



THE COURT OF APPEAL

Record No. 9/2015

Birmingham J.  
Mahon J.  
Hedigan J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

T. O'D (NO. 2)

APPELLANT

**JUDGMENT of the Court delivered on the 1st day of June 2017 by Mr. Justice Mahon**

1. On the 22nd May 2017, this court quashed the conviction of the appellant on the 27th June 2014 for the indecent assault of N, then a sixteen year old boy, on an occasion between the 1st March and the 30th April 1979, at a boarding school in Co Cork.
2. The reasons for quashing the conviction are fully set out in this court's judgment delivered on the 22nd May 2017. Briefly stated, this court so found having identified an error of principle on the part of the learned trial judge in the manner in which he exercised his discretion not to give a corroboration warning.
3. As of the date of this court's hearing of the appeal (the 24th March 2017) the appellant had served the custodial element of the sentence imposed in the Circuit Criminal Court, being five years imprisonment, with the final two years suspended.
4. On the 22nd May 2017 the court refused the respondent's application for a re-trial of the appellant. The court's reason for so exercising its discretion not to direct a re-trial included the fact that the appellant had completed his custodial sentence, the antiquity of the offence and the appellant's age, being seventy four years. The court acknowledged that the error of principle it identified as undermining the conviction was capable of rectification in a new trial.
5. The appellant now seeks an order for his costs of the appeal, and that application is resisted by the respondent. No application to recover the costs of the trial in the Circuit Criminal Court has been made. The appellant has not benefited from State funded legal aid.
6. The jurisdiction to award costs in any matter is derived from Order 99 of the Rules of the Superior Courts. The relevant provisions of Order 99 are as follows:-

*Rule I:*

*Subject to the provisions of the Acts, and any other statutes relating to costs and except as otherwise provided by these Rules:*

- (1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.*
- (2) No party shall be entitled to recover any costs of or incidental to any proceeding from any other party to such proceeding except under an order or as provided by these Rules.*
- (3) Subject to sub rule (4A) the costs of every action, question, and issue tried by a jury shall follow the event unless the Court, for special cause, to be mentioned in the order, shall otherwise direct.*
- (3A) Subject to sub rule (4A) the Court of Appeal shall when determining liability for the cost of an appeal or an application for leave to appeal, have regard to:-*
  - (a) The number and extent of the issues raised, pursued or contested by the respective parties on the appeal or application and,*
  - (b) Whether it was reasonable for a party to raise, pursue or contest the issue, or issues concerned.*
- (4) Subject to sub rule (4A) the costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered follow the event.*
- (4A) The High Court, the Court of Appeal or the Supreme Court upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application."*

7. The jurisdiction to award costs pursuant to Order 99 of the Rules of the Superior Courts in criminal cases was confirmed by the Supreme Court in *People (Attorney General) v. Bell* [1969] IR24, but on the basis that sub-rules (3) and (4) did not apply to criminal proceedings. This, in effect, means that a decision to award or refuse costs in a criminal case is a matter for the court's discretion exercised judicially.

8. Applications for costs by successful defendants in criminal cases are relatively rare because most are processed with the benefit of State provided legal aid. In civil cases, the general rule is that the loser pays the winner's costs. It is a rule occasionally departed from in particular circumstances on the basis of the court's discretion to so decide. In *Dunne v. Minister for Environment* [2007] IESC 60, Murray C.J. stated:-

"Where a court considers that it should exercise a discretion to depart from the normal rule as to costs it is not completely at large but must do so on a reasonable basis indicating the factors which in the circumstances of the case warrant such a departure. It would neither be possible nor desirable to attempt to list or define what all those factors are. It is invariably a combination of factors which are involved. An issue such as this is decided on a case by case basis and decided cases indicate the nature of the factors which may be relevant but it is the factor or combination of factors in the context of the individual case which determine the issue."

9. In *DPP v. Kelly* [2007] IEHC 450, Charleton J. refused an application by an acquitted murder accused for an order for costs against the Director. In his judgment, Charleton J. suggested that a court, in dealing with such an application in a criminal case, might consider the following criteria, and which were not intended to be exhaustive.

- (1) Was the prosecution justified in taking the case through it being founded on apparently credible evidence?
- (2) Did anything within the investigation by the gardaí give rise, of itself, to the existence of a serious inherent doubt as to the guilt of the accused? I use this test, in distinction to a matter that might raise a reasonable doubt because, firstly, the trial judge must distance himself or herself from the evidence and, secondly, it is for the jury to judge whether there is any reasonable doubt about the guilt of the accused;
- (3) Was there any indication that the case had been taken against the accused through being based on an abuse of his rights through oppressive questioning, which contributed to a confession that was unreliable in law?
- (4) Whether the accused was acquitted by direction of the trial judge or acquitted upon consideration by the jury? Then one might go on to consider the reason for such acquittal by the trial judge, whether as to a failure in technical proofs or if it was one of the rare cases of inherent weakness in evidence that had actually been offered;
- (5) If there had been an acquittal by direction of the trial judge, was this one based upon a decision that required the exclusion of evidence, and if so, whether that exclusion was based upon a serious, as opposed to a mistaken, abuse of the accused's rights? This is not a circumstance to apply the rule as to the exclusion of evidence based on a mistake that accidentally infringes some constitutional right of the accused. What might be considered here is deliberate abuse by the servants of the State;
- (6) What answer had the accused given to the charge when presented with an opportunity to answer it? The purpose of a garda investigation is not to provide an opportunity to an accused person to state what his defence is; *McCormack v. Judge of the Circuit Court* [2007] IEHC 123, (Unreported, High Court, Charleton J. 17th April, 2007). The purpose of any fair investigation, however, is to seek out the truth; sometimes according with an initial police view as to who is guilty and often times contradicting it. A fair interview upon arrest would naturally bring an accused person to the point that he or she is expected to deal with the preliminary outline of the case inculcating the suspect and allow him or her an opportunity, if he or she wishes, the chance to say what the answer to it is or might be, in a case based on circumstantial evidence;
- (7) What was the conduct of the accused in the context of the charge that was brought, specifically in terms of who he was associating with and on what ostensible basis? Sometimes an accused can be partly responsible for attracting suspicion by dealing with and having close relations with those who are closely linked to criminal activity. Such a relationship may be explained in evidence in an apparently reasonable way, but at other times the course of dealings may be left untreated in any reasonable way in the evidence. Suspicion can arise against an accused in other ways, such as by running away or apparently destroying what might be relevant evidence.
- (8) What was the conduct of the accused in meeting the case at trial?
- (9) Whether any positive case was made by an accused such as might reasonably be consistent with innocence and whether any right was exercised to testify as to that case or whether an opportunity was used under the Prosecution of Offences Act 1974 to communicate with the Director of Public Prosecutions as to the nature of the defence?
- (10) Has the prosecution made any serious error of law or fact whereby the case became presented on a wrong premise? The same question is applicable to the defence.

10. A similar issue was considered by the Court of Criminal Appeal in *DPP v. Bourke Waste Removal Limited and Others* [2012] IECCA 66. This was an appeal brought by the Director pursuant to s. 24 of the Criminal Justice Act 2006 against orders for costs granted against him following acquittals on all counts recorded against the several respondents following their trial in the Central Criminal Court on competition related offences. The appeal was dismissed. The Court of Criminal Appeal held (as per the head note):-

- (i) that the court would not interfere with the exercise of a discretionary judgment of a trial judge in relation to costs unless it was satisfied that such exercise was substantially flawed, or was such that in the interests of justice ought to be set aside.
- (ii) When the trial court exercises its discretion in criminal cases to award costs, that discretion is not coupled with any specific presumption under the Rules of the Superior Courts 1986, that costs should follow the event. (*The People (Attorney General) v. Bell* [1969] I.R. 24 applied.)
- (iii) That in exercising the court's costs jurisdiction, the actual result of the prosecution was more than a purely neutral factor. The actual result was not determinative of orders for costs following the event but was the starting point of the court's consideration on costs and was to be considered in conjunction with other relevant circumstances.

11. The primary focus of the Court of Criminal Appeal in *Bourke Waste* related to the extent, or the circumstances in which, the court would consider interfering with a discretionary judgment of a High Court judge in relation to his or her decision on an application for costs at the conclusion of a trial in the Central Criminal Court. That particular aspect is absent in the instant case as the appellant's trial in the Circuit Criminal Court concluded in a jury verdict of guilty, and there was no application to the trial judge for costs. No application for the costs of the trial in the court below is made to this court. Nevertheless the decisions in *Kelly*, *Bourke Waste* and *McNicholas* (see below) are relevant in that they have considered the paramount criteria appropriate to a determination of an

application for costs in a criminal case.

12. The judgment of the court in *Bourke Waste* (delivered by Hardiman J.) considered the criteria suggested by Charleton J. in *Kelly* and the judgment of Cooke J. in *DPP v. McNicholas* [2011] IECCC 2 (concerning a competition related prosecution which concluded in an acquittal). In *McNicholas* Cooke J. explained his view that many of the criteria enumerated by Charleton J. in *Kelly*, while of relevance to a murder trial, were less useful in relation to a competition related offence.

13. In *DPP v. Bourke Waste Removal Limited* [2010] IEHC 122, McKechnie J., (the trial judge), suggested:-

*"However, the most significant event in my view is and remains the outcome/conclusion of the case. On the criminal side this is straightforward: guilty or not guilty. An acquittal, in my opinion, is therefore a highly significant factor which when appropriately weighted should be measured as being closely akin to the position of an applicant to whom sub-rr. (3) and (4) apply. Without in any way restricting the discretion involved, the primary approach should be result driven. If this is correct there cannot be any question of weighing up the various factors and whoever tips the scales gets the costs. The starting question must be: why should an acquitted person not get his costs?"*

14. In *McNicholas*, Cooke J. said:-

*"The Court has difficulty in accepting the fact of acquittal by jury verdict as an appropriate starting point for a number of reasons. In particular, to do so would appear to give insufficient recognition to the fact that this jurisdiction in costs in criminal cases derives from O. 99, r. 1 and is based on the distinction made between sub-rules (1) and (2) as compared with sub-rule (3)."*

15. While Cooke J. in *McNicholas* did not take any particular issue with the ten point criteria suggested by Charleton J. in *Kelly* and, indeed, in general terms agreed with them, he took the view that they had *little or no relevance* to the circumstances of the case with which he was then dealing and which involved the Competition Authority. Of particular relevance to Cooke J. in arriving at his decision (which was an award of 50% of the costs to the defendants in the trial) was the *culpable failure of the investigation or of the evaluation of the evidence* and also, the length of time the defendants had the charges pending against them.

16. Returning to the Supreme Court decision in *Bourke Waste*, Hardiman J. said:-

*"While the discretion thereby conferred is wide, it must naturally be exercised in a judicial fashion. But the actual event must nevertheless be the starting point for the court's inquiry as to how the issue of costs should be resolved, even if the absence of sub-rr. (3) and (4) means that the court's discretion in that regard must of necessity be wider than would otherwise obtain in the case of civil proceedings by reason of the presence of sub-rr. (3) and (4). While we respectfully agree that the factors identified by Charleton J. in *The People (Director of Public Prosecutions) v. Kelly* [2007] IEHC 450, [2008] 3 I.R. 202 and by Cooke J. in *The People (Director of Public Prosecutions) v. McNicholas* [2011] IECCC 2, (Unreported, Central Criminal Court, Cooke J., 20th December, 2011) are highly relevant to the exercise of that discretion, we cannot agree that an acquittal is simply a neutral fact so far as the exercise of this discretion is concerned. Nor can we agree with the suggestion of Cooke J. in .. *McNicholas* .. to the effect that treating the acquittal as the starting point in any inquiry as to costs would have the effect of applying sub-r. (3) to criminal proceedings, the decision to the contrary in *The People (Attorney General) v. Bell* notwithstanding, Ord 99, r. 1(3) is in the nature of a *lex specialis* which presumptively mandates the award of costs to the successful party. But if r. 1(3) is disregarded, it does not follow that the event is a purely neutral factor that can be put to one side for costs purposes.*

*Approaching, therefore the question of the interpretation of sub-r. (1) as if sub-r. (3) simply did not exist, we thus find ourselves obliged to acknowledge that the actual result of the prosecution is still the most important consideration regarding the award of costs. As the trial judge stressed in the present case, the acquittal of the accused is, accordingly, the starting point of any inquiry as to costs, to be considered in conjunction with other relevant circumstances, likely to relate primarily to the factors already enumerated by Charleton J. in .. *Kelly*.. and by Cooke J. in ..*McNicholas*.. Naturally, these particular factors may also legitimately be considered where it is judged appropriate to do so by the trial judge."*

17. The court's judgment in *Bourke Waste*, abridged Charleton J.'s ten criteria to the following four:-

*(a) Was the prosecution warranted, both in regard to the matters set forth in the Book of Evidence, what actually transpired at the trial, and what responses were made by or on behalf of the defendants prior to the trial?*

*(b) Had the prosecution conducted themselves unfairly or improperly in relation to the defendants, by oppressive questioning or otherwise, and had the prosecution been pursued with reasonable diligence and expedition?*

*(c) What was the outcome of the prosecution? If an acquittal was this on foot of a direction granted by the trial judge, and if so, on what basis?*

*(d) How had the defendants met the proceedings, both prior to and at trial, and had they associated themselves with undesirable elements, or otherwise contributed to drawing suspicion on themselves?*

18. In the instant case the answer to (a) is that the prosecution was warranted. A specific complaint was made by the complainant, N, alleging the commission of a serious criminal offence by the appellant. In the circumstances, the Director's decision to prosecute was entirely appropriate.

19. In relation to (b) the case against the appellant was one of very significant antiquity. Approximately thirty three years passed between the alleged offence and a complaint being made. A period of well over two years elapsed between the date of complaint to the gardaí and the date of trial, and while such a delay might not be deemed unduly prolonged, arguably that gap in time might have been shortened.

20. In relation to (c), while the outcome of the prosecution in the Circuit Criminal Court was a verdict of guilty, that verdict has now been quashed by order of this court. It is appropriate therefore that this court approach the application for costs as if the appellant had been acquitted, having regard to the reasons for his conviction appeal being allowed.

21. In relation to (d), there can be no criticism as to the manner in which the appellant has met the proceedings. He contested the

charge against a backdrop of pleading guilty to other similar offences against named students in the boarding school in question, and in which he worked at the time, while adamant that he had not committed any offence against the complainant.

22. The decision to refuse to order a re-trial is for the reasons already stated (see para 4, above) and not because of any other impediment, failure to co-operate or action taken by the complainant. The decision to refuse a re-trial was made in the interests of justice.

23. Although not acquitted by the jury the appellant now stands no less innocent than if he had been. The decision to quash the jury verdict, has, in effect, been rendered necessary by the decision of the trial judge not to give a corroboration warning. Such a warning was sought by the appellant, and was opposed by the respondent. There can therefore be no blame or responsibility attributed to the appellant for what occurred.

24. In the circumstances, the Court believes it is appropriate that the appellant should be paid his costs of appealing his conviction, and it will so order.