37/94

SUPREME COURT OF VICTORIA

NORTON v MORPHETT and ANOR

Ashley J

24 May, 8 June 1994 — (1995) 83 A Crim R 90

COSTS – UPON DISMISSAL OF CHARGE – TYPES OF COSTS ORDER AVAILABLE – EXTENT OF COURT'S DISCRETION – AMOUNTS TAXED OFF BILL OF COSTS – WHETHER APPROPRIATE EXERCISE OF DISCRETION: *MAGISTRATES' COURT ACT* 1989, S131(1).

Section 131(1) of the *Magistrates' Court Act* 1989 ('Act') provides:

> "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."

1. Section 131(1) of the Act involves the exercise of a broad discretion. Costs may be awarded on a number of bases including:
(i) Party and party that is, all costs necessary or proper for the attainment of justice;
(ii) Solicitor/client that is, all costs reasonably incurred and of a reasonable amount;
(iii) Solicitor and own client that is, a full indemnity for costs incurred;
(iv) Indemnity, that is, all costs included in the Bill of Costs except for unreasonable amounts or costs unreasonably incurred.

2. So long as the Court apprehends the extent of its discretion and the different types of costs orders that are available, it may do no harm to approach the question of costs in an individual case by reference to what is just and reasonable in the circumstances.

3. Where, after a 3-4 hour hearing a Magistrate dismissed a summary offence, the Magistrate was not in error in effectively awarding costs on a party and party basis and taxing off $1698.78 from a Bill of Costs for $3172.17.

ASHLEY J: [1] This proceeding to challenge an order made on 27 October 1993 by the Magistrates' Court at Heidelberg, constituted by Mr Docking, Magistrate, was commenced by Originating Motion. But in consequence of an order that I made at the hearing on 24 May, it was conducted before me as an appeal pursuant to s92 of the *Magistrates' Court Act* 1989. The only matter considered by the Magistrates' Court on 27 October 1993 was the taxation of the appellant's costs, he having been the successful defendant to a charge brought against him by the First Respondent. That charge, laid under s7(1) of the *Control Weapons Act* 1990, was heard and dismissed on 26 August 1993.

Before going on, I should set the application for costs in context. The appellant was charged that in a public place he possessed a dangerous article without lawful excuse. The circumstances of the alleged offence were that the appellant and some other youths were in a vehicle which was stopped by police on 5 February 1992. There was a hunting knife in the vehicle. It was the appellant's, as he admitted. He said that he used the knife for fishing. The police officers obviously doubted that explanation. The matter seems not to have been at all complicated. When it eventually came to hearing there were two witnesses for the prosecution, and three witnesses for the defence. The prosecution witnesses were apparently the informant and a second policeman present in the intercepting vehicle. The defence witnesses were the appellant and two of the three passengers in his car. That the matter was in short compass **[2]** is further disclosed by the police brief of evidence, a copy of which was provided to me, and by the length of the passengers' statements. One statement, according to a detailed Bill of Costs prepared by the appellant's solicitor, was five folios in length; the other two totalled only four folios in aggregate.

Having regard to the apparent ambit of the dispute, it is, perhaps, surprising that the matter took eighteen months to come to hearing. But the Bill of Costs to which I have referred shows that the appellant's solicitor went to great lengths to investigate the matter on behalf of his client. It seems that a request or requests were made under the *Freedom of Information Act*, that

a request was made for inspection of documents and things, and (probably) that a request was made for further and better particulars of the charge. The solicitor went so far as to contact the Deputy Ombudsman's office in connection with the application under the Freedom of Information Act. I have said that the charge was heard and dismissed on 26 August 1993. I should only add this: that on the day preceding the hearing the prosecutor spoke with the appellant's solicitor and, believing that there was no case for the appellant to answer, offered to withdraw the charge if the appellant did not apply for costs. The solicitor, however, did not agree to this proposal (one must assume that he took his client's instructions about the matter) and so the charge went on to hearing. That hearing, I was informed by counsel, extended beyond the luncheon adjournment, occupying in all three to four hours.

[3] I have referred to the itemised Bill of Costs presented to the Magistrates' Court for taxation on 27 October 1993. It comprised in all seventy items, the amount claimed being $3172.17. There being no scale of costs prescribed for a criminal case in the Magistrates' Court, the appellant's solicitor drew his bill by reference to the scale of costs in civil matters applicable where the amount in issue is between $5,000 and $10,000. The magistrate taxed off $1698.78, and accordingly made an order that the first respondent pay to the appellant's solicitor for the appellant costs of $1322.39.

On the appeal, Mr Perkins of counsel for the appellant argued two broad propositions: First, that in a criminal case, where an order for costs is made in favour of a successful defendant, costs should be awarded on an "indemnity basis". Second, that the magistrate had here determined to award costs on such a basis, but had then wrongly undertaken the taxation as if on a party-party basis. Various aspects of the taxation were contended by Mr Perkins to reveal the working out of the magistrate's faulty approach.

Mr GJ Maguire of counsel for the first respondent submitted that, in respect of an order for costs, an indemnity may be more or less complete. Second, it was submitted that the learned magistrate did not purport to award costs on an "indemnity basis" in the sense that such term has been given meaning by the courts. The description was used, according to Mr Maguire's submission, in a non specific way. The touchstone of the magistrate's approach **(4)** was said to be a test that costs should be just and reasonable, that being consonant with a number of relevant authorities. The power to award costs in this case was given by s131(1) of the *Magistrates' Court Act* 1989. It is only necessary for present purposes to note that the application of that provision involves the exercise by the Magistrates' Court of a broad discretion. That exercise could be successfully challenged if, *inter alia*, a magistrate was bound, in a particular case, to exercise the discretion in a particular way; or if he or she determined to exercise the discretion in a particular way but in fact did something different.

I refer to the affidavit of Mr Patrick O'Shannessy of counsel sworn 14 December 1993 in support of the appeal. Mr O'Shannessy was briefed on behalf of the appellant at the hearing on 27 October 1993. The affidavit discloses that the competing submissions of Mr O'Shannessy and the prosecutor were on the one hand that costs should be "awarded on an indemnity basis", not a party-party basis; and that costs should be taxed on a party-party basis. The magistrate is said to have ruled that "he would tax the costs upon an indemnity basis provided that such costs were just and reasonable". It appears that his Worship referred to *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534; 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287 as well as to a judgment of a judge of the Victorian County Court in support of a conclusion that costs should be just and reasonable. Mr O'Shannessy's affidavit goes on to say that, in answer to a submission which he made that each item in the Bill of **[5]** Costs should be allowed unless it was shown to be unreasonable, the magistrate ruled that it was for the appellant to satisfy him that each item was just and reasonable.

It seems to me apparent that his Worship did, as Mr Maguire submitted was the case, approach the taxation of costs on the basis that costs should be allowed in so far as they were just and reasonable, but not otherwise. It appears also that his Worship perceived no tension between such an approach and an award of costs on an "indemnity basis". Mr Perkins' second submission, that the learned magistrate had determined to award costs on a "indemnity basis", but had then done something else, could not in these circumstances be accepted.

Critical to the outcome of Mr Perkins' first submission are portions of the judgments in *Latoudis*. It is, I think, before going further, of importance to note the issue raised by that case. The critical question was whether there was in this State an unfettered discretion in a Magistrates' Court to refuse or award costs to a successful defendant in a criminal proceeding – which in practice led to applications for costs in such circumstances being often refused; or whether, in ordinary circumstances, an order for costs should be made in favour of a successful defendant. The court, by a majority, resolved to the latter conclusion. The case was not concerned, then, with the basis upon which costs should be awarded by a Magistrates' court to a successful defendant to a criminal charge. But in the course of the judgement various comments were made about the purpose **[6]** of costs, upon which Mr Perkins particularly relied. So, in the judgment of Mason CJ at (1990) 170 CLR p543 his Honour said this:

> "If one thing is clear in the realm of costs, it is that, in criminal as well as civil proceedings, costs are not awarded by way of punishment of the unsuccessful party. They are compensatory in the sense that they are awarded to *indemnify* the successful party against the expense to which he or she has been put by reason of the legal proceedings" (my emphasis).

Mr Perkins also drew attention to his Honour's judgment at p544, as follows:

> "I am persuaded that, in 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" (my emphasis).

Then again, in the judgment of Toohey J at p565 there appears the following:

> "... 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*" (my emphasis).

On that same page, speaking of circumstances where an order might not be made, his Honour said:

> "Again, if the manner in which the defence of the 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" (my emphasis).

McHugh J dealt with the matter at pp566-7 as follows:

> "An order for costs indemnifies the successful party in litigious proceedings in respect of liability for professional fees and out-of-pocket expenses *reasonably incurred in connexion* with the **[7]** litigation" (my emphasis);

At p569, his Honour said that:

> "... 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."

He also observed, at p568, that:

> "Despite the differences between civil and criminal proceedings, once the real issues in the summary proceedings are identified, there is no difficulty in applying in such proceedings principles akin to those applicable to the making or refusing of orders for costs in civil cases."

According to Mr Perkins' submission, the various passages to which I have referred should be taken to mean that, in ordinary circumstances, a successful defendant to a criminal charge in a Magistrates' Court must be awarded costs on what has been described, in civil matters, as an "indemnity basis". Our law recognises a number of bases upon which costs may be awarded. There are party and party costs, the sense of which is set out in Rule 63.29 of Chapter 1 of the Rules. Thus:

> "all costs necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed ...".

Then there are costs upon a solicitor/client basis, described in Rule 63.30 of Chapter 1 as follows:

> "...All costs reasonably incurred and of reasonable amount."

Costs may also be awarded on a solicitor and own client basis. In *National Safety Council of Australia Victorian Division (in liq.); ex parte Perrins v Horne* [1992] VicRp 34; [1992] 1 VR 485; (1991) 9 ACLC 413 JD Phillips J [at VR p500] **[8]** equated solicitor and own client costs with a "full indemnity". The use of the adjective "full" points up the fact that to describe the purpose of costs as indemnification of a successful party does not imply, of itself, that the indemnification will be complete.

There is a fourth basis upon which costs may be awarded. It is that costs be paid on an "indemnity basis". Consideration of the judgment of Megarry V-C in *EMI Records Ltd v Ian Cameron Wallace Ltd* [1983] Ch 59; [1982] 2 All ER 980; [1982] 3 WLR 245 shows that the making of such orders had become relatively commonplace in England by that time, although there was no provision in the English Rules of Court providing a criterion by which taxation could be conducted. The learned Vice-Chancellor concluded that the proper approach was that all costs should be allowed except in so far as they were of an unreasonable amount or had been unreasonably incurred. Provided that the costs were of and incidental to the proceedings, there would be entitlement to recover them except if they fell within the heading "unreasonable amount" or " unreasonably incurred".

He further concluded that when taxation of costs was conducted on an indemnity basis everything in a Bill of Costs should be included unless it were driven out by the words of exclusion. In framing this test and approach the Vice-Chancellor made use of portion of the rule of court dealing with solicitor and own client costs. So, a distinction was maintained between solicitor and own client costs on the one hand, and costs on an indemnity basis on the other – as Rogers CJ Comm D observed in *Singleton and Anor v Macquarie Broadcasting* **[9]** *Holdings Ltd* (1991) 24 NSWLR 103 at 106. In New South Wales, in June 1989, Rule 28A was inserted into Pt. 52 of the *Supreme Court Rules* 1970. It was in terms relevantly comparable to those expressed by the Vice-Chancellor in *EMI*. In this State there has been no corresponding amendment to the Rules, either in this Court or in the Magistrates' Court. But that would not preclude an order to such effect being made.

What I have so far said as to bases upon which costs may be awarded to a successful party does not by any means exhaust the possible forms of order. But it is sufficient to identify the manner in which, according to Mr Perkins' submission, the magistrate was bound to approach the taxation of the costs of the successful defendant below. There has been no order for costs on an indemnity basis; but the contention was that the taxation must have been undertaken upon such a footing. So, the argument ran, the magistrate was obliged to approach the matter on the basis that all costs should be allowed except so far as they were of unreasonable amount or had been unreasonably incurred; and everything in the Bill prepared by the appellant's solicitor should be included except if it was driven out by the words of exclusion. The successful party should have the benefit of any doubt.

In my opinion, the passages in the judgment in *Latoudis* relied upon by Mr Perkins do not oblige an exercise of discretion in the manner submitted. It is no doubt true that in both civil and criminal cases an award of costs is essentially compensatory, awarded to indemnify the successful **[10]** party against his or her costs. But that rationale does not produce the result that in every case all the costs of a successful party will be the subject of an order in his or her favour. Indeed, in civil cases such an order is a rarity. That is why cases contain adjectives qualifying the word "indemnity" where it is used in connection with costs. So, in *Latoudis*, McHugh J referred to an order for costs indemnifying the successful party for costs and disbursements "reasonably incurred in connexion with the litigation". Indeed, even where there is an award of costs on an "indemnity basis" there may be recovery of less than costs actually incurred.

The concept of an award of costs on an " indemnity basis" is well enough understood. But the mere identification of the concept of indemnity in relation to costs in the judgment in *Latoudis* by no means justifies a conclusion that the court was imposing a requirement that a magistrate

awarding costs in favour of a successful defendant in criminal proceedings must do so on an indemnity basis, giving that term its technical meaning. Further, whilst there are several isolated passages which are compatible with an order being made in favour of a successful defendant that would leave him or her not out of pocket at all, I think that it would be to read far too much into those passages to conclude that they were an attempt by the court, using the words of Mason CJ at p541, "to formulate a principle or a guideline according to which a discretion should be exercised". It is one thing to say that a successful defendant in summary criminal proceedings should ordinarily **[11]** have his or her costs.

It is another thing altogether to say that every such defendant in such an ordinary case should have costs upon a very favourable basis which is rarely available to a successful litigant in civil proceedings. I do not think that is an outcome compelled by *Latoudis*. What I have said thus far is enough to dispose of the appeal. But there is one matter to which I should, I think, draw attention. The learned magistrate essentially approached the issue by determining to allow such costs as he thought just and reasonable. That language mirrored various references to the phrase "just and reasonable" in *Latoudis*. But that phrase was used in that case because of the language of s97 of the *Magistrates (Summary Proceedings) Act* 1975, which by s97(b) provided:

> "The power of a Magistrates' Court to award costs and the award of costs by a Magistrates' Court shall be subject to the following provisions:-
>
> (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."

This provision was a variant of s105 of the *Justices Act* 1958. I was referred to various authorities relating to the exercise of the discretion of a magistrate to award costs to a successful defendant. Those authorities made use of the phrase "just and reasonable" in relation to costs. See, for example, *Puddy v Borg* [1973] VicRp 61; [1973] VR 626 at p628, *Bailey v Wallace* [1970] VR 109 at p115, and *Commissioner for Corporate Affairs v Green* [1978] VicRp 48; [1978] VR 505 at p516; (1978) 3 ACLR 289; [1978] ACLC 40-381. Each **[12]** of those cases was decided at a time when the language of the discretion was thus expressed. Obviously enough, it was a phrase of very considerable flexibility. The discretion applied to both civil and criminal matters. In the case of civil matters scales of costs successively applied. Such of those scales as I have examined made provision both for party and party and for solicitor and client costs. The words "just and reasonable" qualifying "costs" would logically permit an award of costs moulded to suit the circumstances of the particular case. That requirement might be for party and party costs, or for something of more extensive character. The fact that there were scales of costs intended to apply under the umbrella that costs be just and reasonable, and that such scales contemplated costs orders of a more or less expansive character, only confirms the natural reading of s97(b).

But now the section that deals with costs is different. There is no separation between an award of costs for a successful plaintiff or informant on the one hand, and in favour of a successful defendant in civil or criminal proceedings on the other. No longer do the words "just and reasonable" appear in the relevant provision. Section 131(1) of the *Magistrates' Court Act* 1989 provides simply that:

> "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."

In *DPP v Moisidis*, reported as case No. 37/91 in the *Magistrates Cases* Series, Smith J in a case involving the current section observed that the magistrate's **[13]** discretion is very broad, that it must be exercised reasonably in accordance with the circumstances of the particular case and that costs must be such as to the court seem "just and reasonable". His Honour referred to *Latoudis* as supporting these propositions. Because *Latoudis* was determined in the context of the earlier and different legislation, I think that what was said about costs, insofar as it simply restated the statutory prescription, should be viewed with some care. As the legislation now stands it seems to me that the discretion is exercisable simply in its terms. That is so whether the matter is in the civil or criminal jurisdiction. It is not a point of relevant distinction that there are scales of costs applicable to civil but not criminal matters. The magistrate will exercise the discretion being aware both of the different types of costs orders that may be made and of the

extent of indemnification of the successful party that the making of an order in one form rather than another will provide. So long, however, as the magistrate apprehends the extent of his discretion and the varying outcomes as to costs that are available, I doubt that it could do any harm for the question of costs to be approached in an individual case by reference to what is just and reasonable in the circumstances. That, in substance, is what the learned magistrate did here. The result that ensued was effectively an award of costs on a party and party basis. Having regard to the circumstances of the case I would not for a moment say that this was a wrong outcome. The appeal should be dismissed.

APPEARANCES: For the appellant Norton: Mr D Perkins, counsel. Kuek & Associates, solicitors. For the first respondent Morphett: Mr GJ Maguire, counsel. Ronald C Beazley, Victorian Government Solicitor.
