7/98

SUPREME COURT OF VICTORIA

LOVEJOY v JOHNSON and ANOR

Coldrey J

28 August, 20 October 1997

COSTS – UPON DISMISSAL OF CHARGES – FIRST HEARING ABORTED – CERTIFICATE UNDER *APPEAL COSTS ACT* 1964 GRANTED – NO CLAIM MADE TO THE BOARD FOR PREPARATION COSTS OF FIRST HEARING – APPLICATION FOR SUCH COSTS ON SECOND HEARING – APPLICATION REFUSED – WHETHER MAGISTRATE IN ERROR – RELEVANT CONSIDERATIONS WHEN DEALING WITH A CLAIM FOR COSTS – WHETHER INTEREST ON THE CLAIM ALLOWABLE: *MAGISTRATES' COURT ACT* 1989, S131; *SUPREME COURT ACT* 1986, S66(2).

Following disqualification on the grounds of bias, a magistrate adjourned charges against L. to a date to be fixed and granted L. a certificate under the *Appeal Costs Act* 1964. The charges were subsequently listed and following their dismissal, an application for costs was adjourned pending the outcome of the claim before the Appeal Costs Board. No claim was made by L. to the Board for the preparation costs incurred prior to the adjournment of the first hearing. When the application for costs later came on for determination, the magistrate declined to make an order for the preparation costs on the grounds that such a claim was covered by the certificate. Upon appeal—

HELD: Appeal allowed. Matter remitted for re-determination of the whole question of costs according to law.
1. The application made to the Board did not include preparation costs and there was nothing in the certificate to indicate that such costs were included in its authorisation for payment. Accordingly, the magistrate was in error in failing to consider the claim for preparation costs and by ruling that they were covered by the certificate.

2. *Obiter*. (a) In awarding a successful defendant costs, full indemnification is not required. The fixing of costs requires the identification of whether each item of the claim was reasonably incurred and is reasonable in amount. There is no general principle requiring a magistrate to order whatever amount a defendant's legal practitioner may have chosen to charge the client or whatever costs the solicitor and client may have agreed between themselves.
***Norton v Morphett & Anor* (1995) 83 A Crim R 90; MC15/95, applied.**

(b) In conducting a costs hearing, a magistrate is not obliged to require the prosecution to provide a list of objections to a Bill of Costs produced to the court.

(c) Section 66(2) of the *Supreme Court Act* 1986 has nothing whatsoever to do with the exercise of the cost discretion by a magistrate.

COLDREY J: [1] These are appeals pursuant to s92 of the *Magistrates' Court Act* 1989. Since they cover identical issues they were heard together. The facts, insofar as they are relevant, are as follows. On 30 May 1995 the appellant, Adam Acintya Lovejoy, was charged by Constable B. Johnson as informant that he:

> "... at Melbourne on 03/03/1995 did wilfully trespass in a place namely David Jones (Australia) Pty. Ltd. situated at 310 Bourke Street Melbourne, and did refuse to leave that place after being warned to do so by William Murphy, who was authorised by or on behalf of the occupier."

A similar charge was brought by Senior Constable B. Gainger as informant for the date of 4 March 1995. The appellant retained the firm of Kuek & Associates to act in his defence. The hearing of the matter commenced on 22 March 1996 at the Melbourne Magistrates' Court. On 7 May 1996, being the eleventh non-consecutive day of summary trial, the presiding Magistrate Ms Popovic, after learning of information which is not relevant to this appeal, disqualified herself on the ground of bias and adjourned the further hearing of the matter to a date to be fixed. Ms Popovic also granted a certificate to the appellant pursuant to s18(1)(d) of the *Appeal Costs Act* 1964.

It appears that the Magistrate also held an informal "Contest Mention" in which she expressed the view that the prosecution would ultimately fail. However the matter was not resolved and the charges were re-listed for hearing on 3 September 1996. During the first day of the adjourned hearing the new Magistrate, Mr Mason, indicated his view that the prosecution could not succeed. Nonetheless the charges were not withdrawn and ultimately on the second day the Magistrate dismissed them. According to the affidavit of the appellant's solicitor Mr Gabriel Kuek, affirmed on 13 June 1997, and other material before this Court, the fixing of costs in the second proceeding was adjourned to a date subsequent to the determination by the Appeal Costs Board of the application pursuant to the certificate granted by Magistrate Popovic, for reimbursement of the costs "thrown away". The costs sought comprised **[2]** counsel's fees of $19,200 and instructing solicitors fees of $8,800 for the eleven days of the initial hearing. No claim was made for any costs of preparation incurred prior to 7 May 1996. According to Mr Kuek's affidavit, the limited claim made was because he did not consider any work done, other than for the eleven days of hearing, were additional costs that could not be re-used in the second hearing.

On 7 March 1997 notification was received from the Registrar of the Appeal Costs Board that the Board had approved the reimbursement of the full amounts claimed. Thereafter attempts to negotiate a settlement of the outstanding costs were unsuccessful and the matter was re-listed before Mr Mason for taxation on 14 May 1997.

During the course of these proceedings Magistrate Mason indicated that he regarded all costs prior to 7 May 1996 to have been covered by the Appeals Costs Fund Certificate granted by Magistrate Popovic. Accordingly, the Magistrate declined to consider any of the items set out in the appellant's Bill of Costs which were incurred before 7 May 1996 (namely items 1-164). These items (which may broadly be termed preparation costs) totalled $14,096.20. (The Bill of Costs is Ex.GK4 to Mr Kuek's affidavit.) Mr Mason went on to consider the balance of the items listed in the Bill of Costs, namely items 165 to 202. Ultimately he ordered costs of $5,875 against each of the respondents. No order was made as to interest. A breakdown of the total amount is set out in para.154 of Mr Kuek's affidavit.

The primary questions of law determined by Master Evans to be raised on this appeal, are as follows:

> "(a) Did the learned Magistrate err in law in that he ruled the Indemnity Certificate granted by Popovic M, covered all costs incurred by the appellant before the 7th May 1996?
>
> **[3]** (b) Did the learned Magistrate err in law in that he ruled that he could not consider the claim for costs relating to professional work done before the hearing of the matter on the 7th May 1996?
>
> (c) Did the learned Magistrate err in law in that he ruled that he would not hear evidence of the items numbered 1 to 164 on the Bill of Costs produced to the Court?
>
> (d) Did the learned Magistrate err in law in that he ruled that he would not hear evidence of all costs incurred by the Appellant and then subtract the amount of costs covered by the Indemnity Certificate granted by Popovic M on the 7th May 1996?"

Further questions, being (e) to (h), appear in the Master's Order but Mr Perkins, who appeared on behalf of the appellant, intimated that it was the questions to which I have referred that required answers and, if the matter was remitted to the Magistrate for re-hearing, the other matters could be dealt with at that time. Nonetheless I will refer back to these questions in due course.

In arguing that the Magistrate had erred by failing to consider any items of costs incurred prior to 7 May 1996, Mr Perkins relied on the decision of the Court of Appeal in *Murphy v Obst & Ors* [1996] VICSC 11; [1996] VicRp 90; [1996] 2 VR 613; (1996) 86 A Crim R 51. Whatever the precise ambit of that case, it is clear that the only costs for which a person in the position of the appellant was entitled to reimbursement were those costs which were "thrown away" when replicated in nature by costs incurred in the second proceeding.

Mr Corrigan, who appeared on behalf of the respondents, submitted that on a proper reading of *Murphy's Case* (*ibid.*) the benefits the appellant derived from the first hearing, which included learning precisely how the prosecution case was put, meant that it could not be said

that a total of eleven hearing days were wasted. Further, it was submitted that the Appeal Costs Board had been extremely generous to the appellant in granting total indemnity for counsel and solicitors fees rather than an amount of costs which had been "reasonably incurred".

I think there is some merit in both those contentions. For example, on one view an allowance of $800 per day for an instructing solicitor in a summary proceeding **[4]** in the Magistrates' Court, where counsel usually appear uninstructed, may be regarded as bordering on munificent. However, it is not for me to speculate upon the reasoning processes of the Board. No doubt they endeavoured to apply the decision in *Murphy's Case* in making their determination. I would however, make the general observation that in awarding a successful defendant costs, according to the principles enunciated in *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534; (1990) 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R, full indemnification of costs is not required. As the Court of Appeal stated in *Norton v Morphett* (1995) 83 A Crim R 90, the fixing of costs requires the identification of whether each item that goes to make up the total costs claim was reasonably incurred and is reasonable in amount.

Moreover, there is no general principle requiring a Magistrate exercising the broad costs discretion under s131 of the *Magistrates' Court Act* 1989, to order, as costs against an informant, whatever amount a defendant's legal practitioner may have chosen to charge the client or whatever costs the solicitor and client may have agreed between themselves.

In any event, I do not propose to attempt to second guess the Appeal Costs Board in its determination in the instant case. What is clear from the documentation is that the application made to the Board on behalf of the appellant did not include preparation costs and there is nothing in the certificate of the Appeal Costs Board to indicate that any preparation costs were included in its authorisation for payment.

Mr Corrigan specifically declined to submit that the questions of law in paras (a) to (c) posed by the Master for determination should be answered in the negative. However, the essence of Mr Corrigan's submissions was that, even if the Magistrate had erred in law, this Court should, in the exercise of its own discretion, find that the total quantum of costs allowed by Mr Mason was more than adequate. It was put that considering the costs agreement struck between the appellant and his solicitor, the Magistrate had effectively allowed solicitor/client costs. A comparison was made between the counsel's fees his Worship allowed and those, for example, on the civil scale in the County Court.

[5] It is clear that there are no Rules of Court governing the award of costs in criminal proceedings in the Magistrates' Court, and, as I have said, s131 of the *Magistrates' Court Act* 1989 confers the widest discretion on the Court in relation to awarding costs and fixing their amount. In fixing costs, a Magistrate may have regard to scales of costs relevant in civil proceedings but is certainly not bound or limited by them. As the authorities indicate, the governing principle to be applied is one of reasonableness. Discussion as to the need for a Magistrate to give reasons on the issue of costs is found in *R v Sobh* 74 A Crim R 453 (a decision of Mandie J) and the approach to be adopted by a Magistrates' Court is the subject of further consideration in *Sobh v Childrens Court of Victoria and Ors*, an unreported decision of the Court of Appeal delivered on 31 July 1997.

In the present case the Magistrate erred in failing to consider at all the preparation costs incurred prior to 7 May 1996 and by ruling that the certificate granted by Magistrate Popovic covered all costs incurred by the appellant before that date. Hence questions (a) to (c) must be answered in the affirmative. Question (d) seems to relate to a particular approach it is said the Magistrate should have taken but I am not disposed to set out the methodology to be employed by a Magistrate in exercising the costs discretion.

Having decided that the Magistrate erred in law, what course should this Court adopt? I indicated to Mr Corrigan during argument that I did not intend to review the decision of the Magistrate by sifting through the 202 items on the appellant's Bill of Costs to determine what is or is not reasonable, particularly so since I do not have the benefit of the evidence of a costs expert which was given before him. Nor am I attracted to the global approach suggested by Mr Corrigan in which, rather than incur additional expense, he urged that I "exercise some rough sort of justice, determine that the overall result is appropriate and decline to intervene further".

On balance, I regard the better course as to remit the whole matter to the **[6]** Magistrate where the issue of costs will again be at large. No doubt in "applying the touchstone of 'reasonableness'" (Hayne J, p102, *Norton's Case* (*ibid.*)) the Magistrate will have regard to the relatively minor nature of the offences alleged and their level of complexity together with the fact that the benefit of any preparation reasonably undertaken prior to the initial hearing, will have persisted for the benefit of the appellant in the subsequent proceedings.

In an endeavour to avoid any further expensive appeals in this matter I think it desirable to briefly express my views on questions (e) to (h) formulated by the Master. These were:

> (e) Did the learned Magistrate err in law in that he refused the Appellant's application that the prosecution provide a list of objections to the Bill of Costs produced to the Court?
>
> (f) Did the learned Magistrate err in law in that he disallowed Item 201 being $1,520.00 for drawing and engrossing the Bill of Costs produced to the Court?
>
> (g) Did the learned Magistrate err in law in that he reduced Items 191 and 197 being for attendance at Court to $750 having allowed Counsel's fee in full for those days?
>
> (h) Did the learned Magistrate err in law in that he refused to award interest on the costs awarded having regard to Section 66(2) of the *Supreme Court Act* 1986?

In my view these questions may be answered simply as follows:

> (e) There is no obligation in law cast upon a Magistrate conducting a costs hearing to require the prosecution to provide a list of objections to a Bill of Costs produced to the Court;
>
> (f) The question as to whether costs ought to be allowed for the drawing and engrossing of the Bill of Costs itself is a matter for the Magistrate applying the touchstone of reasonableness;
>
> **[7]** (g) The principle to be applied is one of reasonableness and there is no necessary link between allowing counsel's fees in full and the total amount claimed by a solicitor for attending to instruct;
>
> (h) Section 66(2) of the *Supreme Court Act* 1986 has nothing whatsoever to do with the exercise of the cost discretion by a Magistrate.

In conclusion, whilst I have found an error of law in the instant case I believe the comments of Hayne J in *Norton's Case* (*ibid.*) although referring specifically to the situation in that case, are generally apposite with respect to hearings on the question of costs. His Honour stated (p104):

> "The proceedings below sought to challenge a discretionary decision about costs. No question of principle was shown to arise. Such proceedings are not to be encouraged; still less are further appeals. They are properly seen as an extravagant use of the resources of the courts and the parties."

APPEARANCES: For the Appellant Lovejoy: Mr D Perkins, counsel. Kuek & Associates, solicitors. For the Respondents: Mr MJ Corrigan, counsel. Victorian Government Solicitor.
