08/86

SUPREME COURT OF QUEENSLAND — FULL COURT

LEWIS v UTTING; ex parte UTTING

Campbell CJ, Matthews and Carter JJ

21 February, 15 March 1985 — [1985] 1 Qd R 423; [1985] 17 A Crim R 139

COSTS – INFORMATION DISMISSED – APPLICATION FOR COSTS BY DEFENDANT – DISCRETION AS TO COSTS – RELEVANT CONSIDERATIONS.

The discretion which a magistrate exercises with respect to an award for costs on the dismissal of an information is an unfettered one. Attention must be given to the facts of each case. It is wrong to commence with the proposition that costs will be awarded as if it were a civil case and that *prima facie*, a successful defendant is entitled to his costs unless there are present some disqualifying factors.

***Smith v Robinson; ex parte Robinson* [1980] Qd R 372, followed.**
***Hamdorf v Riddle* [1971] SASR 398;**
***McEwen v Siely* [1972] 21 FLR 131; and**
***Cilli v Abbott* [1981] FCA 70; [1981] 53 FLR 108, not followed.**
***Davey v Barrow* [1954] VicLawRp 85; [1954] VLR 593; [1954] ALR 977;**
***Puddy v Borg* [1973] VicRp 61; [1973] VR 626;**
***Liu v Caughey,* MC 16/1980; and**
***Heddich v Dike* [1981] 3 A Crim R 139, discussed.**

CAMPBELL CJ: (With whom Matthews J agreed) *[set out the facts, relevant statutory provisions, and continued]:* ... **[426]** We were referred to some of the decided cases which have stated or approved of a practice that generally a defendant acquitted in a court of summary jurisdiction should have his costs unless there are reasons why he should be deprived of them (*Hamdorf v Riddle* [1971] SASR 398; *McEwen v Siely* [1972] 21 FLR 131; *Cilli v Abbott* [1981] FCA 70; [1981] 53 FLR 108), and that such a court, in exercising its discretion as to costs, should not make any distinction between complaints made by police officers and complaints made by other persons. Although counsel for the appellant assumed that this practice rule is one which should be followed in Queensland, the point was not fully argued before us, counsel for the respondent putting forward the propositions that a successful party is not entitled to costs as of right but it is a matter for the court's discretion (*Davey v Barrow* [1954] VicLawRp 85; [1954] VLR 593; [1954] ALR 977), there is nothing appearing from the record that the magistrate wrongly exercised his discretion, and the magistrate's reference to committal proceedings was not relevant to the exercise of his discretion on costs.

I have not been persuaded that this Court should approve of the rule as expressed in such wide and general terms by the Full Court of South Australia in *Hamdorf v Riddle* (*supra*) and by the Full Court of the Federal Court in the two other cases I have mentioned. Those courts appear to have formulated a precept that generally the discretion as to costs in courts of summary jurisdiction should be exercised in the same way as it is exercised in civil actions, or, as stated, perhaps a little less widely in *Cilli v Abbott*, at p112:

> "While the magistrate had a discretion, those principles required him to apply the ordinary rule that a successful party is entitled to his costs unless there are reasons why he should be deprived of them".

I think that there are many considerations to which a magistrate may have regard in exercising his discretion on costs in criminal cases, ones which may not be present in the usual run of civil cases, and which may render the usual rule in civil matters that "costs follow the event" inapplicable as a general principle in criminal cases. When refusing costs to successful informants or to successful defendants magistrates should endeavour to state with clarity the reasons why they have so acted in relation to the circumstances of the particular cases before them. In *Puddy v Borg* [1973] VicRp 61; [1973] VR 626, the Full Court of Victoria (Winneke CJ, Smith and Menhennitt JJ) considered *Hamdorf v Riddle* (*supra*) and, after referring to a passage from the judgment of Viscount Cave LC in *Donald Campbell & Co v Pollak* [1927] AC 732, at pp881-2;

[1927] All ER 1, which includes *dicta* to the effect that a successful defendant in a non-jury case "has no right to costs unless and until the Court awards them to him", the judgment of the Court continues, at p629:

> "In citing those observations of the Lord Chancellor, it is not intended to suggest that the proper approach or the relevant considerations would be the same in criminal as in civil cases. We have referred to his Lordship's remarks for the purpose of emphasizing the concluding portion that the discretion, like any other discretion, must be exercised judicially and that the judge ought not to exercise it except, as the Lord Chancellor said, for some reason connected with the case."

In *Heddich v Dike* [1981] 3 A Crim R 139, Gobbo J said at p145:

> "That matter had been debated before the Full Court in *Puddy v Borg* [1973] VR 626 and the Full Court had dealt with the case before them on the circumstances of that case and had declined to give a view as to the two competing arguments, namely, that costs in criminal proceedings should be dealt with as they would be dealt with in civil proceedings, and the contrary argument that no costs should be awarded unless there were special circumstances."

In *Cilli v Abbott* (*supra)* the Court said, at pp111-2:

> "Many of the difficulties associated with costs in courts of summary jurisdiction are resolved by the implementation of a system whereby the costs of **[428]** successful defendants may be met from a fund, a system which exists in some other jurisdictions".

On this aspect I draw attention to the provisions of the *Costs in Criminal Cases Act* 1973 (UK). By s1 of that Act, when a magistrates' court deals summarily with an indictable offence, it may order the payment out of central funds (i.e. moneys provided by Parliament – see s13 of that Act) of the costs of the prosecution (whether the offence is dealt with summarily or the justices enquire into the offence as examining justices) or, if the information is dismissed or the accused is not committed for trial, order the payment out of central funds of the costs of the defence. However, s2(a) of that Act gives to a magistrates' court, on the summary trial of an information, power to make such order as to costs as it thinks just and reasonable to be paid by the prosecution to the accused if the information is dismissed; and s2(b) gives power to the court on conviction to order the accused to pay to the prosecution such costs as it thinks just and reasonable. There is no power under s2 to order costs to be paid out of central funds. Section 3 of that Act makes provision for the Court to order payment out of central funds of the costs of the prosecution where a person is prosecuted on indictment before the Crown Court or, if the accused is acquitted, of the defence: see also *Practice Direction (Costs: Acquittal of Defendant)* [1981] 1 WLR 1383.

The Court in *McEwen v Siely* (*supra*), at p1367, when referring to similar provisions in the earlier *Costs in Criminal Cases Act* 1952 (UK) drew attention to the fact that the UK legislation applied to proceedings at assizes and quarter sessions and not to those in magistrates' courts. In *McEwen v Siely* (*supra*) the Full Bench of the Federal Court upheld the appeal from the magistrate by way of a hearing *de novo*, so that the matter of the costs in the court of petty sessions was one for the appeal court itself to decide, and it exercised its own discretion to award the costs of the lower court to the successful defendant. In discussing the authorities the Court expressed agreement with the attitude of the Full Court of South Australia in *Hamdorf v Riddle* (*supra*) that informants who are police officers in courts of summary jurisdiction should not be treated with special consideration but took care to state that:

> "As the discretion in criminal cases is unfettered, it is undesirable to devise an exhaustive set of rules" (p136).

In *Hamdorf v Riddle* (*supra*) the Full Court refused to interfere with the discretion of a magistrate who awarded costs in favour of a successful defendant against a complainant police officer saying that the magistrate "certainly acted on grounds connected with the litigation" (p403). See also the passage in *Smith v Robinson, ex parte Robinson* (*supra*) at p373, where prior to making the remarks to which I have earlier referred, Lucas J said: "We do not intend to lay down any principles which should govern magistrates in the exercise of their discretion to award costs on dismissal of a complaint …

[429] It is not sufficient for me to say that I might have taken a different view as to costs

from that taken by the magistrate. I have read the evidence but I am unable to say what view the magistrate may have taken as to the credibility of the witnesses or as to the circumstances which established that the appellant was found to have on his property a large number of sheep from the adjoining properties and had in fact crutched 292 of Ziesemer's sheep and 114 from Moyallen, and has shorn three of the one lot and nine of the other lot. The investigating police officer, Lewis, gave evidence of a conversation with the appellant who, in answer to a question to the effect if whether it was usual for foreign sheep to be crutched and shorn in a shed in such numbers, replied "It does seem a bit high". In his reasons for decision the magistrate said that, as far as concerned the shearing, he found "that the number of sheep shorn as percentage of the total number drafted would not be an unacceptable level in this case". However, he made no similar finding in regard to the numbers of sheep crutched by the appellant, and, as I indicated earlier, he was not asked to give full reasons for his decision.

I do not think that it has been shown that the magistrate's discretion miscarried. I have not been persuaded that he exercised his discretion as to costs on a matter or matters which were not connected with the particular facts of the case. For example, he did not say that, as a matter of general practice, costs should not be awarded when police officers have reasonable grounds for laying complaints, or that an award of costs may deter police officers from performing their duties (*Puddy v Borg*), or that costs ought not to be awarded against a police officer unless the latter acted frivolously or vindictively (*Smith v Robinson, ex parte Robinson*) or that police informants should be given special consideration.

Since preparing these reasons I have had the opportunity of reading, in draft, the judgment of Carter J. I am able to say that I agree with the analysis made by Carter J of the decisions to which he has referred and with his observations about certain differences which may exist between criminal cases and civil cases in relation to the exercise of a discretion as to costs. For the above reasons I would not interfere with the magistrate's discretion and would dismiss the appeal with costs.

CARTER J: (with whom Campbell CJ and Matthews J agreed), *[briefly referred to the facts, and then undertook an analysis of the many cases, reported and unreported, where the question of the award of costs has been addressed. Cases reviewed by His Honour included:*
Ex parte Jones [1906] 6 SR (NSW) 313; 23 WN (NSW) 93.
French v Ianella [1967] SASR 226.
Haag v Underdown [1968] 13 FLR 235.
Mallan v Berry [1964] SASR 8.
Ex parte Musgrove; re Howard [1961] 78 WN (NSW) 88; [1960] NSWR 819.
Reynolds v Gemmell [1927] 22 Tas LR 57.
R v Whelan [1895] 6 QLJ 165.
Jackson v Allen, unrep, 1984, Q'ld District Court.
Hamdorf v Riddle [1971] SASR 398.
Timms v Van Diemen [1968] SASR 379.
Cilli v Abbott [1981] FCA 70; [1981] 53 FLR 108.
McEwen v Siely [1972] 21 FLR 131.
Giles v Samuels [1972] 3 SASR 307.
Leighton v Samuels [1972] 2 SASR 422.
Schaftenaar v Samuels [1975] 11 SASR 266.
Jones v Linnane, unrep, 1983, White J, SA.
Ex parte Justelius; re Lucan & Anor [1970] 92 WN (NSW) 455; [1970] 2 NSWR 610.

His Honour continued]: ... **[438]** There are cases in the Supreme Court of Victoria which, however, are directly in point. In *Davey v Barrow* [1954] VicLawRp 85; [1954] VLR 593; [1954] ALR 977 the defendant had been charged with assaulting the informant, a police officer, and the magistrate had dismissed the information. He refused costs to the successful defendant. The matter came before Herring CJ on appeal. In the result he dismissed the appeal and refused to interfere with the magistrate's exercise of discretion. The relevant provisions of the *Justices Act* were identical with s157, 158 of the *Justices Act* (Q). Herring CJ had been pressed with the decision of the House of Lords in *Donald Campbell & Co Ltd v Pollak* [1927] AC 732; [1927] All ER 1 and with the submission that the relevant sections of the *Justices Acts* make no distinction between civil and criminal cases. After referring to the discretion with which the court was invested and to

the decision of the House of Lords which was relied on by counsel, Herring CJ went on at p594:

> **[439]** "In my opinion, this case (the House of Lords decision) dealing as it does with the practice of the superior courts in civil cases, is of but little assistance in elucidating the position in a criminal case like the present, tried in a Court of Petty Sessions. There is certainly nothing in the case to affect the conclusion, which I have expressed, that under s102 of the *Justices Act* 1928, a successful defendant in Courts of Petty Sessions has no right to his costs, unless and until the court in the exercise of its discretion decides to award them to him. The position with regard to costs in Courts of Petty Sessions is entirely governed by the statutory provisions whereas in the superior courts, their settled practice in civil cases over the years have to be taken into account, and the reasonable expectation of obtaining an order for his costs that their Lordships consider a successful defendant to have in such cases, would seem to have been derived therefrom."

Finally, Herring CJ in dismissing the appeal expressed the view that courts of review must be careful not to qualify or fetter the absolute and unfettered discretion given to Courts of Petty Sessions with regard to costs.

The question then came before the Full Court of the Supreme Court of Victoria in *Puddy v Borg* [1973] VicRp 61; [1973] VR 626. The magistrate had refused costs to a successful defendant who had been charged with an offence under s18 of the *Summary Offences Act* 1966. For the appellant, counsel relied upon *Hamdorf v Riddle* to support his submission that the general rule was that applicable in civil cases, namely that costs should follow the event unless in some particular circumstances there is good reason to depart from the rule. The court said (at p627) that that submission was "at one end of the scale". At "the other end of the scale" was the submission of opposing counsel supported by the line of authority from *ex parte Jones* to *Haag v Underdown* that the rule was that there should be no costs awarded against a police informant unless there are particular and special circumstances to justify an order being made. The Full Court decided that it was "unnecessary and unwise" to rule in terms wider than were required for the determination of the matter before the court. The matter was sent back to the magistrate for further consideration because it was held that he had failed to exercise his discretion properly. The magistrate had refused to order costs because he said that such an order might act as a deterrent to police officers in laying complaints in courts of summary jurisdiction. The Full Court rejected this as an extraneous and irrelevant consideration. In this respect the view of the Full Court coincides with that of Bray J in *Timms v Van Diemen* and that of the Full Court in *Hamdorf v Riddle*, and with it I also agree. It was in the view of the Full Court, an irrelevant consideration, not so much for the reasons expressed in the South Australian decisions, but because it "was not a consideration relevant to **[440]** the determination of the case; nor was it a consideration connected with or arising out of the conduct of the proceedings before the court or the material before the court. As expressed by the magistrate, the reason given was not related or confined to particular facts of the case before him or to the findings that governed his decision."

In *Liu v Caughey* – an unreported decision of Murray J in the Supreme Court of Victoria, O.R. No.7687, 18 December 1979, the applicant for an order nisi to review the decision of a stipendiary magistrate had been charged with exceeding the speed limit. After both the police officer and the applicant had given evidence the magistrate found himself not satisfied beyond reasonable doubt that the applicant had exceeded the limit and he dismissed the information. The magistrate refused to order costs to the successful defendant. Having referred to *Hamdorf v Riddle*, *Leighton v Samuels* and *McEwen v Siely* – all referred to above – Murray J returned to consider *Puddy v Borg*. He said:

> "There is no doubt, in my opinion that there is a long-standing practice in Victoria that in ordinary circumstances successful defendants are not awarded costs in prosecutions brought by members of the police force."

He then dealt with the basis upon which the Full Court in *Puddy v Borg* had held that the magistrate in that case had wrongly exercised his discretion by reference to an irrelevant consideration. He then referred to the order of the Full Court remitting the matter to the magistrate for further consideration, and he continued:

> "It seems to me clear enough that if the Full Court had been of the opinion that in the absence of special circumstances a successful defendant in prosecutions instituted by the police was entitled to his costs there would have been no purpose in remitting the matter to the Magistrate. A careful

> reading of the reasons of the Full Court does not indicate that it was prepared to follow the course recently taken by the Full Court of South Australia in *Hamdorf v Riddle* or in *McEwen v Siely*. Nor do I think that what the Magistrate said indicates that he exercised his discretion by reference to extraneous or irrelevant considerations. It seems to me clear enough that the Magistrate intended to indicate that he saw nothing in the case before him to warrant departing from the well established practice of not awarding costs in prosecutions brought by the police."

Finally he concluded that if the long established practice in Victoria was to be considered afresh it was appropriate that only the Full Court should embark on that task. It is clear therefore that the Supreme Court of Victoria has not taken the same unequivocal approach to the question as that taken by the Supreme Court of South Australia in *Hamdorf v Riddle* or by the Federal Court in *McEwen v Siely*.

[441] Finally in *Heddich v Dike* [1981] 3 A Crim R 139 Gobbo, J on appeal from a magistrate was intent upon correcting what was clearly a misunderstanding by the magistrate of what Murray J had said in *Liu v Caughey* (*supra*). The magistrate appeared to proceed on the basis that there was a rule that unless there were special circumstances costs would not be awarded against police informants and that this was the view of Murray J in *Caughey's case*. Gobbo J said at p145:

> "I do not understand Murray J in *Caughey's Case* to have laid down a rule that costs shall not be awarded against informants except in exceptional circumstances. That matter had been debated before the Full Court in *Puddy v Borg* and the Full Court had dealt with the case before them on the circumstances of that case and had declined to give a view as to the two competing arguments ... It is true that Murray J said that it was not the practice to award costs against informants, but I do not read his decision as purporting to say that this practice, though a wide and long established one, amounted to a rule of law."

Therefore the question in Victoria remains an open one and there is not in that State a decision binding lower courts to the same effect as *Hamdorf v Riddle* and *McEwen v Siely*.

I turn again to the position in Queensland. There is no doubt that at least until recent times the practice both long-standing and well established was the same as that referred to by Gobbo J in Victoria. It is equally clear from the unreported decisions of the District Court referred to above – and I assume that such decisions are read by and accordingly influence stipendiary magistrates – that there is abroad a view that the rule expressed in *Hamdorf v Riddle* is to be followed in Queensland. If that be so, then it is, in my view, wrong and to adopt such a view would be to act inconsistently with other decisions of this court.

Lucas J (with whom Kelly and Sheahan JJ agreed) in *Smith v Robinson; ex parte Robinson* [1980] Qd R 372 described as "manifestly wrong" the view of a magistrate that "unless the prosecution was brought frivolously or vexatiously or with vindictive or malicious intention no order should be made as to costs against the prosecutor". In that case the magistrate refused to order costs because in his view the complainant police officer had not so acted.

Lucas J then continued:

> "There is no rule that a public officer who lays a complaint in his official capacity and who fails in that complaint should not have costs awarded against him except in exceptional circumstances. The magistrate should recognize that there is no rule to that effect."

That clear and unequivocal statement ought to have put to rest in Queensland any idea that a magistrate ought to allow the exercise of his **[442]** discretion to be governed by considerations such as those which influenced the magistrate in the decision appealed against. Lucas J then went on:

> "We do not intend to lay down any principles which should govern magistrates in the exercise of their discretion to award costs on a dismissal of a complaint except to say that they must give their attention to the circumstances in each case and act according to the result at which they arrive."

This undoubtedly is the fundamental principle and the correct one. The unreported decisions of the District Court to the effect that costs "should follow the event" are inconsistent with it. The remarks of Lucas J correctly, with respect, reflect the terms of ss157 and 158 of the

Justices Act. His remarks are also in my view consistent with what was said by the Full Court of Victoria in *Puddy v Borg* at p629 when rejecting the "deterrent to police" argument. The Full Court in rejecting that consideration as relevant at the same time expressed, in the converse, matters relevant to the proper exercise of the discretion. That consideration had been rejected as irrelevant because:

> "It was not a consideration relevant to the determination of the case; nor was it a consideration connected with or arising out of the conduct of the proceedings before the court or the material placed before the court ... The reason given was not related or confined to the particular facts of the case before him or to the findings that governed his decision."

The fact that the prosecution has been instituted by a police officer acting in accordance with his duty is however, in my view, a consideration comprehended by that statement. I am of the view that the *dictum* of Darley CJ in *ex parte Jones* to the extent that it lays emphasis upon the public duty of the police officer in initiating proceedings of this kind is correct and that matter remains a relevant consideration for the magistrate in deciding how he should exercise his discretion as to costs.

Any attempt to list precisely the matters which will be relevant to the proper exercise of the discretion is likely to be counterproductive since there is a real risk that such a list might be seen to be comprehensive and exhaustive and therefore may in fact convert what is in truth an unfettered discretion into a fettered one. It seems to me with great respect to those who express it that a rule which states that the discretion is to be exercised in the same way as in a civil case or that an unsuccessful defendant shall have his costs unless he has disqualified himself by particular conduct will as effectively fetter the discretion as will any attempt to list the relevant criteria. That is not to say that the fact that the proceedings are of a criminal nature and that they are instituted by a police officer in the execution of his duty is the decisive consideration. The content of the so called rule of practice has to be considered in the proper context along with the other considerations **[443]** which emerge from the circumstances of the particular case. I need hardly add that the question whether the successful complainant should have his costs is similarly a matter for the discretion of the magistrate.

The statement of Lucas J in *Smith v Robinson; ex parte Robinson* (*supra*) has to be kept to the forefront of the minds of those charged with the judicial responsibility of applying the relevant sections of the *Justices Act*. It is in my view wrong to commence with the proposition that costs will be awarded as if it were a civil case and that *prima facie* a successful defendant is entitled to his costs unless there are present some disqualifying factors ...
