Neutral Citation Number: [2018] EWCA Crim 1554

Case No: B3 201702458

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
AN APPEAL UNDER PART 1 OF THE CRIMINAL APPEAL ACT 1968
ON APPEAL FROM DERBY CROWN COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/07/2018

Before:

LORD JUSTICE LEGGATT
and
MRS JUSTICE MCGOWAN DBE

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Between:

	NAJIB AND SONS LIMITED	**Appellant**
	- and -	
	CROWN PROSECUTION SERVICE	**Respondent**

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Mr Stephen Hockman QC and Mr David Hercock (instructed by **SAS Daniels LLP**) for the **Appellant**
Mr Richard Wright QC and Mr Howard Shaw (instructed by the **Crown Prosecution Service**) for the **Respondent**

Hearing date: 9 March 2018

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Judgment Approved

Lord Justice Leggatt:

1. For the reasons given in a judgment handed down on 26 April 2018, the court allowed the appeal in this case and quashed the appellant's conviction and sentence for an alleged offence under regulation 17(1) of the Transmissible Spongiform Encephalopathies (England) Regulations 2010 (SI 2010/801) of failing to give an inspector assistance required to take samples. That judgment is at [2018] EWCA 909 (Crim). The essential ground on which the conviction was quashed was that under the Regulations an inspector had no power to require the appellant to provide samples and the appellant's failure to do so therefore did not constitute an offence in law.

2. The appellant has applied for an order that its costs of the proceedings (both in the Court of Appeal and below) be paid by the respondent. The application is made under regulation 3 of the Costs in Criminal Cases (General) Regulations 1986, made by the Lord Chancellor under powers conferred by section 19 of the Prosecution of Offences Act 1985. This provides that:

> "… where at any time during criminal proceedings –

…

(c) the Court of Appeal

is satisfied that costs have been incurred in respect of the proceedings by one of the parties as a result of an unnecessary or improper act or omission by, or on behalf of, another party to the proceedings, the court may, after hearing the parties, order that all or part of the costs so incurred by that party shall be paid to him by the other party."

3. By agreement, the requirement for an oral hearing has been dispensed with in this case and the application is being determined on the basis of written submissions made by each party.

4. In *R v Cornish* [2016] EWHC 779 (QB) Coulson J reviewed the authorities on the meaning of "unnecessary or improper act or omission" in regulation 3, and derived from them (at para 16) the following principles:

"(a) Simply because a prosecution fails, even if the defendant is found to have no case to answer, does not of itself overcome the threshold criteria of s.19.

(b) Improper conduct means an act or omission that would not have occurred if the party concerned had conducted his case properly.

(c) The test is one of impropriety, not merely unreasonableness. The conduct of the prosecution must be starkly improper such that no great investigation into the facts or decision-making process is necessary to establish it.

(d) Where the case fails as a matter of law, the prosecutor may be more open to a claim that the decision to charge was improper, but even then, that does not necessarily follow because no one has a monopoly of legal wisdom, and many legal points are properly arguable.

(e) It is important that s.19 applications are not used to attack decisions to prosecute by way of a collateral challenge, and the courts must be ever vigilant to avoid any temptation to impose too high a burden or standard on a public prosecuting authority in respect of prosecution decisions.

(f) In consequence of the foregoing principles, the granting of a s.19 application will be very rare and will be restricted to those exceptional cases where the prosecution has made a clear and stark error as a result of which a defendant has incurred costs for which it is appropriate to compensate him." [citations and quotation marks omitted]

5. It is common ground that this is an accurate summary of the law.

6. The present case is one in which the prosecution failed as a matter of law. Moreover, it failed because the offence with which the appellant was charged did not exist. In these circumstances the question whether costs have been incurred as a result of an unnecessary or improper act or omission by the prosecutor is one which naturally arises.

7. The fact is, however, that when the appellant sought a preliminary ruling in the Crown Court that the facts alleged did not amount to an offence within the scope of the Regulations, the judge after hearing four days of legal argument gave a detailed written judgment in which he rejected the appellant's arguments. Then, when after pleading guilty to the charge in the light of the judge's ruling the appellant applied for permission to appeal, permission was initially refused by the single judge on consideration of the papers. In those circumstances we think it impossible to say that the prosecution was improperly brought or that the case was improperly advanced by the respondent in the Crown Court. In particular, we think it impossible to say in those circumstances that it was or should have been plain that the prosecution case was without legal merit.

8. The position changed, in our opinion, after the oral hearing in the Court of Appeal on 9 March 2018 at which permission to appeal was granted without calling on the appellant. On that occasion the court made the following observations:

> "…. it is not at the moment obvious to us what answer there is to the first ground of appeal and the third ground of appeal insofar as it is essentially linked with the first ground of appeal. It is not apparent where there is to be found in these Regulations, if there is to be found anywhere in the Regulations, a provision which either enables and requires inspectors to arrange a programme for sampling and monitoring of sheep for TSE or which requires companies to provide assistance in that regard. We cannot find in the ruling of the judge any provision of the Regulations that he identified which imposes such an obligation. So, unless there is one, we cannot at the moment see how there is any peg on which to hang the criminal charge, but that is a matter which we would expect to be addressed in the respondent's skeleton [argument] in due course."

9. The effect of those observations should have been to put the respondent on notice that, unless it could identify a provision of the Regulations which provided a proper basis for the charge, then it would, if it resisted the appeal, be at risk of an order for costs.

10. It is no criticism of the respondent's counsel, who did their valiant best, to say that neither in their skeleton argument for the appeal nor in their oral submissions were they able to identify any such provision. We consider that in these circumstances the test under regulation 3 is satisfied and the appellant is in principle entitled to an award of costs in respect of the proceedings in the Court of Appeal after 9 March 2018.

11. The appellant has produced a schedule of its costs of the appeal in a total amount of £52,046.44. However, this figure includes all the costs incurred after the judgment in the

Crown Court was handed down on 17 January 2017. Although it is not possible from the schedule to ascertain the precise split, it is apparent that the majority of these costs were incurred in the period up to and including the permission hearing on 9 March 2018. Nor do we think it right to award all the costs incurred after that date. In particular, the fees charged by the appellant's representatives are higher than those which we think it appropriate to order another party to pay; and a significant discount should also be made to reflect the fact that, in addition to the grounds on which the appeal succeeded, the appellant pursued two other grounds of appeal which failed.

12. Taking these matters into account and adopting a broad view for the purpose of a summary assessment, the amount of costs that the respondent will be ordered to pay is £10,000.