



LAW REFORM COMMISSION

Opinion Paper

Costs in Criminal Cases

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LAW REFORM COMMISSION

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About the Commission

THE LAW REFORM COMMISSION OF MAURITIUS consists of –

- (a) a Chairperson, appointed by the Attorney-General;
- (b) a representative of the Judiciary appointed by the Chief Justice;
- (c) the Solicitor-General or his representative;
- (d) the Director of Public Prosecutions or his representative;
- (e) a barrister, appointed by the Attorney-General after consultation with the Mauritius Bar Council;
- (f) an attorney, appointed by the Attorney-General after consultation with the Mauritius Law Society;
- (g) a notary, appointed by the Attorney-General after consultation with the Chambre des Notaires;
- (h) a full-time member of the Department of Law of the University of Mauritius, appointed by the Attorney-General after consultation with the Vice-Chancellor of the University of Mauritius; and
- (i) two members of the civil society, appointed by the Attorney-General.

Under the direction of the Chairperson, the Chief Executive Officer is responsible for all research to be done by the Commission in the discharge of its functions, for the drafting of all reports to be made by the Commission and, generally, for the day-to-day supervision of the staff and work of the Commission.

The Secretary to the Commission is responsible for taking the minutes of all the proceedings of the Commission and is also responsible, under the supervision of the Chief Executive Officer, for the administration of the Commission.

Opinion as to Costs in Criminal Cases

1. The Commission has considered observations made by the Supreme Court in *Sookun v State (2010) SCJ 349* at p 4 that “... no specific provision exists for costs to be granted in favour of an accused in the case of a charge being dismissed. The legislator may wish to have this disparity amended in due course”.
2. This is what Chief Justice Yeung Sik Yuen, who delivered the judgment of the Court, had to say:

*... In **Roopchand v The Queen [1990 SCJ 301]** it was stated that as a rule of practice the Appellate Court would not award costs against the Crown [as the State was then referred to] in a criminal case when it allows an appeal at the instance of an appellant who does not happen to be the Crown. One “sound and valid reason” put forward by the Court as to why costs should not be awarded in such a case was because it affected the public revenue. It was submitted before us that **Roopchand** was wrongly decided. While we tend to agree with learned Counsel that the incidence of costs on public revenue should not as a rule of practice or otherwise have any bearing on the equitable administration of justice, we find that there was one compelling reason which justified that decision in 1990, namely the state of the law as it stood then.*

Indeed, prior to 1999, section 75(1) of the District & Intermediate Courts (Criminal Jurisdiction) Act [the Act] provided that:

“On trial of an information, a Magistrate may make such orders as he thinks fit and reasonable regarding the costs to be paid, on conviction, by the party convicted and, on dismissal, by the prosecutor unless the prosecution is by or at the instance of the Director of Public Prosecutions or by any police officer or any other Government officer.”

*No cost could therefore be awarded by a trial Court against a public prosecutor as opposed to a private prosecutor where a charge was dismissed at that time and **Roopchand** merely extended that principle which was based on a text of law from the trial Court to the appellate Court.*

The position is now different. Section 75(1) was amended by [Act No. 4 of 1999] so that costs could be recovered from the prosecution albeit the prosecution was made at the instance of the Director of Public Prosecutions or by any police officer or any other Government officer. The amendment in fact came as a result of the Mackay Report which gives the following guidelines at its paragraph 7.16:

“7.16 Finally, we were asked to consider the matter of costs against the prosecution where the prosecution has failed. We consider it reasonable and recommend that the Court should have power where a prosecution has failed to award costs against the prosecution if the Court is satisfied that on the information available to the prosecutor the prosecution should not have been brought, or where the investigation by the prosecutor has not been sufficiently thorough and if it had been, the prosecution would not have been brought or in circumstances analogous to these. We do not recommend that mere failure of the prosecution should give rise to costs against the prosecution if, for example, that failure has arisen because a witness has gone back upon a statement given to the prosecutor.”

It is appropriate to note that, during the Debate No. 1 of 23 March 1999 in relation to Clause 6(f) of the Administration of Justice (Miscellaneous Provisions) Bill No. XXV of 1998, the then Attorney-General and Minister of Justice, Human Rights and Corporate Affairs (Mr. R. Peeroo) stated the following:
“Clause 6(f) enables District Courts and the Intermediate Court to make an order for costs against the prosecution upon the dismissal of a charge where the Court finds that it was not proper for the prosecution to have brought such a charge against the accused.”

The new section 75(1) of the Act now provides that:
“Subject to subsection (2), the District Court or the Intermediate Court may make such order as it thinks fit and reasonable regarding the costs –
(a) to be paid by a party convicted of an offence
(b) by the prosecution, upon the dismissal of an information where the Court is satisfied that on the facts of the case no prosecution should have been brought against the party charged.”

A trial Court is therefore now apt to order the prosecution, whether private or public, to pay costs upon the dismissal of an information where it is satisfied that it was not proper for the prosecution to have brought such a charge against the accused.

We feel it necessary however to place on record a note of caution in relation to a marked difference which exists in litigations between civil litigants where there is a golden rule that the losing party should normally pay the costs of the case. In criminal cases, the situation is different since the public prosecutor usually has a statutory duty to prosecute accused parties suspected of having committed criminal offences. Dismissal is often pronounced on technical flaws which are not linked with the criminal guilt of a prosecuted suspect. Section 75(1)(b) of the Act must therefore be used within the strict confines of proven impropriety by the prosecution to have brought a charge against an accused.

We may pause here and observe that there is no equivalent of the new Section 75(1) of the Act, which applies to District and Intermediate Courts only, in relation to the original Criminal Jurisdiction of the Supreme Court where we are still guided by section 148 of the Criminal Procedure Act 1853. The Supreme Court, sitting as a Court of first instance, has the discretion to order an accused party to pay the whole or part of the costs or expenses incurred by the prosecution following a conviction but no specific provision exists for costs to be granted in favour of an accused in the case of a charge being dismissed. The legislator may wish to have this disparity amended in due course.
It must be observed that section 75(1) of the Act and section 148 of the Criminal Procedure Act relate to the issue of costs in relation to cases tried at first instance as opposed to hearings on appeal. In relation to costs on appeal we need to refer to other provisions.

Section 100(2) of the Act makes provisions in relation to costs where the appeal is dismissed. In such a case the Supreme Court may award costs against the appellant. The Act contains no specific provisions relating to costs in situations where the appeal is allowed but section 96(2) which is entitled “Powers of the Supreme Court on Appeal” provides that “... the Supreme Court may affirm or reverse, amend or alter the conviction, order or sentence and may, if the order made or sentence passed is one which the trial Court had no power to make or pass, as the case may be, amend the judgment by substituting for the order or sentence such order or sentence as the Court had power to make or pass, as the case may be.” We have no doubt that the terms “order” or “order made” would encompass and cover an order for costs in favour of a non-State appellant which a District or Intermediate Court can now make pursuant to the new section 75(1) of the Act and which is the concern of the appellant in the present application.

It is also appropriate to observe another anomaly which exists in section 15(1) of the Criminal Procedure Act. On the hearing and determination of an appeal or any proceedings preliminary or incidental thereto before the Court of Criminal Appeal it is stated that “no costs shall be allowed on either side.” We see no reason why the Court of Criminal Appeal should be restrained from allowing costs one way or the other, the more so as there is no such restriction in relation to the Judicial Committee of the Privy Council. We believe this loop hole could help promote the lodging of hopeless appeals before the Court of Criminal Appeal and that appropriate legislation is required to plug this lacuna along the model of the first part of Rule 43(1) of the Judicial Committee (Appellate Jurisdiction) Rules Order, 2009 which provides that: “The Judicial Committee may make such orders as it considers just in respect of the costs of any appeal, application for permission to appeal or other application to or proceeding before the Judicial Committee.”

To sum up, the present position in law is as follows:

(1) the District Court or the Intermediate Court may make such order as it thinks fit and reasonable regarding costs:

(a) against a convicted accused;

(b) against the prosecution upon dismissal of an information and where the Court is satisfied that on the facts of the case no prosecution should have been brought against the party charged – vide section 75(1) of the Act.

(2) the Supreme Court, in the exercise of its original criminal jurisdiction, can order an accused to pay costs upon his conviction. There is no provision for the Supreme Court to order costs against the prosecution upon dismissal of the information in any situation – vide section 148 of the Criminal Procedure Act.

(3) no cost is allowed on either side before the Court of Criminal Appeal which hears appeal cases from the Supreme Court in the exercise of its original criminal jurisdiction.

(4) the Supreme Court sitting on appeal from a decision of an inferior criminal Court has the discretion to make an order for costs against an unsuccessful appellant or respondent, including the prosecution, along the same principle of equality of arms which now permeates the new section 75(1) read together with section 96(2) of the Act.

But again we must remind that costs against the prosecution will only be ordered on a dismissal of a charge where the facts show that no prosecution should have been brought against the accused party, on an objective assessment of the case ...”

3. In the light of observations made *Sookun v State (2010) SCJ 349*, the Commission recommends the following amendments to the law:
 - (a) That the Supreme Court be conferred the power to order costs against the prosecution upon dismissal of the information where the Court is satisfied that on the facts of the case no prosecution should have been brought against the party charged;
 - (b) That the Court of Criminal Appeal be empowered to make an order for costs against an unsuccessful appellant or respondent, including the prosecution on a dismissal of a charge where the facts show that no prosecution should have been brought against the accused party on an objective assessment of the case;
 - (c) That Costs should be ordered against the prosecution only where it appears it has acted in bad faith.