19/04; [2004] VSC 131

SUPREME COURT OF VICTORIA

JANDREOSKI and ORS v COLLEY and ORS

Teague J

15, 21 April 2004

CRIMINAL LAW – COSTS ON DISMISSAL OF CHARGES – REFUSAL BY MAGISTRATE TO AWARD COSTS – MATTERS TO BE CONSIDERED UPON AN APPLICATION FOR COSTS – WHETHER MAGISTRATE IN ERROR.

1. In the ordinary case, where a prosecution is dismissed, the appropriate order to make on an application by the successful defendant for costs is that the prosecutor pay the defendant's costs. However, there will be exceptional cases where no order will be made.
***Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534; (1990) 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287, applied.**

2. Factors to consider whether an order for costs should be made include:
(1) Was it reasonable for the prosecutor to have brought the proceedings?
(2) Did the defendant bring the proceedings upon himself or herself?
(3) Did the defendant mislead or fail to assist the prosecutor in a material way?
(4) Was there some other reprehensible behaviour on the part of the defendant?
(5) Why was the defendant not convicted?
(6) Was the defendant lucky to escape conviction in that the proceeding was dismissed because of a technical failure of proof of an element of the charge?
(7) Did the defendant prolong the proceedings unnecessarily?

3. Where the defendants chose to take part in a piece of reprehensible conduct at the expense of those running a service station and then chose to decline to assist the police in a way that might have avoided any charges being laid, a magistrate was not in error in refusing an application for costs on dismissal of the charges.

TEAGUE J:

1. These are three appeals brought under section 92 of the *Magistrates' Court Act* ("the Act"). Summary prosecutions were brought against the three appellants by the two respondents in relation to events which occurred on 16 August 2001. Each of the three appellants was charged with one count each of theft, intentionally damaging property, and being in possession of property suspected of being proceeds of crime. The appellant Jandreoski was also charged with unlicensed driving. At the hearing on 15 April 2003, all of the charges were dismissed. An application was made on behalf of the appellants for an order for their costs to be paid by the respondents. The magistrate refused to make an order as to costs. He gave reasons for so exercising his discretion under section 131 of the Act. The appellants contend that the magistrate erred in refusing to make the order applied for.

2. Before the magistrate, oral testimony was given by a Nick Mortis, a console employee at a BP service station in Highett. In summary, what he said included that his shift on 16 August 2001 had started at 10 p.m. the previous night, and was due to finish at 8 a.m. Around 3 a.m., Mortis saw a red Gemini driven into the service station. It was parked away from the shop area at the service station. Four men got out. They came into the shop. Mortis was then behind a screen in the console area of the shop. One man came to Mortis. That man (the first man) asked where the rest rooms were. The first man was very tall, had a big build, was dark skinned and had close cropped hair. His manner was abrupt and threatening. The rest rooms were outside the shop area. Mortis pointed them out. The first man left the shop and was away briefly. The other men moved through the shop. Another man (the second man) asked Mortis the price of a bottle of drink. The second man was tall, fairly thin, in his mid twenties, and wore a cap. Another man (the third man) brought a drink bottle over to the console area. The third man was stocky, early to mid twenties, and had dark closely cropped hair. Mortis stated the price of the drink. The third

man said: "That's fucking a rip off." He took the bottle of drink back. The fourth man did not talk to Mortis. The fourth man moved around the shop, but was mainly in the auto care section. Mortis said that the fourth man was hard to describe, light or average build, maybe five feet ten tall. The third man was constantly grinning. He stayed closer to the counter than the other men. The other men were not always together. While the second man was near the counter, Mortis heard a noise from near the auto care section of the shop. He described the noise as like crackling, crunching. It was consistent with something falling from a shelf and breaking on the floor. One or more of the three men looked back at Mortis and smiled. Mortis chose not to go down at that time to check out the cause of the noise. A female customer came into the shop, was served and left. As she left, the second man said: "I wouldn't mind doing her. She's got a nice arse." The four men left the shop. Mortis did not see them go out the door. He watched them walk away from the shop. They walked close together. They had their hands in their pockets. Mortis did not see them holding any property items. They were grinning and laughing. They walked to the Gemini and drove off. They had not purchased fuel or anything else. Mortis checked out the auto care area. He found that oil had been spilt on the floor. The oil covered an extensive area. The boyfriend of the regular female customer came back in and handed to Mortis a slip of paper on which was written the registration number of the red Gemini. Mortis called the police. Police came to the service station. Mortis was shown by the police items like confectionery (Freddo Frogs) and tools. He identified them as items stocked at and missing from the shop. The shop had a surveillance video camera. It was not functioning at the relevant time.

3. There was also evidence from a Tom Nestor and from the two respondents. Tom Nestor, who owned the service station, attended there at around 7 a.m. on 16 August. Police showed him various items. He identified them as items stocked at and missing from the service station. The two respondents had attended at a McDonald's car park not far from the BP service station, around 5.20 a.m. on 16 August 2001. They saw there a red Gemini, and three men, the appellants. They saw items in the Gemini such as are stocked in a service station. They arrested the appellants. They went to the service station. They noted containers of oil or like liquid with tops removed. They saw and had photographed various items and the oil spillage damage. They showed items found in the red Gemini to Mortis and Nestor.

4. The magistrate had before him, as well as the oral testimony of Mortis, Nestor and the two respondents, the record of two police interviews. I was informed that the appellant Schembri had been interviewed, and had given no comment responses, and that at the hearing no record of that interview was tendered. The appellant Jandreoski said early in the interview that he was not going to comment on anything, but that he would answer the questions that he would like to answer. He said, in answer to questions: that he had earlier been driving a red Gemini that belonged to a relative; that he was not licensed to drive and had no excuse for driving without a licence; that he had known his two companions for a few years; that he with his companions had been driving around for some hours until they finished up at McDonald's; and, that he could not explain how certain items came to be in his car. He gave no comment answers to all questions relating to the Highett BP service station, including whether he had gone there. The appellant Mahfoud, after the preliminaries, during which he said that he was being sincere, not smart, was asked what happened at the service station. He answered: "No comment, sir. I have no idea." Asked a question about the spilling of oil there, part of his answer was: "...do I look like a spastic or a mental case or a handicap that's got nothing to do but put oils on floors?". Thereafter, with one exception, he made no comment responses to all questions. At one point he said: "I say that your witnesses are bullshit artists and I'd like to see their faces...if someone says something, they should be able to confront me face to face and say, "You done that." Because I wouldn't accuse you of anything if I didn't see."

5. The magistrate's reasons for dismissing all charges were transcribed:

> "I have got no doubt whatsoever that the red Gemini that was found at McDonald's was the red Gemini involved in the incident at the service station. The box of Freddo Frogs came from the BP station. The knife that was found in the car was identical to a brand of knife that was unusual in that it was supplied by the existing owner from the previous owner. It's not a knife that was readily available, and he found like knives with their blades open distributed around the floor of the premises. Similarly with regard to the torch. One looks at the photographs that have been tendered and bearing in mind the evidence of the officers, it is clear that these items or substantially all of them are new products. The pliers are still in the case, so it is another item. My eyes are a little difficult to identify that,

> exactly what that item is that I think it's the common (indistinct) and so are other items including the screwdrivers, doubts that I say I'm satisfied that those particular tool type items came from the premises (sic). I've got no doubt whatsoever that the four persons who have been referred to, including the three persons before the court, went into this BP Station on this particular night not for the purpose of buying anything but one might have the purpose of going to the toilet, but they went into that shop and by their body language and what they said and what was said to the female customer, and their hanging about and their comments and attitude, all demonstrate that they were up to no good. The fourth person has not been identified by any physical characteristic. The three gentlemen before the court have to some degree been identified by some characteristics and I put to on side my observation of one of the offenders has been grinning a lot in the courtroom. Suffice to say that I'm satisfied having regard to the time that elapsed between the time the vehicle was in the driveway and the time it was found at McDonald's, that the three persons are found there were in the shop (sic). The evidence before me is that caps were removed from oil products and that these items the subject which are set out in the plastic bag, some four containers, were emptied onto the floor. It is not clear to me and I cannot be satisfied beyond reasonable doubt as to whether or not all four persons were present when that was happening and participated in the fun and the loss of that property. On the evidence there are a number. I cannot exclude the person who went to the toilet for example or one or other of the others. I cannot be satisfied beyond all reasonable doubt that all four were present and participated precisely in that conduct. But a number of them were. In respect of the items that were stolen, the court does not have the evidence of those outside the service station who observed things happening and all of that is put to one side. They were significant items that were taken in quantity, but they were items that could easily be secreted. Now I've got no doubt that when the four were leaving the store, they knew very well that one or other of them had stolen these items and were participating in the fun and the enjoyment of that successful endeavour. But I cannot be satisfied beyond reasonable doubt that any particular one of the defendants took the items or one or other of the items. I cannot be satisfied beyond reasonable doubt that there was a common purpose at the outset in order to rip off all or one of these items from the service station. Each charge is dismissed and in respect of the charge of driving without a licensed driver seated beside him, the defendant admitted that he was unlicensed, said that he knew that he shouldn't be driving from his record of interview. That would indicate that he knew that he was unauthorised by law to drive that vehicle, and if in fact there was a basis for belief that he had a licensed person sitting beside him, one could ask, well why didn't he volunteer the fact. At the end of the day, the burden is on the prosecution to prove each element of the offence, and the factor otherwise as to whether or not one of the other participants in the vehicle was licensed has not been proven, that charge is dismissed (sic)."

6. After the magistrate finished, counsel for all appellants applied for an order for costs. The police prosecutor briefly submitted that no order be made, given that one defendant had made a no comment interview, and that the other two had answered questions selectively, giving no comment answers as to the allegations, so that the police got no explanation and hence had no choice but to have the matter dealt with in court.

7. The magistrate then gave his reasons for refusing to make an order for the respondents to pay the costs of the appellant. I have separated his reasons into four numbered paragraphs in order to make my later comments on the reasons more understandable:

> 1. "I propose to refuse the application for costs in each case. 2. One, the parties were involved as I have already found as being persons who were present and participated in the joy of the sport that one or other of them committed that night. 3. It might be said that in these circumstances where there has been absolutely no co-operation, no full and frank participation in the record of interview and (indistinct) beyond that, that discretion should be refused on that basis. 4. Now it seems to me in all of the circumstances that it would not be just to award costs where I have no doubt that the defendants before the court participated in one way or another in the enterprise either jointly or after the fact."

8. It has been put on behalf of the appellants that the magistrate erred in failing to properly apply the appropriate principles. The applicable principles are to be found in seven cases. I set them out for ease of later reference in a table in date order:

Latoudis	*Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534; (1990) 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287
Redl	*Redl v Toppin* (Full Court of Supreme Court of Victoria, unrep, 1 April 1993)
Larrain	*Larrain v Clark* (Smith J, unreported, 13 July 1995)

Alexander	*Alexander v Renney* (Batt J, unreported, 21 August 1995)
Oshlack	*Oshlack v Richmond River Council* [1998] HCA 11; (1998) 193 CLR 72; (1998) 152 ALR 83; (1998) 72 ALJR 578; (1998) 96 LGERA 173; [1998] 4 Leg Rep 18
Nguyen	*Nguyen v Hoekstra* (1998) 99 A Crim R 497
Junek	*Junek v Busuttil* (Kellam J, unreported, [2004] VSC 115, 7 April 2004)

9. Differences in positions taken in appellate decisions make the application of principles difficult in this area. In each of the leading case of *Latoudis* and of *Oshlack*, the court was split, with a majority of three, and a minority of two. *Latoudis* established that, in the ordinary case, where a prosecution is dismissed, the appropriate order will be to have the prosecutor pay the defendant's costs, but that there will be exceptional cases where no order will be made. In *Latoudis*, several examples are given by members of the court of considerations which might warrant no order being made. In *Latoudis*, and in cases after *Latoudis*, judges have stressed the importance of trying to avoid the creation of relatively rigid rules. In that regard, see, in *Redl*, Brooking J at 3, and Eames J at 11, in *Nguyen*, Phillips JA at 508, and in *Oshlack*, Kirby J at par 134.

10. What are some of the possible considerations? The cases suggest at least the following seven, that I will state in an overly summary way. First, the prosecutor's reasonableness. Was it reasonable for the prosecutor to have brought the proceedings? Secondly, any self-inflicting behaviour on the part of the defendant. Did the defendant bring the proceeding upon himself or herself? Thirdly, the defendant not taking a chance to explain his position. Did the defendant mislead or fail to assist the prosecutor in a material way? Fourthly, the defendant's other reprehensible behaviour? Was there some other reprehensible behaviour on the part of the defendant? Fifthly, the defendant's reason for succeeding? Why was the defendant not convicted? Sixthly, the defendant's luck. Was the defendant lucky to escape conviction, in that the proceeding was dismissed only because there was say a failure to satisfy the criminal onus as to an element of the offence? Seventhly, the defendant's inappropriate conduct of the proceedings. Did the defendant prolong the proceedings unnecessarily? It is obvious that the seven areas are not susceptible of neat compartmentalisation. For example, the defendant's good fortune may be but an aspect of the defendant's reason for succeeding.

11. *Latoudis* effectively ruled out as a consideration warranting a departure from making the ordinary order as to costs, both considerations one and six, the prosecutor's reasonableness, and the defendant's luck. As to the first, I acknowledge the qualification stated in *Nguyen* at 806. A magistrate might, when stating that the prosecutor acted reasonably, mean no more than that the defendant had brought the prosecution upon himself.

12. As I have noted, in *Latoudis*, the three majority judgments provide guidance with examples of circumstances which might warrant the ordinary order not being made. Mason CJ did so at 544. He briefly addressed considerations that I have summarised as one, two, three and seven. Toohey J did so at 565. He dealt briefly with consideration seven, and at greater length with consideration three. McHugh J did so at 569-570. He addressed aspects of considerations one, two, three, six and seven. As has been noted in *Nguyen* and *Oshlack*, the approach of McHugh J can be seen to be more rigorous in limiting the scope of exceptions.

13. In each of the six cases since *Latoudis*, there has been a review, in some cases a very careful review, of aspects of the guidance provided by *Latoudis*. A similar review was carried out in five other cases that I have not referred to in these reasons, as they were not sufficiently relevant. *Oshlack* is the only case which is not concerned with orders in the Victorian Magistrates' Court. In *Oshlack*, brief references were made to *Latoudis* by Brennan CJ at par 75 and by Gaudron and Gummow JJ at pars 24 to 29. More extensive reviews were made by McHugh J at pars 65, 66 and 76 to 83, and by Kirby J at pars.123 to 135.

14. In his submissions to me, Mr Nash, one of Her Majesty's Counsel, who appeared with Mr John Lavery of counsel for the appellants, argued that the magistrate had effectively said that there were two grounds for refusing to order the respondents to pay the appellants' costs. One was that the defendants had acted in a reprehensible way. The other was that the defendants had failed to co-operate with the police. As to the first, the magistrate had made comments critical of the behaviour of the defendants. But he had found that the evidence did not reveal participation or complicity in a crime. He found that the defendants saw others do something illegal, did

nothing and just enjoyed the fun. In the light of statements made in *Latoudis* and *Redl*, there was not here any reprehensible conduct of the relevant kind. As to the second, the defendants had merely exercised their right to remain silent. As stated in *Larrain*, they were entitled to do so. They should not be penalised as to costs for doing so. The magistrate may have been saying that the appellants were lucky to be acquitted. In other words, that they probably guilty but the had the benefit of the respondents having to satisfy the standard of beyond reasonable doubt. If the magistrate relied on that as a ground, it is not a relevant consideration, in the light of what was said in *Latoudis* by McHugh at 570 and by Dawson J at 560.

15. Mr Dennis, who appeared before me for the respondents, argued that the approach advanced by Mr Nash to the considerations warranting refusing the usual order was too rigid, and was not warranted by *Latoudis*. The High Court in *Latoudis* and *Oshlack* had indicated that it was not appropriate to work to rigid rules. The nature of the reprehensible behaviour that can be taken into account by the magistrate is broader than that submitted by Mr Nash. Here, the conduct of the defendants was reprehensible in a relevant sense based on what was said in *Redl* and *Nguyen*. Misconduct on the part of a defendant can justify a refusal to award costs if the misconduct is sufficiently connected with the subject of the charge. What the defendants did, as per the findings of the magistrate, was very serious misconduct. The question of what is blameworthy conduct on the part of a defendant is a question of fact in the particular circumstances of the case. It was apparent from statements made in *Latoudis* that the magistrate was entitled to take into account how the defendants had responded in interview. They chose not to explain their version of events. They could have, but failed to assist the police with information as to such matters as: Who was in the shop? What was done by any of those in the shop? How did the oil come to be spilt on the floor? It was apparent from what was said in *Latoudis* that an unduly restrictive approach to the exercise of the right to silence was inappropriate. That ought to be seen to be what occurred in *Larrain* and *Junek*. Given what was said in *Alexander*, it is appropriate to assess the relevance and weight of any material that might have been revealed by assistance. Ultimately, the court should only interfere if it is satisfied that the exercise of the discretion was clearly wrong.

16. What, in the case before me, were the considerations that led to the Magistrate making no order as to costs? I have set out in full what he said at the time. Mr Nash put to me that I had to analyse what was said to ascertain what the magistrate was "effectively" saying. Mr Dennis urged me to focus on the findings set out in the reasons.

17. I would first note that I recognise the need to make allowances for the position of the magistrate. He was under pressure to provide reasons immediately. There was no opportunity for later revision as usually is the case in the higher courts. It would have been preferable not to have the situation that an appellate court is obliged to interpret reasons provided orally and not revised. I assume that the magistrate was not asked to provide revised reasons. There is a letter on the file in this court indicating that the magistrate will abide the decision of the court. That being the position, there is no option but to focus on, and interpret judicially, the words in the transcript.

18. I would next note that the magistrate appears not to have sought, nor to have been offered, submissions from counsel for the appellants. The submissions put to him by the prosecutor were very brief. They focused on two considerations. One was as to the police having acted reasonably. The other was as to the appellants having chosen to give no comment interviews and thus offer no explanation of events. As appears from the decided cases, the first consideration is to be disregarded. The second consideration is relevant only in an appropriate case.

19. I would next note that I have not found it easy to interpret the reasons of the magistrate as to costs. Of minimal concern is the one occasion where the transcript reads "(indistinct)" in paragraph 3. I have assumed that the magistrate said "assist" or "co-operate" or the like. Of more concern is that the magistrate started paragraph 3: "It might be said...". I find that to be a troubling formula for stating a ground for exercising a discretion. However, as did counsel before me, I have treated it as if it had been expressed more positively. Likewise I am puzzled that paragraph 2 starts: "One." However, the magistrate did not go on to say: "Two" or "Two" and "Three". I confess that, after closely studying paragraphs 2, 3 and 4, I am left unsure whether he had in mind three grounds or two. There are aspects of paragraphs 2 and 4 that are common and aspects that are not. The introductory words to paragraph 4 are such as to suggest it was

the start of a restating of paragraph 2. Both refer to participation of the defendants. They do so in terms that I would not necessarily treat as meaning the same thing. Paragraph 2 refers to "the joy of the sport", paragraph 4 to "the enterprise". Paragraph 2 refers to "one or other of them", paragraph 4 to "either jointly or after the fact". I also had difficulty reconciling what the magistrate said in the reasons he gave for dismissing the charges with what he said in paragraphs 2 and 4. It seems to me that the deficiencies in the evidence are more strongly stated or stressed in the former than in the latter.

20. I would next note what the magistrate did not say. He did not expressly say that the police acted reasonably, (although that was what was put to him by the police prosecutor). Nor did he say: the appellants brought these prosecutions on themselves; that the appellants were lucky to have the prosecutions dismissed; or that the appellants acted reprehensively.

21. There are aspects of the reasons that warrant a closer focus. I focus on the use of the words in paragraph 3: "...there has been absolutely no co-operation, no full and frank participation in the record of interview..." I also focus on the words in paragraph 2: "...the joy of the sport...", which I take to be " the enterprise" in the context of the words in paragraph 4: "..participated in one way or another in the enterprise either jointly or after the fact".

22. I first digress to raise the query whether, in speaking of "participated" in paragraphs 2 and 4, the magistrate was effectively saying that the defendants were probably guilty? In the end, I am not sure that he was or that he was not. If he had been, that would appear to be an instance of his adverting to the situation that statements of Dawson and McHugh JJ in *Latoudis* at 570, were intended to address. In his dissenting judgment in *Latoudis*, Dawson J said, at 560:

> "In summary proceedings no less than in other criminal proceedings, the prosecution must prove its case beyond reasonable doubt. In many cases defendants quite properly escape conviction without having positively established their innocence. However, to differentiate cases of that kind from those in which a defendant has established his innocence, and not merely raised a doubt, by making an order for costs against the informant in one case but not the other, would be invidious and inconsistent with the presumption of innocence. Moreover, to award costs to a defendant against whom a charge has been proved on the balance of probabilities (but not beyond reasonable doubt) does not seem to be an appropriate exercise of discretion. Such a practice might subtly erode the standard of proof in criminal cases in order to avoid the granting of costs to a defendant who is probably guilty."

23. One must be wary of reading too much into Dawson J's comments about a concern as to the future. The position of McHugh J at 570 is more clearly stated: "Nor can the successful defendant be deprived of his or her costs because the conduct of the defendant gave rise to a suspicion or probability that he or she was guilty of the offence the subject of the prosecution." However, as Batt J noted in *Alexander* at 6, earlier in that same paragraph there are the qualifying words: "speaking generally".

24. I turn next to the use of the words: "...the joy of the sport..." and "..participated in one way or another in the enterprise either jointly or after the fact." What was the magistrate referring to? Was it an appropriate consideration to have regard to? During the hearing, the magistrate made a number of comments that reveal what he was referring to in his reasons as to costs. During submissions, he suggested that: "The purpose of those attendances at the shop was not to buy an item but to have fun at the expense of the proprietor." In his reasons for dismissing the charges, the magistrate said of the three persons before the court, that they "were up to no good", and that they all "participated in the fun".

25. The conduct of the defendants that led to the laying of the charges in the instant case was such as to warrant the strong disapproval of the magistrate. Perhaps much of that conduct was just men being boys. However, some was more troubling. Indeed, some bordered on intimidating. The console operator was understandably frightened. He chose to stay behind his console. If he had been more courageous, there might have been no material gaps in his evidence as to which of the four men did what. A moderate level of damage had been done. The mindless spilling of oil meant that hours had to be spent cleaning up. Customers had to be inconvenienced, so that the risk of slipping could be avoided. Property had been stolen. While some items taken, such as chocolate frogs, were of little value, others, like tools, were of greater value. The police had to be diverted from other duties. At the shop, there had been much smiling and grinning. A snide

remark about a woman had been made. The defendants had been seen to have taken pleasure in the discomfort of others. I can understand why the magistrate would refer to what had occurred as fun and as sport. In the end, the magistrate had to do his duty. He had to recognise that there was a deficiency in the evidence. He had before him evidence that warranted the drawing of adverse inferences as to almost all matters, but not as to individual participation or as to concert. I can understand that there would be a profound sense of dissatisfaction on the part of the magistrate about doing his duty in the light of the evidence he had listened to of much reprehensible behaviour.

26. In *Latoudis*, each of the majority commented on one or more kinds of conduct having the potential to be a consideration as operating to warrant a departure from the usual order. The focus of most of those comments, by Mason CJ at 544, Toohey J at 565-566 and McHugh J at 569-570 was on, or primarily on, conduct in relation to the proceedings or otherwise *after* the events, as distinct from conduct that led to the laying of charges (my italics). The latter conduct was considered in a limited way by McHugh J. It has been considered in a limited way in each of *Redl*, *Larrain*, *Nguyen* and *Junek*. In *Latoudis* at 570, as I have noted in another context, McHugh J, said: "Nor can the successful defendant be deprived of his or her costs because the conduct of the defendant gave rise to a suspicion or probability that he or she was guilty of the offence the subject of the prosecution."

27. In *Redl*, Brooking J at 3 to 5, suggested tags of "misconduct" and "reprehensible conduct". Brooking J said that, in the circumstances of *Redl*, the "supposed misconduct" was appropriately disregarded because it was the behaviour that led to the charges, and persistence in that behaviour. However, he went on to suggest that a costs order might properly be refused on an unproved dishonesty prosecution in the context of a large fraud, noting that that kind of case could be dealt with when it arose. Eames J at 10-11 said:

> "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 a relevant consideration together with other considerations on the question of costs. I say nothing as to that and it would be inappropriate to attempt to lay down any rigid parameters of the range of relevant considerations which might come into play on an application for costs." (My italics).

28. In *Larrain*, Smith J referred to *Redl*, but related the claimed misconduct back to what McHugh J had said in *Latoudis*. In *Nguyen*, the Court of Appeal treated the claimed misconduct as not of the kind referred to in *Redl*. In *Junek*, Kellam J at pars 26 and 40 referred to aspects of what Brooking J had said in *Redl*. In the circumstances before him, he concluded that there was not reprehensible conduct. After reviewing the cases, I am not persuaded that reprehensible behaviour in the circumstances out of which the charges arose is not a relevant consideration together with other considerations on the question of costs.

29. I turn to the criticisms by the magistrate of the lack of co-operation of the defendants. In *Latoudis*, each of the majority commented on that consideration as operating to warrant a departure from the usual order. Mason CJ did so briefly at 544, and McHugh J briefly at 569. Toohey J at 565 was more expansive:

> "...if a defendant has been given the opportunity of explaining his or her version of events before a charge is laid and refuses the opportunity, and it later appears that an explanation could have avoided a prosecution, it may well be just and reasonable to refuse costs: see, by way of illustration, *R v Dainer* (1988) 91 FLR 33. This has nothing to do with the right to silence in criminal matters. A defendant or prospective defendant is entitled to refuse an explanation to the police. But if an explanation is refused, the successful defendant can hardly complain if the court refuses an award of costs, when an explanation might have avoided the prosecution."

30. It may not be easy to reconcile, with the observations of Toohey J in *Latoudis* that I have quoted, what was said in *Larrain*, *Alexander* and *Junek* as to a defendant choosing not to answer certain police questions. The difference may be seen to lie in the distinction which arises from the use of the word "mere" or "merely" relative to the exercise of the right to silence. That may be the same distinction which is made in *Alexander*, by Batt J at 11 between mere omissions and conduct which provokes or leads to the prosecution. Clearly, there underlies the right of a person to decline to answer police questions, the protection against self-incrimination. As against that,

generally the approach of the law is to encourage the provision of information which may tend to incriminate other persons. Hence the discount on sentencing given for co-operation with the police. There are complications however, where the provision of information as to others would or might also, albeit more indirectly, incriminate the individual. In the circumstances before me, I can see that the choice of the defendants not to answer questions could be seen to have acted as a factor which operate to their disadvantage in the way contemplated by Toohey J. By answering police questions, the defendant could have provided more information to the police that would not have incriminated them. That information might have resulted in no charges being laid at all against any of the three. That would have been so if they had said that they had gone to the service station with a fourth man, and that the fourth man alone had taken items and spilled the oil.

31. I am conscious that in preparing this judgment, I have engaged in a process that appellate courts have cautioned judges against engaging in. That is, I have been closely reviewing particular passages of the appellate decisions in *Latoudis*, *Oshlack*, *Redl* and *Nguyen* as if they were statutory provisions. I have done so only after subjecting the *ex tempore* reasons of the magistrate to a similarly close scrutiny. As to that process, I refer to two passages. The first comes from *Nguyen*, where Phillips JA for the Court, after setting out extracts from *Latoudis*, said: "Such general expressions by way of example are not to be read and interpreted as if they were a statute or code."

32. The second is a passage from what Kirby J said in *Oshlack* at 121 (I quote without references):

> "...Judicial descriptions of a statutory discretion to award costs as "absolute and unfettered", "unqualified", "uncontrolled" or "unconfined" cannot be taken at face value. Because the discretion is typically conferred upon a court or tribunal obliged to act judicially, fetters, confinement and controls of a sort are provided by the law. Although appellate courts should avoid the imposition of rigid requirements which would gloss the statute and narrow the discretion afforded to the donees of the statutory power, they retain a function to guide those who are obliged to exercise cost discretions. Such guidance may be afforded by referring in general terms to the considerations which the decision-maker can take into account. Such considerations may be listed for the avoidance of arbitrariness and inconsistency in such decisions. They are not intended to confine the decision-maker to a rigidly mechanical approach. Arbitrariness and inconsistency would be potentially unjust and therefore undesirable. Mechanical rigidity would amount to an abdication of the discretion afforded to the decision-maker in large terms."

33. Only by putting one arguable interpretation on each of the grounds, and comparing that unfavourably against statements in *Latoudis* and other cases, could I conclude that the magistrate erred. On my analysis of his reasons, the magistrate said, in short: "The defendants brought these charges on themselves. They chose to take a part in a piece of reprehensible conduct at the expense of those running a service station. They then chose to decline to assist the police in a way that might have avoided any charges being laid." On my analysis of the guidance provided by appellate decisions, those considerations were relevant and warranted the discretion being exercised as it was exercised. As I am not satisfied that the magistrate did err, the appeals will be dismissed, with the usual order as to costs.

APPEARANCES: For the appellants Jandreoski and Ors: Mr G Nash, QC and Mr J Lavery, counsel. Balot Reilly, solicitors. For the respondents: Mr BM Dennis, counsel. Victorian Government Solicitor.
