02/07; [2006] VSC 488

SUPREME COURT OF VICTORIA

KYMAR NOMINEES PTY LTD v SINCLAIR

Cavanough J

31 July, 18 December 2006

COSTS – SUMMARY CRIMINAL PROCEEDING – PERSON INJURED WHILST EMPLOYED – EMPLOYER INTERVIEWED – DECLINED TO TAKE PART IN AN INTERVIEW - CHARGES LATER LAID – EMPLOYER DID NOT CROSS-EXAMINE PROSECUTION WITNESSES NOR LEAD ANY EVIDENCE – CHARGES FOUND PROVED – PROSECUTION LATER RE-OPENED AT DEFENDANT'S INSTIGATION – EVIDENCE LED ABOUT EMPLOYER'S STATE OF KNOWLEDGE – CHARGES DISMISSED – APPLICATION FOR COSTS UPON DISMISSAL – APPLICATION REFUSED – WHETHER MAGISTRATE IN ERROR.

C. was the managing director of KNP/L. As a result of an employee falling from an unprotected part of C.s roof and being badly injured, C. was interviewed by S. an Inspector with the Victorian WorkCover Authority. After taking a statement from another person at the scene, C. was invited to take part in a taped interview; however, on legal advice he declined.

Charges were later laid against KNP/L alleging two breaches of the *Occupational Health and Safety Act* 1985. A brief of evidence was served together with further and better particulars. When the matter came on for hearing, a plea of "not guilty" was entered in relation to both charges and KMP/L consented to the brief of evidence being tendered. No prosecution witnesses were required for cross-examination and the defendant called no witnesses. Submissions were made at the end of the case and subsequently the magistrate found the charges proved.

When the matter was later listed, the magistrate acceded to the prosecutor's application to re-open the case in order to call the person who was in attendance at the time of the fall. This witness was cross-examined but C. did not give evidence. At the close of the case, the magistrate dismissed the charges and refused an application by KNP/L for costs. The magistrate said that if C. had consented to an interview the charges might never have been brought. Upon appeal—

HELD: Appeal Dismissed.

1. Ordinarily, where a summary prosecution is dismissed, the informant should be required to pay the defendant's costs. However, there are certain circumstances which might take a case outside the ordinary and which might justify a refusal or reduction of costs, including circumstances whereby the defendant's approach to the investigation or to the proceedings themselves brought about or prolonged the proceedings.

Latoudis v Casey **[1990] HCA 59; (1990) 170 CLR 534; (1990) 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287, applied.**

2. 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, when an explanation might have avoided the prosecution.

3. For the purposes of costs in this case, the real question, subject to the magistrate's overall discretion, was whether C.s silence might have brought about or prolonged the proceedings. It was open to the magistrate on the material before him to determine that the case fell within an exception to the general principle or to find that the circumstances were not ordinary. The magistrate was fully entitled to take into account that C. had not provided a statement or given evidence after the charges were laid and that the failure to cross-examine witnesses was a factor which led to the prolongation of the case.

CAVANOUGH J:

Overview

1. The appellant ("Kymar") appeals under s92 of the *Magistrates' Court Act* 1989 (a provision limited to questions of law) from a decision of a Magistrate refusing to award Kymar costs after

the dismissal of a prosecution against it for alleged breaches of the *Occupational Health and Safety Act* 1985. At the relevant time Kymar conducted a McDonald's restaurant in Warragul. The respondent, Ms Sinclair, is the inspector of the Victorian WorkCover Authority (VWA) who, as informant, brought the prosecution against Kymar.

2. In essence, Kymar was charged with failing to provide and maintain a safe system of work for employees engaged in cleaning exhaust ducts on the roof of the restaurant and failing to provide necessary supervision. The prosecution was triggered by an accident in which a man (later held to be an employee of Kymar for relevant purposes), who had been assisting with the steam-cleaning of the exhaust ducts at night, fell from an unprotected part of the roof of the restaurant and was badly injured. At first the Magistrate found the charges proved, basing himself in part on certain evidence on which Kymar had not cross-examined and which indicated, in the Magistrate's view, that the managing director (and sole controller) of Kymar was aware that the injured man was in the habit of leaving the protected part of the roof for purposes connected with cleaning the ducts. On a later date, but before convictions had been formally entered, Kymar caused further evidence to be adduced which counteracted the evidence on which the Magistrate had relied to find awareness. This led the Magistrate to dismiss the charges. However, he refused to order the informant to pay any part of the defendant's costs. He based the refusal, at least in part, on omissions by Kymar, at various earlier stages, to indicate that its managing director was unaware that the injured man was in the habit of leaving the protected part of the roof.

3. Kymar claims that in refusing costs the Magistrate misunderstood or misapplied the principles established in the leading case of *Latoudis v Casey*[1]. In that case the High Court held that, *ordinarily,* where a summary prosecution is dismissed, the informant should be required to pay the defendant's costs. The High Court referred to certain kinds of considerations which would *not* justify a refusal or reduction of costs. In addition, without being exhaustive, the High Court gave examples of circumstances which might take a case outside the ordinary and which might therefore justify a refusal or reduction of costs, including circumstances whereby the defendant's approach to the investigation or to the proceedings themselves brought about or prolonged the proceedings.

4. In the present case, I am not satisfied that the Magistrate's decision on costs was vitiated by any error of principle or error of law. I do not think that the decision should be disturbed.

Summary of the appellant's arguments

5. Mr Lindeman of counsel appeared for the appellant before me. His attack on the Magistrate's decision comes down, in essence, to three points.

6. First, he submits that the Magistrate took into account an irrelevant consideration, namely a "lurking suspicion" that Kymar was guilty as charged.

7. Second, he argues that the Magistrate was wrong to conclude that the case fell within an exception to the general principle established in *Latoudis v Casey*[2]. He submits that there was no proper basis for a finding that Kymar's approach brought about or prolonged the proceeding.

8. Third, he says in the alternative that Kymar should not have been deprived of all, as distinct from a proportion, of its costs.

Ascertaining the Magistrate's reasons

9. The question of costs was debated before the Magistrate on 13 December 2005. The parties' respective solicitors appeared. A transcript of the discussion is in evidence before me. The decision was given at the end of the discussion. However, the Magistrate did not give a discrete set of oral or written reasons for his decision on costs. His reasons must be gleaned as best as possible from the prior discussion, read in the light of the history of the matter as indicated by other relevant evidence[3]. Kymar did not seek a further statement of reasons. Therefore Kymar should be taken to be satisfied that the Magistrate sufficiently articulated his reasons, and indeed Kymar has not suggested that the Magistrate gave inadequate reasons[4]. However, to the extent that there is any significant ambiguity or obscurity about the Magistrate's reasons, that is principally a difficulty for the appellant, not the respondent. The appellant has the burden of satisfying me that the Magistrate proceeded on a wrong view of the law. It is not enough to show a mere possibility that

the Magistrate did so[5]. I will come to the transcript of the discussion on costs in due course. Before doing so, I must refer to the relevant history.

The events leading to the accident and the charges

10. Kymar's managing director and sole controller was a Mr Creelman. The accident happened at about 1.30 am on a night in June 2003. There were only three people present at the restaurant at the time: Mr Creelman, Mr North (the man who was injured) and a Mr Brett Meredith. Mr North was employed by Kymar as a maintenance officer. Mr Meredith was a sales representative for a supplier of "Gerni" brand high pressure cleaners. On several occasions before the accident Mr Meredith had attended at the restaurant to demonstrate how certain "Gerni" steam-cleaning equipment might be used to clean the exhaust ducts on the roof, and he was there for the same purpose on the night in question. On each occasion no-one other than Mr Creelman, Mr North and Mr Meredith was involved. Mr Creelman and Mr North had a plan to develop and patent in their own right a system for cleaning exhaust ducts in McDonalds restaurants. The McDonalds organisation already had standard procedures in place for its franchisees to follow in this regard. They involved using water from a normal hose, not steam under pressure. Mr Creelman and Mr North hoped that the proposed new method might ultimately be taken up by the McDonalds organisation generally. Mr Meredith was hoping to gain sales through the proposed venture. McDonalds' existing standard procedures also required that personnel with certain specified qualifications be used to clean the exhaust ducts (in the standard way). Mr North did not have these qualifications.

11. On the roof of the restaurant, accessible from within by an internal ladder, was a special platform designed to be used by personnel engaged in cleaning the ducts. It had adequate fall protection barriers. There would be no need for any cleaning personnel using the standard McDonalds procedures to leave the protected area. The necessary hose would be connected to a tap within the restaurant and passed up via the opening at the top of the internal ladder.

12. However, on the night in question and on at least some of the prior occasions on which Mr Meredith had demonstrated his equipment, the powered "Gerni" machine had been set up on the ground *outside* the restaurant with a steam hose and gun attached. In order to receive the hose and gun from *outside* the restaurant before taking it to where it could be used on the exhaust ducts, it was necessary for someone to leave the safety of the protected area on the roof and to go to another part of the roof. When the cleaning was finished, it may have been possible for a person in the protected area, without leaving that area, simply to let the hose and gun slide down to the ground. However there was a possibility that the equipment might become wedged on some obstruction on the way down. If so, the person on the roof might be tempted to leave the protected area to free it.

13. On the night in question, the cleaning had been completed and Mr North climbed up the internal ladder, apparently intending to assist with the packing up of the equipment. Shortly thereafter he apparently fell from the roof to the ground. Mr Meredith, who was outside the restaurant, heard but did not see Mr North fall. Mr Creelman was inside the restaurant and did not see the fall. Mr North suffered some brain damage and memory loss. He retained no memory of the events in question.

14. Soon after the accident the VWA began an investigation. In due course an inspector interviewed Mr Meredith, who signed a statement dated 6 November 2003. The statement was the subject of much debate before me. It contains passages which, according to the respondent, would have indicated to any reader that on the night in question or at least on prior occasions Mr Creelman himself had taken part in, or at least observed, a procedure which involved Mr North going onto the roof outside the protected area to collect the "Gerni" hose and gun. Mr Lindeman trenchantly denied that the statement conveyed any such indication. However, in my opinion, it plainly did so. One example will suffice, although there are several more.[6] On page 2 the following appears:

> "The Gerni was situated on the ground near the area of the drive thru under the McDonalds sign, the hose was up the roof, under the sign I'm guessing, to a roof enclosure, on the 11/06/03. At about 11pm on the 10/06/03 I arrived at the site and we set up. Ian North came out onto the roof behind or beside the big yellow 'M' and onto the flat area on the porch and asked me to hand up the Gerni hose which I did, the gun with the hose on the end of it. On the night of the 11/6/03 there were only

> 3 of us on site, myself, Ian North and Mark Creelman. On the first occasion I went to the site they got the hose up the same way, they got it up on the roof the same way on each occasion." (My emphasis)

Mr Lindeman submitted repeatedly that any indication given by this or by any other part of the statement that Mr Creelman had been aware of Mr North being on the roof outside the protected area was negated by the following passage on page 3 of Mr Meredith's statement:

> "I have not had any contact from McDonalds themselves regarding fryer duct cleaning. I did not hear Mark Creelman give Ian North any instructions on how to get the hose up and down the roof to the Gerni, Mark is not a hands on person, he is a typical manager and I assume Ian would just look after getting the hose up he is that sort of guy."

I see in that passage no clear contradiction, much less the negation, of the earlier passages. It may indicate an absence of direction or control as to the methods to be used for getting the hose up, but not the absence of any opportunity to see how the experiment was actually being carried out. The statement as a whole conveys quite the contrary impression, and all the more so when it is borne in mind that only three people (Mr Creelman, Mr North and Mr Meredith) were involved in the plan to develop the experimental "system", and that Mr Creelman had a personal pecuniary interest in its success.

15. On 25 November 2003, after taking the statement from Mr Meredith and after carrying out various other investigations, Inspector Sinclair invited Mr Creelman to take part in a taped interview. On legal advice, he declined.

The substantive proceedings in the Magistrates' Court and the negotiations between the parties about costs

16. The charges against Kymar were laid in June 2004. They alleged two breaches of s21 of the *Occupational Health and Safety* Act 1985. A brief of evidence, including Mr Meredith's statement, was served on Kymar in accordance with s37 of the *Magistrates' Court Act* 1989. Presumably Kymar received the brief of evidence no later than July or August 2004. Further and better particulars of the charges were served on or about 17 May 2005. They included an allegation that Kymar allowed Mr North to perform duct cleaning duties when he was not suitably qualified. They also alleged that Kymar "*allowed* an employee, Ian North to access cleaning hose [sic] beyond the walled area of the roof atop the McDonalds' store". (My emphasis). After a number of prior adjournments, the charges came on for a contested hearing on 19 May 2005. Mr Lindeman appeared for Kymar. The plea was "not guilty" to both counts. Mr Lindeman consented to the tendering by the prosecutor of the entire brief of evidence. He declined to require any of the prosecutor's witnesses (including Mr Meredith) to attend for cross-examination. He called no witnesses. The matter proceeded by way of submissions only. Mr Lindeman handed up a written submission which is in evidence before me. The submission took issue with the informant's allegation that Mr North was acting as an employee at the relevant time. It also asserted[7] that the injury was unforeseeable in that there was nothing to indicate that Mr Creelman knew or ought to have known that Mr North would leave the safety of the protected roof platform. It referred to Mr Meredith's statement but made no mention of the critical passage emphasised above. On the other hand the prosecutor did make reference to that passage and submitted (albeit, apparently, only in reply to Mr Lindeman's submission) that Mr Creelman had been present and had witnessed Mr North leaving the secure fenced area to go down to pick up the hose and bring it back.

17. The Magistrate reserved his decision. On 10 August 2005 he emailed to the parties "reasons for decision" dated that day.[8] The Magistrate held that the mere fact that Mr North (an experienced rigger) was "unqualified" according to the standards of the McDonalds organisation was not enough to establish breaches of the Act, taking into account that employees were not meant to leave the safety of the platform. However, breaches were shown by reason of Mr Creelman's awareness (as found) that Mr North was departing from McDonalds' procedures and was leaving the platform for purposes connected with the experimental cleaning system. The reasons made provision for the prosecutor to seek leave to amend the original particulars of one of the charges in a minor respect (by substituting "ducts" for "fans") so as to accord with the further and better particulars and the evidence. The reasons included the following sentence[9]:

> "On the basis of the evidence of Meredith it is accepted that Creelman was aware of the manner in which the hose was moved onto and down from the roof and that Kymar is fixed with that knowledge."

At the end, "Findings" and a "Decision" were stated, as follows[10]:

> "FINDINGS
> 33.
> (a) At the time of the accident on 11 June 2003 Kymar was North's employer for the purposes of s21(1) of the Act.
>
> (b) The working environment on 11 June 2003 was not safe and involved risks to health.
>
> (c) That the working environment was not safe and involved risks to health was ascertainable by reasonable enquiry.
>
> (d) Kymar allowed North to perform the work in a way which was not safe and involved risks to health.
>
> (e) Practicable alternative methods for performance of the work were available.
>
> DECISION
> 34. The charges are found proved."

The matter was listed for a further hearing on 31 August 2005.

18. In the meantime, on 24 August 2005, Kymar's solicitors wrote to the VWA complaining about the fact that the Magistrate had interpreted Mr Meredith's statement in such a way as to indicate prior knowledge on the part of Mr Creelman. On the evening of 30 August 2005 the solicitors forwarded to the VWA a signed statement of Mr Meredith indicating that when Mr Meredith used the pronoun "they" in the critical passage of his statement he had been speaking colloquially and had not meant to include Mr Creelman among those present. The new statement went on to assert that Mr Meredith did not believe that Mr Creelman ever saw Mr North on the roof receiving the "Gerni" hose from Mr Meredith.

19. The parties attended court on 31 August 2005 but as a result of the new development the matter was adjourned by consent to 21 October 2005. It was not reached on that day and was further adjourned to 28 October 2005.

20. There was more correspondence between the parties during the adjourned period. On 26 September 2005, Kymar's solicitors made a written offer (expressed to be "without prejudice save as to costs") to seek no costs of the proceeding if VWA withdrew the prosecution. On 18 October 2005 the offer was repeated. Failing acceptance of the offer, the solicitors urged the VWA to apply to re-open the prosecution and call Mr Meredith so as to enable Kymar's counsel to cross-examine him. On 20 October 2005 the VWA advised that it would not withdraw the charges but would not object to Kymar's counsel cross-examining Mr Meredith if the Magistrate agreed to the hearing of the further evidence.

21. When the hearing resumed on 28 October 2005 the prosecutor fairly applied to re-open the case for the informant on the basis of the new statement of Mr Meredith. Mr Lindeman supported the application. The Magistrate acceded to it and Mr Meredith was called by the prosecutor, gave sworn evidence and was cross-examined. In substance, his evidence accorded with his new statement, ie he "clarified" that he had not meant to say, and did not believe, that Mr Creelman had seen Mr North on the roof collecting the "Gerni" hose. Mr Creelman himself did not give evidence. Mr Lindeman's objection to the amendment of the particulars was (appropriately) rejected. The Magistrate reserved his further decision.

22. On 7 December 2005 the Magistrate emailed to the parties "supplementary reasons for decision" in which he accepted, on the basis of the new evidence, that Mr Creelman was not present at any stage when Mr North had walked out onto the roof beyond the protected platform. His Honour rejected an alternative submission of the prosecutor to the effect that Kymar (through Mr Creelman) *ought* to have been aware of the risk and ought to have guarded against it.

The costs hearing in the Magistrates' Court

23. The matter came on again for the publication of the supplementary reasons and the making of final orders on 13 December 2005. On this occasion, as mentioned above, the respective solicitors appeared, without counsel.

24. Asked whether there were any issues arising, Mr Gray (for the informant) said:

> "[T]he charges do need to be dismissed and there does need to be an order that the informant pay the defendant's costs. I'd like to address you on the scope of that order."

25. The Magistrate then referred to *Latoudis v Casey*[11] with which he said he was familiar. He also said:

> "I am familiar with the circumstances of this case and the fact that an opportunity was offered to the human agent of the defendant company to provide an interview and that that offer was declined.

The Magistrate then asked whether Mr Gray wanted to add anything further. Mr Gray responded that not only did Mr Creelman decline an interview but also Kymar's counsel *chose not to cross-examine witnesses when the matter was first listed for hearing on 19 May 2005*. In these circumstances, he said, it was "proper to limit the costs awarded to the defendant up to and including the summary hearing on 19 May."

26. The Magistrate then turned to Kymar's solicitor, Mr Dent. Mr Dent put various submissions seeking to justify the forensic decisions that had been made on Kymar's behalf, including that the original evidence did not warrant adverse findings and that Kymar had sought to limit costs by confining the original hearing to one day. He also referred to the correspondence between the parties which is mentioned above. The Magistrate responded:

> "[A]t any time before charges were laid Mr Creelman ... could have gone to Ms Sinclair and said, 'I was not there. I did not know'. That wasn't done. Had it been done the probability is that these proceedings would never have been brought.
> ...
> Perhaps I should put a composite set of propositions to you and have you reply. At any time after the laying of charges, but in particular after the brief had been served and Mr Meredith's statement and its contents became known to the company and those representing it, a statement might have been provided by Mr Creelman which clarified the position from his perspective, that was never done. That could have been available to the court on 19 May at Moe when this matter was first heard; it wasn't done then. Mr Creelman, I believe, may have been in the court on that day. He could have stepped forward and given *viva voce* evidence, although there was no statement from him on the brief; that wasn't done. Or he could have been called down from [Warragul] if he was not there; that wasn't done.
>
> At any time from that date until the first set of reasons were delivered that could have been done. It could have been done on 31 August when the matter was adjourned. Mr Creelman might have given evidence if he'd been in the court."

After some further discussion, the Magistrate said:

> "I don't wish to be seen to [be] partisan, but what one must do is apply the law and the law is to be found in the judgment particularly of His Honour [Mr Justice] Toohey in *Latoudis v Casey*, and that is that where an opportunity is made available to a defendant to exculpate himself by giving an appropriate explanation and that opportunity is declined, then it's appropriate that no order be made for the costs."

Mr Dent submitted in response that the VWA would have brought and gone on with the prosecution in any event. He relied on what the VWA had done *after* it received Mr Meredith's new statement. In response, the Magistrate said words to the effect that the new evidence was critical; that it was not until Mr Meredith's new statement had been made available to the VWA that the position had changed from the evidentiary perspective; that by then "the die had been well and truly cast"; that the signed statement of 30 August was unsworn; and that it was not until 28 October 2005 that there was evidence before the Court on which the informant might have relied. Mr Dent then submitted that the VWA could have contacted Mr Meredith directly at any time after 26 August 2005 to seek confirmation or clarification of his position. To that, the Magistrate responded:
"I think we go back, don't we, to the beginning and if Mr Creelman had provided an opportunity to the investigators to find out his position we wouldn't have assembled on 19 May at Moe ... ".

27. Mr Dent then submitted that the informant had been contending that foreseeability was not relevant. The Magistrate replied:

> "They may have been at the end but they may have had a different view right at the outset before charges had been laid if they were made aware that there was no knowledge of what North was doing, we can only speculate that."

28. Mr Dent repeated that the informant's subsequent persistence with the prosecution was a better guide than any such speculation. The Magistrate responded:

> "The judgment in *Latoudis v Casey*, and in particular the judgment of His Honour Mr Justice Brennan, make it clear that there is no equation between criminal and civil proceedings in relation to issues like this and the touchstone appears to be that if a defendant doesn't take an opportunity to exculpate himself then he loses his entitlement to costs.
>
> Now, I hear what you say about the attitude of the informant being crystallised from the beginning. That's probably subject to some modification by the time the informant became aware of the evidence that Mr Meredith would give, which was some time after 26 August. It had already invested a significant amount of resources in this prosecution and a decision would have to have been made as to whether to accept your offer and pull out or continue and see what the court decided. It's understandable that at that point the informant's advice was to continue and carry the matter through to its conclusion. Is there anything you want to say about that?"

29. Mr Dent made substantially the same point again. The Magistrate then observed that there was still no evidence from Mr Creelman himself. Mr Dent referred to the prosecution's onus of proof and referred again to the alleged inadequacy of the evidence in its original state. The Magistrate then said:

> "I hear what you say, Mr Dent. I think you do have an entitlement to costs of 21 October when the matter had to be adjourned through no fault of either party, but in respect of other matters I remain of the view that the parties should bear their own costs for the reasons I have outlined."

30. Mr Dent said:

> "Even post 26 August?"

31. The Magistrate replied:

> "Yes. It wasn't until 28 October that admissible evidence was provided by Mr Meredith that ultimately changed the course of the proceedings."

32. Mr Dent then sought to blame the VWA for failing to follow up its own witness. The Magistrate responded:

> "I'm not persuaded, Mr Dent. You'll have a certificate for the 21st. The charges are dismissed on the ground that the evidence was ultimately shown to be insufficient to support them. There is a certificate issued under the *Appeals Cost Fund Act* in respect of the adjournment on 21 October 2005."

Did the Magistrate take into account a "lurking suspicion of guilt"?

33. It is well established that it would be erroneous in law for a court of summary jurisdiction to deny costs to a successful accused because of a "lurking suspicion of guilt"[12]. Mr Lindeman submitted that it could be inferred that the Magistrate took this extraneous matter into account, based on the following:

> • At the outset of the costs hearing the informant's solicitor sought only a proportionate reduction of the order;
>
> • Nevertheless, the Magistrate proceeded to debate the matter with Kymar's solicitor;
>
> • The Magistrate said at the end of the exchange with Kymar's solicitor: "The charges are dismissed on the ground that the evidence was ultimately shown to be insufficient to support them".

34. I reject the appellant's submission. The Magistrate was entitled to explore the question of costs with Mr Dent fully, notwithstanding the opening remarks of Mr Gray. The Magistrate's closing words were little more than the necessary pronouncement of his final orders, including the necessary formal dismissal of the proceeding. The inclusion of the words "on the ground that the

evidence was ultimately shown to be insufficient to support them" was not, in my opinion, related to the Magistrate's conclusion as to costs. Rather, it is to be accounted for as an explanation by the Magistrate for the apparent contradiction between his original, *published* "reasons for judgment" and his "supplementary reasons for judgment". Similar words were also included in the form of order as recorded in the Court Register. Moreover, the Magistrate's decision on costs is thoroughly explicable by reference to *permissible* factors, unlike the situation in *Vecchio v Sterling*[13] on which Mr Lindeman relied.

Was it open to the Magistrate to conclude that the case fell within an exception to the general principle?

35. Mr Lindeman next argued that the Magistrate was wrong to conclude that this case fell within an exception to the principle established in *Latoudis v Casey*[14] that, ordinarily, the informant pays the costs of a successful defendant in a summary prosecution.

36. There were two main strands to Mr Lindeman's argument. They corresponded to the grounds numbered two and three in the notice of appeal. First, he submitted that Kymar's approach was not unreasonable or otherwise open to criticism in all the circumstances. He said in effect that the circumstances did not call for an indication of Mr Creelman's position at the outset or at any other stage, and that Kymar was at all times entitled to rely on its "right to silence". Second, Mr Lindeman submitted that, in any event, Kymar's approach did not bring about the proceeding or cause the proceeding to be prolonged.

37. In my view it is somewhat artificial to divide the matter up in that way. It may be unhelpful to ask, in the abstract, whether a party was "entitled" to remain silent in the circumstances. For the purposes of costs, the real question, subject to the Magistrate's overall discretion, is simply whether the party's silence might have brought about or prolonged the proceedings. Moreover, it is not for this Court to re-exercise a magistrate's discretion. Rather, the question is whether it was *open* to the magistrate, on the material before him, to determine that the case fell within an exception to the general principle. Or in other words, as Batt J observed in *Alexander v Renney*[15], the appellant "must really say that it was not open to the Magistrate to find that the circumstances were not ordinary".

38. In *Latoudis v Casey*, Toohey J said that certain previous authorities (which had been referred to by Dawson J) favoured an award of costs to a successful defendant in summary proceedings –

> "...unless the defendant's own actions have precipitated the prosecution (for instance, refusal to give an account to the police when it would be reasonable to do so, or failure to tell the police of a witness who could support the defendant's account of the incident); or the defendant has prolonged the proceedings unnecessarily by his or her approach to the litigation; or some other relevant consideration is present which makes it unjust to award costs to him or her."[16]

I infer from his Honour's judgment overall that his Honour regarded this formulation as being appropriate as an indicator of the correct approach to be taken in the future. It is consistent with the later passage in which his Honour summed up his conclusions, as follows:

> "It is unnecessary to speak in terms of a presumption; it is enough to say that ordinarily it would be just and reasonable that the defendant against whom a prosecution has failed should not be out of pocket.
>
> Now, in a particular case there may be good reasons connected with the prosecution such that it would not be unjust or unreasonable that the successful defendant should bear his or her own costs, or, at any rate, a proportion of them. To return to the examples given earlier in this judgment, if a defendant has been given the opportunity of explaining his or her version of events before a charge is laid and refuses the opportunity, and it later appears that an explanation **could** have avoided a prosecution, it may well be just and reasonable to refuse costs: see, by way of illustration, *R v Dainer, Ex parte Milevich* (1988) 91 FLR 33. **This has nothing to do with the right to silence in criminal matters**. A defendant or prospective defendant is entitled to refuse an explanation to the police. But if an explanation is refused, the successful defendant can hardly complain if the court refuses an award of costs, when an explanation **might** have avoided the prosecution. Again, if the manner in which the defence of a prosecution is conducted unreasonably prolongs the proceedings, for instance by unnecessary cross-examination, neither justice nor reasonableness demands that the successful defendant be indemnified, at any rate as to the entirety of the costs incurred. These

> illustrations are in no way exhaustive but what they point up is that a refusal of costs to a successful defendant will ordinarily be based upon the conduct of the defendant in relation to the proceedings brought against him or her."[17] (My emphasis.)

39. In the same case, Mason CJ said:

> "I agree with Toohey J that, if a defendant has been given an opportunity of explaining his or her version of events before a charge is laid and declines to take up that opportunity, it may be just and reasonable to refuse costs. Likewise, if a defendant conducts his or her defence in such a way as to prolong the proceedings unreasonably, it would be just and reasonable to make an award for a proportion of the defendant's costs."[18]

40. The other member of the majority, McHugh J, said:

> "Speaking generally, before a court deprives a successful defendant in summary proceedings of his or her costs, it will be necessary for the informant to establish that the defendant unreasonably induced the informant to think that a charge could be successfully brought against the defendant or that the conduct of the defendant occasioned unnecessary expense in the institution or conduct of the proceedings. Cf. *Ritter v Godfrey* [1920] 2 KB 47, at pp53, 54-60, 66; [1918-19] All ER 714; *Sunday Times Newspaper Co Ltd v McIntosh* (1933) 33 SR (NSW) 371, at p377; 50 WN (NSW) 155; *Redden v Chapman* (1949) 50 SR (NSW) 24, at p25; *Schaftenaar* (1975) 11 SASR 266, at pp274-275; see also *McEwen v Siely* (1972) 21 FLR 131, at p136. Thus, non-disclosure to investigatory police of a tape recording later successfully used in cross-examination of the informant's witnesses may be a relevant matter to be taken into account in determining whether the defendant should be awarded costs: cf. *R v Dainer, Ex parte Milevich* (1988) 91 FLR 33."[19]

41. The minority, of course, were of the view that a successful defendant in summary proceedings for an offence can have no expectation as a general rule that costs will be awarded in his or her favour.[20]

42. In *Nguyen v Hoekstra*[21], the Court of Appeal emphasised that in an appeal of the present kind issues of fact were for the Magistrates' Court, not the Supreme Court, to decide. Their Honours also made the point that the general expressions in *Latoudis v Casey* by way of example are not to be read and interpreted as if they were a code. Their Honours continued:[22]

> "Section 131 of the *Magistrates' Court Act* commits to the Magistrates' Court a general discretion as to costs and, subject to the successful defendant in a criminal prosecution 'ordinarily' being entitled to costs, **the discretion remains a general one to be exercised according to what is 'just and reasonable' in the particular circumstances of the case**: at 542, 544; 291, 292-293 per Mason CJ, at 565; 308-309 per Toohey J, at 567, 569; 311-312 per McHugh J. **In the case under appeal, it was a matter for the magistrate to decide whether, in the particular circumstances put before him, the conduct of the defendant had been such that it might fairly be said that he had 'brought the prosecution on himself'**. The magistrate decided, after hearing the evidence and looking at documents, that that was the proper characterisation of the appellant's conduct on 31 August 1994 and that as such it disentitled him to an award of costs. As we have said more than once, that view of the facts was open to the learned magistrate and, for the reasons we have given, the appellant has not established that the magistrate's refusing costs involved any error of law." (My emphasis)

43. The Court of Appeal made no reference to the well-known authorities concerning the scope available in ordinary appeals for reviewing the exercise of a judicial discretion, such as *House v The King*[23] and *Australian Coal and Shale Employees Federation v The Commonwealth*[24]. I presume that this was because their Honours considered that that scope was differently defined and even more tightly restricted in an appeal limited to questions of law, such as an appeal under s92 of the *Magistrates' Court Act* 1989. I think that this must be so, because their Honours said[25] that an argument that the Magistrate failed to give "sufficient weight" to the reasonableness of the appellant's conduct raised a question of fact, not law. This indicates that at least some of the grounds of review which are available in an ordinary appeal (which include the giving of insufficient weight to relevant considerations) are not available in an appeal confined to a question of law. In particular, I infer that "making a mistake as to the facts", a ground recognised in *House v The King* and in *Australian Coal*, is not a ground available in an appeal under s92, save to the extent that the ultimate decision was *not open* on the evidence: compare, in relation to appeals from administrative decisions, *Transport Accident Commission v O'Reilly*[26], *S v Crimes Compensation Tribunal*[27]; *Re Minister for Immigration and Multicultural Affairs, Ex parte Applicant* S20.[28] I say

all this notwithstanding that in *Harrison v Mansfield*[29] Sholl J held that the full range of grounds which are available in an ordinary appeal from the exercise of a judicial discretion are also available in an appeal on a question of law. I think that *Harrison v Mansfield* must be treated as being wrongly decided to that extent.

44. I return to the present case. In a further attempt to "divide and conquer", Mr Lindeman sought to distinguish between the investigatory stage of the matter (before the laying of the charges) and the subsequent (Court) stage. I acknowledge that the Magistrate himself appeared to place more emphasis on the possibility that the charges would not have been laid if Mr Creelman had made a statement during the first stage than on the possibility that the proceedings may have been shortened if Kymar had provided during the second stage an indication (by way of evidence or by way of cross-examination) of Mr Creelman's state of knowledge as at the relevant time. However the Magistrate certainly did express concern that Mr Creelman had not provided a statement or given evidence *after* the charges were laid, and I think that in the end he did take this into account and that he was fully entitled to do so. He himself did not expressly mention the failure of Kymar's counsel to cross-examine Mr Meredith on 19 May 2005. However this had been put to him by Mr Gray without adverse remark by the Magistrate, and was so obviously a factor that led to the prolongation of the case that I am prepared to infer that the Magistrate took it into account, as he was fully entitled to do. In any event, the Magistrate did expressly mention the lateness of the production of the "clarifying" statement of Mr Meredith, and this was the opposite side of the same coin. Even if the Magistrate had overlooked any of these matters, the informant would arguably have been entitled to uphold his decision by reference to them, notwithstanding that the decision under appeal was discretionary.[30] Nevertheless I will deal with Mr Lindeman's particular criticisms of the Magistrate's conclusions in relation to the two stages.

The investigatory stage

45. In relation to the investigatory stage, Mr Lindeman submits that the VWA's investigators turned up little or nothing in the way of "objective signs" that Mr North had walked on the roof to collect the Gerni hose. He says that the investigators had no reason to think that Mr Creelman would have known of any such conduct by Mr North. Consistently with this, he says, the investigators did not specifically ask Mr Creelman at any time whether he had observed, or knew, that Mr North had walked on the roof. At one point during the argument before me Mr Lindeman began to read from what he described as an "accident report" completed by Mr Creelman which, he submitted, "confirmed" that Mr Creelman did not know how the accident had happened. What was read did not seem to bear this out, but it any event it transpired that the "accident report" had not been included in the (affidavit) evidence which had been put before me. Nor had it been served on the respondent. I ruled that I could not take it into account. Further, it became clear at the hearing that much of the other evidence which had been before the Magistrate in relation to the VWA's investigations had not been included in the evidence[31]. This really made it impossible for Mr Lindeman to succeed in establishing that the Magistrate was wrong to conclude, *on the material before him*, that the circumstances called for an explanation by Mr Creelman at the investigation stage. In any event, I note in passing that one of the investigator's statements did refer to the detection of a footprint in a position suggesting that someone had climbed the safety barricade of the protected platform[32]. It is true that the investigators did not specifically ask Mr Creelman about his own observations, but they may well have intended to do so as part of the interview they sought in November 2003, which Mr Creelman declined to take part in.

46. Next Mr Lindeman highlights two passages in the transcript of the costs hearing, as follows:

> "...where an opportunity is made available to a defendant to exculpate himself by giving an appropriate explanation and that opportunity is declined, then it's appropriate that no order be made for the costs."
> "The touchstone appears to be that if a defendant doesn't take an opportunity to exculpate himself then he loses the entitlement to costs."

47. Mr Lindeman says that, to the extent that either of the above propositions suggests that a defendant has an obligation in law to unilaterally inform the investigator of its (or his/her) lack of knowledge of some key fact or element of the offence, the proposition is erroneous and represents a misunderstanding of the "exception" referred to in *Latoudis v Casey*. Rather, according to Mr Lindeman, there exists a clear distinction between the exercise by an accused of the mere "right to silence" and any refusal to answer a specific question or to respond by providing correct information. He cites *Jandreoski v Colley*[33] and *Junek v Busuttil*[34]. He also relies on *Dyers v R*[35], a case in which the High Court reaffirmed that, given the accusatorial nature of a criminal trial,

"it cannot be said that, in such a proceeding, the accused would ordinarily be *expected* to give evidence" [36].

48. However, as already indicated, Mr Lindeman's submission ignores the need to ask, *for costs purposes*, whether the defendant's omission to speak was or may have been *causative* of the commencement or prolongation of the proceedings. As Toohey J said in *Latoudis v Casey*[37], this has nothing to do with the right to silence in criminal trials[38]. Of course, a finding that the omission to speak was or may have been causative in this sense will not *dictate* a result whereby costs are denied to the defendant. In the exercise of his or her discretion, the magistrate is still entitled to assess the reasonableness, for costs purposes, of the defendant's omission to speak in all of the circumstances. In the present case, the Magistrate's above quoted remarks cannot fairly be divorced from his express or implied acknowledgment, on several occasions during the discussion, that there must be a *causal link* between the maintenance of silence about a particular matter and the commencement or prolongation of the proceeding. In one of the two cases cited by Mr Lindeman, *Junek v Busuttil*, the Court held that there was no basis for any finding by the Magistrate that the requisite causal link existed. However, in the present case, it was well open to the Magistrate to find that the prosecution *might not* have been brought if Mr Creelman had submitted to an interview.[39] Mr Creelman's awareness, or otherwise, of what Mr North had been doing on the roof was, as the Magistrate found and as even Kymar's solicitor later acknowledged[40], "critical". Because, in the Magistrate's view, the matter cried out for an answer and Mr Creelman had ample opportunity to provide it, and because that view was open to the Magistrate, the Magistrate was fully entitled, for costs purposes, to regard Mr Creelman's omission to do so as unreasonable and as warranting a departure from the usual order.

49. Mr Lindeman, though, submitted to me that the VWA's investigators had not *perceived*, during the investigatory stage, that the state of Mr Creelman's mind (in this respect) was important, and on this basis Mr Lindeman argued that the prosecution would have been commenced in any event. He submitted that the informant's "theory" for the alleged breach of the general duty under s21 of the *Occupational Health and Safety Act* 1985 to provide a safe system of work was to be gleaned from a particular paragraph of Ms Sinclair's statement, which asserted that if Kymar had adhered to McDonalds' requirement that only qualified service technicians perform the task of cleaning the exhaust ducts, Mr North would not have been on the roof for that purpose and would not have fallen.

50. I do not accept Mr Lindeman's argument. It is no more than an attack on the Magistrate's factual findings. In any event, the paragraph in question in Ms Sinclair's statement did not purport to set out, exhaustively or otherwise, particulars of the informant's case. It was merely a part of the evidence. The very fact that Kymar sought further and better particulars shows that Kymar itself did not regard the paragraph in question as containing a complete statement of the informant's "case theory". Moreover, when the particulars came, they demonstrated clearly that the informant's case extended beyond the "unqualified person" allegation. Only two of the five relevant sub-paragraphs of the further and better particulars related to that particular allegation. As indicated above, another of the sub-paragraphs alleged that Kymar "allowed" Mr North to access the cleaning equipment "beyond the walled area of the roof ...". The expression "allowed", in this context, carried, or might well have been thought to carry, an implication of knowledge or awareness. Moreover, as I have indicated in paragraph 14 above, I consider that Mr Meredith's original statement conveyed a clear indication of relevant knowledge on the part of Mr Creelman. If nothing else, the seriousness of any breach of the *Occupational Health and Safety Act* 1985 would have been affected by the state of Mr Creelman's knowledge. I am not satisfied by any means that the question of Mr Creelman's knowledge was not an important issue even before the charges were laid.

51. This leads to the question of the approach taken by Kymar during the proceedings themselves, to which I now turn.

The court stage

52. Mr Lindeman submits that Kymar was not put on notice that knowledge on the part of Mr Creelman that Mr North had climbed onto the restaurant roof was any part of the prosecution case or that anything contained in the evidence might give rise to an inference of such knowledge. He denies that there was anything to such effect in the informant's statement or in the further and

better particulars or in the prosecutor's opening or, save in one limited respect, in the prosecutor's later submissions to the Magistrate. The exception was the prosecutor's submission referred to in paragraph 16 above based on the particular paragraph of Mr Meredith's original statement discussed in paragraph 14 above. Mr Lindeman asserts that the prosecutor's submission in this regard was made after both the prosecution and defence cases, respectively, had been closed and had only been made by way of a "partial answer" to a "specific submission" put for Kymar below, namely "that there was no evidence the defendant's sole director knew the injured person had climbed on the restaurant roof". Further, Mr Lindeman says, the prosecutor submitted at that stage and throughout the hearing that a finding of guilt could be made irrespective of the existence of evidence of such knowledge. On these grounds he submits that there was no basis for a finding that Kymar had prolonged the proceedings unreasonably or that the circumstances of the case were not "ordinary".

53. It will no doubt be apparent from what I have already written that I do not accept these further submissions of Mr Lindeman.

54. As already indicated, I consider that Kymar was well and truly on notice of the possible importance of Mr Creelman's state of knowledge from the outset and, *a fortiori,* during the period after the laying of the charges. There is no need to repeat what I have already said about Mr Meredith's original statement and the further and better particulars. The submission by the prosecutor was a further, very clear indication to the same effect. Mr Lindeman does not suggest that he objected before the Magistrate to the prosecutor's reliance on Mr Meredith's statement. This rather indicates that he was not taken by surprise. The same is indicated by the abovementioned[41] fact that on *three* occasions during the costs argument before the Magistrate Mr Dent referred to Mr Creelman's knowledge as "critical". On one of those occasions[42], Mr Dent referred to the evidence in a way which suggests that the defence was aware of its criticality from the beginning. He spoke of:

> "that evidence, which the defence says is critical and your Honour ultimately found was directly relevant to the outcome of the case ... ."

55. It is true that Mr Dent had submitted repeatedly that the prosecution had regarded the evidence of Mr Creelman's knowledge as irrelevant. Mr Dent had supported this submission by saying that the prosecutor had argued that foreseeability was not relevant. Before me, Mr Lindeman also took up this theme. However, I have no direct evidence before me as to the submissions that were made to the Magistrate on 19 May 2005, except an extract from an unofficial transcript containing only the abovementioned submission by the prosecutor about Mr Meredith's statement. But that very extract shows that the prosecutor did *not* regard or treat the question of Mr Creelman's knowledge as "irrelevant". I will accept that the prosecutor submitted that Kymar could be convicted regardless of Mr Creelman's knowledge, but I infer that that submission was made as part of an *additional* or *alternative* way of putting the case. It was not the equivalent of a submission that the evidence in question was *irrelevant*.

56. I note that Kymar did not rely on its right of appeal in respect of the Magistrate's original findings. It elected to take steps to have further evidence taken from Mr Meredith at a later date. In these circumstances it simply cannot be heard to say that the manner in which it had previously conducted its defence did not prolong the proceedings and cause additional expense.

57. It was well open to the Magistrate to determine that Kymar's approach to the proceedings warranted a departure from the ordinary position on costs.

Was it open to the Magistrate to refuse to award any costs at all?

58. Mr Lindeman submitted in the alternative that it was not open to the Magistrate to deny Kymar all of its costs. This submission was not separately reflected in the notice of appeal. Mr Lindeman did not really develop it, save by pointing out that Mr Gray had originally sought only a proportionate reduction of the costs. Mr Lindeman said that there had been prior discussions between the parties about this matter, but he acknowledged that there was no enforceable agreement and no estoppel.

59. In my view it was fully open to the Magistrate to order that each party bear the entirety

of their own costs, despite Mr Gray's opening remarks.

60. The Magistrate formed the view that if Mr Creelman had consented to an interview the charges might never have been brought. That alone is sufficient justification for his Honour's order. If one adds Kymar's failure to take up the many later opportunities to "clarify" the matter, the justification is all the stronger. It was not even necessary that Mr Creelman be exposed to cross-examination. The matter could have been dealt with by cross-examination of Mr Meredith on 19 May 2005. As the Magistrate said, it was not until 28 October 2005 that fresh admissible evidence from Mr Meredith was provided "that ultimately changed the course of the proceedings". One might also add in the fact that the Magistrate originally found the charges proved, rejecting Kymar's detailed arguments about the employment status of Mr North. Further, Kymar made offers, at a relatively late stage, to bear its own costs if the prosecution was withdrawn. This may indicate a consciousness that Kymar's conduct of the proceedings to that stage had led to a waste of costs *on both sides*. It was not inconceivable at that stage that Kymar might have been ordered to *pay* some or all of the informant's costs as a condition of the re-opening of the proceeding.

61. There is a strong presumption in favour of the correctness of a discretionary judgment of a court, and all the more so in relation to the taxation of costs.[43] Although, strictly speaking, the present question is not one of taxation of costs but of the extent of the parties' respective liability, a reviewing court will rarely interfere on such a question, especially in an appeal limited to questions of law. I can see no error of law or principle in the Magistrate's decision to deny Kymar all, as distinct from merely part, of its costs. This is plainly not a case in which it would be appropriate for this Court to interfere with the Magistrate's exercise of his discretion in that regard.

Conclusion

62. Since I am not satisfied that the Magistrate's decision was vitiated by any error of law or principle, the appeal must be dismissed. Subject to any submissions to the contrary, I would be inclined to order that the appellant pay the respondent's costs of this appeal.

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[1] [1990] HCA 59; (1990) 170 CLR 534; (1990) 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287.
[2] Ibid.
[3] Compare *Intertransport International Private Ltd v Donaldson and Anor* [2005] VSCA 303 at [19]; *DPP v Woodward* [2006] VSC 299 at [19]-[20]; 164 A Crim R 22.
[4] See *Bevis v Alex Gregson Roof Tiles Pty Ltd* (unreported, Supreme Court of Victoria, Gillard J, 19 June 1997 at [6]); *Kuek v Wellens* [2000] VSC 326 (Gillard J) at [93]-[94]; cf *Pasha v Edmonds* [1998] VSC 169 (Smith J) at [20]; (1998) 28 MVR 217; *State of Victoria v McKenna* [1999] VSC 310 (Smith J) at [24]-[34]; [2000] EOC 93-080; (1999) 140 IR 256; *Re Minister for Immigration and Multicultural and Indigenous Affairs*; *ex parte Palme* [2003] HCA 56; (2003) 216 CLR 212; (2003) 201 ALR 327; (2003) 77 ALJR 1829; 76 ALD 1.
[5] See *Portland Properties Pty Ltd v MMBW* (1971) 38 LGRA 6 at 18; *Rumpf v Mornington Peninsula Shire Council* [2000] VSC 311; (2000) VR 69 at 76-78 and cases there cited. Although *Portland* and *Rumpf* were cases relating to tribunals rather than courts, I think that much the same principle applies in respect of courts where the appeal is confined to a question of law: see *Harrison v Mansfield* [1953] VicLawRp 60; [1953] VLR 399 at 404; cf *Day v Electronik Fabric Makers (Vic) Pty Ltd* [2004] VSC 24 at [24]-[26].
[6] Including the third and fourth paragraphs on page 1 (read together) and the first full paragraph on page 2.
[7] Para 6.7, 6.14.
[8] As to the inappropriateness of courts providing their decisions or reasons for decision to the parties by email in the first instance, as distinct from publishing them in open court, see *Esso Australia Pty Ltd v Robertson* [2005] VSCA 138 at [9].
[9] In paragraph 31.
[10] In paragraphs 33 and 34.
[11] *Supra*, [1990] HCA 59; (1990) 170 CLR 534 at 560 per Dawson J; (1990) 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287.
[12] *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534; (1990) 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287; *Vecchio v Sterling*, unreported, Supreme Court of Victoria, O'Bryan J 28 June 1991 (BC9100746); *Junek v Busuttil* [2004] VSC 115 at [43].
[13] *Supra*. See previous footnote.
[14] [1990] HCA 59; (1990) 170 CLR 534; (1990) 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287.
[15] Unreported, Supreme Court of Victoria, 21 August 1995 BC9507255 at p3 of 7.
[16] [1990] HCA 59; (1990) 170 CLR 534 at 544; (1990) 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287.
[17] [1990] HCA 59; (1990) 170 CLR 534 at 544; (1990) 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287.
[18] [1990] HCA 59; (1990) 170 CLR 534 at 544; (1990) 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287.
[19] [1990] HCA 59; (1990) 170 CLR 534 at 569; (1990) 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287.
[20] [1990] HCA 59; (1990) 170 CLR 534 at 544, 561; (1990) 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287.

[21] (1998) 99 A Crim R 497 at 507-508.
[22] At 508.
[23] [1950] HCA 52; (1950) 81 CLR 513 at 532-534; [1950] ALR 944.
[24] [1953] HCA 25; (1953) 94 CLR 621 at 627. This case concerned appellate review of a taxation of costs.
[25] At 506.
[26] [1998] VSCA 106; [1999] 2 VR 436 esp at 459 [52], 460 [58]; (1998) 28 MVR 327; (1998) 14 VAR 189.
[27] [1998] 1 VR 83 at 86-93.
[28] [2003] HCA 30; (2003) 198 ALR 59; (2003) 77 ALJR 1165; (2003) 73 ALD 1 at 13-15; (2003) 24 Leg Rep 10 (per McHugh and Gummow JJ).
[29] [1953] VicLawRp 60; [1953] VLR 399.
[30] Compare *Preston Ice and Cool Stores Pty Ltd v Hawkins* [1955] VicLawRp 17; [1955] VLR 89; [1955] ALR 371; *DPP v Makris,* unreported, Supreme Court of Victoria, Batt J 16 March 2004 (BC9401207) at p7 of 10.
[31] For example, very few of the exhibits to the investigators' statements were included.
[32] Statement of Brian Moody, page 3 of 4.
[33] [2004] VSC 131 at 29, 30.
[34] [2004] VSC 115 at 34 and 37.
[35] [2002] HCA 45; (2002) 210 CLR 285; 192 ALR 181; 76 ALJR 1552.
[36] At [9]. Emphasis in the original.
[37] [1990] HCA 59; (1990) 170 CLR 534 at 565; (1990) 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287.
[38] In criminal trials in the higher courts, costs are not an issue.
[39] As the observations of Toohey J at p 565 in *Latoudis v Casey* show, it is only necessary to find that the proceeding *might not*, as distinct from *would not*, have been brought.
[40] Transcript of costs hearing pages 5, 8-9, 10.
[41] See para 49.
[42] Transcript p 8-9.
[43] *Australian Coal and Shale Employees Federation v The Commonwealth* [1953] HCA 25; (1953) 94 CLR 621 at 627-628.

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