62/89

SUPREME COURT OF VICTORIA

LATOUDIS v CASEY

Kaye J

25, 28 - 30 August, 29 September 1989

COSTS – INFORMATIONS FOR OFFENCES DISMISSED – APPLICATION FOR COSTS REFUSED - WHETHER UPON DISMISSAL COSTS FOLLOW THE EVENT – WHETHER COURT'S DISCRETION FETTERED – FACTORS TO BE TAKEN INTO ACCOUNT: *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, S97(b).

1. Section 97(b) of the *Magistrates (Summary Proceedings) Act* 1975 confers a discretion on a court to order an informant to pay costs to the defendant upon the dismissal of an information. This discretion is to be exercised in each case according to its own circumstances.
***Puddy v Borg* [1973] VicRp 61; (1973) VR 626, applied.**

2. It is no part of the law of the State of Victoria that upon the summary hearing of an information for a criminal offence there is a presumption or rule that costs follow the event in favour of a successful defendant.

3. In the exercise of the court's discretion, the question of reasonableness on the part of the informant in the laying of the information is not of itself a determinative, as distinct from irrelevant, factor. However, there may be cases where the informant's actions, when compared with other considerations, may be a determinative factor.
***Vaux v SE Dickins Pty Ltd* MC 11/1989, referred to.**

KAYE J: [1] This is the return of an order nisi to review an order made by a Magistrate constituting the Magistrates' Court at Oakleigh by which the applicant's (defendant's) application for costs against the respondent (informant, a police officer) was refused. By three informations the applicant was charged with the following offences: first, theft of a motor car; secondly receiving stolen goods, being two black coloured front car seats, one rear black coloured car seat, and door trims, door handles and window winders of a motor car; and thirdly unlawful possession of the goods referred to in the second information. By the first and second informations, the applicant was charged with indictable offences, the third charge being an offence triable summarily. The applicant consented to both the first and second charges being heard and determined summarily, and he pleaded not guilty to all charges. Then, the prosecutor having announced that no evidence in support of the theft charge would be led, the Magistrate dismissed the first information. Witnesses called by the prosecutor were the owner of the motor car and the respondent. The owner deposed that some of the goods were items fitted to his stolen motor car. The respondent verified that, on attending the applicant's premises, she saw the several goods, and that she suspected the goods were stolen or unlawfully obtained because the items fitted the description of the property which had been reported stolen. The record of interview of the applicant which was conducted by the respondent was admitted in evidence.

[2] After the close of the prosecution case, the Magistrate upheld the submission made by Mr AH Swanwick, the solicitor appearing for the applicant, that there was no case to answer on the charge of receiving, and he dismissed the second information. The Magistrate held that there was a case for the applicant to answer on the third charge. The applicant gave sworn evidence of the circumstances in which he purchased the items of car fittings. At the conclusion of the defence case, the Magistrate found that the applicant had satisfactorily accounted for his possession of the stolen goods and he dismissed the third information. Mr Swanwick then made application for an order that the respondent pay the applicant's costs. In support of his application, Mr Swanwick referred to a number of authorities concerned with the award of costs in favour of a defendant following the dismissal of an information charging him or her with offences. Mr Swanwick submitted that, in the exercise of his discretion, the Magistrate should give weight to the following matters:

"(i) The fact that all three charges had been dismissed.
(ii) The fact that the theft charge had been dismissed without evidence being led, suggesting that there had never been proper evidence to support the charge.
(iii) The fact that the handling charge had been dismissed without the need for evidence from the defence – there being no evidence of 'knowledge or belief' even after nine months of police investigation, which must raise doubts as to whether the charge should properly have been laid.
[3] (iv) The fact that the Magistrate had himself acknowledged the absence of suspicion which might have arisen from a 'bargain' basement price.
(v) The fact that the Defendant had revealed the name of the person from whom he bought the goods, as soon as he had learned of it from a prosecution witness, during an adjournment of these very proceedings.
(vi) The fact that an award of costs should be viewed as an indemnity to a defendant, not as a criticism of the informant."

In his affidavit in support of the application for the order nisi, Mr Swanwick deposed that the Court adjourned to enable the Magistrate to consult authorities, and that the hearing then proceeded as follows:

"Upon resumption, the Magistrate stated that he considered that *Anstee v Jennings* and *Puddy v Borg* stood for the following propositions:
(i) An award of costs is an indemnity to a defendant, not a punishment of the informant.

(ii) The fact that a prosecution is reasonable does not debar a defendant from obtaining an order for costs.

(iii) Possible deterrence of police from performing their duty is not a factor to be considered in the exercise of the discretion.

(iv) The discretion is unfettered, and may be exercised by reference to any factual matter revealed by proper evidence.

The Magistrate then stated that he proposed to consider the exercise of the discretion by reference to the following matters:

(i) It was reasonable for the informant to have sworn the information, given that she had a reasonable suspicion that the Defendant was in possession of stolen goods – some of which were in fact now conceded to have been stolen albeit not by the Defendant.

(ii) He did not propose to award costs to a Defendant in circumstances where a Defendant had failed to seek proof of **[4]** identity or proof of ownership of goods at the time of purchase, thereby causing a significant suspicion to fall upon him, and notwithstanding that his account of his possession was accepted by the Court as being satisfactory.

He therefore refused to make an order for costs in favour of (the applicant)."

The order nisi was granted on seven grounds. The thrust of each ground is that the Magistrate's discretion, in the manner therein particularised, miscarried. The power of a Magistrate to award costs is derived from statute, being s97(a) and (b) of the *Magistrates (Summary Proceedings) Act* 1975 which is in these terms:

"97(a) Where the Court makes a conviction or order in favour of an informant or complainant, the Court may order the defendant to pay to the informant or complainant such costs as the Court thinks just and reasonable;

(b) Where the Court dismisses the information or complaint, or makes an order in favour of the defendant the Court may order the informant or the complainant to pay to the defendant such costs as the Court thinks just and reasonable."

By Rule 157 of the *Magistrates' Courts Rules* 1980 it is provided :

"Subject to the provisions of any Act and of these Rules, the costs of and incidental to all proceedings in a Magistrates' Court shall be in the discretion of the court."

From the terms of both the statutory provision and the rule, it follows that the power of a Magistrate to award costs is one of discretion. Principles governing the determination on appeal or

review of the exercise of discretion have been stated by the High Court on several occasions. For present purposes it is sufficient to refer **[5]** to two authoritative statements of principles. Thus, in *House v R* [1936] HCA 40; (1936) 55 CLR 499 at 504-5; 9 ABC 117; (1936) 10 ALJR 202, Dixon, Evatt and McTiernan JJ stated

> "It is not enough that the Judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

Again, in *Australian Coal and Shale Employees' Federation v The Commonwealth* [1953] HCA 25; (1953) 94 CLR 621 at 627 Kitto J referring to authorities appearing in His Honour's judgment in *Lovell v Lovell* [1950] HCA 52; (1950) 81 CLR 513 at 532-4; [1950] ALR 944, stated that:

> "... the true principle limiting the manner in which appellate jurisdiction is exercised in respect of decisions involving discretionary judgment is that there is a strong presumption in favour of the correctness of the decision appealed from, and that that decision should therefore be affirmed unless the court of appeal is satisfied that it is clearly wrong. A degree of satisfaction sufficient to overcome the strength of the presumption may exist where there has been an error which consists in acting upon a wrong principle, or giving weight to extraneous or irrelevant matters, or failing to give weight or sufficient weight to relevant considerations, or making a mistake as to the facts. Again, the nature of the error may not be discoverable, but even so it is sufficient that the result is so unreasonable or plainly unjust that the appellate court may infer that **[6]** there has been a failure properly to exercise the discretion which the law reposes in the court of first instance."

The statements of principle referred to are applicable to review of a Magistrate's exercise of discretion; *Bailey v Wallace* [1970] VicRp 15; [1970] VR 109 at 111-2 per Menhennitt J. The foremost ground on which the applicant relied in his attempt to impugn the Magistrate's decision is expressed in the seventh and final ground of the order nisi. This ground reads:

> "The learned Magistrate was in error in not proceeding from the presumption that costs should follow the event so that the successful defendant in a criminal action should be indemnified for his costs."

At the outset of the hearing of the present proceeding, Mr Freckleton, counsel for the applicant, sought an order referring the return of the order nisi for hearing by the Full Court. The application was said to be based on the existence of conflicting decisions of other Supreme Courts and the Federal Court concerned with the application to summary offences of the ordinary rule that costs follow the event as applied in civil proceedings. Counsel drew attention to a number of decisions of courts, other than this court, holding that courts of summary jurisdiction in the exercise of discretion should award costs to a defendant acquitted of an offence charged. Those cases included *Hamdorf v Riddle* (1971) SASR 398 and *Cilli v Abbott* [1981] FCA 70; (1981) 53 FLR 108. It was contended that in *Puddy v Borg* [1973] VicRp 61; [1973] VR 626, although in argument the application of the ordinary rule in civil proceedings was raised, the Full Court left open whether the rule applies to the hearing of an information for a summary offence.

[7] I refused to refer the present proceedings to the Full Court for the reason that Winneke CJ, delivering the judgment of the court in *Puddy v Borg* at 628, stated that it was unnecessary and unwise to rule in terms wider than required for determination of the particular matter before the court. The Chief Justice at p628 said of the provisions of s105(2) of the *Justices Act* 1958, which are re-enacted in s97(b) of the present legislation:

> "Sub-section (2) plainly confers a discretion upon the court to order an informant to pay to a defendant costs in a case where the information is dismissed. The discretion is one to be exercised in each case according to its own circumstances. Beyond limiting the power to such costs as to the court seems just and reasonable, the sub-section does not otherwise circumscribe the discretion conferred.

> No doubt it must be exercised judicially so as to achieve what is fair and just between the parties according to the circumstances of the particular case, and its exercise is open to challenge according to the well-established rules which govern the exercise of discretionary powers."

In addition I consider that the judgment of the Full Court provides adequate directions for the resolution of the present proceedings concerning matters both proper to be considered as well as those improper to be considered by a Magistrate in the exercise of discretion. More particularly, it is not part of the law of the State of Victoria that upon the summary hearing of an information for a criminal offence there is a presumption or rule that costs follow the event in favour of a successful defendant. Consequently ground seven was not made out.

The complaint made under ground number one is that the Magistrate was in error in giving no weight or insufficient weight to the fact that all three charges **[8]** against the applicant were dismissed. This complaint was not supported by anything which the Magistrate stated in his reasons for denying the applicant an order for costs. The complaint was based upon the omission by the Magistrate to refer expressly to the circumstance that all three charges were dismissed. To conclude from this omission that the Magistrate did not give any weight or any sufficient weight to the dismissals would necessitate assuming that he did not do so. Any such assumption would be unwarranted having regard to the first three factors which Mr Swanwick at the outset of his submission brought to the Magistrate's attention.

Similar considerations apply to the second ground wherein the complaint made is that the Magistrate erred in giving no weight or insufficient weight to the fact that the two indictable offences were dismissed, the first without evidence having been led, and the second as a result of insufficiency of evidence. Those were factors which Mr Swanwick by his submission reminded the Magistrate, and which formed the basis for his application for costs.

The several statements made by the Magistrate when ruling upon the application were no doubt not exhaustive of all the matters which he took into consideration. Indeed the Magistrate was not bound to enumerate or disclose all the matters and facts upon which he acted in the exercise of his discretion; see *Davey v Barrow* [1954] VicLawRp 85; [1954] VLR 593 at 595; [1954] ALR 977 per Herring CJ; although in response to counsel's enquiry it would have been proper for the Magistrate to disclose whether he had taken into **[9]** account particular evidence or a particular fact and if so whether he had attributed any weight to it. Consequently grounds one and two were not made out.

Under ground three it was asserted that the Magistrate was in error in giving excessive weight to the reasonableness of the respondent's suspicion that the defendant was in possession of stolen goods. The assertion was based upon the Magistrate's statement of his proposal to consider in the exercise of his discretion that:

> "It was reasonable for the informant to have sworn the information, given that she had a reasonable suspicion that the defendant was in possession of stolen goods".

Under this ground counsel for the applicant argued that the reasonableness of the respondent in preferring charges which were dismissed was not a proper matter to be considered in the exercise of discretion, and that the Magistrate ought not to have taken the matter into account. In support of his submission counsel cited and sought to rely upon a passage appearing in the judgment of Vincent J in *Vaux v SE Dickins Pty Ltd* (unreported 5th December 1988) on the return of an order nisi to review a Magistrate's decision refusing an order for costs in favour of a successful defendant to an information charging an offence contrary to the *Weights and Measures Act* 1958. In the passage quoted by counsel, His Honour at p27 said:

> "Again it is difficult to see how the reasonableness as opposed to the unreasonableness of an informant's behaviour could provide a proper basis for the exercise of discretion adversely to the applicant. If an informant acted out of malice, or without exercising proper care to avoid a defendant being exposed to unnecessary expense being incurred in order to defend himself against a totally misconceived charge, the unreasonableness of such behaviour might **[10]** militate in favour of an order for costs being made against that informant. However, the fact that an informant might be regarded as having acted reasonably in relation to the institution and conduct of proceedings could hardly of itself constitute an adequate basis for refusing costs to an innocent, or at least, unconvicted defendant."

However, immediately following the passage quoted by counsel, His Honour continued :

> "Yet, it would appear to be clear that the learned Magistrate did regard the reasonableness of the informant's actions as determinative of the issue".

Thus His Honour made clear his opinion that the reasonableness of the informant's behaviour in having laid and prosecuted the information was not *per se* a determinative, as distinct from irrelevant, factor to be considered in the exercise of discretion. With His Honour's statement about this matter I respectfully agree, save that I would not exclude the possibility of circumstances attendant to an information existing when the reasonableness of an informant's behaviour in laying the information, as compared to other considerations, might be a determinative factor in this connection. However, counsel's argument was not supported by the entire passage of Vincent J's *dicta* on which he relied.

Although counsel did not advance any further argument in support of ground three, there are observations relevant to the complaint which are required to be made. First, by the third factor which he brought to the Magistrate's attention and on which he relied, Mr Swanwick expressly "raised doubts as to whether the charge should properly have been made". The reference made by Mr Swanwick was to the receiving charge. Nevertheless by **[11]** the tenor of the factors numbered (iii) and (iv) of his submission, Mr Swanwick's comments were directed to the question whether there was a proper foundation for the preferment of the unlawful possession charge against the applicant. Matters which the respondent, as the informant, was required to prove to found the charge were that the applicant was in actual possession of personal property and that she, the respondent, reasonably suspected the property of being stolen or unlawfully obtained; *Summary Offences Act* 1966, s26(1). The respondent's suspicions and the reasonableness of her suspicion were therefore material to the factor whether it was proper to have laid the charge of unlawful possession against the applicant.

Secondly, by his statement that he proposed to consider the reasonableness of the respondent's conduct, it follows that the Magistrate gave weight to the matter. Yet nothing appears in the expressions used by him or in his decision which warrants the conclusion that the Magistrate gave excessive weight to the reasonableness of the respondent's conduct. Ground three therefore was not made out. The fourth ground reads:

> "The learned Magistrate was in error in holding that it was reasonable to have laid charges for two indictable offences, given the insufficiency of evidence to support those charges."

In support of this ground counsel for the applicant relied upon the same submission as he made in support of the third ground. The submission does not sustain this ground. There are two further observations to be made arising out of the complaint made under the ground. First, the information to which the Magistrate expressly referred in **[12]** his reasons was to the third, charging the applicant with the offence of unlawful possession. Secondly, the assumption of the Magistrate having held that it was reasonable to have laid charges for two indictable offences was entirely without foundation. The fourth ground similarly was not established.

Grounds (v) and (vi), which were argued together by counsel, read:

> "v. The learned Magistrate was in error in attributing any, or any significant, weight to the fact that the defendant did not seek proof of ownership from the vendor of the goods.
>
> vi. The learned Magistrate was in error in adopting a general principle that defendants will be denied their costs if they do not seek proof of ownership from the vendors of goods that they purchase."

The complaints made by these grounds arose out of the second matter which the Magistrate stated he proposed to consider in the exercise of his discretion. The facts referred to by him were based on both answers which the applicant had given to the respondent when she questioned him about his possession of the goods, and evidence given by the applicant to the Court in explanation of his possession.

When first questioned by the respondent at his house, the applicant searched his room for a receipt and for the name of the person from whom he had purchased the parts. In the record

of interview, the respondent described the vendor as "a guy I met on the C.B., Peter". It was his answer to her questions and his failure to provide the receipt for which he apparently searched without success, together with the similarity of the goods **[13]** with those reported to have been stolen, which caused the respondent to charge the applicant with unlawful possession.

In his sworn evidence, the respondent elaborated on the identity of the seller as a person whom he had seen on several occasions at the Dandenong drag races driving a red GT Ford model XY with black interior, and with whom he had held a conversation on C.B. radio, answering the call sign of "Peter". The applicant swore that it did not occur to him to ask the vendor for proof of the ownership of the parts. It was only minutes before giving evidence and while outside the Court that he had learned from the owner of the stolen motor car that the man called Peter was "Greg Opparo" or "Greg Apparo".

No doubt those were the facts which the Magistrate described as having caused a significant suspicion to fall upon the applicant. Adding that "Notwithstanding that his account of his possession was accepted by the Court as being satisfactory", the Magistrate referred to the applicant having discharged the onus of providing the Court with a satisfactory account as to how he came by the goods; *Hofstetter v Thomas* [1968] VicRp 20; [1968) VR 199 at 209 per Menhennitt J. Furthermore, those facts and circumstances were open to the Magistrate to take into account when considering whether to award the applicant costs, and particularly having regard to Mr Swanwick's reliance upon evidence of the applicant having learnt the name of the seller – not Peter, but "Greg Opparo" or "Greg Apparo" – from the owner of the stolen motor car shortly before giving evidence. Those matters being considerations relevant to the determination of the **[14]** information and, in part at least, connected with the conduct of the hearing before the Magistrate were proper for him to take into account in the exercise of his discretion; *Puddy v* Borg at 629.

It was contended that the Magistrate expressed a statement of principle of general application to a person against whom a charge of unlawful possession has been dismissed and who seeks costs. If it were a statement of general policy which the Magistrate applied or took into account, in my view His Worship would have fallen into error. There may be cases in which a person might for valid reasons decline to disclose the name of the person from who he or she has acquired goods suspected by a police officer of having been stolen or unlawfully obtained, and there might be acceptable reasons for a person not seeking from the vendor proof of ownership of such goods. The formulation and application of a principle of general application in such terms reflects policy which might cause a denial of justice to a successful defendant.

Be that as it may, it is significant that Mr Swanwick did not purport to verify the verbatim words spoken by the Magistrate. In this connection, by the substitution of the definite for the indefinite article before the word defendant in two places appearing in the words attributed to him, the Magistrate's statement was not an expression of policy; it was an appropriate comment upon the evidence before him and the course of the hearing of the informations. I therefore do not accept that the Magistrate did use language expressing a statement of principle or policy intended to be applicable to all **[15]** applications for costs made by successful defendants. His statement of conclusions drawn from authorities binding him manifest his awareness of his need to found the exercise of his discretion only upon facts and considerations relevant to the determination of the information before him.

Moreover, the strong presumption in favour of the correctness of the Magistrate's decision refusing the applicant's costs was not displaced by any submissions made on behalf of the applicant. Finally it was not demonstrated that the decision was clearly wrong so as to justify the setting aside of the order refusing the applicant's costs. For these reasons the order nisi will be discharged with costs.

APPEARANCES: For the applicant Latoudis: Mr I Freckleton, counsel. Blake Dawson Waldron, solicitors. For the respondent Casey: Mr BM Dennis, counsel. Victorian Government Solicitor.
