

Neutral Citation Number: [2021] EWCA Crim 1209

Case No: 20200698 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE HARROW CROWN COURT
His Honour Judge Cole
S20150033

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2021

Before :

LORD JUSTICE EDIS
MR JUSTICE SOOLE
MR JUSTICE MORRIS

Between :

THE LONDON BOROUGH OF BARNET

Appellant

- and -

HAMID KAMYAB

Respondent

Andrew Campbell-Tiech QC and Richard Heller, neither of whom appeared below,
(instructed by **HB Public Law**), for the **Appellant**
Nathaniel Rudolf QC (instructed by **Janes Solicitors**) for the **Respondent**

Approved Judgment No 3: Costs

Lord Justice Edis:

1. Further to the two earlier judgments, the court is now dealing with an application by the prosecutor and investigator, Barnet, for the costs of the appeal. A costs schedule was supplied which relates to the costs of the appeal only and claims the sum of £28,296.00 plus £4,907.50 VAT on disbursements only. We have received written submissions and now hand this decision down without a hearing.
2. Mr. Rudolf QC has submitted that there is no jurisdiction in the Court of Appeal to make a costs order in favour of a prosecutor who has succeeded on an appeal brought under s.31(1) of the Proceeds of Crime Act 2002. He also says that the amount claimed is excessive and that, in particular, Mr. Kamyab should not be ordered to pay the costs of two counsel.
3. Mr. Rudolf submits that s.32(1) defines the powers of the Court of Appeal Criminal Division on an appeal of this kind, as we held in our first judgment. The court may confirm, quash or vary the confiscation order, but that is all. S.89(4)-(9) contain costs powers in relation to some proceeds of crime proceedings in the Court of Appeal Criminal Division, but these do not apply to appeals under s.31(1) and (2). Equally, there is no costs power under the Proceeds of Crime Act 2002 (Appeals under Part 2) Order 2003 (SI 2003/82). There is no power either to make a costs order against the accused on an appeal of this kind conferred by s.18 of the Prosecution of Offences Act 1985. The 2002 Act, the 1985 Act and the 2003 Order are the only places where a costs power could have been created for the Court of Appeal Criminal Division, which is a creature of statute and has no inherent powers. In support of this last proposition, Mr. Rudolf cites *R v. Boggild* [2012] 1 Cr. App. R.(S.) 81.
4. Turning to the Criminal Procedure Rules, Mr. Rudolf draws our attention to Part 33 “Confiscation and Related Proceedings”, Part 42 “Appeal to the Court of Appeal in Confiscation and Related Proceedings, and Part 45 “Costs”. None of these Rules confers any costs power in these circumstances and Mr. Rudolf submits that they could not do so, because the CrimPR could not lawfully confer a jurisdiction or power on a court whose powers are the result of statute.
5. Mr. Heller on behalf of Barnet submits that the court should construe s.18 of the 1985 Act as conferring the power he wishes us to exercise. He relies on the parenthesis in paragraph 7.1 of the Practice Direction (Costs in Criminal Proceedings) 2015 as amended which says ‘confiscation proceedings are treated for costs purposes as part of the criminal trial’. Mr. Heller submits that this explains why Parliament did not confer costs powers in relation to such proceedings expressly, as it did in relation to restraint, receivership and third party interest determinations.
6. Mr. Heller’s principal submission concerns s.18 of the 1985 Act. This, so far as relevant, provides:-
 - (1) Where—
 - (a) any person is convicted of an offence before a magistrates' court;

(b) the Crown Court dismisses an appeal against such a conviction or against the sentence imposed on that conviction; or

(c) any person is convicted of an offence before the Crown Court;

the court may make such order as to the costs to be paid by the accused to the prosecutor as it considers just and reasonable.

7. The submission is that that ‘the court’, where it last appears in that sub-section, may include the Court of Appeal in the circumstances of this case. Whilst explicit reference is made at s.18(2) to awards that may be made by the Court of Appeal, that provision applies only where an appeal or application for leave to appeal by an accused has been dismissed. It does not refer to appeals by prosecutors. If there is no power to make an award, it would be a quite extraordinary lacuna in the law that operates against the interests of justice.

Decision and discussion

8. We consider that Mr. Rudolf is right, and that the issue is determined by reference to ss.31 and 89 of POCA. A right of appeal is given to a prosecutor by s.31(4) and (5)(a) against an order in relation to the defendant’s interest in property under s10A of the Act, and a costs power is specifically conferred by s.89(4) on any such appeal. No such power is conferred in relation to prosecution appeals under s.31(1) or (2). By parity of reasoning with our decision on the scope of the substantive powers in the first judgment in this case, we consider that these provisions construed together exclude any costs power except in the cases where such a power is specifically conferred.
9. We also reject Mr. Heller’s construction of s.18 of the 1985 Act. That is a provision which plainly concerns the courts mentioned in it which do not include the Court of Appeal Criminal Division.
10. In any event, we would not have made a costs order in respect of this appeal as a matter of discretion even if such a power had existed. These proceedings were required because the court, with the agreement of both parties, disposed of confiscation proceedings on a preliminary point of law. That, we held, was an error and, having acquiesced in it, through counsel who then appeared, the prosecution should not recover costs incurred by putting it right. Those costs included leading and junior counsel dealing with the complex situation which resulted and were, to a degree, self-inflicted. We would add that the decision in *R v. Panayi* [2019] EWCA Crim 413 would never have been under consideration had the summons in this case been drafted so as to make it clear beyond any possible argument that this was a continuing offence, as s.179(6) of the Town and Country Planning Act 1990 plainly permits.

Note

11. Judgment number 2, as originally published, contained an arithmetical error which has been corrected in an amended version republished yesterday. It is that amended version which is the judgment of the court. The result and reasoning are not affected.