43A/90

HIGH COURT OF AUSTRALIA

LATOUDIS v CASEY

Mason CJ, Brennan, Dawson, Toohey and McHugh JJ

29 May, 20 December 1990

[1990] HCA 59; (1990) 170 CLR 534; (1990) 65 ALJR 151; 97 ALR 45; 18 MVR 154; 50 A Crim R 287; Noted 65 Law Inst Jo 185, 188

COSTS – SUMMARY PROCEEDINGS – DEFENDANT SUCCESSFUL – DISCRETION TO AWARD COSTS – GENERAL RULE – WHETHER IN ORDINARY CIRCUMSTANCES DEFENDANT SHOULD BE AWARDED COSTS – GUIDELINES AS TO EXERCISE OF DISCRETION: *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, S97(b).

Per Mason, CJ, Toohey and McHugh, JJ (Brennan and Dawson, JJ dissenting):
Where a court exercises its discretion whether to award costs to a successful defendant in summary proceedings, it should look at the question primarily from the defendant's perspective, bearing in mind that costs are not awarded by way of punishment of the unsuccessful party but are compensatory in that they indemnify the successful party against the expense incurred by reason of the proceedings.

Whilst, in summary proceedings, there is no general rule that like civil proceedings, costs follow the event, in ordinary circumstances, an order for costs should be made in favour of a successful defendant. However, costs may be refused where a defendant has:

(1) by conduct after the events of the offence brought about the prosecution;
(2) declined to take the opportunity of explaining a version of the events before the charge is laid and it later appears that an explanation could have avoided the prosecution;
(3) unreasonably induced the informant to think that a charge could be successfully brought;
(4) occasioned unnecessary expense in the institution of the proceedings.

A proportion of costs may be awarded where a defendant has unnecessarily prolonged the proceedings for example, by unnecessary cross-examination. Accordingly, a magistrate was in error in refusing to award costs upon the dismissal of an information on the grounds that the police informant acted reasonably in laying the information and that the defendant's conduct prior to the laying of the charge gave rise to a suspicion of guilt.
***Latoudis v Casey* (MC 62/1989), overruled.**

MASON CJ: [*After referring to the different approaches of Australian Courts to the question of costs for a successful defendant, and indicating the benefits which may flow where appellate courts formulate principles and guidelines, His Honour continued*] ... **[5]** By conferring on courts of summary jurisdiction a power to award costs when proceedings terminate in favour of the defendant, the legislature must be taken to have intended to abrogate the traditional rule that costs are not awarded against the Crown. Yet in Victoria and Queensland, the emphasis given by the courts to the unfettered nature of the discretion to award or withhold costs has resulted in practice in costs not being generally awarded against a police officer who is an informant, a result which could scarcely have been intended by the legislature when it enacted s97(b) of the Act. Once that proposition is accepted, as in my view it must be, there is no sound basis for drawing a distinction in relation to the award of costs against an unsuccessful informant between summary proceedings instituted by a police or other public officer and those instituted by a private citizen. In the case of proceedings commenced by a private prosecutor which terminate in favour of the defendant, the private prosecutor should in ordinary circumstances be ordered to pay the costs, even if he or she initiated the proceedings for a public rather than a private purpose.

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. To burden a successful defendant with the entire payment of the costs of defending the

proceedings is in effect to expose the defendant to a financial burden which may be substantial, perhaps crippling, by reason of the bringing of a criminal charge which, in the event, should not have been brought. It is inequitable that the defendant should be expected to bear the financial burden of exculpating himself or herself, though the circumstances of a particular case may be such as to make it just and reasonable to refuse an order for costs or to make a qualified order for costs. As the Report of Committee on Costs in Criminal Cases (NZ), (1966), par.30, stated:

> **[6]** "Because we cannot wholly prevent placing innocent persons in jeopardy that does not mean that we should not as far as is practicable mitigate the consequences."

It will be seen from what I have already said that, in exercising its discretion to award or refuse costs, a court should look at the matter primarily from the perspective of the defendant. To do so conforms to fundamental principle. If one thing is clear in the realm of costs, it is that, in criminal as well as civil proceedings, costs are not awarded by way of punishment of the unsuccessful party. They are compensatory in the sense that they are awarded to indemnify the successful party against the expense to which he or she has been put by reason of the legal proceedings: *Cilli v Abbott* [1981] FCA 70; (1981) 53 FLR 108 at p111. Most of the arguments which seek to counter an award of costs against an informant fail to recognise this principle and treat an order for costs against an informant as if it amounted to the imposition of a penalty or punishment. But these arguments only have force if costs are awarded by reason of misconduct or default on the part of the prosecutor. Once the principle is established that costs are generally awarded by way of indemnity to a successful defendant, the making of an order for costs against a prosecutor is no more a mark of disapproval of the prosecution than the dismissal of the proceedings.

The argument that police and other public officers charged with the enforcement of the criminal laws will be discouraged by the apprehension of adverse orders for costs from prosecuting cases which should be brought is without substance and is no longer accepted by the courts: see *Ex parte Hivis* (1933) 50 WN (NSW) 90; 11 LGR (NSW) 96; *Hamdorf v Riddle* (1971) SASR 398; *Puddy v Borg* [1973] VicRp 61; (1973) VR 626; *Barton v Berman* (1980) 1 NSWLR 63. The courts have rightly recognized that the Executive's practice of indemnifying police officers against payment of costs ordered against them undermines the argument which found favour so long ago in *Ex parte Jones* (1906) 6 SR (NSW) 313; 23 WN (NSW) 93. The availability of legal aid might be regarded as a possible reason for refusing to award costs. But no court can assume that a particular defendant is entitled to, or is in receipt of, legal aid and it would not be right to draw a distinction between defendants based on receipt of legal aid. In any event the courts have traditionally made orders for costs without regard to considerations of that kind.

I am not persuaded that there is a complete analogy between the discretion to award costs in summary proceedings and the power to award costs in civil proceedings. For that reason I would not be prepared to accept that in summary proceedings there should be a general rule that costs follow the event. As I have noted, the making of separate provision in s97(a) and (b) is not without **[7]** significance. The differences between criminal and civil proceedings are substantial, not least of them being the absence of pleadings, the different onus of proof, the defendant's inability in criminal proceedings to enter into a compromise and the possibility that the charge, if proved, may affect the defendant's livelihood and reputation. These differences may possibly provide grounds in the circumstances of particular cases for refusing to order costs in civil proceedings.

Nevertheless,I am persuaded that, in ordinary circumstances, an order for costs should be made in favour of a successful defendant. However, 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. I agree with Toohey J that, if a defendant has been given an opportunity of explaining his or her version of events before a charge is laid and declines to take up that opportunity, it may be just and reasonable to refuse costs. Likewise, if a defendant conducts his or her defence in such a way as to prolong the proceedings unreasonably, it would be just and reasonable to make an award for a proportion of the defendant's costs.

However, I have come to the conclusion that the magistrate's exercise of discretion in

the present case was flawed. In focussing on the reasonableness of the informant's conduct in instituting the proceedings, the magistrate erred in principle. In relying upon the defendant's failure to seek proof of identity of the owner or proof of ownership of the goods, thereby causing suspicion to fall upon him, the magistrate again took into account matters going to the reasonableness of the informant's action in instituting the proceedings. It would have been different had the magistrate relied upon conduct of the defendant in the course of the police investigation of the case. But that was not so. The magistrate based his decision in this respect solely on the defendant's participation in the transaction which gave rise to the offence alleged. For the reasons given by McHugh J, the magistrate erred as well in this respect and the appeal should be allowed. I agree with the orders proposed by McHugh J.

TOOHEY J: [*After referring to a number of relevant authorities, His Honour continued*] ... **[29]** If a prosecution has failed, it would ordinarily be just and reasonable to award the defendant costs, because the defendant has incurred expense, perhaps very considerable expense, in defending the charge. What Kirby P said in *Acuthan v Coates* (1986) 6 NSWLR 472, at p480; 24 A Crim R 304, of defendants to committal proceedings is apposite:

> "The section recognises that persons accused of criminal offences can be put to a great deal of expense in defending themselves. Unlike civil litigation, they cannot simply **[30]** compromise the matter. Their liberty, reputation and pocket are, or may be, at risk."

It is unnecessary to speak in terms of a presumption; it is enough to say that ordinarily it would be just and reasonable that the defendant against whom a prosecution has failed should not be out of pocket. Now, in a particular case there may be good reasons connected with the prosecution such that it would not be unjust or unreasonable that the successful defendant should bear his or her own costs or, at any rate, a proportion of them. To return to the examples given earlier in this judgment, 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; Ex parte Milevich* (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. Again, if the manner in which the defence of a prosecution is conducted unreasonably prolongs the proceedings, for instance by unnecessary cross-examination, neither justice nor reasonableness demands that the successful defendant be indemnified, at any rate as to the entirety of the costs incurred. These illustrations are in no way exhaustive but what they point up is that a refusal of costs to a successful defendant will ordinarily be based upon the conduct of the defendant in relation to the proceedings brought against him or her.

The views expressed in this judgment do not seek to fetter the discretion of the magistrate faced with an application by a successful defendant for an order for costs. But they do seek to identify considerations which are irrelevant and those which are relevant on such an application. It is unnecessary to invoke the analogy of civil actions, though the considerations identified, on the one hand as relevant, and those on the other hand as irrelevant, may prompt such an analogy. Likewise, it is unnecessary to express the guiding principles as requiring an award of costs "unless ...", though again that may be the practical consequence of the application of those principles. To the extent that awards of costs against police officers may be misunderstood as an implied criticism of those officers, a scheme such as is to be found in the *Official Prosecutions (Defendants' Costs) Act* 1973 (WA), referred to in Dawson J's judgment, has much to commend **[31]** it. But, in the absence of such a scheme, magistrates should exercise their discretion according to the principles referred to in this judgment; concerns over a possible misunderstanding should costs be awarded against an informant are not relevant to the exercise of the discretion.

In all the circumstances, a proper exercise of the magistrate's discretion should have resulted in an award of costs to the appellant. The appeal should therefore be allowed, the order nisi made absolute and the respondent ordered to pay the appellant's costs of the proceedings before the magistrate, before the Supreme Court and before this Court.

McHUGH J: **[32]** The issue in this appeal is whether in summary criminal proceedings a

successful defendant should ordinarily be awarded his or her costs. The detailed discussion of the facts, relevant statutory provisions and authorities in the judgment of Dawson J enable me to proceed directly to my reasons for concluding that a successful defendant in summary proceedings has a reasonable expectation of obtaining an order for costs against the informant and that the discretion to refuse to make the order should not be exercised against him or her except for a reason directly connected with the charge of the conduct of the proceedings.

An order for costs indemnifies the successful party in litigious proceedings in respect of liability for professional fees and out-of-pocket expenses reasonably incurred in connection with the litigation: *Kelly v Noumenon Pty Ltd* (1988) 47 SASR 182, at p184. The rationale of the order is that it is just and reasonable that the party who has caused the other party to incur the costs of litigation should reimburse that party for the liability incurred. The order is not made to punish the unsuccessful party. Its function is compensatory. Thus, in civil proceedings an order may, and usually will, be made even though the unsuccessful party has nearly succeeded or has acted reasonably in commencing the proceedings. It may, and usually will, be made even though the action has failed through no fault of the unsuccessful party. In *Cilli v Abbott* [1981] FCA 70; (1981) 53 FLR 108, Keely, Toohey and Fisher JJ pointed out (at p111) that "the object of costs is not to penalize; it is to indemnify the successful party in regard to expense to which he has been put by reason of legal proceedings"; see also *Anstee v Jennings* [1935] VicLawRp 27; [1935] VLR 144 at p148; [1935] ALR 216.

Once it is perceived that costs operate as an indemnity and that the rationale of making a costs order is that it is just and reasonable that the successful party should be reimbursed for the costs incurred in bringing or defending the action, no ground exists for distinguishing between informants in summary proceedings who are public officials and those who are private persons. True it is that public officials should launch prosecutions only when the public interest requires it. This is the chief, but not the only, rationale for the rule that historically the Crown neither paid nor received costs. This rule also applied to a public official who instituted proceedings in his own name but really on behalf of the Crown; *R v Thomas Beadle* [1857] EngR 427; 119 ER 1329; (1857) 7 E & B 492. The purpose of enacting statutory provisions such as s97 of the *Magistrates (Summary Proceedings) Act* 1975 (Vict.)("the Act"), however, is to reverse the historic rule: *Acuthan v Coates* (1986) 6 NSWLR 472; 24 A Crim R 304, per Kirby P at NSWLR p480.

Once a legislature abolishes the rule that the **[33]** Crown and those who institute summary proceedings in the public interest neither pay nor receive costs, the various rationales of that rule cannot be used to justify the exercise of the discretion to refuse to order the payment of costs of a successful defendant in summary proceedings. To use them in that manner is to ignore the purpose of the legislature in enacting the legislation. Moreover, as the decisions on costs in summary proceedings in Queensland and Victoria demonstrate, if the rationales of the historic rule are taken into account in the exercise of the discretion to award costs, they result in practice in the continuance of the position which existed before the legislation, at least so far as informants not being liable for costs are concerned. In the rare cases in those States where a costs order is made against a police officer-informant, the real basis of the order is punishment of the police officer: he or she is ordered to pay costs because his or her conduct has fallen below that is expected of a police officer-informant. Paradoxically, the rationales of the historic rule are not used to defeat the exercise of the discretion in favour of the Crown or police informant when the informant seeks an order for costs. The result is unequal justice.

It follows that I am of the opinion that the South Australian Supreme Court in *Hamdorf v Riddle* (1971) SASR 398 was correct in its general approach to the payment of costs in summary proceedings. In civil proceedings, the relevant statute or rule often provides that costs follow the event unless the court thinks that some other order should be made. But even when the discretion is uncontrolled, civil courts act on the basis that a successful party has a reasonable expectation of obtaining an order for costs and that the discretion to refuse to award costs should not be exercised against the successful party except for a reason connected with the case. Thus, if a plaintiff sues on two causes of action and succeeds on one, he or she will obtain the general costs of the action and the costs of the cause of action on which he or she succeeded, but the defendant will receive the costs of the cause of action on which he or she was successful: *Greeves v Freshwater* (1938) 55 WN (NSW) 113.

It is true that the discretion to award costs in summary proceedings has to be exercised in circumstances which are not identical to those which exist in civil cases. For example, a criminal case cannot be settled, and the informant does not seek to vindicate any right or define any obligation of his or her own. Moreover, there are no written pleadings in criminal proceedings. The plea of not guilty in criminal proceedings, like its historic common law counterpart in civil proceedings, puts everything in issue. As Wells J pointed out in *Schaftenaar v Samuels* (1975) 11 SASR 266, at p274, "the issues, apart from the one joined on the plea of not **[34]** guilty, can be identified only from the course of the evidence and the addresses". But, despite the differences between civil and criminal proceedings, once the real issues in the summary proceedings are identified, there is no difficulty in applying in such proceedings principles akin to those applicable to the making or refusing of orders for costs in civil cases.

Nevertheless, it needs to be stressed that, subject to any contrary legislative indication, costs in summary proceedings do not follow the event and that a successful defendant in such proceedings, like a successful party in civil proceedings, has no right to an order for costs. As Viscount Cave LC pointed out in *Donald Campbell & Co v Pollak* [1927] AC 732, at pp811-812; [1927] All ER 1:

> "A successful defendant in a non-jury case has no doubt, in the absence of special circumstances, a reasonable expectation of obtaining an order for the payment of his costs by the plaintiff; but he has no right to costs unless and until the Court awards them to him, and the Court has an absolute and unfettered discretion to award or not to award them. This discretion, like any other discretion, must of course be exercised judicially, and the judge ought not to exercise it against the successful party except for some reason connected with the case."

Likewise, a successful defendant in summary proceedings has a reasonable expectation of obtaining an order for the payment of his or her costs because it is just and reasonable that the informant should reimburse him or her for liability for costs which have been incurred in defending the prosecution. Consequently, a magistrate ought not to exercise his or her discretion against a successful defendant on grounds unconnected with the charge or the conduct of the litigation. The fact that the informant has acted in good faith in the public interest or may have to meet the costs out of his or her own pocket is not a ground for depriving the defendant of his or her costs. Speaking generally, before a court deprives a successful defendant in summary proceedings of his or her costs, it will be necessary for the informant to establish that the defendant unreasonably induced the informant to think that a charge could be successfully brought against the defendant or that the conduct of the defendant occasioned unnecessary expense in the institution or conduct of the proceedings; cf. *Ritter v Godfrey* [1920] 2 KB 47, at pp53, 54-60, 66; [1918-19] All ER 714; *Sunday Times Newspaper Co Ltd v McIntosh* (1933) 33 SR (NSW) 371 at p 377; 50 WN (NSW) 155; *Redden v Chapman* (1949) 50 SR (NSW) 24, at p25; *Schaftenaar*, at pp274-275; see also *McEwen v Siely* (1972) 21 FLR 131, at p136.

Thus, non-disclosure to investigatory police of a tape recording later successfully used in cross-examination of the **[35]** informant's witnesses may be a relevant matter to be taken into account in determining whether the defendant should be awarded costs: cf. *R v Dainer; Ex parte Milevich* (1988) 91 FLR 33. A successful defendant cannot be deprived of his or her costs, however, because the charge is brought in the public interest or by a public official, because the charge is serious or because the informant acted reasonably in instituting the proceedings or might be deterred from laying charges in the future if he or she was ordered to pay costs. 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. Hence, in most cases, the successful defendant in summary proceedings, like the successful party in civil proceedings, should obtain an order costs in respect of those issues on which the defendant succeeds.

[*After referring to the Magistrate's reasons for refusing costs and part of the evidence, His Honour continued*] ... **[36]** In the circumstances, this Court cannot refuse to order the informant to pay the appellant's costs incurred in defending the proceedings before the learned magistrate. The prosecution tendered no evidence in support of the indictable offence of theft. The magistrate held that there was no evidence to support the indictable charge of receiving stolen goods and, on the summary charge of unlawful possession, he accepted the appellant's account of how he obtained the goods. It is true that, when the goods turned out to be stolen, suspicion fell on

the appellant because he had not obtained a receipt for the purchase or sought to establish the identity of the person from whom he bought the goods. The claim that the appellant should be deprived of his costs really depends, however, upon the proposition that a person who buys goods in the circumstances in which the appellant did is not entitled to his or her costs because his or her conduct has caused suspicion to fall upon him or her. If that is a ground for refusing a costs order in summary proceedings, most successful defendants would not obtain a costs order. The mere fact that a successful defendant's conduct has given rise to a suspicion **[37]** that he or she was guilty of the offence charged is not a reason for depriving that person of his or her costs. The appeal should be allowed. The orders of the Supreme Court made on 29 September 1989 should be set aside. In lieu thereof, it should be ordered that:

(a) the order nisi be made absolute;

(b) the order of the magistrate refusing the appellant's applications for costs be set aside; in lieu thereof, it should be ordered that the appellant's costs of the proceedings before the magistrate on 20 April 1989 be paid by the respondent; and

(c) the appellant's costs of the order nisi be paid by the respondent.

The respondent should pay the appellant's costs of and incidental to this appeal including the application for special leave to appeal.
