

MEMORANDUM NO 2

EXENSES IN CRIMINAL CASES

SCOTTISH LAW COMMISSION,

Expenses in Criminal Cases.

In solemn procedure no expenses are awarded in a trial. This rests on the practice of the Courts and the reason, although it has been the subject of comment, remains obscure. The root of the matter is said to be the privileged position of the Lord Advocate (Hume; Alison) although again the reasons for that are not clear and doubts have been judicially expressed (H.M. Advocate v. Aldred 1922 J.C. 13). In an appeal under the Criminal Appeal (Scotland) Act, 1926, no expenses are allowed on either side (Criminal Appeal (Scotland) Act, 1926, section 8).

In summary procedure expenses are not awarded against a public prosecutor in an inferior Court in cases of common law offences. In this respect he is now on the same footing as the Lord Advocate. This immunity extends to the inferior court only. Public prosecutors in inferior courts however, were formerly liable in expenses (cf. Hume, Alison; also, e.g., Prentice 1843 1 Broun 561) but in practice expenses appear not to have been given against public prosecutors unless the proceedings had been grossly irregular or oppressive. This exemption appears not to extend to an accused (Summary Jurisdiction (Scotland) Act 1954, Section 53(a)). It is not, however, the practice of inferior courts to award expenses against an accused in cases of common law offences although this has been done in times past (Hume; Alison).

In cases of contravention of statute the protection of a public prosecutor is more limited. There was formerly some doubt about the position (Walker v. Jones 4 Irvine 234). The general rule is now that an award of expenses

against a person prosecuting in the public interest must derive its authority expressly or impliedly from the statute or order alleged to have been contravened (Summary Jurisdiction (Scotland) Act, 1954, Section 53(a)). This rule applies to expenses in the inferior court only (cf. Ross v. Stirling 1869 1 Couper 336). It is not always easy to know when such authority is implied. Some statutes expressly provide for an award of expenses against an accused and are silent upon the question of expenses against a prosecutor. In the absence of express authority Courts have upon occasion derived such authority from what has been described as "fair and equitable inference" (Todrick v. Wilson 1891 18 R. (J.C.) 41; cf. also Christie v. Adamson 1 Irvine 293). The 1954 Act itself is silent upon the question of an award of expenses to a person prosecuting in the public interest in a case of contravention of statute.

There is statutory limitation (Summary Jurisdiction (Scotland) Act, 1954, Section 53(c), (e) and Third Schedule), which must be strictly observed (Stewart v. McMiven 1891 18 R. (J) 36), to an award of expenses to a prosecutor but such limitation does not apply to an award of expenses to an accused (J. & J. Cox Ltd. v. Lindsay 1907 S.C. 96).

Expenses may be awarded against an accused without imposition of a fine, or may be ordered to be met wholly or partly out of the fine (Summary Jurisdiction (Scotland) Act, 1954, Section 53(d)). Expenses are not to be equated with penalties (Black v. East Lothian County Council 1943 J.C. 130; but see Stewart v. Macpherson 1918 J.C. 96).

Some Acts which create statutory offences are silent upon the question of expenses either way. This may raise the question whether there is an inherent power of awarding expenses in the Court concerned (Ledgerwood v. McKenna 1863 7M 261). It is understood to be the practice.

however, that expenses are not awarded in an inferior court against an accused unless there is express statutory authority, but the High Court may do so in an appeal (Nimmo v. Clark 1872 10M. 477); Summary Jurisdiction (Scotland) Act, 1954, Section 71(3).

The question of expenses on appeal by way of stated case in summary procedure is regulated by section 71(3) of the 1954 Act. The Court has absolute discretion to award expenses either way and the terms of Section 71(3) taken in conjunction with the provisions of Section 53(a) seem to indicate that the High Court may, in an appeal, give an award of expenses against a public prosecutor in respect of proceedings in the Court below where the Court below could not competently have done so. This applies equally to common law offences and cases of contravention of statute. The High Court may also amend the order of an inferior Court as to expenses (Summary Jurisdiction (Scotland) Act, 1954, Section 73(2); cf. also McCluskey v. Boyd 1916 S.C. (J.) 31).

Appeal by way of advocation or bill of suspension is also competent. Appeal by way of advocation is infrequent. In bills of suspension or of advocation the High Court has a discretionary power, which appears to rest on common law, to award expenses. There appears to be no readily discernible difference in the practice of the High Court in the matter of expenses so far as these different modes of appeal are concerned.

The general rule in an appeal is that expenses follow the event but courts have been jealous of their discretion in the matter (cf., e.g. MacIntyre v. Linton 1876 3 Couper 319). The insistence on preserving the discretion of the Courts is evident not only in appeals but in trials. In

the main, judges have taken the view that the mere fact of acquittal will not necessarily justify an award of expenses to an accused. This view is of long standing and is mentioned by Hume and Alison. One consideration that has weighed with judges, for example, is whether, although a conviction has not been secured, the prosecution is nevertheless justified, e.g., the defence may have succeeded on pure technicality (Matthews v. Glasgow Iron Co. 1836 1 Swinton 393). The conduct of the accused (Clyne v. Keith 1874 14R. (J) 22) or of the case (Bole v. Stevenson 11 R (J) 10; Walker v. Emslie 2 F (J) 13) has also been a material consideration. Expenses have been refused in test cases (Halliday v. Bathgate 1867 5 Irvine 382; Hart v. Hunter 8 F (J) 34).

Sometimes expenses have been given both in the High and inferior Courts (e.g. Macarthur v. Campbell 23 R. (J) 81) but generally in the High Court only. Moncreiff ("Review in Criminal Cases") notes that the inclination is not to award expenses in the inferior court unless the proceedings there have been slovenly, irregular or oppressive. (cf. Christie v. Adamson supra). It appears that it is now most infrequent for the High Court to give expenses in the Court below but it is generally impossible to tell from the form of award whether expenses have been given in both Courts or not.

Sometimes full expenses have been given; e.g., where there has been some fundamental nullity or error in the proceedings, and sometimes there has been a remit to taxation (cf. Rochiciolli v. Walker 1916 S.C. (J) 18; Christie v. Adamson supra), but it appears to be a general practice that, where an award is made, the High Court modifies expenses. Often such awards appear to be arbitrary and to take little or no account of the actual expenses involved. Moncreiff also comments to that

effect. The awards appear to vary between certain fairly well established limits. Maclaren ("Expenses in the Supreme and Sheriff Courts") noted this and the practice appears to be the same today. What determines these limits is not known but it is noticeable that in general an award to a successful appellant seems to exceed that to a Crown prosecutor. There may be some analogy with the rule in summary trials whereby the statutory limitations on expenses against an accused are held not to apply when expenses are awarded to an accused.

There appears to be no provision for an award of expenses to an accused where the prosecution is abandoned. There is, however, statutory authority (Summary Jurisdiction (Scotland) Act, 1954, Section 72(3)) for an award of expenses, in the discretion of the Court, and limited to five guineas, to an accused where a prosecutor is not, in an appeal, prepared to maintain the judgment appealed against. The reason for this limitation is not known. There has been a question, however, as to whether the statutory limit applies when the Court refuses to allow the conviction to be set aside of consent and the appeal proceeds (Small v. Clark 1946 J.C. 133).

There is now provision for legal aid but that cannot alleviate the position of persons who do not qualify for legal aid. In any event the provision of legal aid cannot affect the principles governing the award of expenses in the Courts. The existence of the legal aid scheme may, however, inhibit discussion of the question of expenses as there may be many cases where the matter will now be rendered one of academic interest only and so may go by default.

Where expenses are dealt with it appears to be the general practice for the Court at the end of the diet to make a brief pronouncement, often without reason assigned.

This may in some degree be responsible for the present position whereby the matter is largely regulated by Court practice in which the basic principle involved is sometimes hard to discern. Authoritative judicial and textual pronouncements are infrequent, particularly of recent years. Furthermore, some of the reported cases seem to concern specialities. One of the consequences is that it is difficult for an accused, or his professional advisers, to get any clear idea of his rights in the matter.

16th December 1966.

APPENDIX

1. Is it the case that in practice the question of expenses is seldom raised either by the Crown or by a defender?
2. Are there cases where an accused is deterred from pleading not guilty in view of the probable costs involved?
3. Is there evidence of hardship occasioned to accused persons not enjoying legal aid on account of their being unable after acquittal etc. to recover expenses from the Crown?
4. Are there cases where, although the matter has not been raised at the bar, it appears that there might have been grounds for a motion for expenses in favour of a person against whom a conviction has not been secured?
5. Are there cases where, although a person has not been convicted, the Court in the exercise of its discretion would probably not have considered an award of expenses justified for some reason e.g. the conduct of the defence, or the fact that the prosecution has failed upon some technicality or through some circumstance in which the prosecution cannot reasonably be held to be at fault?
6. When the High Court awards expenses to a successful appellant against conviction or respondent in an appeal are expenses with any frequency given in the court below?
7. Should expenses be awarded to an accused person if he is acquitted, or if the charge against him has been dropped, and for what reasons?
8. Should the Crown be empowered to recover expenses from a convicted person, and for what reasons?
9. If the answer to Question 7 and/or 8 is in the affirmative on what basis should the expenses be awarded? Should the Court be granted discretionary powers and within what limits? Should the expenses be limited in any way? Should the principles governing an award of expenses to an accused be the same as those applying to an award of expenses to the Crown?
10. Should special principles apply to the award of expenses in appeals?