17/08; [2008] VSC 47

SUPREME COURT OF VICTORIA

COSTA v PARKS; SHEPHERD v PARKS

Habersberger J

29 November 2007; 27 February 2008

PRACTICE AND PROCEDURE – COSTS ON DISMISSAL OF CHARGES – TWO DEFENDANTS – SOME CHARGES DISMISSED IN RELATION TO ONE DEFENDANT – ALL CHARGES DISMISSED IN RESPECT OF OTHER DEFENDANT – APPLICATION BY EACH DEFENDANT FOR COSTS - WHETHER DEFENDANTS WERE "SUCCESSFUL" – APPLICATION REFUSED IN RESPECT OF ONE DEFENDANT – FINDING BY MAGISTRATE THAT A LOT OF TIME WAS TAKEN UP IN RELATION TO A JURISDICTIONAL QUESTION – FURTHER FINDING THAT THE NATURE OF THE EVIDENCE AND THAT THE PROSECUTION WITNESSES WERE CREDIBLE – APPLICATION GRANTED IN PART IN RELATION TO SECOND DEFENDANT – WHETHER MAGISTRATE IN ERROR: *MAGISTRATES' COURT ACT* 1989, S131.

1. Where a court dismisses an information or complaint, the court may order that the informant pay to the defendant such costs as the court thinks just and reasonable. The question is whether the defendant can be regarded as being a "successful defendant".

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

2. Where a defendant (Costa) pleaded guilty to two charges and was found guilty of one charge and not guilty of eight charges, it was open to the magistrate to conclude that the defendant Costa was not a "wholly successful" defendant. Whilst the magistrate took into account irrelevant considerations namely, the nature of the evidence led against Costa and that the prosecution witnesses were credible, the magistrate was not in error in refusing Costa's application for costs, particularly in view of the fact that the jurisdictional question had unreasonably prolonged the hearing.

3. Where a defendant (Shepherd) at the same hearing was wholly successful, it was open to the magistrate to order that the informant pay Shepherd's costs of representation for one day of the 7-day hearing plus the solicitor's preparation costs. The magistrate was not in error in finding that the costs should be reduced on account of the excessive time spent on the jurisdictional issue and the "joint nature" of the charges.

HABERSBERGER J:

1. In each of these proceedings, by a notice of appeal filed on 17 March 2006, the appellant has appealed to this Court, pursuant to s92(1) of the *Magistrates' Court Act* 1989, on a question of law from a final order in a criminal proceeding made on 20 February 2006 in the Magistrates' Court at Mildura. The affidavits filed by Samuel Peter Costa and Barry Keith Shepherd in support of their respective appeals disclosed that the joint hearing in the Magistrates' Court of the charges against each of them had lasted for seven days, between 6 and 14 February 2006, with judgment being delivered on 20 February 2006. In each proceeding, the question or questions of law stated in the notice of appeal raised the issue of whether the learned Magistrate had erred in the making of the order in respect of costs at the conclusion of the proceeding.

2. In the case of Mr Costa, the final order was that, in case number T01134532, five charges contrary to the *Fisheries Act* 1995 and three charges contrary to the *Fisheries Regulations* 1998 were dismissed and, in case number T01862131, three charges contrary to the *Fisheries Act* 1995 were found proven (he having pleaded guilty to two of them) in respect of which an aggregate fine of $900 was imposed without conviction. (On the second day of the hearing, 7 February 2006, prosecuting counsel had applied, in case number T01134532, to have six charges against Mr Costa under the Marine Act 1998 withdrawn and, on that day, the Magistrate had ordered that they be struck out.) The 14 charges in case number T01134532 related to alleged acts by Mr Costa on the Murray River at or near Boundary Bend on 15, 16 and 18 February 2005. A threshold question was whether the alleged acts took place in Victorian waters. The two charges in case number T01862131 to which Mr Costa pleaded guilty related to alleged conduct by Mr Costa in Victoria between 1 February and 22 March 2005. The third charge alleged unlawful possession of commercial fishing equipment by Mr Costa in Victoria on 22 March 2005.

3. The learned Magistrate refused the application made on behalf of Mr Costa that the informant, Mr Parks, pay his costs of the proceeding. Her reasons were expressed as follows:

> Mr Costa, as you're aware there is an application that the informant pay your costs of these proceedings. I'm not going to exercise my discretion to make that order. In relation to the matters that are before me, there are clearly a number of charges, certainly in relation to the charges where you were jointly charged with Mr Shepherd. You were successful in defending those matters. But in relation to the substance of the matters, it certainly is the case that there was direct evidence by the prosecution and, as I've found, the prosecution were unable to discharge the onus of proof, because I certainly formed a view that all of the witnesses that I heard were credible.
>
> But ... it was certainly proper for the court to be making those findings of credibility and those assessments. Whilst it might have persuaded me in other circumstances where such credibility issues were ultimately not discharged, it might have otherwise resulted in a costs order. It's certainly the case that much of the proceeding is taken up in relation to an issue in which you were unsuccessful, that being the jurisdictional question.
>
> Probably thirdly, and most importantly, you were facing three other charges, one of which you fought, and whilst not the whole of the proceedings were taken up with that matter, you were unsuccessful in relation to defending that matter. Whilst there are no hard and fast rules in relation to these matters, taking all matters into account, I'm not satisfied in the overall circumstances of this case that I ought to exercise my discretion to award costs in your favour as a result of these proceedings. So that application is refused.[1]

4. In the case of Mr Shepherd, the final order was that, in case number T01135274, five charges contrary to the *Fisheries Act* 1995 and three charges contrary to the *Fisheries Regulations* 1998 were dismissed. These eight charges were similar to the eight charges against Mr Costa, in case number T01134532. (Four charges against Mr Shepherd under the Marine Act 1998, in case number T01135274, were also struck out at the request of the prosecutor on the second day of the hearing.)

5. The learned Magistrate ordered that the informant, Mr Parks, pay the costs of Mr Shepherd limited to the costs of representation for one day in the hearing, together with the solicitor's preparation costs. Orders were also made relating to the quantification of the costs and fixing a stay on payment of the costs. The learned Magistrate's reasons for this costs order were as follows:

> In relation to you, Mr Shepherd, of course you were only facing the charges where you were jointly charged with Mr Costa, and you were wholly successful in relation to those proceedings. Whilst, of course, you were heavily involved in these matters, you took a somewhat lesser role in terms of the overall operation that was involved. In the circumstances it is my view that I ought to exercise my discretion that costs be awarded in your favour, at least in relation to part of the proceedings, given that you were wholly successful in relation to these proceedings.
>
> Now, of course, there was much duplication in relation to these matters and I expressed it rather colloquially before that it was approached on the basis of one in, all in, as it probably needed to be on the facts, given the joint nature of the charges against you. And of course it was the case that Mr O'Haire was representing both you and Mr Costa, and whilst he of course appeared for you separately it was the case that having regard to all of the matters that were traversed, it seems to me that what's appropriate in the circumstances is that – and what I do order is that the informant pay your costs for one day of the hearing, including solicitor's preparation costs in relation to that matter.[2]

6. Neither the initial evidentiary material in support of each appeal nor the framing of the original questions of law said to be raised in each appeal was satisfactory. The first problem largely resulted from the poor quality of the recording of that evidence. Eventually, after a number of orders were made by Masters of this Court, further affidavits were filed exhibiting the transcript of the whole of the evidence of one prosecution witness, Gary Hodges, a fisheries officer, on 6 and 7 February 2006, and the transcript of all of the hearing on 8 February 2006, which included part of the evidence in chief and all of the cross-examination of another fisheries office, David Trickey, the transcript of part of the evidence in chief of Eian Macrae, a senior fisheries officer, and all of the evidence in chief and part of the cross-examination, by senior counsel for Mr Costa, of John Pitt, a surveyor. However, another four witnesses were called by the prosecution. Further, both appellants gave evidence in their defence and were cross-examined, and Mr Costa called one witness. There was no transcript of any of this evidence.

7. Part of the evidence which was not contained in the exhibited transcript was summarised in the affidavit of Brian Vance O'Haire sworn on 17 September 2007 and filed in each proceeding. Mr O'Haire was the solicitor for each appellant. He had instructed counsel on behalf of Mr Costa, and had appeared on behalf of Mr Shepherd, at the hearing in the Magistrates' Court. However, very little was said in his affidavit about the evidence of the fisheries officers, David Trickey, Eian Macrae, David Cattlin, John Cooper and Andrew Driscoll, or the surveyor, John Pitt. The respondent also filed an affidavit in each proceeding exhibiting the transcript of the hearing on 20 February 2006. This contained the reasons for judgment given in respect of the prosecution of both Mr Costa and Mr Shepherd, the argument on costs and the rulings on costs. Although this transcript was satisfactory, deficiencies remained in the material before the Court concerning the course of evidence at the actual hearing of the charges against the appellants.

8. The second of the above problems was dealt with by each of the appellants filing an amended notice of appeal on 1 June 2006. In the case of Mr Costa, the questions of law in the amended notice of appeal were as follows:

> 1. Did the learned Magistrate err when she declined to order costs in favour of the Defendant?
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> 2. Did the learned Magistrate err in the exercise of her discretion when declining to order costs in favour of the defendant, by taking into account that she had made no adverse findings with respect to the credibility of the witnesses called for the prosecution?
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> 3. Did the learned Magistrate err in the exercise of her discretion when declining to order costs in favour of the defendant, by taking into account that there was direct evidence against the Defendant?
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> 4. Did the learned Magistrate err in the exercise of her discretion when declining to order costs in favour of the defendant, by taking into account that the Defendant was successful in Proceeding No. T01134532 as a consequence of the prosecution failing to prove its case to the criminal standard of proof?
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> 5. Did the learned Magistrate err in the exercise of her discretion when declining to order costs in favour of the defendant, by taking into account that the prosecution had been successful in satisfying the Court that the charges in Proceeding No. T01134532 occurred in Victoria and were within the jurisdiction of the Court?
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> 6. Did the learned Magistrate err in the exercise of her discretion when declining to order costs in favour of the defendant, by taking into account that the prosecution had been successful in proving charge No. 3 in Proceeding No. T01862131?

9. In the case of Mr Shepherd the questions of law in the amended notice of appeal were as follows:

> 1. Did the learned Magistrate err in the exercise of her discretion in ordering the Informant to pay to the Defendant, the Defendant's costs limited to the costs of representation for 1 hearing day, including solicitor's preparation costs for defending the matter?
>
> 2. Did the learned Magistrate err in the exercise of her discretion when she found that there was duplication in the presentation of the defence of the case for the Defendant with that of his alleged co-offender, Samuel Peter Costa, such as to justify the limiting of an order for costs in favour of the Defendant?

10. Section 131 of the *Magistrates' Court Act* 1989 relevantly provides as follows:

> (1) 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 the costs are to be paid.
> ...
>
> (2A) In exercising its discretion under subsection (1) in a proceeding, the Court may take into account any unreasonable act or omission by, or on behalf of, a party to the proceeding that the Court is satisfied resulted in prolonging the proceeding.

General Principles

11. In *Latoudis v Casey*,[3] the High Court considered the application of s97 of the *Magistrates (Summary Proceedings) Act* 1975, which was the predecessor of s131 of the *Magistrates' Court Act* 1989. Section 97 provided as follows:

(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.

12. Mr Latoudis was charged with theft of a motor car, receiving stolen goods (being car accessories) and unlawful possession of the same goods. The first charge was dismissed when the prosecution led no evidence. The second was dismissed after a no case submission. The third was dismissed at the close of the defendant's case. The Magistrate refused the defendant's application for costs on the ground that the informant had acted reasonably in instituting the proceedings and that the defendant had caused suspicion to fall on him by failing to seek ownership of the goods when he acquired them. By a majority the High Court held that the Magistrate's exercise of discretion had miscarried, and that the successful defendant was entitled to his costs.

13. Mason CJ stated that:

[I]n ordinary circumstances, an order for costs should be made in favour of a successful defendant. However, there will be cases in which, when regard is had to the particular circumstances, it would not be just and reasonable to order costs against the prosecutor or to order payment of all the defendant's costs. If, for example, the defendant, by his or her conduct after the events constituting the commission of the alleged offence, brought the prosecution upon himself or herself, then it would not be just and reasonable to award costs against the prosecutor. 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.[4]

14. The second member of the majority, Toohey J described the principle as follows:

If a prosecution has failed, it would ordinarily be just and reasonable to award the defendant costs, because the defendant has incurred expense, perhaps very considerable expense, in defending the charge. ...

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 .... 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.[5]

15. Very similar language was used by the third member of the majority, McHugh J. He said:

[A] successful defendant in summary proceedings has a reasonable expectation of obtaining an order for the payment of his or her costs because it is just and reasonable that the informant should reimburse him or her for liability for costs which have been incurred in defending the prosecution. Consequently, a magistrate ought not to exercise his or her discretion against a successful defendant on grounds unconnected with the charge or the conduct of the litigation. ... 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.[6]

16. It can be seen from the quoted passages that s131(2A) has given legislative effect to one of the circumstances which the majority considered might give rise to the conclusion that "it would not be just and reasonable to order costs against the prosecutor or to order payment of all the defendant's costs".[7]

17. Each of the majority judges in *Latoudis* talked in terms of "a successful defendant". Mr Latoudis was regarded as a successful defendant because all of the charges against him were dismissed but, in other more complicated circumstances, whether or not the defendant should be regarded as "successful" will not be so clear.

18. In *Hung Phi Do v Bowers*,[8] the appellant appealed against an order refusing his application that the informant pay the costs of a hearing at which a charge against him of driving under the influence of intoxicating liquor was dismissed and a charge of refusing to undergo a preliminary breath test was withdrawn. This hearing resulted from the informant's refusal at a mention hearing to accept a plea of guilty to the charges of driving a motor car carelessly and driving a motor car in an unsafe condition if the other two charges were withdrawn. O'Bryan J dismissed the appeal. In his judgment, his Honour discussed the situation where a defendant was found not guilty of the most serious charge and guilty of the lesser charge arising out of the same transaction. It was his Honour's view that:

> In such circumstances a defendant would not be awarded costs as a "successful defendant" under the general rule.[9]

His Honour further ruled that the Magistrate was entitled to refuse to award costs, because he "may have found that the appellant was not 'a successful defendant'." His Honour continued:

> That he [the appellant] was successful in relation to the contested charge does not mean that he was "a successful defendant" for at the end of the day he was found guilty of two charges and substantial penalties were imposed by the Court. In these circumstances I consider the learned Magistrate was entitled to refuse to award costs.[10]

19. I do not accept the submission by Mr Trood, of counsel, who appeared for both appellants, that the decision of Olsson J of the Supreme Court of South Australia in *Saleeba v Beck*[11] is contrary to the reasoning of O'Bryan J in *Do*. In the South Australian case, the appellant was charged with two driving offences arising out of the same set of factual circumstances. He was convicted on one charge but not the other. The learned Magistrate rejected the application for costs on the ground that the relevant legislation only gave the Court the power to make an order for costs against the prosecution where the whole of the complaint was dismissed. Olsson J held that the proper construction of the section in question did not require that limitation. He said that when the section:

> speaks of the dismissal of a complaint it is speaking in the sense of the dismissal of a complaint as to a specific charge averred in it, rather than of the original initiatory process as to its entirety.[12]

His Honour therefore concluded that the learned Magistrate had fallen into error "as to the basis upon which the section ought to be applied." Accordingly, his Honour referred the matter back so that the exercise of discretion could be "considered afresh."[13] That is, Olsson J did not conclude that the appellant must receive his costs as a "successful defendant".

20. Appealing against the exercise of the broad judicial discretion given by s131(1) of the *Magistrates' Court Act* 1989 is no easy matter. In *Australian Coal and Shale Employees Federation v The Commonwealth*,[14] Kitto J said 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 there has been a failure properly to exercise the discretion which the law reposes in the court of first instance.

21. In *Kenyon v Driessen*,[15] Ashley J, after referring to the above passage, stated as follows:

> It is true that an exercise of discretion is not to be treated by an appeal court asking itself whether it would have exercised the discretion in the same or a different way to the way in which it was exercised in fact. On the other hand, the appeal court, before it interferes with an exercise of discretion, must be satisfied that the decision was clearly wrong. In my opinion the correct approach is that in considering that question an appeal court is not constrained to hold that an exercise of discretion was wrong only by reason that weight was given to some irrelevant consideration, or by reason only of complaint that insufficient weight was given to some relevant consideration. It may be, despite such matters, that the decision was very evidently supportable by pertinent grounds relied upon by the decision-maker.

22. Similar statements have been made by other judges of this Court. In *Kymar Nominees Pty Ltd v Sinclair*,[16] Cavanough J said that:

> ... 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,*[17] the appellant "must really say that it was not open to the Magistrate to find that the circumstances were not ordinary".

23. Finally, before turning to consider the arguments in each appeal, I note my respectful agreement with the following passage from the judgment of Ashley J in *Kenyon*:[18]

> *Latoudis* provides a basis upon which costs applications by defendants should be considered. But it does not deny to a Magistrate the power and the obligation to exercise the statutory discretion as to costs, having regard to the particular circumstances of the case before the court. It could not be said that *Latoudis* did or claimed to exhaust the circumstances in which costs would not be awarded to a defendant to criminal proceedings...

Mr Costa's Appeal

24. The main ground of Mr Costa's appeal was that, despite having found that he was "successful" in relation to the charges in case number T01134532, the learned Magistrate nevertheless declined to order the informant to pay Mr Costa's costs of defending such charges. Mr Trood submitted that the learned Magistrate's reasons for refusing to make an order for costs in favour of Mr Costa disclosed that she had fallen into error by taking into account irrelevant factors. Her first reason referred to the fact that "there was direct evidence by the prosecution" (the issue raised by question 3) as well as the fact that she had found that "the prosecution were unable to discharge the onus of proof" (the issue raised by question 4) because she had "formed a view that all of the witnesses... were credible" (the issue raised by question 2).

25. I agree with counsel's submission that the nature of the evidence led against Mr Costa, whether it be direct evidence or circumstantial evidence, was an irrelevant matter. I also agree with the submission that it was not a relevant consideration that the learned Magistrate found the prosecution witnesses credible even though she did not find the charges proven beyond reasonable doubt. This was a criminal prosecution and if the charges were not proved to the criminal standard then the defendant was entitled to have them dismissed. The consequences that flow from these conclusions are considered below.

26. Mr Dennis, of counsel, who appeared on behalf of the respondent, submitted that the reference to the credibility of the prosecution witnesses was relevant because considerable time had been taken up during the hearing with an unsuccessful attack on their credibility. Counsel referred to the learned Magistrate's statement during the argument on costs that it was:

> put to a lot of the witnesses that there was some sort of vendetta and I didn't find any evidence of that.[19]

In my opinion, it would be reading too much into this passing comment during argument to conclude that the learned Magistrate had decided that so much time had been spent on challenging

the credibility of the prosecution witnesses, in particular by putting to them that they were part of a vendetta against Mr Costa, that this was a reason for refusing to order costs in Mr Costa's favour. I therefore reject the respondent's submission that the credibility of the prosecution witnesses was relevant to the question of costs.

27. Mr Trood submitted that the learned Magistrate's second reason for refusing the application for costs was also based on an irrelevant consideration, namely, that "much of the proceeding [was] ... taken up in relation to an issue in which [Mr Costa was] ... unsuccessful, that being the jurisdictional question" (the issue raised by question 5). He argued that this was not a finding by the learned Magistrate that this was an unreasonable act by the defence which resulted in the proceeding being prolonged, within the meaning of s131(2A) of the *Magistrates' Court Act* 1989. Rather, he submitted, it was simply being described as an issue in respect of which Mr Costa had been unsuccessful. Mr Trood pointed out that the issue of jurisdiction having been raised by the defendants, the prosecution was required to satisfy the Court on the balance of probabilities that the relevant part of the Murray River was within Victoria.[20]

28. I do not accept the submission that the learned Magistrate may not have been purporting to take into account the type of matter referred to in s131(2A). True it is that the learned Magistrate did not expressly state this to be the case, but it seems to me from her repeated reference during both the argument and the ruling about costs to the fact that "a lot of time was taken up in relation to the jurisdictional question",[21] that she was of the view that this issue had unreasonably prolonged the hearing. Alternatively, I consider that, at the very least, the learned Magistrate considered that, in the exercise of her discretion, Mr Costa should not be awarded all of his costs because of the length of time that was spent on this issue. Clearly, this is a matter connected with the conduct of the litigation. In my opinion, therefore, no error has been shown in the learned Magistrate's approach to this aspect of her ruling.

29. Moreover, Mr Dennis submitted that, in the absence of a transcript of all of the evidence, alternatively an affidavit summarising in sufficient detail all of the evidence, it was not possible to determine what happened in many important respects during the hearing and therefore not possible to conclude that the learned Magistrate had erred in taking the time spent on the jurisdictional error into account in deciding whether or not to award Mr Costa costs. I agree with this submission, particularly because part of the missing transcript or summary of evidence was the balance of the cross-examination of the surveyor, Mr Pitt. It is therefore impossible to know whether this cross-examination was, or was expressed by the learned Magistrate to be, inordinately long. It is also not possible to assess whether senior counsel's estimate, during the argument on costs, that one-tenth of the time was spent on the jurisdictional issue,[22] was accurate.

30. In any event, I consider that the appellant's submission in respect of question 5 is contrary to the final position on the jurisdictional issue adopted by his counsel during the argument before the learned Magistrate. Initially, senior counsel for Mr Costa submitted that it was not relevant for her Honour to take into account the time taken in unsuccessfully raising the jurisdictional issue.[23] Alternatively, he submitted that there should be an apportionment on the basis of the time spent on the unsuccessful issue.[24] But, as Mr Dennis submitted, senior counsel then changed the submission when he said:

> I shall retreat and say this that, yes, an amount of time was spent on the jurisdictional matter, not nearly as much time as spent on the other matters, in our submission, and we would ask not for a full order of costs but we should be entitled, in our submission to a large proportion of them.[25]

Later, senior counsel said:

> So what I would submit is that Your Honour should make an order in favour of the defendants that reflects any matters that you believe should be reflected in the amounts, whether it be three-quarters, or a half, or nine-tenths, or whatever, and costs.[26]

31. In these circumstances, I consider that the appellant cannot now argue that the learned Magistrate erred, in the exercise of her discretion, "by taking into account that the prosecution had been successful in satisfying the Court that the charges in Proceeding No T01134532 occurred in Victoria and were within the jurisdiction of the Court".

32. Finally, Mr Trood submitted that the learned Magistrate's third reason for refusing the application for costs disclosed that, again, she had taken into account an irrelevant factor, namely, that Mr Costa had been "unsuccessful in relation to defending" the third charge in case number T01862131. Counsel submitted that, whilst the hearing of the charges which were the subject of pleas of not guilty took place at the same time, each was the hearing of a separate case against Mr Costa and that, as such, each information required separate consideration and was the subject of a separate verdict. He pointed out that each information contained separate and discrete allegations, and that they were not alternatives to one another. Mr Trood further submitted that the two sets of charges were separate proceedings, separate in date and in the nature of the allegations.

33. So much may be accepted. However, I see no error in the way in which the learned Magistrate exercised her broad discretion under s131(1) in dealing with all of the charges together when considering the question of costs. In my opinion, it was open to the learned Magistrate to conclude, therefore, that Mr Costa, unlike Mr Shepherd, was not a "wholly successful" defendant. It would have been artificial in the extreme and would have unnecessarily complicated matters to have treated the two cases or sets of charges separately – making a costs order in favour of Mr Costa in respect of the charges in case number T01134532 and a costs order against him in respect of the charges in case number T01862131. Far simpler to deal in one order with the costs of the whole hearing, taking into account the outcome of all of the charges. Therefore, the situation was that Mr Costa had pleaded guilty to two charges, had been found guilty of one charge and not guilty of eight charges (or 14, if one includes the *Marine Act* prosecutions which were withdrawn at an early stage). Mr Trood pointed out that during the argument on costs her Honour had characterised the result as being that Mr Costa "won on the main bit". Nevertheless, even looking at the situation "primarily from the perspective"[27] of Mr Costa, it was, in my opinion, open to the learned Magistrate to conclude that overall Mr Costa was not a "successful defendant". I consider that this would be in accordance with the approach taken by O'Bryan J in *Do*, notwithstanding the tenuous evidentiary link between the two sets of charges which clearly did not arise out of the same transaction and which had been laid at different times.

34. I reject Mr Trood's submission that, because the prosecution never asked for costs in respect of the charges against Mr Costa which were found proven, the learned Magistrate could not have performed any setting off of what might otherwise have been two costs orders in reaching her decision. It seems to me to be clear that right from the outset of the argument on costs, everyone proceeded on the basis that the costs of the hearing would be dealt with as a whole. In those circumstances, when so many charges had been dismissed, costs were never going to be awarded to the prosecution. Nevertheless, prosecuting counsel did refer in his submissions to the learned Magistrate that "running through the case" there had been "a successful outcome"[28] in terms of the prosecution of Mr Costa on one of the three charges in the second set of charges. I agree with Mr Dennis' submission that the prosecution would have expected that this partial success would have been taken into account by the learned Magistrate in deciding the application for costs.

35. Whilst another judicial officer may have reached a different result in terms of this setting off or apportioning of costs exercise, no error has been shown, in my opinion, in the conclusion reached by the learned Magistrate about Mr Costa not being a "wholly successful" defendant. It cannot be said that the refusal to order that all or part of Mr Costa's costs be paid by the informant was not open to the learned Magistrate in the particular circumstances of his case. This being so, in my opinion it does not assist the appellant that I have concluded that the learned Magistrate did take into account certain irrelevant factors. As I have said, her conclusion was undoubtedly open to her based on other grounds. Further, it should not be overlooked that the learned Magistrate described her third ground for refusing the application for costs as probably the most important.

36. Mr Costa's appeal against the learned Magistrate's order in respect of costs must, therefore, be dismissed.

Mr Shepherd's Appeal

37. The main ground of Mr Shepherd's appeal was that, despite having found that he was "wholly successful" in relation to all of the charges he was facing, the learned Magistrate nevertheless limited the amount of the costs the informant was ordered to pay to Mr Shepherd. Mr Trood set out what, he submitted, appeared to be the learned Magistrate's reasons for the

costs order which she made. The first matter he referred to was the learned Magistrate's statement that Mr Shepherd had taken "a somewhat lesser role in the operation". Counsel submitted that the appellant's role was an irrelevant matter to have taken into account.

38. I do not agree that this statement played any part in the learned Magistrate's decision on costs. It was simply a comment by her about the allegations against Mr Shepherd. Further, the learned Magistrate then went on to indicate that she would be awarding at least some costs in Mr Shepherd's favour because he had been "wholly successful". In any event, if the learned Magistrate did take Mr Shepherd's "somewhat lesser role" into account in making her costs order, in my opinion, this can only have worked in Mr Shepherd's favour.

39. The second matter Mr Trood referred to was the learned Magistrate's rather cryptic comment that it was a case of "one in, all in". Counsel submitted that as there was no suggestion that the separate representation of Mr Shepherd in the jointly conducted hearing was inappropriate, this was not a proper reason to reduce the award of costs to this appellant. This is the issue raised by the second question of law in Mr Shepherd's amended notice of appeal, which talks of a finding by the learned Magistrate that "there was duplication in the presentation of the defence" of Mr Shepherd with that of Mr Costa.

40. I consider that both this question and the supporting submission are based on a misunderstanding of the learned Magistrate's rather unclear reasons for not awarding Mr Shepherd all of his costs. The comment about "one in, all in" was made in response to Mr O'Haire's submission that from Mr Shepherd's point of view "not a great deal of time, if any, was spent in relation to the jurisdictional issue." In my opinion, the learned Magistrate did not reduce the costs awarded to Mr Shepherd because she considered he should not have been separately represented. Rather, what she was saying was that because of "the joint nature" of the charges against Mr Shepherd and Mr Costa and because, apparently to quite a large extent, Mr O'Haire relied on the cross-examination and submissions of senior counsel for Mr Costa, there was "much duplication in relation to these matters". Further, the learned Magistrate referred to the fact that Mr O'Haire performed the joint role of instructing solicitor for Mr Costa and counsel for Mr Shepherd. Therefore, she concluded that similar conclusions should, where appropriate, be drawn about Mr Shepherd's claim for costs as were drawn in respect of Mr Costa. The most obvious example of this and the basis for the comment, was Mr O'Haire's reliance on Mr Costa's counsel's work in respect of the jurisdictional issue. When this was put to Mr O'Haire by her Honour during the argument, his response was that it was a "fair comment". Thus, the learned Magistrate reduced the costs awarded to Mr Shepherd on account of the excessive time spent on the jurisdictional issue.

41. I do not accept Mr Trood's submission that approaching it in this way was unfair to Mr Shepherd. In my opinion, it was open to the learned Magistrate to conclude that this was not a case where one defendant was defending the charges in an entirely different way to the other defendant, On the contrary, Mr Shepherd was content to rely on the cross-examination and submissions of senior counsel for Mr Costa, and to obtain any benefit resulting from that work. In those circumstances, where the learned Magistrate has concluded in respect of Mr Costa's application for costs that too much time was spent by Mr Costa's lawyers on the jurisdictional issue, it was certainly open to her, in my opinion, to reach the same conclusion in respect of Mr Shepherd's application for costs.

42. Whilst another judicial officer may have reached a different result in terms of the reduction in the amount of costs awarded to Mr Shepherd, in my opinion no error has been shown, nor could it be shown on the material before this Court, in the conclusion reached by the learned Magistrate. It was certainly open to her in the particular circumstances of Mr Shepherd's case.

43. The third matter Mr Trood relied on was the learned Magistrate's reference to "having regard to all of the matters that were traversed". He submitted that this was not just a reference by the learned Magistrate to the fact that the prosecution had satisfied the Court on the jurisdictional issue (which has been already dealt with), but also to the learned Magistrate's earlier findings in respect of charges that "there was direct evidence by the prosecution", and that "the prosecution were unable to discharge the onus of proof" because she had "formed a view that all of the witnesses ... were credible". I agree that the learned Magistrate should be taken to be referring back to those findings. As stated above with respect to Mr Costa's appeal, I accept the submission that the

findings about the nature of the evidence and the credibility of the witnesses were not relevant to the question of costs. Nevertheless, as I have concluded that the limited order for costs in favour of Mr Shepherd was open to the learned Magistrate, it does not assist Mr Shepherd that those irrelevant factors were taken into account.

44. It follows that Mr Shepherd's appeal against the learned Magistrate's order in respect of costs must also be dismissed.

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[1] T 36-37.
[2] T 37-38.
[3] [1990] HCA 59; (1990) 170 CLR 534; 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287.
[4] [1990] HCA 59; (1990) 170 CLR 534 at 544; 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287.
[5] [1990] HCA 59; (1990) 170 CLR 534 at 565-566; 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287.
[6] [1990] HCA 59; (1990) 170 CLR 534 at 569; 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287.
[7] [1990] HCA 59; (1990) 170 CLR 534 at 544; 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287 per Mason CJ.
[8] (Unreported, Supreme Court of Victoria, O'Bryan J, 10 October 1996).
[9] Ibid, p5.
[10] Ibid.
[11] (1991) 54 A Crim R 114.
[12] (1991) 54 A Crim R 114 at 117.
[13] (1991) 54 A Crim R 114 at 118.
[14] [1953] HCA 25; (1953) 94 CLR 621 at 627.
[15] (Unreported, Supreme Court of Victoria, Ashley J, 6 October 1994) p6.
[16] [2006] VSC 488.
[17] (Unreported, Supreme Court of Victoria, Batt J, 21 August 1995) p3.
[18] (Unreported, Supreme Court of Victoria, Ashley J, 6 October 1994) p4.
[19] T 24.
[20] *Thompson v The Queen* [1989] HCA 30; (1989) 169 CLR 1; (1989) 86 ALR 1; (1989) 63 ALJR 447; 41 A Crim R 134.
[21] T 21.
[22] T 23.
[23] T 21.
[24] T 21-22.
[25] T 22-23
[26] T 30.
[27] *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534 at 542; 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287 per Mason CJ.
[28] T 26.

APPEARANCES: For the appellants Costa and Shepherd: Mr AD Trood, counsel. Brian O'Haire, solicitors. For the respondent Parks: Mr BM Dennis, counsel. Victorian Government Solicitor.
