40/91

SUPREME COURT OF VICTORIA

PARKER v KELLY; McDONALD v ARCHIBALD

Marks J

16 July 1991

COSTS – INFORMATION DISMISSED – APPLICATION FOR COSTS – DEFENDANT UNCO-OPERATIVE WITH INVESTIGATING POLICE OFFICER – 'NO COMMENT' TO SPECIFIC ALLEGATIONS – GENERAL RULE AS TO COSTS - WHETHER RULE APPLICABLE – 'NO CASE' SUBMISSION UPHELD – INFORMATION DISMISSED – PROSECUTION WITNESS NOT SUFFICIENTLY RELIABLE – WHETHER ENTITLED TO COSTS UPON A DISMISSAL.

1. Having regard to the High Court's decision in *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534; 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287, the discretion to award costs involves the award of costs to a successful defendant in the ordinary case. Accordingly, where costs are refused upon the dismissal of an information, a magistrate is required to find that the circumstances of the case are not "ordinary".

2. Where an alleged offender was given a full opportunity when questioned to tell an investigating police officer what he later gave in evidence at the court hearing, it was open to the magistrate to have found that the circumstances of the case were not ordinary and accordingly, refuse an application for costs upon the dismissal of the information.

3. Where a magistrate found a prosecution witness to be insufficiently reliable, upheld a 'no case' submission-and dismissed the information, there was nothing out of the ordinary in the circumstances of the case to justify the magistrate's refusal of the application for costs.

MARKS J: **[1]** This is the return of two orders nisi to review decisions of the Magistrates' Court at Portland, which raise the same issue, namely, whether in each case the Magistrate's discretion to refuse an application for costs by the successful applicant miscarried. The appeals relate to totally different proceedings but have been heard together because both turned, to a large extent, on what was decided by 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.

The circumstances in each of the appeals were common to the extent that they arose out of a strike at Borthwick's Meatworks in Portland where some workers continued to work and other made up pickets to obstruct entry to the premises. In the appeal in which Barry Desmond Parker is the applicant, it was alleged in the Magistrates' Court that he had assaulted a person named Kenneth Clarke on 18 February 1989 outside a milk bar in Portland. It is unnecessary to detail the circumstances at length but, in effect, Clarke said that he had been getting on his bicycle when he was attacked from behind by Parker. The explanation for the assault, which appeared, on its face, to be unprovoked, was that Clarke was a worker at the meatworks who did not participate in the strike, whilst Parker had been a former union man who supported the picketers. It is not to the point whether this was made out at the hearing, for the two informations against Parker were dismissed. One information alleged intentional causing of injury and the other unlawful assault. In the upshot the Magistrate dismissed the **[2]** informations on the basis that he was not satisfied beyond reasonable doubt as to the identity of the assailant.

There was some change of story and inconsistencies on the part of the alleged victim, Clarke, which, no doubt, founded the reasonable doubt the Magistrate professed to entertain. Clarke said in evidence that his assailant ran way after the assault and increased his pace after looking back towards him. He also said that the assailant got into an orange-coloured Falcon with white wheels and described the clothing which Parker denied he wore on that day. In addition, Parker gave evidence, supported by medical practitioners, that his physical condition was such that he could not run. He said also that although he owned an orange-coloured Falcon, he had not driven it to the milk bar that day but, in any event, it did not have white wheels. He said that he had driven

a Commodore to the milk bar. He admitted that he was at the milk bar at or about the time of the alleged assault. After his apprehension, however, the applicant was very unco-operative in an interview he had at the police station with two members of the Police Force. The interview was conducted by a Sergeant Sprague whose absence from the witness box was the subject of much comment by counsel for the applicant. The interview was recorded in writing. Counsel informed me from the Bar table that the record was in fact signed by the applicant although the copy document placed before me bears no signature. The original has not been produced. Nevertheless, no challenge appears to have been made to the answers recorded there, or that they were other than **[3]** accepted by the Magistrate as having been given. These answers show that the applicant refused to give the account, which he was given an opportunity by Sergeant Sprague to provide, that he gave later in the witness box. In particular, he was asked whether he went to the milk bar in question and answered that he did. He was then asked these questions:

> Question: "It is alleged that a male person was outside the milk bar back in Otway Street putting items on his bike and that you ran up behind him and punched him several times about the head? Answer: "No comment." Question: "It is further alleged that you punched the man until he fell to the ground; what do you say to that?" Answer: "No comment". Question: "It is alleged that you then ran east up Otway Street, then left down a side street known as Palmer Street; what do you say to that?" Answer: "No comment." Question: "It is alleged that a short time later you returned to the shop where you again saw the male person in the rear of the shop, that you bought some items and left?" Answer: "No comment." Question: "Do you deny having assaulted the male person?" Answer: "No comment."

A number of further questions were put to which the applicant replied, "No comment". However, he did answer some questions, which makes it likely that the declination to answer specific allegations were admissible against him as tending to establish the prosecution case. It must be said at once that it is surprising that the applicant did not deny strongly that he was the person involved, if such was the case, or to meet the allegation that he ran from the scene by pointing out that he could not run.

These matters, I think, were relevant to the question of costs which is the only issue with which I am concerned. However, the Magistrate did not have at the time of his decision the benefit of *Latoudis* which has **[4]** since been published. At that time, the practice in Victoria was not to award costs to successful defendants unless there were some unusual or special circumstance. The practice did result quite often in costs being awarded against informants but it is unnecessary that I discuss the ambit of the exceptions. The Magistrate may well be forgiven for thinking that it was proper for him to refuse an order for costs notwithstanding the successful defence to the charges.

In his reasons the Magistrate indicated, I think, quite clearly, although there is some dispute about what precisely he said, that the practice was not to award costs unless there was some impropriety or lack of *bona fides* in the bringing of the prosecution. **[5]** It is not disputed that the Magistrate said:

> "Whether or not the informant acted reasonably is not a proper test and this was not an appropriate matter for awarding of costs as there was no evidence of malice or a conspiracy against the defendant".

Mr Dennis, of counsel, I think correctly interpreted these words as meaning that the case before him was not appropriate for the awarding of costs because there was no evidence of malice or conspiracy against the defendant.

Magistrate thought that the case before him was not appropriate for the awarding of costs because there was no evidence of malice or conspiracy against the defendant. The Magistrate must be taken to have meant that because there was no evidence of malice or conspiracy against the applicant, no order for costs should be made against the respondent. *Latoudis* makes such a consideration irrelevant, despite valiant submissions by Mr Dennis on behalf of the respondent that *Latoudis* does not alter the law, and discretion remains unfettered.

In my opinion, the High Court has made it clear that a proper exercise of the discretion conferred by s97(b) of the *Magistrates (Summary Proceedings) Act* 1975, which was the relevant provision at the time, involves costs being awarded to a successful defendant in the ordinary case. In *Latoudis*, at page 49, Sir Anthony Mason CJ said:

"In ordinary circumstances it would not be just or reasonable to deprive a defendant who has secured the dismissal of a criminal charge brought against him or her of an order for costs".

The Chief Justice was one of a majority of three which supported that proposition, although the other two members of the Court used slightly different language, but, in my opinion, to the same effect. The result, I think, must be that in order that the Magistrate exercised his discretion correctly in **[6]** accordance with the guidelines of the High Court, and to have refused the costs of the applicant, he needed to find that the circumstances were not "ordinary". He might have done so by reference to the unco-operative attitude of the applicant in the interview with Sergeant Sprague. The applicant was given, in my opinion, according to the evidence, a full opportunity to say what he later said in evidence. If he had said that, the police would have been given a feasible account contradicted by the word only of Clarke. No eye witness supported the evidence of Clarke. Accordingly the case was one in which only the word of Clarke was against the word of the applicant. The applicant, by his conduct in the police station, could have been taken to have made admissions by declining to give the explanation and firm denial which he gave in the witness box.

The Magistrate, however, did not rely upon this factor to refuse the order for costs. His exercise of discretion must be taken to contain the error to which I have referred. However, I am of the opinion that s93 of the *Magistrates' Courts Act* 1971, which, it is conceded, is relevant to these appeals, the new Act not being applicable, gives this court a discretion whether a matter should go back, notwithstanding a ground or grounds of the order nisi have been established.

Mr Monti, for the appellant, submitted strongly that I should not regard the answers given by the applicant as showing an unco-operative or improper approach, because it is said that the applicant was in a hostile environment and that Sergeant Sprague was determined to charge him, no matter what he said.

[7] I am not satisfied that I would be entitled on the material to approach the matter in that way. It is a matter for fine decision whether the order nisi should be made absolute and the matter remitted, but I am finally of the view that having regard to the costs of the litigation, the time that has passed, and the clear foundation for exception constituted by the applicant having failed to give the explanation which he later gave in court, that the proper course is to leave the matter where it is and discharge the order nisi.

It was conceded by counsel that the circumstances are of the very kind to which the majority referred as capable of taking a case out of the "ordinary". So, the circumstances here relevant to the question of costs were not "ordinary". (See Mason CJ at CLR page 51, Toohey J at CLR pages 66 to 67, McHugh J at CLR pages 69 to 70). In Parker v Kelly the order nisi is discharged. My tentative view is that there be no order as to costs but I will allow counsel to speak on that matter when I have dealt with the other case, McDonald v Archibald. In this case the circumstances relate to an alleged occurrence at the picket line at the same Meat Works. The respondent alleged by information dated 25 January 1989 that on 5 December 1988 the applicant wilfully damaged a motor car owned by Robert Leslie Woods by breaking the windscreen. The circumstances again need not be detailed at length. Woods was attempting to enter the factory to resume work whilst the picketers were bent on stopping him. He drove through the picket line slowly, and as he did so his windscreen was broken. Woods alleged **[8]** that the applicant had either thrown or smashed against the windscreen a roll of tape.

At the hearing on 5 November 1989 before the Magistrate constituting the Magistrates' Court at Portland, Woods was extensively cross-examined and the Magistrate upheld a submission at the end of the prosecution case that there was no case to answer. Although the Magistrate held that there was no case, it appears that his essential finding was that he found the prosecution witness insufficiently reliable to require him to call on the defence. Accordingly the applicant did not give any evidence and was not required to call any witnesses.

[9] After the submission was upheld, the Magistrate was asked to award costs against the respondent. He refused to do so and gave reasons which are set out in the supporting affidavit. These reasons also disclose, in the light of *Latoudis*, more than one error in the exercise of the discretion. Again the Magistrate was purporting to exercise his discretion under s97(b), but, in

the process, referred to a decision of a judge of this court who had declined to follow *Hamdorf v Riddle* (1971) SASR 398. That was a decision of the South Australian Full Court which held, in effect, that in awarding costs in summary proceedings which determined in favour of a defendant, courts should "in a general way" exercise their discretion as they do in civil cases. As I have said in relation to Parker, this was contrary to the practice in this State, but the High Court in *Latoudis* approved *Hamdorf* and thus, in effect, overruled the decision of a single judge of this court which the Magistrate in McDonald v Archibald purported to follow. In doing so, he clearly was by virtue of *Latoudis* in error and that error must be said to have vitiated his discretion.

Moreover, the Magistrate said that he found no evidence that the prosecution was brought out of malice towards those picketing the premises. This again is made an irrelevant consideration by *Latoudis*. The Magistrate also said that he found that the prosecution acted reasonably which "is a factor to be considered but not the deciding factor." The majority in *Latoudis* held that the fact that a prosecution acts reasonably is no longer to be considered a relevant factor. It is unnecessary to **[10]** analyse further the reasons of the Magistrate but it must be conceded that he proceeded on the basis of the practice in Victoria which was overruled in *Latoudis*.

Mr Dennis for the respondent in this case was unable, in my opinion, to point to anything out of the ordinary in this case which would provide a foundation for the view I have taken in the case of Parker. Accordingly, the order nisi is made absolute with costs. The refusal of the Magistrate to order costs in favour of the applicant against the respondent is set aside and the matter is remitted to the Magistrates' Court at Portland to be dealt with according to the law. The Magistrate will determine the quantum of costs the applicant should receive.

APPEARANCES: For the applicant McDonald. Mr T Monti, counsel. Stringer Clark, solicitors. For the respondent Archibald: Mr BM Dennis, counsel. Victorian Government Solicitor.
