THE PEOPLE v UPTON (1965) ZR 70 (HC)

HIGH COURT
CHARLES J
1st June 1965

Flynote and Headnote

[1] Criminal Procedure - Costs against complainant - right to hearing:

Costs cannot be awarded against the complainant if he had no opportunity to be heard on this question.

[2] Criminal Procedure - Costs against State - computation of amount:

Costs awarded against the State are not intended to be punitive but rather are designed to compensate the accused for the reasonable costs incurred by him in his defence.

[3] Criminal Procedure - Costs against State - when ordered:

Costs will only be awarded against the State in cases in which it should have been apparent, had the case been investigated properly by the State's agents, that the prosecutor was doomed to failure.

Cases cited:

(1) *Ridge v Baldwin* [1964] AC 40; [1963] 2 All ER 66; [1963] 2 WLR 935.

(2) *R v Highgate Justices, ex parte* Petrou [1954] 1 All ER 406, [1954] WLR 485.

Statute construed:
Criminal Procedure Code (1965, Cap. 7), s. 160 (2).
DPP Chuula, for the people
Cunningham, for the accused

Judgment

Charles J: This case has come under review in respect of an order made by the Subordinate Court (Class II) at Choma against one Besswell Zyambo to pay 100 guineas as costs to the accused following the latter's acquittal on a charge in respect of which Zyambo was the complainant.

The relevant facts, as they appear from the record are as follows: On the 8th February, 1965, the accused appeared before the Subordinate Court (Class II) at Choma to answer to a charge of having used insulting language contrary to section 157A of the Penal Code (Cap. 6), in that he had said to Besswell Zyambo 'You are a stupid fool'. Besswell Zyambo had previously sworn a complaint, apparently to that effect, before a magistrate against the accused. The charge in respect of which the accused appeared - unrepresented on the 8th February, 1965 - was signed by one Monjala as Public Prosecutor. The accused pleaded not guilty to the charge and the hearing was adjourned until the 19th February, 1965, owing to the absence of the complainant. On the latter date a Chief Inspector of Police appeared as prosecutor and Mr Cunningham of counsel appeared for the accused. The complainant gave evidence in support of the charge, and he was cross - examined by Mr Cunningham to such effect that even from the record he appears to have acted in the incident out of which the charge arose as an irresponsible trouble - maker. After the complainant had completed his evidence, the prosecutor obtained an adjournment for ten minutes after which he stated that he offered no further evidence and that he applied for leave to withdraw the charge under section 184 of the Criminal Procedure Code (Cap. 7). The court agreed to the withdrawal and the accused was acquitted. Mr Cunningham then asked for 100 guineas as costs against the complainant on the ground that he had been frivolous and irresponsible in making the complaint. The prosecutor stated that he did not oppose the application as the amount asked was reasonable having regard to the cost of employing a lawyer and the time spent in dealing with the case. The complainant himself does not appear to have been given the opportunity of being heard on the question of costs. The court made the order requested.

The jurisdiction of a court to make an order for costs in favour of an acquitted or discharged accused is conferred by section 160 (2) of the Criminal Procedure Code, which is as follows:

' It shall be lawful for a Judge or a magistrate who acquits or discharges a person accused of an offence to order that such reasonable costs, as to such Judge or magistrate may seem fit, be paid to such person and such costs

shall be paid, where the prosecution was in the charge of a public prosecutor, from the general revenues of the Republic, and in any other case by the person by or on behalf of whom the prosecution was instituted:
Provided that no such order shall be made if the Judge or magistrate shall consider that there were reasonable grounds for making the complaint.'

It is clear that the jurisdiction under the section cannot be exercised if the court considers that there were reasonable grounds for making the complaint, that is the original allegation that the accused had committed the offence charged (see Criminal Procedure Code, section 2). It is also clear that when the jurisdiction is exercised it must be exercised against the State, and not against the complainant, that is the maker of the original allegation, if the prosecution was in the charge of a public prosecutor. If, on the other hand, the prosecution was not in the charge of a public prosecutor, it must be exercised against the complainant. In short, the court has no discretion with regard to whom it will exercise its jurisdiction.
I see no reason for impeaching the conclusion which the magistrate must have reached in order to have jurisdiction under the section to make an award of costs in favour of the accused, namely that the complaint was made without reasonable grounds. Two questions, however, have presented themselves on review:

(1) Should the order have been made against the State instead of the complainant?

(2) Was the amount of the order reasonable?

In respect of these two questions both the State and the accused were given the opportunity to make representations in writing. The Director of Public Prosecutions has simply replied on behalf of the State that he would welcome a variation of the order both by having it made against the State and by having it reduced in amount. Mr Cunningham has replied on behalf of the accused. Disregarding a lot of what is hearsay only, and which does not relate to any evidence contained in the record, his submissions are: it is not known that the Chief Inspector of Police, who prosecuted on the second day of the hearing, could be said to have been acting in accordance with the provisions of section 79 of the Criminal Procedure Code; the prosecution was instituted by the complainant when he made his sworn complaint and it would be unfair, in those circumstances, to mulct the State in costs; the amount ordered as costs was proper as a partial reimbursement of the costs which the appellant had incurred and as a deterrent against the making of frivolous complaints in future; and that, while the court was entitled to have regard to the scale of costs allowed in civil cases as a guide, it was not bound by that scale.
It is quite clear that the Chief Inspector who appeared in this case was a public prosecutor. (*See* Appendix 16, page 6, Volume IX, Laws of Zambia.) [*Editor* - In the 1965 Edition of the Laws of Zambia, *see* Appendix 16, page 6, Volume X.] It must be presumed, moreover, that it was in his capacity as public prosecutor that he did appear, there being no record in the proceedings that he either sought or was granted permission to appear as representing the complainant. Further, it would be inconsistent with his duty to have appeared in any other capacity. Not only did the Chief Inspector appear at the hearing but he conducted the prosecution. As a result, and having regard to sections 80 and 81 of the Criminal Procedure Code, he, as public prosecutor, assumed the charge or control of the prosecution, notwithstanding that it originated from a private complaint, and the order for costs against the complainant is a nullity as having been made without jurisdiction.
That result is not avoided, in my judgment, by the purported withdrawal of the charge under section 184 of the Criminal Procedure Code. That section is in terms which enables the actual complainant, as distinct from a public prosecutor, to withdraw his complaint. Whether it can be construed as applying to a public prosecutor, particularly having regard to the public prosecutor having an express power of withdrawal under section 81, appears very doubtful. It is unnecessary, however, to answer that question here. If section 184 can be so construed, then the application to withdraw was another, and the final act of the public prosecutor while in charge of the prosecution. If the section cannot be so construed, the application to withdraw was a nullity, since the Chief Inspector could not surrender charge of the prosecution and assume the role of representative of the complainant. Such a nullity, however, would not affect the validity of the acquittal, as,

with no evidence other than the complainant's obviously unsatisfactory evidence having been offered, the court was bound to acquit under section 189.
[1] The order for costs against the complainant was a nullity on another ground, namely that it was made without the complainant having been given an opportunity to be heard in respect of it.

CHARLES J
As already indicated, the opportunity which was given to the public prosecutor to be heard was in right of the State only, and he could not represent the complainant on the question of costs any more than on the conduct of the prosecution. (As to failure to give a person an opportunity to be heard before an order is made against him nullifying the order, *see Ridge v Baldwin* [1964] AC 40, [1963] 2 All ER 66; [1963] 2 WLR 935, H.L.; *R v The Attorney-General for Northern Rhodesia and the Ministry of Labour and Mines for Northern Rhodesia, ex parte* Allen, Unreported.)
The question then arises whether an order for costs against the State should be substituted for the order against the complainant. In considering that question it is necessary to bear in mind that, while the amount awarded as costs should be assessed on the same basis whether the award is made against the State or against a private complainant, the power to award costs against the State in a criminal prosecution is rarely used. The reason is that it is the Executive's duty to bring to the appropriate courts for judicial determination all accusations of crime which are not apparently frivolous or vexatious or unsupported by credible evidence unless there are sound reasons of public policy, as distinct from considerations of political partisanship, for not so doing; it is not part of the Executive's functions to usurp the functions of the courts. [2] Consequently, the practice has developed that costs will not be awarded against the State merely because a prosecution by its executive agents has failed. What has to appear is that it should have been apparent that, had the case been investigated properly by those agents at the outset, the prosecution was doomed to failure. The practice undoubtedly works hardship but I think that it has passed beyond the power of the courts to change it, and if a change is to be made it must be by the Legislature.
This case, however, appears to me to be one in which costs can be awarded against the State without departing from the practice, and should be so awarded. It is apparent from the record itself that the complainant was an unreliable witness, and it seems to me that had the police inquired more fully into his complaint before accepting it as the basis of prosecution it would have become obvious to them that it was frivolous and not a matter with which they should concern themselves.
[3] The remaining question is whether the substituted order against the State should be in the same amount as that purportedly made against the complainant. As I have said, there is not a more favourable scale in favour of the State than a private complainant - for both the requirement is the same: that the costs awarded shall be reasonable. 'Reasonable costs' may be less than the costs actually incurred by the accused, as they are intended to compensate him to a reasonable extent for the expense which he had to incur for his adequate defence. An accused person is not bound to choose the least expensive counsel, but neither is he entitled, as of course, to have the fees of the most expensive counsel charged against the other party. What has to be taken into account in determining the reasonableness of costs are: the nature of the case and its complexities, or lack of complexities; the standing of the counsel engaged both by itself and in relation to the nature of the case and its complexities; the length of time taken on the hearing; the length of counsel's time taken in attendance on the case and in travelling and loss of other remunerative work which may thereby be incurred by counsel while engaged on the case; and any unusual out of pocket expenses which were likely to be incurred by counsel in travelling from his chambers to court. It must also be remembered that costs are awarded as compensation, not as punishment. (*R v Highgate Justices, ex parte* Petrou [1954] 1 All ER 406, [1954] WLR 485, D.C.)
Here, the case was a simple one which did not involve any legal complexities. On the other hand, the services of an experienced cross - examiner was fully justified, as it was upon effective cross - examination that the destructions of the prosecutor's case was bound to

depend. Further, counsel had to be engaged from outside Choma, and his fees would have to cover 'dead time' in travelling and waiting at the court and the expense of travelling. Having regard to the foregoing matters, it seems to me that a reasonable amount to allow for the accused's costs would be no more than 50 guineas. I shall make the order against the State accordingly.

I make the following order:

(a) The order for costs in the sum of 100 guineas against the complainant is squashed.

(b) In substitution for the order last mentioned, the accused is to be paid 50 guineas costs from and out of the revenues of the Republic, and the same are to be charged accordingly.