[2005–06 Gib LR 34]

ATTORNEY-GENERAL v. SHIMIDZU (BERLLAQUE, Intervenor)

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL (Lord Bingham of Cornhill, Lord Steyn, Lord Scott of Foscote, Lord Rodger of Earlsferry and Lord Carswell): June 28th, 2005

Criminal Procedure—costs—acquittal—non-provision for successful defendant's costs by Criminal Procedure Ordinance, s.232(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 respondent was charged in the Supreme Court with a criminal offence.

The respondent was acquitted by a jury at his trial but his application for costs was refused on the ground that the Criminal Procedure Ordinance, s.232(2) precluded the award of costs of an acquitted defendant, except in rare cases, although he had a liability (under s.232(1)) to reimburse the prosecution if convicted. The respondent sought to challenge the ruling in the Supreme Court, contending that the provisions of s.232 violated the Constitution of Gibraltar. The matter was referred to the Court of Appeal, which held that the absence of a discretion to award costs infringed the constitutional right to a fair trial and directed that the Ordinance be amended accordingly.

On appeal, the Attorney-General submitted that (a) the right to the protection of the law conferred by s.1(a) of the Constitution did not require that the law provide any particular remedies, only that there be procedural fairness in general; (b) the criminal hearing was not rendered unfair, contrary to s.8(1), as a result of the respondent's inability to recover costs after the verdict; (c) s.232, although admittedly inequitable, did not violate the Constitution; (d) equality of arms did not require that the positions of prosecutor and defendant be identical; (e) the right given by s.8(2)(d) to be defended by a legal representative did not encompass a right to recover the expenses involved; and (f) the lack of a discretion to award costs could not be understood as throwing doubt on Mr. Shimidzu's innocence.

The respondent submitted in reply that the lack of a provision to award costs (a) breached his right to the protection of the law under s.1(a); (b) rendered the criminal hearing unfair, contrary to s.8(1); (c) was arbitrary and unjust; (d) breached the principle of equality of arms between

prosecutor and defendant; (e) compromised his right under s.8(2)(d) to be defended by a legal representative; and (f) undermined the presumption of innocence guaranteed by s.8(2)(a).

Held, allowing the appeal and setting aside the order of the Court of Appeal:

(1) The Criminal Procedure Ordinance, s.232 did not violate the Constitution. The right to the protection of the law was a procedural, not a substantive, right and the respondent had not shown that he had suffered any procedural disadvantage as a result of his inability to recover his costs after his acquittal. The Constitution did not require that an acquitted defendant be reimbursed for his costs, nor did the European Convention, art. 6 support the existence of such a right. There was nothing to suggest that, when a defendant exercised his right to legal representation, the expenses incurred must be recoverable. Furthermore, the refusal to award costs to the respondent did not in itself offend against the presumption of innocence (paras. 9–14).

(2) The Constitution contained no power to amend existing laws unless they failed to conform with it. Although there was an unjustifiable unfairness in s.232 (and the Government proposed to repeal s.232(1)), nevertheless the section did not fail to conform with the Constitution and therefore the order of the Court of Appeal, directing that it be amended to allow a discretion to award costs, would be set aside (paras. 15–16).

Cases cited:

(1) *Beer* v. *Austria*, E.C.H.R., App. No. 30428/96, February 6th, 2001, unreported, referred to.
(2) *De Haes* v. *Belgium* (1997), 25 E.H.R.R. 1, referred to.
(3) *Ford* v. *Labrador*, 2003–04 Gib LR 224; [2003] 1 W.L.R. 2082; [2003] UKPC 41, referred to.
(4) *Golder* v. *United Kingdom* (1975), 1 E.H.R.R. 524, referred to.
(5) *H* v. *Belgium* (1987), 10 E.H.R.R. 339, followed.
(6) *James* v. *United Kingdom* (1986), 8 E.H.R.R. 123; 26 R.V.R. 139, followed.
(7) *Khan* v. *Trinidad & Tobago*, [2005] 1 A.C. 374; [2003] UKPC 79, followed.
(8) *Leutscher* v. *Netherlands* (1996), 24 E.H.R.R. 181, referred to.
(9) *Lewis* v. *Att. Gen. (Jamaica)*, [2001] 2 A.C. 50; (2000), 9 B.H.R.C. 184; [2000] UKPC 35, followed.
(10) *Lutz* v. *Germany* (1988), 10 E.H.R.R. 182, applied.
(11) *Masson* v. *Netherlands* (1996), 22 E.H.R.R. 491, applied.
(12) *Matthews* v. *Ministry of Defence*, [2003] 1 A.C. 1163; [2003] 1 All E.R. 689; [2003] I.C.R. 247; [2004] H.R.L.R. 2; [2003] U.K.H.R.R. 453; [2003] P.I.Q.R. P4; [2003] UKHL 4; (2003), 14 B.H.R.C. 585; 100(13) L.S.G. 26, followed.
(13) *Minelli* v. *Switzerland* (1983), 5 E.H.R.R. 554, referred to.
(14) *R.* v. *Diani*, 1999–00 Gib LR 113, applied.

(15) *R.* v. *Dotto*, Supreme Ct. of Gibraltar, Crim. Case No. 21 of 2001, April 4th, 2001, unreported, applied.
(16) *Robins* v. *United Kingdom* (1997), 26 E.H.R.R. 527, referred to.
(17) *Saunders* v. *United Kingdom* (1996), 23 E.H.R.R. 313; [1998] 1 BCLC 362; [1997] BCC 872; (1997), 2 B.H.R.C. 358, referred to.
(18) *Z* v. *United Kingdom*, [2001] 2 FLR 612; [2001] 2 FCR 246; (2002), 34 E.H.R.R. 3; 10 B.H.R.C. 384; (2001), 31 Fam. Law 583, followed.
(19) *Ziegler* v. *Switzerland*, E.C.H.R., App. No. 33499/96, February 21st, 2002, unreported, referred to.

Legislation construed:
Criminal Procedure Ordinance (1984 Edition), s.229: The relevant terms of this section are set out at para. 3.
s.232: The relevant terms of this section are set out at para. 3.

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p.3602), s.1: The relevant terms of this section are set out at para. 5.
s.8: The relevant terms of this section are set out at para. 5.
Annex 2: The relevant terms of this annex are set out at para. 6.

J. Leighton Williams, Q.C., and *D. Hughes* for the appellant;
R.R. Rhoda, Q.C., Attorney-General, and *Mrs S. Peralta, Crown Counsel*, for the Crown.

1 **LORD BINGHAM OF CORNHILL,** delivering the judgment of the Board: The issue in this appeal is whether the provisions of s.232 of the Criminal Procedure Ordinance violate the provisions of the Constitution of Gibraltar. That section governs the making of costs orders in trials on indictment. Sub-section (1) permits the making of a costs order against a convicted defendant in favour of the prosecution, but sub-s. (2) precludes the making of a costs order in favour of an acquitted defendant against the prosecution, save in rare cases. Mr. Shimidzu, with whom the intervenor (Mr. Berllaque) makes common cause, challenges these provisions, and in particular sub-s. (2), as arbitrary, unjust and inconsistent with the Constitution.

2 Both Mr. Shimidzu and Mr. Berllaque were charged with serious offences and, after a full hearing, were committed for trial by judge and jury. In Mr. Shimidzu's case, a submission of no case at the end of the prosecution case was rejected by the trial judge, but he was acquitted by the jury. In Mr. Berllaque's case, a submission of no case succeeded and the jury acquitted on the judge's direction. In each case an application was made that the prosecution pay the costs of the defence, and in each case the application was refused on the ground that, as previously decided in *R.* v. *Diani* (14) and *R.* v. *Dotto* (15), such an order could not be made. A motion to challenge that ruling in the Supreme Court under s.15 of the

Constitition, made by Mr. Shimidzu with the support of Mr. Berllaque, was referred by the Supreme Court to the Court of Appeal which by a majority (Glidewell, P. and Stuart-Smith, J.A., Staughton, J.A. dissenting) upheld Mr. Shimidzu's challenge and amended s.232(2) of the Ordinance. In this appeal, the Attorney-General, while acknowledging the unattractiveness of s.232, contends that there is no constitutional violation.

The Ordinance

3 Part XI of the Ordinance governs costs and other ancillary orders in criminal cases. Section 229, governing the award of costs by magistrates' courts, so far as material provides:

> "(1) On the summary trial of an information the magistrates' court shall have power to make such order as to costs—
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> (a) on conviction, to be paid by the defendant to the prosecutor; and
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> (b) on dismissal of the information, to be paid by the prosecutor to the defendant,
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> as it thinks just and reasonable:
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> Provided that—
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> (i) where under the conviction the court orders payment of any sum as a fine, penalty, forfeiture or compensation, and the sum so ordered to be paid does not exceed £1, the court shall not order the defendant to pay any costs under this subsection unless in any particular case it thinks fit to do so; and
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> (ii) where the defendant is a child or young person, the amount of the costs ordered to be paid by the defendant himself under this subsection shall not exceed the amount of any fine ordered to be so paid.
>
> (2) The court shall specify in the conviction, or, as the case may be, the order of dismissal, the amount of any costs that it orders to be paid under subsection (1).
>
> (3) Where examining justices determine not to commit the accused for trial on the ground that the evidence is not sufficient to put him upon his trial, and are of opinion that the charge was not made in good faith, they may order the prosecutor to pay the whole or any part of the costs incurred in or about the defence."

Section 232, governing the award of costs by the Supreme Court, provides:

"(1) The Supreme Court may, if it thinks fit, order any person convicted before it to pay the whole or any part of the costs incurred in or about the prosecution and conviction, including any proceedings before the examining justices.

(2) 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;

(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) Costs payable under this section shall be taxed by the Registrar."

4 The derivation of these provisions is clear. Section 229 reproduced almost, but not quite, verbatim the provisions of s.6 of the Costs in Criminal Cases Act 1952, which consolidated an earlier provision. Section 232(1) reproduced, again almost verbatim, s.2(1) of the 1952 Act, which consolidated a provision earlier consolidated in s.6(1) of the Costs in Criminal Cases Act 1908. Section 232(2) reproduced the effect of s.2(2) of the 1952 Act, which consolidated a provision the substance of which was earlier consolidated in s.6(2) of the 1908 Act. Thus the differentiation between magistrates' courts and higher criminal trial courts, and between the liability of defendants and prosecutors, was a feature of the English legislation on which the Ordinance was based. But in the English legislation, the effect of this differentiation was lessened by a power, conferred on magistrates' courts as well as higher criminal trial courts, to direct that the costs of the prosecution or the defence or both be paid out of local funds: s.1(1) of the 1908 Act; ss. 1(1) and 5 of the 1952 Act. The Ordinance did not provide for the payment of costs to either prosecution or defence out of local (or, as they became in the Costs in Criminal Cases Act 1973, central) funds. This was clearly a deliberate decision made by the Government or the House of Assembly in Gibraltar. However, the impact of the differentiation between the liability of defendants and prosecutors, evident in the contrast between sub-ss. (1) and (2) of s.232, has in practice been mitigated by the invariable practice of the prosecution in Gibraltar, at least in recent years, of not seeking costs orders against convicted defendants, with the result that no such orders are made.

The Constitution

5 Chapter I of the Constitution governs the protection of the fundamental rights and freedoms of the individual. It follows a familiar pattern and, so far as material to this appeal, provides in s.1:

> "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—
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> (a) the right of the individual to life, liberty, security of the person and the protection of the law;
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> . . .
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> and the provisions of this Chapter shall have effect for the purpose of affording protection to the said rights and freedoms subject to such limitations of that protection as are contained in those provisions . . ."

Section 8, in this chapter, is entitled "Provisions to secure protection of law", and provides, in sub-ss. (1) and (2):

> "(1) 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.
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> (2) Every person who is charged with a criminal offence—
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> (a) shall be presumed to be innocent until he is proved or has pleaded guilty;
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> (b) shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence;
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> (c) shall be given adequate time and facilities for the preparation of his defence;
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> (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;
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> (e) shall be afforded facilities to examine, in person or by his legal representative, the witnesses called by the prosecution before any court, and to obtain the attendance and carry out

the examination of witnesses to testify on his behalf before that court on the same conditions as those applying to witnesses called by the prosecution; and

(f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the offence,

and, except with his own consent, the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence."

It is evident that these sub-sections, although not in identical language, are closely based on the criminal limb of art. 6 of the European Convention on Human Rights. The European Convention has not been incorporated into the domestic law of Gibraltar and the decisions of the European Court are not strictly binding on the courts of Gibraltar, but they are rightly treated, where pertinent, as persuasive: *Ford* v. *Labrador* (3) (2003–04 Gib LR 224, at para. 16).

6 It is unnecessary to recite the terms of s.15 of the Constitution, since no issue arises on the procedure chosen by Mr. Shimidzu to seek constitutional redress. Reference should, however, be made to the transitional provisions set out in Annex 2 to the Constitution:

"**Interpretation.**

1. In this Annex 'the existing laws' means any Ordinances, rules, regulations, orders or other instruments made, or having effect as if they had been made, in pursuance of the existing Order and having effect as part of the law of Gibraltar and includes any Order of Her Majesty in Council (other than the existing Order or any Order made under an Act of Parliament of the United Kingdom) having effect as part of the law of Gibraltar.

Existing laws.

2.(1) Subject to the provisions of this section, the existing laws shall have effect on and after the appointed day as if they had been made in pursuance of the Constitution and shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution."

The issues

7 As Schofield, C.J. observed when ruling on an application made before Mr. Shimidzu's trial: "There is no power in the magistrates' court to commit a person for trial in the Supreme Court other than in custody or

by binding him by recognizance." Thus no, or virtually no, acquitted defendants can rely on s.232(2)(a). Cases within s.232(2)(b) and (c) are rare. So a privately-funded defendant acquitted on indictment is effectively unable to recover his costs from the prosecutor or any other source, no matter how much he has expended or how strong his claim to reimbursement may be, and despite his liability (on the language of s.232(1)) to reimburse the prosecutor if convicted. Mr. Leighton Williams, Q.C. contended that the lack of a provision permitting the court to order that Mr. Shimidzu recover his costs against the prosecution, if the court in its discretion thought fit to make such an order, denied him the protection of the law, rendered unfair the hearing of the criminal charge against him, was arbitrary and unjust, breached the principle that there be equality of arms between prosecutor and defendant and undermined the presumption of innocence guaranteed by s.8(2)(a) of the Constitution. The Court of Appeal was unanimous in dismissing Mr. Leighton Williams, Q.C.'s argument based on the presumption of innocence, but the majority held that the absence of a discretion to award costs in favour of an acquitted defendant against the prosecution infringed the fair trial guarantee. Glidewell, P. said in his judgment:

> "To quote again a phrase from the passage I quoted earlier from Millett, L.J.'s judgment [in *Thomas* v. *Baptiste* ([2000] 2 A.C. at 22)] in relation to the phrase 'due process of law,' '. . . it invokes the concept of the rule of law itself and the universally accepted standards of justice observed by civilised nations which observe the rule of law.' We know that the legislation in relation to costs in criminal cases in England and Wales, in Scotland, and in those west European countries from which the European Court of Human Rights decisions were cited to us, in each case made provision for an acquitted defendant to be reimbursed the costs of his defence in the court's discretion. This is an indication that some such provision is in accord with the accepted standards of justice observed by civilized nations."

Stuart-Smith, J.A. considered that s.232 infringed the principle of equality of arms and infringed Mr. Shimidzu's right to a fair trial.

8 Section 8 of the Constitution, like its analogue, art. 6 of the European Convention, seeks to guarantee the procedural fairness of the criminal process. The rights expressly listed (such as that to a neutral court, a reasonably expeditious procedure, a burden of proof on the prosecutor, detailed notice of the offence alleged, time and facilities to prepare the defence, professional representation if sought, an adversarial hearing and free interpretation if needed) are directed to that end. So are such implied rights as that of access to a court (*Golder* v. *United Kingdom* (4)) and the privilege against self-incrimination (*Saunders* v. *United Kingdom* (17)).

Section 8 and art. 6 are not, in general, directed to regulation of the substantive criminal law. They do not seek to prescribe what conduct should be criminal, or what punishment can or should be imposed on those convicted, or what ancillary orders can or should be made.

9 The parties to the appeal were agreed, and rightly so, that the expression "hearing" in s.8(1) should be generously interpreted. It embraces not only the trial itself, but also forensic proceedings before the trial (such as preliminary hearings and applications) and after the verdict (such as sentence and appeal, and costs): *Minelli* v. *Switzerland* (13) (5 E.H.R.R. 554, at para. 30); *Robins* v. *United Kingdom* (16) (26 E.H.R.R. 527, at para. 29); *Beer* v. *Austria* (1) (at paras. 10–13); *Ziegler* v. *Switzerland* (19) (at paras. 22–25). The requirement of procedural fairness under s.8 and art. 6 applies to the determination of any issue arising in the course of the criminal process thus generously interpreted. But neither purports to require that any issue shall arise in the course of the criminal process or purports to proscribe a law providing that an issue shall not arise: *James* v. *United Kingdom* (6) (8 E.H.R.R. 123, at para. 81); *H* v. *Belgium* (5) (10 E.H.R.R. 339, at para. 40); *Z* v. *United Kingdom* (18) (34 E.H.R.R. 3, at paras. 87 and 98); *Matthews* v. *Ministry of Defence* (12) ([2003] 1 A.C. 1163, at paras. 3, 51 and 142). Thus it might be thought fair and just that a defendant acquitted by a jury at trial should be entitled to seek reimbursement of costs he has incurred defending himself. It might also be thought fair and just that such a defendant should be compensated for the months during which he was detained before trial. If the law provides such remedies they must be the subject of fair adjudication. But s.8 and art. 6 do not require that the law provide such remedies.

10 The jurisprudence on the European Convention lends no support to the argument that art. 6 requires a discretion to award costs to an acquitted defendant. In *Masson* v. *Netherlands* (11), the European Court of Human Rights held (22 E.H.R.R. 491, at paras. 48–49):

> "48. As to whether a 'dispute' over a 'right' existed so as to attract the applicability of Article 6(1), the Court will first address the issue whether a 'right' to the compensation claimed could arguably be said to be recognised under national law.
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> 49. In view of the status of the Convention within the legal order of the Netherlands, the Court observes firstly that the Convention does not grant to a person 'charged with a criminal offence' but subsequently acquitted a right either to reimbursement of costs incurred in the course of criminal proceedings against him, however necessary these costs might have been, or to compensation for lawful restrictions on his liberty. Such a right can be derived neither from Article 6(2) nor from any other provision of the Convention or

> its Protocols. It follows that the question whether such a right can be said in any particular case to exist must be answered solely with reference to domestic law.
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> In this connection, in deciding whether a 'right', civil or otherwise, could arguably be said to be recognised by Netherlands law, the Court must have regard to the wording of the relevant legal provisions and to the way in which these provisions are interpreted by the domestic courts."

In the court's judgment in *Lutz* v. *Germany* (10) the same point was made (10 E.H.R.R. 182, at paras. 59–60):

> "59. The Court points out, first of all, like the Commission and the Government, that neither Article 6(2) nor any other provision of the Convention gives a person 'charged with a criminal offence' a right to reimbursement of his costs where proceedings taken against him are discontinued. The refusal to reimburse Mr. Lutz for his necessary costs and expenses accordingly does not in itself offend the presumption of innocence. Counsel for the applicant moreover stated, in reply to a question from the President, that his client was not challenging that refusal but solely the reasons given for it.
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> 60. Nevertheless, a decision refusing reimbursement of an accused's necessary costs and expenses following termination of proceedings may raise an issue under Article 6(2) if supporting reasoning which cannot be dissociated from the operative provisions amounts in substance to a determination of the accused's guilt without his having previously been proved guilty according to law and, in particular, without his having had an opportunity to exercise the rights of the defence."

One may, like Glidewell, P., favour an even-handed discretionary power to order reimbursement of costs incurred by a successful prosecutor or a successful defendant, but he was factually wrong to regard the existence of such a power as universal among civilized western European countries. There is no power to order payment of costs by the Crown to an acquitted person under solemn procedure in Scotland. In Northern Ireland (as in Gibraltar) there is no power to order that a successful defendant should recover costs out of local or central funds, and a provision permitting costs to be ordered against the prosecution is a dead letter.

11 Equality of arms is an aspect of procedural fairness, protected by s.8 and art. 6. It seeks to ensure that the defendant does not suffer an unfair procedural disadvantage: *De Haes* v. *Belgium* (2) (25 E.H.R.R. 1, at para. 53). It does not require that the situations of the prosecutor and the defendant should be assimilated. In practice, those positions are necessarily different: the prosecutor is not liable to be detained pending

the trial and is not liable to punishment if the prosecution fails. Neither Mr. Shimidzu nor Mr. Berllaque was able to show that he had suffered any procedural disadvantage in the conduct of the trial from the inability, after the verdict in his favour, to recover costs against the prosecutor.

12 Mr. Leighton Williams placed heavy reliance on the constitutional right to the protection of the law. But this expression has been held by the Board to cover the same ground as the entitlement to due process: *Lewis* v. *Att. Gen. (Jamaica)* (9) ([2001] 2 A.C. at 84–85); *Khan* v. *Trinidad & Tobago* (7) ([2005] 1 A.C. 374, at para. 9). It is a procedural, not a substantive, right.

13 Reliance was placed by Mr. Leighton Williams on the wording of s.8(2)(d) of the Constitution. This guarantees three rights to a criminal defendant: a right to defend himself in person; a right to be defended by a legal representative provided at the public expense in cases where it is prescribed that such representation should be available; and a right to be defended at his own expense by a legal representative of his own choosing. There is nothing to suggest that where this third right is exercised (as it was by Mr. Shimidzu and Mr. Berllaque) the expense incurred is to be recoverable.

14 Where the domestic court has a discretion to order costs against a prosecutor in favour of an acquitted defendant, the court should not refuse to make such an order in terms which throw doubt on the presumption of innocence. So much appears clearly from the passage quoted from the judgment of the court in *Lutz* (10); *Leutscher* v. *Netherlands* (8) (24 E.H.R.R. 181, at para. 29); *Minelli* v. *Switzerland* (13) (5 E.H.R.R. 554, at para. 37). But where domestic law grants no discretion and does not permit the making of an order, the failure to make such an order cannot be rationally understood as throwing doubt on the defendant's innocence. The position was made plain, publicly, when Mr. Shimidzu's counsel made an application for costs after the trial. The Chief Justice said: "But, Mr. Hughes, you know that you can't get costs. I would grant them, if I could, you know that the law is against you." When counsel persisted, the Chief Justice said:

> "You keep trying, Mr. Hughes. I understand why you keep trying, but in my opinion it is an unjust system, which says you can award costs against the defendant on conviction but you cannot award costs in the Supreme Court on acquittal. It is not a just system, but it's not something that I can get round, however much I would enjoy trying to weave it. I just cannot, and it is a matter for the legislature, but it is a matter perhaps that the legislature ought to be invited to give their attention to."

15 There is, as the Chief Justice recognized and the Attorney-General acknowledged, an unattractive and unjustifiable lack of even-handedness

in sub-ss. (1) and (2) of s.232. What is sauce for the goose ought to be sauce for the gander. This unattractiveness is relieved by the fact that sub-s. (1) is a dead letter, and the Board was told by the Attorney-General on instructions that steps will be taken to repeal it. But s.2(1) of Annex 2 to the Constitution Order gives the court a limited remit to amend existing laws which do not conform with the Constitution. In the absence of a disconformity the court has no power to act. Here there is no disconformity, and hence no power to make the change directed by the Court of Appeal majority, of deleting conditions (a), (b) and (c) in s.232(2) and inserting an express discretion.

16 The Board will humbly advise Her Majesty that the provisions of s.232 of the Criminal Procedure Ordinance do not violate the provisions of the Constitution of Gibraltar, that the Attorney-General's appeal should be allowed and that the order of the Court of Appeal should be set aside. The parties are agreed that the costs order made by the Court of Appeal should not be disturbed and that there be no order for costs before the Board.

Appeal allowed.