decision in Darroch CA required a different approach. However, the judgments of the Court of Appeal in Darroch CA did not include any explicit disapproval of the principle that the criminal costs scheme should be applied (within its proper limits) unless there are exceptional circumstances making it appropriate for the High Court to make an award under the civil costs scheme. Nor, in our view, is any disapproval of that principle to be inferred from the reasons given by the Court of Appeal for its decision on the issue of jurisdiction. Moreover, the decision in Darroch CA makes it clear that in this context, there is no necessary distinction to be drawn between an appeal by way of case stated and a claim for judicial review which seeks the quashing of a criminal conviction. We are not persuaded by Mr Mably's submissions that the principle set out in Murphy is wrong or that we should not follow it. This is a claim for judicial review in a criminal cause or matter, and the criminal costs scheme should apply unless there are exceptional reasons to take a different course."

22. The last case to which we refer is the *Argos* case which concerned the costs of the prosecutor. The appellant prosecutor was prepared to accept that it could not recover its costs in the proceedings before the Divisional Court by an order of the Divisional Court because of the decision in *Lord Howard's* case. However, the court in *Argos* held that beyond its finding that the criminal costs regime applied to the proceedings, the

decision in *Lord Howard's* case was "irrelevant." The prosecutor in the *Argos* case was not seeking an order for costs and the court merely noted its position.

23. We are not concerned with an application for costs on behalf of a person who has been convicted in the magistrates' court and in respect of whom there are two possible regimes for costs. We are not concerned with the *Murphy* test of exceptionality because there was only one scheme available here to the prosecutor and that is pursuant to s.28A(3). In our judgment, that is the power which is available in this case to make an order for costs against the appellant. The fact that there is no power at all under the Prosecution of Offences Act does not mean that the power under s.28A(3) cannot be exercised in this case if we think it appropriate to do so. It is the very absence of a power under the Prosecution of Offences Act which brings s.28A(3) into play where prosecution costs are concerned. The fact too that Parliament has legislated specifically to prevent the recovery of an accused's legal costs by s.16A of the 1985 Act cannot serve to limit the scope of s.28A(3) as it applies to prosecution costs. There is nothing in the language of s.16A to suggest that it was intended to affect prosecution costs in any way. As to the importance of the matter to the appellant, points affecting the liberty of the subject can be advanced not only in the Divisional Court, but also in the magistrates' court, Crown Court and Court of Appeal, in each of which there is power to order an individual to pay prosecution costs. It may well be that an order to pay prosecution costs in the Divisional Court would in practice be the exception rather than the rule because many defendants would not be in a position to pay them. However, this does not preclude the power to make such an order in an appropriate case.

24. Accordingly, we are satisfied that there is power to order the appellant to pay the respondent's costs. We are also satisfied, subject to the issues of means and amount, that it is appropriate to make such an order. The appellant was unsuccessful and put the respondent to the expense of resisting the appeal. The case follows a number of unsuccessful attempts by the appellant to settle the matter at a lower figure than the court had ordered. A large amount of time was wasted and expense incurred in the process. If he has the means to pay, in all the circumstances here, there is no reason why the appellant should be insulated from any liability to pay the successful party's costs.

25. In this case, there is no satisfactory basis for the assertion that the appellant has effectively no means. In addition to his assets in real property, it is clear that the appellant has the means to fund his own legal costs in these proceedings. His solicitor confirmed in the Statement of Costs Form N260, dated 23 June 2022, that the appellant had incurred the costs personally. There is no explanation of what has happened to rental income from any of the properties. None of the outstanding amount has been paid since the imposition of the order. It is well-established that it is for an offender to put forward such information as will enable the court to assess what he can reasonably afford to pay. Unless he does so, the court is entitled to draw reasonable inferences from all the circumstances of the case – see, for example, *R v North Allerton Magistrates' Court ex p. Dove* [2000] 1 Cr.App.R. (S.) 136.

26. The appellant's own costs are slightly in excess of the figure claimed by the respondent. The appellant's costs include the costs incurred at two bail hearings and for the attendance of Leading and junior Counsel. The respondent instructed Leading Counsel acting alone. It is a matter for the respondent to decide what legal fees it is prepared to

pay. We have to decide how much it should be permitted to recover from the appellant and how much he is able to pay. We assess that figure at £25,000, inclusive of VAT.