25/03; [2003] VSC 345

SUPREME COURT OF VICTORIA

CAUSOVSKI v DELAHUNTY and ANOR

Smith J

8, 15 September 2003

COSTS – CRIMINAL PROCEEDING ADJOURNED – APPLICATION BY WITNESS FOR COSTS AND EXPENSES BEFORE COMPLETION OF HEARING – APPLICATION REFUSED BY MAGISTRATE AS BEING PREMATURE – WHETHER MAGISTRATE IN ERROR: *MAGISTRATES' COURT ACT* 1989, SS43, 45, 131.

C., a legal practitioner, was sub-poenaed to attend the Magistrates' Court in relation to charges laid against one O'M. The charges were adjourned to a later date on which C. applied to the magistrate for an order for costs being loss of income in attending court. The magistrate refused the application on the ground that it was premature and that there was nothing to stop C. applying at an appropriate time later for his witness costs, expenses and losses. The charges were then adourned to a later date for a plea of guilty. Upon an Originating Motion seeking a declaration and an order in the nature of mandamus—

HELD: Application dismissed.
1. It is common ground that a Magistrates' Court has the power to award costs to a witness summoned to give evidence before it, including compensation for loss of income associated with the obligation to attend court.

2. The magistrate was not obliged to deal with C's application for costs. Normally, issues of witness costs and expenses are dealt with at the conclusion of the hearing, at which time the magistrate dealing with the matter is usually best placed to consider the question. If the proceedings resulted in a conviction and the imposition of a penalty it would also be relevant then to consider the question of costs.

3. Accordingly, it was appropriate for the magistrate not to deal with the application made by C.

SMITH J:
The Application
1. By Originating Motion filed 28 March 2003, the plaintiff, Dan Causovski seeks the following principal relief:

> "1. A declaration that the Second Defendant failed or refused to exercise jurisdiction in respect of the Plaintiff's application for costs. 2. An order in the nature of mandamus requiring the Second Defendant to hear and determine the Plaintiff's application for costs according to law."

Background to application
2. The plaintiff is a solicitor. In November 2001, he received instructions to act for a Mr O'Mara who had been charged by the first defendant, Sergeant Delahunty, with a number of criminal offences arising out of a crimes compensation claim brought by him.

3. In late December 2001, the plaintiff while perusing the police brief against Mr O'Mara became aware that his own name appeared on the list of Crown witnesses. The police brief contained what purported to be a summary of the evidence he would give, although he had not then (or since) provided a statement to the police in the matter. The plaintiff immediately ceased to act for Mr O'Mara.

4. On 12 August 2002 the plaintiff was served with a witness summons to give evidence in the proceedings against Mr O'Mara on 11 September 2002 at the Magistrates' Court at Dandenong (the second defendant). He deposes that he then incurred costs in seeking legal advice about his position.

5. On 5 September 2002, he was advised by Senior Constable Edwards of the Dandenong Prosecution's Office that the matter relating to Mr O'Mara had been adjourned for a contested hearing to 3 February 2003 at the Dandenong Magistrates' Court. There is no evidence that the Court excused the plaintiff from further attendance.[1] By letter dated 10 September 2002, the plaintiff advised the informant that further costs would be claimed because of the adjournment.

6. On about 12 September 2002, the informant advised the plaintiff by letter that he had not been "subpoenaed or re-subpoenaed" to attend on 3 February 2003 and that the witness summons related to 11 September 2002 only. He also stated that it was "not anticipated or expected" that the plaintiff would be "subpoenaed as a witness" to attend Court in the matter. The plaintiff deposes that he sought further legal advice following that correspondence.

7. On 17 January 2003, the plaintiff notified the informant by fax that he had briefed counsel to apply for costs and expenses occasioned to him by the witness summons and that the application would be made on 3 February 2003 at the Dandenong Court. On 22 January 2003, the plaintiff wrote to the informant seeking advice as to whether the plaintiff was required to attend the hearing.

8. By letter dated 2 February 2003, the informant, Mr Delahunty, responded to the plaintiff's letter indicating that he had only recently returned to work, that the matter had been adjourned to a Filing Hearing at the Melbourne Magistrates' Court and that the plaintiff was not required to attend the Dandenong Court on 3 February 2003. The letter advised the plaintiff to make any further inquiries at the Office of Public Prosecutions. Thus the plaintiff was informed that the matter was proceeding by way of committal hearing.

9. On 3 February 2003, counsel for the plaintiff applied for costs at the Dandenong Court. The application included an alleged loss of income resulting from the obligation to attend on 11 September 2002 and the costs of attending court on 3 February 2003. The application was refused. The transcript records that the learned Magistrate gave the following reasons.

> "The application for the costs in my view are premature. It may be that at the end of the hearing and on a close examination of all the facts and circumstances and evidence being called as to the application for costs in this case have been determined it may be that all of these costs are not entitled to be claimed and the application would be refused and as a result of that the appearance fee for today's application in addition is not appropriate. The application is refused."

10. Subsequently, the matters against Mr O'Mara were listed in the Melbourne Magistrates' Court for a plea of guilty on 4 August 2003. That fact was deposed to in an affidavit sworn by the first defendant on 16 July 2003, an affidavit delivered to the plaintiff in this proceeding. It was common ground that the matters referred to the committal process were the original three charges set out in the Charge and Summons (exhibit M D-1) and a charge of perjury. The plaintiff did not attend the August hearing or apply for costs on that occasion.

The issues

11. It is common ground that the Magistrates' Court has the power to award costs to a witness summoned to give evidence before it, including compensation for loss of income associated with the obligation to attend Court.[2]

12. Counsel for the plaintiff submitted that, in all the relevant circumstances, the learned Magistrate was obliged to consider and determine the application when made by the plaintiff on 3 February 2003. Counsel for the first defendant, submitted that this was not so. He argued further that this was not the occasion for the granting of a declaration and that the application for mandamus was misconceived. Counsel for the first defendant also submitted that as a matter of discretion, the application should be dismissed.

The Magistrate's decision and his obligations

13. The transcript of the proceedings makes it quite clear that the learned Magistrate, while refusing the application, did so on the basis that it was premature and that there was nothing to stop the plaintiff applying at an appropriate time for his witness costs, expenses and losses.

14. Counsel for the plaintiff, however, submitted that it was necessary for the learned

Magistrate to deal with the application there and then because the case was being transferred from a summary Magistrates' Court hearing to a committal hearing which would be under the control of the Office of Public Prosecutions and not the police. Counsel submitted that the case was changed from a criminal proceeding in the summary jurisdiction to an administrative proceeding. He relied upon *Grassby v The Queen*.[3] He argued that the learned Magistrate was *functus officio*. Counsel argued that it was appropriate that the application be dealt with because there were many possible scenarios that could occur that would disadvantage his client in that the matter could be concluded without his knowledge and the opportunity to have his claim for witness costs and expenses determined; he mentioned possibilities such as a guilty plea, direct presentment, death of Mr O'Mara, withdrawal of charges, appeals and re-trials.

15. It is not enough for the plaintiff to argue that it was appropriate that the application be dealt with by the learned Magistrate. The plaintiff, to succeed, must demonstrate that the learned Magistrate was obliged to deal with the application there and then.

16. In my view, he was not obliged to deal with it. Despite the informant's expectations, the possibility remained that the plaintiff might be called as a witness. Normally, issues of witness costs and expenses would be dealt with at the conclusion of the hearing in question, at which time the Magistrate dealing with the matter is usually best placed to consider the question. If the proceedings resulted in a conviction and the imposition of a penalty it would also be relevant then to consider costs questions because, if the accused is to be ordered to pay the costs of the informant (including witness costs and expenses) that is a matter relevant to any fine that might be imposed[4]. In my view the contrary proposition is correct – namely, that it was appropriate not to deal with the application at that time.

17. The *functus officio* argument is also not made out. The Magistrates' Court remained seized of the matter, a matter that had been commenced by charge and summons[5] and was merely transferred to the committal process, a change of procedure but not a new proceeding.[6] The witness summons continued to operate requiring attendance at any adjourned hearing.[7] It remained open to the plaintiff to apply for his witness costs and expenses to the Magistrate who dealt with the committal proceeding. The learned Magistrate who refused the application on 3 February 2003 was entitled to proceed on the basis that that option remained open and was the preferable course.

18. There is, in any event, a problem for the plaintiff in relying on the *functus officio* argument. If it is correct, an order in the nature of mandamus could not be made and the declaration sought would be refused as being pointless.

19. Accepting the above analysis, it cannot be demonstrated that the learned Magistrate was obliged to hear and determine the application on 3 February 2003. Accordingly the plaintiff has not made out his case for the declaration sought or for an order in the nature of mandamus to hear the application according to law.

Conclusion

20. The plaintiff having failed on the threshold question, it is unnecessary to consider the other matters raised by the first defendant in opposition to the application.

21. For the foregoing reasons, the plaintiff's application should be dismissed.

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[1] *Magistrates' Court Act* 1989, s45.
[2] *Magistrates' Court Act* 1989, ss43, 45, 131.
[3] [1989] HCA 45; (1989) 168 CLR 1 at 11, 16, 19; 87 ALR 618; (1989) 63 ALJR 630; (1989) 41 A Crim R 183.
[4] *Sentencing Act* 1991, section 3, 50.
[5] Exhibit MD1.
[6] See *Magistrates' Court Act* 1989 Part 4, Division 2, especially ss26, 28, 53, 56.
[7] *Magistrates' Court Act* 1989, s45.

APPEARANCES: For the plaintiff Causovski: Mr M Gurvich, counsel. H & C Lawyers. For the defendant Delahunty: Mr BM Dennis, counsel. Victorian Government Solicitor.
