23/95

SUPREME COURT OF VICTORIA

ALEXANDER v RENNEY

Batt J

21 August 1995

PROCEDURE – CRIMINAL PROCEEDING DISMISSED – COSTS – TEST TO BE APPLIED – APPLICATION FOR COSTS REFUSED – NON-DISCLOSURE BY ACCUSED AT CONTEST MENTION HEARING OF MATTERS WHICH MAY HAVE BEEN RELEVANT – WHETHER ACCUSED REQUIRED TO TAKE POSITIVE STEPS AFTER INTERVIEW ABOUT DISCLOSURE – WHETHER FAILURE TO DISCLOSE MAY TAKE CASE 'OUT OF THE ORDINARY': *MAGISTRATES' COURT ACT* 1989, S131.

A. was charged with two counts of possessing drugs of dependence namely, Rohypnol and Ecstasy. The drugs were found by police in A.'s jacket following a raid on premises being attended by A. In the subsequent interview, A. said that the drugs were not his but the Rohypnol may have been placed there by a female acquaintance (later ascertained to be Patton) for a friend (Salt). Prior to the hearing, the matters proceeded to a contest mention hearing. When the charges came on for final determination, both charges were dismissed and an application by A. for costs was refused on the ground that A. could have given more information to Police particularly Patton's name, even though the evidence given by her was not all that relevant. Upon appeal against the refusal to award costs—

HELD: In relation to the charge relating to the drug Ecstasy, appeal allowed. In relation to the charge involving the drug Rohypnol, appeal dismissed.
1. In ordinary circumstances, an order for costs should be made in favour of a successful defendant in criminal proceedings.
***Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534; 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287, applied.**

2. In the present case, the informant bore the onus of showing facts taking the case out of the ordinary circumstances.

3. Evidence of the witnesses Patton and Salt did not affect the charge relating to the drug Ecstasy; therefore, the non-disclosure by A. of their likely evidence did not take the case out of the ordinary circumstances. Accordingly, A. was entitled to his costs in respect of this charge.

4. A defendant is not required to take positive or affirmative steps after interview to supply material to police for investigation and consideration. However, post-commencement events such as the contest mention hearing may be relevant to the question of costs because it provides a real opportunity to narrow the issues and to disclose the nature of the prosecution and defence cases if the parties are so minded.

5. In the present case, in view of the failure by A. to disclose at the contest mention hearing relevant evidence that may have been given by Patton and Salt, there was sufficient to conclude that the case involving the drug Rohypnol was out of the ordinary and accordingly, refuse an order for costs.

BATT J: [1] *[After referring to the question of law stated in the Master's order, the provisions of s131 of the Magistrates' Court Act 1989 and certain judgments 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, His Honour continued]...* **[6]** A brief chronology of this case is as follows. On 7 August 1994 the police raided the premises of the Commerce Club, where the appellant, amongst others, was searched. After a body search had been conducted, his jacket was retrieved from the cloak room hanger by the police at his request and it was found to contain in an upper outer pocket a small packet containing small quantities of the two drugs mentioned. He was detained and interviewed some four hours later in a tape recorded interview.

In the interview he gave a possible explanation for the drugs being there, namely, that he had been asked by a female acquaintance, whose name he could not during the interview recall, if she could put a common male friend's cigarettes and Rohypnol in his jacket, to which he had agreed because he believed that the friend, whom he believed to be one Damien Salt, had a prescription

entitling him to use Rohypnol for some form of insomnia. But essentially he maintained in the interview that the drugs were not his. After the interview he was released without being charged and I infer that the police conducted **[7]** in relation to him and others further inquiries before, in his case, he was charged with the two offences mentioned. The date of charging, as I have indicated, does not appear in the sense that the date of issuing does not appear, but the charge sheet was agreed before me to have been signed by the informant on 23 September 1994.

The summons had as its first return date 30 November 1994, when it was adjourned. There was a contest mention hearing on 1 February 1995. Counsel presently appearing for the appellant did not appear then. Those hearings are, I was told, without statutory or regulatory authority but are clearly within the power of the Magistrates' Court and reflect a modern day practice of endeavouring, by a brief preliminary hearing, to ascertain and confine the issues and explore whether the proceeding must proceed to a full hearing. On 29 March 1995 the appellant pleaded not guilty to the two charges and after hearing evidence the Magistrate dismissed both charges. The conclusion of his reasons for doing so appears in the following passage:

> "In the end, I have got to be satisfied beyond a reasonable doubt that those items were placed in Mr Alexander's pocket, to his knowledge, that he was in fact in possession of them, to his knowledge, and that he knew where they were and what they were. I am not persuaded to that necessary standard of proof in the unusual circumstances of many people who were likely to have had drugs in their possession being asked to undress in the area where that jacket was and perhaps having the opportunity to place their item out of their possession into some other place. In those circumstances, of course, I must dismiss the charge and I do that."

[8] Although His Worship spoke of the charge, it is clear from the extract from the register that is before me that both charges were dismissed.

An application was made by counsel for the present appellant for costs and there was some discussion between the Magistrate and counsel to which the prosecutor, a Senior Constable, contributed to a small extent. His Worship refused the application. Although it is necessary to read his ruling for doing so against the discussion which had taken place I set out only his reasons for doing so. He said:

> "Mr Alexander, the charges are dismissed, however, in respect of the application for costs, that application is refused on the basis ... of what I have already said, that in my view, Mr Alexander could have at that particular time, an appropriate time, given more information and particularly Ms Patton's name so that she might have been able to be questioned at that time, she being, as it would have appeared then, at least, a relevant witness, even though the evidence that she gave to the court today was not all that relevant."

As I say, those reasons must be read against the preceding discussion. In my view, a fair reading of them is that the word "particularly" shows that the Magistrate did not rely solely on the non-disclosure of Ms Patton's name. Furthermore, it shows that whatever the Magistrate meant by "that particular time", his correcting reference, as I read it, to "an appropriate time", enables consideration to be had of the whole span of time from the alleged offence to the day of hearing. In the record of interview, the appellant stated that he could not remember the name of the person who proved to be Ms Patton, but he said that he would find out her name. He did not notify the police of her name **[9]** when he found it out as he must have, although the date of finding out does not appear. In any event, her evidence did not support or harm his case because she claimed to be unable to remember whether the alleged relevant conversation had ever occurred, or to remember any relevant actions on her part. To fail to disclose the name of a witness at some earlier point of time, who might at that point of time have been thought to be material, when it is found in the event that her evidence is unimportant, would not seem to me to constitute a circumstance taking the case out of the ordinary, even assuming that critical witnesses' names should at that time have been disclosed.

The appellant did not in his record of interview, as I read it, undertake to notify the police of her name. I do not accept what was implied in the respondent's argument, namely, that her statement that the conversation alleged may have taken place amounts to any evidence that it did or any worthwhile evidence at all. In the record of interview, the appellant mentioned, as I have said, that he believed Mr Salt had a prescription for Rohypnol, but in the event the case on

the merits turned on the drugs not being Mr Salt's at all. (I observe parenthetically that Mr Salt's cigarettes or cigarette packet was not on the evidence found when the jacket was retrieved). Mr Salt gave evidence that neither of the drugs was his when he was told about them. He said that he had taken his Rohypnol and cigarette packet out of the appellant's jacket as it **[10]** was being cloaked in. But, essentially, the general contention of the appellant in his record of interview was upheld or, to put it another way and more in accordance with the onus, the Magistrate was not satisfied beyond reasonable doubt that the contrary of that contention had been made out, that contention being that the drugs were not his and he did not know anything about them.

In my view, Mr Salt's evidence did not affect the Ecstasy charge at all and nor did Ms Patton's evidence, and therefore the non-disclosure of the likely evidence of either of them did not, so far as the charge relating to Ecstasy is concerned, take the case out of the ordinary circumstances. In my view, in relation to the Ecstasy charge the Magistrate's discretion miscarried and the appellant was entitled to costs.

I now concentrate on the other charge, that relating to Rohypnol. The examples in the case of *Latoudis* do not cover this precise case. It was put for the respondent before me that the appellant should have in the one and a half months or so between the night in question, 7 August 1994, and the date of the signing of the summons by the informant, have not only looked out Salt and Ms Patton, but have produced them to the police or, perhaps, told the police what they said. In my view, that step was not required. What, in my view, the High Court was speaking about when it referred to a defendant's availing himself or herself of an opportunity to explain his or her version of events by answering questions in an interview by the police does not, in my view, require a defendant to take positive or **[11]** affirmative steps, after having submitted himself or herself to such an interview, to place additional material before the police for investigation and consideration. Nor can it, in my view, be said that the appellant brought the prosecution on himself by his conduct within the meaning of the statements by the majority justices in the High Court. That is, rather, a reference to conduct which provokes or at any rate leads to the prosecution by positive acts as opposed to mere omissions.

Despite the examples that I have just been referring to, given by majority justices, which relate to events up to the commencement of a prosecution, I do not consider that post-commencement events are entirely irrelevant except where they are matters prolonging proceedings. By that I mean they may be relevant even though they do not constitute a prolonging of proceedings. I refer in this regard to the references to conduct of the proceedings that I have already identified in the passages I have cited.

It seems to me that the contest mention hearing provided a real opportunity to narrow the issues and to disclose the nature of prosecution and defence cases if the parties were so minded. There is, even in the universe of criminal law, an observable move towards disclosure, and requiring disclosure, and away from trial by and defence by ambush. I shall, however, defer consideration of the contest mention hearing in this case for a moment.

The disclosure by counsel for the appellant to **[12]** the prosecutor on the day of hearing of the nature of the evidence of Mr Salt and Ms Patton was, I agree with the Magistrate, too late because it did not afford the prosecution an opportunity to investigate the accuracy of their foreshadowed evidence and because, as a particular aspect of that, the witnesses were not made available to the prosecutor, as I would infer in the case of Mr Salt and as is obvious in the case of Ms Patton because of her late arrival to give evidence as the very last witness. For that reason I do not draw the inference which I was invited on behalf of the appellant to draw from the fact that the prosecution went ahead with the case notwithstanding the disclosure of the foreshadowed evidence to the prosecutor on the day of hearing, 29 March 1995. That inference was that the failure to disclose earlier, for instance at the contest mention hearing, was immaterial because it would not have led to a withdrawal of proceedings or a shortening of them and a saving of costs.

I turn finally to the contest mention hearing, being so far, that is to this point, in agreement with the Magistrate, not in relation to Ms Patton, but in relation to his general observations as I interpret them. The prosecutor asserted in argument on the application for costs that:

> "Perhaps some of these matters could have been resolved at a contest mention on 1 February."

The Magistrate said "Yes, well it could have been raised anyway, I suppose". Counsel for the appellant then said:

> "If I could make some reference to that, sir, I think there were some matters raised on the contest mention day, I think if **[13]** I could find my predecessor's notes. I do not know if it is a matter of enormous significance, sir, I do not know if you wish to hear from me on the point at all."

The Magistrate said, "I do not think so," and then proceeded to give the reasons which I have earlier set out. It was submitted for the appellant that the Magistrate should not have given the reasons he gave, or more particularly, dismissed the application for costs, without taking up counsel's offer, and that in the dismissal of the application without taking up the offer, there had been a denial of natural justice (which would, I think, constitute error of law), and, perhaps more relevantly in view of the terms of the Master's order, a failure to take a relevant consideration into account.

Perhaps ordinarily a failure to allow the course raised to be followed would have those two results, but in the end with some doubt I have concluded that it did not do so in this case. It was submitted to me that the Magistrate did not decide about the contest mention but merely excluded the hearing day's events from being relevant to assist the appellant and effectively put the onus on the appellant to show a disclosure at an appropriate time that bore on costs. The informant, in my view, bore the onus of showing facts taking the case out of the ordinary circumstances. That was a legal onus, but I think that in the way cases are argued about costs, the prosecutor's assertion that the matters could have been disclosed at a contest mention, in the absence of a direct challenge to that statement, can on a **[14]** procedural matter such as costs be relied upon by a Magistrate, even though it is not admissible evidence. Otherwise every minor point, as well as some others, would have to be proved. I think that accordingly the prosecution showed just enough to take the case out of the ordinary circumstances so far as it relates to Rohypnol.

As to counsel's very tentative statement, the respondent before me submitted with some justification that that was almost an invitation to disregard the matter, but the appellant submitted that it was a way of bringing the matter to the attention of the Magistrate for investigation if he considered it to be important. I have found a decision between those two views difficult. In the end I think that the matter should have been pressed more strongly for non-accession to it to be relied upon as a failure to take a relevant matter into account. I should say that it was not established that investigation would have produced information showing a disclosure, so in one sense it was a failure only to investigate something which might yield a relevant matter. That is more like a consideration applying to administrative decision makers than judicial ones.

Be that as it may, I consider that a definite view on the effect of the prosecutor's assertion and the effect of counsel's tentative invitation is not really required because, on instructions, counsel for the appellant stated in response to my inquiry that remission to the Magistrates' Court was not sought solely on the basis of his quoted remarks appearing at **[15]** the foot of page 44 and at the top of page 45 of the transcript alone, and that would be the only basis on which I would consider remitting the proceedings so far as they relate to Rohypnol. As I have said, two orders appear from the extracts to have been made. I consider that the order relating to costs in the case of the drug Ecstasy was erroneous and should be set aside and that the appellant should have his costs of that charge. With some hesitation I consider that no error was shown in relation to the order relating to Rohypnol and that it should stand. Therefore, the appeal will be allowed to the extent I have indicated. *[After dealing with the question of quantum, His Honour ordered as follows]:*

[18] 1. The Appeal be allowed as regards charge number 2 in case G 02547061, but otherwise be dismissed.
2. The order relating to costs as regards charge number 2 is set aside.
3. In lieu of that order, it be ordered that the Chief Commissioner of Police pay the costs of the defendant of charge number 2, which are fixed by consent at $500, but the operation of this order be stayed until 21 November 1995.
4. The respondent pay to the appellant 80 per cent of the appellant's taxed costs of this appeal, including reserved costs, but the operation of this order be stayed until 21 September 1995.
5. The respondent be granted a certificate of indemnity in respect of the appeal pursuant to section 13(1) of the *Appeal Costs Act* 1964.

APPEARANCES: For the Applicant: Mr J Lavery, counsel. Solicitors: Fitzroy Legal Service. For the Respondent: Mr SL Dewberry, counsel. Solicitors: Office of Public Prosecutions.