

R v CD

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Supreme Court Hamilton
15 August 1975
Somers J

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Criminal law – Costs – Defendant found not guilty – Meaning of expression “having regard to” – Defendant’s behaviour relevant to justifying and not to disqualifying an award – Costs in Criminal Cases Act 1967, s 5 (1) and (2) (g). 15

The defendant had been arraigned upon an indictment on one count of theft as a servant. She pleaded not guilty and was acquitted. The accused sought an order that costs be awarded to her. 20

Held, awarding costs in the sum of \$150:

1 The expression “shall have regard to” contained in s 5 (2) of the Costs in Criminal Cases Act 1967 is not synonymous with the expression “shall take into account” (see p 437 line 5). 25

2 The behaviour of the defendant referred to in para (g) of the said s 5 (2) is concerned with behaviour justifying an award and not with behaviour disqualifying an award (see p 438 line 5).

R v AB [1974] 2 NZLR 425, 432, followed. 30

Note

Refer 4 Abridgement 315.

Motion

This was a motion for an order for costs against the Crown pursuant to s 5 of the Costs in Criminal Cases Act 1967. 35

J G Ross for the accused in support.

V R Jamieson for the Crown to oppose. 40

SOMERS J. The accused was arraigned upon an indictment containing one count of theft as a servant. That count covered a period between June 1971 and July 1973. Upon her arraignment, she pleaded not guilty. She was acquitted. The trial ended after the luncheon adjournment on the third day. 45
Mr Ross of counsel now moves for an order that costs be awarded to her.

The matter is governed by s 5 of the Costs in Criminal Cases Act 1967 together with the Costs in Criminal Cases Regulations 1970. Section 5 has recently been considered by Chilwell J in *R v AB* [1974] 2 NZLR 425 for whose illuminating history of the earlier enactments and practice of the court I am indebted. I accept his conclusions on s 5 (3), (4) and (5). 50

Section 5 (1) provides that where any defendant is acquitted of an offence, the court may order that he be paid such sum as it thinks just and reasonable towards the cost of his defence. Section 5 (2) provides that

“Without limiting or affecting the Court’s discretion” under subs (1) “it is hereby declared that the Court, in deciding whether to grant costs and the amount of any costs granted, shall have regard to all relevant circumstances and in particular (where appropriate)”, to seven considerations.

5 The first question (not I think canvassed before Chilwell J), is what is meant by the words “shall have regard to”. I do not think they are synonymous with “shall take into account”. If the appropriate matters had to be taken into account, they must necessarily in my view affect the discretion under s 5 (1) and it is clear from s 5 (2) that the matters to be regarded are not to limit or affect that discretion. I think the legislative intent is that the court has a complete discretion but that the seven matters, or as many as are appropriate, are to be considered. In any particular case, all or any of the appropriate matters may be rejected or given such weight as the case suggests is suitable. I propose to examine the matter on that footing.

15 “(a) Whether the prosecution acted in good faith in bringing and continuing the proceedings”.

Although the contrary is suggested, I am of the opinion that the prosecution acted in good faith throughout. I do not regard this of any particular significance. Most (perhaps I may be permitted to express the hope, that all) Crown prosecutions are bona fide. Malice may be important: the converse does not seem to me to carry much weight

20 “(b) Whether at the commencement of the proceedings the prosecution had sufficient evidence to support the conviction of the defendant in the absence of contrary evidence”.

25 It was conceded by Mr Ross that such was the case. I think his concession was properly made.

“ (c) Whether the prosecution took proper steps to investigate any matter coming into its hands which suggested that the defendant might not be guilty ”.

30 I think there was no matter of an exculpatory nature which was not investigated properly.

“ (d) Whether generally the investigation into the offence was conducted in a reasonable and proper manner ”.

I think the investigation was so conducted.

35 “ (e) Whether the evidence as a whole would support a finding of guilt but the information was dismissed on a technical point ”.

This paragraph is not appropriate in the circumstances.

40 Pausing at this point, the several factors – (a) to (e) – so far mentioned have reference in a general way to the propriety, conduct and strength of the prosecution case. The inference I draw is that the legislature has in mind that affirmative answers may tend to inhibit or weigh against an award of costs or diminish the quantum of the same.

45 “ (f) Whether the information was dismissed because the defendant established (either by the evidence of witnesses called by him or by the cross-examination of witnesses for the prosecution or otherwise) that he was not guilty ”.

50 To use the statutory terminology, I do not think this paragraph is appropriate in the case of an accused acquitted in a trial upon indictment. The words “information was dismissed” are not apposite to a verdict of not guilty by a jury in such a trial. I think they are used in their technical sense. They are expressly so used in s 5 (1) and s 5 (4) in contrast respectively to “acquitted of an offence” and “acquitted”. But apart from that, I do not think it often possible to deduce the reasons which led a jury to an acquittal. No equation can be formulated from an affirmative answer to para (b) plus an acquittal for

there is the further imponderable that the jury may not have accepted the prosecution witnesses.

“(g) Whether the behaviour of the defendant in relation to the acts or omissions on which the charge was based and to the investigation and proceedings was such that a sum should be paid towards the costs of his defence”.

Considering first the acts and omissions on which the charge was based I think that to a large extent, if not wholly, the accused has brought this charge upon her own head by failing to comply with the directions of her employer as to the manner of dealing with moneys paid by clients on account. Had those moneys been placed in the till with the appropriate narrative, no case against the accused could ever have arisen. So far as the investigation and proceedings are concerned, the behaviour of the accused was not open to attack. The answer to the question posed by the word “whether” is no. But para (g) is formulated in a positive way. That is referred to by Chilwell J in *R v AB* [1974] 2 NZLR 425, 432, where he observed that the paragraph is concerned with behaviour justifying an award and not with behaviour disqualifying an award. I agree with that view.

There is in relation to the considerations in s 5 (2) a balance against the applicant. But it is not a conclusive balance. I am required to have regard to all relevant circumstances which include necessarily the acquittal. In the event, for reasons which are largely pragmatic and which, as I think is often the case in the exercise of a judicial discretion, do not succumb to semantic analysis, I come to the view that the accused is entitled to an award of costs but that, in all the circumstances, that award should be less than the maximum prescribed in the regulations which amounts to \$300. I order payment of a sum of \$150 to the accused.

Order accordingly.

Solicitor for the Crown: *Crown Solicitor* (Hamilton).

Solicitors for the accused: *McCaw, Smith & Arcus* (Hamilton).