

07/87

SUPREME COURT OF QUEENSLAND — FULL COURT

SAVAGE v BOZIER; *ex parte* SAVAGE

Kneipp, Connolly and Vasta JJ

12 November 1986 — (1987) 1 Qd R 468; (1986) 24 A Crim R 249

COSTS – INFORMATION FOR ASSAULT – NO CASE TO ANSWER – INFORMATION DISMISSED – APPLICATION BY DEFENDANT FOR COSTS – DISCRETION AS TO COSTS – RELEVANT CONSIDERATIONS – POLICE OFFICER CHARGED WITH PUBLIC DUTY – ASSAULT CASES – WHERE OFFICER ACTS PROPERLY IN BRINGING CHARGE – WHETHER LIABLE FOR COSTS.

B. was charged by S. with the offence of assault occasioning bodily harm to V. At the hearing, the Magistrate took an adverse view of V's credibility, held that B. had no case to answer and dismissed the charge. Upon application by B. for costs upon the dismissal, the Magistrate ordered the Police informant S. to pay the sum of \$700 costs. Upon appeal—

HELD: Appeal allowed. Order for costs set aside.

(1) In exercising the discretion concerning the award of costs upon the dismissal of an information, the Court must give proper weight to the circumstances in each case, including the nature and gravity of the type of offence.

Lewis v Utting; ex parte Utting (1985) 1 Qd R 423; (1985) 17 A Crim R 139; MC8/1986, applied.

(2) In cases of assault, a Police Officer has a duty of keeping the peace, bringing the charge before the Court and acting properly at all times. Where the Officer has so acted, it would be a most exceptional and rare case to award costs against him.

(3) In the present case, it was not a relevant consideration in the exercise of the Magistrate's discretion:

(a) that he took an adverse view of the credibility of the complainant;

(b) whether the complainant communicated to the police her desire to withdraw the charge.

VASTA J: (with whom Kneipp and Connolly JJ concurred) [*after dealing with questions as to the legality of the appeal, continued*] ... [1] I turn then to the merits of the appeal. It was neither argued in the lower court nor before us that this was a case which was not properly brought before the Court by the arresting police officer.

[2] This is so notwithstanding the fact that the Magistrate took an adverse view of the credibility of the complainant. I am of the view that despite this finding by the Magistrate, a strong *prima facie* case nevertheless existed. The observations which the Stipendiary Magistrate made with regard to the matter of costs does seem to me to indicate that because he took an adverse view of the complainant that the defendant necessarily had to be awarded costs. In my view, this constituted a wrong exercise of his discretion. In *Lewis v Utting, ex parte Utting* (1985) 1 Qd R 423 this Court held, following *Smith v Robinson; ex parte Robinson* (1980) Qd R 372 that a Stipendiary Magistrate must give proper weight to the circumstances in each case and to act according to the result at which he arrives. At p442 Carter J observes:-

"Any attempt to list precisely the matters which will be relevant to the proper exercise of the discretion is likely to be counter-productive since there is a real risk that such a list might be seen to be comprehensive and exhaustive and therefore may affect or convert what is in truth an unfettered discretion into a fettered one. It seems to me with great respect to those who express it that a rule which states that the discretion is to be exercised in the same way as in a civil case or that an unsuccessful defendant shall have his costs unless he has disqualified himself by particular conduct will as effectively fetter the discretion as will any attempt to list the relevant criteria. That is not to say that the fact that the proceedings are of a criminal nature and that they are instituted by a police officer in the execution of his duty is a decisive consideration..."

In my view the giving of proper weight to the circumstances in each particular case includes the consideration of the nature and gravity of the type of offence brought by the complainant. The

Stipendiary Magistrate observed:-

"It is no fault of the arresting officer that the case has not proceeded any further than it has because the manner in which the complainant gave her evidence ultimately destroyed her own case."

This coupled with the earlier remarks that it was a pity he could not order the complainant to pay the costs suggests that he thought that there was no basis at all for the case having been brought to Court in the first place. This was clearly wrong. I make mention of this because much time was taken up in the lower Court concerning the aspect of whether the complainant had communicated to the police her desire to withdraw the charge. This, in my view is an irrelevant consideration in the determination of whether there has been a proper discharge by a police officer of his public duty. It must be remembered that prosecutions of this nature, that is cases of assault, do not cease to proceed upon the mere say so of a complainant. Moreover, if a complainant were to withdraw the complaint, a police officer would be justified in proceeding even if it meant that to do so would involve declaring a complainant a hostile witness.

In placing undue emphasis on the complainant's credibility seems to me to indicate that the Stipendiary Magistrate was not looking at the whole of the circumstances in exercising his discretion to grant costs. In my view, the most important factor in this case was that the award for costs was to be made against an arresting police officer charged with a public duty of keeping the peace and in bringing the charge before the Court he acted properly at all times. There was no other competing relevant consideration. In these circumstances, there was no warrant for the making of an order for costs against him. It would follow then that I would consider it a most exceptional and rare case [3] where an award for costs were made against a police officer who has been found to have acted with the utmost propriety in bringing a charge in respect of an offence against the person. In such cases the keeping of the peace is of paramount community concern.

I would order that the order nisi be made absolute with costs to be taxed and that the order by the Magistrate as to costs be set aside. I would grant an indemnity certificate in accordance with the provisions of the *Appeals Cost Fund Act*.

[Judgment supplied courtesy of CSM Queensland].
