THE STATE

v.

WAISALE ROKOTUIWAI

[HIGH COURT, 1998 (Pain J) 31 March]

Criminal Jurisdiction

Courts- whether the High Court has an inherent jurisdiction to award costs arising from interlocutory applications in criminal cases — Criminal Procedure Code (Cap. 21) Section 158 (1).

The Accused sought an award of costs to compensate him for expenses incurred by defence counsel in connection with an abandoned interlocutory application by the Prosecution. The High Court HELD: notwithstanding the absence of any statutory power to award costs arising from interlocutory applications the High Court possessed an inherent jurisdiction to award costs in such circumstances when it was just so to do.

Cases cited:

Connelly v Director of Public Prosecutions [1964] AC 1254
R v Moke and Lawrence [1996] 1 NZLR 263
R v Munro (1993) 97 Cr. App. R. 183
The State v Davendra Singh (1997) 43 FLR 257
The State v Neori Qoli (1997) 43 FLR 195

Application for costs.

Mrs R Olutimayin for the State
J Cameron for Accused

Pain J:

This is an application by counsel for the accused for costs in respect of an appearance in this Court on 16th October 1997.

HISTORY

By information of the Director of Public Prosecutions dated 14th November 1996, the accused was charged in this Court with the offence of murder. On 4th November 1996 a trial commenced before Pathik J with assessors. On 27th November 1996 the learned Judge stopped the trial and ordered "a *venire de novo* before a fresh panel of assessors".

On 17th February 1997, the case was called before Townsley J for mention. Counsel for the Prosecution advised the learned Judge that "three doctors are overseas - State is considering whether the murder charge should be reduced".

Counsel for the accused is Dr. J Cameron of Perth, Australia. He subsequently had communications with the prosecutor and particularly made representations as to whether a new trial should proceed.

On 12th September 1997 the case was called before me for mention. The prosecutor advised that an amended information for causing grievous harm was to be filed and the prosecution intended to proceed to trial on that charge. Counsel for the accused was not present. However, he had been forewarned of this and had advised the Court that he wished to make submissions on the issue. The matter was therefore adjourned to 16th October 1997 for argument on whether the Director of Public Prosecutions could file an amended information in this case.

Counsel for the accused was advised of this fixture by facsimile from the Registrar and informed that he could file written submissions or appear at the hearing and make oral submissions. Counsel replied by facsimile dated 16th September 1997 (copied to the Director of Public Prosecutions) stating:

> "Bearing in mind the changed character of the application, and its importance to the accused, I am of the view that written submissions would be unsatisfactory and I am making arrangements to come to Fiji to make oral submissions on 16th October".

The prosecution decision to amend the charge from murder to causing grievous harm was undoubtedly prompted by the fact that the pathologist who conducted the post-mortem had left Fiji and was unable to give evidence. However, on 29th September 1997 a decision was delivered in this Court in The State v Davendra Singh (1997) 43 FLR 257 holding that, in such circumstances, the pathologist's report could be admitted in evidence under Section 4 of the Evidence Act as a business record of the hospital.

At the hearing on 16th October 1997 the Prosecutor announced that the State had changed its position. The Court was told that on the previous Friday (i.e. 10th October), The Director of Public Prosecutions had been briefed on the decision in The State v Davendra Singh (supra) and had instructed State Counsel to review the evidence in all homicide prosecutions in the light of that decision. This present case had been reviewed and a decision made to proceed on the original charge of murder. The prosecutor advised that this decision had only been made the previous day (15th October) and defence counsel had only been advised of it when he attended Court for the hearing (16th October). Counsel advised that he had travelled from Australia specifically to argue the amendment issue. He sought an order for costs. Both Counsel were asked to file written submissions.

The written submissions were filed and have been considered by me.

SUBMISSIONS

Counsel for the State submits that the Court has no jurisdiction to make an order for costs against the prosecutor. The matter of costs is covered by Section 158(2) of the Criminal Procedure Code. An order can only be made when an accused is acquitted or discharged and then only if the prosecutor either had no reasonable grounds for bringing the proceedings or has unreasonably prolonged the same. That is not the situation in this case. Moreover, it is submitted that the Court cannot have recourse to the common law or inherent jurisdiction. The Criminal Procedure Code is a complete code for the trial of criminal cases and the power to award costs is specifically covered by section 158(2).

The principal submissions of counsel for the Accused are that the application to amend had no prospect of success and therefore amounted to abuse of process and the failure of the prosecution to withdraw the application to amend and advise the accused timeously thereof also constituted an abuse of process. The Court has an inherent jurisdiction to protect itself and parties against such abuse of process and this can be done by an award of costs on an indemnity basis. It is further submitted that Section 158 of the Criminal Procedure Code is limited to "outcome costs" following disposal of the case and does not necessarily exclude costs on interlocutory applications.

MERITS

The merits of the issue clearly favour the defence. Counsel's facsimile letter of 16th September 1997 was clear notice to the Director of Public Prosecutions that he intended to travel from Perth, Australia personally to represent the accused at the hearing in Suva on 16th October 1997. The judgment that prompted the Director to review the decision to amend the charge (The State v Singh) was delivered on 29th September 1997 in a case being prosecuted by State Counsel from the Director's office. It was a judgment with far reaching consequences for the State because of current difficulties in prosecuting homicide cases because of the unavailability of pathologists who had conducted post-mortems. This was one of those cases. When the Director finally decided on 10th October 1997 to review the evidence in homicide prosecutions this case should have been given urgent priority. A decision had already been made to amend the charge and it was known that defence counsel was travelling from Australia to challenge that decision at a hearing set for 16th October 1997. However, the decision not to proceed with the amendment was not made until 15th October 1997 and defence counsel was not advised until he arrived at Court on 16th October 1997. The Director had ample time from the date of delivery of the judgment in The State v Singh, and even from the date of her decision to review all homicide cases, to consider this case and decide to proceed on the original charge. In the circumstances, this could, and should, have been done in ample time to advise defence counsel and save him the unnecessary expense of travelling to Fiji for a hearing that would not

take place.

A The broad justice of this situation calls for an award of costs to compensate the defence for the unnecessary expenses incurred by counsel attending a hearing of a matter that the prosecutor abandoned without prior notice. Such an award would, in all likelihood, be made in civil proceedings. The question is whether the court has jurisdiction to make such an order in criminal proceedings.

CRIMINAL PROCEDURE CODE

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Section 158 is the only provision of the Criminal Procedure Code dealing with costs. It is not applicable in the present situation. Sub-section (2) makes it lawful for a Judge to order the prosecutor to pay costs to any accused if one of the matters in the proviso is established - but that is only when the accused has been acquitted or discharged. No provision is made for the award of costs at

C an interlocutory stage.

The issue raised in this case is whether the Criminal Procedure Code is a complete and exclusive code for the conduct of criminal prosecutions. The State argues that it is and this Court can only exercise the powers prescribed in the Code. Thus Section 158(2) is an exclusive provision for the award of costs against a prosecutor and the Court cannot have recourse to the common

D law or it's inherent jurisdiction for that purpose.

It must be remembered that the Criminal Procedure Code is, as the name implies, primarily a code of procedure. In terms of Section 3, all offences under the Penal Code or any other statute are to be tried in accordance with the provisions of the Code. However, subsection (3) of Section 3 provides that

E if the procedure prescribed by the Code is inapplicable in respect of a particular matter, the High Court may exercise criminal jurisdiction "according to the course of procedure and practice observed by and before Her Majesty's High Court of Justice in England at the commencement of this Code". Therefore, it could be said that, as Section 158 is not applicable to an interlocutory award of costs, this Court can have recourse to the procedure and practice of the

F English High Court of Justice on this issue. That would include any common law or inherent jurisdiction. (It might also be arguable that this Section and/or Section 18 of the High Court Act may empower this Court to have recourse to the Prosecution of Offences Act 1985 of England and the 1986 Costs in Criminal cases (General) Regulations thereunder - but this point has not been raised or argued).

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Further, Section 158 of the Code could not be construed, on its own, as a complete code on costs ousting any common law or inherent jurisdiction on the issue. It has very limited application. Compare for example, Part II of the Prosecution of Offences Act 1985 in England (and the Regulations thereunder) and the Costs in Criminal Cases Act 1967 in New Zealand which each contain an extensive code for the award of costs.

Also, Section 158 is in Part IV of the Code which contains "provisions relating to all criminal investigations". More specifically, it is within a Sub-Part thereof entitled "Costs and Compensation". Significantly, all sections within this Sub-Part (158 to 162) deal with orders for costs, compensation, expenses and payment of money after an accused has been discharged, acquitted or convicted. They are in the nature of penalties or sanctions that may be imposed after the charge has been determined. Counsel for the accused aptly described costs under Section 158 as "outcome costs". Specific provision is made for an award of costs after the case has been heard. However, the Section does not deal with and is inapplicable to the making of interlocutory orders for costs. If the Court has an inherent jurisdiction to make an order for costs prior to final determination of the case, that jurisdiction would be in addition to the power given by Section 158.

In practice this Court does, from time to time, make orders and sanction procedures that are not specifically authorised by the Criminal Procedure Code. For instance, a Judge will deal with contempt of Court in the course of criminal proceedings. Warrants to arrest are issued in both the trial and appellate jurisdiction. Successive informations filed by the Director of Public Prosecutions are regularly accepted and acted upon.

For all of the foregoing reasons, I am satisfied that this Court is not precluded by the provisions of the Criminal Procedure Code, and particularly Section 158 thereof, from exercising any common law or inherent jurisdiction it may have to make an. interlocutory order for costs.

INHERENT JURISDICTION

Counsel for the accused urged the Court to invoke its inherent jurisdiction. It is submitted that there has been an abuse of process entitling the accused to an award of costs against the State.

The nature of the inherent jurisdiction of this Court is succinctly expressed in commentary on The Code of Civil Procedure in New Zealand at J.16.05 as follows:

> "The court, as a source of justice, has inherent jurisdiction to ensure that justice is administered according to law in a regular, orderly, and effective manner. The jurisdiction exists not in contradistinction, but in addition, to the Court's statutory jurisdiction. The Court may exercise its inherent jurisdiction so long as applicable statutes and rules of Court are not contravened. The jurisdiction encompasses making any order necessary to:
>
> (a) Enable it to act effectively, even in respect of matters regulated by rules of Court, so long as it does not contravene those rules:

(b) Ensure that no misuse (abuse) of its powers and procedures occurs in the course of litigation:"

A The article "*The Inherent Jurisdiction of the Court*" by Master Jacob (published in 1970 Current Legal Problems at page 23) is recognized as an authoritative treatise on this topic. The learned author notes that an inherent jurisdiction may be exercised in a given case notwithstanding that there are Rules of Court "governing the circumstances of such case" and "the two heads of power are generally cumulative and not mutually exclusive" (page 25). Further, that the B inherent jurisdiction enables the Court "to exercise control over process by regulating its proceedings, by preventing the abuse of process and by compelling the observance of process" (page 28). Finally, that inherent jurisdiction is "a residual source of powers which the Court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or C oppression, to do justice between the parties and to secure a fair trial between them". (page 51)

Inherent jurisdiction can equally be invoked in the criminal jurisdiction as in the civil. Counsel for the Accused has referred to the well known House of Lords case of Connelly v Director of Public Prosecutions [1964] A.C. 1254 D and particularly the following extracts from the speech of Lord Devlin at page 1347:

> "My Lords, in my opinion, the judges of the High Court have in their inherent jurisdiction, both in civil and in criminal matters, power (subject of course to any statutory rules) to make and E enforce rules of practice in order to ensure that the court's process is used fairly and conveniently by both sides".
> ".....a general power, taking various specific forms, to prevent unfairness to the accused has always been a part of the English criminal law, ..."
>
> F " nearly the whole of the English criminal law of procedure and evidence has been made by the exercise of the judges of their power to see that what was fair and just was done between prosecutors and accused".

Applying these principles to the issue in this case, I am satisfied that, in appropriate circumstances, inherent jurisdiction could be invoked by the Court G to make an interlocutory order for costs in a criminal case. That would not be in conflict with any statutory provision. The Criminal Procedure Code is silent on interlocutory costs. Such a power would be complementary to and cumulative upon Section 158 which makes specific provision for costs after conviction or discharge of the accused (i.e. after final determination of the case). Appropriate circumstances for such an order would be those generally justifying the exercise of inherent jurisdiction in criminal cases. That is when it is equitable to do so to ensure the effective administration of justice and

fairness between the prosecutor and the accused. This would encompass such obvious matters as controlling and compelling the observance of due process and procedures, preventing abuse of process and procedures, preventing improper vexation or oppression and securing a fair trial.

ABUSE OF PROCESS

The inherent jurisdiction of the Court to regulate its procedures by preventing abuse of its process is well recognized. In relation to costs, a clear abuse might well justify an award of full indemnity costs.

In this case, Counsel for the accused submits that the circumstances amount to abuse of process by the State justifying an award of costs to the accused. Two specific matters are advanced.

It is first submitted by counsel for the Accused that the application to amend the information had no chance of success and constituted an abuse of process because there was no defect in the information which must exist before an information can be amended under S.274(2) of the Criminal Procedure Code.

In my view there has been no abuse of process in this regard. Section 274(2) provides a very narrow ground for amendment when it appears to the court that the information is defective. That was not the case here and no application was made to amend under this section. In fact no formal application was ever made by the State to amend the original information for murder. Notice was given by the State that it was intended that an amended information would be filed for the lesser offence of causing grievous harm. The use of the term amended information is unfortunate. It was intended that a fresh information would be filed pursuant to Section 248 of the Criminal Procedure Code for a lesser offence. This is a common and long accepted practice in this Court and in other common law jurisdictions. In England, for example, multiple indictments were common prior to the passing of the Indictments Act 1915 and the practice is still acceptable (Connelly v DPP [1964] AC 1254 and R v Munro (1993) 97 Cr. App. R. 183). In the present case the Director of Public Prosecutions would have had good reason to believe that she could file and proceed upon a second indictment for a lesser offence - more particularly in view of the Ruling of this Court given on 11th August 1997 in The State v Neori Qoli (1997) 43 FLR 195 approving this procedure. Other considerations may arise from such action but they are not relevant to the present issues. There has been no abuse of process on the basis that an application to amend the information had no chance of success.

The second submission on behalf of the Accused is that failure to withdraw the application and to advise the accused timeously of the withdrawal constituted an abuse of process.

It has already been pointed out that there was no application before the Court that needed to be withdrawn. The prosecutor had indicated that a further information for a lesser offence was to be filed. Counsel for the Accused had

advised the Court that he wished to make submissions on this issue and a hearing was fixed for 16th October 1997. That fixture was made on the 12th September 1997. Both parties knew that it was for argument on whether the Director of Public Prosecutions could file an amended information for a lesser offence in this case. The prosecution knew that counsel for the accused was attending the hearing from Australia.

I have earlier related the history leading up to that hearing, the attendance of counsel for the accused at the hearing and the prosecutor then advising that it has been decided to proceed on the original information. I have also outlined the reasons for this change of mind by the prosecution. The ruling of this Court that influenced the Director of Public Prosecutions to proceed on the original information was delivered on 29th September 1997. That was 17 days before the hearing in this case being attended by Counsel for Accused from Australia. There was ample time for a decision to be made by the Director in this case and for Counsel to be advised. There was a failure on the part of the prosecution "to advise the accused timeously" that the hearing would not proceed.

However, I am not convinced that this can be categorised as an abuse of process.

In judicial proceedings the phrase abuse of process (often in civil proceedings coupled with the words frivolous and vexatious) is frequently used rather glibly and without due consideration to its true meaning. Apposite meanings for the separate words can be found in the Shorter Oxford and Concise Oxford Dictionaries. "Abuse" is misuse, improper usage or use for a bad or corrupt purpose. "Process" is the whole of the proceedings in any action at law; the course or method of carrying on an action. In the criminal law it is the whole judicial procedure whereby an alleged offender is brought before the Court and tried for an alleged offence. Thus an abuse of process is the improper use of this procedure for a bad or corrupt purpose. It is defined in Mozley and Whiteleys *Law Dictionary* (11th Edition) as:

> "The malicious and improper use of some regular legal proceeding to obtain some advantage over an opponent."

In this case the actions of the prosecutor did not amount to an abuse of process within this definition. The Director of Public Prosecutions decided to file an information for a lesser charge and then changed her mind in view of a ruling of this Court in another case. There was no misuse of any procedure and no improper purpose. The fault or default on the part of the prosecutor was not in respect of the judicial process but in failing to give timely advice to Counsel for the accused that the further information would not be filed. There was no abuse of process.

DECISION

Undoubtedly, the Court can exercise its inherent jurisdiction to prevent abuse of process but that is not the only purpose for which it can be invoked. Reference has already been made to the general nature of the jurisdiction as described in such legal authorities as Connelly v Director of Prosecutions (supra) and *The Inherent Jurisdiction of the Court* by Master Jacob (supra). The precise limits of the jurisdiction are not prescribed. It is accepted, for instance, as extending to the making of any order necessary to enable the Court to act effectively and do justice between the parties. In R v Moke and Lawrence [1996] 1 NZLR 263 the New Zealand Court of Appeal said at page 267:

> "Indeed, it is both unwise and unnecessary to seek to define the scope of the Court's inherent jurisdiction. Broad principles governing its exercise is all that is required. The Court may invoke its inherent jurisdiction whenever the justice of the case so demands. It is a power which may be exercised even in respect of matters which are regulated by statute or by rules of Court providing, of course, that the exercise of the power does not contravene any statutory provision. The need to do justice is paramount".

I have earlier found that, in appropriate circumstances, the inherent jurisdiction of this Court could be invoked to make an interlocutory order for costs in a criminal case. That would be complementary to and not in conflict with Section 158(2) of the Criminal Procedure Code. It would promote the administration of justice by effectively regulating Court procedures, promoting the due despatch of Court business and encouraging both prosecutor and accused to facilitate a hearing without waste of time or resources. Above all the Court strives to do what is fair and just between the prosecutor and the accused. An award of costs maybe needed to do justice or prevent unfairness to one party. That would reasonably include counsel representing that party.

I have earlier given a detailed account of the facts and circumstances leading up to the present application for costs by Counsel for the accused. I have also said that the merits of the issue clearly favour the defence and that the broad justice of this situation calls for an award of costs to compensate the defence for the unnecessary expenses incurred by counsel. For the reasons given, I consider that this Court has inherent jurisdiction to make such an award. I am satisfied that an award of interlocutory costs should be made in this case. It is a unique case. It involves a serious error of omission by one party which could and should have been avoided. That omission was of such a nature and had such obvious consequences and detriment to the other party that an award of compensatory costs ought to be made to redress the unfairness to that other party (and particularly his counsel). An award in this case is a proper regulation of procedures to ensure justice between the parties.

In fixing the amount of costs to be awarded, I have regard to the fact that the Prosecutor had never made an application to amend the Information. As a matter of courtesy, State Counsel advised counsel for the Accused of the State's intention to file an amended information for a lesser charge. It was counsel for the Accused who insisted upon a hearing to argue against this common procedure. The omission of the Prosecutor which justifies an award of costs was the failure to notify counsel for the Accused in ample time that a decision had been made not to reduce the charge. If this had been done, that would have been the end of the matter. Counsel for the Accused would not have travelled from Australia to Fiji. There would have been no hearing as there was no application before the Court requiring determination.

Counsel for the Accused had merely been given the indulgence of presenting argument to the Court opposing the proposed action by The State.

In all the circumstances, this is not a case for full indemnity or solicitor-and-client costs. The award does not have a disciplinary purpose and is not made to penalise the prosecution. It is to compensate for the unnecessary travel by Counsel for the Accused from Australia to Fiji. He should be re-imbursed for his actual travel costs. In addition some allowance should be made for preparation for the proposed hearing and preparing the memorandum in respect of costs. On this basis, I fix a total sum F$6060 made up as follows:

Travel insurance	$A90	
Air fares		
Perth-Nadi-Perth	$A13689.80	
Nadi-Suva-Nadi		F$160
Departure tax		F$ 20
Airport travel		
Taxis – Perth	$A46.30	
Taxi – Nadi		F$ 4
Accommodation		
Hotel Sydney (2)	$A310.00	
Hotels Fiji (2) F$169		
Preparation		F$300
	$A4136.10	F$653
Fiji equivalent of $A4136.10 @ 0.765		F$5407
		F$6060

ORDER

Accordingly I order that The Director of Public Prosecutions to pay to Counsel for the Accused costs of $6060. A

(Award of costs in favour of the Accused.)

[Editor's Note: see however State v. Ramesh Patel Cr. App. AAU 2 of 2002S]

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