Neutral Citation Number: [2022] EWHC 2635 (Admin)

Case No: CO/1326/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/10/2022

Before :

LADY JUSTICE MACUR

- and -

MRS JUSTICE CHEEMA-GRUBB

- -

Between :

COLL

Appellant

- v -

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

- -
- -

Robert Levack (instructed by **Gotelee Solicitors both acting *pro bono***) for the **Appellant**
Andrew Johnson (instructed by **The Crown Prosecution Service**) for the **Respondent**

Hearing date: Thursday 6 October 2022

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Approved Judgment

This Judgment was handed down remotely by circulation to the parties' representatives by email and release to the National Archives. The date and time for hand down is deemed to be 11.00am on Wednesday 19 October 2022.

LADY JUSTICE MACUR :

Introduction

1. This is an appeal by way of case stated against the decision of District Judge (Magistrates' Courts) David Wilson ("the Judge") made on the 8 November 2021 by which he refused an application for costs made by the Appellant, Mr Timothy Coll, against the Crown Prosecution Service (the "CPS"), following the discontinuance of three, and subsequent dismissal of one of the criminal charges against him.

Jurisdiction to make costs order

2. Section 19 of the Prosecution of Offences Act 1985 ("section 19") provides for the Lord Chancellor to make regulations "empowering magistrates' courts …, in any case where the court is satisfied that one party to criminal proceedings has incurred costs as a result of an unnecessary or improper act or omission by, or on behalf of, another party to the proceedings, to make an order as to the payment of those costs." There is separate provision made, by section 19A of the 1985 Act, to make "wasted costs" orders against legal representatives.

3. Regulation 3 of the Costs in Criminal Cases (General) Regulations 1986/1335 so empowers the Magistrates' Court to do so, confirming the basis upon which to do so to be the "result of an unnecessary or improper act or omission" and requiring the order to specify the amount of costs to be paid in the order.

4. The interpretation of "unnecessary" and "improper" has been comparatively frequently visited by Judges of the High Court, sitting in both the Crown and Administrative Courts. Prior to 2015, a tension emerged in the jurisprudence regarding the interpretation of the terms of the provision arising from two authorities namely, *Ridehalgh v Horsefield* [1994] Ch 205 and *DPP v Denning* [1991] QB 532. In short, the Court in *Denning* did not regard the term 'improper' necessarily "to connote some grave impropriety", rather "an act or omission that would not have occurred if the party concerned had conducted his case properly." However, *Ridehalgh* signalled a significantly higher bar in determining 'improper' to be equivalent to professional misconduct or malfeasance.

5. In *R (DPP) v Sheffield Crown Court* [2014] EWCA 2014 (Admin), the Administrative Court presided over by Lord Thomas of Cwmgiedd CJ, indicated agreement with the view recently expressed by Simon J in his ruling in *R v Counsell* (unreported) 13 March 2014 given in the Crown Court at Bristol, when he made clear that "the test for impropriety is the rigorous test as set out in the *Ridehalgh* case and not the test set out in the Denning case."

6. In *Evans v SFO* [2015] EWHC 263 (QB), [2015] 1 WLR 3595 Hickinbottom J (as he then was) reviewed the previous authorities in determining an application for costs following on from protracted and complex criminal proceedings, ultimately resulting in dismissal prior to trial. In paragraphs [83] to [88] he provided the legal background to costs in criminal proceedings. In paragraphs [89] to [95] he considered the development of the jurisdiction for 'wasted costs' orders, and in paragraph [96] quoted extensively from the judgment of Sir Thomas Bingham MR in *Ridehalgh*. In paragraph [99] he noted that "there was no reference in *Ridehalgh*'s case [1994] Ch

205 to section 19 or the *Denning* case [1991] 2QB 532. Further, the diligent research of counsel before me have failed to find any case concerning a wasted costs application in which the section 19 jurisdiction has been considered or any section 19 cases raised (with the exception of *R v Walker* [2011] 1Costs LR 11…".

7. After further analysis of other authorities including the obiter comments of the Divisional Court in *Davenport v Walsall Metropolitan Borough Council* [1997] Env LR 42, which had expressly considered the different meanings of 'improper' stated in *Ridehalgh* and *Denning*, Hickinbottom J in paragraphs [134] and [135] of the judgment came to the reluctant conclusion that *Counsell* and *DPP V Sheffield* had been decided per incuriam.

8. In *R v Cornish and Maidstone and Tunbridge Wells NHS Trust* [2016] EWHC 779 (QB) Coulson J (as he then was) referred to *Evans*, also commenting upon the "potential blurring of the line between the test for an order for costs under s.19, on the one hand, and the test for wasted costs orders and the like, on the other. This confusion might have given rise to an issue in the present application, because the test for impropriety noted in *Ridehalgh*, a wasted costs case, is commonly regarded as even more rigorous than the test in *Denning*. However, I need not consider this point further since Hickinbottom J demonstrated that the relevant authorities for s.19 are those set out … above, and in the present case both counsel expressly agreed with that approach." He went on in paragraph [16] to list the principles to be derived from the authorities in respect of an application under section 19 and Regulation 3 as follows:

(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 section 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 section 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 section 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.)

9. This summary has been approved by the Court of Appeal (Criminal Division) in *R v M Najib & Sons Ltd (No. 2)* [2018] EWCA Crim 1554, at [4] and [5] as "an accurate summary of the law", and more recently in *Asif v Ditta and another* [2021] EWCA 1091.

Background

10. On 11th October 2020 two police officers attended at a small woodland area in order to carry out an open land search under the Wildlife and Countryside Act 1981. They came upon a dead fox with a snare wrapped tightly around its neck. A number of set and unset snares were located in the wooded area, and all appeared to have been made of the same wire type. None had stoppers attached to prevent tightening around anything caught in them and they appeared to offend against several aspects of the codes of practice for the setting of snares.

11. One of the officers, a wildlife crime officer, examined the carcass, which appeared "relatively fresh", and could find no signs of blood or injury; the cranium felt fully intact. Later on, the same day, the Appellant when spoken to under caution stated that he made all his own snares and sets them. He made an unsolicited assertion that the fox found dead in the snare was already dead when he, the Appellant, found it and that it would have died quickly. Later, when interviewed under caution, he said that he works as a gamekeeper and reared game birds. Part of his work involved the control of foxes. His snares were a legitimate means of control since he considered they were free running. He then recalled that the fox was alive when he found it and that he shot it in the ear with a rifle to kill it.

12. On 1 November 2020, a statement was obtained from Ms Davies, a veterinary surgeon who had been shown a picture of the dead "fox that had died from strangulation in a snare. The fox had been caught around the neck and, as it attempted to escape, the snare tightened resulting in its death." In her opinion, the fox would have suffered greatly; it would have been caused great pain by the wire cutting into its neck as it tightened and would have been asphyxiated.

13. On 10 March 2021, the Appellant was issued with Notice of Criminal Charge citing four offences concerning the setting of snares by which it was alleged he had intended, calculated or knew or ought to reasonably have known would cause unnecessary suffering to a fox in October 2020.

14. On 28 April 2021, a statement was obtained by the police from Dr Calvert, a Principal Wildlife Management Adviser for Natural England. The statement was directed to legislation and best practice relating to the use of snares together with an analysis of the evidence. As part of his conclusion in relation to a number of the Appellant's snares that he was asked to examine he stated that:

> "None of these home-made snares possess 'stops' to prevent the snare loop from closing beyond the recommended 26cm. Should the snare wire kink and fray, due to the struggles of the caught animal, the snare loop could become 'self-locking' and continue to tighten in a rachet action beyond 26cm and risk strangulation of the caught animal. It is possible that this scenario (albeit temporarily as the action of the snare was

> deemed to be 'free running when I checked it on 15/03//2021) contributed to the death of the fox that was discovered by Sgt CALVER. Indeed, COLL stated under Caution on 11/10/2020 that the fox in the snare was caught on Friday morning (presumed to be 09 October 2020) and that it was dead in the snare (presumably when it was found by COLL or his son). COLL went on to say that it would have died quickly (because of the lack of disturbance to the ground) and that it must have strangled itself …. [After discussing two other possible scenarios] … but only a post-mortem examination of the carcase would indicate the most probable cause of death of this fox."

15. The Appellant appeared before the Magistrates Court in Ipswich on 7 May 2021 and pleaded Not Guilty. Thereafter, two of the charges, namely inflicting unnecessary suffering to a wild animal and setting a snare to cause injury to a wild animal, were discontinued on 6 August 2021. On 1 September 2021, the date set for trial, the CPS discontinued a third charge of causing the setting of a snare to injure a wild animal but proceeded in the final charge of causing unnecessary suffering to a protected animal, contrary to sections 4(1) and 32(1) of the Animal Welfare Act 2006. The justices upheld the Appellant's submission of no case to answer, apparently finding that there was no sufficient evidence regarding whether the fox had been caused unnecessary suffering prior to death, and that there was no evidence that the Appellant had set the snare in which the fox carcass was found.

16. An application for an order for costs in the sum of £8709.90 was made in proper form on 1 September 2021. The claim asserted that "It was clear on the Crown's evidence that neither charge had any prospect of succeeding, and the failure to properly assess the state of the evidence was so poor to amount to a negligent act that had exposed [the Appellant] to unnecessary loss … this is one of the rare cases where the Crown should be required to pay the costs of [the Appellant] on the basis that there had been improper or unnecessary acts or omissions, pursuant to section 19."

17. The application was listed before the Judge who had regard to the written application, the skeleton arguments filed, and oral submissions made on behalf of the Applicant and CPS. In his written ruling dated 12 November 2021, the Judge reviewed a number of authorities at some length, concluding that "The above principles were the subject of review in the case of *Evans v Serious Fraud Office* [2015] 1 WLR 3395." Regrettably, although there was reference to *Cornish* in the CPS skeleton argument, the Judge was not referred to the subsequent and binding Court of Appeal authority which approved Coulson J's formulation of the test to be applied in an application pursuant to section 19.

18. Applying the principles, he drew from the authorities cited by the parties, the Judge concluded that:

    i) the commencement of the proceedings was a decision open to the police on the available evidence;

    ii) despite "evidential deficiencies", the prosecution was not continued in bad faith or otherwise revealed a clear and stark error. The decision to continue to

trial on the one charge was within the band of decisions that a reasonable prosecutor could take.

19. An application to state a case for appeal to the High Court was made on 2 December 2021 asserting that the Judge had fallen into error in fact and in law. The identified factual error, as conceded by CPS, was addressed pursuant to section 142 Magistrates' Courts Act 1980 in a hearing convened on 28 January 2022. Subject to that, the final case stated for the High Court on the 5 April 2022 posed the following questions:

    i) Were the legal tests as set out in my written ruling on the 12th of November 2021 in paragraphs 14-37 the correct tests and principles to apply when determining an application for costs pursuant to section 19 of the Prosecution of Offences Act 1985?

    ii) In any event, was I correct to find that the decision to prosecute Mr. Coll was one which a reasonable prosecutor could have made, applying the full code test and CPS legal guidance on wildlife offences, in the light of the evidence available at the date proceedings were commenced or was prosecution an improper or unnecessary act?

    iii) Notwithstanding the answer to ii), was I correct to find that the decision to continue the prosecution of Mr. Coll beyond 23rd April 2021 was one which a reasonable prosecutor could have made or was it an improper or unnecessary act?

    iv) In all the circumstances, was I correct to dismiss the Applicant's application for costs under section 19 of the Prosecution of Offences Act 1985?

The Appeal

20. The focus of the appeal is upon the two charges that remained outstanding against the Appellant on the 1 September 2021: "causing the setting of a snare to injure a wild animal" contrary to sections 11(1)(d) and 21(1) of the Wildlife and Countryside Act 1981 and "causing unnecessary suffering to a protected animal", contrary to sections 4(1) and 32(1) of the Animal Welfare Act 2006.

21. Mr Levack, who appeared for the Appellant before the Judge on the application for costs, but not before the justices at trial, submits that the Judge fell into errors of law and otherwise by application to the facts of the case. He submits that certain paragraphs of the Judge's written ruling on the law which refer to the more stringent definition of an 'improper' act as set out in *Ridehalgh, Counsell* and *DPP v Sheffield*, demonstrate that the Judge imposed too high a burden for the appellant to establish his claim. In any event, he argues that the Judge failed to address the factual background which demonstrated that clear and stark errors had been made in the failure to follow CPS Legal Guidance: Wildlife Offences ("the Guidance") and the Code for Crown Prosecutors (8th Edition) ("the Code") in the charge and prosecution of the offences. That is, the charges were laid without any sufficient 'safeguarding' evidence required by the Guidance and there was failure, in breach of the Code to apply the 'full code test' since there was no evidence capable of establishing the charges brought. Therefore, the charge and prosecution of offences should be categorised as improper

and unnecessary and outside the range of decisions that a reasonable prosecutor, whether police officer in bringing the charge or advocate in pursuit of it, would take.

22. Mr Johnson, who did not appear below, and appears on behalf of the Respondent, the Director of Public Prosecutions ("DPP"), resists the appeal and submits that the Judge correctly refused to accede to the application and reached a decision that was properly open to him. He submits that criticism of the Judge's approach to the law is misplaced and arises from reading passages in the judgment in isolation and out of context of the whole ruling. Specifically, Mr Johnson submits that the ruling demonstrates a proper approach to the application of the relevant law and that it is clear from the concluding paragraph in the section of the Judge's ruling dealing with 'the law', that he would follow Evans, quoting from paragraph [148] of that judgment:

> "Each case will be fact-dependent; but cases in which a section 19 application against a public prosecutor will be appropriate will be very rare, and generally restricted to those exceptional cases where the prosecution has acted in bad faith or made a clear and stark error as a result of which a defendant has acted in bad faith or made a clear and stark error as a result of which a defendant has incurred costs for which it is appropriate to compensate him. The court will be slow to find that such an error has occurred. Generally, a decision to prosecute or similar prosecutorial decision will only be an improper act by the prosecution for these purposes if, in all the circumstances, no reasonable prosecutor could have come to that decision."

Discussion

23. There is no dispute between the parties that the applicable legal principles are those summarised in *Cornish* and subsequently approved in the Court of Appeal (see above).

24. I agree with Mr Levack that parts of the Judge's ruling dealing with the legal principles are not as clear as may have been possible if he had been referred to the more recent and binding authorities indicated above. The Judge had been informed, and wrongly, that there was an inconsistency between *DPP v Sheffield* and *Evans* which had not been resolved. However, it appears to me that the Judge addressed the issue by acknowledging both sets of authorities, without explicit indication of which he distinguished or otherwise determined to be binding upon him. Further, although it is correct to observe that, in the penultimate paragraph of his ruling, the Judge indicates that he was "satisfied [the prosecutor] was acting in good faith in pursuing to trial one matter and in conducting the evidential reviews he did in the case generally" which tends to suggest a *Ridehalgh* approach, this must be seen in the context of the whole ruling. In preceding paragraphs, the Judge makes clear that he had regard to the *Evans* principles as now confirmed by the Court of Appeal's endorsement of *Cornish*. Consequently, I am not persuaded that the Judge did adopt the wrong legal test in considering the application. The error is one of form rather than substance.

25. In any event, as indicated above, the Judge's assessment of the facts is criticised as inadequate. Mr Levack provided a schedule of detailed submissions regarding what he asserted was the absence of any evidence which substantiated the charges before the

Judge below and has made written and comprehensive oral submissions before us on specific aspects of the documentary evidence. I do not regard it to be necessary for the Judge to have detailed those submissions, nor do I, save as I indicate in general terms below, since the Judge was correct to find that the process is a summary one. It is not appropriate, nor should it be necessary for the court to embark upon a minute examination of the facts to determine whether there has been a 'clear and stark error' which no reasonable prosecutor could have made.

26. It was not for the Judge to determine if the prosecutor's decision was 'correct' in his assessment of the evidence, nor is it for this Court to determine whether the Judge was correct in his assessment of the facts, when considering whether the appellant has established an improper or unnecessary act. I agree with Mr Johnson that the Appellant can succeed only if he can demonstrate that no reasonable District Judge could have declined to make an order for costs in his favour.

27. Contrary to Mr Levack's submissions, the attack made upon the sufficiency of the evidence in order to lay a charge against Mr Coll in relation to the two charges that were continued against him is not established by the discontinuance of the section 11 offence on the morning of trial, or the dismissal of the section 4 case at the close of the prosecution case. It is right and proper that a prosecutor should keep a criminal case under continuous review. That the justices were not satisfied that there was a case to answer, does not inevitably indicate that the prosecutors view that it was more likely than not that an objective, impartial and reasonable bench of magistrates properly directed would convict the appellant of the charge alleged, was so in error to constitute an improper or unnecessary act.

28. That the prosecution laid charges before a 'suitably qualified expert' had inspected the relevant snare six days later, in apparent disregard of the Guidance and Code, may be regarded as 'premature' but could not possibly qualify as an 'improper act'. Dr Calvert's statement was in fact equivocal, see paragraph [14] above.

29. The statement of Ms Davies contained opinion based upon hearsay information and Mr Levack draws attention to non-compliance with the requirements in Crim PR 19.4. The breaches were capable of rectification and did not preclude the ability of the prosecutor to have regard to the opinion seen in context of other first-hand evidence provided by the wildlife crime police officer.

30. Consequently, it follows that the Judge's conclusion that the "evidential deficiencies" did not reveal the 'clear and stark error' needed to be demonstrated for a successful section 19 application was properly open to him. He correctly reminded himself that section 19 should not be used to impugn the decision of the Crown Prosecution Service to prosecute or to continue to proceed to trial save in rare cases.

Disposal

31. I would reformulate the questions 2 to 4 posed in the case stated to reflect the point in paragraph [26] above. Otherwise, in answer to question 1, the Judge did not adequately reflect the binding authorities which preferred the test in *Denning* to *Ridehalgh*, but sufficiently well set out the correct legal principles. In answer to reformulated questions 2 and 3, the Judge reached decisions that were open to him on the facts and within the band of decisions which a reasonable Judge could reach. In

these circumstances, the answer to question 4 is that not only was it properly open to the judge to decline to make the order for costs under section 19, but he was correct not to do so.

32. I would dismiss this appeal.

MRS JUSTICE CHEEMA-GRUBB:

33. I agree.