IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

T. No. 150-151/88

SET 5

631.

IN THE MATTER of the Costs in Criminal Cases Act 1967

AND

IN THE MATTER of an application for costs by BRENT WILLIAM MACAULAY of Paekakariki, Scrap Metal Dealer

Date of Hearing: 21 March 1991

Date of Decision: 26 MAR 1991

Counsel: P.V. Paino for Applicant
K.G. Stone for Crown

DECISION OF NEAZOR J

This is an application under the Costs in Criminal Cases Act 1967 by Mr Macaulay who in 1989 was tried with another person on a charge of manslaughter. After a trial lasting four days and a retirement of something over 7 hours both accused were acquitted. The Crown and each accused were all represented by senior and junior counsel.

The charge arose out of a fire at a brewery in Wellington, where large disused tanks were being cut up and removed from a building. The building was lined with insulating material which caught fire as a result of the use of particular cutting equipment. The fire developed rapidly and caused

the emission of thick toxic smoke. One of the men working on the tanks (which were 50 feet above the floor of the building) was overcome by, and died as a result of, smoke inhalation.

The cutting equipment operated with great heat and precautions were required to protect the operator and to prevent fire. The Crown case was based on the lack of adequate precautions in the use of the cutter, particularly against the background of difficult access and egress from the tanks positioned high above the floor, the provision of little by way of emergency fire fighting equipment immediately adjacent to the work place or in for the premises as a whole, and some earlier fires which had been able to be controlled.

One of the accused, the present applicant, was a scrapmetal dealer who was alleged to be in charge on site of the removal operation. The other was the actual operator of the cutting equipment.

The charge was based on failure to observe a legal duty to take reasonable care when the accused had under their control cutting equipment which, without care, could endanger life.

At the end of the Crown case an application under s 347 of the Crimes Act for dismissal of the charge was heard in full, but I thought it proper to have the case determined by the jury.

Although no evidence was called by the defence, a central feature of the accuseds' response to the charge was their lack of or limited knowledge of the potential danger of the situation and in particular of the possibility of rapid development of any fire and of the potential of the insulating material to produce toxic smoke in great volume. It was suggested to the jury that the brewery company or

some of its officers had greater reason than those working on the job to be aware of the potential danger and the ability to plan for and require the provision of fire safety equipment to a more effective standard.

In support of the claim under the Costs in Criminal Cases Act, Mr Paino placed emphasis on the circumstances in which the death occurred and on the propositions that the competence and qualifications of the accused to perceive and avoid a potential hazard were what were in issue in the trial and that that was rare in a criminal trial. No company was, or could have been, charged with manslaughter (Murray Wright Ltd [1970] NZLR 476) even if a significant degree of fault might in the circumstances properly be attributable to a failure by the brewery company or its officers.

Mr Stone for the Crown, although opposing the application, agreed that the case could properly be regarded as one in which the prosecution was brought for public policy or social policy reasons i.e. to emphasise that there is a legal duty on persons engaged in dangerous activities to take care, and that the performance of that duty had the backing of criminal sanctions.

Mr Stone submitted that the beginning and continuation of the prosecution were well justified by the low level of safety standards observed on the job and, whilst agreeing that it may have been that there was a degree of responsibility elsewhere than the accused, said that that could not be a complete answer for anyone who voluntarily engaged in a dangerous activity which was beyond his experience.

The application is one in Mr Stone's view, which was not I think really challenged by Mr Paino, and is one with which I agree, where several factors are to be weighed in the scales: the public importance of bringing a prosecution for

the enhancement of observance of proper safety precautions; the fact that others with probably better knowledge than those accused, who could have planned and required better safety standards, were not subjected to any criminal proceedings; and on the other hand that it was not unreasonable to proceed against the accused because they, in different capacities, were closest to the cause of the fire and to the failure to provide proper safety precautions.

Section 5 of the Costs in Criminal Cases Act 1967 is the relevant statutory provision authorising the Court to order payment of such sum as it thinks just and reasonable towards the costs of a successful defendant. The Court is directed by s 5(2) to have regard to all relevant circumstances and in particular 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 witnesses called by him or by the 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.

There was no suggestion by Mr Paino that the prosecution could be faulted on any of the factors (a) to (d) above nor was it suggested that (e) was applicable. In some measure (f) might be since the defence cross-examination and argument was directed to the point that in all the circumstances the accused had not failed to take reasonable care. Mr Stone submitted that subparagraph (g) could be relevant but that the factors presented by the evidence could under that provision weigh both for and against the applicant: to the extent that there was failure on his part to take reasonable precautions that could be seen as behaviour such as to weigh against payment to him. However, that submission is contrary to the decision in re AB [1974] 2 NZLR 425 and R v CD [1976] 1 NZLR 436 where it was held that this paragraph is concerned with behaviour justifying an award and not with behaviour disqualifying from an award, and I do not accept it.

So far as the investigation and conduct of the proceedings is concerned, the accused's behaviour was not criticised. He made a full statement to the Police at the outset, and co-operated in further enquiries by the Police. The trial was completed in a shorter time than had been allowed for.

It is clear from the statute and the two decisions referred to that the answers to the questions posed by s 5(2) are not determinative of the discretionary question which arises under s 5(1) i.e. whether it is just and reasonable in the particular case to order that a successful defendant receive a contribution towards the costs of his defence; they simply assist by focussing attention on particular issues.

This was a costly prosecution. Crown disbursements in respect of witnesses alone would have exceeded $17,500.00.

I was advised that the costs charged to the applicant were $43,750.00 plus GST plus disbursements of $1,000.00. His co-accused was on legal aid throughout.

In my view the exercise of the discretion under s 5(1) of the Act in this case should substantially be governed by these factors:

(a) the somewhat unusual nature of the prosecution arising as it did out of an industrial accident, and the public policy served by proceeding with it;

(b) the fact that there was apparent substance in the suggestion that others as well as the two accused could be regarded as having a share in responsibility for the death;

(c) conversely, that the accused engaged in an activity beyond his total competence;

(d) the costs of the prosecution and the applicant's defence and the fact that his co-accused was defended on legal aid.

On balance, in the circumstances of this case, I consider that it is just and reasonable that the applicant should receive a contribution towards the cost of his defence.

Regulations made under the Act prescribe a limit to the contribution which may be ordered unless the Court is satisfied that having regard to the special difficulty, complexity or importance of the case, the payment of greater costs is desirable.

The regulations (S.R. 1988/144) allow the same maximum for preliminary hearings as is allowed for a trial before the High Court, where the maximum allowed is $226.00 per half day. A further payment at up to half rates may be allowed for second counsel. The time taken for trial was 8 half days and if pre-deposition hearings were included in the

depositions a further two half days were occupied. At the maximum rates for two counsel this would produce a contribution for all stages of $3,390.00.

In my view the case can be classed as one of special difficulty as a criminal trial in that it involved the consideration of proper work and safety practices on an industrial site rather than simply the elements of cause and effect and state of mind to be found in the general run of criminal cases, and one of special importance in that the very institution of the prosecution served a particular aspect of public policy.

For those reasons I consider that the prescribed scale may be exceeded and the contribution fixed on a basis which bears some relationship both to the actual cost to the applicant and the amount paid by way of legal aid for the defence of his co-accused, which I fixed at $6,750.00 plus GST.

In this case I fix the contribution to the cost of the applicant's defence at $10,000.00 plus GST at the appropriate rate. Payment will be made under s 7(1)(a) of the Costs in Criminal Cases Act.

D.P. Neazor J

Solicitors: Renshaw Edwards, Upper Hutt for Applicant
Crown Solicitor, Wellington