ROYAL COURT
(Samedi Division)

21st March, 1996 56.

Before: The Bailiff,
Single Judge.

Between	Nuno Manuel Camilo Santos Costa	Representor
And	The Attorney General	Respondent

Advocate N. M. C. Santos Costa on his own behalf.
Advocate C.E. Whelan Crown Advocate.

JUDGMENT

THE BAILIFF: This is a representation by Nuno Manuel Camilo Santos Costa ("Mr. Costa") seeking a declaration;

> *"1. That the interpretation of the meaning of Article 2(4) of the Costs in Criminal Cases (Jersey) Law 1961 as set out in A.G. v. Bouchard is manifestly wrong;*
>
> *2. that the Article itself should apply equally to those who are legally aided as to those who are not".*

The background to the representation is that on 13th December, 1995, I dismissed, for the reasons given in a judgment delivered on that day, an appeal by Adrian Raymond Hakes against a ruling of the Judicial Greffier. The Judicial Greffier had ruled that he was bound, in taxing the costs incurred by Mr. Hakes in relation to criminal proceedings brought against him, to apply the principle laid down by the Court in A.G. v. Bouchard (6th April, 1983) Jersey Unreported; (1989) JLR 350. The representation which is the subject of these proceedings was served upon the Attorney General, and Crown Advocate Whelan on his behalf agreed to argue the point at short notice. No issue has been taken by the Crown Advocate on the question of *locus standi* and I assume therefore that I have jurisdiction to hear and determine the matter.

Mr. Costa was the legal adviser and counsel acting for Mr. Hakes against whom a charge of demanding money with menaces had been brought. On the 23rd February, 1995, following an Assize trial, Mr. Hakes was acquitted. The Court, pursuant to Article 2 (1)(c) of the Costs in Criminal Cases (Jersey) Law 1961 ("the 1961 Law") ordered the payment out of public funds of the costs of the defence. Mr. Costa submitted to

the Judicial Greffier evidence that he (and his associates) had provided defence services to the value of £14,787.50. This was accompanied by an account addressed to Mr. Hakes showing costs in that amount but inviting payment in the reduced sum of £7,500. In a covering letter Mr. Costa explained to the Judicial Greffier that the lesser sum was regarded by him as being a reasonable legal aid contribution to be made by Mr. Hakes which he would have sought to recover had Mr. Hakes been living in Jersey. In fact Mr. Hakes appears to have left the jurisdiction and his present whereabouts are not known. Mr. Costa presented his account in that way because the ruling in A.G. v. Bouchard was that the costs recoverable in circumstances where the defendant was assisted on legal aid were limited to *"that contribution towards the legal aid assistance which he has been granted which he would normally expect to make".* Before the Judicial Greffier Mr. Costa argued that the Bouchard ruling should not be followed. As I have stated, the Judicial Greffier found, quite properly, that he was bound by Bouchard.

Mr. Costa, who appeared on his own behalf, has launched a direct assault upon the Bouchard ruling and has urged me to reach a conclusion different from that at which the Court arrived in 1983. Mr. Whelan has reminded me of the principle of *stare decisis.* The Court last considered this principle, at the invitation of the Attorney General, in A.G. v. Hall (24th March, 1995) Jersey Unreported. In that case the Court endorsed the passage from Halsbury's Laws (4th Ed'n) Vol.22 at para 1689 previously adopted by this Court.

> *"Where, however, a judge of first instance after consideration has come to a definite decision on a matter arising out of a complicated and difficult enactment, the opinion has been expressed that a second judge of first instance of co-ordinate jurisdiction should follow that decision; and the modern practice is that a judge of first instance will as a matter of judicial comity usually follow the decision of another judge of first instance unless he is convinced that that judgment was wrong."*

Although it may be doubted whether the statutory provision in question here is "complicated and difficult" it must be said that the ruling in A.G. v. Bouchard has been followed in this Court on several occasions. Nevertheless I have a duty to consider whether Mr. Costa has convinced me that Bouchard was wrongly decided.

Article 2 of the Costs in Criminal Cases (Jersey) Law 1961, so far as material, provides:

> *"(1) Subject to the provisions of this Article, where any person is prosecuted or tried before a Court to which this Article applies, the court may -*
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> *(a) if the accused is convicted, order him to pay the whole or any part of the costs incurred in or about the prosecution and conviction;*
>
> *(b) order the payment out of public funds of the costs of the prosecution;*

(c) if the accused is discharged from the prosecution or acquitted, order the payment out of public funds of the costs of the defence.

.....

(4) The costs of the defence payable under sub-paragraph (c) of paragraph (1) of this Article shall be such sums as appear to the court reasonably sufficient to compensate the accused for the expenses properly incurred by him in carrying on the defence and to compensate any witness for the defence for the expense, trouble or loss of time properly incurred in or incidental to his attendance and giving evidence.

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(7) The amount of costs ordered to be paid under this Article shall be ascertained as soon as practicable by the Judicial Greffier."

Both counsel submitted that the representation raised, apart from the question of *stare decisis*, a narrow point of statutory construction. Was the phrase *"such sums as appear to the Court reasonably sufficient to compensate the accused for the expenses properly incurred by him in carrying on the defence ..."* to be interpreted as meaning the entire cost of his legal services even where such services were provided under the legal aid scheme?

In Bouchard the court ruled in the negative. That decision was followed in A.G. v. McKinney (3rd January, 1992) Jersey Unreported where Tomes DB stated:

"The second issue arises from the fact that the defendant was "on legal aid". This means that Attorney General v. Bouchard (6th April, 1983) (No 121 of 1991 Jersey Unreported) applies. I read the final paragraph:-

> *"Now, when I say his costs, I mean that contribution towards the legal aid assistance which he has been granted which he would normally expect to make".*

Accordingly, Miss Nicolle submits that the defendant can have only part of her costs, for whatever period, which represents her contribution towards legal aid which she would normally be expected to pay, based upon her means. The custom, which has the force of law, is that legal aid is given gratis to those who cannot afford it and it was not the intention of the legislature to alter that custom by indemnifying counsel for providing legal aid.

Miss Fitz submitted that I should simply make an order for the payment of costs and that the question of the amount is for counsel, the bâtonnier and the Greffier. I do not agree - the question is one of law for me to decide.

Counsel further referred me to Archbold - 1992 p.999 para. 6 - 9 which cited R. v. Miller and Glennie (1983) 1 W.L.R. 056 Q.B.D. She relied on the following extract:

> *"Once it was shown that the defendant was the client of the solicitor then a presumption arose that he was to be personally liable for the costs. That presumption could be rebutted if it were established that there was an express or implied agreement binding on the solicitors that the defendant would not have to pay those costs in any circumstances."*

But that extract was part of a finding relating to the liability of a third party for costs. The court held that costs were incurred by a party if he was responsible or liable for those costs, even though they were in fact paid by a third party and even though the third party was also liable for the costs.

Miss Fitz argued that even in legal aid cases the client is liable for the costs of counsel, but that counsel has a discretion to waive or reduce those costs, with a reference to the bâtonnier in matters of dispute; the fact that counsel has a discretion does not alter the basic fact that the client is liable for all costs incurred; and that that position would only be altered if there was an express agreement that the individual would not be charged under any circumstances.

I have to say that that is not my understanding of our customary legal aid system. I prefer the submission of Miss Nicolle. Legal aid is granted gratis, subject to such contribution by the individual to whom it is granted by the bâtonnier, as he or she can reasonably make on a means test basis.

The decision in Attorney General v. Bouchard is that of a co-ordinate court. I refer, therefore, to Halsbury's Laws of England, 4th edition, volume 26, page 301, para. 580 :-

> *"There is no statute or common law rule by which one court is bound to abide by the decision of another court of co-ordinate jurisdiction. Where, however, a judge of first instance after consideration has come to a definite decision on a matter arising out of a complicated and difficult enactment, the opinion has been expressed that a second judge of first instance of co-ordinate jurisdiction should follow that decision; and the modern practice is that a judge of first instance will as a matter of judicial comity usually follow the decision of another judge of first instance unless he is convinced that that judgment was wrong."*

I cannot say that the decision in Attorney General v. Bouchard arose out of a complicated and difficult enactment. However, I believe that I should follow the modern practice and, as a matter of judicial comity follow the decision of the learned Bailiff unless I am convinced that that judgment was wrong.

Miss Fitz has failed to convince me that the judgment of the learned Bailiff was wrong. It has stood since 1983 and has been applied in other cases. If it is to be overruled now it is a matter for the court of Appeal.

Accordingly, I order the payment out of public funds of the costs of the defence, restricted to the contribution towards legal aid which the defendant would normally be expected to pay."

The underlying rationale in McKinney appears to be that, because a lawyer is obliged by custom and by his oath to defend a legally aided client at no cost or at limited cost, the lawyer's notional fees are not "expenses properly incurred ... in carrying on the defence". The only such expenses are "the contribution towards legal aid which [he] would normally be expected to pay". Put another way, the argument is therefore that because a legally aided client is not obliged to pay his lawyer for legal services rendered (or alternatively is under only a partial obligation) the lawyer's costs are not expenses which he has incurred in carrying on his defence.

Mr. Costa referred me to the English case of R. v. Miller and Glennie [1983] 1WLR 1056, which was cited in McKinney, where a similar argument was advanced. In that case the defendant was acquitted of affray and the trial judge ordered the payment of the defence costs out of central funds pursuant to section 3 (1)(b) of the Costs in Criminal Cases Act 1973. The English statutory provision is in virtually identical terms to that contained in the 1961 law. The solicitors acting for the defendant submitted a bill of costs but the taxing authority decided that no costs had been incurred by the defendant within the meaning of the relevant statutory provision as the defendant had been supported by his employers and they had never intended that he should pay the costs of his defence. The defendant appealed unsuccessfully to the taxing master and then to the court. The court allowed the appeal, Lloyd J. stating:

"If I may summarise the essential point in my own words, it is whether an employee, who is a successful defendant in a criminal trial, and who has been awarded his costs out of central funds, can recover those costs when it is his employers who are expected to pay the bill.

The point is of importance in itself. But it also has an importance outside the relationship of employer and employee. For if a successful defendant cannot recover his costs when he is supported by his employer, it is obviously arguable that he cannot recover his costs when he is supported by his trade union or by an insurance company or even by the legal aid fund."

During the course of his judgment the learned judge referred to the case of Lewis v. Averay (No.2) [1973] 1WLR 510:

"This time it was the Automobile Association who undertook the successful appeal to the Court of Appeal. The solicitors in the case wrote to the Law Society:

'...We made it clear that Mr. Averay was indemnified in all respects by the Automobile Association so that no part of the costs of the appeal has or would have fallen on him.'

Nevertheless it was held that the successful defendant's costs in the case could be recovered from the legal aid fund. Lord Denning MR said, at p513:

'Mr. Hames suggests that in this case the costs were not incurred by Mr. Averay, but were incurred by the Automobile Association: because the Automobile Association undertook the appeal and instructed their solicitors and paid them. I cannot accept this suggestion. It is clear that Mr. Averay was in law the party to the appeal. He was the person responsible for the costs. If the appeal had failed, he would be the person ordered to pay the costs. If the costs had not been paid, execution would be levied against him and not against the Automobile Association. The truth is that the costs were incurred by Mr. Averay, but the Automobile Association indemnify him against the costs ... that is sufficient to satisfy the requirement that the costs were "incurred by him"'."

Lloyd J. concluded by rejecting the argument that *"costs incurred by"* meant *"costs paid by"*. He held that:

"... costs are incurred by a party if he is responsible or liable for those costs, even though they are in fact paid by a third party, whether an employer, insurance company, motoring organisation or trade union, and even thought the third party is also liable for those costs. It is only if it has been agreed that the client shall in no circumstances be liable for the costs that they cease to be costs incurred by him ..."

Mr. Whelan's argument was that a legally aided client is not liable for the costs of his defence. If he were liable, he would not be on legal aid. But it seems to me that there is a circularity in this argument. A client obtains legal aid because he is not able to pay for the costs of his defence. But if the court has ordered, following his acquittal, the costs of his defence to be paid out of public funds, he is surely *ex hypothesi* able to pay them. In those circumstances his lawyer would be entitled to charge him the full fee rather than a reduced fee to reflect his means. In my judgment the construction of Article 2 (4) of the 1961 law adopted by the Court in Bouchard amounts to the insertion after the words *"reasonably sufficient to compensate the accused for the expenses properly incurred by him in carrying on the defence"* of some such phrase as *"except that where the accused is legally aided only such contribution as he could afford to pay shall be recoverable"*. This seems to me to strain the statutory language beyond its breaking point. I am re-enforced in my conclusion by the fact that the legislature, in enacting the 1961 law, was clearly alive to the question of legal aid. In Article 3 (3) specific provision is made for the payment of the advocate's fees and expenses on an appeal irrespective of the outcome of the appeal. Paragraphs (1) and (2) of Article 3 make similar provisions to those found in Article 2 (1) for

the payment of costs by the appellant or out of public funds as the case may be. Article 3 (3) continues:

> *"(3) whether or not the court makes an order under the provisions of this Article, there shall be defrayed out of public funds, up to an amount allowed by the court -*
>
> > *(a) where, by reason of the insufficiency of the appellant's means, an advocate has been assigned to him, the fees and expenses of the advocate; ..."*

It was open to the legislature to make specific provision to cover the situation where an accused person was legally aided if it had wished to do so. In default of any such express provision, it seems to me that the statutory language must be given its ordinary and natural meaning. If, on acquittal, the court orders the payment of the costs of the defence out of public funds, that is what should be paid.

I reach that conclusion with some diffidence, in the knowledge that I am differing from the conclusion reached by two learned judges of this Court. My conclusion also has the result, which might be thought unfortunate, that there is a premium on success for the lawyer acting for a legally aided defendant. However unfortunate that outcome may be, if it is the result of a proper construction of the statutory language, it must be a matter to be addressed by the legislature. I am comforted however by the thought that on this construction the costs of the defence can at least be objectively determined. On the Bouchard ruling, the costs of the defence are determined by a subjective assessment by the lawyer acting on legal aid of what he thinks his client can reasonably afford to pay. It may be doubted whether this is really a satisfactory way of assessing the costs of the defence which are to be paid out of public funds.

I accordingly find, with some diffidence as I have said, that Bouchard was wrongly decided on this point, and I grant the declaration sought by Mr. Costa. The costs of Mr. Hakes' defence should be assessed by the Judicial Greffier without regard to the fact that Mr. Hakes was assisted under the legal aid scheme.

Authorities

A.G. v. Bouchard (6th April, 1983) Jersey Unreported; (1989) JLR 350.

4 Halsbury 22: para. 1689.

4 Halsbury 11(2): para. 1527.

A.G. v. Hall (24th March, 1995) Jersey Unreported.

Costs in Criminal Cases (Jersey) Law, 1961: Articles 2 and 3.

Costs in Criminal Cases Act 1973: s.3(1)(b).

A.G. v. McKinney (3rd January, 1992) Jersey Unreported.

R. v. Miller & Glennie (1983) 1 WLR 1056.

Lewis v. Averay (No.2) (1973) 1 WLR 510.

Legal Practice Committee Report, 1993.

Archbold (1995) Re-issue Vol 1: paras. 6-1 to 6-20.

R. v. Whitby (1977) 65 Cr.App.R. 257.

Practice Direction (Costs: Acquittal of Defendant) (1981) 1 WLR 1383.

R. v. Agritraders Ltd (1983) QB 464.

Practice Direction: Costs in Criminal Proceedings (1991) 93 Cr.App.R. 89.

Bland & Ors. v. First National Commercial Bank (24th May, 1993) Jersey Unreported; (1993) JLR 80.

Maxwell: Interpretation of Statutes (12th Ed'n): pp.28-29.

Duport Steel Ltd & Ors. v. Sirs & Ors. (1980) 1 All ER 529.

Forrest v. A.G. (10th October, 1994) Jersey Unreported.

In re Cooper (1985-86) JLR N.15.

A.G. v. Weston (1979) JJ 141.

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(4) The costs of the defence payable under sub-paragraph (c) of paragraph (1) of this Article shall be such sums as appear to the court reasonably sufficient to compensate the accused for the expenses properly incurred by him in carrying on the defence and to compensate any witness for the defence for the expense, trouble or loss of time properly incurred in or incidental to his attendance and giving evidence.

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> > *(a) where, by reason of the insufficiency of the appellant's means, an advocate has been assigned to him, the fees and expenses of the advocate; ..."*

It was open to the legislature to make specific provision to cover the situation where an accused person was legally aided if it had wished to do so. In default of any such express provision, it seems to me that the statutory language must be given its ordinary and natural meaning. If, on acquittal, the court orders the payment of the costs of the defence out of public funds, that is what should be paid.

I reach that conclusion with some diffidence, in the knowledge that I am differing from the conclusion reached by two learned judges of this Court. My conclusion also has the result, which might be thought unfortunate, that there is a premium on success for the lawyer acting for a legally aided defendant. However unfortunate that outcome may be, if it is the result of a proper construction of the statutory language, it must be a matter to be addressed by the legislature. I am comforted however by the thought that on this construction the costs of the defence can at least be objectively determined. On the Bouchard ruling, the costs of the defence are determined by a subjective assessment by the lawyer acting on legal aid of what he thinks his client can reasonably afford to pay. It may be doubted whether this is really a satisfactory way of assessing the costs of the defence which are to be paid out of public funds.

I accordingly find, with some diffidence as I have said, that Bouchard was wrongly decided on this point, and I grant the declaration sought by Mr. Costa. The costs of Mr. Hakes' defence should be assessed by the Judicial Greffier without regard to the fact that Mr. Hakes was assisted under the legal aid scheme.

Authorities

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4 Halsbury 22: para. 1689.

4 Halsbury 11(2): para. 1527.

A.G. v. Hall (24th March, 1995) Jersey Unreported.

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