

GRAHAME BRUCE SOUTHWICK v STATE (CAV0001 of 2003S)

SUPREME COURT — CRIMINAL JURISDICTION

5 FATIAKI P, FRENCH and WEINBERG JJ

20, 21 May 2004

Criminal law — criminal procedure — costs — acquittal of co-accused — autrefois acquit.

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Practice and procedure — costs — costs orders — refusal of costs — proper construction of s 158(2) of the Criminal Procedure Code (Cap 2) in relation to s 28 of the Constitution of the Republic of Fiji — Constitution of the Republic of Fiji ss 21, 28, 28(1)(d), 43(3), 122(2) — Criminal Procedure Code (Cap 21) s 158(2).

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In 1998, Grahame Southwick (the Appellant) and Visanti Makrava were charged with several criminal offences related to an alleged conspiracy to obtain money by false pretenses. Before their joint trial, Makrava was acquitted of the charge of official corruption where the evidence was closely related to the evidence in the joint conspiracy proceedings.

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At the commencement of their joint trial, counsel for the prosecution conceded that the conspiracy charges against the Appellant and Makrava jointly could not proceed because of Makrava's acquittal on the official corruption charge based upon the proposition that the "autrefois acquit" protected Makrava from further prosecution and that the Appellant could not be convicted of a conspiracy with a man who was acquitted in respect of the same agreement.

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The learned judge granted a permanent stay of the trial on the ground that there was no possibility for a fair trial and that if the case will proceed a misuse of the processes of the court would occur. Both the accused were discharged.

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On 13 July 1999, after a permanent stay of the proceedings against the Appellant was granted, a motion was filed by the Appellant for an order for costs relying on s 158(2) of the Criminal Procedure Code (Cap 21) (the Code) against the State in the amount of \$F582,577.77. The application was later dismissed on the ground that the prosecutor either had no reasonable ground for bringing the proceeding or had unreasonably prolonged them.

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The Appellant appealed but the same was dismissed. The Court of Appeal granted leave to the Appellant to appeal to the Supreme Court. The court concluded that the judgment was final and given in the exercise of the original jurisdiction of the High Court. It held that it had jurisdiction to entertain the appeal and found that the grounds for the award of costs under s 158(2) failed.

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The issues were: (1) whether or not s 158(2) of the Code is inconsistent with the Constitution of the Republic of Fiji; and (2) where the burden of proof lies in an application for costs.

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Held — (1) Section 158(2) of the Code gives a judge or magistrate a power to award costs to an accused person acquitted from criminal proceedings based on an unreasonable conduct on the part of the prosecutor in bringing the prosecution or prolonging it. The same is reflected in s 28 of the Constitution of the Republic of Fiji on presumption of innocence operating with regard to a person charged with an offence "until proven guilty according to law". However, there is no need for a finding of guilt or innocence to determine whether the exercise of the power under s 158(2) of the Code is satisfied. Further, s 158(2) is a beneficial, limited, and power-creating provision that cannot be constitutionally attacked upon the basis that it does not go far enough.

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(2) The power under the first limb of s 158(2) of the Code expresses the power to award reasonable costs while the second limb articulates the word "provided" which is expressed

as a necessary condition in awarding costs. Thus, the person seeking an award for costs must prove that the conditions for the exercise of the power to order costs were made. This means that when an accused was acquitted after trial, the judge or magistrate is in a good position to assess whether the prosecution was brought on reasonable grounds or whether the prosecutor had unreasonably prolonged it. Hence, the burden of proof will be argumentative rather than evidentiary. The terms expressed in the section are clear in that there is still a condition which must be established before an order can be made and that condition must be established by the person seeking the order. In Appellant's case, this ground failed to stand.

Appeal dismissed.

Case referred to

Minelli v Switzerland (1983) 5 EHRR 554, not followed.

P. Greaney and S. Sorby for the Appellants

G. Allan for the Respondent

Fatiaki P, French and Weinberg JJ.

Introduction

[1] Grahame Southwick was charged with a number of criminal offences in 1998. At the commencement of his trial in July 1999 a motion for a permanent stay of the proceedings against him was granted. He subsequently applied for an order for costs in his favour under s 158(2) of the Criminal Procedure Code (Cap 21). The application was refused on the basis that Mr Southwick had not shown that the prosecutor either had no reasonable grounds for bringing the proceedings or had unreasonably prolonged them.

[2] Mr Southwick appealed to the Court of Appeal against the refusal of the costs motion, but the appeal was dismissed. The Court of Appeal granted leave to him to appeal to this court on questions relating to the proper construction of s 158(2) having regard to the provisions of s 28 of the Constitution which confers the right, upon persons charged with an offence, to be presumed innocent until proven guilty according to law. The related contention in respect of which leave to appeal was granted was that if the section could not be interpreted consistently with his proposed construction of s 28, it should be declared invalid to the extent that it imposed the requirement that a costs order not be made unless the prosecution had acted unreasonably in the ways mentioned in the section. His appeal also involved the contention that if valid the section does not require the applicant for costs to show unreasonable conduct on the part of the prosecution.

[3] For the reasons that follow, we are of the opinion that the appeal should be dismissed.

Factual and procedural history

[4] On 7 October 1998, Grahame Southwick and Visanti Makrava were committed for trial by the Chief Magistrate following a preliminary enquiry at which oral evidence was given for the prosecution. The charges upon which the two men were committed related to an alleged conspiracy to obtain money by false pretences.

[5] Prior to their joint trial, Mr Makrava was acquitted, after trial, of a charge of official corruption, the evidence in which was closely related to the evidence to be adduced in the joint conspiracy proceedings.

[6] At the commencement of their joint trial, counsel for the prosecution conceded that the conspiracy charges against Mr Southwick and Mr Makrava jointly could not proceed in view of Mr Makrava's acquittal on the official

corruption charge. This concession was said, by counsel for the Petitioner, to have been based upon the proposition that “*autrefois acquit*” applied to protect Mr Makrava from further prosecution and that Mr Southwick could not be convicted of a conspiracy with a man who had been acquitted in respect of the same agreement. It was also conceded that Mr Southwick could not be convicted upon remaining counts of fraudulent conversion because they related to the use of a loan obtained pursuant to the agreement said to constitute the conspiracy alleged against both accused. The prosecution is said to have conceded that Mr Makrava’s acquittal affected the whole information. In addition, it was accepted that a fair trial was not possible because certain documents were missing which might have materially undermined the State’s case. The learned trial judge, Pathik J, said, according to his notes:

I endorse the remarks of both Mr Stewart and Mr Shankar that Mr Schuster has informed (sic) his function as a prosecutor remarkably well bearing in mind the facts and circumstances of this case.

Fair trial and justice is all one looks to in any criminal trial and I must say that on the facts and circumstances of this case and the difficulties likely to be encountered by the prosecution Mr Schuster’s approach to the matter was the only approach open to him. I therefore in the exercise of the Court’s inherent power supported by authorities referred to by counsel, I grant a permanent stay of the trial of this case and therefore the information would be marked “Stayed” in (sic) the ground that the continuation of the case would constitute a misuse of the process of the Court and a fair trial was not possible.

The judge then said that both accused were to be discharged.

[7] By a motion dated 13 July 1999, Mr Southwick applied to the learned primary judge, under s 158(2) of the Criminal Procedure Code, for an order for costs against the State in the amount of \$F582,577.77. Argument on the motion proceeded before Pathik J on 21 July 1999. On 19 November 1999, his Lordship dismissed the motion. Mr Southwick then appealed to the Court of Appeal. On 1 March 2002, the court dismissed that appeal. On 28 February 2003, the Court of Appeal, differently constituted, granted leave to Mr Southwick to appeal to the Supreme Court from the judgment of the Court of Appeal.

The certified question

[8] Section 122(2) of the Constitution provides that an appeal may not be brought from a final judgment of the Court of Appeal unless the Court of Appeal gives leave to appeal on a question certified by it to be of significant public importance or the Supreme Court gives special leave to appeal. The question certified by the Court of Appeal in this case was:

Is the proviso to section 158(2) of the Criminal Procedure Code inconsistent with the Constitution of the Republic of the Fiji Islands?

The statutory and constitutional framework

[9] Section 158(2) of the Criminal Procedure Code provides:

It shall be lawful for a judge of the Supreme Court or any magistrate who acquits or discharges a person accused of an offence, to order the prosecutor either public or private, to pay to the accused such reasonable costs as to such judge or magistrate may seem fit:

Provided that such an order shall not be made unless the judge or magistrate considers that the prosecutor either had no reasonable grounds for bringing the proceedings or has unreasonably prolonged the same.

[10] The provisions of the Constitution which are said, in this case, to be relevant to the construction and validity of s 158 are the following:

- 2(1) This Constitution is the supreme law of the State.
- 5 (2) Any law inconsistent with this Constitution is invalid to the extent of the inconsistency.
- (3) In the interpretation of a provision of this Constitution:
- 10 (a) a construction that would promote the purpose or object underlying the provision, taking into account the spirit of this Constitution as a whole, is to be preferred to a construction that would not promote that purpose or object; and
- (b) regard must be had to the context in which this Constitution was drafted and to the intention that constitutional interpretation take into account social and cultural developments, especially:
- 15 (i) developments in the understanding of the content of particular human rights; and
- (ii) developments in the promotion of particular human rights.

[11] Chapter 4 of the Constitution establishes a Bill of Rights. It commences in s 21 with general provisions about the application of the rights:

- 20 (1) This Chapter binds:
- (a) the legislative, executive and judicial branches of government at all levels: central, divisional and local; and
- (b) all persons performing the functions of any public office.
- 25 (2) The rights and freedoms set out in this Chapter apply according to their tenor and are subject only to the limitations under laws of general application permitted by this Chapter and to such derogations as are authorised under Chapter 14.
- (3) Laws made, and administrative and judicial actions taken, after the commencement of this Constitution are subject to the provisions of this Chapter.
- 30 (4) In considering the application of this Chapter to particular legislation, a court must interpret this Chapter contextually, having regard to the content and consequences of the legislation, including its impact upon individuals, groups or communities.
- (5) This Chapter applies to all laws in force at the commencement of this Constitution.
- 35 (6) To the extent that it is capable of doing so, this Chapter extends to things done or actions taken outside the Fiji Islands.

[12] Section 28 deals with “*Rights of charged persons*”. It provides, inter alia:

- 40 (1) Every person charged with an offence has the right:
- (a) to be presumed innocent until proven guilty according to law;
- ...
- (d) to defend himself or herself in person or to be represented, at his or her own expense, by a legal practitioner of his or her choice or, if the interests of justice so require, to be given the services of a legal practitioner under a scheme for legal aid;

45 Section 43(3) provides:

50 A law that limits a right or freedom set out in this Chapter is not invalid solely because the wording of the law exceeds the limits imposed by this Chapter if the law is reasonably capable of a more restricted interpretation that does not exceed those limits. In that case, the law must be construed in accordance with the more restricted interpretation.

The judgment in the High Court

[13] Pathik J at first instance dismissed the motion for costs. His Lordship observed that he had a discretion to award costs provided that the prosecution had “no reasonable grounds for bringing the proceedings” or had “unreasonably
5 prolonged the same”. He rejected the contention that the prosecution had no reasonable grounds for bringing the proceedings. He observed that at no stage of the proceedings had the defence contended that they were not reasonably brought. No such contention was made at the preliminary hearing. The matter had
10 been properly investigated and the prosecution’s view was that the case was not so thin that no prosecution should have followed. His Lordship was satisfied that the prosecution did have sufficient evidence to lay the information. This was confirmed by the decision of the committing magistrate. His Lordship also held that there was ample evidence to justify the prosecution. No good grounds were shown for the exercise of the discretion under s 158(2).

[14] It should be noted that there was reference in the course of argument, acknowledged by his Lordship, to s 28(1)(d) of the Constitution.

The Court of Appeal

[15] There was a debate before the Court of Appeal on whether it had the
20 jurisdiction to deal with Mr Southwick’s appeal against the decision of Pathik J. The court concluded that the judgment below was “final” and given in the exercise of the original jurisdiction of the High Court. It held it had jurisdiction to entertain the appeal. It found that the grounds for an award of costs under s 158(2) had not been made out.

25 Grounds of appeal

[16] The grounds of appeal involve two sets of propositions. The first set of propositions relate to the construction and validity of s 158(2) in the light of the provisions of the Constitution. They are as follows:

- 30 1. The Court erred in impliedly adopting a strict interpretation of section 158(2) of the Criminal Procedure Code.
2. The Court erred in failing to construe section 158(2) in a manner which took into account social and cultural developments including developments in other jurisdictions and in the understanding of the content of particular human
35 rights.
3. In the event that no such interpretation was possible the Court should have declared the section invalid to the extent necessary to ensure an appropriate interpretation. The Court failed to take into account that in the modern world an accused person against whom criminal proceedings have terminated without conviction is entitled to his costs of defending himself unless there is
40 some valid reason for not making an award.
4. Construing section 158(2) according to the requirements of the Constitution the Court should have struck out the proviso to the section establishing the conditions upon which no order for costs can be made.
5. The Court should have ruled that only the first part of section 158(2), suitably interpreted, remains valid.
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[17] The preceding grounds relate to the constitutional validity and construction of s 158(2) having regard to human rights considerations. By way of alternative, it is asserted that:

- 50 1. The Court erred in law in ruling that the onus of proving that the prosecution had no reasonable grounds for bringing proceedings must rest on the applicant for costs.

2. The preceding reflects the general principle in criminal proceedings that the burden of proof rests on the prosecution subject to any express or implied statutory provision to the contrary.
- 5 3. No express burden is placed upon an applicant for a costs order under section 158(2). It must rest upon the prosecution to prove that it had reasonable grounds for bringing the proceedings and has not unreasonably prolonged them.
4. The burden upon the prosecution must be discharged to the criminal standard.

10 **The constitutional inflation of s 158(2)**

[18] It is convenient to deal with the first set of grounds together. That may be done quite shortly. The resolution of the questions they raise turns upon the juristic character of s 158(2), the proper construction of the Constitution and the proper limits of the court's function.

15 [19] Section 158(2) of the Criminal Procedure Code confers upon a judge or magistrate a positive power to award costs to an accused person who is acquitted or discharged from criminal proceedings. The section creates an express power conditioned upon the existence of unreasonable conduct on the part of the prosecutor in bringing the prosecution or in prolonging it. There is no common
20 law power to award costs in criminal proceedings. Even if there were, the section does not in terms limit any existing powers or rights.

[20] The submissions advanced by Mr Southwick's counsel involved the proposition that the right to the presumption of innocence, guaranteed by s 28 of the Constitution, applies not just within the four corners of the criminal trial
25 process but also to processes ancillary to it. The presumption is therefore to be taken as informing the basis upon which the court should approach an application for costs in the event of an acquittal or discharge. The prosecutorial unreasonableness condition imposed upon the power conferred by s 158(2) offended, so it was submitted, against the presumption of innocence because it
30 would, as a matter of practical reality, require an applicant to show that he or she was innocent as part of demonstrating the unreasonableness of the prosecution.

[21] These submissions are rejected. The presumption of innocence is not a true presumption but a shorthand way of referring to the proposition that, in a criminal
35 trial, the burden of proving guilt rests upon the prosecution and not upon the accused. This is reflected in the language of s 28 itself which talks about the presumption of innocence operating in respect of a person charged with an offence "until proven guilty according to law". Moreover, there is no legitimate conceptual basis upon which the presumption of innocence can be extended to
40 affect the resolution of a question which as a matter of principle involves no determination of guilt or innocence but rather whether the prosecutor acted unreasonably in bringing the prosecution or unreasonably prolonged it.

[22] Counsel for Mr Southwick relied upon a decision of the European Court of Human Rights in *Minelli v Switzerland* (1983) 5 EHHR 554 (*Minelli*). In that
45 case, a private prosecution for criminal defamation was terminated before judgment on the ground that a statutory limitation period had expired. However costs were awarded against the defendant. The European Court of Human Rights held that the nature of the proceedings was criminal in character. The prosecution being private, the costs would not be paid by the state but had to be borne by the
50 parties themselves. Article 293 of the Zurich Code of Criminal Procedure provided:

The losing party shall bear the court costs and shall pay compensation to the other party in respect of his expenses; a departure from this rule can be made only if special circumstances so warrant.

5 [23] The court which awarded costs against the defendant in that case took the approach that it was entitled, in assessing the apportionment of costs, to consider what the judgment would have been had the case not fallen foul of the limitation provision. The question of principle identified in the judgment was whether it was consonant with the presumption of innocence to direct that a person shall pay court costs and compensation in respect of expenses where he has been acquitted
10 or where the case has been discontinued, discharged or terminated on account of a time limitation. The court said at [37] of the judgment:

15 In the Court's judgment, the presumption of innocence will be violated if, without the accused's having previously been proved guilty according to law and, notably, without his having had the opportunity of exercising his rights of defence, a judicial decision concerning him reflects an opinion that he is guilty. This may be so even in the absence of any formal finding; it suffices that there is some reasoning suggesting that the court regards the accused as guilty.

20 The Assize court which imposed the costs order had concluded that, in the absence of limitation, the defendant would very probably have been convicted. In the words of the European Court of Human Rights:

25 In setting out [its] reasons, the Chamber treated the conduct denounced by the private prosecutors as having been proved; furthermore, the reasons were based on decisions taken in two other cases to which, although they concerned the same facts, Mr Minelli had not been a party and which, in law, were distinct from his case.

30 [24] As appears from this review of the *Minelli* decision, the problem it addresses is conceptually distinct from that involved in a demonstration that a prosecution was brought unreasonably or unreasonably prolonged. The dicta in that case have no application to the present situation. We leave open the question whether a positive finding, in the course of a decision refusing a costs order under s 158(2), that the applicant for costs would have been found guilty had the case proceeded would offend the presumption of innocence and require reconsideration of the motion. No finding of guilt or innocence is required in order to determine whether the condition for the exercise of the power under
35 s 158(2) is satisfied.

40 [25] Further, given the juristic character of s 158(2) as a beneficial, albeit limited, power-creating provision it cannot be open to constitutional attack upon the basis that it does not go far enough. What counsel for Mr Southwick seeks to do is to invoke s 28 of the Constitution to extend the application of the power as a matter of construction or to rewrite it by striking out the limitation upon its exercise. This submission does not invite the court to exercise its traditional judicial function of testing the validity of legislation against constitutional principles. Rather it invites the court to legislate. This would involve a clear transgression of the constitutional limits upon its function.
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The burden of proof

50 [26] Strictly the argument relating to burden of proof does not fall within the scope of the certified question. It can however be dealt with briefly. In considering the second group of grounds relating to the burden of proof in an application for costs under s 158(2), it is necessary to have regard to the character of the power created by the section. It is expressed in the first limb of the section

as a power, under certain conditions, to award reasonable costs. The necessary condition is that a person accused of an offence has been acquitted or discharged by a judge of the High Court or any magistrate. The second limb commences with the word “*provided*” and might, at first, be thought to be a proviso. However, it is in terms expressed as a necessary condition for the exercise of the power to make an order for costs. That is to say, it is a condition which must be satisfied before such an order can be made. On ordinary principles the person seeking the order must show that the conditions for the exercise of the power to make it have been satisfied.

- 10 [27] In the case of an acquittal after trial it may be expected that the judge or magistrate making the order will be in a good position to assess whether the prosecution was brought on reasonable grounds and whether the prosecutor has unreasonably prolonged it. The burden of proof will be essentially argumentative rather than evidentiary. It may be that in other cases a prosecution will be abandoned by way of *nolle prosequi* or consent to the dismissal of a complaint in summary proceedings in circumstances which would allow an inference of unreasonableness to be drawn in the absence of any explanation by the prosecutor. The variety of circumstances which can lead to acquittal or discharge is such that the weight of the burden of proving the condition necessary for a costs order will vary significantly from case to case. However, the words of the section are clear, there is a condition which must be established before the order can be made and that condition must be established by the person seeking the order.

25 **Conclusion**

[28] Having regard to our conclusions on the two principal grounds of appeal the question of the reasonableness of the costs claimed by Mr Southwick does not arise for consideration. For the preceding reasons the appeal is dismissed. The Appellant is to pay the Respondent’s costs of the appeal.

30 **Orders**

- (1) The appeal is dismissed.
- (2) The Appellant is to pay the Respondent’s costs of the appeal.

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Appeal dismissed.

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