

16/2/2007
Com.

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **HOLDEN AT GEORGE TOWN, GRAND CAYMAN**

S.C.A No. 16/05

7 **REGINA †**

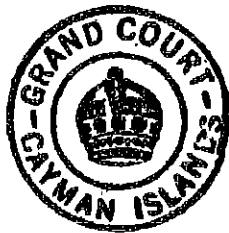
9 **V.**

11 **DAVID LYONS WATLER**

14 **Appearances:** **Mr. Anthony Akiwumi of Stuarts Walker Hersant for the**
15 **defendant**
16 **Ms. Gail Johnson for the Crown**

19 **Before:** **Hon. Justice Henderson**

22 **Heard:** **October 4, 2006**



25 **JUDGMENT**

27 In what circumstances will a criminal defendant who successfully appeals his convictions
28 to the Grand Court be awarded his costs of the appeal and of the trial in the court below?

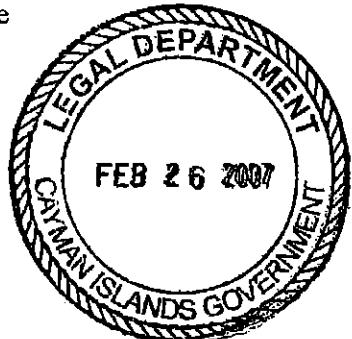
29 Section 182 of the *Criminal Procedure Code* (2006 Revision) says only that:

30 "The court hearing any appeal may make such order as to the
31 costs to be paid by either party as it may think just:

32
33 Provided that no magistrate shall be liable to any costs in
34 respect of any appeal against his decision."
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36 Neither party has cited any Cayman Islands authority on the subject.

38 Mr. Watler was charged with eighteen criminal offences involving gambling. After a
39 trial in the Summary Court, he was acquitted of one count and convicted of the others.



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Upon his appeal from conviction, I held that his trial had been irregular because the Crown had failed without justification to disclose an immunity agreement (and a letter setting out the terms of that agreement) to the defence in a timely fashion. I found that this failure to disclose may well have prejudiced the defendant.

Ordinarily, such a determination would have resulted in a new trial in the Summary Court. However, after weighing the criteria set out by Harre, C.J., of this court in *Regina v. Bertolino* 1990 CILR 112, I found that a new trial was not justified. I therefore set aside the convictions and entered verdicts of acquittal.

In companion civil proceedings, the Crown was successful in freezing a substantial sum of money in bank accounts owned by Mr. Watler. That order was later set aside by Sanderson, J. (Ag.) of this court. On appeal by the Attorney General to the Court of Appeal, the original freezing order was restored. Mr. Watler was awarded his costs of that appeal. In making the award, the Court of Appeal said this (at page 11 of their unreported Reasons for Judgment released March 11, 2005):

“It is not the normal practice to make an order for costs in proceedings of this sort, involving discharge by the Crown of responsibilities ancillary to its duty to enforce the criminal law. But the Crown did not in the proceedings below take the alternative position that the *ex parte* order might in fact be an interim preservation order only; had the Crown taken that position below, the order would surely not have been set aside. All that would in that case have happened is that the bank would have obtained the variation order that it sought and did in fact obtain, and in those circumstances there would have been no basis for departure from the normal rule on such applications, that each party bear its own costs. The additional relief granted below -- setting aside of the

1 order as a whole -- was a benefit to Mr. Watler to which, we have
2 found, he was not entitled, one obtained because the Crown did
3 not advance its alternative ground.
4

5 The Attorney General was thus unsuccessful on the appeal so far as
6 the bank is concerned; the bank continues to have the right of
7 combination or set-off that it sought and obtained below. The
8 principal position that counsel for the Attorney General was
9 instructed to maintain as against the bank and Mr. Watler on appeal
10 was in our view one that plainly could not succeed. It was only on
11 the "fall-back" position adopted by counsel during the course of the
12 hearing before us that the Attorney General succeeded, a position on
13 which the appeal was not opposed by the bank or Mr. Watler. The
14 Attorney General has been unsuccessful on the contested grounds of
15 appeal and successful only on a new, uncontested ground that could
16 have been raised below.
17

18 In these unusual circumstances there is a basis, in our view, for departure
19 from the normal rule applied in cases of this sort, to the extent only that
20 the bank and Mr. Watler should have their costs of the appeal."
21

22 The discretion with respect to costs conferred by Section 182 of the *Criminal Procedure*
23 *Code* is essentially unfettered. Both the Appellant and the Respondent expended
24 considerable effort in making reference to, and seeking to draw parallels with, United
25 Kingdom legislation and authorities on the subject of costs in criminal cases. I do not
26 think any such parallels can be drawn. Legislation such as sections 16 to 21 of the
27 *Prosecution of Offences Act 1985*; the *Costs in Criminal Cases (General) Regulations*
28 *1986*; Section 52 of the *Supreme Court Act 1981*; Rule 78 of the *Criminal Procedure*
29 *Rules 2005*; and the *Practice Direction (Costs; Criminal Proceedings)* [2004] 2 All E.R.
30 1070; constitute a virtual code of practice on the subject which has never been adopted
31 even in part, in the Cayman Islands. English authorities decided under these legislative
32 provisions can have only limited application here.
33

1 The Court of Appeal has observed (in the passage quoted earlier) that it is not the
2 "normal practice" to make an order for costs in proceedings taken by the Crown to
3 discharge its responsibilities ancillary to the enforcement of the criminal law. The court
4 then found there were "unusual circumstances" which justified a departure from the
5 normal rule; they granted Mr. Watler his costs of the appeal.

6
7 In the case before me, there are no such unusual circumstances. The evidence adduced
8 by the Crown at trial provided a reasonable basis for suspecting that Mr. Watler was
9 involved in a very substantial way in unlawful gambling. His convictions were set aside
10 because of procedural error on the part of the Crown. The verdict on appeal does not
11 imply that the Crown was in any way at fault in laying the charges and bringing the case
12 to trial. In doing so, the Crown was simply discharging its duty of enforcing the criminal
13 law of the Cayman Islands.

14
15 In these circumstances, I exercise my discretion against an award of costs to Mr. Watler
16 notwithstanding the fact of his acquittals.

17
18 Dated this 16th day of February, 2007

19
20 *Henderson, J.*

21 Henderson, J.
22 Judge of the Grand Court

