

# SUPREME COURT OF QUEENSLAND

CITATION: *Commissioner of the Police Service v Merrin* [2002] QCA 480

PARTIES: **COMMISSIONER OF THE POLICE SERVICE**  
(plaintiff/respondent)  
v  
**THOMAS WILLIAM MERRIN**  
(defendant/applicant/appellant)

FILE NO/S: Appeal No 3615 of 2002  
DC No 5 of 2001

DIVISION: Court of Appeal

PROCEEDINGS: Application for leave s 118 DCA (Civil)  
General Civil Appeal

ORIGINATING COURT: District Court at Maryborough

DELIVERED ON: 8 November 2002

DELIVERED AT: Brisbane

HEARING DATE: 24 October 2002

JUDGES: McPherson JA, Cullinane and Holmes JJ  
Separate reasons for judgment of each member of the Court,  
each concurring as to the orders made.

ORDERS: **Application and appeal allowed by varying from \$0.20 to \$0.50 per kilometres the rate at which the travelling allowance is paid to the applicant as part of his costs. Respondent to pay applicant's costs of and incidental to this application and appeal**

CATCHWORDS: PROCEDURE - COSTS - TAXATION - DISBURSEMENTS  
- PARTY'S EXPENSES - appellant travelled to court as defendant and witness - whether judge bound to award costs on witness scale

PROCEDURE - COSTS - TAXATION - DISBURSEMENTS  
- WITNESSES - witness who incurred no expense - whether able to award witness fee

PROCEDURE - COSTS - TAXATION - PRINCIPLES - GENERAL - costs not incurred in proceedings - whether costs of attending probation allowed

Justices Act 1886 (Qld), s 158A, s 222, s 225, s 226  
Queensland Government Gazette, vol CCCXVI, 5 December 1997, no 84

COUNSEL: Appellant appeared on his own behalf  
S McLeod for the respondent/plaintiff

SOLICITORS: Appellant appeared on his own behalf  
Queensland Police Service Solicitors for the  
plaintiff/respondent

- [1] **McPHERSON JA:** This is an application for leave to appeal by Mr Merrin from an order for costs made in the District Court on 25 March 2002. In February 2001 Mr Merrin was found guilty in the Magistrates Court at Cairns on a charge of using insulting words, and he and his son were found guilty of obstructing police and also of serious assault. The sentences imposed were that they were each admitted to probation. On appeal to the District Court sitting at Maryborough the charges were dismissed on their merits. His Honour exercised his discretion pursuant to the *Justices Act 1886*, ss 225, 158A, and 226, to make an order for costs in favour of the Merrins. The order awarded \$5,122 in costs to Mr Merrin for the magistrates court proceeding and a further \$459.10 for the costs of the appeal to the District Court. Mr Merrin's application here concerns the quantum of the costs ordered. His three complaints are as follows:

1. He was awarded only \$.20 per kilometre for travel to and from the magistrates court. He submitted that \$.50 per kilometre is appropriate to cover the actual costs of travel. It should be explained that there were six such return journeys undertaken in his own car by Mr Merrin from his home in Hervey Bay to the court house at Cairns for the purpose of attending and defending himself against the two charges.
2. He also claimed \$147 for payment to Mrs Merrin for her attendance as a witness and travel to those hearings. Mr Merrin submitted that the respondent should make a payment as if Mrs Merrin had lost income from a full time job because during the period in question she was not with her younger son, who was unable to travel with them due to his high school commitments. This claim was rejected by his Honour.
3. Mr Merrin sought but was unable to obtain a stay of his sentence or probation order pending the appeal to the District Court. He claimed that he should be paid the costs of travel to the five probation meetings that he attended in Maryborough between his conviction and the successful appeal.

#### **Costs of Travel**

- [2] The primary judge based his consideration of the amount to be paid to the Merrins for travel to hearings on two assumptions. First, that Mr Merrin attended the hearings as a witness for his son (reasons for judgment, p 2, lines 40-50). Secondly, that because he was a witness, Mr Merrin was entitled only to the payments prescribed in the Schedule contained in the *Queensland Government Gazette*, vol CCCXVI, 5 December 1997, no 84, at 1513-14. The *Justices Regulation 1993*, Schedule 2, Part 3, s 2, provides that an allowance paid or payable or that will be paid by the defendant to a witness may be allowed up to the amount listed in the Schedule published in the Gazette. Paragraph 3(b) of that Schedule provides that the travel allowance be paid at a rate of \$.20 per kilometre.

[3] The learned primary judge considered his discretion to be bound by or limited to this amount, as he indicated during the hearing (trs, p 7, line 58 to p 8, line 12) and in his reasons for judgment (p 9, lines 15 to 20). In this respect I consider that the learned primary judge fell into error in two ways. First, if it was correct to classify Mr Merrin as a witness, his Honour had discretion under ss 158B(2) and 232A(2) of the *Justices Act* to order that a higher amount be paid. He was therefore not in law bound to order costs to be paid at only \$.20 per kilometre as he suggested, so that to that extent he fettered his discretion.

[4] Secondly, while Mr Merrin in fact attended court as a witness for his son, the primary reason for his presence there was to defend himself against the charges. The proper test is to ask if Mr Merrin would have travelled to Cairns to defend himself even if his son had not faced charges as well. If the primary judge had considered Mr Merrin to be a party as he was, instead of simply as a witness, his Honour would not have been bound by the rate specified in the Schedule to the Gazette. Under those circumstances, his Honour ought to have considered himself free to determine the travelling allowance as a disbursement under the *Justices Regulation 1993*, Schedule 2, Part 3, s 1. That section is in the following terms:

**“Disbursements, other than to witness for attending.**

1. Court fees and other fees and payments (other than allowances to witnesses to attend proceedings) including allowances to interpreters, and travelling, accommodation and other expenses of counsel and of a solicitor acting as advocate, may be allowed to the extent they have been reasonably incurred and are paid or payable.”

On one reading of this provision, it might be thought to be confined to the persons specifically mentioned in it; but it is not expressly so restricted and, I consider, must be given a wider operation.

[5] Under that provision an allowance could have been awarded to Mr Merrin as a party for his travel at a rate which better reflected both the actual costs of travel in fuel and otherwise, as well as the expense of wear and tear on his vehicle. His Honour noted that the rate of \$.20 did not necessarily cater for the latter (reasons, p 10, line 1) but held that he was not able to award at a larger rate. In my opinion his Honour erred in considering himself bound by the schedule and in ordering an award of only \$.20 per kilometre. In all the circumstances, the award under this head for the costs for the hearing in the magistrates court should be increased by a total of \$5,400. This is arrived at by increasing the travel allowance rate from \$.20 to \$.50 on each of the items 5, 7, 9, 11, 13, and 15 and by increasing each of those items by \$900 to produce an overall increase of \$5,400. It also entails another but much smaller adjustment in the amount awarded for the costs of travelling to and from Hervey Bay and attending the appeal in the District Court at Maryborough by increasing item 31 in the costs assessment by \$158.40 and item 33 by \$192.00. This will result in an enlargement of the costs awarded of and on the appeal on that account by the sum of \$350.40.

**Payment to Mrs Merrin**

[6] At the hearing of the costs application Mr Merrin claimed \$147 for the attendance of his wife for three days of the hearing. This appears to be a request for a witness fee similar to those available for witnesses in civil matters under s 13 of the Uniform Civil Procedure Regulations, where a witness fee of \$50 per day is

allowed; or under r 5(b) Magistrates Court Rules, where provision is made for a witness fee of \$43 per day. Those rules apply, however, only to witnesses in civil matters, whereas these were proceedings taken on complaint for offences. During the hearing of the appeal, Mr McLeod of counsel for the Queensland Police Service acknowledged that the learned primary judge devoted little specific attention to this issue at the hearing of the costs application. There was, however, some discussion of this item of costs in the reasons for judgment (at p 9, lines 42 to 50), where his Honour mentioned those items in the costs application that were not allowed. On examination, it appears that the only items that were disallowed entirely were the witness fees requested for Mr and Mrs Merrin and for their son, as well as Mr Merrin's expenses of travelling to attend probation meetings. The latter are addressed below.

- [7] His Honour's reasons show that he disallowed these expenses on the basis either that he did not have jurisdiction to award them, or that they were covered by another item. In the result, it is evident that the learned judge did consider the items in question but disallowed them in the exercise of his discretion. It is not possible to conclude that he failed to consider them, or that he exercised his discretion incorrectly.
- [8] At the hearing of his costs application in the District Court, Mr Merrin did not ask for payment on the footing that Mrs Merrin had lost income as a result of her attendance at court. He has now made that claim on appeal because the primary judge failed to order that Mr Merrin be paid an allowance for the cost of Mrs Merrin's travel to the hearings. The allowance was, however, correctly refused by his Honour. When she attended court, Mrs Merrin travelled in the same car as Mr Merrin and their son (trs p 7, lines 22-34). Paragraph 3(2) of the gazetted Schedule does not allow two payments if two witnesses travel in the same vehicle to court. Paragraph 3(3) of the Schedule precludes a payment if the witness, as in this case, has incurred no expense. Further, s 3 of the *Justices Regulation 1993*, Schedule 2, Part 1, allows for payment only of costs necessarily incurred. It is a compelling implication that the cost must in fact have been incurred before it is payable to a witness. It cannot be said that two people travelling in a car together each incur the costs of operating the vehicle unless perhaps there is an arrangement to that effect. If there had been, one would expect that, as a consequence, the allowance to Mr Merrin himself would be correspondingly reduced.
- [9] A cost not otherwise provided for in the gazetted Schedule can be allowed if it is an expense incurred by a witness under para 10(1) of the schedule. This might perhaps have authorised payment to a person in Mrs Merrin's position were it not that, in this instance, it was accepted that Mrs Merrin incurred no expense at all as a result of being away from home. Had she made a tenable claim for the cost of a child-minder, or a driver to assist her son in getting to school in her absence, it is perhaps possible that such an expense might conceivably have been payable or allowable under the Schedule, but no expense of that kind was in fact claimed or proved.
- [10] Similarly, Mrs Merrin is not entitled to payment for lost income because she had no income to lose. She was not being paid to work as a housewife. Paragraph 5 of the Schedule allows for payments to witnesses for non-professional loss of earnings for each day a witness is required to attend court. The allowance is \$35 for

an absence from the place of employment or of abode of 4 hours or less, and \$70 for an absence of more than 4 hours. An award under this provision would have produced a payment to Mrs Merrin of not more than \$210. The section, however, requires that the witness be one who has “suffered a loss of earnings for the purpose of attendance at Court”. According to Mr Merrin’s submission, Mrs Merrin did not lose income; what she lost was the opportunity to perform her duties as a full-time mother. Such a form of compensation is not catered for under the Schedule. It appears clear that the Schedule is intended to compensate witnesses for monetary loss occasioned by attending court. Mrs Merrin does not claim to have lost income as a result of her attendance, and so on that ground alone is not entitled to monetary compensation on account of her absence from home. The primary judge was therefore correct in deciding to refuse the claim under this head because the payment is not an allowable witness expense under the gazetted Schedule.

### **Probation Meetings**

- [11] Mr Merrin also claimed compensation for travel to attend five probation meetings in Maryborough. It appears that his son and he each claimed a total of \$12.50 as an allowance or compensation on this account. This Court is asked now to consider the \$12.50 claim by Mr Merrin for the first time. It is not a cost that can be recognised for the reason that the only costs that can be awarded under s 158A of the *Justices Act 1886* are costs of the “proceedings”, which would not naturally or ordinarily include costs consequent upon or as a result of those proceedings once they terminated in sentence. The Court was not provided with authority to the contrary.
- [12] Mr Merrin applied to a District Court Judge for a stay of the probation order pending his appeal to the District Court. The respondent or the Department administering the sentence seems to have expressed a willingness to suspend execution of the order pending the appeal. This, however, did not happen. The judge to whom the stay application was made (who was a different judge of the District Court) expressed doubt whether he had power to stay the probation order as sought. The matter was left there, and the probation order remained in force until the appeal was allowed. Mr Merrin continued to comply with it, as no doubt he was in law bound to do.
- [13] Section 222(2) of the *Justices Act 1886* suggests that a stay may be granted of the order of the magistrate appealed against, but with or subject to any recognisances that justice may require. Section 225 of the *Justices Act* confers upon the District Court power upon the hearing of an appeal to make any order that the justices could have made. These two provisions might perhaps operate to invest the District Court with power to stay the order of the magistrate until an appeal is heard. However, the fact that a stay might have been, but was not, granted would not and does not have the effect of making the cost of attending the probation meetings a cost of the proceedings. It follows that no allowance can be awarded on account of the cost to Mr Merrin of travelling to these meetings.
- [14] We were also pressed at the hearing of the appeal with various statutory and other provisions, such as chapter 29 of Magna Carta, that were said to support Mr Merrin’s claims to these items of costs as a matter of “people’s law”, as he called it, in contrast to “politicians’ law”. It is, however, a fundamental principle of the common law (which appears to qualify as “peoples law”) that costs cannot be

awarded unless authorised by statutory provisions. See *Re Birkman, ex p Pickering* (1860) 1 QSCR 14, and *R v Justices of South Brisbane, ex p Zagami* (1901) 11 QLJ 81. None of the statutes referred to by Mr Merrin have the effect of altering that rule.

[15] The consequence is that he is entitled at most only to the additional amount for travelling expenses in attending court in Cairns in the course of defending the charges against him. What is before us is, however, not an appeal, but no more than an application for leave to appeal for the grant of which a favourable exercise of discretion is needed under s 118 of the *District Court Act 1968*. The amount involved is not, by the standards of this Court, very large, but the point involved is one of principle, or one that is liable to arise in some, perhaps many, cases in the future. That, according to the principles that were formerly applied in granting leave to appeal to the Privy Council or the High Court, invests it with the status of a point of law of some public importance. Although not a prerequisite for obtaining leave, I consider it to be a significant factor in the circumstances of this matter.

[16] I would therefore give leave to appeal and allow the appeal by varying the order below to allow the applicant his costs of travelling to and from his home in Hervey Bay to the court house in Cairns, and from his home to the court house in Maryborough, at the increased rate of \$0.50 instead of \$0.20. That will result in an increase of \$5,400 in the case of the travel to Cairns and \$350.40 in the case of the travel to Maryborough. The applicant has been successful in this Court on the major item in dispute, and the respondent should be ordered to pay the costs of and incidental to this application and appeal.

[17] **CULLINANE J:** I agree with McPherson JA's reasons and the orders proposed.

[18] **HOLMES J:** I agree with the reasons of McPherson JA and with the orders he proposes.