33/96

SUPREME COURT OF VICTORIA

HUNG PHI DO v BOWERS

O'Bryan J

10 October 1996

CRIMINAL LAW – COSTS – DEFENDANT PARTIALLY SUCCESSFUL – WHETHER ENTITLED TO COSTS.

H. was charged with four offences arising out of the driving of a motor vehicle. At the contest mention, H. indicated a willingness to plead guilty to two of the charges if the prosecutor was prepared to withdraw the other two charges. No agreement was reached and the charges were fixed for hearing at a later date. At the hearing, H. pleaded guilty to two charges as previously indicated and not guilty to a third charge; the fourth charge was withdrawn. At the conclusion of the informant's case the contested charge was dismissed and penalties were imposed on the remaining two charges. The Magistrate refused H's application for costs of the hearing. Upon appeal—

HELD: Appeal dismissed.
1. The relevant principle is that costs are generally awarded by way of indemnity to a successful defendant in a court of summary jurisdiction.
Latoudis v Casey **[1990] HCA 59; (1990) 170 CLR 534; 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287, referred to.**

2. In the present case, whilst the defendant was successful in relation to the contested charge, it did not mean that he was "a successful defendant" under the general rule, for at the end of the day he was found guilty of two charges and substantial penalties were imposed by the Court.

3. The magistrate was entitled to consider the reasonableness of the prosecutor's decision not to proceed at the Contest Mention. In the circumstances, the magistrate was not in error in refusing to award costs.

O'BRYAN J: [1] This is an appeal from an order made in the Magistrates' Court at Dandenong on 21 June 1996 whereby the Court made no order as to costs in favour of the defendant (the appellant in this Court) when a charge of driving under the influence of intoxicating liquor was dismissed. The appellant has appealed the order which effectively refused an application that the informant should pay the costs of the hearing on 21 June. The error of law relied upon is that the Magistrate took into account an irrelevant matter namely the conduct of the appellant when he exercised his discretion as to costs. The material before the Court does not articulate clearly the reasons expressed by the Magistrate when he refused the costs application. The affidavit relied upon by the appellant was made by one Tuan Phi Nguyen on 15 July 1996. After referring to the ruling that no costs would be awarded Mr Nguyen deposed (para. 13):

> "The Magistrate said there was no way he would order costs against the police in this case citing again the events that founded the charge."

Nowhere else does one find the reasons of the Magistrate for no affidavit was filed on behalf of the respondent.

The background to the charge began on 29 December 1995 when the appellant was arrested in Noble Park whilst driving a motor vehicle and was charged with four summary offences. The appellant's car had apparently collided with a kerb as it turned a corner and one of its wheels was severely damaged. The appellant elected to drive on after the collision notwithstanding the damage caused to a wheel. Police intercepted the appellant's vehicle and he was taken to Dandenong Police Station and requested to provide a sample of his breath for breath/alcohol analysis. The appellant **[2]** declined to do so. Eventually four summary offences were charged:

Driving a motor car carelessly;
Driving a motor car in an unsafe condition;
Driving a motor car under the influence of intoxicating liquor;
Refusing to undergo a preliminary breath test.

The practice in the Magistrates' Court required the appellant and the informant to attend a "contest mention" hearing in the Court on 14 May 1996. At the hearing counsel for the appellant informed the prosecutor and the Court that the appellant was willing to plead guilty to the careless driving and unsafe condition charges if the informant was prepared to withdraw the other two charges. No agreement was reached and the Court fixed a hearing date. Counsel for the appellant indicated to the Court that should the contested charges be dismissed on the hearing date the appellant would seek costs against the informant. Counsel informed me that had the prosecutor acceded to his client's offer on 14 May the presiding Magistrate would have proceeded then and there to hear the plea and to impose penalties thus avoiding a second day in Court. It is common ground that the procedure in the Magistrates' Court permitted the hearing to be completed on 14 May, if the guilty pleas had been accepted by the prosecutor.

On 21 June the charges came on for hearing in the Magistrates' Court. The appellant pleaded guilty to careless driving and to driving a motor car in an unsafe condition. The prosecutor withdrew the charge of failing to undergo a preliminary breath test and proceeded to call evidence in relation to the driving under the influence charge. At the **[3]** conclusion of the informant's case the appellant opted not to call evidence and the charge was dismissed. The Magistrate refused to order costs against the informant. The evidence led in support of the driving under the influence charge was also relevant to the two charges to which the pleas of guilty had been entered. The evidence disclosed to the Magistrate the events relating to the two charges and he was able to assess the seriousness of the charges for the purposes of penalty. The appellant was fined $300, was ordered to pay $46 statutory costs and had his licence suspended for one month on the careless driving charge. On the unsafe condition charge the appellant was fined $200 and had his licence suspended for one month. Clearly, the Court took a serious view of those offences.

In support of the application for costs counsel for the appellant relied upon a decision of 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. In *Latoudis* the Court held that ordinarily a court of summary jurisdiction in exercising a statutory discretion to award costs in a criminal proceeding will make an order for costs in favour of a successful defendant. The relevant principle is that costs are generally awarded by way of indemnity to a successful defendant in a court of summary jurisdiction. A qualification to the rule was expressed by Mason CJ:

> "There will be cases in which, when regard is had to the particular circumstances, it would not be just and reasonable to order costs against the prosecutor or to order payment of all the defendant's costs. If, for example, the defendant by his or her conduct after the events constituting the commission of the alleged offence, brought the prosecution upon himself or herself, then it would not be just and reasonable to award costs against the prosecutor." (544).

[4] The Court held in *Latoudis* that the Magistrate's discretion erred because he focussed upon the reasonableness of the informant's conduct in instituting the proceedings. Recently, the Full Court in Victoria considered the general rule and what sort of conduct may justify a departure from the general rule: *Redl v Toppin* (Brooking, Nathan and Eames JJ, 1/4/93, unreported). Brooking J observed:

> "What sort of conduct may justify a departure from the general rule is something which it is difficult if not impossible to state exhaustively and definitively."

The problem that arises in the present appeal is in identifying the reason why the learned Magistrate refused to make an order for costs in favour of the defendant. Counsel for the appellant submitted that the Magistrate wrongly took into account the behaviour or conduct of the appellant after the event. Counsel for the respondent disputed this interpretation of the Magistrate's reasons. The question arises whether a Magistrate confining himself to relevant circumstances was entitled to exercise his discretion so as to deprive the appellant of his costs. I raised with counsel a question at the conclusion of the hearing whether the appellant had to be regarded as "a successful defendant" to summary criminal proceedings. Was the learned Magistrate entitled to find at the end of the hearing that the appellant was not "a successful defendant" for the purposes of the general rule as to costs? The Court had dealt with three charges arising out of the same circumstances. The appellant was successful in relation to the contested charge and unsuccessful in relation to the charges to which he pleaded guilty, in the sense that penalties were imposed by the Court.

[5] It is not unusual in the Magistrates' Court for a defendant to contest a number of charges and at the end of the day to be found not guilty of some and guilty of others. A defendant may be found not guilty of the most serious charge and guilty of the lesser charge arising out of the same transaction. In such circumstances a defendant would not be awarded costs as a "successful defendant" under the general rule. Counsel for the appellant submitted that the learned Magistrate was required to have regard to the offer to plead guilty to two charges made on 14 May 1996.

The consequence of the prosecutor refusing to accept the offer increased the legal costs of the appellant, it was submitted. In my opinion, the learned Magistrate was entitled to consider the reasonableness of the prosecutor's decision not to proceed on 14 May but was not entitled to give consideration to the conduct of the appellant at the time the offences were allegedly committed. The material before the Court does not reveal what matters the Magistrate took into consideration.

I am not satisfied, however, that the learned Magistrate gave any consideration to the conduct of the appellant. He may have found that the appellant was not "a successful defendant". That he was successful in relation to the contested charge does not mean that he was "a successful defendant" for at the end of the day he was found guilty of two charges and substantial penalties were imposed by the Court. In these circumstances I consider the learned Magistrate was entitled to refuse to award costs.

In this appeal the appellant had to show that the learned Magistrate's discretion miscarried because he departed from the general rule by taking into consideration an irrelevant matter or by omitting to take into consideration a relevant matter. This was not shown. As there was a basis upon which a Magistrate acting judicially could refuse costs I am unable to find an error of law. The appeal will be dismissed with costs.

APPEARANCES: For the Appellant: Mr Houlihan, counsel. James Karavias & Co, Solicitors. For the Respondent: Mr Newton, counsel. Victorian Government Solicitor.
