14/09; [2009] VSC 199

SUPREME COURT OF VICTORIA

NG v IP

Beach J

20, 25 May 2009

COSTS – CHILDREN'S COURT – CHARGES DISMISSED – APPLICATION BY DEFENDANT FOR COSTS – DISCRETION TO AWARD COSTS TO A SUCCESSFUL DEFENDANT – RELEVANT CONSIDERATIONS – APPLICATION FOR COSTS REFUSED – WHETHER MAGISTRATE IN ERROR: *CHILDREN, YOUTH AND FAMILIES ACT* 2005, SS427, 528(2); *MAGISTRATES' COURT ACT* 1989, S131.

NG, aged 16 years, was charged with 3 counts of rape. The prosecution alleged that NG forced the complainant down to a beach where sexual acts occurred. Later, NG was interviewed by police and gave a largely "no comment" interview. Police took statements from two witnesses who were on the beach at the time of the alleged events. At the subsequent hearing in the Children's Court the question of penetration and consent were relevant issues. The charges were dismissed and an application for costs was made. In refusing the application, the Magistrate recognised the defendant's right to remain silent but said that he could not expect to receive costs "in the peculiar and unusual circumstances" of the case. Upon appeal—

HELD: Appeal allowed. Order of refusal set aside. Chief Commissioner of Police ordered to pay the costs of NG.
1. In ordinary circumstances an order for costs should be made in favour of a successful defendant in a criminal proceeding in the summary jurisdiction of the Magistrates' Court. Because of s528(2) of the *Children, Youth and Families Act*, that proposition has equal force with respect to a criminal proceeding in the Children's Court.
***Latoudis v Casey* [1990] HCA 59; (1991) 170 CLR 534; (1990) 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287, considered.**

2. However, there will be cases in which, when regard is had to 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.
per Mason CJ, *Latoudis v Casey supra* at p544.

3. There was no evidence of any conduct by NG after the events in respect of which he was charged which could be described as conduct which brought the prosecution upon himself. There was no evidence justifying the conclusion that this case was outside the class of ordinary cases where an order for costs under s131 of the *Magistrates' Court Act* should be made. Accordingly, the principles enunciated in *Latoudis v Casey* were misapplied and the Magistrate was in error in refusing the application for costs.

4. Specifically, the only unusual or out of the ordinary circumstance identified by the Magistrate was the evidence given by the witnesses; however, this circumstance alone was not capable of taking the case outside an application of *Latoudis v Casey*. Further, there was no evidence of any conduct by NG after the events which could be described as conduct which brought the prosecution upon himself. Nor did NG unreasonably induce the informant to think that a charge could be successfully brought against him. Finally, there was no evidence that if NG gave his version to Police before he was charged that charges might not have been laid or that NG, in exercising his right to silence, prolonged the proceeding unreasonably.

BEACH J:

Introduction

1. On 20 August 2008, NG was acquitted in the Children's Court in respect of three charges of rape contrary to s38(1) of the *Crimes Act* 1958.[1] His counsel then made application for costs pursuant to s131 of the *Magistrates' Court Act* 1989. Section 131 of the *Magistrates' Court Act* applies in the Children's Court by the operation of s528(2) of the *Children, Youth and Families Act* 2005. After hearing the application for costs, the Magistrate refused the application. On 12 September 2008, her Honour delivered reasons for dismissing the application.

2. In this proceeding, NG appeals pursuant to s427 of the *Children, Youth and Families Act*, on a question of law, from the decision of the Children's Court refusing his application for costs. For the reasons given below, the appeal will be allowed.

Background facts

3. The circumstances giving rise to charges being laid against NG occurred on 31 December 2007 at Warrnambool. At the time, NG was 16 years of age. Broadly speaking, the allegations against NG were that on 31 December 2007 (New Year's Eve), he forced the complainant down to the beach, through a caravan park and down some stairs to the beach area. From the record of interview (which was largely a "no comment" record of interview), it would appear that the allegations against NG were that he carried the complainant down over his shoulder and took her onto the beach; he pushed her onto the ground; he pulled down her leggings and underpants until they were down around her ankles; he pulled his pants down until they were around his ankles; he touched the complainant on the vagina with his hand; he placed his finger inside her vagina; he tried to put his penis inside her vagina; his penis actually entered the complainant's vagina for a short time (maybe ten seconds); the complainant broke free and she ran or walked back up the stairs to the caravan park with NG behind her; once the complainant was back in the caravan park, NG had hold of her arm and was trying to get her back down to the beach again and she broke free. It was further alleged that NG put his penis in the complainant's mouth.

4. NG was interviewed by the police on 2 January 2008 and, as I have said above, gave a largely "no comment" record of interview. On 22 January 2008, the police obtained statements from two witnesses, W1[2] and W2,[3] who were on the beach at the time of the alleged events. On or about 8 February 2008, NG was charged with the charges that were the subject of the Children's Court proceeding.

The disposition of the charges

5. The trial of NG was conducted in the Children's Court during the week of 11-15 August 2008. The Magistrate reserved and then gave judgment on 20 August 2008. All charges were dismissed.

6. In her reasons for dismissing the charges, the Magistrate said:

> "The complainant alleges penetration without consent. The defendant denies penetration. Their versions of events are at odds in a number of other ways as well, most notably in relation to [some evidence concerning a condom]."

7. Her Honour then referred to the evidence of five other witnesses before describing some of the evidence of W1 and W2. Her Honour then concluded:

> "The end result of all this is that the contradictory nature of the evidence combined with no physical evidence in relation to the complainant and I know that's not unusual in these cases, leaves me unable to determine with the required degree of certainty what occurred on the beach that night. And in those circumstances the law requires me applying the standard of beyond reasonable doubt to find the defendant not guilty of all offences."

The Magistrate's reasons for refusing costs

8. The Magistrate embarked on her reasons with a discussion of *Latoudis v Casey*.[4] Her Honour then referred to the decisions in this Court of *Jandreoski v Colley*[5] and *Junek v Busuttil*.[6] Her Honour then summarised the case as follows:

> "In the present case, the defendant [NG] was charged with three counts of rape in that he penetrated [the complainant's] vagina with his fingers and his penis and her mouth with his penis. He was also charged with [an] indecent act with a child in that he touched the outside of [the complainant's] vagina with his fingers. The offences were alleged to have occurred on New Year's Eve 2007 on the beach at Warrnambool. The complainant alleged that the defendant dragged her against her will from a beachside caravan park onto the beach, pushed her onto the sand and raped her in the three ways described above. There was no forensic evidence of penetration. The defendant did not give his version of events until he gave evidence at the contested hearing.
>
> The charges against the defendant were issued on 8 February 2008. As was his right, he made a 'no comment' record of interview. The fact that the defendant relied on his right to remain silent in the interview has no bearing on my decision to refuse costs in this matter."

9. Her Honour then detailed the mentions that occurred prior to the commencement of the contested hearing. Her Honour then noted that the hearing commenced on 11 August and concluded on 15 August. The prosecution called a total of 23 witnesses. The defendant gave evidence and called a number of character witnesses on his behalf.

10. During the course of the application for costs, NG's counsel submitted that the OPP had been made aware of NG's defence at a special mention before the Magistrate on 1 August 2008. The Magistrate dealt with this submission as follows:

> "The special mention was solely concerned with an application by the OPP that all child witnesses in the proceeding give evidence remotely. After I determined the point, the following exchange took place (I have transcribed this from the tape recording):
>
> [Magistrate]: 'And I gather from what you've said just reading between the lines that the issue is consent ... is that the?'
>
> [Counsel]: 'Well that will ultimately be the issue.'
>
> I do not consider this exchange to constitute the provision of the defendant's version to the prosecution. In any event, consent was not the central issue to the defence, it was the absence of penetration."

11. While it may be accepted that the absence of penetration was the central issue to the defence of the three rape charges, consent was obviously also a relevant issue. Her Honour concluded:

> "*Latoudis v Casey* makes it clear that a legitimate ground upon which a Court might refuse to exercise its discretion to grant costs is where a defendant refuses to provide an explanation to the prosecution in circumstances where the prosecution may have been avoided had the explanation been given. [Counsel] for the OPP submitted that had the prosecution been made aware of the defendant's account, informed consideration would have been given to whether the prosecution should have proceeded in the light of the substantially similar versions of [W1] and [W2]. I have much sympathy for this argument. It is extremely rare in cases of sexual assault to have independent and objective eye witness evidence. In determining this case I placed significant weight on the evidence of [W1] and [W2] given the discrepancies in some of the other evidence. It might be said that the OPP should not have proceeded with this prosecution in the face of the eye witness accounts alone. I do not agree with this. There was no way to determine the accuracy of the accounts without the defendant's version having been given. In addition, it stands to reason that had the prosecution been made aware of the defence before the start of the contested hearing the case may have been shortened in length as the issues would have been confined.
>
> I accept that the defendant had the right to remain silent until he gave evidence at the hearing and I do not criticise him for doing so. However, having done so, for the reasons stated above, he cannot then expect costs in the particular and unusual circumstances of this case."

12. There are two difficulties with the Magistrate's statement that she placed significant weight on the evidence of W1 and W2:

(a) First, the reasons for dismissing the charges do not bear this proposition out. In the reasons for dismissing the charges, her Honour devotes a paragraph and a half to reciting the evidence of W1 and W2 as it was given in evidence-in-chief, cross-examination and re-examination. No finding is made that any particular aspect of the evidence of W1 or W2 was accepted by the Magistrate or that the acceptance of any such evidence was a reason why the charges had to be dismissed. Having recited the evidence of W1 and W2, the Magistrate merely said: "[t]he end result of all this is that the contradictory nature of the evidence combined with no physical evidence in relation to the complainant ... leaves me unable to determine with the required degree of certainty what occurred on the beach that night. And in those circumstances the law requires me applying the standard of beyond reasonable doubt to find the defendant not guilty of all offences".

(b) Secondly, as her Honour noted, the central issue to the defence was the absence of penetration. The evidence of W1 and W2 went to the presence of NG on the beach with a girl at the relevant time, and the issue of consent (in the sense of whether she appeared to be being forced to do something or was a willing participant). The evidence of W1 and W2 was not directed to the issue of penetration.

13. The Magistrate noted that it might be said that the OPP should not have proceeded with the prosecution in the face of the eye witness accounts alone. Presumably, this was a reference to W1 and W2, who her Honour had described as "independent and objective" eye witnesses. Her Honour's answer to the proposition that the OPP should not have proceeded was that there was no way to determine the accuracy of the eye witness accounts without NG's version having been given. The correctness of this proposition is not immediately apparent. If NG never gave a version, and remained silent as he was entitled to do, the accuracy of W1 and W2's accounts would have fallen to be assessed in the usual way. Further, the disclosing of NG's version (be it consistent with or different from the versions of W1 and W2) would not mandate the necessary acceptance or rejection of anything said by W1 or W2.

14. Finally (so far as this brief analysis of the Magistrate's reasons is concerned), her Honour's statement that "[t]he fact that the defendant relied on his right to remain silent in the interview has no bearing on my decision to refuse costs in this matter" is not easy to reconcile with her Honour's conclusion that NG had the right to remain silent, however, having done so, "he cannot then expect costs" in what her Honour described as the particular and unusual circumstances of the case.

Principles to be applied

15. *Latoudis v Casey*[7] is authority for the proposition that in ordinary circumstances an order for costs should be made in favour of a successful defendant in a criminal proceeding in the summary jurisdiction of the Magistrates' Court. Because of s528(2) of the *Children, Youth and Families Act*, that proposition has equal force with respect to a criminal proceeding in the Children's Court. In *Junek v Busuttil*,[8] Kellam J (as his Honour then was) conveniently summarised the principles as follows:

> "In *Latoudis v Casey*[9] the majority of the High Court stated the principles applicable to the exercise of the discretion given by s131 of the Act. That decision establishes that, '..in ordinary circumstances, an order for costs should be made in favour of a successful defendant.'[10]

The Chief Justice, Mason CJ, said further[11]:

> 'However, there will be cases in which, when regard is had to 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.'

In relation to such after events conduct Toohey J said[12]:

> '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 ... 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, where 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.'

Mason CJ in his judgment expressed agreement with Toohey J in the following terms[13]:

> 'I agree with Toohey J that, if a defendant has been given an opportunity of explaining his or her version of events before charges are 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.'

Likewise McHugh J said[14]:

> '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 proceeding...Thus, non-disclosure to investigatory police of a tape-recording later successfully used in cross examination of the informant's witnesses may be a relevant matter to be taken into account in determining whether the defendant should be awarded costs... 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 for costs in respect of those issues on which the defendant succeeds.'

Since the decision of the High Court in *Latoudis*[15] was handed down, it has been the subject of consideration by the Supreme Court of Victoria in a variety of circumstances, and on a number of occasions. In *Parker v Kelly*[16], Marks J concluded that the refusal of a Magistrate to award costs should not be set aside. After referring to the judgment of Mason CJ in *Latoudis*[17], Marks J said:

> 'The result, I think must be that in order that the Magistrate exercised his discretion correctly in 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.'

Marks J concluded that the failure of the appellant to give the explanation which he later gave in evidence, at the time he was interviewed by police, was sufficient foundation to constitute an exception to the 'guidelines' established by the High Court.

The issue was further considered by the Full Court of the Supreme Court in *Redl v Toppin*[18]. The appellant had been charged with offensive behaviour and using insulting words arising out of an incident which occurred at a religious meeting in Swanston Street. Brooking J said:

> 'The law, as laid down in *Latoudis v Casey* is that a successful defendant to a summary criminal prosecution should ordinarily be awarded costs. 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 ...
>
> Having regard to what is said in *Latoudis v Casey* about the scope of exceptions to the general rule, the two considerations advanced by the learned Magistrate could not, whether taken separately or in conjunction warrant the refusal of an order of costs. The appellant was behaving in a disagreeable, and, some would say, anti-social way by expressing his religious views in an inconsiderate and objectionable manner. However strongly he held his religious convictions; his conduct was to be censured; but that censure was not to be marked by a refusal of costs. What I shall for want of a better word call misconduct, may it seems to me, justify a refusal of an award of costs to a successful defendant in summary criminal proceedings provided that it is sufficiently connected with the subject of the charge ... I am here not concerned with conduct by which the defendant may be said to have brought the prosecution upon himself in the sense in which this must be understood in the light of the decision of the High Court. Nor am I concerned with conduct which prolongs the proceedings unreasonably. I am speaking of conduct which might be said to be so reprehensible (I use a vague term advisedly) that it would not be just to allow costs to follow the event. What may be regarded as reprehensible for this purpose I do not attempt to state, for it is clear that the appellant's conduct could not be said to warrant the refusal of costs. ... One certainly could not bring this case with a "misconduct" exception to the general rule in the sense to which I am speaking of that exception. It is not, for example, as if a defendant charged with an offence of dishonesty is not proved to have committed the offence having regard to all the ingredients of the particular charge laid (the missing ingredients not being the "dishonesty" one) but is nevertheless shown by the evidence led to have embarked upon some grand scheme to defraud the public in a large scale. That case can be dealt with when it arises.'

In the same case Eames J said:

> 'In exercising his or her discretion so as to refuse an order of costs, the Magistrate would be entitled to take into account as being a relevant factor, conduct of the defendant after the occurrence of the event which constituted the charged offence which brought proceedings to Court. Such conduct might include refusal to put forward information which may have led to a decision not to proceed

> with the prosecution at all. I interpolate, however, that that consideration would also need, in a given case, to be carefully weighed against other considerations which might quite reasonably (lead a) person to decline to take advantage of such opportunity. For example, a defendant who believed, on apparently reasonable grounds, that investigating officers had already determined to charge him and would therefore use any explanation given by him solely for purposes of manufacturing an answer to his explanation, rather than treating his explanation on its merits, may choose to exercise his right to silence.'

Having expressed the opinion that the Magistrate had taken irrelevant considerations into account Eames J said:

> 'Having said this, however, one should not be taken as adopting or laying down any categoric proposition that conduct falling short of justifying conviction could never be taken into account on the question of costs. Whether the High Court judgment has gone so far as to say this remains to be considered. But it is unnecessary to consider in the circumstances of this case. 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 the 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.'

In *Larrain v Clark*[19], Smith J heard an appeal under s92 of the *Magistrates' Court Act* against the refusal of a magistrate to order costs. The appellant had been charged under s26 of the *Summary Offences Act* 1966 with having actual possession of property (ie videotapes) suspected of having been stolen. The Magistrate dismissed the charges on a no case submission but declined to make a cost order in favour of the appellant. Smith J said:

> 'The mere exercise of the right to silence does not deprive a successful defendant of his or her costs.' In the case before him, the appellant had failed to identify who had supplied the videotapes to him. Smith J said, '...the critical matter is whether the failure to identify the supplier of the videos was something that would have entitled the Magistrate to find that the appellant was disentitled from receiving compensation for his costs. In my view, it would not. The case is not one whether withholding of information prevented investigation by the informant of the matters in respect of which the question was asked. (See *R v Dainer* (1988) 91 FLR 33). The informant in this case could have investigated the explanation by questioning the persons who had hired the alleged videos in the first place. This may have led to a more difficult and protracted enquiry but the refusal to give the information did not prevent it. It was also not a case where the withholding of information (such as alibi information) would affect the case generally. The information only affected the issue of the reasonableness of the explanation. Further, as noted above, the refusal to give the information could not properly affect the assessment by the appellant of the crucial threshold question on which the case failed whether there was reasonable suspicion that the goods in question were stolen or unlawfully held at the time they were in the possession of the appellant.'

In *Hehir v Bishop*[20], the appellant was charged with driving an unregistered motor vehicle on the highway. The charge was dismissed. The Magistrate declined to award costs as he considered that the decision in *Latoudis* should be limited to those cases in which there was a fact situation similar to that before the High Court. Ashley J said in referring to *Latoudis*:

> 'It is true that the Court was there concerned in looking to the relevance or otherwise of a particular matter brought to account by a magistrate in exercising his discretion. But the guidelines which the majority developed were and were plainly intended to be of general usefulness. They were applied by the Full Court of this Court in *Redl*, a decision to which I earlier referred. In these circumstances it appears to me that his Worship in the present case acted in a wrong view of *Latoudis*. He should have considered whether the reasonable expectation of the appellant that he should have his costs in the circumstances was defeated by some such consideration as was identified by Mason CJ and by Toohey and McHugh JJ; or, to put it in slightly different language, but to the same intent, whether the ordinary situation that it would be just and reasonable that the successful defendant have his costs was displaced by some such consideration. The discretion of the Magistrate in my opinion miscarried.'

In *Alexander v Renney*[21] Batt J said referring to the decision of the majority in *Latoudis*[22]:

> 'The appellant in this case in challenging the Magistrate's orders must really say that it was not open to the Magistrate to find that the circumstances were not ordinary.'

In *Nguyen v Hoekstra*[23] the Court of Appeal upheld the decision of a Magistrate not to award costs in circumstances where the appellant had been charged with an offence of unlicensed driving and in circumstances where the appellant had given to police a name that did not appear upon licence records. Upon subsequent investigation it was established by the informant that the appellant was in fact licensed but under a different name. The Court of Appeal concluded that it was open to the Magistrate in such circumstances to decide that the appellant had brought the prosecution upon himself and the decision of the Magistrate to refuse costs was upheld."[24]

Analysis

16. In order to succeed in this appeal, NG must show it was not open to the Magistrate to conclude that this case was out of the ordinary circumstances so as to justify the withholding of an order for costs in favour of NG or that the Magistrate's decision was affected by an error of law vitiating the exercise of her Honour's discretion.

17. For present purposes, it can be accepted that it is "extremely rare in cases of sexual assault to have independent and objective eye witness evidence". However, this fact alone cannot be sufficient to take the case outside the class of cases contemplated by the expression "in ordinary circumstances". Similarly, merely because every case is unique (and thus involves its own "particular ... circumstances") cannot be a ground for considering such a case as falling outside "ordinary circumstances". In her Honour's reasons for refusing costs, the only unusual (out of the ordinary) circumstance identified is the existence of independent and objective eye witness evidence in a case of sexual assault. As I have said above, this circumstance alone is not capable of taking this case outside an application of *Latoudis v Casey* which is favourable to NG.

18. Further, the submission made by counsel for the OPP to the Magistrate (not counsel who appeared in this appeal) that had the prosecution been made aware of NG's account, informed consideration could have been given to whether the prosecution should have proceeded in the light of the versions of W1 and W2, was without merit. As her Honour noted, penetration was a central issue. The complainant alleged penetration. NG denied penetration. The evidence of W1 and W2 was not directed to the issue of penetration. Additionally, if there was any merit in this submission, then the prosecution, having heard NG's version in the witness box, could have determined not to proceed further (either after the evidence was given or during the five days when her Honour's decision was reserved). While different factors may be called into play in deciding whether to discontinue a prosecution which has commenced, as compared with not commencing a prosecution, nothing in the material before me suggests there was any realistic prospect that if NG gave his version before he was charged, charges might not have been laid. This was a case of oath against oath on the issue of penetration, with a body of evidence (independent and objective) relevant to the issues of identification and consent.

19. There was no evidence of any conduct by NG after the events in respect of which he was charged which could be described as conduct which brought the prosecution upon himself. There was no evidence justifying the conclusion that this case was outside the class of ordinary cases where an order for costs under s131 of the *Magistrates' Court Act* should be made.[25] Accordingly, the principles enunciated in *Latoudis v Casey* were misapplied. This constitutes a relevant error of law.[26] It follows that the appeal must be allowed. In the event that I reached this conclusion, the parties asked me to re-exercise the discretion.

Re-exercising the discretion

20. Having considered the material, in my view, there is nothing which establishes that NG unreasonably induced the informant, IP, to think that a charge could be successfully brought against him.[27] Further, there is nothing to suggest that the conduct of NG "occasioned unnecessary expense in the institution or conduct of the proceedings".[28] NG was acquitted, not because the Magistrate accepted his "version", but rather on the basis of "the contradictory nature of the evidence combined with no physical evidence".[29] There is force in NG's submission that "if the acceptance of the appellant's evidence in the contested hearing was not instrumental in securing his acquittal (as it appears not to have been), it would be wrong to reason that the same evidence might have persuaded the prosecution not to pursue the charges had that explanation been given in [the record of] interview".[30]

21. So far as the question of whether the prosecution was not able to "determine the accuracy"

of the statements of the witnesses W1 and W2 is concerned, if this was a matter of significant importance, then one would have expected the police to attempt to reinterview NG after those statements were obtained. The failure of the police to take this step leads to the obvious inference that the witness statements of W1 and W2 were assessable for accuracy on their face – without the need for NG to provide his "version".

22. At the time he was interviewed, NG was 16 years of age. Prior to being interviewed, he received advice from a solicitor to exercise his right to silence in the interview. I have already concluded that there was no evidence justifying the suggestion there was any realistic prospect that if NG gave his version before he was charged, charges might not have been laid. Thus, NG's exercise of his right to silence did not constitute a refusal to put forward information which may have led to a decision not to proceed with the prosecution.[31] In my view, it was quite reasonable for NG to exercise his right to silence in the context of this case on the basis that any explanation he gave would only have had the capacity to be used against him – rather than potentially resulting in no charges being laid.[32]

23. Consistently with what I have said above, there is no reason why an order for costs should not be made under s131 of the *Magistrates' Court Act* in respect of the Children's Court proceeding. Indeed, having considered the matter afresh, and for the reasons given above, I conclude that in the exercise of my discretion there should be an order for costs in favour of NG.

24. There is one further matter that requires consideration. At the conclusion of the second-last paragraph of her Honour's reasons, her Honour said that "It stands to reason that had the prosecution been made aware of the defence before the start of the contested hearing the case may have been shortened in length as the issues would have been confined". Her Honour did not identify how the prosecution's knowledge of the defence might have shortened the length of the proceeding. No specific matter was relied upon by her Honour. Further, an examination of the submissions made on behalf of the OPP below discloses no reference to any specific area of delay or specific evidence which was rendered unnecessary by the subsequent discovery of NG's "version". While the fact that identity was not an issue might not have been known to the prosecution until some way into the examination-in-chief of the complainant,[33] neither counsel for the OPP below nor counsel for the OPP in this appeal sought to submit that some evidence given before counsel for NG conceded that identity was not issue, was unnecessary having regard to that concession. In the circumstances, there is nothing in the material to suggest that NG, in exercising his right to silence, prolonged the proceeding unreasonably – and thus disentitled himself to an exercise of discretion (in the ordinary course) in his favour.

25. Section 131(2C) provides:

> "If the Court determines to award costs against an informant who is a member of the police force, the order must be made against the Chief Commissioner of Police."

IP is a member of the police force. Accordingly, the order for costs will be made against the Chief Commissioner of Police.

Conclusion

26. For the reasons given above the appeal will be allowed. Subject to hearing from counsel as to the precise form of the orders, the orders I propose are:

> (1) Appeal allowed.
> (2) The order of the Children's Court in case number X00355869 in relation to costs be set aside.
> (3) In lieu of that order, it be ordered that the Chief Commissioner of Police pay the costs of the defendant in Children's Court proceeding number X00355869.
> (4) The matter be remitted to the Children's Court at Melbourne for determination of the amount payable.

27. I will hear the parties further on the question of the costs of this appeal.

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[1] He was also acquitted of a charge of indecent act with a child.
[2] Whose statement is Exhibit JJS3 to the affidavit of Justin James Serong sworn 9 October 2008.
[3] Whose statement is Exhibit JJS4 to the affidavit of Justin James Serong sworn 9 October 2008.
[4] [1990] HCA 59; (1991) 170 CLR 534; (1990) 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287.

[5] [2004] VSC 131 (Teague J).
[6] [2004] VSC 115 (Kellam J).
[7] [1990] HCA 59; (1991) 170 CLR 534; (1990) 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287.
[8] [2004] VSC 115.
[9] *supra*.
[10] Per Mason CJ at p544.
[11] *supra* at 544.
[12] *supra* at 565 to 566.
[13] *supra* at 544.
[14] *supra* at 569.
[15] *supra*.
[16] Unreported, Supreme Court of Victoria, Marks J, 16 July 1991.
[17] *supra*.
[18] Unreported, Supreme Court of Victoria, 1 April 1993.
[19] Unreported, Supreme Court of Victoria, Smith J, 13 July 1995.
[20] Unreported, Supreme Court of Victoria, Ashley J, 20 April 1993.
[21] Unreported, Supreme Court of Victoria, Batt J, 21 August 1995.
[22] *supra*.
[23] 99 A Crim R 497.
[24] See also *Jandreoski v Colley* [2004] VSC 131 and *Kymar Nominees Pty Ltd v Sinclair* [2006] VSC 488.
[25] Cf *Transport Accident Commission v O'Reilly* [1998] VSCA 106; [1999] 2 VR 436; (1998) 28 MVR 327; (1998) 14 VAR 189.
[26] Cf *House v R* [1936] HCA 40; (1936) 55 CLR 499; 9 ABC 117; (1936) 10 ALJR 202 and *Australian Coal and Shale Employees Federation v The Commonwealth* [1953] HCA 25; (1953) 94 CLR 621.
[27] Cf *Latoudis v Casey*, per McHugh J at CLR 569.
[28] *Ibid*.
[29] See the Magistrate's reasons for dismissal at Exhibit JJS6 to the affidavit of Justin James Serong sworn 9 October 2008.
[30] See paragraph 8.15 of the appellant's outline of submissions dated 20 May 2009.
[31] Cf the judgment of Eames J (as his Honour then was) at p8 in *Redl v Toppin* (*supra*).
[32] *Ibid*.
[33] See p5 of the Magistrate's reasons on the issue of costs (Exhibit JJS8 to the affidavit of Justin James Serong sworn 9 October 2008).

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