

**COSTS FOR SUCCESSFUL DEFENDANTS IN CRIMINAL CASES
AND COMPENSATION FOR WRONGFUL IMPRISONMENT**

Memorandum by
THE COMMONWEALTH SECRETARIAT

This paper draws on material available at the Commonwealth Secretariat in January 1983 and on information supplied by a cross-section of Commonwealth jurisdictions.

2. The question of compensation for acquitted persons falls into two quite separate categories: compensation for those who incur costs in successfully defending criminal charges, and those who are imprisoned but are subsequently found (whether on appeal or subsequently) to have been wrongfully convicted. To some degree the criteria applied in redressing grievances can overlap, and in each instance the remedy provided is generally the tort of malicious prosecution.

A. Costs for Successful Defendants

3. The normal rule in Commonwealth jurisdictions is that it is the prerogative of the State not to pay costs. As was said by the first Chief Justice of the High Court of Australia, Sir Samuel Griffiths in Affleck v. The King (1906) 12 ALR 112,119:

"There is no doubt that at common law the Crown is, by its prerogative, exempt from the payment of costs in any judicial proceeding, or that this right cannot be taken away except by Statute".

4. The position may differ in courts of summary jurisdiction, where the State as such may not be the prosecutor [see Hamdorf v. Riddle (1971) SASR 398].

5. The question of costs for successful defendants only assumes relevance to the extent that a defendant is not the recipient of legal aid.

(i) Australia

6. The position in Australia varies from State to State, and the material available suggests that there is a considerable lack of uniformity throughout Australia in the respective State and Territory legislation on this topic and that the principles behind the enactment of the United Kingdom's Costs in Criminal Cases Act have been adopted by only New South Wales and Tasmania. Why this should be so is not clear as there is a general dearth of legal literature on the topic, both in Australian law journals and textbooks on costs and the criminal law.

7. The first Act enacted in Australia to deal specifically with the granting of costs to successful defendants in criminal cases was the costs in Criminal Cases Act 1967 of New South Wales. This provides, inter alia

S.2. The Court or Judge or Justice or Justices in any proceedings relating to any offence, whether punishable summarily or upon indictment, may -

- (a) where a defendant, after a hearing on the merits, is acquitted or discharged as to the information then under inquiry; or
- (b) where, on appeal, the conviction of the defendant is quashed and
 - (i) he is discharged as to the indictment upon which he was convicted; or
 - (ii) the information or complaint upon which he was convicted is dismissed,

grant to that defendant a certificate under this Act, specifying the matters referred to in section three of this Act and relating to those proceedings.

S.3. (1) A certificate granted under this Act shall specify that, in the opinion of the Court or Judge or Justice or Justices granting the certificate -

- (a) if the prosecution had, before the proceedings were instituted, been in possession of evidence of all the relevant facts, it would not have been reasonable to institute the proceedings; and
 - (b) that any act or omission of the defendant that contributed, or might have contributed, to the institution or continuation of the proceedings, was reasonable in the circumstances.
- (2) A certificate granted under this Act by a Justice or by Justices shall specify the amount of costs that he or they would have adjudged to be paid if he or they had made an order for costs against the informant, prosecutor or complainant, as the case may be.
4. (1) In this section "Under Secretary" means the Secretary of the Department of the Attorney General and of Justice.
- (2) Any person to whom a certificate has been granted pursuant to this Act may, upon production of the certificate to the Under Secretary, make application to him for payment from the Consolidated Revenue Fund of the costs incurred by that person in the proceedings to which the certificate relates...

8. In his speech at the second reading of the Bill, the then-Minister of Justice said that the measure "represented a middle course" between two extremes. "It departs from the old English conception that costs in criminal trials should only be awarded in exceptional cases. On the other hand it establishes criteria which, when applied judicially, permit courts to make orders in appropriate cases without any innuendo arising from the making, or the refusal to make such orders that would be critical either of the prosecutor or the accused. In summary matters, costs may, by existing provisions of the Justices Act, be awarded against the informant. Where it would not seem appropriate to make such an order, the magistrate, under this Bill, may grant his certificate leading to the successful defendant being paid by the Treasurer the costs which would have been ordered to be paid by the informant had the court seen fit. More important, where examining justices determine not to commit the accused for trial on the grounds that the evidence is not sufficient to put him upon his trial, and for example are of the opinion that the charge was not made in good faith, the Bill permits them to order the prosecutor to pay costs incurred in or about the defence. Again it will be noted that the Treasurer may pay such costs where the court grants a certificate rather than order costs against the informant. The criteria to which I have referred, will be relevant to the court in reaching its decision whether a certificate is to be granted, are simply applied. The two questions to be answered in the negative by the court before granting a certificate are first, does it appear that the prosecutor would not have been acting reasonably in initiating the proceedings had he been in possession of all the facts established in the course of the trial: and second, and equally important, did the defendant do or fail to do anything which resulted in or contributed to the proceedings' being commenced or continued. These two tests are applied in England where costs in Criminal Cases Act of 1908 permits the costs of the prosecution and expenses of witnesses for the prosecution or for the defence to be paid from local funds."

9. In an editorial (28 April 1967) the Australian Law Journal observed :

"The Costs in Criminal Cases Act does not seek to pay the costs of their defence to all persons who are acquitted. The decision not to do so may be quite justifiable but once taken it is difficult to find any basis for reimbursement which will entirely eliminate the danger that a refusal of costs may be interpreted as casting a doubt on a jury's finding in favour of innocence. The Act itself certainly does not ask the court to consider guilt or innocence. Rather, it has regard to the reasonableness of the institution of proceedings. Clause 2 provides that the court, judge, justice or justices in any proceedings relating to any offence, may grant a certificate where a defendant, after a hearing on the merits is acquitted or discharged, or where, on appeal, the conviction is quashed and the defendant discharged on the information or complaint dismissed. But the certificate must specify the matters referred to in s.3. By virtue of this section the court etc. must specify that, in its opinion, if the prosecution had, before the proceedings were instituted, been in possession of evidence of all the relevant facts, it would not have been reasonable to institute the proceedings and that any act or omission of the defendant that might have contributed to the institution or continuation of the proceedings was reasonable in the circumstances. The class of cases in which a certificate may be granted is thus a rather narrow one. The mere granting of a certificate, moreover, does not ensure payment of costs. The Treasurer must also consider that, in the circumstances, a payment is justified and he is also to have a discretion as to the amount of the costs which are to be paid. The certificate itself is not to contain any specification of the amount of costs except that, under s.3(2), one granted by a magistrate (or justices) shall specify the amount that would be adjudged to be paid if an order was being made for costs against the informant,

prosecutor or complainant. The Under Secretary is to furnish a statement to the Treasurer in which he is to state the amount specified under s.3(2), or what in his opinion are the reasonable costs, and also to specify any amounts that the applicant has received or could have received independently of the Act, by reason of incurring the costs. Then, where the Treasurer considers that "in the circumstances of the case the making of payment to the applicant is justified, the Treasurer may pay to the applicant his costs or such part thereof as the Treasurer may determine." Speaking on this discretion, on the introduction of the Bill for the Act, the Minister of Justice said that the Treasurer might decide, for example, that payment is unjustified where a person acquitted on one charge is subsequently convicted on another charge arising from the same circumstances. The discretion reserved to the Treasurer thus goes far beyond the mere questions of what costs were reasonably incurred and of what alternative means of covering them could be, or could have been, explored. It seems unfortunate that such a broad discretion is being given to the Treasury and it at least seems desirable that its exercise to refuse reasonable costs, where a certificate has been granted, should be confined to the most exceptional circumstances."

10. In Tasmania, a special Act was passed, the Criminal Proceedings (Special Defence Costs) Act 1976, in order to discharge an undertaking given by the prosecution to meet certain costs and expenses incurred in an abortive criminal trial. A fortnight later a further Act, Costs in Criminal Cases Act 1976, was enacted to make provision generally for the payment of costs in criminal cases to successful defendants. The Act provides inter alia:

S.4.(1) Subject to this Act, where a person having been charged with an offence is discharged from the proceedings in respect thereof, that is to say, where

- (a) he is acquitted of the offence;
- (b) the complaint charging him with the offence is dismissed or withdrawn;
or
- (c) he is discharged upon an indictment for the offence.

the court having the conduct of the proceedings may, upon the application of the defendant, order that he be paid in respect of his defence such costs as it thinks just and reasonable.

(2) The court, in deciding whether to grant costs and the amount of any costs granted, shall have regard to all relevant circumstances and in particular to the following:

- (a) Whether the proceedings were brought and continued in good faith;
- (b) Whether proper steps were taken to investigate any matter coming to, or within, the knowledge of any person responsible for bringing or continuing the proceedings;
- (c) Whether the investigation into the offence was conducted in a reasonable and proper manner;
- (d) Whether the evidence as a whole would support a finding of guilt but the defendant is discharged from the proceedings on a technical point;
- (e) Whether the defendant is discharged from the proceedings because he established (either by the evidence of the witnesses called by him or by cross examination of witnesses for the prosecution or otherwise) that he was not guilty.

(3) No defendant shall be granted costs by reason only of the fact that he is acquitted of an offence, the complaint charging him with an offence is dismissed or withdrawn, or he is discharged upon indictment.

(4) No defendant shall be refused costs by reason only of the fact that the proceedings were properly brought and continued.

(5) No defendant shall be refused costs by reason only of the fact that in the investigation of the offence with which he had been charged he remained silent or refused to assist in respect thereof.

11. There appears to be no overview of the current legal position for this area of the law throughout Australia. It is, however, possible to say that a successful defendant in criminal proceedings is likely to be awarded costs in cases of summary offences but with the

exception of Tasmania and New South Wales not necessarily in all cases of indictable offences. It should, however, be remembered that the general availability of legal aid in cases of criminal offences is now such that the absence in Australia of statutory enactments similar to the United Kingdom's Costs in Criminal Cases Act may not be quite such a handicap as might be thought at first glance.

12. As noted, courts of summary jurisdiction are generally given a discretion to make an order for costs in favour of successful complainants or defendants. In such provisions there is usually nothing to indicate that any different principles are to be applied in awarding costs against unsuccessful parties depending upon whether they are complainants or defendants, or depending upon whether (being complainants) they happen to be police officers or not. However, there appears to be a practice whereby costs are awarded against unsuccessful defendants almost as a matter of course, whereas costs are awarded against unsuccessful complainants who happen to be police officers only in unusual circumstances, such as where the police have acted unreasonably in laying or proceeding with the complaint. Such a practice was rejected by the Full Court of South Australia as "offending against the conception of evenhanded justice" (Hamdorf v. Riddle, (1971) S A S R 398). An example of the legislation is Victoria's Justices Act 1958, which provides:

S.105. The power of a magistrates' court to award costs and the award of costs by any such court shall be subject to the following provisions:

- (1)
- (2) Where the court dismisses the information or complaint, or makes any order in favour of the defendant it may in its discretion in and by its order of dismissal or other order award and order that the informant or the complainant respectively shall pay to the defendant such costs as to such court seem just and reasonable;
- (3) The sums allowed for costs shall in all cases be specified in the conviction or order or order of dismissal;
- (4) Any sum adjudged awarded or ordered to be paid whether to an informant or complainant or to a defendant for costs including any such sum for costs alone may be raised and levied by distress under the provisions of this Act and in the case of costs adjudged awarded or ordered on a conviction for a fine may be raised and levied by a separate warrant of distress;
- (5) When any case is adjourned the court may in its discretion order that the costs of and occasioned by the adjournment be paid by any party to any other part;

(ii) Barbados

13. Magistrates' courts are empowered to award costs by s.120 of the Magistrate's Jurisdiction and Procedure Act, Cap. 116. This is severely circumscribed as it is limited to costs other than legal costs (note s.120(11)). It is further restricted by s.120(3) where the prosecution is brought by public authorities.

14. Section 120 provides as follows:

S.120. Subject to the provisions of any other enactment to the contrary, on the trial of an information or hearing of a complaint, a magistrate shall have power in his discretion to make such order as to costs -

- (a) on convicting the accused or making the order for which the complaint is made, to be paid by the accused or defendant to the informant or complainant;
- (b) on dismissing the information or complaint, to be paid by the informant or complainant to the accused or defendant, as he thinks reasonable.

(2) Notwithstanding subsection (1), where the complaint is for an order for the periodic payment of money or for the revocation, revival or variation of such an order or for the enforcement of such an order, the magistrate may, whatever adjudication he makes, order either party to pay the whole or any part of the costs of the other.

(3) No costs shall be awarded against a constable, public officer or officer in the service or employment of the Interim Commissioner for Local Government prosecuting any information or complaint is dismissed and the magistrate is of opinion that the information or complaint was frivolous or vexatious.

(4) Where a magistrate has dismissed any information or complaint and is of opinion that the information or complaint was frivolous or vexatious, he may also with the consent of the accused or defendant, order the informant or complainant to pay to the accused or defendant a reasonable sum, not exceeding one hundred dollars, as compensation for the trouble and expense to which the accused or defendant may have been put, by reason of such information or complaint, in addition to his costs.

(5) The consent of the accused or defendant to any such order for compensation shall be a bar to any subsequent civil proceedings for false imprisonment or malicious prosecution by him against the informant or complainant.

(6) Where a magistrate has convicted an accused or made an order against a defendant, he may, in addition to the sentence or penalty, if any, imposed on such accused or defendant and to any costs ordered under subsection (1) or (2) and subject to subsections (7) and (8), order the accused or defendant to pay to the informant or complainant or any other person such compensation, not exceeding one thousand dollars, as to the magistrate may seem just and reasonable.

(7) The magistrate shall not award compensation in respect of damages for injury or loss suffered by the informant or complainant as a result of the offence or matter upon which the information or complaint was founded unless the informant or complainant or such other person consents.

(8) The award of any such compensation mentioned in subsection (7) shall release the accused or defendant from all other civil proceedings for the same cause.

(9) The amount of any costs or compensation ordered to be paid under subsection (6) shall be specified in the conviction, order or order of dismissal, as the case may be.

(10) Any order for payment of costs made against an accused or a defendant may include costs of and attendant upon his apprehension.

(11) No order for payment of costs made under this section shall include any fees to attorney-at-law.

(12) Subject to subsection (13), any sum of money awarded for costs or compensation under this section shall be enforceable as a sum adjudged to be paid by conviction or order.

(13) Any costs or compensation awarded on a complaint for an affiliation or maintenance order or for the enforcement, variation, revocation, discharge or revival of such an order, against the person liable to make payments under the order shall be enforceable as a sum ordered to be paid by an affiliation order or a maintenance order, as the case may be.

15. The High Court has a general discretion to grant costs in all cases heard by it.

(iii) Canada

16. The question is under active review in a number of Canadian jurisdictions.

17. In 1973, the Law Reform Commission of Canada in a Study Paper recommended a Federal scheme for the compensation for the acquitted accused. The Law Reform Commission will be reviewing the matter in the future, but probably not before they have completed their work on the Criminal Law Review. In 1974, the Law Reform Commission of British Columbia recommended legislation permitting an award of costs to a successful defendant in cases prosecuted under Provincial statutes. No action has been taken on this recommendation. The Law Reform Commission of Saskatchewan is studying the question, but has not yet reported. The Canadian Bar Association has undertaken a study of the question arising out of discussions on the issue at the 1982 Annual Meeting. The Government of Ontario is also examining the question.

18. The review in Ontario arises out of a prosecution in which in 1982, after a hearing of fifty sitting days (probably the longest preliminary inquiry in the history of Canada) a finding of no case to answer was made and a defendant discharged. Press reports estimate legal costs at £75,000.

19. The range of options tentatively identified by one Canadian researcher are as follows:

- (a) the formalising of an ex gratia scheme, with a panel of High Court judges advising Cabinet (as recommended by the Ontario Royal Commission on Civil Rights);
- (b) conferment of judicial discretion (viz: Barbados);
- (c) conferment of judicial discretion with guidelines (viz: UK ; New South Wales; Tasmania).
- (d) establishment of an independent tribunal along the lines of the Criminal Injuries Compensation Board (suggested in a Working Paper of the Law Reform Commission of Canada);
- (e) retrospective waiving of guidelines on legal aid to enable a successful defendant, who was not legally aided, to be granted such aid (suggested by the Law Reform Commission of British Columbia);
- (f) creation of a new sort of "improper prosecution" so as to downgrade the requirements of establishing malicious prosecution.

(iv) Jamaica

20. In common with most Commonwealth jurisdictions, there is no provision for costs as such in Jamaican law. Such compensation can only be obtained through an action for malicious prosecution.

(v) Kenya

21. The general position in Kenya is that unless an acquitted person succeeds in bringing an action for malicious prosecution, there is no power for the court to award costs against the prosecution. The Criminal Procedure Code does, however, provide by s.171 for costs to be awarded against a person who is convicted. They may only be awarded in favour of a person who is acquitted of charges brought by private prosecutor, provided that

- (a) such costs shall not exceed one thousand shillings in the case of an acquittal or discharge by the High Court or five hundred shillings in the case of an acquittal or discharge by a subordinate court;
- (b) no such order shall be made if the judge or magistrate considers that the private prosecutor had reasonable grounds for making his complaint.

(vi) New Zealand

22. The statutory basis for awards of sums of money "towards the costs" of acquitted defendants is to be found in the Costs in Criminal Cases Act 1967, s.5 of (which applies to all courts exercising jurisdiction in criminal cases) provides:-

S.5 Costs of successful defendant - (1) Where any defendant is acquitted of an offence or where the information charging him with an offence is dismissed or withdrawn, whether upon the merits or otherwise, or where he is discharged under section 179 of the Summary Proceedings Act 1957 the Court may, subject to any regulations made under this Act, order that he be paid such sum as it thinks just and reasonable towards the cost of his defence.

(2) Without limiting or affecting the Court's discretion under subsection (1) of this section, it is hereby declared that the Court, in deciding whether to grant costs and the amount of any costs granted, shall have regard to all relevant circumstances and in particular (where appropriate) to -

- (a) Whether the prosecution acted in good faith in bringing and continuing the proceedings;
- (b) Whether at the commencement of the proceedings the prosecution had sufficient evidence to support the conviction of the defendant in the absence of contrary evidence;

- (c) Whether the prosecution took proper steps to investigate any matter coming into its hands which suggested that the defendant might not be guilty:
 - (d) Whether generally the investigation into the offence was conducted in a reasonable and proper manner:
 - (e) Whether the evidence as a whole would support a finding of guilt but the information was dismissed on a technical point:
 - (f) Whether the information was dismissed because the defendant established (either by the evidence of witnesses called by him or by the cross-examination of witnesses for the prosecution or otherwise) that he was not guilty:
 - (g) Whether the behaviour of the defendant in relation to the acts or omissions on which the charge was based and to the investigation and proceedings was such that a sum should be paid towards the costs of his defence.
- (3) There shall be no presumption for or against the granting of costs in any case.
- (4) No defendant shall be granted costs under this section by reason only of the fact that he has been acquitted or discharged or that any information charging him with an offence has been dismissed or withdrawn.
- (5) No defendant shall be refused costs under this section by reason only of the fact that the proceedings were properly brought and continued.
23. The costs of a convicted defendant may also be contributed to, s.6 providing:
- S.6 Costs of convicted defendant - Where any defendant is convicted but the Court is of the opinion that the prosecution involved a difficult or important point of law and that in the special circumstances of the case it is proper that he should receive costs in respect of the arguing of that point of law, the Court may, subject to any regulations made under this Act, order that he be paid such sum as it considers just and reasonable towards those costs.
24. Costs on appeal are provided for in s.8:
- S.8 Costs on appeals - (1) Where any appeal is made pursuant to any provision of the Summary Proceedings Act 1957 or the Crimes Act 1961 the Court which determines the appeal may, subject to any regulations made under this Act, make such order as to costs as it thinks fit.
- (2) No defendant or convicted defendant shall be granted costs under this section by reason only of the fact that his appeal has been successful.
- (3) No defendant or convicted defendant shall be refused costs under this section by reason only of the fact that the appeal was reasonably brought and continued by another party to the proceedings.
- (4) No Magistrate or Justice who states a case in accordance with Part IV of the Summary Proceedings Act 1957 and no Judge who states a case shall be liable to costs by reason of the appeal against the determination.
- (5) if the Court which determines an appeal is of opinion that the appeal includes any frivolous or vexatious matter, it may, if it thinks fit, irrespective of the result of the appeal, order that the whole or any part of the costs of any party to the proceedings in disputing the frivolous or vexatious matter shall be paid by the party who raised the frivolous or vexatious matter.
- (6) If the Court which determines an appeal is of opinion that the appeal involves a difficult or important point of law it may order that the costs of any party to the proceedings shall be paid by any other party to the proceedings irrespective of the result of the appeal.
25. Regulations may be made prescribing the heads of costs that may be ordered and the maximum scales of costs (s.13). The court may exceed any maximum scale "having regard to the special difficulty, complexity, or importance of the case."
26. However, the Secretariat has been informed by another country that the total costs

awarded between 1968 and 1972 averaged only \$1,000 per annum (i.e. about £450). As against this, in 1980 the High Court handled 2,550 indictments or informants involving 989 distinct persons, and in 1979 the Magistrates' Courts handled 295,612 cases. It appears that costs are seldom awarded, and that where they are, only modest sums are ordered.

(vii) Nigeria

27. Section 32 of the Constitution of the Federal Republic of Nigeria 1979 guarantees the right to personal liberty and, among other things, deals with arrest, detention and bail of persons arrested by the police or charged before the Courts. The Criminal Procedure Act (Cap. 43 of the Laws of the Federation - applicable to the Southern States) and the Criminal Procedure Code (Cap. 89 of the Laws of Northern Nigeria -applicable in all Northern States) have complementary provisions.

28. Specifically, section 299 of the Criminal Procedure Act (Cap.43) enjoins the Court in giving its decision at the conclusion of a trial, in addition to either discharging or convicting the accused, also to make such other order as to it may seem just. In addition to the foregoing, the following ancillary orders, (inter alia) may be made in favour of the victim of an offence or against the convicted accused, as the case may be:

(a) On Acquittal: Costs against a private Prosecutor

Section 258 provides that where an accused person is acquitted or discharged in a prosecution originally instituted on a summons or warrant issued by the court on the complaint of a private prosecutor, not being a person prosecuting on behalf of the State or any public officer prosecuting in his official capacity, the court may order the private prosecutor to pay to the accused such reasonable costs as it considers proper unless the court is of the view that the private prosecutor had reasonable grounds for starting the prosecution. This provision is subject to any other provision in any written law relating to the procedure to be followed in awarding of costs.

(b) Compensation to the accused for false and vexatious charge

Section 256 provides that if the court discharges or acquits any accused person and the judge or magistrate is of the opinion that the accusation against him was false and either frivolous or vexatious, the judge or magistrate may for reasons to be recorded, order compensation of a specified amount, not more than N20 to be paid to the accused person by the complainant.

29. The accused may refuse to accept the compensation under (b) but where he accepts it, the accused is precluded from any civil action in respect of the same injury.

30. The Northern Nigeria Criminal Procedure Code contains provisions corresponding to the foregoing.

31. Mention should also be made of the novel provisions of subsection (6) of section 32 of the Constitution which reads:

"Any person who is unlawfully arrested or detained shall be entitled to compensation and public apology from the appropriate authority or person; in this connection, "appropriate authority or person" means an authority or person specified by law."

(viii) United Kingdom

32. The material available suggests that in the Commonwealth the UK is the jurisdiction in which a successful defendant is most likely to have all or part of the costs he has incurred reimbursed.

33. The power to award costs in criminal proceedings depends on statute and is governed mainly by the Costs in Criminal Cases Act 1973, under which the court may order payment of costs out of central funds to the prosecutor and to a successful defendant and payment of costs by one party to the other. Costs out of "central funds" should normally be awarded to a successful defendant unless there are positive reasons for making a different order. An order may be made notwithstanding that the defendant has been granted legal aid. "Central funds" simply means money provided by Parliament.

34. In a Practice Note [1973] 2 All ER 592, the then Lord Chief Justice, Lord Widgery, stated

"Although the award of costs must always remain a matter for the court's discretion, in the light of the circumstances of the particular case, it should be accepted as normal practice that when the court has power to award costs out of central funds it should do so in favour of a successful defendant, unless there are positive reasons for making a different order. Examples of such reasons are:

- (a) Where the prosecution has acted spitefully or without reasonable cause. Here the defendant's costs should be paid by the prosecutor.
- (b) Where the defendant's own conduct has brought suspicion on himself and has misled the prosecution into thinking that the case against him is stronger than it really is. In such circumstances the defendant can properly be left to pay his own costs.
- (c) Where there is ample evidence to support a verdict of guilty but the defendant is entitled to an acquittal on account of some procedural irregularity. Here again, the defendant can properly be left to pay his own costs.
- (d) Where the defendant is acquitted on one charge but convicted on another. Here the court should make whatever order seems just having regard to the relative importance of the two charges, and to the defendant's conduct generally."

35. As has been observed by a number of writers, a decision by the court in exercise of such a discretion can involve an interpretation of a "not guilty" verdict, either as amounting to "not proven" or as being technical in nature and therefore undeserved. It can therefore place a gloss on the verdict, casting doubt on the verdict and thereby undermine the presumption of innocence (see, e.g. (1967) 40 Australian Law Journal (at page 411)).

36. Where a court has exercised its discretion in favour of making an award of costs out of central funds there is no further discretion to limit the amount awarded. Any provision of the Costs in Criminal Cases Act 1973 enabling any sum to be paid out of central funds, however, has effect subject to regulations prescribing rates or scales of payments of any costs so payable and the conditions under which such costs may be allowed.

37. Where costs are ordered to be paid out of central funds costs may be allowed as follows in respect of:

- (1) a witness for attending to give professional evidence, an allowance not exceeding the prescribed maximum and, where appropriate, a night allowance not exceeding such maximum;
- (2) an expert witness for attending to give expert evidence and for work in connection with its preparation, an expert witness allowance of such amount as the court considers reasonable;
- (3) a seaman who misses his ship for the purpose of attending to give evidence, an allowance in respect of loss of wages and maintenance;
- (4) a witness other than those named under heads (1) to (3) who attends to give evidence, a subsistence allowance in accordance with the prescribed scale and, where appropriate, a loss allowance not exceeding the prescribed maximum;
- (5) a witness who travels to or from court by public conveyance or private motor vehicle, a travelling allowance as prescribed;
- (6) a person employed as an interpreter, such allowance as the court may consider reasonable;
- (7) any prosecutor, defendant or appellant, or party to proceedings before a Divisional Court of the Queen's Bench Division, the same travelling and subsistence allowances as if he attended to give evidence other than professional or expert evidence.
- (8) any other person who in the opinion of the court necessarily attends for the purpose of the case otherwise than to give evidence, the same allowances as if he had attended to give evidence other than professional or expert evidence;
- (9) a written report made by a registered medical practitioner in pursuance of a request by the court, a medical report allowance in accordance with the prescribed scale.

B. Compensation for Persons Wrongfully Convicted

(ix) General

38. We are not aware of any Commonwealth jurisdiction which has a statutory scheme providing for compensation for persons who have been wrongfully convicted. It has, however, been suggested that in Nigeria such a person might seek redress under the Fundamental Rights provisions of the 1979 Constitution.

39. A number of Commonwealth countries are, however, party to the UN International Covenant on Civil and Political Rights, Article 6 of which provides:

"When a person has by final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is approved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

40. It has been suggested that this Article imposes upon a signatory an obligation to provide a statutory basis for such compensation as has been done in a number of European countries (cf. Compensation for Wrongful Imprisonment, JUSTICE, 1982).

41. Instead, Commonwealth jurisdictions have up till now dealt with the matter on an ex gratia basis, although a Royal Commission in New Zealand in 1980 was asked to suggest appropriate compensation, "if any", for a person convicted of two murders and subsequently granted a free pardon after serving eight years' imprisonment. Its recommendation of approximately NZ\$1,87,450.35 (£450,000), and which also embraced members of the person's immediate family, was accepted by the Government.

42. In 1982, a Report by JUSTICE (the British Section of the International Commission of Jurists) published a report entitled Compensation for Wrongful Imprisonment. It cites the following extract from a letter from the Home Secretary as being "the clearest statement of the position" in a case in which the Home Secretary has not intervened:

"The law makes no provision for ... payments to persons acquitted in the ordinary process of law, whether at trial or an appeal. If someone thinks he has grounds for compensation his legal remedy is to pursue the matter in the civil courts, by way of a claim for damages. In exceptional circumstances, however, the Home Secretary may authorise an ex gratia payment from public funds, but this will not normally be done unless the circumstances are compelling and there has been default by a public authority."

43. The JUSTICE Report recommends the establishing of an Imprisonment Compensation Board to deal with such cases, with the following guidelines:

- (a) After the Board has accepted a claim as falling within its jurisdiction and being worthy of consideration it may refuse or reduce compensation if it considers that:
 - (i) a conviction has been quashed on grounds that the Board regard as being mere technicality;
 - (ii) it would be inappropriate in view of the imprisoned person's conduct in respect of the matters which led to the criminal proceedings;
 - (iii) the applicant has failed to give reasonable assistance to the Board in its efforts to assess compensation.
- (b) In respect of paragraphs (a)(i) and (a)(ii) above the Board will normally only consider evidence which was advanced at the trial or at the hearing of the appeal, except that it may consider and take into account matters which have come to light in the course of a subsequent investigation.
- (c) Where the applicant's claim is accepted as coming within the provision of the Scheme the Board will grant compensation for:-
 - (i) expense reasonably incurred in securing the quashing of the imprisoned person's conviction;

- (ii) loss of earnings by the imprisoned person or any dependant person where such loss is a direct consequence of the imprisonment;
- (iii) any other expenses or loss which are reasonably incurred upon imprisonment either by the imprisoned person or any dependant person;
- (iv) pain suffering and loss of reputation suffered by the imprisoned person or by the imprisoned person's dependants.

The Board will reduce any award by the amount of any other compensation or damages already received by the claimant.

- (d) Compensation will not be paid if the assessment is less than £250.
- (e) A person compensated by the Board will be required to undertake that any damages, settlement or compensation he may subsequently receive in respect of his wrongful imprisonment will be repaid to the Board up to the amount awarded by the Board.
