THE STATE

v

GRAHAM BRUCE SOUTHWICK
& VISANTI PETERO MAKRAVA

[HIGH COURT, 1999 (Pathik J) 19 November]

Criminal Jurisdiction

Crime: procedure- application for award of costs by accused. - Criminal Procedure Code (Cap 21) Section 158 (2).

The High Court permanently stayed a trial after certain documents were lost. The first accused sought to recover his costs. The High Court noted that at no stage prior to the application for the stay had it been suggested that the prosecution was unreasonable or an abuse of process. Furthermore the accused was commited for trial after a prima facie case had been established. In the circumstances the application was refused.

Cases cited:

Latoudis v Casey. (1990) 170 C.L.R 534
R v AB [1974] 2 NZLR 425
R v Chapple and Bolingbroke (1892) 17 Cox 455,
R v Maywhort 39 Cr. App.R. 107
R v Michael Somes - (1992) 106 FLR 97 (1992) ACT SC 19
R v Sam Scott SCC No.75 of 1990

Application for costs in the High Court.

R.A. Shuster for the State
J. Stewart Q.C. with *J. Howard* for 1st Accused

Pathik J:

This is a motion dated 13 July 1994 by the first accused Graham Bruce Southwick (the "applicant") for an order for costs pursuant to section 158(2) of the Criminal Procedure Code Cap.21 (the `Act') to be paid to the applicant in this action.

The said section 158(2) provides:

> "It shall be lawful for a judge of the High Court or any magistrate who acquits or discharges a person accused of an offence, to order the prosecutor whether public or private, to pay to the accused such reasonable costs as to such judge or magistrate may seem fit.
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> Provided that such an Order shall not be made unless the judge

> or Magistrate considers that the prosecutor either had no reasonable grounds for bringing the proceedings or has unreasonably prolonged the same."

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The hearing of the motion took place on 21 July 1999 when I heard submissions from both counsel on the issue before me.

In exercising its power under the above section the Court has a discretion in the award of costs provided firstly, in the words of the section the prosecution had
B 'no reasonable grounds for bringing the proceedings' or secondly, has 'unreasonably prolonged the same' It is on firstly that Mr. Stewart addressed the Court and based his submissions on that alone.

The basis of the claim by the applicant has been given in considerable detail by the learned defence counsel. It is based upon a collection of circumstances and
C I shall merely give a summary of the facts and arguments put forward by Mr. Stewart.

Background facts

The applicant Southwick and one other Visanti Petero Makrava were committed for trial at the High Court at Suva following an Oral Preliminary Inquiry before
D the Chief Magistrate on 7 October 1998; Southwick was represented by Mr. Stewart whereas Makrava was represented by Mr. G.P. Shankar.

The trial of this action in the High Court commenced on 30 June 1999 but had to be adjourned for a few days until 5 July 1999 because Mr. Southwick was immobile with his leg in plaster and unable to attend Court. Assessors were
E sworn in on 5 July 1999.

Before the hearing commenced Mr. Shuster for the D.P.P. encountered difficulties in obtaining disclosure of certain documents pertaining to the charges. The Prosecution attempted to trace the documents but were unsuccessful. This led to Mr. Stewart making an application to Court for a stay of the proceedings, to
F which Mr. Shuster, after addressing the Court, conceded. I then made an order in the following terms:

> "I therefore in the exercise of the court's inherent power, supported by the authorities that had been referred to by counsel, grant a permanent stay of the trial of this case, and to use the words in the Birmingham Case, the information will be marked "stayed", on the
G ground that the continuation of the case would constitute a misuse of the processes of the court, and a fair trial was not possible."

Now I turn to the nature of the arguments presented to me on the present application for costs.

Mr. Stewart's submission

Mr. Stewart submits that the Prosecution pay Southwick such reasonable costs as the court thinks fit under s158(2) of the Act. He makes three points: firstly, the Prosecution had no reasonable grounds for bringing these proceedings, secondly, that Court should exercise its discretion to order the Prosecution to pay all costs; and thirdly, that the costs claimed set out in appendix B of his written submission are reasonable and that the Court make the Order in that total sum.

On firstly, counsel commenced to deal with each count in the Information when I interrupted him to clarify whether there was any need for him to deal with each count in this manner when there has not been any trial in the Court on the charges and no evidence has been adduced.

Counsel responded by saying that costs should follow the event and here Mr. Southwick has been discharged for the reason that a fair trial is not possible because Count 1 was fatally flawed, and also because the Prosecution in some form, the Police or the D.P.P. had lost documents which made it not possible to have a fair trial. He further submitted that the only basis for which he was going through this process is because of the terminology in s.158(2) so that "such order shall not be made unless the Judge considers that Prosecution either had no reasonable grounds for bringing the proceedings or had unreasonably prolonged the stay but not suggesting in this case the proceedings have been unreasonably prolonged."

Mr. Stewart submitted that there were no reasonable grounds for bringing the charges and that is the basis of the application and that therefore Southwick be compensated in costs for the extraordinary expense to which he has been put by this prosecution.

It is Mr. Stewart's argument, that these charges should have been included in another case which has just been disposed rather than charged separately and tried separately thus leading to an abuse as it breached the established procedures.

Mr. Stewart continued with his submission and commented on each of the counts in the Information.

Counsel submits that the facts of a committal for trial is no basis for disallowing costs. He told the Court when asked, that he is entitled to costs "right from the beginning".

Mr. Stewart's legal submission on costs are contained in his Skeleton Submission.

He submits that costs should generally follow the event and that in this case the wording of s.158(1) & (2) should be construed in the light of modern authorities in Australia and England. He made reference to Australian cases on costs thus:

R v Michael Somes - (1992) 106 FLR 97 (1992) ACT SC 19. Miles, C.J.

A "The practice in this territory was authoritatively laid down by a Bench of Three Judges in McEwen v Siely, a decision which was approved by the majority judgments in Latoudis v Casey." (1990 170 C.L.R 534).

Mason, C.J. said on p542

B "In ordinary circumstances it would not be just or reasonable to deprive a defendant who has secured the dismissal of a criminal charge brought against him of an order for costs. To burden a successful defendant with the entire payment of the costs of defending the proceedings is in effect to expose the defendant to a financial burden which may be substantial, C perhaps crippling, by reason of the bringing of a criminal charge which, in the event, should not have been brought. It is inequitable that the defendant should be expected to bear the financial burden of exculpating himself, though the circumstances of a particular case may be such as to make it just and reasonable to refuse an order for the costs or to D make a qualified order for costs."

The approach of Mason, C.J.

"appears to treat a prosecution which has failed as one which should not have been brought clearly excludes as irrelevant on the exercise of the discretion to award or refuse costs, any E consideration of the public duty to prosecute or the reasonableness of the decision to prosecute.

His Honour referred at P544 to situations in which it would be appropriate to deprive a successful defendant of his costs where the defendant has brought the prosecution upon him F or herself, when the defendant has declined an opportunity of explaining his version of an offence before charges are laid, or conducted a defence in such a way as to prolong the proceedings unreasonably."

R v Sam Scott SCC No.75 of 1990 costs Higgins, J. said

G "There is a threshold question as to whether it is just that a person accused of an indictable offence and committed to stand trial in the court should be financially penalised by properly incurring legal costs, if the accused fails or is withdrawn. I have no doubt that it is unjust. For the reasons approved by the Majority of the High Court in Latoudis v. Casey (1990) 170 C.L.R. 534 successful defendant in criminal proceedings should, ordinarily, be compensated by a

costs order. Not to do so is effectively to deny an accused person right to legal counsel and/or to impose a substantial financial penalty for exercising such a right.

"I further observe that if the risk of an adverse costs order is contrary to the interests of justice, and I agree that generally it is, it can be avoided, if the courts, in the interests of justice, endorse the right of the accused person to put the Crown to proof, and to take all proper interlocutory proceedings in support of a proper defence without risk of an order for costs."

As for practice in England, Mr. Stewart says that it is governed by Practice Direction (Costs in Criminal Proceedings) Cr. App. R. 89: *Archbold* 6-104.

Defence Costs from Central Funds in the Crown Court

"Where a person is not tried for an offence for which he has been indicted or committed for tiral or has been acquitted on any count in the indictment, the court may make a defendant's costs order in his favour. Such an order should normally be made ... unless there are positive reasons for not doing so. Examples of such reasons reasons are

(a) 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;

(b) There is ample evidence to support a conviction but the defendant is acquitted on a technicality which has no merit.

Mr. Stewart submitted that there is no evidence of either example in this case.

He further said that under section 28(1)(d) of the Fiji Constitution:

"every person charged with an offence has the right:

(a) to be represented, at his or her own expense, by a legal practitioner of his choice.

He submitted that the allegations were so serious that the applicant "was therefore in jeopardy of losing his freedom and his livelihood. His companies, if he was convicted and sent to prison, would probably have gone into liquidation, and the employees would have lost their job".

Therefore he says that the applicant was justified in instructing senior Queen's Counsel from England, together with Mr. John Howard, to represent him.

The costs claimed, he says, are reasonable bearing in mind the seriousness of the allegations and the legal and factual complexities of the case.

Mr. Shuster's submission

A Mr. Shuster filed his written submission in reply to Mr. Stewart's submissions.

He outlined the sequence of events emphasising that at no time prior to date of trial i.e. 30 June 1999 nor after it, did Mr. Stewart or Mr. Howard at any time raise the matter of abuse of process in relation to the charges against the applicant.

B I think it is important that I ought to set out the chronology of events. It is as follows as stated by Mr. Shuster in his said submission:

> "3. The case was set for a full hearing at the High Court in Suva on 30/6/99, at the request of Mr. Southwick's Counsel, Mr. Stewart. It was listed for a six week trial.
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> C 4. In the meantime Mr. Makrava was tried in the High Court before Mr. Justice Surman on 21st of May 1999. He was acquitted by the Assessors on a charge of Corruption. The period for appeal ended in June, 1999.
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> 5. On or about the 2nd week of June 1999 the Office of the
> D Director of Public Prosecutions wrote to Messrs Howards and G.P. Lala's solicitors requesting a meeting. On or about the 17/6/99 the Director of Public Prosecution's Office received a phone call from Mr. Howard suggesting an earlier meeting between Counsel for the State, and himself. No call or acknowledgment was received from Messrs G.P. Lala
> E Solicitors.
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> 6. A meeting took place at 2.15 on Tuesday 22/6/99. Certain issues were raised, nothing concerning abuse of proces.
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> 7. A further meeting took place at 2.35 on Tuesday 29/6/99 between State Counsel and Mr. Stewart Q.C. and Mr. Howard
> F and a representative from G.P. Lala. Certain matters were raised. Nothing concerning abuse of process.
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> 8. On 30/6/99 the Trial was called before the Honourable Mr. Justice Pathik; the case was adjourned to 5/7/99 due to an accident to Mr. Southwick.
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> G 9. A further meeting took place to agree facts at the office of Mr. Howard on Friday 2/7/99.
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> 10. Again nothing was put forward indicating abuse of process.
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> 11. The trial took place on Monday 5/7/99 when Assessors were sworn in. One declared he knew Mr. Makrava. He was

discharged and the trial adjourned to the next day 6/7/99. Certain missing documents concerning a search warrant dated 10/7 were requested, by Messrs Howards and Co.

12. The State undertook to try to find them. On 6/7/99 the State requested a short adjournment to check on the contents of a Fax received from Mr. Shankar for Mr. Makrava. Mr. Shankar indicated documentation might exist which would be needed by his client. That document was faxed to the DPP's Office 5/7/99. (exhibit 1).

13. On the 6/7/99 the State requested a short adjournment to try to locate the documentation requested, if they existed, in respect of the faxed request from Mr. G.P. Shankar.

14. This request was met with some slight objection by the Honourable Court, but was allowed.

15. The State checked with the Chief Manager of the NBF, Mr. Yee, The Manager of the Asset Management Bank Mr. Robert Escudier and the Samabula Manager of the NBF.

16. No other documents existed, at these offices.

17. The State Prosecutor returned and informed counsel for the defence.

18. As a result, the Defence at 2.15 p.m. Tuesday 7/7/99 told the State they were making an application for a stay alleging an abuse of process for the first time.

It is the Prosecution's contention that it had a strong case which was fully tested at the Oral Preliminary Inquiry before a Magistrate by the same Defence Counsel Mr. Stewart who also appeared in the High Court.

It was on Friday 2 July 1999 that Defence Counsel just after 3.30 p.m. informed Mr. Shuster of the allegation of missing documents in respect of the Search Warrant dated 10 July 1997. On the State making inquiries and searches on Tuesday 6 July 1999 the State conceded that the Defence may not have had sight of those documents.

It is Mr. Shuster's submission that the Defence should have moved to have quashed the Information at a much earlier stage, rather than coming to trial, and in any event from 30 June 1999.

Mr. Shuster argues that knowing that the co-accused Makrava had only just been acquitted of the charge of corruption should have challenged the Information and applied for the stay of indictment or of relevant counts. He referred the

Court to *Archbold* 1-129. He says that the proper time to move to quash an indictment is before the accused has pleaded to it. [*Archbold* 1-240; R v Chapple and Bolingbroke (1892) 17 Cox 455, R v Maywhort 39 Cr. App.R. 107]

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He submits that the Prosecutor had proceeded on reasonable grounds in bringing the proceedings and has not unreasonably prolonged them.

Mr. Shuster argues that the defence should have at the conclusion of Makrava's case which was completed earlier requested an oral hearing before a High Court

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Judge suggesting abuse of process (*Archbold* 1-12J) but the Defence did not approach the Prosecution until 2.15 p.m. Tuesday 6 July 1999 to allege abuse of process. He said that Prosecution had within 18 hours (including night time) carried out an investigation and supported the quashing of the indictment on technical grounds beneficial to the Defendants. The defendants were lawfully committed by the Magistrate's Court to stand trial.

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Determination of the issue

The issue before me is whether to grant costs in all the circumstances of this case. In determining the issue the facts and circumstances relating to the action need to be considered, a detailed account whereof has already been given hereabove.

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By conferring in the Court the power to award costs, there is no doubt that in an appropriate case prosecution could be ordered by the Court to pay costs to defence under section 158(2) of the Criminal Procedure Code; and as far as the issue before me is concerned the said section sets out the criteria to which the Court must have regard in deciding whether to grant costs. An order cannot be made

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unless for the purposes of this application the Court considers that the prosecutor had no reasonable grounds for bringing the proceedings.

For the determination of the issue I have helpful written and oral submission from both counsel and I have given due consideration to the arguments put forward by them. The applicant seeks an order for costs against the State in respect of

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taking of the depositions in the Magistrates' Court and in respect of this trial. The costs are substantial.

The determination of the issue of costs depends, in my view, on my findings whether on the facts and circumstances of this case, particularly bearing in mind the steps leading upto the trial of the action, the Prosecution had "reasonable

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grounds for bringing the proceedings", to use the words of s158(2) under which this application is made.

In order to justify his application Mr. Stewart adopted the method of outlining briefly the facts on each Count and submitted that on each of the Counts the Prosecution had no reasonable grounds for laying the charges.

With the greatest respect for Mr. Stewart, in view of the facts surrounding this

case I find this to be a highly inappropriate method of justifying unreasonableness particularly when what he stated by way of facts could not at this stage in the situation that has now arisen after the commencement of the trial, be tested by cross-examination. His approach is tantamount to him putting evidence himself before the Court from the Bar Table in expectation that the Court will accept them without going through the normal procedure of adducing evidence in a trial and allowing cross-examination and re-examination. For Mr. Stewart to approach the issue of costs in this manner is being wise after the event so to say. The Court did not get to the stage of hearing on merits. The trial did not even get off the ground apart from the swearing in of the assessors, adjournments and legal submissions.

In this case as Mr. Shuster submits one cannot be oblivious to the fact that at no stage the defence raised the matter of unreasonableness of proceedings or abuse of process until after the Court had discharged the accused in the circumstances outlined hereabove. The oral Preliminary Inquiry in the matter proceeded without any mention of this aspect. Once the applicant was committed for trial in the High Court by the learned magistrate, it was the State's duty to prosecute once it has sufficient evidence and in the words of Chilwell J "I would take a lot of convincing that it is the Crown's duty always to adduce a perfect case" (R v AB [1974] 2 NZLR 425 at 431) who went on to say, and I adopt:

> "If Mr Ward's submission were accepted there would be a great danger that prosecutors, instead of placing the evidence they have fairly before the Court, would tend to become persecutors and do their level best to bolster up every case by going to extraordinary lengths to close all possible gaps."

A quotation from the judgment of Mason C.J. in Latoudis v Casey (1990) 170 C.L.R. 534 has been referred to above regarding award of costs, but the following passage at 544 is also worth bearing in mind pointing to the fact that there can be cases when costs will have to be refused:

> "Nevertheless, I am persuaded that, in ordinary circumstances, an order for costs should be made in favour of a successful defendant. However, there will be cases in which, when regard is had to the particular circumstances, it would not be just and reasonable to order costs against the prosecutor or to order payment of all the defendant's costs. If, for example, the defendant, by his or her conduct after the events constituting the commission of the alleged offence, brought the prosecution upon himself or herself, then it would not be just and reasonable to award costs against the prosecutor."

Mason C.J. goes on to state:

> "I agree with Toohey J. that, if a defendant has been given an

> opportunity of explaining his or her version of events before a charge is laid and declines to take up that opportunity, it may be just and reasonable to refuse costs. Likewise, if a defendant conducts his or her defence in such a way as to prolong the proceedings unreasonably, it would be just and reasonable to make an award for a proportion of the defendant's costs."

Here the accused has by his conduct right from the time of the Preliminary Inquiry until his discharge brought the proceedings or their continuation upon himself by not having raised the issue that the Prosecution acted unreasonably or abused the process. An order for costs cannot be made in a case where, as Mr. Shuster argues, the accused is discharged on a technicality. Mr. Shuster submitted that "the prosecution within 18 hours (including night time) carried out an investigation and supported the quashing of the indictment on technical grounds beneficial to the defendants".

The applicant or his counsel did not raise the issue of unreasonableness which gave rise to the presumption that the prosecution had ample evidence to justify the commencement of the prosecution of the accused and therefore there was no need to reconsider the chosen form of the prosecution. In any case this was a matter which was properly investigated and in the view of the prosecution the case was not so thin that no prosecution should have followed.

I find great merit in Mr. Shuster's submission that the application for the quashing of the indictment or stay of the Counts should have been made long before the day of the trial (30 June 1999). An application could even have been made at the conclusion of Makrava's case on charges of corruption which was concluded shortly before the commencement of this case.

On the whole of the facts before me I am satisfied that the prosecution did have sufficient evidence to lay the information as was confirmed by the learned Magistrate who committed the applicant for trial. He was represented by the same counsel as in this case at the hearing before the Magistrate and cross-examined the State witnesses at some length. No evidence was given by the accused or called on his behalf.

Conclusion

To conclude, in all the circumstances of this case, one of the main factors to be borne in mind is whether the Prosecution acted reasonably in these proceedings. In the present case I find that the prosecution had ample evidence to justify the commencement of the prosecution of the applicant, and no need arose to reconsider the chosen form of the prosecution. After the Oral Preliminary Inquiry when the applicant was committed for trial to the High Court it was a clear indication of a *prima facie* case against the applicant. On this aspect the following passage from the English Practice Note recorded in (1952) 36 Cr. App. R.13 and reviewed

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in (1959) 43 Cr. App. R. 219 is apt:

> "Each case must be considered on its own facts as a whole and costs may and should be awarded in all cases where the court thinks it right to do so. It is impossible to catalogue all the factors which should be weighed. Clearly, however, matters such as whether the prosecution have acted unreasonably in starting or continuing proceedings and whether the accused by his conduct has in effect brought the proceedings, or their continuation, upon himself are among the matters to be taken into consideration."

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In deciding whether to grant costs I have considered all relevant circumstances and for all of the reasons given by me I have come to the view that the applicant cannot expect to have costs awarded in his favour. The said section 158(2) does confer a discretion in the Court to make an order for costs but that discretion has to be exercised judicially which I have done bearing in mind that each case must be considered on its own special facts. In this case I find that no good grounds have been shown for the exercise of that discretion in the applicant's favour.

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In this case which is a criminal proceeding a particular approach according to its own circumstances is required as already stated hereabove. As is clear from the provisions of s158(2) the mere fact that the accused has been discharged does not result in an order for costs being made in his favour, nor for the reasons that I have given after considering the submissions of the learned defence counsel that I ought to make the Order for costs.

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The application is accordingly dismissed. I make no order as to costs on this motion.

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(Application dismissed.)

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