61/94

SUPREME COURT OF VICTORIA

LEIGH v HODGKINSON and ORS

Smith J

24, 26 April, 15 May 1995

COSTS – CHARGES DECLINED TO BE PROSECUTED – CHARGES STRUCK OUT – APPLICATION BY DEFENDANTS FOR COSTS – RELEVANT CONSIDERATIONS – APPLICANT MUST PLACE SUFFICIENT MATERIAL BEFORE COURT TO JUSTIFY ORDER FOR COSTS: *MAGISTRATES' COURT ACT* 1989, S131.

1. Whilst it may be relevant when determining the question of costs to consider the merits of the proceedings and the conduct of the defendants, the court's discretion as to costs is not fettered. However, before such an application is granted, sufficient admissible material must be placed before the Court.

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

***Redl v Toppin* MC 23/1993, referred to.**

2. Where the DPP took over a private prosecution commenced by L., declined to prosecute the matter and, without giving any reasons sought that all charges be struck out, there was no relevant material to justify the magistrate's decision that L. pay the costs of the defendants.

SMITH J: [2] In these matters the appellant, Mr Leigh, is appealing against orders made against him to pay the costs incurred by Messrs Sergant, Avery, Reid and Hodgkinson in four criminal proceedings that had been issued by Mr Leigh against them in the Magistrates Court at Melbourne.

It appears that in or between July and September 1994 the Director of Public Prosecutions for the Commonwealth, in exercise of his powers under s9(5) of *Director of Public Prosecutions Act* 1983, took over the proceedings from Mr Leigh. At a subsequent hearing on 12 September 1994, the Director of Public Prosecutions announced to the Magistrates' Court that he was declining to prosecute the matter and was seeking orders striking out all charges. A debate ensued at the end of which the magistrate ordered that a cost order should be made in favour of the defendants stating that the defendants had not prolonged the proceedings and were entitled to reasonable costs. Her Worship ordered that costs be ordered against Mr Leigh pursuant to s131 *Magistrates' Court Act* 1989. According to a contemporaneous note of the proceedings, she indicated that she was satisfied that such an order should be made against Mr Leigh observing that the DPP had stepped in at a late stage and "with the public interest at heart". Her Worship went on to say:

> "It had stepped in with lofty motives assessed material quickly and expeditiously, and accordingly costs will be ordered as follows:
> $1803.40 - Smith
> $6755 00 - Winton and Ridley
> $8136.30 - Reid and Others
> $2433.00 - Steinam and Others"

[3] One of the difficulties in dealing with these appeals is that until the Friday before their hearing on Monday 24 April 1995, Mr Leigh was unrepresented. As a result, there were problems in ensuring that all relevant papers were before the Court for the appeal. For example, the affidavit material did not exhibit official copies of the orders made. There is no issue, however, as to the orders made and steps have been taken to ensure that all relevant documents for the purpose of the determination of the appeal have been placed before the Court.

By orders made on 9 January 1995, Master Wheeler identified the questions of law to be determined in the appeals in the following terms:

> "(a) Did the magistrate err in awarding costs against the appellant after the Director of Public

Prosecutions had:
(i) taken over the prosecution and
(ii) declined to carry it on further as permitted by s9(5) *Director of Public Prosecutions Act* 1983 (Commonwealth);

(b) Was the magistrate wrong in failing to distinguish between periods when the appellant was pursuing the prosecution and other periods?"

The appeal seeks a review of the exercise of the magistrate's cost discretion and, accordingly, it is necessary, for the appellant to succeed, that he overcome the strong presumption in favour of the decision and demonstrate that the decision was clearly wrong (*Australian Coal Shale Employees Federation v The Commonwealth* [1953] HCA 25; (1953) 94 CLR 621 **[4]** at 67). In this instance, the appellant seeks to demonstrate that the magistrate failed to have regard to relevant considerations.

The appellant first submits that the magistrate should have ordered that the costs be paid by the Director of Public Prosecutions and not Mr Leigh and, in the alternative, that, if costs were to be ordered against Mr Leigh, then they should be apportioned as between Mr Leigh and the Director of Public Prosecutions. On the material before me, such arguments should not be entertained in so far as they seek orders against the Director of Public Prosecutions because he was not made a party to the appeal even though he was a party to the original proceedings. The effect of taking over the proceedings as set out in s14(2) of the *Director of Public Prosecutions Act* 1983 was that:

"The Director shall, as from the time when he complies with sub-section (1) in relation to a prosecution or proceeding that he has taken over pursuant to sub-section (9) ... (5), be deemed for purposes to be the prosecutor, informant or complainant, as the case requires, in that prosecution or proceeding."

If the argument could be entertained, they could not be made out in that material was not placed before the magistrate which would have enabled judgments to be made on these matters. In further support of his appeal in relation to the first question of law raised, Mr Leigh submits that the magistrate failed to have regard to relevant considerations, (in particular, to the merits of the prosecution and the behaviour of the defendants giving rise to the prosecutions), such matters being, it is said, matters relevant to the **[5]** exercise of the cost discretion.

Notes were taken of what transpired at the proceeding by a Mr Hallowell who was acting for one of the defendants. Mr Leigh accepted their accuracy. The notes record the following of relevance to this issue:

"Mr Leigh stated that he was not in agreement with the DPP's decision (to discontinue) and that he was seeking orders for mandamus against the Commonwealth DPP. He said he had issued an originating motion and is awaiting a date for hearing. He requested that the magistrate give him a date for committal. ... Mr Leigh stated that he had received advice from Family Court barristers who were convinced that there was evidence available to indicate the charges *prima facie*. Mr Leigh tendered a copy of the originating motion and supporting affidavit which he said set out the incorrectness of the DPP's reasons. This had not yet been served."

There was some discussion between counsel and the magistrate about whether the matter should be struck out or simply adjourned until the Supreme Court proceedings had been heard and determined but this course was objected to on the basis that the criminal proceedings could be resurrected in the event that Mr Leigh was successful in the Supreme Court. Other submissions were received on the matter. In particular, Mr Pedley for the DPP indicated that the DPP had the power to decide whether or not to proceed. Reference was made to s9(5) of the *Director of Public Prosecutions Act* 1983. The notes went on:

"Mr Leigh indicated that he considered the strike out application was frivolous and he requested that the magistrate read the Supreme Court originating motion. The magistrate indicated that it was not appropriate. She said that it took the matter **[6]** no further. The Commonwealth DPP had said they would not proceed. She commented that the DPP had done some efficient housekeeping. The Court has given the matter no attention so the merits of the case have not been considered. It may be relevant to determine the merits of the case to consider any cost application."

The precise meaning of the last sentence quoted is unclear. The note then records:

> "After hearing further submissions the magistrate indicated that she would strike the matter out; it had been before the Court on a number of occasions and had been nursed gently through from the date on which Mr Leigh initiated the prosecution. The magistrate considered that in respect of cost there were three matters for consideration:
> (1) whether to make orders for costs?
> (2) Against whom those orders should be made?
> (3) How much?"

Submissions were then made that, there being no special circumstances, costs should follow the event and that the cost order should be made against Mr Leigh. The first submissions were made by counsel for the defendant Smith and counsel for the defendants Ridley and Winton. The notes record:

> "The magistrate asked whether she should order costs against the third party such as Mr Leigh, if for example, the prosecuting authority had been dilatory. In these circumstances why should the complainant bear the costs".

The notes then record that remaining counsel indicated that they were seeking costs order against Mr Leigh although, in the case of the defendant Steinam, costs were sought against either Mr Leigh or the DPP or both. Mr Pedley, for the DPP, conceded that the magistrate could award costs against **[7]** the DPP. He submitted that the proceedings had been taken over on 5 July 1994 and went on to say according to the note:

> "That the DPP had brought the matters to resolution speedily and it was his submission that no order for costs should be made against the DPP. He indicated that from 16 August he had been waiting for material from Mr Leigh. He had had one solicitor working solely on this matter (which was quite unusual) and the decision not to proceed had been made swiftly.

The notes then record submissions made by Mr Leigh as follows:

> "Mr Leigh indicated that this was a complicated family court matter. He had been incarcerated for two years. The matter had gone to the Court of Appeal and had been tossed out. He had taken the initiative in the action but the real initiatives had been taken by the defendants in committing the alleged offences. It was important to see whether the defendants are or are not guilty. On the matter of costs, Mr Leigh said he had some concerns eg, he did not think it was appropriate for Mr Reid to come down here from Sydney together with all other officers. The magistrate said she would be very concerned if all the officers had attended but one officer instructing seemed to be reasonable. Mr Leigh submitted that to award costs against him was punitive. It was his submission that the instructions not to seek costs against the DPP but rather against him were punitive, malicious and vexatious".

The notes then indicated that the Magistrate said that the DPP had decided to take over the matter and that therefore "some onus may rest with the DPP" but also that, if the DPP had not stepped in, the matter could have "gone for longer with substantially greater costs". Mr Leigh responded:

> "... That the seeking of costs against him was vexatious and punitive and was another attempt to punish him. He had taken these prosecutions in his known name, in the public interest to ensure public authorities are held accountable."

[8] Mr Leigh then made some comments about the breakdown of the bills and the matter was adjourned until 2 p.m. for further argument. On the resumption, according to the notes, the following occurred:

> "Mr Leigh submitted that costs should not be awarded against him at this point in time and that the magistrate should stay any cost order until the outcome of his mandamus application.
>
> The magistrate asked the parties to consider what would happen if the Supreme Court proceedings went completely in Mr Leigh's favour. Is there any prejudice if the proceedings are on foot again? Is it not presumptive to order costs?
>
> Mr McArdle submitted that the Magistrates' Court order is not under attack. If Mr Leigh wished to attack the present court order these would be separate proceedings with a separate remedy open

> to Mr Leigh in relation to these proceedings. Mr McArdle urged the magistrate to be realistic about the situation. There were all sorts of hypothetical possibilities about what might happen if Mr Leigh was successful, however, that was not relevant to the present application. *Prima facie*, Mr McArdle submitted that his clients were entitled to costs.
>
> After hearing further submissions from Ms Nordlinger the magistrate advised Mr Leigh that in any event he had rights which he may exercise in respect of any order that she may make today."

The magistrate then went on to indicate her decision (above).

It is to be noted that the magistrate made the costs orders against a person who was not strictly speaking then a party to the proceeding. It was not contended before me, however, that that power did not exist. Section 131 of the *Magistrates' Court Act* is in the broadest of terms and in my view would permit a magistrate to make such an order. Further, the case would appear to be one that comes within the criteria referred to in *Bischof v Adams* [1992] VicRp 61; [1992] 2 VR **[9]** 198. I also note that it was not argued before me that the magistrate was in error in proceeding to make any cost orders in circumstances where there were relevant Supreme Court proceedings pending.

The essence of the submission made on behalf of Mr Leigh is, as noted above, that the magistrate failed to consider relevant matters – in particular, the merits of the proceedings and the conduct of the defendants. Reliance was placed on the cases of *Redl v Toppin* (Full Court, Supreme Court of Victoria, unreported, 1.4.1993)) and *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534; 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287.

It is clear from these appellate court authorities that the discretion as to costs is not to be fettered and there will be some cases where, in deciding whether to award costs against an informant, it will be relevant to consider the merits of the informant's case and the conduct of the defendant. Before the magistrate, Mr Leigh, (who was unrepresented) attempted to raise the question of the merits of his cases against the defendants. He led no evidence but had attempted to do so, albeit in the context of whether the proceedings should be discontinued, and been told it would not be received.

In this case there is the complication that the order sought by the defendants was an order against Mr Leigh and not the party on the record, the DPP. The appeal is in fact not against the making of an order for costs in favour of the defendants but the making of that order against Mr Leigh. The result of the order made below was that the lay informant who was no longer a party was required to bear the **[10]** cost burden of the proceedings as a result of a decision taken by the DPP to discontinue the proceedings, a decision over which the former lay informant had no control. To the extent that that decision involved a consideration of the merits of the proceedings, the merits again were relevant as well as the reasons generally for discontinuance. The decision of the DPP, for example, may have been influenced by public interest considerations – e.g. the cost to the community which may have outweighed the importance of the matter or the merits of the proceedings. If that were the basis for discontinuing the proceedings, then an issue would arise whether the community through the DPP should bear the cost of a decision that has been made in the interest of the community.

Before her Worship, the defendants carried the onus of proof in their application and they had to place admissible material before the court sufficient to persuade her to make the order sought. The only material before the magistrate was the statement made in open court by the DPP that he proposed to discontinue in the exercise of his statutory power. No evidence was given as to his reasons. Even if it be open to imply a presumption of regularity in that situation (and on that I express no view), such a presumption would do no more than support a conclusion that the decision was properly made. In the absence of the evidence of the DPP's reasons, however, one could not conclude that the decision had not been made on public interest grounds even though there might have been merit in the prosecution. As I have said, if that were the situation **[11]** then the question would arise whether the DPP on behalf of the community should bear the cost and not the lay informant. It may have been assumed that the DPP's decision was made on the basis that the prosecutions had no merit. While that may well be so for her Worship to base her decision on such an assumption would have been to assume the existence of an opinion or a fact of which there was no evidence. She would also have determined the issue on the basis of

the latter's opinion, an opinion of a party to the proceedings that was not tested. Her Worship found that the DPP had not delayed matters and, therefore, added to the costs but that finding was relevant, in my view, only to the question of an apportionment of costs if Mr Leigh was liable.

It seems to me that there was no relevant material before the magistrate which would have justified the decision made to make Mr Leigh liable not the DPP, and accordingly, the application of the defendants should have failed and the order against Mr Leigh should not have been made.

I reach this conclusion with reluctance because I am conscious of the possibility that the resolution of the question could involve a daunting investigation ending in the same result. If the matter be approached, however, on the basis that it is the defendants who are seeking an order for costs against the non-party rather than the informant on the record, a possible commencement point would be the calling of evidence by the defendants from the person in the DPP's office responsible for the decision not to proceed who could give evidence of his or her reasons and who could then be cross-examined by Mr Leigh to challenge those reasons. The **[12]** issue may well be quickly resolved. In the end, however, the fact cannot be escaped that no admissible material was placed before her Worship to support a decision requiring Mr Leigh to pay the defendants' costs rather than the DPP. As a result, it may be said that her Worship made her decision to order costs against Mr Leigh without having regard to relevant considerations. This came about because of the failure of the defendants to adduce admissible evidence in support of their application. Perhaps, therefore, more accurately, the error demonstrated was that there was no basis upon which an order could properly be made against Mr Leigh rather than the DPP. In these circumstances it appears to me that error has been shown such as warrants interference with the order made below.

I have considered whether the decision below could be upheld on the basis that, if the court had admitted into evidence the material that Mr Leigh sought to have admitted, the decision would have been justifiable. There has been admitted into evidence in these appeals the originating motion and affidavit in support with exhibits relating to the mandamus proceedings which Mr Leigh has brought against the DPP. He sought to tender these documents before the magistrate and the magistrate declined to receive them. The documents included a letter from the DPP to Mr Leigh dated 8 September 1994 setting out an explanation for the reason for the decision to discontinue the prosecution. In relation to the relevant defendants it is stated that "there is no evidence of an agreement between ... to bring a false allegation against you [or to do an **[13]** illegal act in the case of Sergant and Avery]. This is the reason I will be seeking to have the charge withdrawn".

This expression of opinion, however, could not in itself have justified the decision in that it is the sort of issue on which views can differ and it would need to be explored before being accepted. Another justification mentioned in the letter was that the charges brought against Reid and Hodgkinson alleged that they had acted contrary to s41 of the Commonwealth *Crimes Act* 1914. That offence occurs only when a Commonwealth offence is falsely brought against a person. The allegation made, however, was that a New South Wales offence was falsely brought against another person. That problem might well have been addressed by referring the prosecutions to the New South Wales DPP and amending the information. There may have been other solutions. The examination of these matters does not assist the respondents. As the appellant has succeeded on the first question of law raised, it is unnecessary to consider the other question identified by Master Wheeler. The appellant seeks the remittal of the proceedings to her Worship for further consideration. That course would appear to me to be appropriate.

APPEARANCES: For the appellant Leigh: Mr A Phillips, counsel. Aquaro & Co, solicitors. For the respondents Hodgkinson and Ors: Mr T Langmead, counsel. Victorian Government Solicitor.
