IN THE DISTRICT COURT
HELD AT AUCKLAND

T NO. 1058/97

COLIN GARY MOORE

Applicant

v

THE QUEEN

Respondent

Date of Hearing:	3 August 1999
Date of Judgment:	6 August 1999
Counsel:	P Dean for Crown P A Williams QC and C Reid for Applicant

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JUDGMENT OF JUDGE MHW LANCE QC
(Upon application pursuant to Section 5 Costs in Criminal Cases Act 1967)

This is an application for an award of costs made pursuant to Section 5 of the Costs in Criminal Cases Act 1967 (hereinafter referred to as "the Act"). The application was opposed by the respondent.

General Background

The accused was originally charged on indictment, together with his wife, of offences under S.9 and S.6 of the Misuse of Drugs Act 1975. In a reserved decision on 7 August 1998, pursuant to an application under s.347 Crimes Act 1961 Judge Cadenhead discharged the wife Anna Moore.

The Crown laid a fresh indictment against the accused Colin Gary Moore with the same charges that had been preferred in the original indictment, namely:

1. That on or about 10 February 1998, at Great Barrier Island, cultivated a prohibited plant, namely cannabis plant – an offence against s.9 Misuse of Drugs Act 1975; and

2. That on or about 10 February 1998, at Great Barrier Island, had in his possession a Class C controlled drug, namely cannabis plant, for the purpose of sale – an offence against s6 Misuse of Drugs Act 1975.

The Crown case at trial was that the accused owned a farmlet at 80 Shoal Bay Road, Tryphena, Great Barrier Island where he resided with his wife and child in a dwelling house. Between 9 and 11 February 1998 the Auckland Drug Squad

conducted an operation, code named Operation Leonie, on the island to identify where cannabis was growing and if possible the persons responsible. As a result of an aerial operation cannabis was sighted on the Moore property. A subsequent ground search revealed approximately 487 plants growing in different locations on the property and/or immediately adjacent to it. The plants ranged in height from seedlings to 2.5 metres. An examination of the root structure of many plants indicated they had been grown in bucket like containers and had been recently planted out. Most were in a healthy condition. Some had signs of recent harvesting. In addition a quantity of dried cannabis was found under a deck at the rear of the dwelling and under a sheet of corrugated iron nearby. The accused denied any knowledge of any of the cannabis located.

My reasons for discharging the accused are recorded in detail in a Judgment delivered 10 February 1999. In summary I granted the application pursuant to Section 347 because Anna Moore, had been discharged pursuant to Section 347 in a decision delivered by Judge Cadenhead and I found there were no distinguishing features in evidentiary terms between Anna Moore and this applicant and therefore it would have been unfair and unjust to decline a discharge to this applicant. Furthermore I granted the application to stay on the grounds of abuse of process in general terms on the grounds that the evidence of the officer in charge, Detective Watters lacked credibility and reliability: failure by the Crown to disclose relevant material and a poorly prepared and presented prosecution case.

The Law

The relevant provisions are s.5 and s.13 of "The Act". They provide as follows:

> "5. **Costs of successful defendant** – (1) Where any defendant is acquitted of an offence or where the information charging him with an offence is dismissed or withdrawn, whether upon the merits or otherwise, or where he is discharged under [s.167] of the Summary Proceedings Act 1957 the Court may subject to any regulations made under this Act, order that he be paid such sum as it thinks just and reasonable towards the costs of his defence.
>
> (2) Without limiting or affecting the Court's discretion under ss.(1) of this section, it is hereby declared that the Court, in deciding whether to grant costs and the amount of any costs granted, shall have regard to all relevant circumstances and in particular (where appropriate) to –
>
> (a) Whether the prosecution acted in good faith in bringing and continuing the proceedings;
>
> (b) Whether at the commencement of the proceedings the prosecution had sufficient evidence to support the conviction of the defendant in the absence of contrary evidence;
>
> (c) Whether the prosecution took proper steps to investigate any matter coming into its 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 evidence as a whole would support a finding of guilt but the information was dismissed on a technical point;
>
> (f) Whether the information was dismissed because the defendant established (either by the evidence of the witnesses called by him or by cross-examination of witnesses for the prosecution or otherwise) that he was not guilty;
>
> (g) Whether the behaviour of the defendant in relation to the acts or omissions on which the charge was based and to the investigation and proceedings was such that a sum should be paid towards the costs of his defence;
>
> (3) There shall be no presumption for or against the granting of costs in any case.
>
> (4) No defendant shall be granted costs under this section by reason only of the fact that he has been acquitted or discharged or that any information charging him with an offence has been dismissed or withdrawn.
>
> (5) No defendant shall be refused costs under this section by reason only of the fact that the proceedings were properly brought and continued."

5. "**13. Regulations** – (1) The Governor General may from time to time, by Order in Council, make regulations for all or any of the following purposes:

> (a) Prescribing the heads of costs that may be ordered to be paid under this Act;
>
> (b) Prescribing maximum scales of costs that may be ordered to be paid under this Act;
>
> (c) Prescribing the manner in which costs for which the Crown is liable shall be claimed from or paid by the Crown;
>
> (d) Providing for such matters as are contemplated by or necessary for giving full effect to the provisions of this Act and for the due administration thereof.

(2) Any regulations made under this Act may
(a) Apply scales of costs, fees, or expenses prescribed from time to time under other enactment's;
(b) Delegate, or empower a court to delegate, to any person or officer, the power to determine the costs to be allowed under any particular head.
(3) Where any maximum scale of costs is prescribed by regulation, the Court may nevertheless make an order for the payment of costs in excess of that scale if it is satisfied that, having regard to the special difficulty, complexity, or importance of the case, the payment of greater costs is desirable."

Costs in Criminal Cases Regulations 1987 (1987/200) Regulation 3:
3. Heads of costs and maximum scales of costs – Subject to section 13 (3) of the Act, the heads of costs and the maximum scales of costs that may be ordered to be paid under the Act shall be those set out in the Schedule to these regulations.

Schedule –
Part II – Fees payable to Barristers and Solicitors in respect of proceedings under the Crimes Act 1961

In proceedings in the High Court on trials of indictable offences –
(a) For conducting a prosecution or defence (including interlocutory or ancillary proceedings or matters) – For each half day or part half day occupied in Court, a maximum of $226.00
(b) In respect of arraignment where for any reason the trial does not proceed further, a maximum of $113.00

The Court's jurisdiction to award costs to a successful defendant is set out in s.5 of "The Act". The discretion to grant an award of costs is wide and unfettered. Ss.2(2), without limiting that discretion, provides that the Court shall have regard to all relevant circumstances and, in particular, seven specific matters. The section declares that there shall be no presumption for or against the granting of costs, nor shall a defendant be granted costs by reason only of the fact he or she has been acquitted, nor shall he or she be refused costs by reason only of the fact proceedings were properly brought and continued.

The exercise of the Court's powers and discretion has been considered in a number of reported and unreported cases over a lengthy period of time. All

underline the wide discretion and that each case falls to be considered on its own facts. It is clear that there may be, in any particular case, relevant circumstances which should be considered so that in the end, there ought to be an overall consideration as to the justice of the case and the appropriateness of awarding costs or not to a particular applicant. In R v Goffe [1963] NZLR 620, Hutchison J said:

> *"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."*

That very broad principle has been cited with approval and received additional judicial annotation. I refer to some of those authorities which outline the general guidelines. In R v AB [1974] 2 NZLR 425 at page 434, Chilwell J said:

> *"I have avoided laying down any general principle in this judgment because, in my view, it would be dangerous to do so. Each case must be considered on its own special facts. Furthermore, I observe that the section governs prosecutions of every conceivable offence, whether at the suit of the Crown, a Government department, a local authority, a public body or a common informer."*

And the learned Judge, in considering s.5 observed that the whole of the section is enabling only and the Court "may" order costs.

> *"But I observe that the whole section is enabling only. The Court "may" order that a sum be paid towards the costs of the accused's defence."*

In R v Margaritas (unreported) Christchurch T66/88 14 July 1989, Hardie Boys J said in relation to s.5:

> *"The section sets out seven considerations to which the Court is to have regard, but it makes it clear that they are not intended to be restrictive of the wide discretion which is given to the Court in respect both of whether costs should be awarded and if so, in what sum. It also states that there is no presumption for or against granting costs; that an acquittal is not of itself sufficient reason for an order, nor is the fact that the proceedings were properly brought and continued, of itself a ground for refusing one. All this really means is that the Court is to do what it thinks right in the particular case."*

And later:

> *"The various criteria in s.5 really come down to two questions: was the prosecution reasonably and properly brought and pursued; did the accused bring the charge on his own head?"*

Other commentary on the approach is to be found in R v CD [1976] 1 NZLR 436 at page 437 where Somers J said:

> *"The first question: is what is meant by the words "shall have regard to" I do not think they are synonymous with "shall take into account". If the appropriate matters had to be taken into account they must necessarily, in my view, affect the discretion under s.5(1) and it is clear from s.5(2) that the matters to be regarded are not to limit or affect that discretion. I think the legislative intent is that the Court has a complete discretion but that the seven matters, or as many as are appropriate, are to be considered. In any particular case, all or any of the appropriate matters may be rejected or given such weight as the case suggests is suitable."*

In R v Reed [1980] 1 NZLR 758 at page 766 Mahon J said:

> *"S.5(2) sets out a number of criteria to which the Court must have regard in deciding whether to grant costs, and if so, the amount to be granted, but the subsection also makes it clear that the establishment of such criteria is not to limit or affect the overall discretion provided by s.5(1)."*

The approach has been considered in a number of recent cases. Some of them are:

R v Davidson and Others (unreported): High Court Christchurch, T9/93; Williamson J:

> *"To decide whether to make an order in an particular case and the amount of such an order, a Court must have regard to every factor affecting that particular case ..."*

That decision was cited with approval by Penlington, J in R v Hopkirk (unreported): Rotorua Registry T49/92,

In R v Gillespie (1993) 10 CRNZ 668 Tompkins, J said at page 672:

> *"An examination of the section as a whole justified, in my view, the following broad approach. If costs are not to be awarded only because the*

defendant has been acquitted, the defendant must be able to point to some relevant circumstances, either within the criteria or otherwise, that justify an award. More particularly, an examination of the criteria suggests that the relevant circumstances would normally relate to the conduct of the prosecution or the defendant. In the case of the prosecution, the conduct relates to the manner in which the prosecution has been investigated and brought to trial. In the case of the defendant, it relates to his conduct in relation to the trial generally, and the nature of his evidence in particular. However, in considering the general discretion the Court can have regard to any circumstances that it considers to be relevant to whether it is just and reasonable that a sum be paid towards the costs of the defence. Those circumstances may include such matters as, for examples, the fact of the acquittal, the nature of the evidence given or called by the defendant and the nature, length and complexity of the trial."

That passage was cited with approval by Salmon, J. in R v Y (T281/96, Auckland Registry: 21 July 1997).

In Ham v R 16 CRNZ 199 Hammond, J. brought a more modern and, with respect, realistic approach to the issue where he said at page 204 when referring to a Law Commission paper ..."Miscellaneous Paper 12 Costs in Criminal Cases (November 1997) and after analysing statistics the learned Judge said ...

..."The criteria in s5(2) were referred to in only 26 (45%) of the 58 cases where costs were awarded, which demonstrates the breadth of factors which have been considered relevant.

And later

"The policy factors in this area of law are difficult. In its 1966 report the committee on costs in criminal cases concluded (p12):...

> *..."It is our view that the law in 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 committee then went on to say at pp12 and 13, that the most difficult part of its task had been to find a way in which "that principle could be afforded legal affect without making the award of costs an almost general consequence of acquittal".

> *The central difficulty has always been the philosophical position articulated by Devlin. LJ in Berry v British Transport Commission (1962) 1QB 306, 327 viz that a prosecutor brings proceedings in the public interest and therefore "should be treated more tenderly". In Long, at p381, I suggested that if the matter were ever to be subject to a review by a higher Court, or if the statute were to be reviewed, it was questionable "whether in today's context the State should remain privileged to the extent that it is by the present policy". Nevertheless I went on to say that the present approach is well established and that it was not open to me, in the Court, to change it.*
>
> *Without departing from that position, and since the matter is apparently under active review, it maybe thought appropriate if I note that at all levels the position of the State has been under review in contemporary society. It is not just that there has been a "withdrawal" of the State in the economic domain; in a variety of ways the hitherto, highly privileged, position of the State has been addressed, and even watered down, to the extent that it is arguable that the State is today "just another citizen". And, New Zealand, in common with a number of other jurisdictions, is having to grapple with the advent of alternative prosecutorial systems. The closer we come to the privatisation (at least to some extent) of prosecutions, the less force there is in Devlin LJ's proposition..."*

In summary, the approach was succinctly summarised in this way by Hardie Boys, J. in R v Margaritas (supra). When referring to the provisions of section 5 he said at page 2 ...

> *..."All this really means is that the Court is to do what it thinks right in the particular case..."*

A Preliminary Issue

In argument Mr Dean submitted this Court has no jurisdiction to consider this application. He submitted this Court is a creature of statute exercising statutory jurisdiction. That Section 5(1) of the Act is the empowering provision. He drew my attention to the provisions ...

> *..."5. **Costs of Successful Defendant** – (1) Where any defendant is acquitted of an offence or... the Court may subject to any regulations made under this Act, order that he be paid such sum as it thinks just and reasonable towards the costs of his defence..."*
>
> *(emphasis mine)*

He then referred to Regulation 3 of the Costs in Criminal Cases Regulations 1987 (see supra) and then referred to the Schedule which provides in Part I for fees payable in respect of proceedings under the Summary Proceedings Act 1957 but more particularly to Part II (see supra) and he emphasised that under the word

...*"A. Trials*

Noting it referred only to trials in the High Court.

Mr Dean submitted that he had researched such statutory provisions as the Judicature Act and the District Courts Act and could find no transitional nor empowering provisions and he submitted the District Court thus has no jurisdiction to order costs in trial matters. In an amendment to the District Courts Act 1947 this Court was given Jury Trial jurisdiction on 1 May 1981. The Costs in Criminal Cases Regulations came into force on 1 August 1987.

In my view, given this Court has had trial jurisdiction since 1981 it is clearly an omission that the District Court was not included (with the High Court) in Part II of the Schedule. There is no other logical explanation. It is clearly an oversight.

In an exercise of statutory interpretation in "Statute Law in New Zealand" Section Edition J F Burrows at page 127 said in dealing with the purposive approach...

> *"It is true that Courts normally cannot fill gaps in legislation. They cannot write in what the legislature has not thought fit to include. However sometimes a question may arise to which the legislation does not provide an express answer, but to which the Court is able to construct an answer by considering the purpose of the Act as a whole, and the various indications of intention in it's provisions...*

Northland Milk Vendors Association (Inc.) The Northern Milk Ltd (1988) 1NZLR 530

And later at page 198...

> ..."*However the Court can only "fill the gap", i.e. answer the particular question before the Court, by divining from the scheme and purpose of the Act what the Parliamentary intent was. The Courts cannot create policy on their own: they cannot "usurp" the Policy-making function which rightly belongs to Parliament*".

The scheme and purpose of the Costs in Criminal Cases Act is to be found in the headnote to the Act...

> ..."*An Act to amend the law relating to the payment of costs in criminal cases...*"

Clearly there is no distinction in criminal cases in the High Court or the District Court. Furthermore the Schedule to the regulations provides for fees payable for hearings and appeals in respect of proceedings under the Summary Proceedings Act 1957. It seems illogical the Act contemplates payment of costs in all categories of criminal cases including depositions, summary matters, appeals from the District Court with the exception only of trials in the District Court. In my view the legislative intent was to include Jury trials in the District Court and such a finding is not usurping the policy making function of Parliament.

That seems to be confirmed by the fact the fees payable under Part I for hearings before Justices or a Judge in summary matters are the same as under Part II for proceedings under the Crimes Act (in the High Court) for trials ($226.00 per half day).

I find I have jurisdiction to determine this application.

Another preliminary matter raised by Mr Dean was that neither the Act nor the regulations and in particular the Schedule makes any provision for payment for costs in respect of preparation for trial. He is correct. I can find no authority which deals specifically with that issue. It was referred to in Harrington v R (1994) 3NZLR 272 where Casey, J. in delivering the Judgment of the Court of Appeal said at page 275...

> ..."*However, Courts in this country have the criteria laid down for them in s5 of the Act, and we see no occasion to put forward any further suggestions about how the discretion under that Act is to be exercised. Nor need we address Counsel's submissions on the way the scale of costs in the Schedule to the Costs in Criminal Cases Regulations 1987 (SR 1987/200) should be applied, having regard to the absence of any reference to preparation as a separate head of costs. Where there has not been a hearing of an appeal (as in this case) it maybe arguable whether S11(3) of the Act (allowing a payment above the maximum) could be availed of to cover preparation...*"

It seems to me if the Court finds costs are properly payable but according to the Schedule on Scale, the Court in its general discretion under Section 5 (and many cases refer the importance of the general discretion and in R v CD (supra) Somers, J. made an award for reasons ...*"largely pragmatic... which ...do not succumb to semantic analysis..."* to adopt the approach of Hardie Boyes in Margaritus. The Court has to do...

> ..."*What it thinks right in the particular case...*".

Thus in instances where the Court finds costs are payable according to scale in my view there is a discretion to award costs for preparation.

In cases where the Court finds an award is payable in excess of the scale most cases indicate the Courts have adopted a global approach. Certainly in recent

times, see R v Y (supra), R v H (T99/97 Rotorua Registry), Paterson, J. M v R (supra), W v The Queen (T25/96 Wellington Registry) Gallen, J. – and others. In most cases in my experience, as here, Counsel merely file a copy of the Bill of Costs in global terms (plus identification of disbursements) which obviously the Court takes into account, and then makes a global award. Clearly this approach embraces an acceptance that an allowance should be made for preparation. In any event in the real world, it is a pragmatic, and in my view, proper approach.

The Issues

In my view these are:

1. In the exercise of my discretion under s5 whether there should be an award of costs to the applicant.
2. If so, whether the award should be in accordance with the scale proscribed by the Costs in Criminal Cases Regulations 1987 or whether the award should exceed that scale.
3. If the award should exceed the scale then the quantum of costs.
4. And which agency should pay such costs.

The Evidence

Section 12 of "The Act" provides:

> ..."*Before deciding whether to award costs under this Act the Court should allow any party who wishes to make submission or call evidence on the question of costs a reasonable opportunity to do so...*"

The application for costs in this matter was filed by Mr Reid together with affidavits in support and written submissions. The Crown filed written submissions. Crown did not call the deponents for cross examination. No viva voce evidence was called. At the hearing Counsel adopted the written and made oral submissions. I reserved my decision.

Issue 1

Whether there should be an award of costs to the applicant.

Whilst bearing in mind the overall discretion under Section 5 (1) it is necessary to examine the various criteria under s5 (2). I do so sequentially and then turn to consider the exercise of the general discretion.

(a) Whether the prosecution acted in good faith in bringing and continuing the proceedings?

(b) Whether, at the commencement of the proceedings the prosecution had sufficient evidence to support the conviction of the defendant in the absence of contrary evidence?

Counsel invited me to consider both these points of criteria together.

Mr Dean summarised the evidence from the time cannabis plants were identified on and near the property from an aerial observation to the search of the property

which revealed 487 plants spread about the property and some close to the dwelling house many of which showed signs of recent watering. He pointed to other evidence relating to dried cannabis found: a well walked path from the dwelling to a small valley where plants were found: the fact that some plants had obviously been grown from seedlings while others showed signs of having been planted out and submitted there was adequate evidence and the prosecution acted in good faith in bringing and continuing the proceedings and that at the commencement there was sufficient evidence to support a conviction.

Mr Reid submitted the applicant was humiliated by the lodging of the caveat over the property and entry to inspect the home under the provisions of the Proceeds of Crimes Act. He submitted the charges were denied from the outset: all the evidence was circumstantial and there was no forensic evidence to support (all features very common in criminal cases even where verdicts of guilty are brought in). And he mentioned other features which I consider are more appropriate under other heads of criteria.

I have no difficulty in finding that there was adequate evidence at the commencement of the proceedings to support a conviction and the prosecution acted in good faith.

(c) Whether the prosecution took proper steps to investigate any matter coming into its 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?

In considering some of the criteria under s5 (2) instances arise where there is a degree of overlapping. In this case I think it occurs under criteria (c) and (d). Thus I propose to deal with both criteria together.

Mr Reid submitted as there was evidence that a number of the mature plants showed signs of having been recently planted in the ground from buckets or similar containers and buckets were found on the property the Police should have had soil samples taken and forensically examined. He submitted that the finding of mature plants recently planted should have alerted the Police to the possibility unknown persons had endeavoured to fabricate evidence against the applicant and he allied this with a submission relating to the prospect that if the applicant had been convicted his property would have been sold pursuant to the Proceeds of Crimes Act and thus there is an inference the accused had been "set up" for the purpose of someone acquiring his valuable property. That particular submission overlooks the fact that there were numerous plants found in various stages of growth clearly grown from seedlings. Mr Reid submitted in normal circumstances the Police should have, prior to search, kept the property under surveillance.

Mr Dean submitted the Police did not have the resources to mount a surveillance and given Operation Leonie would have been known to residents on the island it would be unlikely the cultivators of the cannabis would have

approached the area. Furthermore he submitted when interviewed the accused made no suggestion he had been set up and thus the Police were not alerted to the possibility. That of course overlooks the evidence that the applicant denied knowledge of any cannabis on his property. Mr Dean dealt with the failure of Detective Watters to disclose the events surrounding the arrest and ..."de-arrest..." of the applicant but in any event, as Mr Dean submitted, the issues of admissibility could have been disposed of by way of a pre trial application (or course that presupposes disclosure). Whatever the outcome the evidence of the interview was of little significance to the Crown case. It was basically an exculpatory explanation.

As Tipping, J. observed in R v S (M4/96: Greymouth Registry: 19 September 1996) in considering these criteria ...

> *..."I must guard myself against the wisdom of hindsight..."*

I find the Police failed to investigate the circumstances in a reasonable and proper manner and to take steps to investigate evidence in the following respects:

(a) The applicant should have been taken over the property and shown the plants particularly those which showed signs of recent planting out.

(b) The Police should have taken photographs of many of the areas where the plants were found (and I reject the excuse given in evidence that there was no camera available or that it was in the helicopter: that shows

inadequate preparation for an investigation which if not at the outset certainly was at some stage into the search a substantial cultivation).

(c) The Police failed to take soil samples and analyse them when it appeared some of the more mature plants had recently been planted out from buckets and buckets were found on the property.

(d) Once the applicant denied knowledge of any cannabis on the property given the evidence of recent planting out: the proximity of the property to the roadway and access up a stream and valley at least enquiries could have been made as to whether other persons had been seen in the area: whether there was any evidence of entry onto the property by trespassers and things of that sort.

(e) There was evidence of poor exhibit control and possible contamination.

I do not think issues relating to failure to disclose material by the prosecution to the defence falls within the matters to be considered under these heads of criteria. I will refer to that later.

(f) Whether the evidence as a whole would support a finding of guilty but the information was dismissed on a technical point

This criteria has no relevance in this case.

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

In R v Gillespie (supra) Tompkins, J. said

..."for these reasons, para (f) can have no application to the present case tried on an indictment..."

In R v T (supra) Tipping, J. came to a different conclusion but recognised the difficulties. If there is a dissenting view I prefer that of Tompkins, J. for the reasons he gave thus I do not propose to consider this criteria.

(h) Whether the behaviour of the defendant in relation to the acts or omissions on which the charge was based and to which the investigation and proceedings were such that a sum should be paid towards the costs of his defence.

In R v AB (supra) Chilwell, J. said...

..."It seems to me that this paragraph is concerned with behavioural aspects of a nature justifying an award of costs and not with behavioural aspects which are of a disqualifying nature..."

In this case Mr Moore acted responsibility and properly throughout. I find in his favour.

General Discretion

Mr Dean made no submissions under this head. Mr Reid submitted matters referred to in my reasons for Judgment are relevant.

All the authorities emphasise the discretion is wide and unfettered. And matters referred to in s5(2) are matters to which the Court should have regard without limiting the overall discretion. As Justice Hardie Boys said (Margarita) ...

> ..."*The Court is to do what it thinks right in the particular case...*"

In adopting that approach and in the exercise of my discretion this was a case where there was initially a strong prima face evidence: simply stated a large number of plants found on and near a property occupied by the accused. As I have found there were some aspects of the investigation which were, negligent. However the Police preparation for the trial was grossly inadequate and in the following respects:

(a) Failure by Detective Watters to disclose the circumstances relating to the arrest and ..."de-arrest..." of the accused and generally surrounding his interview with the accused.

(b) The production of a completely inaccurate brief of evidence at depositions (Constable Kennedy).

(c) The proposal during the course of the trial to call Constable Stokes as to events in the bedroom and surrounding the interview of the applicant which had not been disclosed to the defence and even during the trial inadequate disclosure of what was a purported brief of evidence.

(d) The directly contradictory and conflicting evidence of Detective Watters and Detective Vernon.

(e) The evidence of Detective Watters on a number of issues which I found (and again find) lacked credibility and was totally unreliable.

(f) Other issues relating to non-disclosure of less important matters which occurred from time to time during the trial.

In Ham v R (supra) Hammond, J. said at page 205...

> ...*"The question of Police conduct – which could by itself form a ground for an award of costs - ..."*

He was there referring to the failure by the Police to investigate alibi witnesses but I see little difference, if any, to the situation here where, in general terms, there was clearly, a very poorly prepared case by the Police which at times in my view embarrassed the Crown prosecutor in his presentation in Court.

In the exercise of my overall discretion and having regard to the particular matters I have considered under the relevant criteria I am of the clear view the answer to issue 1 is that there should be an award of costs to the applicant.

Issue 2

Whether the award of costs should be in accordance with the scale proscribed or whether the award should exceed the scale.

Section 13 of the Act provides, pursuant to the appropriate regulations, the appropriate scale and also provides (subsection 3) that the Court may make an order in excess of the scale:

> *"If it is satisfied that, having regard to the special difficulty, complexity, or importance of the case, the payment of greater costs is desirable."*

In R v Stringer (unreported) T109/76, Auckland Registry, Chilwell, J. at page 13 said:

> *"However, I take the view that the word "importance" is to be read "eius den (sic) generis" with the preceding word "special difficulty, complexity". All criminal cases are of importance to the accused. I cannot accept the view that Parliament intended to prefer some accused persons to others. This case was neither difficult nor complex, nor was it of any special importance as far as the criminal law is concerned."*

In D v R (1995) 3 NZLR, 366 where Barker, J. said at p 371:

> *"Ultimately I must exercise my discretion having regard to the combined effect of all the matters which I have heard and observed. I consider that this is a proper case for the award of costs and disbursements as per the scale in the regulations.*
>
> *I cannot invoke s.13(3) to give a higher award. I adopt the reasoning of Penlington, J. in R v Accused (T 30/91) (1991) 7 CRNZ 686, 693:*
>
> > *"Mr McDonald for the Crown resisted this submission. He relied on the observations of Doogue, J. in Re Cregg wherein His Honour said:*
> >
> > > *"I am not persuaded by the applicant, however, that this is a case to which s13(3) of the Act applies. It was not a case of special difficulty, complexity or importance. Whilst I accept that the case was undoubtedly of importance to the applicant, every criminal prosecution is of importance to the accused person and the applicant in this case is therefore in no different position to any other accused person. I am not therefore satisfied that I have any jurisdiction to award costs in excess of the scale of costs laid down under the regulations."*
>
> *I agree with the observations of Doogue, J. The applicant in this case is in the same position as the applicant in Re Cregg. See also*

> *R v Rosson (unreported) Holland, J. 19 March 1991, H C Dunedin T24/90. Unquestionably, where a person is accused of a serious crime it is of importance to that person. I note, however, that the word "importance" is qualified by the epithet "special" and, secondly, that the word "importance" is followed by the words "of the case". The focus is therefore on the case and not on the accused. The legislature has significantly not added the words "for the accused" after the word "case". It therefore seems to me that the phrase "the special importance of the case" means a case which is one of particular importance and which is not in the ordinary run of cases; that is to say, a case which is not a normal case."*

It is not possible on the facts to distinguish that case from others and indeed the present case. It is very much how an individual Judge sees a particular case. Illustrative of that is the approach of Barker, J. in R v Brunton (unreported) T14/91 (New Plymouth Registry) where he said at page 8:

> *"I doubt whether there could be a finding of "special importance", although one must recognise that a case of this nature is extremely important both to the complainant and to the accused who would face a lengthy period of imprisonment if convicted. This is of course not to mention the importance to the public of cases of this nature.*
>
> *I mention, colloquially, the "miserable" nature of the scale of costs under the Regulations. It prescribes a fee of $226.00 for Counsel for every half day in Court: it proceeds on the basis that no preparation is necessary, which is completely unreal. The unreality of the scale could make it easier to succumb to a submission that a case involves special difficulty, complexity or importance."*

Justice Barker, whether succumbing to temptation or not, clearly considered the miserly scale in adequate and said in making an award in excess:

> *"This award is not an indemnity but one decided on the justice of the case."*

Even more recently Salmon, J. said in R v Y (supra):

> *"As to the quantum of costs, I concur to with what has been said on numerous occasions to the effect that the scale is hopelessly out of date..."*

Today the scale is quite unrealistic.

In any event, in this case the applicant was charged with very serious offending. There were aggravating features if he had been found guilty. His property could be sold. It was a case of public importance. It was important to the prosecution. It was very important to the applicant. I also bear in mind the comments of Hardie Boys, J. in R v Margaritas (supra):

> *This section sets out seven considerations to which the Court is to have regard, but it makes it clear that they are not intended to be restrictive of the wide discretion which is given to the Court in respect of both whether costs should be awarded AND IF SO IN WHAT SUM." (The emphasis is mine).*

He added:

> *"The existence of the scale makes it clear that there is no intention that a successful applicant should receive a full indemnity..."*

As Barker, J. said in D v R (supra):

> *"As the trial Judge I am in a particularly good position to consider the application for costs. As Chilwell, J. said in R v AB at p 433:*
>
> > *"...As the trial Judge, I had the advantage of hearing all the evidence. It would not be convenient nor, indeed, possible to advert to it all in this Judgment."*

So it is in this case. In the exercise of my wide discretion, and having regard in serious nature of the charges and the probable consequences to the applicant upon conviction under the Proceeds of Crimes Act; the serious difficulties created for the Defence by the inadequate Police preparation and the added complexity that caused (a number of issues giving rise to legal argument during the trial including a very lengthy voir dire) and the inadequacies of the scale and in line with the more liberal approach of more recent authorities I find this is a case where the award of costs should exceed the scale. Which leads me to consider the third issue.

Issue III The Quantum of Costs

This issue has also been considered in numerous cases. Different approaches have been adopted.

In this case the applicant swore an affidavit and annexed details of his costs. They are not in a "taxable" form. The total fees of the applicant's legal representation amounted to $76,700.00. In addition there were disbursements which included fares for return flights to and from Great Barrier Island and costs incurred by a witness whom the defence proposed to call and who was present at trial which included fares, accommodation and miscellaneous expenses. Some (for example loss of income) are not appropriate and I bear in mind Mr Dean's submission the Schedule to the scale for disbursements should be followed.

In R v Reed (1980) 1 NZLR 758 Mahon, J. said in comparing the Defence and Crown costs:

> *"I only make the comparison between the $22,000.00 and the $2,200.00 so as to demonstrate the right of an accused person to retain in his defence if he can afford it, defence counsel who are in the top rank of the criminal bar and who can accordingly set their own price for their services. This is what the defendant did in the present case. Hence the high fees which he paid or agreed to pay for leading Counsel and their respective juniors."*

He also noted that s.5(1) of the Act provides that the sum ordered must be *"...just and reasonable..."*.

That case has a degree of similarity to the present in that the applicant elected to retain one of Her Majesty's Counsel pre-eminent at the criminal bar in New Zealand. Perhaps there the parallel ceases. Mahon, J. fixed a fee that took into account the actual costs incurred by the accused when compared with the Crown costs. That is an approach I am unable to follow here because the Crown did not provide any details of its costs.

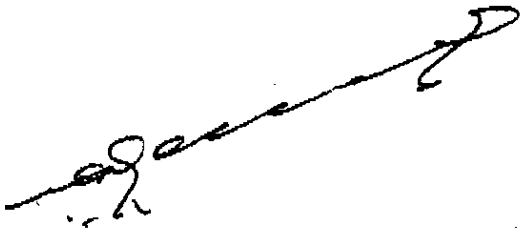
In R v Long (1996) 1 NZLR, 377 Hammond, J. adopted a percentage approach applied to the actual costs of the applicant. For myself, and with respect, I find that approach has certain artificiality about it. The result very much, if not entirely, depends on the Defence costs and the percentage factor used. Furthermore it has an indemnity flavour to it. I prefer the ..."*in the round*..." approach of Barker, J. R v Brunton (supra):

> *"Looking at all those matters in the round I think an appropriate award is $2,000.00 costs together with disbursements... as I say, the amount of this award is not an indemnity but is one decided on the justice of the case. I have balanced the deficiencies in the investigatory process with the clearly inappropriate conduct of the accused."*

More recently in Ham v R (supra): Hammond, J. adopted a global approach as did Patterson, J. in R v H (supra) (1998): Salmon, J. in R v Y (supra): Gallen, J. in W v The Queen (supra) (1996).

Having regard to all the circumstances I have mentioned I award the applicant the sum of $50,000.00 plus allowable expenses of $4,000.00 – a total of $54,000.00.

Finally under Section 7 of the Act I have a discretion as to who should pay the costs substantially the grounds for the award was inadequate Police preparation. I order the Police department to pay the costs.



M H W Lance QC
District Court Judge