22/93

SUPREME COURT OF VICTORIA

HEHIR v BISHOP

Ashley J

20 April 1993

COSTS – SUMMARY OFFENCE – CHARGE DISMISSED – APPLICATION FOR COSTS REFUSED – GENERAL RULE IN *LATOUDIS v CASEY* – WHETHER RULE CONFINED TO SIMILAR FACT SITUATIONS – WHETHER RULE HAS GENERAL APPLICATION.

1. The guidelines proposed by the majority of the High Court in *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534; 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287 as to the reasonable expectation of a successful defendant to an order for costs are intended to be of general application.

2. Accordingly, where upon the dismissal of a charge of using an unregistered motor vehicle on a highway a Magistrate declined to award costs to the successful defendant on the ground that the decision in *Latoudis* should be confined to cases of similar fact situations, the Magistrate was in error in failing to consider whether any circumstances existed which made it just and reasonable to refuse costs.

ASHLEY J: [1] This is an appeal from a decision of a Magistrate at the Magistrates' Court at Heidelberg refusing the successful appellant his costs. The appellant was charged with using an unregistered motor vehicle on a highway, contrary to s7(1)(a) of the *Road Safety Act*. The charge was heard summarily on 10 December 1992. The appellant was represented by his solicitor. The charge was dismissed. An application was made for costs. No doubt the Magistrate had a discretionary power to award the appellant his costs – see s131(1) of the *Magistrates' Court Act* 1989 (the Act). Though more generally expressed, the section is not relevantly different to the former s97(a) and (b) of the *Magistrates (Summary Proceedings) Act* 1975. According to the appellant's affidavit sworn 16 December 1992, the Magistrate declined to exercise his discretion to order costs against the informant and when asked for his reasons -

> "His Worship indicated that he declined to make an order as it was his view that the decision of the High Court of Australia in *Latoudis v Casey* (1990) 50 ACR 287 should be limited to those cases in which there was a similar fact situation to that which applied in *Latoudis v Casey*".

That is the only evidence of the basis upon which the Magistrate exercised his discretion adversely to the appellant. The question raised for my determination on the appeal has been framed as follows:

> "Did the Magistrate err in unexercising (sic) his discretion to award the appellant costs?"

[2] Under s92(1) of the Act an appeal on a question of law lies to this court from a final order of the Magistrates' Court in a criminal proceeding (other than a committal proceeding). The formal order made by the Magistrate as recorded was simply that the information be dismissed. But it is plain that there was a refusal to make a consequential order for costs; and the refusal to make an order may constitute a final order for the purposes of s92(1) of the Act. The contrary was not argued by Mr Gebhardt of counsel, who appeared for the respondent on the appeal, and it was implicit in the decision of the Full Court in *Redl v Toppin* (unreported, judgement 1 April 1993).

An exercise of discretion may give rise to a question of law. The circumstances in which an exercise of discretion may successfully be attacked are well known. I need do no more than refer to the judgment of Kitto J in *Australian Coal & Shale Employees Federation v The Commonwealth* [1953] HCA 25; (1953) 94 CLR 621 at p626. In *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534; 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287, the majority emphasised that although the discretion given by s97(b) of the *Magistrates (Summary Proceedings) Act* 1975, was very broad,

nonetheless it was not wrong for a final Appellate Court to set some principles or guidelines for its operation; see per Mason CJ at pp541-2, and per Toohey J at p562; see also the dissenting judgement of Dawson J at p558. There seems to me to be no doubt that the majority in *Latoudis* proposed as a guideline for the exercise of the discretion to award costs in favour of a successful defendant in criminal proceedings disposed of summarily **[3]** that, although such a party had no right yet there was a reasonable expectation of his obtaining an order for costs That expectation might be dashed in some circumstances – most evidently associated with the conduct of the defendant connected with the charge or in the conduct of the litigation; see per Mason CJ at p544, Toohey J at pp565 and 566, and McHugh J at pp566 and 568-9.

It is true that the court was there concerned with looking to the relevance or otherwise of a particular matter brought to account by a Magistrate in exercising his discretion. But the guidelines which the majority developed were and were plainly intended to be of general usefulness. They were applied by the Full Court of this court in *Redl*, a decision to which I earlier referred. In these circumstances, it appears to me that his Worship in the present case acted upon a wrong view of *Latoudis.* He should have considered whether the reasonable expectation of the appellant that he should have his costs in the circumstances was defeated by some such consideration as was identified by Mason CJ and by Toohey and McHugh JJ; or, to put it in slightly different language, but to the same intent, whether the ordinary situation that it would be just and reasonable that the successful defendant have his costs was displaced by some such consideration. The discretion of the Magistrate in my opinion miscarried. Under s97(2) the court is empowered to make such order as it thinks appropriate. In the present case, the only factual material before me consists of the appellant's affidavit and exhibits thereto, and the **[4]** affidavit of the respondent sworn 16 April 1993. The material is not extensive. I have not had the advantage of hearing the witnesses. Mr Gebhardt submitted that this was a case where, as Mason CJ said in *Latoudis*, at p544:

> "... if a defendant has been given an opportunity of explaining his or her version of events before a charge is laid, and declines to take up that opportunity, it may be just and reasonable to refuse costs";

and as Toohey J said in the same case at p565:

> "... if a defendant has been given the opportunity of explaining his or her version of events before a charge is laid and refuses the opportunity, and it later appears that an explanation could have avoided a prosecution, it may well be just and reasonable to refuse costs".

Mr Gebhardt relied upon an account said to have been given by the appellant to the respondent at the time of his apprehension – an account varying from that given on oath by the appellant at the hearing, and one which the appellant denied having given at the outset. Mr Gebhardt submitted that had the appellant given his sworn version of events at the outset, or at least before the charge was laid, that charge might never have been laid. The Magistrate simply dismissed the charge on the basis that a reasonable doubt had been established. It is possible that he accepted the police account of what the appellant had said at the outset but nonetheless was not satisfied, in light of the sworn evidence of the appellant to the contrary, that such account had been accurate. Alternatively, the Magistrate may have treated the evidence given by the informant of what the appellant had said when apprehended as being confused and unreliable, quite apart from the evidence given by the appellant at **[5]** the hearing.

Had the Magistrate accepted the police account of the initial conversation with the appellant, and of his failure to thereafter attend the police station before the charge was laid, it is possible that the Magistrate might have exercised his discretion as to costs against the appellant. He might possibly have concluded that the appellant had by his original version brought the charge upon himself. It seems improbable that the Magistrate could have concluded, on the other hand, that the appellant's failure to attend the police station in the period prior to his being charged was likely to have brought about a prosecution when otherwise there would have been none. The parties each agreed that, with a view of saving further costs I should, if possible, resolve the whole matter finally. But because it is possible (I do not say it is likely) that the Magistrate could have determined the costs issue against the appellant, and because the Magistrate had the advantage of hearing the witnesses, and because he will know what he accepted in the evidence of the various witnesses, it seems to me undesirable that I should attempt to exercise the available discretion in lieu of the Magistrate doing so. I would propose in the circumstances to make orders in accordance with the following minutes:

1. Appeal allowed with costs, including reserved costs.

2. Order of the Magistrates' Court refusing defendant's application for costs be set aside. **[6]**

3. Case be remitted to the Magistrates' Court for determination of the application by the defendant for costs in accordance with these reasons.

APPEARANCES: For the appellant Hehir: Mr JJ Lavery, counsel. Toop Harris & Metcalfe, solicitors. For the respondent Bishop: Mr SP Gebhardt, counsel. JM Buckley, Solicitor to the DPP.
