6/96

SUPREME COURT OF VICTORIA

FITZGERALD v GOLDEN and ANOR

Beach J

27 November, 5 December 1995

COSTS – ALIBI NOTICE SERVED LATE – APPLICATION FOR ADJOURNMENT GRANTED – CLAIM FOR COSTS OF PROSECUTOR AND INFORMANT – GRANTED ON BASIS OF CIVIL PROCEEDINGS – DISCRETION OF MAGISTRATE TO ORDER COSTS – WHETHER DISCRETION MISCARRIED.

At the contest mention hearing, the defendant indicated that alibi evidence would be called. However, notice of alibi was not given to the prosecutor until the day before the hearing. When the matter came on for hearing, the prosecutor sought an adjournment to enable investigation of the alibi and for the defendant to pay the costs of the prosecutor and informant thrown away by reason of their attendance at the court for the hearing. The magistrate granted the adjournment and ordered the defendant to pay the sum of $232 costs for the prosecutor and $116 for the informant. These costs were said to be the normal rate recoverable by the Victoria Police in civil proceedings. On appeal—

HELD: Appeal allowed. Order for costs quashed.
1. A magistrate has power to award costs in a criminal proceeding and in exercising that discretion the magistrate has an unfettered discretion save that the discretion must be exercised judicially.
Latoudis v Casey **[1990] HCA 59; (1990) 170 CLR 534; 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287;**
Norton v Morphett **[1995] VSC 211; (1995) 83 A Crim R 90; MC15/95, referred to.**

2. In the present case, the magistrate erred in the exercise of his discretion in that he overlooked—
- **that there had been no breach by the defendant of the alibi procedure**
- **that the prosecutor and informant had not incurred any expense by reason of the adjournment against which they were entitled to be indemnified.**

3. It is inappropriate in a criminal proceeding to award costs to the prosecutor or the informant on the basis of what may be recovered by them if called as a witness in a civil proceeding.

BEACH J: [1] This is the return of an originating motion filed in the Court whereby the plaintiff, Joseph Fitzgerald, seeks judicial review of the decision of Mr Graham Angus Golden M, sitting as the Magistrates' Court at Prahran, made on 4th August 1995. The background to the originating motion may be summarized as follows: The plaintiff, Joseph Fitzgerald, who is a school student, was charged on 16th February 1995 with two counts of possession of cannabis; one count of possession of LSD; one count of using cannabis; one count of trafficking in cannabis and one count of trafficking in LSD. On 9 June 1995 there was a contest mention hearing in respect of the charges at the Prahran Magistrates' Court. During the course of the hearing Fitzgerald's solicitor informed the court that a notice of alibi would be served "within a week". The section in the *Magistrates' Court Act* 1989, which deals with alibis and alibi notices is s47 which reads: *[His Honour set out the provisions of the section and continued]...*

[2] The charges were then adjourned to 4th August 1995 for a contested hearing. Contrary to what had been said at the contest hearing mention Fitzgerald's notice of alibi was not sent to the prosecution office until 5.55 p.m. on 2 August 1995. According to the affidavit of Kieran Largey, who was the prosecutor dealing with the matter, that was after normal hours of business of the prosecution's office and he did not receive the notice until the 3 August which, of course, was the day before the contested hearing was to take place. The notice of alibi was to the effect that one of Fitzgerald's school teachers would be called by the defence to give evidence that at the time and place that it was alleged that the offences were committed, Fitzgerald was in fact at school.

On 3 August the prosecutor sought the consent of Fitzgerald's solicitors to an interview of the alibi witness. Fitzgerald's solicitors refused to give permission and the prosecutor then

informed them that he would be applying to adjourn the hearing to enable him to **[3]** have the alibi investigated. Later that same day the prosecutor informed the coordinator's office at the Prahran Magistrates' Court that the matter might not proceed the following day as the prosecution would be applying for an adjournment. On 4 August 1995 the prosecutor made his application to Mr Golden M, to adjourn the proceedings to give the applicant time to investigate Fitzgerald's alibi.

Pausing at this point, in the circumstances of this case, that was an application which was bound to succeed. It could not possibly be said such an adjournment would "prejudice the proper presentation of the defence". When questioned by the magistrate as to why the notice of alibi had not been served within a week as previously stated, counsel for Fitzgerald replied that he did not know what transpired at the contest mention but that it was generous of his solicitor to have notified the prosecution of the proposed witness; that it would have been inappropriate to forward a notice of alibi until the proof of evidence had been taken from the alibi witness, and until the evidence had been thoroughly checked out; and that due to school holidays confirmation of the alibi evidence was not forthcoming till the day the alibi notice was forwarded to the prosecution.

Counsel for Fitzgerald then stated to the magistrate that he opposed the adjournment application, that the defence was anxious not to waste the court's time and that the court should commence to hear the prosecution case. Mr Golden did not accede to the application and by arrangement between the parties the proceedings were adjourned to 6 December 1995. **[4]** The prosecutor then made an application for his costs of the day and for the informant's costs of half a day. Fitzgerald's account of the application is set out in his affidavit of 26th September 1995. The relevant paragraphs read:

> "24. His Worship, Mr Golden, then asked Senior Constable Largi how many witnesses the prosecution proposed to call. Constable Largi replied: "four witnesses, three police and one civilian, and I apply for costs for this adjournment for myself for prosecuting this case and for the presence of the informant in court."
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> 25. His Worship, Mr Golden, then asked Senior Constable Largi how much were the costs and Senior Constable Largi replied: '$232 to prosecute and $116 for the informant.'
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> 26. My counsel then submitted to His Worship that in these circumstances there was no power to award costs to the prosecutor and the informant. My counsel further submitted that police prosecutors are employees of the State and are paid to be in court for the day. He continued by stating that in this instance the police prosecutor had to be in court as did the informant as the party bringing the charges and it was the defence application for the adjournment and if anything the defence should be granted costs. He further submitted that in the superior courts no costs were payable to the Crown.
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> 27. His Worship then stated that it has been the practice in this region to award costs to the prosecutors and informants.
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> 28. Mr Webb submitted that costs should be paid to the defence because although the contest mention had been in early June some of the materials requested in early April pursuant to Schedule 2 clause 1 of the *Magistrates' Court Act* were not delivered until 20th June. He also stated it had come as a surprise that the prosecutor announced there was to be four witnesses called by the prosecution as the defence had only been supplied with two statements.
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> 29. Now shown to me and marked with the letter "B" is a copy of the Schedule 2 clause request.
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> 30. Mr Webb pointed out to the learned magistrate that the defence had also requested pursuant to Schedule 2 clause 1A2(e) copies of the prior convictions of any of the witnesses to be called by the prosecution and none had been supplied despite the fact that the defendant's solicitors had sent a faxed latter to the prosecution on the 2nd August 1995 repeating the request.
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> **[5]** 31. Now shown to me and marked with the letter "C" is a copy of the fax of the 2nd August requesting details of the criminal histories of all the prosecution witnesses.
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> 32. My counsel stated that my solicitors had reason to believe that the main witness for the prosecution had drug priors and as none had been supplied by the informant a further faxed request was sent on the 2nd August. He stated that no reply had been forthcoming and it was not until 9.50 a.m. on 4th August 1995, the day after my case, pursuant to a direct request by the prosecutor Senior Constable Largi that the defence was told that the main witness against the defendant had been convicted at that very court of trafficking in cannabis in June of 1995. Mr Webb said he had been shown an

extract of the court records and it was apparent from that extract that further investigation of the matter was required. He submitted that due to non-compliance by the informant with the schedule 2 request in both ways outlined costs should be granted to the defence.

33. Now shown to me and marked with the letter "D" is a copy of the Courtlink record in relation to the prosecution witness Teschendorf.

34. His Worship, Mr Golden, then remarked, 'It makes the contest mention system ineffectual. The defendant's solicitor was at fault and the court must make sure that the system works effectively. I intend to make the order for costs in the sum of $348'.

35. My barrister, Mr Webb, then requested to examine the claimants for costs on questions such as wages foregone as a result of being at court; what the claimants were intending to do for the rest of the day as it was only 10.20 a.m.; whether the claimants would be going back to work or if they were intending doing other work for the rest of the day; as to their duties and generally as to the quantum of costs.

36. His Worship the learned magistrate replied 'I refuse the application to cross-examine. The question of costs is entirely within my discretion.'

37. The following exchange then took place between my counsel and the learned magistrate:
Mr Webb: 'I wished to make submissions and I am entitled to cross-examine the claimants in relation to their claim for costs.'
His Worship: 'No you are not I have made my order.'
Mr Webb: 'My client will be appealing your order.'
His Worship: 'Well you won't be needing a stay.'
Mr Webb: 'I would seek a stay of three months.'
His Worship: 'That is outrageous.'
Mr Webb: 'That is what the police informants get as a matter of course when costs are awarded against them and my client is only a student.' **[6]**
His Worship: 'You are not going to need a stay if you are going to appeal.'"

The only comment of the prosecutor of relevance to those paragraphs appear in paragraphs 12 and 13 of Largey's affidavit which reads:

"12. Paragraph 25, Fitzgerald's affidavit: I submitted that the costs that ought to be awarded against Fitzgerald were: A. $232 for my attendance, on the basis of a full day being thrown away; plus B. $116 for the attendance of the informant, on the basis of a half day being thrown away;

13. Although not submitted to the Court, the rates of pay for which costs were claimed—

(i) was based on the salaries of the administrative costs associated with the employment of Senior Constable or Constable;

(ii) is the normal rate recoverable by the Victoria Police in civil proceedings and is a rate regularly updated and widely circulated."

The Plaintiff now seeks orders from this Court quashing the order awarding the costs of the adjournment to the plaintiff and directing that the charges laid against the plaintiff be heard and determined by a magistrate other than Mr Golden.

Let me say at the outset that in my opinion there is no basis for making an order that the charges brought against the plaintiff be heard by another magistrate. In my opinion nothing that the magistrate said or did during the course of the application for adjournment could be said to give rise to a reasonable apprehension of bias. That application is refused.

A number of grounds was relied upon by the plaintiff in support of his application in respect of the costs of the adjournment. It is only necessary to set out grounds 1, 2, 4 and 5 in my reasons for judgment. They read: **[7]**

"1. In exercising his discretion to award costs against the plaintiff, the learned magistrate erred in law in that he failed to take into account relevant considerations namely:

(a) the application for adjournment was made by the prosecution.

(b) the prosecution had made no effort to investigate the alibi although they had time to do so.

(c) the prosecution had come to court unprepared to present its case even though without prejudice to the investigation of the alibi the prosecution case could otherwise have been presented on the same day.

(d) The failure of the prosecution to notify the court of its intention to adjourn the case.
(e) the prosecution had failed to comply with all of the plaintiff's requests pursuant to clause 1A Schedule 2 the *Magistrates' Court Act*.

2. That in exercising his discretion to award costs against the plaintiff, the learned magistrate erred in law in that he took into account irrelevant considerations namely:
(a) Events which occurred at the contest mention.
(b) The failure of the plaintiff to serve a notice of alibi earlier than the date it was served.

4. That the learned magistrate erred in law in exercising his discretion to award costs against the plaintiff without hearing any evidence that the prosecution had incurred or thrown away any costs by reason of the adjournment.

5. That in refusing the plaintiff's application to cross-examine the applicants for costs the learned magistrate erred in law and denied the plaintiff the right to procedural fairness and natural justice."

In the circumstances of this case, I consider there is no substance to grounds 4 and 5. It was perfectly clear that the prosecutor and informant had not personally incurred any costs by reason of the adjournment. What the prosecutor was seeking was the rates normally recoverable by police officers if they are called as witnesses to give evidence in civil proceedings.

The whole question in this case is whether the magistrate was justified in awarding costs against the plaintiff in a criminal proceeding based upon those **[8]** rates. There is no doubt that a magistrate has the power to award costs in a criminal proceeding, that much is clear from the provisions of the sub-s1 and 2C of s131 of the *Magistrates' Court Act*. Section 131(1) reads:

"The costs of, and incidental to, all proceedings in the Court are in the discretion of the Court and the Court has full power to determine by whom, to whom and to what extent costs are to be paid."

Section 131(2C) reads:

"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."

In exercising that power a magistrate has an unfettered discretion in the matter. In *Norton v Morphett & Anor* [1995] VSC 211; (1995) 83 A Crim R 90 a decision of the Court of Appeal delivered 31 October 1995 at page 10 Phillips JA had this to say concerning that discretion:

"Under s131(1), the magistrate plainly has an unfettered discretion – both in relation to the awarding of costs and in relation to the fixing of their amount. In relation to the first, *Latoudis* must be taken into account when the magistrate is deciding whether to order costs or not; but when such an order is resolved upon, the question of fixing the amount of those costs is one on which he is altogether at large. Of course the discretion conferred in this regard is a judicial discretion and must be exercised accordingly; it cannot be exercised capriciously, by reference to mistaken facts or irrelevant considerations or for some purpose altogether foreign to that for which the discretion is conferred in the first place: see, for example, *House v The King* [1936] HCA 40; (1936) 55 CLR 449 at 504-5, *Australian Coal and Shale Employees' Federation v The Commonwealth* [1953] HCA 25; (1953) 94 CLR 621 at 627 and *Magna Alloys and Research Pty Ltd v Coffey* [1981] VicRp 3; [1981] VR 23 at 26. But subject to such considerations which go to ensure that discretions which are conferred in general terms are nevertheless exercised judicially, the discretion is at large and the magistrate must exercise it as he sees fit in the light of all the particular circumstances of the case before him."

[9] The case referred to by Phillips JA was that of *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534; 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287. In that case the High Court was called upon to determine whether a successful defendant in a criminal proceeding in the Magistrates' Court was entitled to an award of costs in his favour against the informant. In concluding that the defendant was, Mason CJ said at page 543:

"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 recognize 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 the 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."

With that principle in mind I turn to the magistrate's decision in the present case. It is clear from the material to which I have referred that the magistrate took the view that the adjournment had been occasioned by the lateness of the service of the notice of alibi, and that in that situation the prosecutor and the informant should be indemnified against the expenses they had incurred by reason of the adjournment. But in my opinion that overlooked two significant facts: In the first place there had been no breach by the defendant of s47 of the *Magistrates' Court Act*. The only requirement is that he serve the notice of alibi on the informant or the prosecutor before the start of the examination of the **[10]** first witness for the prosecution. This he had done. In the second place the prosecutor and the informant had not incurred any expense by reason of the adjournment against which they were entitled to be indemnified. Their pay had not been docked by reason of the adjournment. I have little doubt that following the adjournment of the court, which I was informed occurred at approximately 10.20am, they went about their normal duties as police officers.

In my view it is quite inappropriate in a criminal proceeding to award costs to the prosecutor or the informant on the basis of what may be recovered by them if they are called as witnesses in a civil proceeding. In my opinion the magistrate erred in the exercise of his discretion so far as the order for costs was concerned and that order should be quashed.

It was argued by counsel for the defendant that in the circumstances of this case an order in respect of the costs of the adjournment should have been made in favour of the defendant. I do not accept that proposition. If a defendant does leave it to the last moment to serve his notice of alibi, for whatever reason, then it becomes almost inevitable an adjournment will be sought by the prosecution and granted, unless, of course, the defendant can satisfy the court that to adjourn the hearing would prejudice the proper presentation of the defence. In such a situation there is no proper basis for making an order for costs in favour of the defendant. I order that the order of the Magistrates' Court at Prahran made 4 August 1995 whereby it was ordered that Joseph Fitzgerald pay to Atilla Kovacs costs of $348 be quashed. **[11]** I order that plaintiff's costs of this originating motion be taxed and paid by the second-named defendant.

APPEARANCES: For the Plaintiff. Mr L Webb, counsel. Solicitors: Slades & Parsons. For the second-named Defendant. Mr A Albert, counsel. Victorian Government Solicitor.
