IN THE GRAND COURT OF THE CAYMAN ISLANDS
CRIMINAL SIDE

IND. NOs: 0002 + 0004/2020

THE QUEEN

V

CHARMAINE ELIZABETH MOSS
&
CANOVER NORBERT WATSON

Appearances:	**Mr. Nicholas Dixey of Nelsons Legal for the Applicant/Charmaine Moss**
	Mr. Stephen Kamlish Q.C. instructed by Ms. Amelia Fosuhene of Brady Attorneys for the Applicant/Canover Watson
	Mr. Andrew Radcliffe Q.C. with Ms. Toyin Salako for the Crown/Respondent
Before:	**Justice Roger Chapple (Actg.)**
Heard:	**6th July 2021**

HEADNOTE

Criminal Law – Defence Application for Costs – s.24 of the Judicature Act – s.33 of the Summary Jurisdiction Act

JUDGMENT
ON AN APPLICATION BY THE DEFENCE FOR COSTS

1. Ms Charmaine Moss ("CM") and Mr Canover Watson ("CW") faced an indictment containing five counts. Counts 1 and 2 alleged conspiracies to defraud. Counts 3, 4 and 5 alleged money laundering offences. These offences were said to have taken place within a 2-year period, from September 2012 to November 2014.

2. The conspiracy alleged in count 1, in short summary, involved the submission of false invoices by companies owned and operated by CM to the Confederation of North, Central American and Caribbean Football Association ("CONCACAF"). At the material time, Jeffrey Webb was the President of CONCACAF. CM was, and had for a long time been, in a relationship with Mr Webb. The conspiracy was said to involve CM, Mr Webb and others, but not CW. A total of US$207,000 or thereabouts was said to have been fraudulently obtained and thereafter dissipated.

3. Both CM and CW were indicted in count 2. Jeffrey Webb was again named as a co-conspirator. Again, the conspirators were alleged to have defrauded CONCACAF, this time in respect of office premises leased in George Town. The conspirators were alleged, by the device of what the prosecution described as a dummy lease, to have dishonestly obtained $100,000 a year from CONCACAF. The conspirators had arranged to rent the office premises for $160,000 a year, but provided a false lease to CONCACAF. CONCACAF was under the impression that the rent was $260,000 which they were duly paying, with the conspirators pocketing the difference. There were also renovations to the offices, which, although carried out, were, it was said, charged at over inflated prices. It was estimated that something in the order of $500,000 was fraudulently obtained as a result of the count 2 conspiracy.

4. Although these offences were said to have taken place in 2012 -2014, the defendants were not charged until December 2019. The trial was originally scheduled to commence in November 2020, but due to the non-availability of leading Counsel for CM, the case was re-scheduled for March 2021. A jury was then selected but not put in charge, since various matters of law were raised that required resolution. Those matters were still being argued on Friday 12th March when Mr Radcliffe told the court that he had only recently been made aware of the existence of a substantial amount of potentially disclosable material. Having taken time to familiarise himself with this newly emerging material and to take stock generally, Mr Radcliffe concluded that it was not realistic or feasible to seek to continue this trial with the present jury and applied for the case to adjourned. Consideration of the new material and disclosure of that which was relevant would take a number of months. Mr Radcliffe made clear that if his application to adjourn were to be unsuccessful (and it was strenuously opposed by both defendants), he would be obliged to offer no evidence on all counts of the indictment.

5. Having heard full argument and taken time to consider the application, I refused the Crown's application for an adjournment. I gave a full judgment setting out at length the background and circumstances of this case, together with my detailed reasons for refusing the application. That judgment, dated 22nd March 2021, should be read in conjunction with this judgment. The Crown duly offered no evidence on all counts and not guilty verdicts were entered.

6. Both defendants now make application for the legal costs incurred in defending this case to be paid by the Crown.

7. Mr Kamlish and Ms Fosuhene are privately instructed by CW. CM has been legally aided throughout. Her application for costs is, so it is said, "*brought to safeguard the legal aid budget. The protection of budgets is of importance to all government departments*"[1]. The Crown oppose these applications.

8. I have the assistance of written submissions from all parties, as follows:

a. From CM dated 25th March;

b. From CW dated 26th March, supported by a fee note from Mr Kamlish and a breakdown of costs from Messrs. Brady Attorneys at Law (Ms Fosuhene);

c. Submissions on behalf of the Crown, dated 6th April, together with a comprehensive file of authorities and other supporting material;

d. From CM dated 19th April;

e. Supplementary submissions on behalf of the Crown dated 9th July.

9. These applications are brought pursuant to s24(5) of the ***Judicature Act*** 2021. In view of the arguments advanced in this case, I should recite the provisions of s24 (1) to (6) in full. They are as follows:

> *"(1) Subject to the provisions of this or any other Law and to rules of court, the costs of and incidental to all civil proceedings in –*
> *(a) the Court of Appeal; and*
> *(b) the Grand Court,*
> *shall be in the discretion of the relevant court.*
>
> *(2) Without prejudice to any general power to make rules of court, such rules may provide for regulating matters relating to the costs of civil proceedings referred to in subsection (1), including, in particular —*
> *(a) the entitlement to costs;*
> *(b) the taxation of costs;*

[1] (Mr Dixey's skeleton argument dated 19th April 2021)

(c) the powers of taxing officers;
(d) the powers of judges to review decisions of taxing officers; and
(e) the powers of the court, as defined in section 24A(4), to make protective costs orders in judicial review proceedings and constitutional proceedings.

(3) The court shall have full power to determine by whom and to what extent the costs are to be paid.

(4) In any criminal or civil proceedings, the court may disallow or (as the case maybe) order the attorney-at-law or foreign lawyer concerned to meet the whole of any wasted costs or such part of them as may be determined in accordance with the rules of court.

(5) Costs, including wasted costs, may be awarded to or against the Crown.

(6) A costs certificate made by a taxing officer shall be enforceable as if it were a judgment or order of the court"

10. I should add that amongst the definitions that appear in sub-section (7) is the following:

> *"**wasted costs** mean any costs incurred by a party –*
>
> *(a) as a result of any improper, unreasonable or negligent act or omission on the part of any attorney at law or foreign lawyer or any employee of such attorney at law or foreign lawyer; or*
> *(b) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay."*

11. It is clear from the wording of s.24(5), argue the defence, that the criminal division of the Grand Court has a general power to award costs in favour of or against the Crown. It was made plain on behalf of both defendants in the course of oral submissions – there had earlier, in the course of exchange of skeleton arguments been some confusion – that these were not applications for wasted costs under s.24(4).

12. As to the law and the way in which such applications – for costs against the Crown – are to be approached, the defence submit that one need look no further than what

is said to be the "leading authority"[2] of ***R v Bernardo***[3], a first instance decision of Williams, J, the essence of which is that, the court has an "*unfettered discretion*."

13. The prosecution's primary submission is a bold one: that on a true reading of s.25 taken as a whole, save for wasted costs pursuant to ss.(4), the criminal division of the Grand Court has no power to make an award of costs against (or in favour of) the Crown. As it is put in paragraph 10 of the Crown's skeleton argument dated 9th July, "*in this jurisdiction, costs are unavailable either to or against the Crown save where statute provides instances of wasted costs*." The Crown submits that the concessions or assumptions made in previous cases are erroneous, urging that the time has come to analyse the position in depth.

14. The Crown has made and developed its submissions at length and in considerable detail in the course of written and oral submissions. For the purposes of this judgment, a relatively short summary of those submissions will suffice, although I have of course carefully studied and considered everything urged upon me. Many authorities have been cited in the course of argument. The fact that I have not referred to an authority does not mean that I have not considered it. In short, the Crown submit as follows:

i. The well-established common law position is that *"the Crown is by its prerogative exempt from the payment of costs in any judicial proceeding, and that this right cannot be taken away except by statute"*[4]

[2] (Mr Dixey's description, at paragraph 1 of his skeleton argument dated 25th March)

[3] [2014] 2 CILR 397

[4] *Affleck v The King* [1906] HCA 2; 3 CLR 608; 1906 3CLR p.630

ii. The only statutory reference to costs in criminal proceedings in the Grand Court is to be found in s.24 of the ***Judicature Act*** 2021 (and previous incarnations of that statute). In light, particularly, of the common law exemption provided to the Crown, this statute should be construed strictly;

iii. Section 24 is almost exclusively concerned with costs in civil proceedings in the Court of Appeal and the Grand Court. The only mention of "criminal…. proceedings" to be found in the entire section is at ss.(4) (*wasted costs*). Accordingly, only ss.(4) applies to criminal proceedings.

iv. Section 19 of the ***Grand Court Act*** 2015 gives power to the Rules Committee to make rules, inter alia, for *"regulating pleading, practice and procedure in respect of the conduct of criminal business and of civil business before the court in relation to all matters within the jurisdiction of the court, whether original or appellate in nature."* The Grand Court Rules provide comprehensive guidance before the court on very many matters of practice and procedure, yet, by Order 1 rule 2, save for (i) committal, (ii) applications for judicial review, (iii) wasted costs and (iv) Confidential Relationships (Preservation) Act, *"these rules shall not apply to any criminal proceedings."* This then provides strong support for the view that there is no general power to award costs to or against the Crown in the criminal division of the Grand Court. Had there been such a power, the rules would characteristically have given comprehensive guidance as to the exercise of that power.

15. Towards the end of oral submissions, Mr Dixey drew my attention to the case of ***Andrel Harris v R***[5], a decision of Chief Justice Anthony Smellie. The case was mentioned by Williams, J in his judgment in ***Bernardo***, but its relevance to the Crown's primary submission in this case was not perhaps fully appreciated until submissions had been developed. In that case, the Crown was advancing essentially the same argument as that upon which Mr Radcliffe now relies. The subject matter of the appeal was the Magistrate's decision not to award costs to the appellant following his acquittal, the Crown having eventually offered no evidence. Albeit that the Chief Justice was concerned with the meaning and interpretation of s.33 of the ***Summary Jurisdiction Act***, the decision is plainly of relevance to the applications I now have to decide since the wording of s.24 of the ***Judicature Act*** is identical. It was for that reason that, with the agreement of all parties, I gave leave for the Crown to serve further written submissions.

16. Mr Radcliffe rightly observes that "whilst any judgment of the Chief Justice is due the greatest respect" it is not binding upon me. That said, I am driven firmly to the same conclusion as the Chief Justice as to the interpretation of s.24 of the ***Judicature Act*** and s.33 of the ***Summary Jurisdiction Act***. I am satisfied that, contrary to the Crown's submissions, ss.(5) of those statutes does provide the criminal divisions of the Grand Court and the Summary Court with a general power to award costs in favour of and against the Crown.

17. Whilst one must look at the words of any statute in context, the words of ss.(5) are to my mind clear – and are worth repeating:

"Costs, including wasted costs, may be awarded to or against the Crown."

[5] SCA 33 of 2010

18. As the Chief Justice observed in ***Harris*** (and I align myself with his observations):

> *"There is no basis for confining their meaning [the words of subsection (5)] to costs in civil proceedings as [Crown Counsel] also argued by reference to the fact that subsection (5) follows on from subsections (1) to (3) which, in their terms, deal only with costs in civil cases. Subsection (4) expressly includes costs in criminal cases. Had the intention been to exclude costs in criminal cases one would expect subsection (5) which follows immediately, to be qualified in those terms. No such qualification is placed upon it."*

Had it been the intention of the legislature to confine ss.(5) to civil proceedings, it could so easily have said so in terms.

19. Mr Radcliffe observes that the Chief Justice was not apparently referred to the Grand Court Rules – point (iv) in paragraph 12 above – venturing the view in oral argument that had the Chief Justice been so referred, his conclusion might have been otherwise. For my part, I very much doubt it. Such force as this argument might otherwise have had is diminished by a failure at any stage in the course of submissions to make reference to s.34 of the ***Penal Code***, which provides as follows:

> "*Subject to limitations imposed by any other law, a court may order any person convicted of an offence to pay the costs of and incidental to the prosecution or any part thereof*."

20. It is then plain beyond any argument that the criminal courts have power make an award of costs against a convicted defendant yet, as the Cayman Islands Court of Appeal (CICA) recently observed in ***R v Errington Webster***[6]:

> *"There is no dispute but that in deciding whether or not to make an order for costs, the judge is exercising a discretion. There is no Cayman guidance regarding this exercise."*

21. A further clear power to award costs to or against the Crown is to found in s.182 of the ***Criminal Procedure Code***:

> "*The court hearing any appeal may make such order as to the costs to be paid by either party as it may think just*."

[6] Criminal Appeal 19 of 2019

22. This bears upon the Crown's primary submissions in two ways:

i. again, it detracts from the argument that since the rules do not deal with applications for costs against the Crown (save for wasted costs), such a power does not exist; and

ii. it would surely make no sense for the Grand Court to be given a power to award costs against the Crown in its appellate jurisdiction but not at first instance.

As the Chief Justice noted in ***Harris***, a court is entitled to take into account absurdity or inconsistency when construing statutes.

23. Accordingly, I am altogether satisfied that in this case, this Court has, pursuant to s.24(5) of the ***Judicature Act***, a general discretionary power to make costs orders in favour of and against the Crown.

24. I then turn to consider the exercise of that discretion.

25. As with the decision of the Chief Justice, the decision of Williams, J in ***Bernardo*** is of persuasive authority, but I am not bound by it. Of the authorities to which I have been referred, the following have been of particular assistance to me in reaching my conclusions:

i. ***Attorney General v Cayman National Bank***[7]

ii. ***R v Watler***[8]

iii. ***R v P***[9]

iv. ***Front Door (Cayman) Ltd v R***[10]

[7] [2004-05] CILR 298
[8] [2007] CILR121
[9] [2011] EWCA Crim 1130
[10] (Case 03767/2014)

26. Debate has continued, in these and other cases, as to whether or not it is helpful to look at the position in England and Wales. In very many instances, this court derives considerable assistance by looking in that direction, although it is important to ensure that one is comparing like with like.

27. It is common ground that the costs regime in the criminal courts of England and Wales is markedly different from the regime in force in this jurisdiction – first and foremost, because, in this jurisdiction, unlike in England and Wales, there is no power to make an award of costs from central funds. Here, there are no "central funds." In England and Wales, the default position, as it might be, is that an acquitted defendant will be granted an order for costs from central funds. The courts are justified in departing from that general starting point if there is good reason to do so. The examples usually given are where the conduct of the defence has been such as to lead the prosecution to conclude that its case was in fact stronger than it was or the defendant has brought suspicion upon himself.

28. I have little doubt that the legislature in this jurisdiction considered the provisions and framework of the England and Wales costs structure when constructing its own criminal costs regime. Clearly, a positive decision was taken to depart significantly from England and Wales practice, by not establishing a central fund. It would therefore, I am sure be altogether wrong to import the central funds default position referred to above to this jurisdiction. Here there is no room for a starting point of criminal costs following the event.

29. A clear and emphatic theme emerges from the cases to which I have been referred, particularly those listed above.

30. In ***Attorney General v Cayman National Bank***, a decision of the CICA, Taylor, JA said this:

> *"It is not the normal practice to make an order for costs in proceedings of this sort, involving discharge by the Crown of responsibilities ancillary to its duty to enforce the criminal law."*

31. The Court of Appeal was dealing with an application by the Crown to freeze bank accounts held by Mr Watler (the appellant) in advance of trial.

32. Eventually, Mr Watler was tried in the Summary Court. He was successful in his appeal against convictions in his Summary Court Appeal – all convictions were quashed but his application for costs was refused by Henderson, J. This was of course an exercise of the power contained in s.182 of the ***Criminal Procedure Code***, rather than s.25(5) of the ***Judicature Act***, but I am satisfied that the principles applicable to both powers should be similar, if not the same. I can do no better than quote the law reporter's summary of Henderson J's decision, which I am satisfied is an accurate distillation of his judgment:

> *"The defendant would not be awarded the costs of his criminal trial and appeal. Although the court had unfettered discretion under the Criminal Procedure Code, s.182, it would not normally award costs in criminal proceedings when the Crown was not at fault in bringing charges but was merely discharging its duty to enforce the criminal law. In the present case, there were no unusual circumstances that would justify a departure from the general rule. The code of practice constituted by legislation in the United Kingdom had not been adopted here and therefore English authorities decided under those provisions could have only limited application."*

33. The case of ***R v P*** is, in my view, of particular assistance. The costs decision of the judge at first instance, against which the appeal was brought, was, for a variety of reasons, fundamentally flawed. That is of no particular moment. What is important

is the guidance given by Hughes, LJ (as he then was) upon general principles said to be applicable to all costs applications against the Crown, as follows:

> *"The decision to prosecute or not is a thoroughly difficult and delicate one. It is one on which two perfectly responsible lawyers may easily differ. It is only in the clearest possible cases that a decision taken by the appropriate authority in good faith could possibly justify a penalty in costs."*

34. Hughes, LJ later continued:

> *"It is important that the making of that decision should not be overshadowed by the fear that if a prosecution is continued and fails there may be an order for the payment of costs. An acquitted defendant will normally receive his costs from central funds unless there is a good reason why he should not. We do not say that there will never be a case where a decision to prosecute is so unreasonable that a costs order is appropriate, but we are satisfied that this case was not arguably such. Here, the complainant's evidence might have been assessed as likely to be accepted. The flatmate's evidence might have been assessed as capable of disbelief. There was, we note, some material which perhaps suggested possible partiality. There were, it was said, some possible injuries to the complainant. We want to make it clear that we simply do not know whether the decision to prosecute was right or wrong. It is clear that it was made in good faith. Supposing, however, that it was a wrong judgment on a difficult issue, that is not enough to justify an order for costs…"*

35. Despite the different costs regime in England and Wales, the guidance given by Hughes, LJ is of considerable assistance in this jurisdiction and in the decision I have to make.

36. In ***Front Door (Cayman) Ltd v R***, Mettyear, J, (Actg.) having considered a number of authorities, opined thus:

> *"The law expects for good reason restraint to be used in the making of costs orders against the Crown."*

37. From all these cases can be distilled a general principle that an award of costs against the Crown is to be regarded very much as the exception rather than the rule. The Crown should not be constrained in the exercise of its clear duty and responsibility to enforce the criminal law in these courts by financial considerations, or to use Hughes, LJ's expression, the Crown should not feel overshadowed in the carrying out of its public duty by costs implications. A necessary corollary to that proposition is that costs should not be awarded against the Crown save in exceptional circumstances.

38. It was presumably to address the hardship and potential unfairness caused to acquitted defendants by the application of that principle that a central fund was established in England and Wales.

39. It bears repeating that a positive decision was taken not to provide a central fund in this jurisdiction. It was surely not the intention, as Mr Radcliffe rightly submits, to place an additional burden on the Crown's financial resources.

40. Williams, J was right when he observed in ***Bernardo*** that the court has a wide discretion when considering applications for costs against the Crown. Needless to say, as with all discretions given to the court, it should be exercised judiciously. Williams, J did not of course suggest otherwise.

41. Whilst each case must be decided on its merits, I would not for my part describe the discretion as unfettered. Williams, J was:

> *"... not convinced that it is appropriate for the court to fetter itself by having a strict starting point, whether it would be that normally a court should not make orders unless there are unusual circumstances justifying the making of them, or whether it would be normally a court should make orders unless there are positive reasons for not doing so."*[11]

42. In this regard, in the light particularly of the authorities referred to above, I respectfully part company with him. I am convinced that there should be a firm starting point, which is – as I have said – that it is exceptional for a costs order to be made against the Crown. Accordingly, before such an order is made, there must be exceptional circumstances, such as, to use the example given by Hughes, LJ:

> "*a decision to prosecute [that is] so unreasonable that a costs order is appropriate*."

43. Turning now to the facts of this case.

44. Both Mr Kamlish and Mr Dixey agreed in the course of submissions that, had it not been for the disclosure problems encountered by the Crown, had the case been tried before the jury and concluded with not guilty verdicts from the jury, applications for costs against the Crown would not have been appropriate.

45. It was not suggested on behalf or either CM or CW that the prosecution should not have been brought. It was recognised that there was, in respect of both defendants, a case to answer and, on the evidence, a reasonable prospect of conviction.

46. The question then arises as to whether the defence should be in a better position by reason of the disclosure problems encountered by the Crown - which, in the event, resulted in their earlier acquittal and considerably reduced both the length of the trial and the legal costs incurred – than they would have been had the case proceeded in

[11] paragraph 37 of the judgment

the usual way. Logic, common sense and fairness would, to my way of thinking, dictate otherwise.

47. I have reminded myself, both from my earlier judgment[12] and my notes taken at the time, of the reasons the case was brought to an early conclusion. No allegations of bad faith, negligence or impropriety are alleged against prosecuting Counsel. It is not in dispute that as soon as Mr Radcliffe became aware of the existence of what was, to the prosecuting team new material, he informed the defence and the Court and sought time to consider his position. On 17th March, in a skeleton argument, the Crown conceded that there had been a failure of disclosure and that: *"opportunities presented themselves at each stage of the investigation and prosecution to address the issues that have led to the failure of disclosure. It is plain that there was an absence of coordination at each level and a series of missed opportunities."*

48. The reference to an absence of coordination refers to the liaison between various bodies charged with the investigation of criminal offences – in this case, Royal Cayman Islands Police Service generally, the Financial Crime Unit and the Anti-Corruption Commission – rather than between the Financial Crime Unit and the Office of the Director of Public Prosecutions. There is no reason not to take at face value that explanation, in which event, such fault as there may have been lies with those agencies rather than the Crown (in the shape of the Office of the Director of Public Prosecutions).

[12] Application to Adjourn

49. In some contexts, the phrase "the Crown" is used as an umbrella term, to include both the prosecuting authority and the police or other investigating agency. In the context of a costs application against the Crown, there is no justification for including the agencies with whom the Office of the Director of Public Prosecutions works in that term. There is no good reason why the Office of the Director of Public Prosecutions – which would be responsible for satisfying any order for costs – should take responsibility for the failings, if such they be, of the agencies with whom they work. The Crown should not be penalised for having acted fairly and appropriately once this new material was brought to its attention.

50. For all the above reasons these applications for costs are refused.

51. It is then unnecessary for me to consider further whether a legally-aided defendant can or should make an application for costs against the Crown in order to "safeguard the legal aid budget." However, in deference to the arguments advanced, I make the following observations.

52. Such an order, if granted, simply operates to transfer public funds from one department to another. The raison d'etre of the legal aid department is to provide legal representation to defendants who are unable to fund their own representation. The purpose and duty of the Office of the Director of Public Prosecutions is to enforce, by prosecution, the criminal law. It is difficult to see, at first blush, what proper purpose is served by diverting funds from the former to the latter. Simply to punish the Crown for perceived failings is something of an arid exercise, and is not in accordance with authority.

53. The first instance decision in ***R v Assad Walker, Fitzroy Ottey, Owen Reid***[13] was cited as authority for the proposition that such an order can be made. It is not clear from the partial transcript provided to me as to what led the proceedings to be adjourned, but it appears there were failures of disclosure. One legally-aided attorney opined that she was "duty-bound" to make an application for costs. I very much doubt that such a duty exists. The application was not subjected to scrutiny by full argument; the court indicated at an early stage that "*you don't have to persuade me with regards to the costs*." The Crown did not oppose the order in principle. The Court spoke of imposing a "sanction" on the Crown. While a Court's sense of frustration about a case having to be adjourned is readily understandable, the imposition of a sanction does not, it seems to me, sit happily with Hughes, LJ's guidance in ***R v P*** that the Crown should not, generally speaking, be penalised in costs.

54. Whilst I do not say that there could never be a case in which costs against the Crown could be awarded in favour of the legal aid department, it would be an exceptional course.

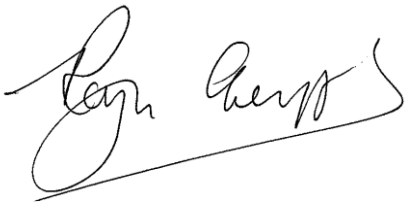
55. Mr Dixey is right when he observes that "the protection of budgets is of importance to all government departments." That is equally true of the Office of the Director of Public Prosecution's budget, which has no dedicated fund to meet orders for costs.

56. When an order for costs is made, funds have to be diverted from elsewhere to meet the order. The result of this is unlikely to increase its efficiency or enhance its performance. I close by repeating and endorsing the words of Mettyear, J quoted above:

[13] Indictment 43 of 2018

"the law expects for good reason restraint to be used in the making of costs orders against the Crown."

Dated this the 30th November 2021



Justice Roger Chapple
Acting Judge of the Grand Court