

**IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CRIMINAL DIVISION)**

**JP APPEAL NO. 1/13
(CR 73/13)**

IN THE MATTER of Section 76(1) of the Judicature Act
1980-81

AND
IN THE MATTER of an Application to appeal a decision
of a Justice of the Peace on
conviction of an offence under the
Transport Act 1966

BETWEEN **TIARE DOLLY KELLEHER** of
Rarotonga, Cook Islands
Appellant

AND **COOK ISLANDS POLICE** of
Rarotonga, Cook Islands
Respondent

Hearing: 11 September 2013

Appearances: Ms M Henry for the Crown
Mr M Mitchell for the Defendant

Judgment: 18 September 2013

JUDGMENT OF WESTON CJ AS TO COSTS

Introduction

[1] On 11 September 2013 I upheld an appeal brought by Ms Kelleher against her conviction and sentence for an alleged breach of s 28B(4)(a) of the Transport Amendment Act 2007.

[2] The oral judgment (now reduced to writing) sets out the reasons for my decision at length and I do not, except as necessary, repeat any of that detail here.

Costs application

[3] Following the successful appeal, Mr Mitchell for the appellant applied to have costs paid to his client in terms of s 80 of the Judicature Act 1980-81. In his

written submissions he set out the reasons why he said costs should be paid. He said that the appeal was meritorious and was not simply based on a technicality. He submitted that the evidence of the female constable was, in a number of respects, unsatisfactory. He also submitted that the overall police conduct on the evening in question was “baffling, to say the least”. He noted that the constable gave conflicting evidence about the subsequent arrest. He referred to the fact that the appellant was held in the police station overnight. He also submitted that the system had let her down in relation to the suppression of her name.

[4] He concluded his submissions by observing that her likely costs, although not yet fixed, would be in the region of \$12,500.

Police submissions in response

[5] Ms Henry in reply emphasised that in criminal cases costs do not automatically follow the event. She referred to earlier authorities such as *BTIB v Taakoka Island Villas* in which the Court’s approach to these matters was discussed by reference to s 5(2) of the New Zealand Costs in Criminal Cases Act 1967. Ms Henry emphasised that costs were to be approached on a principled basis.

[6] She then set out s 5(2) of the New Zealand Act. She submitted that a number of the provisions did not apply and I agree with her as to that. She then submitted there was no bad faith in bringing the prosecution. She accepted that the manner in which the police had conducted their investigation could have been handled better and accepted that costs in the sum of \$500 might be appropriate.

Discussion

[7] I believe this is one of those relatively unusual cases where costs are justified. I have reviewed the factors set out in s 5(2) of the New Zealand Act. It seems to me there are two key dynamics at work. The first of these is that, in the absence of any formal finding by the JP, I was not able to decide whether the constable or the appellant were credible in giving their evidence. Therefore I tested the various statements of evidence by reference to external factors. In a number of respects the conduct of the constable was unsatisfactory. However, having said that, the evidence she gave in Court was clear and consistent. It is possible that the negative

features which I assessed, may not have led to the conclusion that I actually reached, if I had been able to hear and determine the evidence itself. Therefore, this is not one of those cases where the prosecution case can be said to have been hopelessly flawed. There was a distinct possibility that a guilty verdict would be the result. That, then, stands against the award of costs in this case.

[8] However, the more compelling feature, I believe, is that the overall police conduct on the night in question fell below appropriate standards. This is a factor set out in s 5(2). I refer for example to subsection (d). It seems to me that what happened on the night in question is properly regarded as part of the investigation into the offence.

[9] Ms Henry responsibly accepted that the conduct of the police investigation could have been better. It seems to me that this is the more powerful dynamic and justifies the award of costs. However, the first dynamic discussed above suggests that these costs need to be kept in proportion.

[10] Having reached that conclusion it now becomes a matter of quantum. Mr Mitchell suggested that costs should be as high as \$12,500. With respect, I believe that is entirely unrealistic. I have no doubt that the appellant has and will have to meet costs rendered by counsel. In many respects, though, she has received a Rolls Royce service in relation to what was a relatively minor charge. I do not want to downplay the importance of drink driving cases but the steps taken by her to defend herself were quite extensive. Of course, she was perfectly entitled to do that, but not necessarily at full cost to the police if she prevailed.

[11] Taking all things into account, I believe an appropriate balance is reached if I order costs to be paid to the appellant by the police in the sum of \$1,500 and I so order.



Tom Weston
Chief Justice