IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
[2022] EWHC 3137 (Admin)

No. CO/1908/2022

Royal Courts of Justice

Thursday, 3 November 2022

Before:

MR JUSTICE CHAMBERLAIN

B E T W E E N :

HO-SHING — Appellant

- and -

CROWN PROSECUTION SERVICE — Respondent

MISS A FENDRICH (instructed by Shearman Bowen) appeared on behalf of the Appellant.

MR P GRIEVES-SMITH (instructed by Crown Prosecution Service) appeared on behalf of the Respondent.

J U D G M E N T

MR JUSTICE CHAMBERLAIN:

1 This is an appeal by case stated from a decision of District Judge Kumar, sitting at Bromley Magistrates' Court, refusing an application for costs by the appellant, Alicia Ho-Shing. The facts appear from the case as follows.

2 On 22 May 2021, at 12.30 a.m., in the car park of the Odeon Cinema in Bromley, Ms Ho-Shing was arrested on suspicion of being drunk in charge of a motor vehicle, having given a roadside sample of breath measuring 57mg of alcohol per 100ml. She was taken to the custody suite at Croydon Police Station. At 3.30 a.m. she was in a cell when a police officer asked her to provide two samples of breath for analysis. She did not respond. On the afternoon of the same day, she was charged with failing to provide a specimen for analysis contrary to s.7(6) of the Road Traffic Act 1988 and Schedule 2 to the Road Traffic Offenders Act 1988.

3 Prior to her first appearance before the Magistrates' Court Ms Ho-Shing entered into an agreement with a solicitors firm in which they agreed to represent her for a fee payable in two instalments; £800 plus VAT immediately and a further £800 plus VAT becoming due upon her solicitor's first attendance at the first appearance. This was the entirety of the fee.

4 Prior to the first appearance Ms Ho-Shing received details of the prosecution case, including a witness statement from Police Sergeant Nelis, who said this:

> "I later went to the cells to see if she would engage with the drink drive process at about 0328 hours. I am aware that at this time she was on rouse checks, so was responding to commands and questions from the cell door wicket. The DP [the detained person] did not respond to any questions about her consumption of substances post-arrest and made no reply when, at 0330 hours, I asked her to provide two samples of breath for analysis."

5 At the first appearance on 21June 2021, Ms Ho-Shing made clear that her defence would be that at the time of the request for a specimen she was asleep and so had a reasonable excuse for failing to provide one. At the time, the police had CCTV footage of the cell showing that she was, indeed, asleep. The police did not provide this to the CPS.

6 Ms Ho-Shing served her defence statement on 5 July 2021. On 6, 20 and 28 July 2021, the PCS made requests to the police for the CCTV footage. On 17 August 2021, they sent a proposed noticed of discontinuance, noting the lack of CCTV footage. There was a case management hearing on 18 August 2021. On 19 August, the police served the CCTV footage on the CPS. On 23 August, the CPS reviewed it and served it on the defence. On 25 August, the CPS sent another proposed notice of discontinuance to the police. On 26 August there was another case management hearing and on 31 August the CPS discontinued the case.

7 On 6 October 2021, Ms Ho-Shing applied for her costs. That application was heard on 25 January 2022 and refused on 28 January 2022 with written reasons. The judge noted that there was no distinction to be drawn between the CPS and the police for the purposes of s.19 of the Prosecution of Offences Act 1985, which confers the power to make regulations authorising costs awards where one party to criminal proceedings has incurred costs as a result of an unnecessary or improper act or omission by or on behalf of another party to the proceedings. The judge set out the case law to which he had been referred (*Evans v Serious Fraud Office* [2015] EWHC 263 QB; *Singh, R (on the application of) v Ealing Magistrates'*

Court [2014] EWHC 1443 (Admin)*; Director of Public Prosecutions, R (on the application of) v Aylesbury Crown Court* [2017] EWHC 2987 (Admin) and *Re Joseph Hill & Co.* [2013] EWCA Criminality 775). The judge then adopted a three-stage approach, asking:

1) Has there been an unnecessary or improper act or omission?

2) As a result, have any costs been incurred by another party?

3) If the answers above are "yes", should the court exercise its discretion to order the party responsible to meet those costs in whole or in part?

8 At stage one, the judge cited the decision of Hickinbottom J in *Evans* for the proposition that cases in which there is a successful application for costs under s.19 against the public prosecutor will be very rare and "generally restricted to those exceptional cases where the prosecution has acted in bad faith or made a clear and stark error as a result of which the defendant has incurred costs for which it is appropriate to compensate him" and that a decision to prosecute would constitute such an error only if no reasonable prosecutor could have come to that decision. On the facts, the judge considered that the Crown should have reviewed all the CCTV footage before the first appearance. This would have provided the outcome (discontinuance) that was, in fact, achieved on 31 August 2021 at a much earlier stage of the proceedings. The failure was lamentable, but, noting what had been said in *Evans*, it did not cross the high threshold for a costs award under s.19. This was because prior to the first appearance there was a *prima facie* case against Ms Ho-Shing based on the witness statement of PS Nelis. Whilst that evidence was capable of being undermined by the CCTV footage and the custody record, it was only at the first appearance that the nature of her defence became clear. It was this that focused the issue in the case and highlighted the importance of the CCTV footage, which should have been reviewed, the judge found, within 28 days, i.e., by 19 July 2021. So the judge found that there had been a clear and stark omission of the kind that could, in principle, trigger an award of costs by reason of the failure to review the CCTV evidence and/or the custody record by 19 July 2021.

9 Moving to stage two, the judge found that no costs were incurred as a result of this omission since Ms Ho-Shing's costs had all been incurred by the time of the first appearance. There was therefore no need to go to third stage.

10 The question posed for determination by this court was: "Was I correct to conclude that the Crown's conduct prior to the first appearance did not amount to an improper or unnecessary act or omission?" Framing the question in this way suggests that it is for this court to decide for itself whether the judge was correct or incorrect to decide that the Crown's conduct prior to the first appearance satisfied the test for costs in s.19 of the 1985 Act, but this is not so. The question for this court on an appeal by case stated is whether the judge erred in law or approach or reached a decision that was not open to him on the evidence.

11 Annie Fendrich, for the appellant, accepts that the law, insofar as applicable here, is correctly stated by Hickinbottom J in *Evans*. She does not contend that the judge misunderstood this law. Such a contention would be impossible, given the terms of the case stated by him. What remains, therefore, is the question whether it was open to the judge to conclude that it was only after the first appearance that a clear and stark error had been made. The essence of the judge's reasons for reaching that conclusion was that although the CCTV footage and custody records should, ideally, have been reviewed prior to the first appearance, it was only at the first appearance that the defence was made clear and the significance of the CCTV footage highlighted.

12 Miss Fendrich points out that the Code for Crown Prosecutors requires prosecutors to undertake an objective assessment of the evidence, including the impact of any defence which the suspect has put forward or on which they might rely and that this must be done at the initial stage when deciding whether to charge, at least in a case where charging is done by the CPS. In this case, the streamlined disclosure certificate showed that the custody record had been considered at a very early stage but it was wrongly categorised as clearly not disclosable; its significance was not appreciated.

13 Furthermore, says Miss Fendrich, the DPP's Guidance on Charging 6th Edition provides in Annexe 3 that the material required for a charging decision includes audio-visual material, e.g., CCTV footage, where it demonstrates the commission of the offence or has other evidential value. I should say that Miss Fendrich accepts that the Guidance on Charging is not directly applicable, but she relies upon it by analogy, even in this case where the charging decision was made by the police.

14 Miss Fendrich says that in the light of all the matters to which I have referred, a clear and stark error had been made, even before the first appearance. She relies, in this respect, on the judgment of Bean J (as he then was) in *Singh*, where a failure to forward papers at a first appearance was regarded as sufficient to justify an award of costs. The difficulty with this submission is that the judge accepted that an error had been made prior to the first appearance – the question before him was what sort of error. Was it a clear and stark error or something less than that? That was a highly fact-sensitive question of evaluation for him.

15 In my judgment, the reasons he gave were intelligible, coherent and sufficient to explain why he considered that the line between an error simpliciter and a clear and stark error of the kind needed to justify an award of costs had been crossed 28 days after the first appearance and not before that.

16 In my judgment, the judge was well-placed to identify the point at which that line was crossed. This was a case where the charging decision had been made by the police and therefore not one to which the CPS Guidance on Charging applied. The judge had a close understanding of the context of the case, as demonstrated by his detailed ruling, which itself is reflected in the case stated for this court. The judge considered the significance of the evidence deployed by the prosecution. The regulations made under s.19 of the 1985 Act conferred a discretion on him. It was for him, and not for me, to exercise that discretion. In my judgment, there was no error of law or approach. The conclusion he reached was properly open to him. I would therefore dismiss the appeal.

CERTIFICATE

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