

IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

CRIM. NOS : S.473/92

& S.95/92

BETWEEN : POLICE

Informant

A N D : SONNY STEHLIN of
Vailima

Defendant

Counsel : H M Aikman for Prosecution
R S Toailoa for Defendant

Hearing : 10 August 1993

Decision : 16 August 1993

DECISION OF SAPOLO, CJ

EMS.

The defendant in this case had pleaded not guilty to the charges of possession of narcotics and cultivation of narcotics under the Narcotics Act 1967. At the trial he was found guilty of the charges and was convicted and sentenced to 12 months imprisonment on the possession charge and 2½ years imprisonment on the cultivation charges. Both sentences are to be served concurrently.

The prosecution has now applied for costs under section 167 of the Criminal Procedure Act 1972. The relevant provisions of section 167 for the purposes of the present application are as follows:

"S.167 (1) : Where the Court convicts a defendant, it may
"order him to pay to the informant such costs as it thinks
"just and reasonable for Court fees, witnesses and inter-
"preters expenses, and solicitor's fees.

"S.167 (5) : Costs allowed under this section shall in no case exceed the amount provided for in any scale prescribed by regulations or rules made under this or any other Act.

"S167 (6) : Any costs allowed under this section shall be specified in the conviction or order for dismissal, and may be recovered in the same manner as a fine".

Thus the Court, whether it be this Court or the Magistrates Court, may order a defendant who has been convicted of an offence to pay the informant's costs for witnesses expenses provided those costs are just and reasonable in the circumstances of the case and that they do not exceed any scale of costs prescribed by any regulations or rules which are applicable. There are presently no regulations or rules which prescribe a scale for costs which may be awarded in a criminal case even though there is provision under sections 175 and 176 of the Criminal Procedure Act for the making of such regulations and rules. So the Court in awarding costs against a defendant who has been convicted of an offence will just have to go on what it considers to be just and reasonable in the circumstances. Perhaps it should also be mentioned before going further that the Police who brought the prosecution in this case come within the meaning of the word "informant" as defined in section 2 of the Criminal Procedure Act.

Now it is uncommon for the prosecution to apply for costs in a criminal case where a defendant has been convicted. In my experience this is the first time the prosecution has applied for costs. The reason for the present application is that the prosecution had to bring over from the Institute of Environmental Health and Forensic Sciences in New Zealand a scientific witness to testify in this case. It has been the Police practice for many years in narcotics prosecutions to send samples of

substances they allege to be cannabis to the Department of Scientific and Industrial Research in New Zealand for proper laboratory testing and identification and reports of those laboratory tests and identification are sent from New Zealand to the Police. If the laboratory tests are positive, then the Police will continue with the prosecution and a copy of the report from New Zealand is made available to the police before the trial and produced in evidence for the prosecution during the trial. Perhaps it should also be mentioned that as a matter of practice, the defence has not required the presence at the trial of the person who conducted the laboratory tests and identification in New Zealand in order to testify as to the report from New Zealand and to produce that report as evidence for the prosecution. This is the first narcotics prosecution to my knowledge where a scientific witness from New Zealand has been brought over to testify as to the findings of her laboratory tests and identification on alleged narcotic substances sent from the Police here.

Now that the defendant has been convicted, the prosecution is seeking from the Court an order for costs for bringing over its scientific witness from New Zealand. The total costs incurred for this scientific witness airfares and accommodation is NZ\$2,402. These costs are itemised and set out in a document submitted by the prosecution to the Court. Counsel for the prosecution has said that if costs are not awarded for the full amount of the scientific witnesses expenses, then the defendant should at least be ordered to make a just and reasonable contribution to those expenses. Counsel for the prosecution also says, and I agree, that the only defence relied on by the defendant was the defence of necessity which does not relate to the evidence for which the scientific witness was required to be brought over from New Zealand. I was also the presiding

Judge at the trial. Apart from the cross-examination of the scientific witness, there was, in my view, no really serious challenge of that witness' evidence even though the defence has had the report from that witness for several months. No doubt the conduct of the defence is a relevant factor in the exercise of the Court's discretion whether to award costs.

I have come to the view that in this case, the defendant should be ordered to make some contribution to the costs incurred in bringing over this scientific witness from New Zealand. But as the Court must be guided by what is just and reasonable in the circumstances, I think the means of the defendant is a significant factor to be considered by the Court in deciding whether to order costs against the defendant and if so ordered, how much should be those costs. It was for that reason that I asked counsel, the day after the application for costs was made by the prosecution, to advise the Court as to the means of the defendant. Clearly the Court will not make an order for costs which is beyond the defendant's means to pay.

So in an application for costs by the prosecution against a convicted defendant, it is good practice for the prosecution to submit a clear estimate of the costs claimed. The defendant must disclose his means. And the Court must not make an order for costs until advised as to the means of the defendant.

I must however make it clear that the conduct of the defence and the means of the defendant are only two of the factors to be taken into consideration in the exercise of the Court's discretion as to costs on application by the prosecution against a convicted defendant. There must of course be other relevant factors. But the Court is not now concerned with any other relevant factors. For a discussion of English authorities on the principles governing the exercise of the Court's discretion on an

application for costs by the prosecution see Archbold Criminal Pleadings Evidence and Practice 43rd ed. paras. 6-10. And for a brief New Zealand discussion see Adams Criminal Law Vol. 1, CA 402.06.

The Court has now been advised of the defendant's financial situation. He has 7 acres of bananas which have not matured for harvesting; $\frac{1}{2}$ an acre of taros which is for defendant's family consumption; an acre of melons only recently planted; and a pick-up vehicle. It is not clear when the bananas and melons will be ready for harvesting. But it is clear to the Court that the main source of income will be from the 7 acres of bananas.

The defendant also has debts totalling \$2,900. He also has a wife and four children who range in age from 16 years to 9 months. I assume that the wife and the children will also look mainly to the bananas as a source of income for themselves especially as the defendant has now been sentenced to prison. In the absence of the defendant, I presume that the wife and the 16 year old son will be most likely to look after the plantation.

Taking into consideration all these matters, the defendant is ordered to pay \$500 towards the costs of the prosecution for its scientific witness from New Zealand. As it is not clear when the melons and especially bananas will be ready for harvesting and sale, the costs of \$500 awarded to the prosecution must be paid within 5 months from the date of this decision. These costs must be specified in the conviction.

TF. Supalm
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CHIEF JUSTICE