32/92

SUPREME COURT OF VICTORIA

REDL v TOPPIN

O'Bryan J

13, 29 April 1992

COSTS – SUMMARY OFFENCE – OFFENDER REQUESTED TO LEAVE SCENE – REQUEST DISREGARDED – LATER CHARGED – CHARGE DISMISSED – APPLICATION FOR COSTS – WHETHER OPEN TO REFUSE APPLICATION.

Where a person was requested to leave a scene but refused and was arrested and charged (the charge being subsequently dismissed) it was open to the magistrate to infer that the person was the architect of the arrest and prosecution and accordingly, refuse an application for costs.

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

O'BRYAN J: [1] This proceeding is an appeal on a question of law pursuant to s92 of the *Magistrates' Court Act* 1989. The question of law arises out of an order made in the Magistrates' Court at Melbourne on 2nd October 1991 whereby a Magistrate refused to award costs to the appellant following dismissal of charges that the appellant did use insulting words in a public place and did behave in an offensive manner in a public place on 31st March 1991.

One may be very surprised to know that the legislature in its wisdom, (or lack of it) has created an avenue of appeal to the Supreme Court from a Magistrates' Court limited to a question of costs. In my opinion, an avenue of appeal to this court on a question of law limited to costs awarded or not awarded in the Magistrates' Court is a wasteful use of this Court's limited resources.

The appellant allegedly carried a placard with words printed thereon: "Ecumenism = Trojan Horse. International Protestant Resistance Rejects It. They speak in Tongues by Satan's Power", adjacent to a gathering of persons attending a Christian rally in a public place. The appellant's protest annoyed or irritated persons attending the rally and, after declining a verbal request to depart from the place, he was duly arrested. The appellant was represented by counsel in the court below and pleaded not guilty to the charges. The learned Magistrate dismissed the charges at the conclusion of the prosecution case and no appeal has been brought against this decision. The learned Magistrate declined to order the informant to pay costs, apparently for two reasons:

> **[2]** 1. That the appellant's conduct was insensitive of the feelings of the majority of the persons present in the vicinity at the time;
>
> 2. That the appellant was warned to leave and did not comply.

Mr Freckelton of counsel for the appellant submitted that the learned Magistrate erred in law in that he took into account in exercising his discretion the conduct of the appellant which constituted the commission of the alleged offences. It is trite that this court cannot exercise its own discretion but is called upon to review a discretion exercised in an inferior tribunal. Error may be shown, if the inferior tribunal took into account irrelevant material or omitted to have regard to relevant material.

Mr Freckelton submitted that the reasons of the Magistrate do not fall within the exceptions to the general rule that a successful party is *prima facie* entitled to his costs in a criminal proceeding. Reliance was placed upon the recent decision in the High Court – *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534; 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287. By a majority (Mason CJ, Toohey and McHugh JJ) the court held that "ordinarily, a court of summary jurisdiction in exercising statutory discretion to award costs in criminal proceedings, will make an order for costs in favour of a successful defendant". The Chief Justice recognised, however,

that "the circumstances of a particular case may be such as to make it just and reasonable to refuse an order for costs or to make a qualified order for costs" and proceeded to identify cases in which "it would not be just and reasonable to order costs against the prosecutor or to order payment of all the **[3]** defendant's costs" (at CLR 154). The learned Chief Justice and Toohey, J selected three examples when no order or a limited order for costs might be appropriate. (see CLR pp154 and 163.)

It is common ground that the circumstances of the present case do not bring the case within the exceptions to which their Honours adverted. The examples were not intended to be exhaustive:

> "These illustrations are in no way exhaustive but what they point up is that a refusal of costs to a successful defendant will ordinarily be based upon the conduct of the defendant in relation to the proceedings brought against him or her." (Toohey J at 163)

Returning now to the reasons of the Magistrate, one should say that the first reason is not, in my opinion, a proper reason for refusing to award costs. The learned Magistrate appears to be saying that the conduct of the appellant, whilst not contravening the relevant statute law, justified depriving him of costs. In substance, the court is punishing the appellant for his conduct by depriving him of costs notwithstanding that his conduct did not contravene the criminal law. This reason cannot support the Magistrate's exercise of discretion.

The second reason relied upon the learned Magistrate is, in my opinion, a relevant consideration and a proper reason for refusing to award costs. The Magistrate has had regard to the circumstances that the appellant was requested to leave the scene of the rally and declined to do so. No doubt the Magistrate inferred that probably no charge would have been laid had the appellant taken the opportunity offered and departed from the scene. In **[4]** choosing to stay the appellant was the architect of the arrest and prosecution which followed.

In my opinion, the learned Magistrate was entitled to have regard to this circumstance, it being so closely connected with the charge in deciding not to award costs to the appellant. As earlier indicated this court is called upon to review the exercise of a discretion in another court and is not to determine how the discretion would be exercised in this court. I am not persuaded that the learned Magistrate erred in depriving the appellant of his costs. Appeal dismissed with costs.

APPEARANCES: For the appellant Redl: Mr I Freckleton, counsel. Jean Ely & Associates, solicitors. For the respondent Toppin: Mr SP Gebhardt, counsel. JM Buckley, Solicitor for the DPP.
