12/95

SUPREME COURT OF VICTORIA

LARRAIN v CLARK

Smith J

3, 13 July 1995

COSTS – UNLAWFUL POSSESSION CHARGES DISMISSED – APPLICATION FOR COSTS – REFUSED – PROPERTY IN DEFENDANT'S POSSESSION FOR A FEW DAYS – DEFENDANT REFUSED TO DISCLOSE NAME OF SUPPLIER – WHETHER DEFENDANT BROUGHT PROSECUTION UPON HIMSELF – WHETHER REFUSAL OF COSTS WARRANTED: *SUMMARY OFFENCES ACT* 1966, S26.

L. was charged with the unlawful possession of videotapes. The videos had come from different video outlets and were long overdue. L. was not a member of the relevant video clubs. When interviewed, L. said that the videos had been given to him a few days before by a friend and he did not suspect that they were stolen. At the hearing, the magistrate upheld a 'no case' submission and dismissed the charges on the ground that the police informant did not hold a reasonable suspicion at the time the videos were in L.'s possession. However, the magistrate declined to award L. costs on the ground that L. had invited his own prosecution by having the videos in his possession for such a long period and for refusing to name the person who supplied the videos to him. Upon appeal against the refusal to award costs—

HELD: Appeal allowed. Remitted to the magistrate for further determination.
1. Whilst there was evidence that the videos were long overdue, the answers given by L. in the record of interview at best might support an inference that the videos were in L.'s possession for more than a few days. Accordingly, it was not open to the magistrate to make a finding of fact that the videos had been in L.'s possession for a lengthy period of time.

2. The charges failed on the question whether there was a reasonable suspicion that the videos were stolen or unlawfully held at the time they were in L.'s possession. As L. was not required to give an explanation to the court, his refusal to give information to the informant about the supplier of the videos had no relevant impact. Accordingly, the magistrate was in error in refusing to grant costs on the dismissal of the charges.

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

SMITH J: [1] The appellant, Alexander Larrain, was charged by the respondent, Senior Constable Robert Clark with several charges of unlawful possession of certain videotapes. The proceeding concerning the charges was heard on 27 March 1995. At the conclusion of the prosecution case counsel for the appellant submitted that there was no case to answer. The submission was accepted and the charges were dismissed. Counsel for the appellant then submitted that costs should be awarded in favour of the successful defendant. This application was refused.

The appellant has appealed on a question of law under s92 of the *Magistrates' Court Act* 1989 against the refusal to award costs. The question of law identified in the Master's order giving directions dated 26 April 1995 was stated in the following terms:

> "Did the magistrate err in the exercise of his discretion in refusing to award costs to the successful defendants?"

The original charges were laid under s26 of the *Summary Offences Act* 1966. It provided as follows:

> "26(1) Any person having in his actual possession ... any personal property whatsoever reasonably suspected of being stolen or unlawfully obtained in any State or Territory of the Commonwealth may be arrested either with or without warrant and brought before a Magistrates' Court, or may be summoned to appear before a Magistrates' Court.
>
> (2) If such person does not in the opinion of the Court give a satisfactory account as to how he came by such property he shall be guilty of an offence."

One of several elements that must be established by the prosecution in proceedings under s26 is that the reasonable **[2]** suspicion referred to in s26(1) of the Act was entertained at the time the person was in possession of the property in question. In addition, the reasonable suspicion must attach to the property and not merely to the person in possession (*Nicholls v Young* [1992] VicRp 62; [1992] 2 VR 209 at 215).

The respondent gave evidence that he attended at the appellant's premises and that he there saw videos that came from three video stores in three different suburbs none of which were suburbs in which the appellant lived. The respondent agreed in cross-examination that the videos were not hidden in any way but were in a video cabinet under the television set. He agreed that there did not appear to have been any attempt to interfere with the videos. He conceded that the videos did not have due dates on them. He agreed that it was not unusual for a person to belong to more than one video outlet. He denied that his suspicions related to the appellant rather than the property.

Evidence was also led by the prosecution from the proprietor or employees of the video outlets in question relating to videos of the films in question. They stated that videos had been hired by one Vince Moushino or his family or a Robin Young and they gave evidence that they were long overdue, in some instances for a year or more. They also gave evidence that the appellant was not a member of the relevant video club.

Evidence was also given in the form of a transcript of a police interview with the appellant. The tape recording of the interview was not in evidence. In substance he said in the interview that the videos had been brought to him by a **[3]** friend not long before, that he had no reason to believe that the videos were stolen or unlawfully obtained and that he had no suspicion at all in relation to the videos. He said that he did not know how long his friend had had the videos. He himself had not yet watched the videos. He refused to state who the friend was.

The principal submission in the no case submission was that it was not open to the respondent to hold a reasonable suspicion at the time that the seven videos were in the accused possession that they had been unlawfully obtained. The prosecutor made no submissions in reply.

The magistrate, in declining to award costs to the accused appellant, made the following points:

> (a) "the question of whether the appellant had invited his own prosecution was affected by his having had the property in his possession for such a long period and by his advancing nothing that was attractive as an explanation";
>
> (b) it was relevant that "the appellant was 'highly susceptible to the charge of receiving at the very least';
>
> (c) 'the high level of moral and criminal culpability of the plaintiff was a relevant factor"':
>
> (d) "the effect of *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534; 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287 was that the costs should be awarded only to a deserving defendant, namely, one that is successful but whose success is not tarnished by conduct inviting the prosecution".

The appellant does not dispute the proposition that it was relevant for the magistrate in the exercise of his discretion to determine whether in some sense the appellant by his conduct had invited his own prosecution. Both counsel referred to the leading case *of Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534; 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287. In their reasons, Mason CJ (at 154), **[4]** Toohey J (at 162-3) and McHugh J (at 165) acknowledged that the fact that a defendant had unreasonably induced the informant to think that a charge could be successfully brought was a matter relevant to the exercise of the costs discretion. Plainly, the learned magistrate was relying upon this proposition in reaching his decision.

The appellant submits that the magistrate erred in the exercise of his discretion in that the above matters were without foundation and irrelevant. For present purposes I think it is sufficient, however, to consider the first point relied upon by the learned magistrate - that the appellant had invited his own prosecution by having had the property in his possession for such

a long period. This finding appeared to be relevant to the other conclusions he advanced.

The only evidence available to the magistrate about the period of possession by the accused was contained in the record of interview. It is true that there was evidence that the video tapes had been long overdue but the only evidence as to the possession of the appellant was that contained in answer to the following questions in the interview:

> "Q. How long have they been at your premises?
> A. Wouldn't have clue. A few days.
>
> Q. ... Why were you holding them for him?
> A. Because I wanted to watch them.
>
> Q. When did you watch them? Have you watched them all - sorry?
> A. I haven't watched them.
>
> Q. And he brought them in - sorry - when was it?
> A. Just a few days ago." **[5]**

The respondent could not support the magistrate's finding of possession "for such a long period" by reference to direct evidence. Instead the respondent sought to do so on the ground that the answer "Wouldn't have a clue. A few days" was an evasive answer and that one could infer from that evasion that the appellant had had the video tapes for a long period. Such an inference would not, however, be enough to support the finding made. The finding was that the appellant had had the videos in his possession for "such a long period". His Worship plainly had a period in mind and a lengthy one at that. The answers do not enable a period to be identified. Further, at best they might support an inference that the period was more than a few days. A further point to consider is that the question whether the appellant had "invited his own prosecution" required a consideration of the causal connection between the alleged acts or omissions [of] the appellant and the bringing of the prosecution.

Section 26 requires, firstly, that there be a reasonable suspicion, entertained by the informant at the time the goods were in the possession of the defendant, that the goods were stolen or unlawfully obtained. The existence of that circumstance enables the proceedings to be commenced. While any interview with a defendant may shed some light on the prospects of that defendant succeeding in establishing a reasonable explanation, an informant bringing such proceedings would know that the first and critical hurdle to overcome to succeed in such proceeding is the demonstration **[6]** of the existence of the reasonable suspicion and that will depend on the circumstances surrounding the possession known at the time of the possession. Taking the worst position from the appellant's point of view, and assuming that his answers offered encouragement to the informant that any explanation offered would not be regarded as satisfactory, those answers could not and should not have assisted the informant in deciding whether there was sufficient evidence to support the commencement of proceedings. Under s26, they could be commenced if there were reasonable grounds for suspecting, when the goods were found in the possession of the appellant, that they were unlawfully obtained. An interview subsequent to the loss of possession could not assist in determining the success or otherwise of the informant's case on those matters. Thus, in my view it was not open to the magistrate on the evidence to make the finding of fact he did about the period of time in which the videos had been in the possession of the appellant nor could he properly find, assuming the appellant's explanation to be unsatisfactory, that the appellant should in some way be held to have "invited" the prosecution to bring the proceeding.

A case of error having been made out, it is necessary to consider whether the decision can be supported upon an alternative basis. The respondent relies upon the following matters as being sufficient to support a conclusion that the appellant brought the prosecution upon himself. Those matters were that during the subsequent interview

(a) the appellant had answered "No comment" to a **[7]** question

> "Do you think it's slightly suspicious that these videos are at your premises, when each of them are marked obviously that they come from a video store?"

(b) the fact that he refused to supply details of the person who allegedly supplied the video tapes to him.

(c) It is further said that he attempted to displace any blame onto the person who had allegedly supplied the video tapes to him.

In relation to points (b) and (c), the argument is put that, if the person had been named, further investigations could have been conducted which may have led to the charges not being prosecuted. As to point (a), it may be said that the appellant was doing no more than seeking to rely upon his right to silence as he had with earlier questions and as he was entitled to do. The mere exercise of the right to silence should not deprive a successful defendant of his or her costs. He shortly afterwards abandoned the attempt and gave detailed answers to questions which included questions about the suspiciousness of the situation such as:

"Do you think it's suspicious?

Suspicious on his behalf, not mine."

As to the other points, the critical matter is whether the failure to identify the supplier of the videos was something that would have entitled the magistrate to find that the appellant was disentitled from receiving compensation for his costs. In my view, it would not. The case is not one where the withholding of **[8]** information prevented investigation by the informant of the matters in respect of which the question was asked (cf *R v Dainer* (1988) 91 FLR 33). The informant in this case could have investigated the explanation by questioning the persons who had hired the alleged videos in the first place. This may have led to a more difficult and protracted inquiry but the refusal to give the information did not prevent it. It was also not a case where the withholding of information (such as alibi information) would affect the case generally. The information only affected the issue of the reasonableness of the explanation. Further, as noted above, the refusal to give the information could not properly affect the assessment by the appellant of the crucial threshold question on which the case failed - whether there was reasonable suspicion that the goods in question were stolen or unlawfully held at the time they were in the possession of the appellant.

It was also sought to justify the decision on the basis that the facts relied upon before the magistrate revealed misconduct of a kind which should prevent the appellant recovering costs. The possibility of such an argument was conceded by the Full Court in *Redl v Toppin* (unreported, 1 April 1993). Brooking J at (3) conceded this possibility and stated that the possible exception concerned conduct that might be:

"said to be so reprehensible (I use a vague term advisedly) that it would not be just to allow costs to follow the event. What may be regarded as reprehensible for this purpose I do not attempt to state, for it is clear that the appellant's conduct could not be said to warrant the refusal of costs ... It is not, for example, as if a defendant charged **[9]** with an offence of dishonesty is not proved to have committed the offence having regard to all the ingredients of the particular charge laid (the missing ingredients not being the 'dishonesty' one) but is nevertheless shown by the evidence led to have embarked upon some grand scheme to defraud the public on a large scale. That case can be dealt with when it arises."

Eames J (at 10) stated:

"Having said this, however, I should not be taken as adopting or laying down any categoric proposition that conduct falling short of justifying a conviction could never be taken into account on the question of costs. Whether the High Court judgment has gone so far as to say this remains to be considered. But it is unnecessary to be considered in the circumstances of this case. It could well be for example that where a case was dismissed solely because of a technical failure of proof on the part of the prosecution or where, for example, a charge was dismissed solely because of the non-attendance of a witness, that the circumstances out of which the charge arose might remain the relevant consideration together with other considerations on the question of cost. ..."

For the respondent it is submitted that the evidence before the magistrate revealed facts which supported a conviction for receiving stolen goods and that applying the above principles such misconduct disentitled the appellant from obtaining a cost's order. In my view, however, the evidence would not support such a finding.

On any proper reading of it, the record of interview could not support a finding of the

requisite *mens rea*. Further, the other evidence led for the informant was consistent with the appellant's account that the videos had been lent to him by someone who had hired them. There was no evidence to suggest that he was aware or had grounds to suspect that they were overdue or that they were overdue for any length of time. There was no evidence as to the charge that had been levied for the videos – whether, for example, **[10]** it was for a night or for a week or longer. There was no evidence that such charges were recorded on the videos in any way. On the other hand, the videos were openly displayed at the premises and there was no evidence to suggest that the appellant was seeking to conceal them in any way. While one can perhaps understand the informant and the magistrate entertaining suspicions, suspicions cannot deprive a successful defendant of his costs (see McHugh J in *Latoudis v Casey*, above, at 165). For the foregoing reasons I am not persuaded that the decision of the magistrate can be sustained on any alternative basis.

Having found that the appellant has demonstrated error of law, I am invited by the parties to exercise the powers contained in s92(7) of the *Magistrates' Court Act* 1989 and to determine the application for costs.

Section 26 in effect calls upon a defendant for an explanation but only where the circumstances when the goods were in his possession gave rise to a reasonable suspicion that they were stolen or unlawfully obtained. The magistrate's ruling on the no-case submission recognised that the circumstances did not call for an explanation – that is, the respondent had misjudged those circumstances. Thus the appellant succeeded in his no-case submission on a point in relation to which his acts, such as refusing to give information, had no relevant impact. Further, the ruling on the no-case submission indicated that the appellant should not have been charged. Consistently with the above analysis and applying the principles enunciated in *Latoudis v Casey* **[11]** (above), the appellant is clearly entitled to receive his costs of defending the proceedings. Not being in a position to determine the amount of the costs, it will be necessary after making the appropriate general order to remit the matter to the Magistrates' Court at Prahran for determination of the amount to be awarded –- unless the parties are able to agree on the amount. I will give the parties that opportunity before making final orders.

APPEARANCES: For the appellant Larrain: Mr I Freckleton, counsel. Victoria Legal Aid. For the respondent Clark: Mr D Brown, counsel. Peter Wood, Solicitors for the DPP.
