IN THE GRAND COURT OF THE CAYMAN ISLANDS
CRIMINAL DIVISION

IND. NO. 3/13 &
IND. NO. 3A/13

REGINA

v.

AARON JOHN BERNARDO

Appearances:	Ms. Candia James for the Crown Ms. Lucy Organ for Aaron Bernardo
Before:	Hon. Justice Richard Williams
Heard:	1 August 2014
Written submissions received:	1 October 2014
Draft Judgment circulated:	22 October 2014
Judgment Handed Down:	31 October 2014

JUDGMENT - COSTS

The Background

1. On 4 January 2013 Aaron John Bernardo ("the Applicant") was charged with robbery and possession of an imitation firearm with intent. On 23 January 2013 Indictment No. 3/13 was laid against the Applicant with one count of robbery and one count of possession of an unlicensed firearm. On 16 August 2013, at a dismissal argument listed before Henderson J. in relation to the indictment, the

Crown indicated an intention to offer no evidence in relation to robbery and possession of an unlicensed firearm and to amend the indictment to include one count of handling stolen goods. The new Indictment No. 3A/13 was signed by the Director of Public Prosecutions ("the DPP") on 24 September 2013. On 11 December 2013 the Applicant was found not guilty of handling by a jury. The Applicant had to pay for his own legal representation throughout, because he was unable to obtain Legal Aid as he fell outside of the means test. He now applies for a *"reasonable"* costs order against the Crown in relation to defending the above-mentioned indictments.

2. On 1 August 2014 I heard the application for costs made by the Applicant. I adjourned the hearing to enable me to prepare a reserved judgment. On 24 September 2014 I provided the parties with details of the following cases:

(i) ***Attorney General for Gibraltar v Takahasi Shimidzu*** Privy Council Appeal No. 40 of 2004;

(ii) ***Takahasi Shimidzu and Andrew Ivan Berllaque v the United Kingdom*** European Court of Human Rights Application No. 648/06;

(iii) ***DPP v Denning*** [1991] 2 QB 532;

(iv) ***R (Commissioners of Customs and Excise) v Crown Court at Leicester*** [2001] EWHC Admin 33;

(v) ***R v P*** [2011] EWCA Crim 1130;

(vi) ***R v (Director of Public Prosecutions) v Sheffield Crown Court and Goodison*** [2014] EWHC 2014 (Admin); and

(vii) ***R v A*** (2012) EWCA Crim 434.

The parties were then afforded the opportunity to provide written and/or oral submissions in relation to these cases. Both parties were content to provide only written submissions, and these were all received by 1 October 2014.

3. There is no issue as to whether the Grand Court has the power to make costs orders in favour of the defence or prosecution in criminal proceedings, but the application before me raises the question of whether an order should be made in this case and how should a Court decide that.

4. The factual background is that on 7 January 2013 at approximately 6:40 PM forty-four Rolex watches and one Breitling watch were stolen during a robbery at Kirk Freeport Jewellery Store located in The Strand, West Bay Road. This was not disputed, as set out in paragraph 1 of the Applicant's Admissions. The robbery was committed by four persons, who disguised their appearance by wearing balaclavas. During the robbery, one of the persons stood guard at the doorway with a gun and his three cohorts smashed glass display cabinets from which they removed the watches.

5. On the next day, 8 January 2013, at approximately 7:55 PM, the Applicant was arrested on suspicion of robbery. Between 10:05 PM and 11:30 PM on that night a search, pursuant to a search warrant, was carried out by the police on his home. The police recovered a gold and silver Oyster Rolex watch from a jewellery box in his bedroom. Kirk Freeport were able to identify the watch as one of the stolen watches and valued it at CI$10,878. None of this background is contentious.

6. The Applicant was interviewed in the presence of his attorney by the police on 9, 11 and 14 January 2013. At the outset of the interview he provided the police with a pre-prepared written statement signed by him and dated 8 January 2013. He told the police that he was at home at the time of the robbery, and had played no involvement in it. He informed the police that he purchased the watch, which he believed to be a fake, in the car park of O-Bar for CI$500 in the early hours of 8 January 2013.

7. Having been charged, the Applicant was held in police custody between 8 January 2013 and 15 January 2013. When the matter came before the Summary Court on 15 January 2013, it was transmitted to the Grand Court and an unsuccessful opposed application for bail was made. An unsuccessful opposed application for bail was then made to the Grand Court on 18 January 2013.

8. When the matter came before Quin J. on 1 February 2013 and before Henderson J. on 15 February 2013 the Applicant's attorneys outlined their view about the weaknesses in the Crown's case. They informed the Court and the Crown that they would be making a dismissal argument.

9. On 13 March 2013, although the Crown objected, Smellie C.J. granted conditional bail to the Applicant. At that hearing, the Applicant placed new materials he had obtained before the Court. This material included:

(i) a report of Edward Primeau (a video forensics expert) dated 15 February 2013;

(ii) a report of Larry Daniels (a telephone expert) dated 1 March 2013;

(iii) a statement of Brett McMurray dated 24 January 2013; and

(iv) a statement of Rachel Smyth dated 12 March 2013.

10. The Applicant contends that this evidence established that he could not have been at the scene of the robbery at the relevant time. The Crown were relying upon four balaclavas which they had found in the Applicant's home and vehicle[1], but the expert evidence and CCTV footage tended to show that these were not similar to the ones worn during the robbery. The expert evidence concerning the telephone was consistent with the content in the statements obtained from McMurray and Smythe. This evidence tended to show that at around the time of the 6.40 PM

[1] One was found in the Applicant's vehicle, three were found in his bedroom.

robbery, phone calls at 6:25 PM and 6:49 PM were made by the Applicant from the Birchwood Road, West Bay area, where his home was located. The Applicant contends that this was consistent with what he had told the police during interview, namely that he was at home at the time of the robbery.

11. It was not until 16 August 2013, when the dismissal argument was due to be heard, that the Crown decided to offer no evidence on Indictment No. 3/13 and indicated that there would be a fresh indictment alleging one count of handling stolen goods.

12. The Applicant contends that the Crown was made aware of the weakness in its case alleging robbery or possession of imitation firearm with intent, from the very first appearance before the Summary Court. The Applicant said the Crown had been put on notice from 1 February 2013 of his intention to pursue a dismissal. The Applicant highlights that it was the Defence, and not the Crown, who went to the expense of seeking and obtaining evidence to demonstrate whether or not he could have been a participant in the robbery. The Crown, of course, have a responsibility to conduct a full investigation, the consequence of which may rule in or rule out a suspect. It is contended that at no time was there sufficient evidence for the Crown to pursue those charges, especially after the production of the materials by or in March 2013. At the very least, it is contended that the

Crown should have offered no evidence in relation to those charges in March and not delayed that decision until 16 August 2013.

13. The Crown contended that, when the Applicant received the watch, he did so dishonestly believing it to be one of the genuine Rolex watches, which had so recently been stolen from Kirk Freeport. The Crown contended that part of the reason that they said the Applicant knew it was stolen was because of the content of the BBM messages received or sent by him. The Crown contended that the messages would have made him aware that there had been a robbery that evening at Kirk Freeport and that jewellery had been stolen. The Applicant agreed at the trial that, at the time he purchased the watch, he had knowledge of a robbery of jewellery, but not of watches. He highlighted that none of the BBMs made any specific mention about watches, but only referred to jewellery. In light of the above, at trial, the Crown relied greatly on the fact that, when asked by the police if he had heard about the robbery that night, the Applicant indicated that he had not. When charging him in January 2013, the Crown also relied upon his recent possession of the watch, the four masks found in the Applicant's car and home which they believed to have a *"similar overall appearance"* to those used by the perpetrators of the robbery and what they considered to be a lack of detail about the person who he said had sold him the watch.

14. Crown Counsel in her written submissions prepared for this costs hearing stated at paragraph 34 that *"It is accepted that further evidence eventually came to hand in the form of CCTV footage and telephone evidence which considerably weakened the Crown's case against the defendant with respect to the robbery."* She went on to say at paragraph 35 that *"the Crown then reviewed the matter as it was obliged to do and took the view that the likelihood of a successful conviction was diminished; thereafter chose to proceed on a charge of handling stolen goods."* During the costs hearing Crown Counsel stated that from March to August 2013 the matter was under review and that the final decision was not made until receipt of the written submissions from the Defence of 15 August 2013. In her oral submissions Crown Counsel said "*I accept in March, when examined in closer detail in the CCTV report, that there was merit to the Defence's argument that it was not the same mask."* Importantly, when dealing with the indictments, she then went on to concede "*I can see that between March and August, a decision should have been taken to substitute at an earlier point."* However, in her later written submissions, provided to comment upon the additional case authorities, Crown Counsel said that although there was an opportunity for further review the police investigations were still being undertaken and a report in relation to glass debris found in the defendant's vehicle was not received until June 2013. She said they were also awaiting results of telephone analysis of the defendant's cellphone. Crown Counsel contended that the failure to make the decision until the August

hearing did not amount to an improper act by the Crown and/or did not merit an order for costs being made against the Crown.

Cayman Islands Statutory Provisions and Case Law

15. The Grand Court's jurisdiction to award costs in criminal proceedings derives from s.24(5) Judicature Law (2007 Revision) which simply provides:

"Costs, including wasted costs, may be awarded to or against the Crown."

16. There are no rules governing the procedure for applying for such costs in criminal proceedings or any statutory guidance as to the applicable principles. This is most regrettable, especially having regard to the wide discretion derived from s.24(5). The Attorneys indicated to the Court that they would have been greatly assisted by the same or by a guiding practice direction. In the Cayman Islands there is no central fund out of which the Court can order costs to be paid. Any order for costs made against the Crown in criminal proceedings is in reality an order for the prosecution to bear those costs, with similarities to a wasted costs order.

17. There is not a great deal of Cayman Islands case law concerning costs in criminal proceedings. The earliest relevant case appears to be ***Attorney General v Cayman National Bank*** [2004-05] CILR 298, where the Court of Appeal, in civil proceedings, referred to s.90 Criminal Procedure Code. Taylor J.A. stated at paragraph 28 that *"It is not the normal practice to make an order for costs in*

proceedings of this sort, involving discharge by the Crown of responsibilities ancillary to its duty to enforce the criminal law." The Court of Appeal found that there were unusual circumstances justifying a departure from the normal rule and they granted the application for costs of the appeal. The Crown submit before me that this is the correct approach, especially as this is a small jurisdiction and the Crown would struggle to pay costs of acquittals for prosecutions properly brought.

18. The ***Cayman National Bank*** case was cited by Henderson J. in companion criminal proceedings, ***R v Watler*** [2007 CILR 121]. This case involved an unsuccessful application for the Crown to pay the Defence's costs following an acquittal on appeal from the Summary Court to the Grand Court. Henderson J. held that the Crown, by bringing the case, was discharging its duty to enforce the criminal law in the jurisdiction and he found no fault in the laying of the charges and bringing the case to trial. Henderson J. found there to be no unusual circumstances justifying a departure from the normal practice expressed by the Court of Appeal in the ***Cayman National Bank*** case. Although he did not mention the English Prosecution of Offences Act 1985, Henderson J. appeared to be adopting a similar approach, finding that there was no improper conduct by the Crown.

19. Henderson J. referred to s.182 Criminal Procedure Code (2006 Revision) which provides that *"the court hearing any appeal may make such order as to the costs to be paid by either party as it may think just..."* Henderson J. rightly stated at paragraph 6 of his judgment that the discretion with respect of costs conferred by s.182 was "*essentially unfettered.*" Henderson J. noted that both parties had spent a great deal of time commenting upon the legislation and case authorities from England and Wales concerning costs in criminal proceedings. Henderson J. did not agree with the attorneys about their relevance to these proceedings and indicated that the Court should not draw parallels with them in relation to costs in the Cayman Islands. Henderson J. commented that the legislation, regulations and practice directions which existed in England *"constituted a virtual code of practice on the subject, which has never been adopted, even in part, in the Cayman Islands."* I would respectfully add that this "*virtual code of practice*" was put in place having regard to the historical and prevailing circumstances and greater resources available in England and Wales, which the Court may have regard to when exercising its discretion fairly. These cannot be said to be the same as those that exist in the Cayman Islands. Henderson J. went on to say that "*English authorities decided under these legislative provisions can have only limited application here.*"

20. The Crown adopts the approach taken by Henderson J. in ***Watler***. However, the Applicant contends that the Court of Appeal's "*observation*" in the civil case of

Cayman National Bank should not be relied upon, as it was not based on any legislation and authority. The Applicant submits that Henderson J. was wrong in ***Watler*** to rely upon the Court of Appeal's "*observations.*" and that it would be unsafe for this Court to rely upon his decision.

21. The next relevant Cayman Island case appears to be ***Voiculescu v R*** (SCA 50 of 2008). This was a successful appeal heard in the Grand Court against conviction in the Summary Court. Henderson J., again considered s.182 of the Criminal Procedure Code (2006 Revision). He also noted s.33(5) of the Summary Jurisdiction Law which provides "*costs, including wasted costs, may be awarded to or against the Crown.*" There is a marked similarity between that latter provision and s.24(5) of the Judicature Law. Henderson J. remarked that there were no practice directions, regulations or guidelines governing the question of costs in criminal proceedings in the Cayman Islands. Regrettably, from the content of his judgment, it appears that the parties failed to draw Henderson J.'s attention to the Court of Appeal decision in the ***Cayman National Bank*** case and his decision in ***Watler***. Henderson J. seemed to depart from his approach in ***Watler***, as he felt that he "*derived some assistance*" from the "*comprehensive*" English Practice Direction [2004] 2 All E.R. 1070. He concluded that although the Practice Direction had no application to the Cayman Islands, its "*governing philosophy*" could be "*applied appropriately to proceedings in this jurisdiction.*"

22. Henderson J. highlighted SII.1, SII.2 of the Practice Direction which stated that, in the circumstances set out therein; the making of defence costs orders in the Magistrates and Crown Court *"should normally be made unless there are positive reasons for not doing so."* Importantly, I note that both of these Directions appear under the heading "*Defence costs from central funds."*[2]

23. Henderson J. also highlighted that the Practice Direction provided that court orders in England *"will be for such amount as the court considers sufficient reasonably to compensate the party for expenses incurred by him in the proceedings."*[3]

24. Henderson J. highlighted that the Practice Direction provided that it was not appropriate for all cases in which there might be an acquittal for there to be an award of defendant's costs.[4] When considering the facts in ***Voiculescu***, he believed that the successful Appellant's own conduct served to bring suspicion on himself and led the Crown to think its case against him to be stronger than it proved to be and therefore there was a positive reason for not awarding him his costs.

[2] My emphasis by underlining.
[3] This has changed since 2012 as costs are tagged at legal aid levels.
[4] The Directions provided an example of when a defendant may have pay his own costs namely when *"....the defendant's own conduct has brought suspicion on himself and has misled the prosecution into thinking that the case against him was stronger than it was."*

25. The Crown contends that the approach of Henderson J. in ***Watler*** should be preferred to his seemingly different approach in ***Voiculescu***. In support of this contention the Crown relies upon the fact that the earlier Cayman Islands case authorities had not been brought to Henderson J.'s attention, that the case had a general application and no consideration had been given to the differences between costs awarded out of the central fund and those awarded directly against a party, that the guidelines had never been entered into statute or any regulations in the Cayman Islands and that in any event the position in England and Wales is now different and more restrictive than it was.

26. The most recent decision from the Cayman Islands appears to be ***Andrel Harris v R*** (SCA 33 of 2010). This case involved an appeal by way of case stated against the refusal of a Magistrate to award defence costs following the withdrawal of the prosecution case. Smellie C.J. agreed with Henderson J.'s finding in ***Voiculescu*** that there was jurisdiction both in the Summary Court and on appeal to the Grand Court for costs to be awarded against the Crown. The Chief Justice, although mentioning the English Practice Direction, did not express a view concerning its applicability, although he noted that the Magistrate had refused to make an order for costs as she felt the appellant had brought suspicion upon himself. He found that the Magistrate's determination was one based on facts in exercise of her discretion and, as it was not a determination based on point of law, it could not give rise to right of appeal by way of case stated.

The Bill of Rights (the Cayman Islands Constitution Order 2009) and Non-Cayman Islands Case Authorities

27. The European Convention on Human Rights ("ECHR") has been incorporated into our law by the Bill of Rights (the Cayman Islands Constitution Order 2009) ("the Constitution"). S.7 of the Constitution mirrors Article 6 of the ECHR which enshrines a right to a fair trial.

28. There is no general right to costs or expenses under the ECHR. In ***Attorney General for Gibraltar v Takahasi Shimidzu*** Privy Council Appeal No. 40 of 2004 the Judicial Committee of the Privy Council, consisting of Lord Bingham of Cornhill, Lord Steyn, Lord Scott of Foscote, Lord Rodger of Earlsferry and Lord Carswell unanimously held that Section 8 of the Gibraltar Constitution Order, which is drafted in similar terms to Article 6 of the ECHR, had not been infringed by the failure of a statutory power to award costs to a defendant in criminal proceedings.[5] In other words, as stated by Lord Bingham at para 10:

> *"The jurisprudence on the European Convention lends no support to the argument that article 6 requires a discretion to award costs to an acquitted defendant."*

29. At paragraph 11 Lord Bingham went on to state:

> *"Equality of arms is an aspect of procedural fairness, protected by section 8 and article 6. It seeks to ensure that the defendant*

[5] An approach deemed correct by the European Court of Human Rights ***Takahasi Shimidzu and Andrew Ivan Berllaque v the United Kingdom*** (European Court of Human Rights Application No. 648/06).

does not suffer an unfair procedural disadvantage; De Haes and Gijsels v Belgium (1997) 25 EHRR 1, 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 inability, after the verdict in his favour, to recover costs against the prosecutor."

30. At paragraph 8 of the decision, Lord Bingham indicated that Article 6 seeks to guarantee the procedural fairness of the criminal process. He reiterated the rights which were listed including 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. He also mentioned the implied rights of privilege against self-incrimination and access to court. Lord Bingham stated that Article 6 is "*not in general directed to regulation of the substantive criminal law*" and that it did 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*[6]*.*"

[6] My emphasis by underlining.

31. Although Article 6 ECHR, which is similar but less detailed than s.7 of the Cayman Islands Constitution, does not require that the law provide remedies such as costs for an acquitted defendant, such a remedy exists in the Cayman Islands, unlike in Gibraltar. Lord Bingham stated at paragraph 9 that:

> *"...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.... If the law provides such remedies they must be the subject of fair adjudication."*

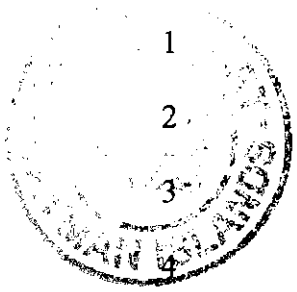
32. Therefore, although a defendant does not have an automatic right to receive costs upon an acquittal, the Court must exercise its discretion in a fair manner when deciding whether or not to order the same. As I have already indicated, in the Cayman Islands the difficulty the Court finds itself in is when determining what principles and what approach are fair in the absence of any statutory guidance or practice direction designed to meet local circumstances.

33. When taking a fair approach to these applications, the Court should not refuse to make a costs order on a basis which implies guilt on the part of the acquitted defendant.[7] The Court may refuse to make costs order for an acquitted defendant if his own conduct brought suspicion upon himself and thus misled the prosecution into thinking that the case against him was stronger than it was.[8] It is submitted on behalf of the Applicant that Henderson J in his reasoning in ***Watler***

[7] ***Hussain v United Kingdom*** (2006) 43 E.H.R.R 22.
[8] ***R v (Spiteri) v Basildon Crown Court*** [2009] EWHC 665 (Admin).

implied the Appellant's guilt when he found there to be "*a reasonable basis for suspecting that Mr. Watler was involved in a very substantial way in unlawful gambling.*" It is submitted that by doing so, Henderson J. offended the presumption of innocence set out in the Constitution. Even if this submission is right, it does not in itself detract from any force in Henderson J's view that the English legislation, regulations and practice directions have limited application in the Cayman Islands, as it goes to how he exercised his discretion when finding there to be no unusual circumstances justifying a departure from the "*normal practice*" expressed by the Court of Appeal in the ***Cayman National Bank*** case.

34. The introduction of the Bill of Rights in the Cayman Islands does not in itself require a change in the Court's approach to these matters. When exercising the wide and "*unfettered*" discretion given in s.24(5) of the Judicature Law (2007 Revision) the Court has always had to do so justly and fairly. Nothing has changed in that regard. When deciding how to adjudicate in a just and fair manner a court is entitled to do so having regard to the circumstances that exist, and the reasonable approach taken to such issues, in its own jurisdiction. The exercise of the Court's discretion in the Cayman Islands has not been fettered by the Legislature. I share the view expressed by Henderson J. in ***Watler*** that the case law, regulations and practice directions in place in England and Wales are designed to meet the specific circumstances that prevail in that jurisdiction and may have only limited application here. I accept that, depending on the facts of



the particular case, some of the general principles and factors to be taken into account emanating from England, although not binding, may offer some assistance. However, when considering the case law and approach taken in cases in England, great care should be taken not to rigidly impose the same on the clearly different circumstances that prevail in the Cayman Islands.

Overview

35. For a number of years, until the legislative reform contained in the Legal Aid Sentencing and Punishment of Offenders Act 2012[9] and the Costs in Criminal Cases (Legal Costs) Exceptions Regulation 2014, it was commonly thought that an acquitted defendant in England was entitled to recover the costs of his privately funded representation from central funds. The Practice Direction (Cost in Criminal Proceedings) [2013] EWCA Crim 1632 gave guidance following the legislative reform. The changes in the law came about due to the concerns about the level of funds being taken from the central fund to meet costs orders and so the Legislature in England restricted a defendant's ability to do this. The current position is that a non-legally aided privately paying person may recover costs in the Crown Court if they are acquitted, but recovery is limited to the legal aid rates and can only be recovered where an application made for legal aid has been unsuccessful due to the means test. Wasted costs claims can still be made

[9] Schedule 8 amended s.16 of the Prosecution of Offences Act 1985.

pursuant to s 19 of the Prosecution of Offences Act 1985 and Regulation 3 of the Costs in Criminal Cases (General Regulations) 1986.

36. The Legislature in England has historically made specific provision for costs to be paid out of the central fund. The law in the Cayman Islands has not provided for the payment of costs out of central funds. I do not agree with the Applicant's submission that this difference is of no significance. In England funds have had to be allocated to the central fund for this particular purpose. It is evident that funds in the Cayman Islands have not been allocated to the DPP for the purpose of meeting future potential costs orders. It is a deliberate choice by the Legislature in the Cayman Islands not to make statutory provision for such payments to come from the central fund. The availability of such funds in a jurisdiction of this size, if cost orders were routinely made to those acquitted of criminal proceedings, cannot be put on the same level proportionally to England and Wales. "*The criminal standard of proof creates an institutional probability that guilty persons may frequently be acquitted.*"[10] If the approach was for criminal costs to follow the event as in civil cases, the Cayman Islands would likely have insufficient financial resources to meet costs orders, even if they be only for those applicants who were not able to obtain legal aid due to the means test.

[10] Quotation from Kawally J. in ***Michael James Mello v Eunice Lambert*** , Supreme Court of Bermuda 2009: No. 3.

37. The Grand Court has a wide discretion. There is no guidance offered up in any legislation, rules, regulations or practice directions. A wholly consistent approach cannot be derived from the Cayman Islands case law. Therefore, I am satisfied that when an application for costs is made, that the Court, when discharging its duty to act justly and fairly when deciding whether to make a costs order, should have regard to the circumstances of that particular case, and its approach when doing so is unfettered. The Court may be assisted by having regard to some of the factors considered in England or in previous Cayman Islands case law. This may include a review of the Crown's conduct to see, for example, whether it has acted improperly or unreasonably. It may also include consideration as to whether the defendant's conduct has brought suspicion on himself thereby misleading the prosecution into thinking the case against him was stronger than it was. I am not convinced that it is appropriate for the Court to fetter itself by having a strict starting point, whether it be that normally a court should not make orders unless there are unusual circumstances justifying the making of them or whether it be normally a court should make orders unless there are positive reasons for not doing so.

38. In a recent possession case such as this, I am not satisfied that the Crown could be said to have commenced the proceedings improperly by bringing the robbery and firearm counts. The fact that the Crown decided to discontinue the two counts, in itself, does not demonstrate impropriety in the original decision.

Similarly, in a recent possession case and in light of the Applicant's inconsistent evidence in interview that he knew nothing about the robbery on the night of the robbery[11], the Crown did not act improperly in bringing a replacement indictment with the count of handling stolen goods. When I reach this conclusion I have regard to the sentiments expressed in English Court of Appeal decision ***R v P*** [2011] EWCA 1130 which stated at paragraph 13:

> *"The decision to prosecute or not is a thoroughly difficult and delicate one. It is one on which two perfectly responsible lawyers may easily differ. It is only in the clearest possible cases that a decision taken by the appropriate authority in good faith could possibly justify a penalty in costs."*

The Court of Appeal went on to say at paragraph 15:

> *"... The question in this case was not whether the decision to prosecute was right or wrong. It is simply not the judge's function to sit on appeal from a decision of the Crown Prosecutor..... In most cases such as the present, there will be room for a legitimate difference of opinion. It is important that the making of that decision should not be overshadowed by the fear that if a prosecution is continued and fails there may be an order for the payment of costs. An acquitted defendant will normally receive his cost from central funds unless there is a good reason why he should not."*

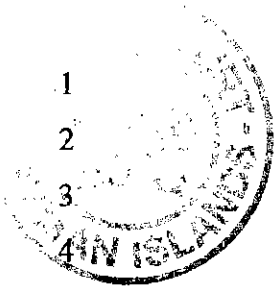
[11] Which appears to miss lead the Crown into believing that they had a stronger case.

Conclusion

39. However, at the costs hearing Crown Counsel rightly conceded that between March[12] and August 2013 a more timely decision should have been made in relation to the robbery and firearm counts. As a consequence of the accepted failure to do so, the Applicant had to incur legal costs, in particular in relation to making an application to dismiss in August 2013. I am of the view that the Crown had an ongoing responsibility to actively review the case, especially after receipt of the additional evidence, and a failure to then do so went to the heart of whether the case should proceeded in relation to those counts. I view it as unreasonable for the Crown to have failed to actively do so post-March 2013 in this case. I accept that mistakes may be made and that resources may be stretched, but in the circumstances of this case that should not have prevented a far more timely proper consideration of the new materials, leading to a timlier conclusion concerning the robbery and firearm counts. I am satisfied that the Applicant has incurred costs between March 2013 and August 2013 as a result of the Crown's failure to properly review.

40. I note that Nolan L.J. in **DPP v Denning** [1991] 2 QB 532 at 541 when considering wasted costs orders under s. 19 Prosecution of Offences Act 1985 and Regulation 3 Costs in Criminal Cases (Gen) Regulations 1986 stated that improper:

[12] When the evidence outlined in paragraph 9 above was provided to the Crown by the Defence.

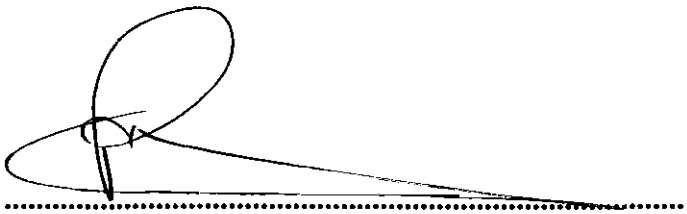
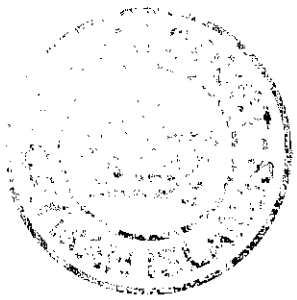


".... does not necessarily connote some grave impropriety, used, as it is, in conjunction with the word 'unnecessary', it is in my judgment intended to cover an act or omission which would not have occurred if the party concerned had conducted his case properly."

41. It is clear from ***R (Commissioners of Customs and Excise) v Crown Court at Leicester*** that I have a discretion whether to order a party to pay all or part of the costs said to have been incurred. Although I am not in a position to assess them to reach a figure, I am satisfied that the Applicant has incurred costs in relation to the first indictment post March 2013 until the dismissal hearing in August 2013. It was not reasonable for the Crown to wait until the hearing in August 2013, in light of the additional evidence received and the ongoing indication from the Applicant from at least February 2013 that such an application would be made, to decide to discontinue the two counts. Accordingly, I make an order for the Crown to pay the Applicant's costs incurred during that period in relation to indictment 3/13.

42. The Applicant will need to satisfy the taxing officer that he has incurred the costs claimed. The taxing officer will then decide whether it was necessary and reasonable for him to have incurred them. The taxing officer will then see, in the context of the proceedings at that time and the counts then being pursued, whether they were proportionate to that issue.

43. For the avoidance of doubt, I make no order for costs incurred prior to the conclusion of the hearing on 13 March 2013 and post the hearing of 16 August 2013.



The Honourable Mr. Justice Richard Williams
JUDGE OF THE GRAND COURT