

[1999–00 Gib LR 113]**R. v. DIANI**

SUPREME COURT (Schofield, C.J.): March 19th, 1999

Criminal Procedure—costs—acquittal—non-provision for successful defendant’s costs by Criminal Procedure Ordinance, s.222(2) not breach of rights to protection of law, fair hearing and legal representation under Gibraltar Constitution, ss. 1(a), 8(1) and 8(2)(d) or right to fair trial under European Convention on Human Rights, art. 6

The accused appeared before the Supreme Court charged with possession of a controlled drug.

The accused applied for legal aid for the conduct of his defence to a charge of possessing a controlled drug to which he pleaded not guilty. Legal aid was refused on the ground that his means were sufficient to enable him to fund his own defence. (The accused’s attempted appeal to the Court of Appeal from the refusal is reported at 1999–00 Gib LR 107.) He obtained private legal representation and was acquitted by the court. By s.222(2) of the Criminal Procedure Ordinance, he was unable to recover the costs of his defence, since he had been bound by a recognition to answer the indictment. He nevertheless applied for his costs.

He submitted that (a) s.222(2) was in breach of (i) his right to the protection of the law under s.1(a) of the Gibraltar Constitution, since without an order for costs he would be in a worse position than if he had pleaded guilty and been fined, (ii) his right to a fair hearing before the court under s.8(1) of the Constitution and under art. 6 of the European Convention on Human Rights, since he had suffered detriment despite being acquitted of the charges, and (iii) his right to defend himself by a legal representative provided at the public expense under s.8(2)(d) of the Constitution; and (b) costs would have been available to him had he been tried under English practice, and the absence of provision for costs was equivalent to a penal sanction.

The Crown submitted in reply that (a) the accused had not been deprived of the protection of the law simply because he had incurred costs in defending himself; (b) since the accused’s trial had been fairly conducted and resulted in acquittal, there had been no breach of s.8(1) of the Constitution or of art. 6 of the Human Rights Convention; (c) in any event, the Convention had not been adopted as part of Gibraltar law, and s.222(2) was unambiguous; and (d) the fact that legal aid had been unavailable to the accused did not mean he had been denied access to legal representation.

Held, dismissing the application:

(1) The unavailability of costs by virtue of s.222(2) of the Criminal Procedure Ordinance did not offend against s.1(a) of the Constitution. Whilst the court sympathized with the dilemma faced by the accused and others—namely, whether falsely to plead guilty to a minor charge and incur a small financial penalty or to plead not guilty and be put to additional time and expense in defending himself—he had nevertheless benefited from the protection of the law in being fairly tried and acquitted (paras. 5–6).

(2) Similarly, there had been no breach of s.8(1) of the Constitution, which recognized the right to a fair hearing by an impartial court. The different practice in England of awarding a successful defendant his costs out of central funds was irrelevant under the statutory regime in place here, and the absence of provision for costs could not be equated to a penal sanction. Furthermore, the case law of the European Court of Human Rights had shown that the failure to award costs and expenses to the accused would not be regarded as a breach of the Convention, even if it were directly applicable here (paras. 8–11).

(3) The accused's right to legal representation under s.8(2)(d) of the Constitution had been complied with, since he had been ineligible for legal aid and had employed his own counsel. Under s.222(2), he was not entitled to receive his costs of that representation. The case law of the European Court relating to the refusal of legal aid was irrelevant, not only because it was not on point but, more fundamentally, because the provisions of the Convention had not been adopted here and the provisions of s.222(2) of the Criminal Procedure Ordinance were clear and unequivocal. In the absence of any ambiguity, the court was obliged to construe the section according to its plain meaning even if it conflicted with the Convention. The application would be dismissed (paras. 12–17).

Cases cited:

- (1) *Leutscher v. Netherlands* (1996), 24 E.H.R.R. 181, considered.
- (2) *Practice Direction (Costs: Acquittal of Defendant)*, [1981] 1 W.L.R. 1383; [1981] 3 All E.R. 703, not followed.
- (3) *R. v. Home Secy., ex p. Brind*, [1991] 1 A.C. 696; *sub nom. Brind v. Home Secy.*, [1991] 1 All E.R. 720, *dicta* of Lord Bridge of Harwich applied.
- (4) *R. v. Pozo*, 1995–96 Gib LR 214, distinguished.

Legislation construed:

Criminal Procedure Ordinance (1984 Edition), s.222(2): The relevant terms of this sub-section are set out at para. 2.

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p.3602),

Annex 1, s.1(a): The relevant terms of this paragraph are set out at para. 4.

s.8(1): The relevant terms of this sub-section are set out at para. 7.

(2)(d): The relevant terms of this paragraph are set out at para. 12.

European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, November 4th, 1950; UK Treaty Series 71 (1953)), art. 6(1):

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. . .”

D.G. Hughes for the accused;

R.R. Rhoda, Attorney-General, and *K. Warwick* for the Crown.

1 **SCHOFIELD, C.J.:** Edward Diani (“the applicant”) was tried on indictment for an offence of possession of a controlled drug. By a unanimous verdict of the jury on June 9th, 1998 he was acquitted on the indictment.

2 The applicant now applies for his costs, having privately employed his legal representative. In making this application the applicant has to overcome the hurdle of s.222(2) of the Criminal Procedure Ordinance [s.232(2) of the revised Ordinance], which reads:

“Where any person is acquitted on indictment, then, if—

(a) he has not been committed to or detained in custody or bound by recognizance to answer the indictment; or

(b) the indictment is for an offence under the Merchandise Marks Ordinance; or

(c) the indictment is by a private prosecutor for the publication of a defamatory libel or for any corrupt practice within the meaning of the House of Assembly Ordinance,

the Supreme Court may order the prosecutor to pay the whole or any part of the costs incurred in or about the defence, including any proceedings before the examining justices.”

3 The applicant was bound by a recognizance to answer the indictment and it is common ground that he does not qualify under s.222(2) for an award of costs on his acquittal. None the less, it is argued on the applicant’s behalf that s.222(2) offends against the Gibraltar Constitution and art. 6 of the European Convention on Human Rights and that I should award him his costs.

4 Mr. Hughes has cited various provisions of the Gibraltar Constitution

and I shall deal with them in turn. First, he has referred me to s.1(a) of the Constitution, which reads:

“It is hereby recognised and declared that in Gibraltar there have existed and shall continue to exist without discrimination by reason of race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, each and all of the following human rights and fundamental freedoms, namely—

(a) the right of the individual to life, liberty, security of the person and the protection of the law. . .”

The argument is that the applicant will have been denied his constitutional right to the protection of the law if he is denied his costs because he will be in a worse position for having successfully defended himself against an accusation than he would be if he had pleaded guilty.

5 One does indeed have sympathy with the argument that had this innocent person pleaded guilty to this minor charge before the Magistrate he would probably have come away with a small fine rather than with a heavy legal bill. But this is a problem facing many people charged with minor offences even where costs are available to them on an acquittal. Do they incur the time and expense of defending such a charge, and risk unwelcome publicity, or take the easier route of admitting what they consider is a wrongful charge so as to receive a discharge or small fine? Unfortunately, the law has not found a way of legislating for this dilemma.

6 However, it does not mean that a person does not receive the law’s protection because he is put to the time, trouble and expense of defending a charge which may not be proved. Section 1(a) of the Constitution provides a fundamental right to the protection of the law. The applicant has had that protection, has been fairly tried and has been acquitted.

7 The applicant next cites s.8(1) of the Constitution which reads: “If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.” It is argued that the applicant did not have a fair hearing because, despite having been acquitted, he has suffered a detriment as a result of having been charged. The argument goes that a person does not have a fair trial if he suffers a penalty when acquitted.

8 I was referred to Lord Lane, C.J.’s *Practice Direction (Costs: Acquittal of Defendant)* (2), in which it is stated that as a normal practice an acquitted defendant shall receive his costs out of central funds. This

does not assist the applicant in this case because it is a Practice Direction to the Crown Court in England, in which there exists an entirely different statutory regime in relation to the award of costs.

9 I was also referred to the case of *R. v. Pozo* (4), in which Alcantara, A.J. held that the clamping of a motor vehicle and the subsequent imposition of a fee was a penal sanction used to punish road traffic offenders and such sanction must be susceptible to challenge before an independent and impartial court in accordance with the Constitution. To my mind, the imposition of a fee to remove clamps from a motor vehicle, which is clearly a penal sanction, is a far cry from a failure to award costs after a fair trial and this case does not help the applicant.

10 The European Court of Human Rights in the case of *Leutscher v. Netherlands* (1) held that the refusal of a court to order costs and expenses to a defendant following the discontinuation of criminal proceedings does not amount to a penalty or a measure that can be equated to a penalty. I shall say more about the applicability of cases from the European Court later in this judgment. What is clear from this decision is that the European Court would not uphold the applicant in this argument.

11 It is my finding that the applicant received a fair hearing and that his failure to receive his legal costs has not offended s.8(1) of the Constitution. The fact that he does not receive his costs does not affect the fairness of the hearing.

12 I was next referred to s.8(2)(d) of the Gibraltar Constitution, which reads:

“Every person who is charged with a criminal offence—

. . .

(d) shall be permitted to defend himself in person or, at his own expense, by a legal representative of his own choice or, where so prescribed, by a legal representative provided at the public expense. . .”

The applicant was permitted to defend himself by a legal representative of his own choice and did so defend himself successfully. I understand that he applied for legal aid but did not fall within the financial limits for its grant. It was not, therefore, prescribed that he should have a legal representative provided at the public expense. That he is not entitled to receive his costs for privately employing a solicitor does not mean he was denied access to such a solicitor. We must not confuse the question of availability of legal aid with the question of the award of costs following the trial.

13 Mr. Hughes, for the applicant, has referred me to several cases of the European Court of Human Rights, in interpreting the European Convention for the Protection of Human Rights, in which statements have been made about the denial of access to a court because of the unavailability of legal aid.

14 The first point I would make is the one I made in the last paragraph. There is a difference between a denial of access to a court because of the unavailability of legal aid and a denial of an award of costs following such access in a trial.

15 The second point I would make is that these cases, in interpreting the European Convention, which is not part of our domestic legislation, do not assist this court when applying local legislation which is as clear and unequivocal as s.222(2) of the Criminal Procedure Ordinance. This much is clear from the following passage from the speech of Lord Bridge of Harwich in *R. v. Home Secy., ex p. Brind* (3) ([1991] 1 A.C. at 747–748):

“It is accepted, of course, by the applicants that, like any other treaty obligations which have not been embodied in the law by statute, the Convention is not part of the domestic law, that the courts accordingly have no power to enforce Convention rights directly and that, if domestic legislation conflicts with the Convention, the courts must nevertheless enforce it. But it is already well settled that, in construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the Convention, the courts will presume that Parliament intended to legislate in conformity with the Convention, not in conflict with it. Hence, it is submitted, when a statute confers upon an administrative authority a discretion capable of being exercised in a way which infringes any basic human right protected by the Convention, it may similarly be presumed that the legislative intention was that the discretion should be exercised within the limitations which the Convention imposes. I confess that I found considerable persuasive force in this submission. But in the end I have been convinced that the logic of it is flawed. When confronted with a simple choice between two possible interpretations of some specific statutory provision, the presumption whereby the courts prefer that which avoids conflict between our domestic legislation and our international treaty obligations is a mere canon of construction which involves no importation of international law into the domestic field. But where Parliament has conferred on the executive an administrative discretion without indicating the precise limits within which it must be exercised, to presume that it must be exercised within Convention limits would be to go far beyond the resolution of an ambiguity. It would be to

impute to Parliament an intention not only that the executive should exercise the discretion in conformity with the Convention, but also that the domestic courts should enforce that conformity by the importation into domestic administrative law of the text of the Convention and the jurisprudence of the European Court of Human Rights in the interpretation and application of it.”

16 I do not consider that the provisions of s.222(2) of the Criminal Procedure Ordinance offend s.8(2)(d) of the Constitution. The applicant was permitted to defend himself by a legal representative and he did so successfully.

17 It follows from all that I have said above that I do not regard myself as able to award costs to the applicant in view of the provisions of s.222(2) and I deny the application.

Application dismissed.
