

38/84

SUPREME COURT OF VICTORIA

R v MAGISTRATES' COURT at WODONGA & ANOR; ex parte A-G for VICTORIA re: LIZIO

Hampel J

28 June 1984

COSTS – ORDER FOR STATUTORY COSTS WHERE ISSUING FEE PAID – VALIDITY OF ORDER – FOR IMPRISONMENT IN DEFAULT OF COSTS SATISFIED BY DISTRAINT – WHETHER 'FINE' INCLUDES 'COSTS': *PENALTIES AND SENTENCES ACT 1981, S10; MAGISTRATES' COURTS' ACT 1971, S28(3A); MAGISTRATES (SUMMARY PROCEEDINGS) ACT 1975, SS97, 106.*

Informations with duty stamps affixed came on for hearing in the Magistrates' Court alleging that L. had committed offences against the provisions of the *Protection of Animals Act 1965*. The Court convicted L. in respect of one information, fined him \$500 with \$13.50 costs under s28(3A) of the *Magistrates' Courts Act 1971* in default 26 days' imprisonment. The Court also ordered that L. pay the sum of \$2000 costs in default distress and in default of sufficient distress, 50 days' imprisonment. As the orders for costs were of doubtful validity, the Attorney-General applied for a writ of *certiorari*. Upon order nisi to review—

HELD: Order absolute.

(1) In respect of the order for payment of the \$13.50 statutory costs, the Court had no power to make such an order.

(2) The power provided by s10 of the *Penalties and Sentences Act 1981* to order imprisonment in default of payment of a fine does not extend to an order for costs.

(3) Accordingly, the Magistrate was in error by ordering that L. be imprisoned in default of the costs being satisfied by distraint.

HAMPEL J: [1] This is the return of an order nisi for a writ of *certiorari* made by Marks J on the 18 November 1983 in relation to a decision of the Magistrates' Court at Wodonga given on the 6 July 1983. The order was made upon the following grounds:

(a) That upon the proper construction of Section 28(3A) of the *Magistrates' Courts Act 1971* the learned Stipendiary Magistrate had no power pursuant to that section to make an order for costs in favour of the Informant;

(b) That upon the proper construction of Section 106 of the *Magistrates (Summary Proceedings) Act 1975* that section did not authorize the Magistrates' Court to order that in default of payment of costs such costs be levied by distress and that in default of distress the person in default be imprisoned:

[2] (c) That the Magistrates' Court was not empowered to order that in default of payment of costs such costs be levied by distress and that in default of distress the person in default be imprisoned;

(d) That upon the proper construction of the *Magistrates (Summary Proceedings) Act 1975* and of the *Penalties and Sentences Act 1981* there was no power in the Magistrates' Court to fix a term of imprisonment in default of payment of an amount awarded by way of costs;

(e) That the learned Stipendiary Magistrate wrongly exercised his discretion in ordering that Joseph Lizio pay \$2,000 costs to the Informant Anthony Whiteley.

Joseph Lizio was convicted on the 6 July 1983 of a breach of s5(2) of the *Protection of Animals Act 1966*. The certificate of summary conviction dated 8 November 1983, recites that Mr Lizio was "convicted and fined \$500 with \$13.50 costs under s28(3A) of the *Magistrates' Courts Act*, in default of payment to be imprisoned for 26 days. Order pursuant to s106(h) of the *Magistrates' Courts Act* that \$2,000 costs in default distress and in default of sufficient distress defendant is to be imprisoned for 50 days". This recital contains an error in that the reference to s105(h)

of the *Magistrates' Courts Act* should be a reference to s106(1)(h) of the *Magistrates (Summary Proceedings) Act*, and I proceed on that basis.

[3] The first matter of substance is the order for the payment of \$13.50 costs which were described as statutory costs by the Magistrate. It is common ground in these proceedings that there was no power to make such an order, and that is clearly so. The main matter of substance the subject of dispute is the question of the power to order imprisonment in default of distress in relation to the order for \$2,000 costs. Prior to its repeal, paragraph (b) of s106(1) was in the following terms:

"Except in the case of a corporation the Court, Magistrate or Justice shall order that in default of payment of the amount of the fine the offender shall be imprisoned."

Then followed a formula for the calculation of the duration of such imprisonment by reference to the amount of the fine. Sub-section 3 of s106(1) specifically extended the meaning of "fine" to include costs ordered to be paid by the person to be fined. Section 10 of the *Penalties and Sentences Act* 1981 repealed paragraph (b) of sub-s(1) of s106 and substituted penalty units in the formula. Otherwise it left the provision substantially the same. Mr Nash of Counsel, who appeared for the Attorney-General, submitted that the repeal of paragraph (b) removed the power to order imprisonment in default for non-payment of costs. This was so because the expanded meaning of "fine" was not adopted by the *Penalties and Sentences Act*.

It [4] appeared that imprisonment could not be ordered in default of non-payment once the express provision was repealed. Without such a provision costs form no part of a fine as they are not awarded in order to punish, but rather to compensate a person for expenses incurred. Mr Ryan QC, who with Mr Murdoch appeared for the informant, submitted as the repealing provision was confined to paragraph (b) it was not intended to have effect on other paragraphs of the section, including paragraph (h). The removal of paragraph (b) merely removed the formula and did not affect the powers conferred by paragraph (h) to impose imprisonment in default of payment of fine. The formula is now provided in s10 of the new Act. He submitted that the use of the word "fine" in the new provision must be looked at in the context of the legislation empowering the Magistrate to impose the fine, and since "fine" in sub-s3 of s106 included costs, then s10 of the new Act, if applied in the context of s106 empowers the Magistrate to impose a term of imprisonment for non-payment of costs. Mr Ryan referred me to the 6th edition of *Craies on Statute Law* where at p375 the learned author said:-

"Even if a subsequent statute, taken strictly and grammatically, is contrary to a previous statute, yet if at the same time the intention of the legislature is apparent that the previous statute should not be repealed, it has been in several cases held that the previous statute is to remain unaffected by the subsequent one."

In my view the penalty provided for in the new Act does not include costs. The Magistrate's power to award costs is contained in s97 of the *Magistrates (Summary Proceedings) Act* 1975. Sub-section (d) of that section provides as follows:

[5] "Subject to the provisions of section 106 any amount ordered to be paid for costs may be raised and levied by distress under the provisions of this Act."

The now repealed paragraph (b) of s106(1) empowered the Magistrate to order imprisonment in default of payment of a fine. It was only by virtue of the extended definition of "fine" contained in s106(3) which included costs that power was given. When paragraph (b) was repealed, in my opinion, those powers were revoked. The power to order imprisonment in the case of a non-payment of fine was re-established by the enactment of s10 of the *Penalties and Sentences Act*, but that Act does not contain the extended definition of "fine" to include costs.

It follows, in my opinion, that the only power which remains to imprison is in default of a failure to pay the penalty and not costs. If the legislature intended to maintain the power to imprison in default of payment of costs, it should have done so in clear terms. For those reasons the order will be made absolute. The order of the Magistrates' Court is varied by deleting the order as to the payment of \$13.50 costs and by deleting the provision for the imprisonment for fifty days in default of sufficient distress in relation to the payment of costs of \$2,000.