27/12; [2012] SASC 126

SUPREME COURT OF SOUTH AUSTRALIA

HUTCHINSON v POLICE

Kourakis CJ

5 July 2012

COSTS – COSTS UPON DISMISSAL OF CRIMINAL CHARGE – GENERAL RULE – COSTS FOLLOW THE EVENT – COSTS OF WHOLE ACTION.

This was an appeal against an order of a Magistrate refusing to make a costs order in favour of a successful defendant. The appellant was charged with theft, pleaded not guilty and defended the charge by explaining that her mental state was impaired as a result of a medical condition. The Magistrate found the appellant not guilty after she gave compelling evidence as to her medical condition. On the date of the alleged offence, the appellant declined to participate in a recorded interview. The appellant provided a medical report to the Criminal Justice Section of the South Australia Police before a complaint and summons were laid and provided a second medical report after the charge. Upon appeal the issues were: (1) whether there was good reason to not award costs to the successful defendant; (2) whether the appellant's conduct was unreasonable in the circumstances; and (3) whether the Magistrate took into account an irrelevant consideration, namely, whether material provided by the appellant to the Police was in admissible form.

HELD: Appeal allowed. Order dismissing appellant's costs set aside. Appellant to have costs in the Magistrates' Court.

1. In the ordinary course the discretion as to costs upon the dismissal of a criminal charge is to be exercised in favour of a successful defendant.

2. It follows from that statement of general principle that there must be good reason not to award costs to a successful defendant. It has been authoritatively held that the unreasonable manner in which the defence has been conducted may warrant a refusal to award a successful defendant costs. Indeed, even conduct before charges are laid that brings the prosecution on the defendant, might also justify a refusal of costs. Moreover, if a defendant acts unreasonably it is of no moment that he or she did so in the exercise of his or her right to silence.

***Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534; 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287, applied.**

3. However, the judgment as to whether a defendant's conduct was or was not unreasonable will necessarily be influenced by the common law conception of a criminal trial which includes, amongst its incidents, the right to silence.

4. The Magistrate made two errors which vitiated the exercise of the discretion not to award costs. First, the Magistrate had regard to an irrelevant consideration, namely, whether the material provided by the appellant's legal practitioner to the police was in admissible form. There was no such requirement in the authorities. It is difficult to see why there should be such a requirement as a matter of principle. It would impose a very onerous burden on defendants in the course of negotiations with police. It cannot be said that it is unreasonable of a defendant not to go to the great trouble which would be necessary to put material in an admissible form. Secondly, the Magistrate asked herself the wrong question. The passages from the Magistrate's reasons showed that the Magistrate addressed the question of the reasonableness of the police in proceeding to trial, and not whether some particular aspect of the defendant's conduct was unreasonable.

5. Accordingly, the appeal was allowed and the matter remitted to the Magistrates' Court for an assessment of the quantum of the costs on dismissal, should the parties fail to agree them.

KOURAKIS CJ: (*ex tempore*):

1. This is an appeal against an order of a Magistrate refusing to make a costs order in favour of the defendant, who had successfully defended a complaint of theft made in the Magistrates Court.

The Alleged Offence and the Proceedings

2. On 9 June 2011 the appellant was witnessed by a security guard employed at the Semaphore Foodland placing a number of items into a cooler bag in her trolley, and certain other items into a handbag which was in her trolley.

3. The appellant proceeded to a checkout where she paid for the items in the cooler bag but did not pay for the items in her handbag. Shortly thereafter police arrived. The appellant declined to participate in a formal record of interview but did tell the police officers in explanation of her conduct that she had forgotten about the items in her handbag. The appellant had also told the security officer who spoke to her that she was "not thinking".

4. The history of the subsequent proceedings which follows is taken largely from the respondent's helpful outline of argument. The appellant was reported for the offences on 9 June 2011. She declined to answer questions when interviewed by police on that date. A complaint and summons charging a single count of theft were executed and filed on 16 August 2011.

5. In the interim, the appellant's solicitor wrote to the officer in charge of the Criminal Justice Section of the South Australia Police on 23 June 2011 attaching a brief medical report of Dr Nelson-Marshall, a general practitioner, dated 10 June 2011 (the 'first letter' and 'first report' respectively).

6. The relevant passage of the first report read:

> The patient has attended this surgery suffering with influenza and cystitis and both of these conditions would explain Carol's confused state. Carol is in the midst of urodynamic studies at the QEH for her incontinence (10 June 2011).

Nothing in the first report suggested that the general practitioner was aware of the allegations against the appellant, nor did it detail how or why the appellant's condition caused her to be confused.

The first medical report was accompanied by, as I have said, a covering letter. The first letter emphasised that:

> The doctor indicates that the fever associated with her influenza and also her cystitis would both have contributed to her confusion and therefore her forgetfulness on this occasion. Could this letter and the note from Dr Nelson-Marshal be provided to the officer adjudicating the brief as to whether a charge should be laid in relation to this matter.

7. Notwithstanding receipt of the first letter the proceedings against the appellant were commenced.

8. It is apparent from the history so far recited that even before the summons was issued the Criminal Justice Section of the South Australia Police was aware that the appellant's defence to the charge was that she had forgotten because of a medical condition. I accept that the details of that defence were sparse, but it can not be doubted that the police were informed of its essential nature.

9. After the appellant was charged, a further medical report, dated 15 September 2011, was sent to the Criminal Justice Section of the South Australia Police attached to a covering letter dated 21 September 2011 (the 'second report' and 'second letter' respectively).

10. The relevant passages of the second report provided:

> This patient attended my surgery on 10 June. She had a distressing infection of her bladder (cystitis) which had been present for at least two days prior to her consultation. Unfortunately when this occurs in pre-menopausal or menopausal females the only symptom that occurs is not only fever with the generalised aches and pains but also urinary incontinence which can occur quite unexpectedly. At the same time Carol had acute viral influenza with sneezing and coughing both of which would make incontinence impossible to control.

11. The second letter urged the Criminal Justice Section of the South Australia Police to

withdraw the complaint in the following terms:

> I refer to the report of Dr Nelson-Marshal dated 10 June 2011 and the more comprehensive report dated 15 September 2011 which was provided to the prosecutor in court on 20 September. These reports establish that because of the effects of medication being taken by Ms Hutchinson and the distracting symptoms being experienced while she was attempting to shop there is clearly scope for her to have placed items into the wrong bag. I note that in the conversation with the store detective Ms Hutchinson is recorded as saying "I'm not thinking". That state of mind would be consistent with the content of the medical report.

12. The second letter again requested that the material be provided to the adjudicating officer so that it might be discontinued because of the lack of any reasonable prospect of success.

13. The Criminal Justice Section of the South Australia Police rejected the proposal put by the appellant's solicitor by a letter dated 1 December 2011, which advised:

> We will be proceeding with the charge, Ms Hutchinson was using a trolley at the same time yet chose to place 12 items in her handbag instead of the trolley. We cannot accept this was simple absentmindedness given the quantity of the items and the fact that she was using a trolley specifically designed for the transport of items on sale in the shop to the checkout. It appears she was able to remain at the shop, once detained, for approximately 40 minutes without any incident relating to her ailments. I suggest if the matter is to remain disputed the matter be set for trial.

14. The pre-trial conference was held on 2 December 2011 and a date was fixed for trial. The appellant's solicitor did not raise either the question of the appellant's medical condition or its effects on her at the time of the commission of the offence. That is not at all surprising given the preceding correspondence and, in particular, the position taken by the Criminal Justice Section of the South Australia Police in its letter of 1 December 2011.

15. At the conclusion of the trial on 24 January 2012, the Magistrate found the appellant not guilty after the appellant gave what the Magistrate described as 'compelling' evidence of her medical condition and its effect on her on the day of the alleged offence.

The Reasons

16. The appellant applied for costs. The Magistrate declined to make an award for costs. The appellant now appeals against that order.

17. The grounds of appeal are as follows:

> 1. The Magistrate incorrectly concluded that because the appellant failed to engage in a formal record of interview with police that there was no potentially admissible evidence from the appellant as to the affect of her medical condition and therefore it was not appropriate to award any costs.
>
> 2. The Magistrate failed to adequately take into account statements made by the accused to the store security officer and to the police on the date of the alleged offence.
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> 3. The Magistrate failed to adequately take into account the medical reports provided to police accompanied by correspondence from the appellant's solicitor asking the police to consider the content of the reports and to not charge the appellant or to discontinue the charge against the appellant in light of the medical evidence to be called at trial.
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> 4. In determining whether any of award of costs would be made the Magistrate failed to adequately take into account the terms of Rule 51 of the *Magistrates Court Rules* 1992 and the terms of the first schedule of those rules.

18. The Magistrate's reasons for refusing costs are to be found essentially in paragraphs [19] and [23]-[25] of her reasons:

> [19] Subject to a specific challenge, a record of interview will generally be admissible as against a defendant. An admission made to a Security Officer has not occurred following a police caution or in the context of a record of interview made to the police. A statement to a security officer or loss prevention officer may be the subject of a challenge as to its admissibility. Any material obtained from a lawyer during negotiations with prosecution would not be admissible as evidence against the defendant.

...

[23] I found a case to answer. The defendant gave evidence in her defence. Had the defendant not given the compelling evidence as to her medical condition on that day, I would have found the charge proven. The medical reports on their own would not have led to the same outcome.

[24] The evidence given by the defendant relating to her health could not have been known to anyone else other than the defendant. The evidence was personal to her. There was no indication when she was apprehended as to her condition. Her condition *may* manifest some outward symptoms – such as distress – but it is primarily a condition that is not evident to others. There were no symptoms evident on the day. The defendant did not deny the objective elements of the offence. The defendant was entitled to exercise her right to silence. She did that – when initially spoken to by the police and at all subsequent times. Without knowing how her medical condition was affecting her on that day, the evidence before the court formed a strong prosecution case. Her medical condition was not a static condition – it has the potential to vary from day to day. She was not totally incapacitated and indeed she maintained full time employment. On the day in question she was on sick leave. Her medical condition had the potential to flare up unexpectedly and without warning. The medical reports set out the background to her health condition. The reports are not evidence as to how the condition was impacting on the defendant when she was at the supermarket.

[25] There was disclosure by the defence of the medical material. There was no potentially admissible evidence from the defendant as to how her medical condition affected her on the day and in particular as how it affected her when she was leaving the supermarket.

Discussion

19. Section 189 of the *Summary Procedure Act* 1921 (SA) (the Act) provides:

> Subject to sections 189A to 189D (inclusive), the Court may award such costs for or against a party to proceedings as the Court thinks fit.

In the ordinary course the discretion so conferred will be exercised in favour of a successful defendant.[1]

20. It follows from that statement of general principle that there must be good reason not to award costs to a successful defendant. It has been authoritatively held that the unreasonable manner in which the defence has been conducted may warrant a refusal to award a successful defendant costs. Indeed, even conduct before charges are laid that brings the prosecution on the defendant, might also justify a refusal of costs.[2]

21. Moreover, if a defendant acts unreasonably it is of no moment that he or she did so in the exercise of his or her right to silence.[3]

22. However, the judgment as to whether a defendant's conduct was or was not unreasonable will necessarily be influenced by the common law conception of a criminal trial which includes, amongst its incidents, the right to silence.

23. It is important to emphasise that an award of costs will still, generally, be made on the dismissal of a complaint, even in those cases in which the prosecution has acted reasonably. The question is not whether the prosecution acted reasonably but whether the defendant acted unreasonably.[4]

24. In my view, the Magistrate has made two errors which vitiate the exercise of the discretion not to award costs. First, the Magistrate has had regard to an irrelevant consideration, namely, whether the material provided by the appellant's legal practitioner to the police was in admissible form. There is no such requirement in the authorities. It is difficult to see why there should be such a requirement as a matter of principle. It would impose a very onerous burden on defendants in the course of negotiations with police. It cannot be said that it is unreasonable of a defendant not to go to the great trouble which would be necessary to put material in an admissible form.

25. A defendant who fails to inform the prosecuting authorities of the essential nature of his or her defence might be said to have acted unreasonably for the purposes of the discretion as to costs, at least in cases in which the prosecutor would not otherwise be aware of the defence. A

case in which the ground on which the prosecution is successfully defended is peculiarly within the knowledge of the defendant and could not have reasonably been foreseen is an example. However, care must be taken before refusing a successful defendant costs for failing to disclose the evidential material in support of that defence. To refuse costs for that reason creates significant tension between the requirement of reasonableness for the purposes of the discretion as to costs and the common law conception of a criminal trial. Nonetheless, there may still be cases where a defendant's failure to disclose amounts to unreasonable conduct. For example, a refusal to provide any evidentiary confirmation of an alleged exculpatory circumstance that is subsequently accepted at trial might, in all the circumstances, be adjudged unreasonable.

26. Secondly, the Magistrate has asked herself the wrong question. The passages from the Magistrate's reasons that I have set out above show that the Magistrate has addressed the question of the reasonableness of the police in proceeding to trial, and not whether some particular aspect of the defendant's conduct was unreasonable.

27. From the time the first letter and first medical report were provided to the Criminal Justice Section of the South Australia Police, the prosecution was on notice that the appellant's defence was that she had forgotten to present the items in her handbag because of her confused mental state. The prosecution did not request greater details of the medical evidence, nor a more comprehensive report. The prosecution did not request any further information from the appellant as to how it was that she came to forget so many of the items that she had selected and placed in her handbag. Nor did the prosecution ask the appellant to submit to an interview so that her credibility might be assessed. The prosecution, in my view not unreasonably, simply refused to accept that the assertion of a confused mental state could possibly explain the appellant's conduct.

28. It was always a matter for the prosecution to assess whether its evidence would prove the intent element of the offence beyond reasonable doubt. In making that assessment the prosecution must have anticipated that the appellant would give evidence on oath of her "simple absent-mindedness". Plainly enough, the prosecution letter shows that an assessment was made that the prosecution would prove its case beyond reasonable doubt even if the appellant were to testify. As things turned out the prosecution assessment, even though not unreasonable, was wrong because of the "compelling" testimony of the appellant. In the result, the police have unnecessarily put the appellant to expense.

29. Be that as it may, there is little more that the appellant could have done. She could hardly have simulated in advance the giving of her sworn testimony under examination-in-chief and cross-examination. It was that testimony which the Magistrate ultimately found compelling enough to return a finding of not guilty.

Conclusion

30. For the above reasons I allow the appeal. I set aside the order dismissing the appellant's application for costs. I order that the appellant have her costs in the Magistrates' Court subject to the scheduled fees in that court. I remit the matter to the Magistrates' Court for an assessment of the quantum of those costs, should the parties fail to agree them.

31. Finally, I order that the respondent pay the appellant the costs of this appeal being an amount to compensate for the filing fee and the sum of $250 for legal costs.

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[1] *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534; 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287.
[2] *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534 at 537–544; 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287 per Mason CJ; *Ling v Police* (1996) 90 A Crim R 376 at 388; (1996) 188 LSJS 488.
[3] *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534; 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287; *Ling v Police* (1996) 90 A Crim R 376 at 388; (1996) 188 LSJS 488.
[4] *Hamdorf v Riddle* [1971] SASR 398; *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534 at 544; ; 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287 per Mason CJ; *Ling v Police* (1996) 90 A Crim R 376 at 388; (1996) 188 LSJS 488.
