41/91

SUPREME COURT OF VICTORIA

TAYLOR and ORS v GALLOWAY

Nathan J

23 September 1991

COSTS – CRIMINAL PROCEEDINGS – INFORMATION STRUCK OUT – DISCRETION TO AWARD COSTS TO DEFENDANT.

Where a criminal proceeding is struck out by a magistrate, the question of whether to award costs to the defendant does not fall squarely within the rubric of *Latoudis v Casey* (1990) 170 CLR 534 which applies to cases which should not have been brought or where a criminal charge has been dismissed. Accordingly, the circumstances of a particular charge which is struck out may be such as to make it just and reasonable to refuse an order for costs.

NATHAN J: [1] On 28 August 1989 family warfare broke out between the Taylors and the Grinters, both farming families near Stanhope. Scenes reminiscent of the Hatfields and McCoys, involving breaches of levee walls and the consequent flooding of farmland and the burning of motor cycles and other similar incidents, flavoured with the occasional assault, all occurred. I need not concern myself further with them.

It is sufficient to say that informations in respect of offences arising out of these incidents were laid and came on for their first hearing before the Magistrates' Court on 31 October 1989. The informations against the respondents were then adjourned because it was a mention day in which cases to be contested were assigned to suitable Magistrates' Courts at appropriate times.

Accordingly, on 7 March 1990 the informations came on for hearing a second time. They were not reached and were adjourned to 1 May 1990. On that day, they were again not reached and were adjourned for a fourth time, to 2 May 1990. It would appear there was insufficient time available to the court on that day and consequently the informations were further adjourned for the fifth time, to 12 July 1990.

On that occasion, informations laid against Mr Grinter were heard and disposed of. The prosecution witnesses being Taylor and his clan. It was agreed between the parties, entirely appropriately, it would not have been proper for the Magistrate to have disposed of the informations dealing with both families at the one time and place.

[2] Accordingly, for the sixth occasion, on 4 October 1990, the informations came on for hearing but this time were further adjourned because the prosecution was not ready to proceed. And so, for the seventh time, on 20 November 1990, the informations were called on for hearing. On this occasion, the matters were made returnable for 10 am in the morning but were not reached by the Magistrate until about 11. The prosecuting officer had become aware in the intervening hour, that the Grinters, witnesses for the prosecution, were not in attendance. Upon being called on for hearing the prosecutor informed the Magistrate that Mr Grinter and his wife were at their home but had no way of getting to the Court, and his son was at school. The prosecutor advised the Magistrate he had previously told the Grinters they were required to attend on that day and that they had agreed to do so. He informed the Magistrate that he had a police car at hand and was prepared to send that car out to the Grinter farm, have them collected and brought back to the Court, and that would take about an hour. The prosecutor asked for the matters to be stood down.

Mr Danos, who appeared for Mr Taylor and his clan, submitted that all informations should be struck out and added that delay had had a prejudicial effect upon his clients. The Magistrate acceded to that submission and, accordingly, all informations were struck out. The Magistrate said that he did so because of the number of previous adjournments and the inferences which he

could draw from the non-attendance of the witnesses. He said that these previous adjournments were not the fault of the **[3]** police. Mr Danos then made an application for his costs. The Magistrate refused to exercise his discretion in favour of Mr Taylor and the other persons against whom informations had been laid and said that as the matter was discretionary, they were not warranted in this case and he would not make any further order. I interpolate it must be taken that his previous comments, about the number of adjournments and the inferences to be drawn from the non-attendance of witnesses, must also be held to relate to the exercise of his discretion in respect of costs.

The appeal before me seeks an order that the order of the Magistrate, refusing to grant costs to Mr Taylor and his clan, be set aside and that the matters be referred to the Magistrates' Court at Echuca for re-hearing. It was contended the Magistrate was bound by the decision of *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534; 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287 and even if the Magistrate were not so bound, I am when I come to exercise my independent discretion as to any appropriate order for costs.

That case substantially altered the position in Victoria so far as successful defendants in criminal proceedings were concerned. The Chief Justice, at CLR p542, said:

> "In ordinary circumstances it would not be just or reasonable to deprive a defendant who has secured the dismissal of a criminal charge brought against him or her for an order for costs. To burden a successful defendant with the entire payment of the costs of defending the proceedings is in effect to expose the defendant to a financial burden which may be substantial, perhaps crippling, by reason of the bringing of a criminal charge which, in the event, should not have been brought. It is inequitable that the defendant should be expected to bear the financial burden of exculpating **[4]** himself or herself, though the circumstances of a particular case may be such as to make it just and reasonable to refuse an order for costs or to make a qualified order for costs."

He also said, at CLR p544:

> "Nevertheless, I am persuaded that, in ordinary circumstances, an order for costs should be made in favour of a successful defendant. However, there will be cases in which, when regard is had to the particular circumstances, it would not be just and reasonable to order costs against the prosecutor or to order payment of all the defendant's costs."

Mr Justice Toohey who, together with the Chief Justice, formed part of the majority, said at CLR p565:

> "It is unnecessary to speak in terms of a presumption (that is the presumed entitlement to costs); it is enough to say that ordinarily it would be just and reasonable that the defendant against whom a prosecution has failed should not be out of pocket."

Now, it must be noted that this judgment was handed down on 20 December 1990, that is one month after the Magistrate had made his order, when the previous position prevailed. That is that there was no presumption a successful defendant was entitled to costs.

Mr Danos contended before me that even in the pre *Latoudis v Casey* days there was still a discretion available to a Magistrate to grant costs and, in this case, the same should have been ordered. He said that no fault had been established on the part of the defendants and there was no conduct on the defendant's part which would disentitle them to costs. He contended that they had been forthright with the police from the very outset and had at all times said the matter would be contested. He contended that as they themselves had incurred real and substantial costs they should not now be disadvantaged by the inability of the prosecution to have proceeded.

[5] In my view, there is no substance to an argument that a Magistrate must be seen to be bound by a change in the law which post-dates his decision. The proposition need only be stated to realise how impossible it is. Accordingly, I must look at the exercise of the Magistrate's discretion in the light of the law as it was at the time he exercised it. At that time, there was no presumption, or no general guidelines, as indicated by the Chief Justice in *Latoudis'* case, that in ordinary circumstances it would not be just or reasonable to deprive a defendant who had secured the dismissal of a criminal charge against him from his entitlement to costs. In the terms of Toohey J's remarks, "it would ordinarily be just and reasonable that the defendant against whom a prosecution has failed should not be out of pocket."

When I look at the Magistrate's exercise of discretion at the time, I can find no fault in it. It is aligned perfectly with the general principles of the law as it then was. He took into account the number of times the matters had been adjourned and the failure of the prosecution witnesses to attend and the proper inference that he might draw therefrom.

However, a critical matter in this case is not that the defendants were successful after the conclusion of a prosecution case again them. They were successful in having a matter struck out; that is, set to one side and not finally disposed of. Kaye J in *R v McGowan* [1984] VicRp 78; (1984) VR 1000, and particularly at 1002, His Honour accepted arguments previously put to the Court in *Aiken v Aiken* [1941] VicLawRp 27; [1941] VLR 124; [1941] ALR 159 and said:

> **[6]** "It is clear that the Chief Justice accepted counsel's submission and recognised that the action was still extant notwithstanding the order striking it out."

In this case, were I to exercise an independent discretion as to costs, which power I have under the Act, I would be in accord with the Magistrate's findings, and I shall elaborate the reasons very shortly. The fact is that this matter does not fall squarely within the rubric of *Latoudis v Casey*. It will be seen from the judgments which I have already read they are constrained to those circumstances where a charge has been brought unsuccessfully and disposed of after adjudication. The words of the Chief Justice were, in my view, carefully chosen and rest upon the predicate that the ordinary circumstances which would entitle a successful defendant to costs are "securing the dismissal of a criminal charge" or defending proceedings which, it is said, should not have been brought.

In this case, there has been no final adjudication. Accordingly, the matters which must exercise a Magistrate's mind are wider than those which would ordinarily prevail in a case where the issues of fact have been disposed of. Where a matter has been struck out, issues as to costs must necessarily be broad and include antecedent facts and matters anterior to entitlement at the close of criminal proceedings: see *Jones v Lenane*, an unreported decision of White J of the Supreme Court of South Australia, delivered on 6 April 1983.

In this case, the Magistrate was fully aware of the circumstances surrounding the prosecutions of both the **[7]** Taylors and the Grinters. He had had the benefit of a conference in chambers with counsel for both sides and had been told of the long standing feud. He knew, therefore, that this was a neighbourhood dispute and not like proceedings by a policeman against a citizen for an offence which the policeman himself had detected or had observed.

This was a case where the prosecutions of the Grinters on the one hand depended upon the evidence of Taylor and his clan and the prosecutions of Taylor and his clan depended upon the evidence of the Grinters. The Magistrate had been made aware by counsel, purposefully and intentionally, of the social circumstances in which these alleged offences had occurred. They were matters entirely appropriate for him to consider in the exercise of his discretion, as indeed they are for me, coming before me by way of the affidavit material.

The Magistrate must have known of the warnings that the police prosecutor had given to the Grinters of the adjourned hearing date. It is apparent they chose not to attend and one of the witnesses actually went to school. This was not a matter which could not proceed because of some lapse on the part of the prosecuting authorities or the police. This was a matter of which they could have had no knowledge and, in fact, appear to have been deliberately deceived by the Grinters. It is not a case in which any culpability can be laid at the door of the prosecutor.

In fact, the reverse can be said. The affidavit material discloses that the policeman was prepared to go out with a police car and bring in the Grinters from the outlying farm, but before that could be done, or put into **[8]** effect, the application to have the matter struck out was heard and disposed of. I find there was every assiduity displayed and every effort put into place by the prosecuting authorities to avoid having the matter struck out and that they should not, in the reasonable exercise of discretion, be now burdened with costs.

It must be noted that the Chief Justice in *Latoudis* did say that circumstances of a particular case may be such as to make it just and reasonable to refuse an order for costs. In my view, this is a case falling fairly and squarely within the terms of that proviso for the reasons I have already

given and this additional one. The matters had had seven hearings before a Magistrates' Court. The Magistrate heard that the essential prosecution witnesses either had not come or would not come or were at school. He was entitled then to take the view that the matter should be struck out. It had a long history. The non-appearance of the Crown witnesses carried with it inferences contrary to the prosecution case. In the context of a long standing family dispute, it could be said that one side had backed away from the final confrontation.

It is in this broad context that the exercise of the discretion must be examined. It provides circumstances in this particular case in which it would be quite reasonable, in my view, to refuse an order for costs. The community at large would be burdened by that order and not the Grinters. Although it placed a burden upon Taylor, *et al*, they had the advantage of having the immediate risk of prosecution and conviction removed. It is also a matter of notoriety **[9]** that matters struck out are very seldom reinstated.

Accordingly, the Taylors had had the advantage of having the criminal proceedings, in effect, dissolved without exposing themselves to the risk of conviction and further costs. The Magistrate in those circumstances was entitled to assume they had benefited by the striking out order and that was sufficient to render justice in the instant case.

Finally, it must be said that in circumstances where a Magistrate is silent as to the reasons for the exercise of his discretion there is no presumption that the silence indicates error. It follows from these reasons that the relief sought in the notice of motion will not be granted and it is dismissed.

APPEARANCES: For the plaintiffs Taylor, Shandley and Johnson: Mr T Danos, counsel. Morrison Sawers, solicitors. For the defendant Galloway: Mr BM Dennis, counsel. Director of Public Prosecutions.
