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COURT OF APPEAL

181.

26th September, 1997.

Before: The Rt. Hon. The Lord Carlisle, Q.C., (President)
Miss E. Gloster, Q.C., and
The Hon. M.J. Beloff, Q.C.

IN THE MATTER OF the Appeals against Conviction and Sentence of FRANCIS WILFRED JOSEPH DOWSE and against Conviction of PHILLIP HEYS, heard on 7th, 8th, and 11th July, 1997. (*see Jersey Unreported Judgment of 11th July, 1997.*)

Applications by the Appellants for an Order under Article 3(2) of the Costs in Criminal Cases (Jersey) Law, 1961.

Advocate S.J. Habin and Advocate C.J. Scholefield for F.W.J. Dowse.
Advocate J.C. Gollop and Advocate H. Tibbo for P. Heys.
The Solicitor General

JUDGMENT

THE PRESIDENT: On 27th December, 1996, before the Inferior Number of the Royal Court, Francis William Joseph Dowse was convicted on an indictment containing two counts: firstly, that of being knowingly concerned in the unlawful importation of a dangerous drug; and, secondly, being in possession of a dangerous drug, namely heroin, with intent to supply.

On the same occasion Phillip Heys appeared before the Court on one count: that of being knowingly concerned in the unlawful importation of the heroin and he also was convicted.

On 20th January, 1997, before the Superior Number of the Royal Court, the appellant, Dowse, was sentenced to a term of 13½ years' imprisonment, concurrent on each count, and the appellant, Heys, to one of 12½ years. Both defendants appealed to the Court of Appeal and on 11th July, 1997, after a three day hearing, the Court of Appeal allowed the appeal against conviction of Francis Dowse on count 1 of the indictment, namely being concerned in the importation of the heroin, dismissed the appeal against conviction on count 3 relating to the possession of the heroin, but allowed the appeal so far as sentence was concerned on

that count and reduced the sentence from one of 13½ years to 12 years.

So far as the appellant, Phillip Heys, was concerned, the Court allowed the appeal against conviction and quashed the conviction on the one count on which he had been convicted.

The appeal was allowed due to the failure of the prosecution to disclose to the defence evidence which was material to the issue which led to the convictions of the two appellants. At the end of his judgment, Mr. Harman giving the judgment of the Court of Appeal, said at lines 35 to 40 on p.8 of the judgment of the Court of Appeal:

> *"We are also satisfied that the consequent irregularity was the cause of a substantial miscarriage of justice. We have therefore concluded that the appeals must be allowed on counts one and two and the convictions on those counts quashed".*

At the time that the judgment was given, no order was made as to the costs of the appeal. Both appellants were legally aided. Accordingly, we were told that, according to normal practice, no order having been made under Article 3(2), the record of the Court shows that by Article 3(3)(a) of the Costs in Criminal Cases (Jersey) Law, 1961, the fees and expenses of the appellants' advocates, after taxation by the Judicial Greffier, should be defrayed out of public funds.

Both the appellants were in fact represented by different advocates, both at the trial before the Inferior Court and again in the Court of Appeal. Both of the appellants now make application in respect of all four of the advocates who were involved in this case - namely the two advocates involved in the court of trial and the two in the Court of Appeal - that an order should be made in relation to their costs under Article 3(2) of the Costs in Criminal Cases (Jersey) Law, 1961.

The power of the Court of Appeal to grant costs is set out in Article 3 in the Costs in Criminal Cases (Jersey) Law, 1961. The relevant part is Article 3(2), which reads as follows:

> *"The Court of Appeal may, when it allows an appeal against a conviction, 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 in the prosecution of his appeal, including any proceedings preliminary or incidental thereto, or in carrying on his defence".*

And by sub-paragraph (3), it states:

"Whether or not the court makes an order under the provisions of this Article, there shall be defrayed out of public funds, up to an amount allowed by the court -

(a) where, by reason of the insufficiency of the appellant's means, an advocate has been assigned to him, the fees and expenses of the advocate".

As I say, in this case, the order of the Court provided for the payment out of public funds through Article 3(3)(a), no order having been made by the Court of Appeal under Article 3(2).

The importance of the point is this: if the costs are limited to those which are provided to be paid for out of public funds under Article 3(3)(a), then they are paid on a scale which was fixed in 1990 and is considerably lower than that which would apply if the Court of Appeal makes an order under Article 3(2).

The Court will deal first with the situation of the appellant, Dowse, in the Court of Appeal. He was acquitted of the charge of importation but his conviction was upheld on the charge of possession.

It was originally argued before this Court by the Solicitor General that the effect of Article 3 was that the Court of Appeal had no power to make any order under 3(2) unless the appellant were successful on his appeal on each count on which the appeal was taken.

On reflection the Solicitor General conceded that the words at paragraph (2) of Article 3 include a case in which an appellant has appealed against more than one conviction and the Court allows the appeal against one or some but not all of the convictions.

In the opinion of this Court, not only was that concession wholly proper, but it is clearly the correct interpretation of the wording of Article 3(2). The Court is not inhibited from making an award for costs under that Article merely because the appellant has not succeeded on all the counts against which appeals have been made.

That being so, we are satisfied that we have the power to make an order, so far as Mr. Dowse is concerned. The discretion to make such an order is absolute in relation to any court on which the appeal has been allowed. The principles which should guide the Court in the exercise of that discretion are, we are told, similar to the principles which apply in the English Courts and are clearly set out in the case of AG -v- Bouchard (1989) JLR 350, where it is said that *"defence costs should normally be paid out of public funds unless there were strong reasons indicating otherwise".*

In this case, the appellant, Dowse, clearly won his appeal on the count of importation which was the count on which argument took place. It is true that his conviction on the charge of possession was upheld, but we have no doubt in our own mind, that had application been made to the Court of Appeal at the time when judgment was given for an order under Article 3(2), that the Court would have given such an order and we accordingly make an order under Article 3(2) so far as the costs of the appeal are concerned, so far as they relate to that count on which the conviction was quashed.

I now turn to the situation of Phillip Heys in the Court of Appeal. Here, again, a totally similar situation arises. The appeal was allowed on the one count on which he faced a charge on the basis that the Court had found that an irregularity had led to a substantial miscarriage of justice. Again, we have no doubt that, had an application been made at the time for an order under Article 3(2) for the costs of his appeal to be paid out of public funds that application would have been granted and we make such an order in his case.

I next turn to the question of what is the right line for this Court to take as regards costs incurred by both appellants so far as their trial before the Royal Court is concerned, and any other matters which could be said to be proceedings preliminary to the appeal, or incurred in carrying out their defence.

The Solicitor General, whilst making the concession as regards Article 3, claimed that we ought to consider our powers, so far as granting the costs of any earlier hearing is concerned, as similar to the powers contained in Article 2 for the granting of costs by the Royal Court. She submitted that the Royal Court would have no power to make any order as to costs unless the accused was discharged wholly from the prosecution or acquitted on all of the counts on which he faced trial. We do not consider that that is a correct interpretation of that Article, but in any event the application before this Court is not under Article 2; it is under Article 3, and it is Article 3(2) which specifically provides that we have power, not only to order costs to compensate the appellant for the expenses incurred in the prosecution of his appeal, but also those incurred and included in "any proceedings preliminary or incidental thereto or in carrying out his defence".

It is a wide discretion and we have to look at the overall situation and decide, in exercising that discretion, whether it is right to make such an order.

We are satisfied, so far as Dowse is concerned, that in view of the finding of the Court - and I repeat that a substantial miscarriage of justice had occurred - that the order that we make under Article 3(2) should also include any proceedings preliminary to the appeal, any proceedings incidental thereto, or in carrying

out his defence and we make such an order. These orders of course, so far as Dowse is concerned, relate purely to those costs which can be identified as being related to the charge of importation on which the Court convicted him and do not cover any costs incurred in his defence so far as the charge of possession is concerned.

The Court would add - and these are matters which will have to be identified by the Greffier - that we saw no merit in Mr. Scholefield's argument that the costs involved in the *voir dire* were costs relating specifically to the count of importation rather than to the count of possession.

So far as the appellant, Heys, is concerned, it was submitted to this Court that we should not grant him his costs other than those of the appeal because he had in some way brought the prosecution upon himself and had made the case appear stronger than it otherwise was - matters which have been clearly identified as matters which the Court in its discretion should take into account in deciding whether to make such an award. However, again, so far as Heys is concerned, we have to look at what happened in this case. The situation is that the count against him was quashed in the Court of Appeal because the material irregularity which led to the substantial miscarriage of justice related to the failure of the prosecution to prove the importation. In those circumstances we are satisfied that Heys also should be paid out of public funds his costs sufficient to compensate for the proceedings at the Royal Court as well as in the Court of Appeal. Accordingly we make orders under Article 3(2) in relation to both appellants. In the case of Dowse relating to the count on which he was acquitted and Heys, generally, on the one count on which he appeared.

The only final matter that we have to consider is that each of the advocates appearing in this Court have asked also that we should make an order for the payment of their costs out of public funds on the basis that this application was incidental to the granting of the appeal.

We are told that it has become normal practice that no application is made for costs at the end of the hearing of the Court of Appeal. We do not understand why or how that practice has arisen. It is quite clear that the power under Article 3(2) in the Court of Appeal to make such an order is a discretionary one and we wish to make it clear that before the Court has the power to exercise that discretion clearly an application to the Court should be made, and we are absolutely satisfied that the right time for making that application is at the end of the hearing of the appeal, as the Court that has heard the appeal is conversant with all the facts when deciding on that application. We must make it clear that in future the Court of Appeal will expect applications for costs to be made at that stage and,

indeed, if applications for costs are not made at that stage, but are made at a later stage, that would be one of the matters which the Court of Appeal could take into account in deciding whether in its discretion to make an order for the award of costs out of public funds.

However, on this occasion, as I have said, we have been told that the procedure followed was something which had become the usual practice and, since the hearing of this application has given the Court of Appeal an opportunity to clarify the correct interpretation of Article 3 and also to clarify the procedure by which applications for costs in future should be made, we have decided in the circumstances of this case that it would be appropriate to treat this application as an application incidental to the hearing of the appeal and to grant to both appellants, on behalf of both of their advocates who appeared in this Court, namely all four advocates, a reasonable sum to compensate them for their appearance in this application to be paid out of public funds and that is the order that we make.

Authorities

Practice Note [1991] 2 All ER 924-931.

4 Halsbury 12 (1994) Re-issue: pp.954-964: Costs in Criminal Cases.

Costs in Criminal Cases (Jersey) Law, 1961: Article 3(2), 3(3)(a).

AG -v- Bouchard (1989) JLR 350.

In re Shoestring (Jersey) Ltd (30th January, 1996) Unreported Judgment of the Magistrate's Court.

AG -v- Santos Costa (1996) JLR.