REPORT OF COMMITTEE ON COSTS IN CRIMINAL CASES

1. The Committee was asked to review the law and practice relating to the grant of costs to persons acquitted of criminal charges in the Supreme Court and the Magistrate's Courts, including appeals, and to make such recommendations for changes as we saw fit. Except on one relatively minor point, which is recorded in due course, we have after a good deal of discussion been able to reach complete agreement on the matters we have considered. We now report as follows.

History and Present Law

2. At common law costs were not payable either by the prosecutor or the defendant in criminal cases. Chitty(1) states the principle in the following words -

> "At common law indeed, it is a general principle that the King neither pays nor receives costs, and as an indictment, though carried on by an individual, is always considered as his suit, no costs are payable whatsoever may be the event of the prosecution."

3. This rule has long been qualified by statute both in England and New Zealand and it should probably now be regarded as of merely historical interest. Reference should be made however to the decision of Wily S.M. in Commissioner of Inland Revenue v. Viskovich(2) in which the learned Magistrate held that as the Summary Proceedings Act did not bind the Crown he had no jurisdiction under s.72(2) of that Act to award costs to the defendant upon the dismissal of an income tax prosecution. This decision does not seem to have been generally followed and we are inclined with respect to doubt its correctness. If costs cannot be awarded against the Crown, s.72(2) and other provisions of the Summary Proceedings Act to which we refer later are without any application. In our view these provisions bind the Crown by necessary intendment. As the Crimes Act is expressed to bind the Crown the point does not arise in respect of criminal cases tried in the Supreme Court.

4. The first statutory provision in New Zealand for the award of costs in criminal cases was enacted one hundred years ago.

(1) Chitty on Criminal Law 2nd ed. Vol. 1, 825
(2) (1960) 10 M.C.D. 11

Section 34 of the Justices of the Peace Act 1866, which was repeated with virtually no change in successive consolidations up to and including the Justices of the Peace Act 1927, provided as follows -

> "In all cases of summary conviction the convicting Justices may order by such conviction that the defendant shall pay to the informant such costs as to such Justices shall seem just and reasonable and in cases where the Justices instead of convicting shall dismiss the information it shall be lawful for them in their discretion by their order of dismissal to award and order that the informant shall pay to the defendant such costs as to the said Justices shall seem just and reasonable."

5. Costs in appeals to the Supreme Court were covered by legislation passed a year later -- ss. 20 - 22 of the Appeals from Justices Act 1867. These provisions too found their way into later enactments, the present equivalent being s.140 of the Summary Proceedings Act 1957. Section 20 provided for the respondent to receive costs where any of the grounds for appeal were frivolous or vexatious. Section 21 enabled costs to be awarded against a party who gave notice of appeal and did not prosecute it. Section 22 was the general section and provided that "the Supreme Court or the District Court (as the case may be) shall hear and determine the matter and make such order in relation thereto and such orders as to payment of costs to either party and to the Justice if appearing in support of his decision as to the Court shall seem fit."

6. There is a certain amount of case law on the practice to be followed under what was s.22 of the 1867 Act. In Batley v. Cullen[1] (a prosecution for the unlicensed sale of liquor) Prendergast C.J. said -

> "We think a general rule of practice ought to be laid down, and have considered this case with that view. The general rule appears to be that costs are not given against the prosecution, at least in cases like the present, where the prosecution is by the police. The prosecution was commenced by the police and resulted in a conviction. The defendant appealed and the conviction was held bad. I think in cases of this nature the general rule ought to be that costs be not given against the police . . . Where there is no doubt about the law costs are given, but where there is a genuine point of law raised, no costs are given."

(1) (1888) 6 N.Z.L.R. 755

In McBride v. Gamble[1] (a prosecution under the Employment of Females Act 1881) Gillies J. said -

> "The Court has no doubt the power to allow costs in such a case, but I think this should only be done when the police have acted in an unjustifiable manner, and not when simply doing their duty as in the present case."

The same reasoning is repeated by Cooper J. in Schroder v. Duddy[2]. He referred to Batley v. Cullen and said -

> "I make no order for costs, as the respondent is a police officer and laid the information in the course of his duty, and there was a genuine point of law to be argued."

7. The underlying thinking appears to be that the police shoul not be exposed to the payment of costs unless the appeal, or as the case may be the prosecution, was entirely without merit. Any hardship suffered by the defendant was ignored.

8. A recent exception to this rule is supplied by the case of Davis v. Samson.[3] The case reflects the change which has been taking place in the approach to defence costs. F.B. Adams J., in awarding costs said (p.914) -

> "The appeal is allowed and the conviction quashed. The rule of practice is that costs are not allowed in such cases, but there is power to do so under s.325 of the Justices of the Peace Act 1927, and, as this appeal succeeds on the merits, an allowance of costs is not prohibited by s.328. I think that rare exceptions may be admitted to the rule of practice and propose to make an exception in this case. I do not criticize in any respect the conduct of the Police or of anyone else concerned in the case. But it happens that the appellant, being unable to get his appeal heard promptly, has suffered imprisonment for a month on a conviction which is not sustained; and while his record is such that a month of imprisonment more or less will neither make or mar him, I think it is just under all the circumstances that his costs should be paid."

9. The comment may be made at this point that in view of these decisions legislation might well be necessary even to restore the Court's unfettered discretion insofar as appeal cases are concerned.

(1) (1889) 7 N.Z.L.R. 396
(2) (1916) 35 N.Z.L.R. 767 at 772
(3) [1953] N.Z.L.R. 909

10. In 1952 provision was made for the first time for the award of costs on the discharge of a defendant at the preliminary hearing of an indictable offence. Section 157A of the Justices of the Peace Act 1927, which was inserted by s.21 of the Justices of the Peace Amendment Act 1952 and the substance of which is now contained in s.179 of the Summary Proceedings Act 1957, provided -

> "On the withdrawal of an information, or where the defendant is discharged, the Court may, if it is of opinion that the charge was not made in good faith or that it was made without reasonable grounds, order the informant to pay to the defendant such sum by way of costs as the Court thinks just and reasonable."

11. It will be seen that this discretion is a strictly limited one. Why it was not widened when the Summary Proceedings Act was prepared, and brought into line with other provisions as to costs, we do not know. The simplest and most likely reason is that it was overlooked.

12. Finally s.402(3) of the Crimes Act 1961 made provision for the award of costs to an accused person acquitted upon a trial in the Supreme Court. The section so far as relevant provides as follows -

> "(1) Where any person is convicted by the Supreme Court of any crime, the Court may order the offender to pay such sum as it thinks just and reasonable towards the costs of the prosecution.
>
> (2) Where on the arrest of the offender any money was taken from him the Court may in its discretion order the whole or any part of the money to be applied to any such payment.
>
> (3) Where any person is acquitted by the Supreme Court of any crime, the Court may order the prosecutor to pay to that person such sum as it thinks just and reasonable towards the costs of his defence."

13. To complete this survey of the New Zealand statute law on the subject we quote ss. 72 and 140 of the Summary Proceedings Act 1957 which are the existent provisions governing the award of costs in the Magistrate's Courts and on appeal in the Supreme Court in respect of summary proceedings, and s.391 of the Crimes Act 1961 which deals with costs in the Court of Appeal -

> "72. (1) Where the Court convicts the defendant, it may order him to pay to the informant such costs as it thinks just and reasonable for Court fees, witnesses' and interpreters' expenses, and solicitor's fees.
>
> (2) Where the Court dismisses any information, it may order the informant to pay to the defendant such costs

as it thinks just and reasonable for Court fees, witnesses' and interpreters' expenses and solicitor's fees.

(3) Any order under subsection one or subsection two of this section may include such costs as the Court thinks just and reasonable for the Court fees, witnesses' and interpreters' expenses, and solicitor's fees of or in relation to any adjournment or the taking of evidence under section thirty-one or section thirty-two of this Act.

(4) Where the Court convicts the defendant and the informant has not prepaid any fees of Court, the Court may order the defendant to pay the fees of Court.

(5) Costs allowed under this section shall in no case exceed the amount provided for in any scale prescribed by regulations under this Act."

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"140.(1) On the determination of any appeal the Supreme Court may make such order as to payment and amount of costs to either party as it thinks fit.

(2) No Magistrate or Justice who states a case in accordance with this Part of this Act shall be liable to costs by reason of the appeal against the determination.

(3) If the Supreme Court is of opinion that an appeal includes any frivolous or vexatious matter, it may, if it thinks fit, irrespective of the result of the appeal, allow the respondent the whole or any part of his costs in disputing the frivolous or vexatious matter."

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"391. On the hearing and determination of any such appeal or any proceedings preliminary or incidental thereto no costs shall be allowed on either side."

Position in England

14. The law with respect to the payment of costs in criminal cases in England was consolidated by the Costs in Criminal Cases Act 1952. That Act makes comprehensive provision giving the Court a discretion to order the payment of the costs of the defence out of local funds where the defence is successful. The Act applies to criminal proceedings in all Courts and at all stages and under it the Court, as in New Zealand, has on the face of it a complete discretion.

15. The English practice at the time the 1952 Act was passed and for some years thereafter was summed up in the following

extract from a statement by Lord Goddard L.C.J. in 1952 -

> "The principle which the Judges thought should be followed was this: While s.44 in terms imposed no limit on the discretion of the Court it was never intended, and it would be quite wrong, that costs should be awarded as of course to every defendant who was acquitted. Its use should be reserved for exceptional cases and every case should be considered by the Court on its own merits."

16. In October 1959 the following practice direction was given by Lord Parker L.C.J. It indicates that a more liberal policy is being followed in England towards the award of costs to defendants in criminal cases -

> "In a statement issued on March 25, 1952, this Court, while emphasising that every case should be considered on its merits, said that it is only in exceptional cases that costs should be awarded . . . On the other hand a suggestion has been canvassed that the mere fact of acquittal should carry with it the expectation that the discretion conferred by the Statute would be exercised in favour of the accused . . . There is no presumption one way or the other as to its exercise. 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 on himself, are among the matters to be taken into consideration." (1)

17. Following this practice direction was a statement by Devlin J. in deciding an application for the payment of costs to a successful defendant: see [1959] 3 All E.R. 472. He said -

> "The recent pronouncement by the Lord Chief Justice . . . has not I think laid down any new law, but it has perhaps made it clear that the Judge's discretion to award costs is rather wider than has hitherto been thought, and in particular I think that it has now been made quite clear that the notion which was very generally entertained, that an award of costs against the prosecution necessarily involved some reflection on the prosecution or on the propriety of its being brought, is quite wrong."

New Zealand Developments

18. These statements were taken notice of in New Zealand by the then Chief Justice who made a statement on the subject of costs at the opening of the Wellington Sessions in May 1963 -

> "Recent press reference to this subsection may have created the erroneous impression that whenever a person

(1) 43 Cr. App. R. 219

> is acquitted of any crime he can expect that the prosecution will be ordered to pay a reasonable sum towards the costs of his defence. This is not an occasion upon which I should attempt to lay down any rule as to when costs may or may not be allowed against the prosecutor, for each case must be decided on its own merits: but the Judges think it proper that attention should be drawn to the fact that subs. (3) of s.402 of our Crimes Act followed in all presently material respects the provisions of s.1(a) of the Costs in Criminal Cases Act 1952 of England. Counsel will be aware that that enactment has twice been considered by the English Court of Criminal Appeal."

However, he went on to say: "The Court has a discretion in the matter and in each case good grounds must be shown for the exercise of that discretion in the applicant's favour". This differs in emphasis from Lord Parker's remark already quoted: "there is no presumption one way or the other as to its exercise". Altogether there is a less generous flavour about the New Zealand statement, particularly as compared with the forthright words of Devlin J.

19. Moreover the idea that costs should not be awarded where a prosecution has been properly brought does not seem to have disappeared from the minds of some judicial officers. In a case at Christchurch in 1963, after the statement by Barrowclough C.J. referred to, one Magistrate said -

> "This is not a case where the police have acted improperly. They were faced with a confused scene and a fight. Their immediate job was to restore order by breaking up the fight. This meant arresting the participants."

On evidence, the Magistrate said, he held that the accused were simply defending themselves. Now they were in effect asking for compensation from the State. Counsel conceded that there was nothing improper in the police procedure. The police could not be blamed for desiring to have the issue decided by the Court.

> "It seems to me that it is against the public interest to award costs against the police in a case like this. So long as the police act honestly and reasonably they should not be asked to pay compensation."

20. Other instances might be quoted. For example in September 1963 another Magistrate is reported to have said that the Courts would grant costs only in exceptional cases. Even where the circumstances might make it appear that an acquitted defendant had been prosecuted without justification he might disentitle himself to costs by some improper or imprudent conduct. Again, in Transport Department v. Raynes (unreported, 18.4.66) the

Magistrate said -

> "I have dismissed this application because I think I should do so, but on the evidence as a whole I think the prosecution was justified and when I reach that stage then I should not award costs against the prosecution . . . From the point of view of the person deciding whether the prosecution should be brought on the evidence available at that stage . . . I must conclude that the prosecution was justified and once I reach that decision I should not mulct the department in costs."

Comparative Law and Practice

21. We have been able to find little in the way of useful precedents or comparisons from the law of other countries whose legislation is accessible to us. Generally the law of the Australian States and Canadian Provinces simply gives the Court a discretion in summary cases to award costs on the dismissal of an information. These provisions are obviously derived from the older English legislation. We have not attempted to examine the situation in Continental European countries. The problem of costs in criminal cases is of course much diminished where legal aid is provided on an extensive scale for persons accused of offences. Thus in Denmark there seems to be a virtually unqualified right to legal aid in criminal proceedings, and representation by State paid counsel without any sort of means test is normal where the defendant is in peril of imprisonment. Should an accused person be convicted the State is entitled to seek recovery of costs from him and may sometimes do so, but generally the question of costs is of little importance. The principle is firmly established that in criminal cases the cost of legal representation should be borne by the State.

22. It is of interest also that in England itself legal aid is now much more freely granted in criminal cases than formerly. This liberal approach is reflected in the just-issued report of the Departmental Committee on Legal Aid in Criminal Proceedings.(1)

Costs and Legal Aid

23. We have not been asked to, and we do not regard ourselves as qualified to, consider the working of the present system of legal aid in criminal cases. As we have suggested, the more liberal are the provisions for legal aid the less important is the question of paying the costs of successful defendants. It can confidently be said however that there are many cases under

(1) Cmnd. 2934

the present law and practice where the defendant would probably not qualify for legal aid and other cases where he would prefer to engage counsel of his own choice. The present scale of fees for legal practitioners in aided cases is extremely modest, and if aid were granted in anything like the majority of difficult cases there is a danger that most of the work would fall to inexperienced or less competent practitioners.

24. Our recommendations are therefore made on the assumption that in the ordinary run of case the defendant or accused will employ his own counsel and will be expected to pay him and necessary witnesses.

Approach to Problem

25. We think everyone would agree that if a prosecution is brought either maliciously or unreasonably the defendant should receive his costs. On the other hand none of us consider that a defendant should expect costs merely by virtue of his acquittal; nor do we think this would commend itself to legal or public opinion generally. There is a substantial class of cases where in the popular phrase the accused is "lucky to get off" - the prosecution has not quite clinched the case or the exacting standard of proof in criminal cases is not quite satisfied. Alternatively the accused may by his misconduct or lack of candour contribute to his own misfortune - he has "brought it on himself". In our opinion it would ordinarily be wrong to award costs in these sorts of case.

26. There is however a middle group and it is here that the application of the present law can give rise to criticism. We refer to cases where, although the police (if it is a case of a police prosecution) were diligent and acted reasonably in bringing a charge in the light of the facts as they knew them, the defendant has nevertheless shown his innocence or the probability of his innocence. He has "cleared himself" either by discrediting the prosecution case or showing its insufficiency or by bringing credible witnesses of his own who have thrown a different light on the circumstances.

27. The issue is: to what extent should a successful defendant in these circumstances be able to recover his costs.

28. There are two possible approaches to this question. The first is that exposure to the risk of a prosecution is one of the inevitable hazards of living in society and that there is no reason to shield the citizen against the financial consequences as long as no malice, incompetence or serious neglect can be attributed to the prosecutor. This view has prevailed in the past. The second is that it is unjust for an innocent man to have to suffer financial hardship, perhaps serious hardship, in establishing his innocence. The expense of a defended criminal case even in the lower Court is often quite substantial and counsel's fees together with witnesses' expenses may often go into treble figures.

29. This view is of respectable antiquity. Chitty for example, in his book on criminal law which we have already quoted, has this to say -

> "As the Crown does not pay, any more than receive, costs, it follows that the defendant, though acquitted, must, in general, bear his own expenses. This seems to be another defect in the statutes which relate to this subject; for it appears hard that an individual should be punished for the manifestation of his innocence."

30. It would we think be common ground that by accepting the benefits of an ordered society the citizen becomes subject to various dangers and risks, among them the risks of being suspected, of being arrested and of being prosecuted for offences he has not committed. These dangers are minimised by the provision of fair procedures, trained and upright police forces, and speedy and efficient access to the Courts. Nevertheless there are and will always be cases where innocent men are prosecuted without any fault being necessarily laid at the door of the police. It does not seem to us to follow that in these circumstances the citizen must also be expected to bear the financial burden of exculpating himself. Because we cannot wholly prevent placing innocent persons in jeopardy that does not mean that we should not as far as is practicable mitigate the consequences.

31. The proposition that a person wrongly accused of an offence should not suffer financially for having to establish his innocence in Court would we believe commend itself to public opinion generally When this proposition was put forward tentatively by the Minister

of Justice in 1963 it received general and often strong support from the press. This has not prevented us from examining the problem in an objective way freed from any preconceptions, but it does help to reinforce the general conclusions which we have reached.

32. Representations are made quite frequently to the Minister of Justice for payment of the costs of persons acquitted of some offence. The policy is not to do so in any case where the Court has considered an application for costs, on the ground that this would be tantamount to interfering with the Court's discretion. In other cases approval to an ex gratia payment has been given very sparingly but in one or two instances it has been done.

33. There is a particularly strong argument for the award of costs to a successful defendant in petty cases. If such costs are not given as a general rule, defendants who believe they have a good defence may prefer to plead guilty simply because the costs of establishing their innocence may greatly exceed the likely amount of any fine the Court will impose. It is impossible in the nature of things to say how often this happens, but the proposition that it pays better to plead guilty than to secure an acquittal is hardly in accord with our sense of justice.

Objection to Liberal Award of Costs

34. Perhaps the most serious objection to making more generous provision for the grant of costs is that it may tend to discourage the police from bringing prosecutions in all but the clearest cases. The prospect that failure to secure a conviction may result in costs being awarded against the police might on the one hand tend to produce an undue caution in bringing criminal charges although they are justified and on the other hand create a temptation to use improper means to secure convictions. Neither is in the public interest.

35. On analysis however this difficulty does not seem to us a real one logically, and we think that any psychological effect it might have can be removed by suitable changes of procedure. The objection is valid only if the award of costs against the prosecution is to be regarded as a rebuke to the police. As long as costs are seldom awarded except where the police are in fact blameworthy this element of rebuke will be present. However the essential criticism is precisely that costs should not be so

limited. If costs are awarded on a different basis they cannot properly be regarded as a criticism of the police officers responsible.

36. Nevertheless the result of a policy of freer award of costs to successful defendants would be that police officers would more frequently involve their department in expense. This could be a source of anxiety and thus a deterrent to some police officers. To meet this we recommend that, except where there has been negligence or impropriety, the costs of successful defendants should be paid not by the police but out of a separate fund administered by the Department of Justice. That department is willing to undertake this responsibility and we think that such a procedure will more truly reflect the principles which in our opinion should govern the award of costs. A similar approach exists in England where under the Costs in Criminal Cases Act 1952 costs are paid out of local funds - they are granted to the defendant but not against the police.

Costs in Court of Appeal

37. Before passing to our general recommendations we point out that under the present law the power to grant costs to a successful accused covers original summary proceedings in the Magistrate's Court, the preliminary hearing and trial of indictable cases, and appeals from convictions by Magistrates. Only in the Court of Appeal is there no provision for the award of costs. We recommend that s.391 of the Crimes Act 1961 be repealed, and the Court of Appeal given the same power as the Supreme Court has on appeal to award costs.

Conclusions

38. It is our view that the law and practice with regard to the award of costs to successful defendants in criminal cases should be based on the principle that ordinarily costs should be granted where in one way or another the defendant has shown his innocence, and of course in cases where the prosecution has for one reason or another been brought improperly or negligently. The most difficult part of our task however has been to suggest a way in which this principle can be accorded legal effect without making the award of costs an almost general consequence of acquittal. As we have said we think this would be undesirable.

39. At present, the Courts have on the face of it an absolute

discretion and the circumstances of particular cases are likely to be so various that we regard it as most important that an element of discretion should be retained. It would be simple to draft a provision that the Court should award costs "if it thought that on the balance of probabilities the defendant was innocent" or some such formula. This however would be quite out of the question unless New Zealand were also to introduce something like the Scots verdict of "not proven".

40. What we recommend is that there should be written into the legislation some principles to guide Judges or Magistrates in determining applications for costs, and to encourage them to use their discretion more liberally.

41. It is also our view that, in dealing with an application for costs, the Court should have the opportunity of hearing submissions and, if desired, evidence from both the applicant and the Crown. There may be evidence not given at the hearing which would throw light on the circumstances and would assist the Court in deciding the application. We recommend that provision for this should be written into the legislation.

Criteria

42. We suggest that in the exercise of their discretion the Courts should have regard to all relevant circumstances and in particular to -

(a) whether the informant acted in good faith in bringing and continuing the prosecution;

(b) whether at the commencement of the prosecution the informant had sufficient evidence to support the conviction of the defendant in the absence of contrary evidence;

(c) whether the informant took proper steps to investigate any matter coming into his hands which suggested that the defendant might not be guilty;

(d) whether generally the investigation into the offence was conducted in a reasonable and proper manner;

(e) whether the information was dismissed because the defendant established (either by the evidence of witnesses called by him or by the cross-examination of witnesses for the prosecution or otherwise) that he was not guilty;

(f) whether the evidence as a whole would support a finding of guilt but the information was dismissed on a technical point;

(g) whether the behaviour of the defendant in relation to the investigation and to the proceedings was reasonable and proper.

43. In addition we think there should be a proviso to the effect that the Court should not grant costs by reason only of the fact that the information was dismissed, or decline to grant costs by reason only of the fact that the proceedings were properly brought and continued.

44. Paragraphs (a) to (d) above relate to cases where the prosecution is at fault and call for no special comment. We imagine that even under the stricter practice today costs would usually be awarded in these cases. Paragraph (e) is intended to cover not only cases where the defendant has brought witnesses to prove his innocence but where his innocence or probable innocence emerges from a cross-examination of the prosecution's witnesses or from any other source. Paragraphs (f) and (g) in contrast to the earlier paragraphs suggest grounds for the refusal of costs.

45. These guides are all positive. The proviso following them is negative and would act to direct the Court's discretion within channels. It would be protection against a too liberal as well as a too restrictive policy towards the award of costs. This combination of positive and negative criteria is common enough in our law and we think it would be valuable in the present case.

Questions of Law

46. The recommendations we have made above will cover the great bulk of ordinary cases. There are some prosecutions however where the issue of guilt or innocence turns primarily

on a difficult point of law. This may happen for example with minor offences, where even if the defendant is guilty at law his moral guilt is slight or non-existent. Such proceedings may be brought as a test case, with the defendant in a sense a guinea pig on whom to try out a particular opinion as to the law. But there are other proceedings too that are dominated by legal issues and where the defendant if convicted is likely to receive a small or even nominal penalty.

47. We can see no reason why if the defendant is successful in proceedings of this sort he should not normally receive costs. Indeed we go further and say that in such cases there are circumstances in which it would be reasonable for the defendant, even if convicted, to be paid something towards his costs. At present the Court has no discretion to do this and we are agreed that it should have this power. We accordingly recommend a provision along the following lines -

> "Without limiting or affecting any other power of the Court to award costs in any case, the Court, if it is of opinion that the question of conviction has turned upon a difficult, important or novel point of law, may where the information has been dismissed or in special circumstances where the defendant has been convicted, order the payment of such sum in respect of the defendant's costs as it thinks fit."

48. The representative of the police however considers that a convicted person should not in any case be entitled to costs on this ground in the lower Court. He would therefore favour limiting the provision to appeals.

Quantum of Costs

49. We accept that there must be a general relationship between the amount of costs awarded in a normal case and the scale of fees for Crown Solicitors and counsel for aided defendants. These are now prescribed by the Crown Solicitors Regulations 1963,(1) but in our opinion they bear little relation to what private counsel would usually need to charge, particularly where the case is in any way difficult. There is in our view a strong case for a very substantial increase in the amount of these fees, but that is a matter outside our province. We are anxious however that when costs are awarded they should not be too

(1) S.R. 1963/161

unrealistic; otherwise the object of awarding costs is frustrated. To meet this we suggest a provision to the following general effect -

> "Costs granted to a defendant shall be in accordance with a scale prescribed by regulation [we would expect this to be the Crown Solicitors' scale] , but in any case the Court may in its discretion order the payment of a smaller or larger sum having regard -
>
> (a) to the nature difficulty and importance of the case, and to the course of the hearing, and
>
> (b) to the conduct of the informant and the defendant."

General Observations

50. The wording of the various formulae we have suggested in this report will fit most closely the case of summary proceedings in the Magistrate's Courts. We regard the principles they embody as equally valid for Supreme Court trials and for the preliminary hearing of charges that may proceed on indictment, but the language may require adaptation.

51. Where a convicted person succeeds on appeal, whether to the Supreme Court or the Court of Appeal, a somewhat different approach may be preferable. If the appeal is on a question of law the provision we suggest in paragraph 47 of our recommendations might apply with suitable adaptation. If the appeal succeeds on some other ground it might be sufficient to give the Court a general discretion to award costs, but care should be taken to ensure that the restrictions on discretion imported by such cases as Batley v. Cullen, and McBride v. Gamble should be removed. Similarly the restrictions imposed on the discretion to grant costs where, at the preliminary hearing of an indictable offence, the information is withdrawn or the defendant discharged(1) should be done away with.

Summary of Recommendations

(1) That there should be a more liberal approach towards the payment of costs to successful defendants in criminal cases.

(2) That the Courts should continue to have a general discretion but that statutory guidelines should be adopted to assist the Courts and to encourage them to use their discretion more freely.

(1) Summary Proceedings Act 1957, s.179

(3) That costs should not be refused merely because the prosecution has been properly brought and continued, nor should costs be granted merely because the defendant has been acquitted.

(4) That in considering applications for costs the Courts should be entitled to hear submissions and receive evidence from both parties.

(5) That special provision should be made for the award of costs where a difficult, important or novel point of law has been involved -

(a) where an information is dismissed;

(b) in special circumstances, where the defendant is convicted.

(6) That the Courts should have a general discretion to award costs where an indictable charge fails at the preliminary hearing and on all appeals.

(7) That except where there has been bad faith or negligence on the part of the prosecution costs awarded to successful defendants in proceedings instituted by the police should be paid out of a fund administered by the Department of Justice.

(8) That where costs are granted to a successful defendant they should be in accordance with a scale prescribed by regulations, but that the Courts should in any case have power to award a greater or lesser amount.

B.J. Cameron

G.A. Dallow

R.C. Savage

R. Stacey

WELLINGTON, 12 September 1966