16/80

SUPREME COURT OF VICTORIA

LIU v CAUGHEY

Murray J

18 December 1979

COSTS – APPLICATION FOR UPON DISMISSAL OF CHARGE OF SPEEDING – APPLICATION REFUSED – MAGISTRATE SAID THAT IT WAS NOT AN "APPROPRIATE CASE" TO AWARD COSTS – FURTHER, THAT IT WAS "THE NORMALITY OF THE MATTER" – WHETHER MAGISTRATE IN ERROR: *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, S97(b).

Section 97(b) of the *Magistrates (Summary Proceedings) Act* 1975 ('Act') provides as follows:

> "Where the court dismisses the information or complaint, or makes an order in favour of the defendant the court may order the informant or the complainant to pay to the defendant such costs as the court thinks just and reasonable."

Upon the dismissal of an information for speeding, the defendant applied for costs. The Magistrate refused this application stating that "it was not an appropriate case" and that "it is the normality of the matter – the normality of the order." Upon appeal—

HELD: Order nisi discharged.
1. Section 97(b) of the Act clearly conferred discretionary power on the magistrate. It would be extraordinary, having regard to the great bulk of authority relating to the exercise of judicial discretion in relation to costs in the superior courts, to find that in Magistrates' Courts no such discretion existed and that in all cases civil and criminal alike orders for costs must be made in accordance with sub-sections (a) or (b) of s97.

2. What the magistrate said did not indicate that he exercised his discretion by reference to extraneous or irrelevant considerations. It seems clear enough that the magistrate intended to indicate that he saw nothing in the case before him to warrant departing from the well-established practice of not awarding costs in prosecutions brought by police.
***Puddy v Borg* [1973] VicRp 61; (1973) VR 626, considered;**
***Hamdorf v Riddle* (1971) SASR 398; and**
***McEwen v Siely* (1972) 21 FLR 131, not followed.**

3. The magistrate did not refuse to give reasons for his decision. His statement relating to the normality of the case conveyed his reasons clearly enough. Furthermore even if he did fail to give reasons such failure would not amount to reviewable error of law.
***Brittingham v Williams* [1932] VicLawRp 35; (1932) VLR 237; 38 ALR 176, applied.**

MURRAY J: This the return of an order nisi to review the decision of the Stipendiary Magistrate sitting at the Magistrates' Court at Benalla on the 21st March 1979. The applicant, who was the defendant in the proceedings before the magistrate, was charged with driving a vehicle on a highway at a speed exceeding 100 kilometres per hour. After hearing the evidence of the informant, who is a Constable of Police and of the applicant, the magistrate dismissed the information. In doing so the magistrate said that he had no reason to disbelieve the evidence of the applicant. The onus of proof rested upon the prosecution to prove the case beyond reasonable doubt and that in the present case he (the magistrate) felt that he had a reasonable doubt and that accordingly he should dismiss the information.

Counsel for the applicant then applied for an order that the respondent pay the applicant's costs. The magistrate refused to make such an order and counsel asked him to give his reasons for so refusing. The affidavit filed in support of the order nisi indicates that the magistrate said:

> "The fact that Mr Liu has travelled all the way from Canberra to defend this matter and has briefed counsel is not a peculiar fact which would entitle him to such an order. Counsel then asked the magistrate whether he ruled that costs could only be awarded against an informant if there were

> a peculiar factor about the case. The magistrate said that he did not say that. He said that it was not an appropriate case. In further discussion the magistrate said that he took into account all the things that he was required by law to take into account and that he disregarded those things that he was not to take into account. He said that he disregarded the matters referred to in *Puddy v Borg*. The magistrate then said: 'I will just say that it is the normality of the matter – the normality of the order. That is all. I do not propose to say anything further.'"

The applicant obtained an order nisi to review this decision upon the following grounds:

> 1. That the refusal to order costs in favour of the applicant by the learned magistrate was a wrongful exercise of his discretion;
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> 2. That the said refusal was based upon wrong considerations of law;
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> 3. That the learned magistrate in refusing to disclose the matters which he took into consideration in exercising his discretion to disallow costs was wrong in law.

Mr RC Gillard who appeared for the applicant submitted that upon its proper construction s97(b) of the *Magistrates (Summary Proceedings) Act* 1975 was an enabling or empowering provision and that the magistrate did not have any discretion and was bound to exercise the power conferred by the sub-section. This submission proceeded under the second ground of the order nisi. Alternatively, Mr Gillard said if the magistrate did have a discretion, he had a duty to exercise it judicially and there was no proper basis upon which his client, the successful defendant, should have been refused his costs. This submission proceeded under the first ground of the order nisi. Thirdly, Mr Gillard submitted that the magistrate should have stated his reasons for refusing the application for costs and failed to do so and that such a failure constituted an error of law.

In relation to his first submission Mr Gillard referred to the legislative predecessor of s97 *Magistrates (Summary Proceedings) Act* 1975 namely s105 *Justices Act* 1958. Section 105(2) provided as follows:

> "Where the court dismisses the information or complaint or makes any order in favour of the defendant it may in its discretion in and by its order of dismissal or other order award or order that the informant or the complainant respectively shall pay to the defendant such costs as to such court seem just and reasonable."

Section 97(b) *Magistrates (Summary Proceedings) Act* 1975 provides as follows:

> "Where the court dismisses the information or complaint, or makes an order in favour of the defendant the court may order the informant or the complainant to pay to the defendant such costs as the court thinks just and reasonable."

Mr Gillard pointed to various differences between the two sub-sections particularly the omission from s97(b) of the words "in its discretion". He referred to the authorities for the proposition that the word "may" in a statute does not necessarily import a discretion and sometimes should be construed as simply conferring a power. In cases in which a power is conferred upon a public officer and the exercise of the power is for the public benefit it is the duty of such officer to exercise the power in appropriate cases when called upon to do so: See *Julius v Lord Bishop of Oxford* (1880) 5 AC 214; [1874-80] All ER 43; 49 LJQB 577; 42 LT 546; *South Australian Cold Stores Ltd v Electricity Trust of South Australia* [1965] HCA 67; (1965) 115 CLR 247 at 265; [1966] ALR 685; 39 ALJR 332. Such an interpretation may apply to impose a duty to exercise a power upon judicial bodies. See *MacDougall v Paterson* [1851] EngR 970; (1851) 11 CB 755; 138 ER 672; 21 LJCP 27.

Mr Uren who appeared for the respondent submitted in reply that sub-section 97(b) clearly conferred a discretion upon the magistrate. He referred to authority for the proposition that it is not permissible, when a statute is clear in its terms, to seek to interpret it and give it a different construction by reference to its legislative history. See *Farrell v Alexander* [1976] UKHL 5; [1976] 2 All ER 721; (1977) AC 59 per Lord Wilberforce at p72; Lord Simon of Glaisdale at p82 and Lord Edmund-Davies at p97. Mr Uren submitted that the verbal differences between s105(2) the *Justices Act* 1958 and s97(b) *Magistrates (Summary Proceedings) Act* 1975 were merely the result of a process of "tidying up" by the draftsman. Mr Uren submitted that the power to order payment

of costs has always been considered a discretionary one and that it would be extraordinary if such a significant change in law were to be effected by the use of the word "may" in place of the phrase "may in its discretion" which latter phrase involved a redundancy in any event.

In my view s97(b) clearly does confer a discretionary power upon the magistrate. It appears to me that the words of the sub-section in their ordinary meaning confer a discretionary power and I see no ambiguity that would justify me in construing those words in a different way by reason of the words of s105(2) *Justices Act*. It would in my opinion be extraordinary, having regard to the great bulk of authority relating to the exercise of judicial discretion in relation to costs in the superior courts, to find that in Magistrates' courts no such discretion existed and that in all cases civil and criminal alike orders for costs must be made in accordance with sub-sections (a) or (b) of s97. I therefore think that Ground 2 of the order nisi must fail.

In support of Ground 1 Mr Gillard submitted that his client was the successful party and that there was no reason why the ordinary principle that costs follow the event should not have had applied by the Magistrate. He pointed to the magistrate's reference to "the normality of the order" and submitted that this indicated that the magistrate had exercised his discretion by reference to an extraneous and irrelevant consideration – see *Puddy v Borg* [1973] VicRp 61; (1973) VR 626 especially at p628 and 629. Mr Gillard also referred to *Hamdorf v Riddle* (1971) SASR 398 in which the Full Court in South Australia held that courts of summary jurisdiction should not make any distinction between complaints made by police officers and complaints made by other persons and should exercise their discretion as to costs in the same manner as it would be exercised on the trial of a civil action. It is to be noted however that in making this decision the Full Court recognised that it was departing from a well-established practice. See also *Leighton v Samuels* (1972) 2 SASR 422. A similar approach has been adopted in the Australian Capital Territory. See *McEwen v Siely* (1972) 21 FLR 131.

There is no doubt in my opinion that there is a long-standing practice in Victoria that in ordinary circumstances successful defendants are not awarded costs in prosecutions brought by members of the Police Force. This practice also existed in the other states of the Commonwealth as the judgments in *Hamdorf v Riddle* (*supra*) and *McEwen v Siely* (*supra*) indicate. It also was the practice in England. See *Berry v British Transport Commission* (1962) 1 QB 306. Devlin LJ (as he then was) after discussing the difference between civil and criminal cases in the practice of the courts in awarding costs said (page 326):

> "It is the intent of every statute which confers discretionary power that the power should be used justly. It does not follow that a principle in which it is just to make an award of civil costs will be equally just when applied to an award of criminal costs; and that is how the distinction arises. I do not propose to examine all the relevant differences that may be made for this purpose between a civil action and a criminal proceeding. But in relation to an award of costs against the party who initiates the proceedings there is no difference that is obvious. A plaintiff brings an action for his own ends and to benefit himself. It is therefore just that if he loses he should pay the costs. A prosecutor brings proceedings in the public interest, and so should be treated more tenderly."

In *Puddy v Borg* (*supra*) the Full Court dealt with a case in which the magistrate had refused to make an order for costs against a police informant in favour of a successful defendant upon the dismissal of the information. The Full Court considered that the magistrate, in arriving at his reason for refusing to make an order for costs that awards of costs might act as a deterrent to the police in laying complaints in courts of summary jurisdiction, misdirected himself in that such a reason was irrelevant and extraneous to the determination of the case and was not a reason connected with or arising out of the conduct of the proceedings or the material placed before the court. Nevertheless the Full Court, in setting aside the order, refused to make an order for costs itself but remitted the case to the magistrate for further consideration.

It seems to me clear enough that if the Full Court had been of the opinion that in the absence of special circumstances a successful defendant in prosecutions instituted by the police was entitled to his costs there would have been no purpose in remitting the matter to the magistrate. A careful reading of the reasons of the Full Court does not indicate that it was prepared to follow the course recently taken by the Full Court of South Australia in *Hamdorf v Riddle* (*supra*) or the Full Court of the Australian Capital Territory in *McEwen v Siely* (*supra*). Nor do I think that what the magistrate said indicates that he exercised his discretion by reference to extraneous or

irrelevant considerations. It seems to me clear enough that the magistrate intended to indicate that he saw nothing in the case before him to warrant departing from the well-established practice of not awarding costs in prosecutions brought by police.

It may well be that the time has come when this practice should be re-examined in the interests of evenhanded justice, to use the expression of the Full Court of South Australia, but my duty is to say whether the magistrate misdirected himself or exercised his discretion wrongly not to express any views I may have upon the established practice. It may be that if a similar case as the present one is taken to the Full Court that that Court will think it appropriate to consider the practice afresh but I do not think it would be appropriate for me as a single judge to attempt to do so. The first ground of the order nisi therefore fails.

In relation to the third ground all that need be said is that in my opinion the magistrate did not refuse to give reasons for his decision. As I have already indicated. I think his statement relating to the normality of the case conveyed his reasons clearly enough. Furthermore even if he did fail to give reasons such failure would not in my view amount to reviewable error of law: *Brittingham v Williams* [1932] VicLawRp 35; (1932) VLR 237; 38 ALR 176.

The order nisi must therefore be discharged. The applicant must pay the respondent's costs limited to $200.
