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ROYAL COURT

147.

10th August, 1992

Before: **The Bailiff, and Jurats Orchard and Gruchy**

Police Court Appeal: Paul Michael Gilbraith

Appeal by way of case stated against decision of Magistrate not to award costs under Article 2 (1) (c) of the Costs in Criminal Cases (Jersey) Law, 1961, following acquittal on charge of contravening Article 41 (1) of the Road Traffic (Jersey) Law, 1956, as amended.

S.C.K. Pallot, Esq., Crown Advocate.
Advocate D.J. Petit for appellant

JUDGMENT

BAILIFF: The appellant, Mr. Paul Michael Gilbraith, comes before this Court appealing against the decision of the learned Relief Magistrate of 11th June, 1992, to refuse him costs following his acquittal on a charge of having: *"acted in contravention of Article 41 paragraph 1 of the Road Traffic Act (Jersey) Law, 1956, as amended, in that he offered to sell a vehicle in such a condition that the use thereof on a road in that condition would be unlawful by virtue of the provisions of any order made under Articles 39 or 40 of the said Law as respects brakes, steering gear, tyres, or as respects the construction, weight or equipment of the said vehicle."*

The facts are quite simple. The appellant received the car for sale from the owner; he placed it in the forecourt of his premises and put a price on it. The car was not examined but in the course of the evidence, to which we were directed this morning, the appellant said that, although it was common practice - as agreed with a representative of the Motor Traffic Office - to inspect vehicles as soon as he received them, he did not do so on this occasion. However, by placing the vehicle on

the forecourt, he was not offering it for sale but was merely inviting prospective purchasers to treat. It seemed to us that the practice of this appellant was that, when a sale was finally agreed - and it is accepted by both Counsel that that was what the position in law was - Mr. Gilbraith would check the vehicle against a check list, which was before the Relief Magistrate, and verify if there were defects in the vehicle. (The reason these defects came to light was that a previous owner of the vehicle saw it on the forecourt and reported to the Motor Office that the car had been a write-off previously. This resulted in the prosecution.).

The learned Relief Magistrate took the view that although he had acquitted the accused - there is a note on the Court file, using a Scottish expression which is unknown in Jersey: "not proven" - he decided it was a technical infraction and on the authority of Bouchard, (6th April, 1983) Jersey Unreported (no. 121 of 1991), to which I will turn in a moment, he refused to award the appellant his costs.

Unfortunately it is necessary to go back a little into the history of the hearing. The matter first came before the Police Court on 26th March, 1992, when there was a submission made by the present Counsel before another Magistrate, the Assistant Magistrate, Mr. Trott, in the same form as has been submitted now: that there was no infraction of the relevant article because that article did not cover an invitation to treat. The case was remanded because Mr.Trott - if we may say so - wisely decided to consider it and give his decision later on the 30th April. But, owing to some misunderstanding, when the appellant and his Counsel turned up in the Police Court on that day, Mr. Day was sitting as Relief Magistrate. On that occasion, Counsel told us, the matter came up late in the day and it was therefore adjourned until 5th June. Again there appears to have been some misunderstanding, or wrong arrangement so that on the 5th June, the appellant, with his Counsel, appeared, not before Mr. Trott, but before Mr. Short. Counsel very frankly said that rather than ask for a further adjournment, so that Mr. Trott could give his decision on his earlier submission, he decided to proceed with it. He told us that some time prior to 11th June, he met Mr. Short by chance and the Relief Magistrate, with great candour, said that the submission was going to succeed. Whereupon Counsel, knowing that he was going to be successful, decided not to put before Mr. Short in advance of his giving his decision on 11th June, the other limb of the defence which is covered by Article 41 4 (b) of the above Law, which reads - and I quote from the beginning of paragraph 4:

> ***"A person shall not be convicted of an offence under this Article in respect of the sale, supply, offer or alteration of a vehicle or trailer if he proves...***

(b) that he had reasonable cause to believe that the vehicle or trailer would not be used on a road in the island or would not be so used until it had been put into a condition in which it might lawfully be so used."

What I have said about the evidence of Mr. Gilbraith would have been important in that context. But, Counsel did not put his argument to the Relief Magistrate, relying on the candour, I repeat the word, with which he had been notified that his submission was going to succeed. And, accordingly it was successful, but I have no doubt Counsel was somewhat surprised to find that his costs were refused.

Now, Mr. Pallot has asked this Court to take a wider view of the case of Bouchard and the matters mentioned in that judgment, as justifying a Court, in the exercise of its complete discretion regarding costs, not to award a prosecuted person costs even though that person has been acquitted of the charge.

I read from Bouchard starting half way down page 2. The Court first of all having referred to the Costs in Criminal Cases (Jersey) Law, 1961, then went on as follows:-

"There is similar legislation in the United Kingdom which, however, is limited to accused persons who are acquitted, but for the purpose of the present ruling, we have thought it right to apply the same principles here. In the United Kingdom, there is a practice direction to assist the Courts, and the latest one is to be found on page 698 of the 41st edition of Archbold. The relevant parts of paragraph three and four of those directions are as follows: '3. The exercise of those powers is in the unfettered discretion of the court in the light of the circumstances of each particular case. 4. It should be accepted as normal practice that an order should normally be made for the costs of an acquitted defendant out of central funds (under section 3 of the 1973 Act)..' "

I pause for a moment it is irrelevant for our purposes where the money is to come from, we do not have the same distinctions.

"..unless there are positive reasons for making a different order. Examples of such reasons are:-
(a) where the prosecution has acted spitefully or has instituted or continued proceedings without reasonable cause, the defendant's costs should be paid by the prosecutor. (That is not relevant)
(b) where the defendant's own conduct has brought suspicion on himself and has mislead the prosecution into

thinking that the case against him is stronger than it is, the defendant can be left to pay his own costs.."

That indeed was the case in Bouchard and that was the reason for the Court's decision in that case.

"(c) where there is ample evidence to support a conviction but the defendant is acquitted on a technicality which has no merit. Here again the defendant will have to pay his own costs."

And, it was on that paragraph that Mr. Short relied in the Court below.

However, Mr. Pallot, for the Crown makes two points. He says, first of all, that by showing a clearly defective vehicle, (I say clearly in the sense that once it was examined these defects would have been found) on his forecourt and putting a price tag on it, the appellant was offending - I do not say that in the criminal sense but in the technical sense perhaps - and committing the mischief which the statute was designed to avoid. In that respect Counsel has referred us to an extract from the Cheshire & Fifoot's Law of Contracts (9th Ed'n) where the learned authors have a commentary on the case of Fisher -v- Bell, (1960) 3 All ER 731, which is in fact the case cited and relied upon by the learned Relief Magistrate. In the commentary on Fisher -v- Bell, there is a footnote to the statement that there is a well known and settled rule that the display of an article with a price on it in a shop window is merely an invitation to treat, and is in no sense an offer for sale, the acceptance of which constitutes a contract. I pause here for a moment to say that nowhere in our statute are the words comprehensive enough to include an invitation to treat; that is why the prosecution failed below. But, the footnote to that case, at any rate in the context of the authors' questions about it is this:-

"Although the rule is well settled, its application to self service stores has been criticised."

And, a number of authorities are mentioned. It goes on:

"In practice the question has usually arisen in the context of a criminal statute making it an offence to "offer" goods of a prescribed description for sale. Display of goods in a shop window may well fall within the mischief of such a

statute and a well drafted statute may contain a special wider definition of "offer"."

Unfortunately our statute does not include that. Whilst it may well fall within the mischief it does not fall within the mischief to the extent of enabling a prosecution satisfactorily to be brought based on an invitation to treat.

The second point that Mr. Pallot has made is that, as in the case of Bouchard, Mr. Gilbraith brought the prosecution on himself by his own conduct. It is worthwhile repeating paragraph (b) of the extract from Archbold.

"where the defendant's own conduct has brought suspicion on himself and has misled the prosecution into thinking that the case against him is stronger than it is, the defendant can be left to pay his own costs."

All that Mr. Gilbraith did in this particular case was to put the car, which was admittedly defective, on the forecourt. It cannot be said, in the opinion of this Court, that he was misleading anyone either the public or the prosecution, particularly the prosecution, into thinking that the case was stronger than it was. It was there openly to be seen and openly to be examined; in the case of Bouchard there was some positive conduct on Bouchard's part which led the Court to take the view that that conduct could have been such as to mislead the prosecution. In the Bouchard case, the Jurats found that it was; I was presiding - it was a costs hearing - and I differed from them, and found that it was not. In this particular case the Court is quite satisfied that there was no positive conduct in the actions of Mr. Gilbraith which positively led the prosection into thinking that their case was stronger than it was.

As regards the question of the submission which, Mr. Petit this morning said, he would have wished to have made to Mr. Short in relation to the exemption under Article 41 4 (b) of the Law, Mr. Pallot said that because he knew that he was going to win he opted not to mention it to Mr. Short. It would be unfair for this Court to base any ruling or decision on that failure because it was something which Counsel, in full knowledge that he was going to succeed, voluntarily did not do. We think there is a good deal of merit in that argument but we do not have to decide on it.

Thirdly, Mr. Pallot has said that the appellant really brought the prosecution on his own head. He referred us to page 29 of the transcript, which I have touched on briefly, and submitted that if this Court were satisfied, after taking a

broad view of the case, that Mr. Gilbraith had brought the matter on his own head, then he should be left to pay his own costs. There is much force in that argument, but we are dealing with a criminal statute. If it is not drafted sufficiently widely to catch the kind of mischief which it is said Mr. Gilbraith was perpetrating, then there has to be some good reasons, along the lines of the exemptions mentioned in Archbold, to deprive a successful defendant of his costs.

The case was brought in respect of something which was not an offence; the statute was not sufficiently wide nor drawn with adequate precision to catch the kind of conduct, though no doubt the legislature intended it to do so. If they intend to catch that sort of conduct, however, they must say so. We cannot enlarge the frontiers of a criminal statute; that would be to usurp the prerogative of the legislature.

Therefore we are unable to find that there is any abnormal reason in this matter to deprive the appellant - or the successful defendant in the Police Court in this case - of his costs and the appeal is allowed, with costs.

Authorities

A.G. -v- Bouchard (6th April, 1983) Jersey Unreported (No.121 of 1991).

Cheshire & Fifoot Law of Contract (9th Ed'n) p.p. 30 & 31.

Archbold (41st Ed'n): Page 698.

Nicholas: French Law of Contract (Butterworths, 1982) p.p. 58-62.

Fisher -v- Bell (1960) 3 All ER 731 at p. 733.