

39/91

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v COSTA

Young CJ, Kaye and Hampel JJ

28 November 1990

PROCEDURE – APPEAL COSTS FUND – APPEAL FIXED FOR HEARING – COURT MEMBER ILL – APPEAL NOT HEARD – WHETHER CIRCUMSTANCES APPROPRIATE FOR GRANTING CERTIFICATE: APPEAL COSTS FUND ACT 1964, S18(1).

Where an appeal was fixed for hearing before the Court of Criminal Appeal but was not heard on the day fixed due to the illness of one of the members of the Court, the circumstances did not justify the court granting a certificate pursuant to the provisions of s18(1) of the *Appeal Costs Fund Act 1964*.

YOUNG CJ: [1] This is an application by Antonio Costa for a certificate in connection with the hearing of an appeal to this Court which was originally fixed for hearing in June of last year. It could not be heard on the day fixed owing to the illness of one of the members of this Court. The very fact that the application is made so long after the event might, in some circumstances, be a ground for refusing it, but I think there are other more significant grounds in the present case. The application is supported by an affidavit of the solicitor for the appellant, who recounts the course of proceedings.

In substance, what the applicant now seeks is put in three different ways. Firstly, an application is made under s18(1)(a) of the Act, because the appeal was not heard on the day upon which it was originally listed for hearing. Mr Maxted valiantly sought to bring that circumstance within the phrase "any criminal proceedings being rendered abortive", but in my view the words are quite inappropriate to cover such a situation. Further than that, however, even if those proceedings were rendered abortive for any of the reasons set out in s18(1)(a), it does not appear that it is a matter that requires the certification of the Court.

Next it was said that, under s18(1)(d), where a criminal proceeding is adjourned by or on behalf of the prosecution, the presiding Judge may grant a certificate to the person described in the paragraph as the accused, stating the reason why the proceedings were adjourned, and that the reason why the proceedings were adjourned, and that the reason is not attributable in any way to the act, [2] neglect or default of the accused or his legal practitioner. Where such a certificate is granted, then the accused who incurs additional expense is entitled to be paid from the fund such costs as the Board considers to be reasonably incurred by him or on his behalf. The difficulty about applying that paragraph is that the appeal to this Court, if it be properly described as a criminal proceeding in a Court, was not adjourned by or on behalf of the prosecution, which is one of the necessary criteria in the paragraph.

Thirdly, Mr Maxted turned to s18(1)(c), which deals with the situation where the hearing of a civil or criminal proceeding is discontinued and a new trial ordered. In such a case, where it is a criminal proceeding, the presiding Judge may grant to the accused a certificate stating the reason why the proceeding is discontinued and a new trial ordered, but again that is not appropriate to cover the situation in the present case.

In both paragraph (c) and paragraph (d) the certificate provided for is a certificate which, *inter alia*, must state the reason for the discontinuance or adjournment, as the case may be, was not in any way attributable to the act, neglect or default of the accused or his legal advisers. It is not suggested in this case that what occurred in June, 1989 was in anyway due to the act, neglect or default of the accused or his legal advisers, and, insofar as that statement may assist the applicant to approach the Appeal Costs Board, the applicant is entitled to rely upon it. The circumstances, however, [3] do not justify the Court in granting a certificate for the reasons which I have outlined. The application, accordingly, will be refused.

APPEARANCE: For the applicant Costa: R Maxted, counsel. Purcell Balfe Webb, solicitors.