23/93

SUPREME COURT OF VICTORIA

REDL v TOPPIN

Brooking, Nathan and Eames JJ

1 April 1993

COSTS – SUMMARY OFFENCES – CHARGES DISMISSED – APPLICATION FOR COSTS – GENERAL RULE – WHETHER EXCEPTION TO GENERAL RULE.

1. A successful defendant to a summary criminal proceeding should ordinarily be awarded costs.
***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 an application for costs was made by a defendant following dismissal of summary criminal proceedings, a magistrate was in error in refusing to award costs on the grounds that the defendant was insensitive to the feelings of persons in the vicinity of the alleged offences and that the defendant failed to heed a warning to leave the scene.
***Redl v Toppin* MC32/92, overruled.**

BROOKING J: **[1]** These appeals arise out of an incident which occurred in Swanston Street, Melbourne two years ago in connection with a religious meeting of some kind which was there taking place. What happened was this: what was described in the Magistrates' Court as a Christian gathering at the corner of Collins and Swanston Streets was in progress when the appellant appeared carrying a banner or placard which bore the words "Ecumenism = Trojan horse. International Protestant Resistance rejects it. They speak in tongues by Satan's power". There was evidence that television cameras were at the scene and that the appellant was at pains to have his message televised. Those at the meeting evidently tried to prevent this. There was evidence that the appellant called out to persons at the meeting including speakers there, such words as "you are a liar" "go to hell", "Satanist" and "Antichrist". A Sergeant of police from Port Melbourne, who had, perhaps, the misfortune to be present, did his best to deal with the situation. He asked the appellant to leave. The appellant declined to do so. He was later charged with offensive behaviour and using insulting words. Both charges were dismissed by the learned Magistrate. As to offensive behaviour, His Worship was not satisfied that the behaviour was or could be viewed as offensive. And as to insulting words, His Worship was not satisfied that the words were or could be viewed as insulting. Indeed, the charges were dismissed as a result of the upholding of a no case submission. Thereupon counsel for the appellant applied for costs and referred to the decision of the High Court in **[2]** *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534; 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287.

The appeal to this Court has been conducted upon the basis that the proper inference is that the learned Magistrate declined to make the order for costs sought because of two circumstances, thus expressed:

> "A That the defendant's conduct was insensitive of the feelings of the majority of the persons present in the vicinity at the time, and –
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> B. That the defendant was warned to leave and did not comply".

In consequence of the wide provisions of the *Magistrates' Court Act* 1989 concerning appeals from the Magistrates' Court (too wide, some would say) and the wide provisions now dealing with appeals to the Full Court (again too wide, some would say) the question of the costs of a single prosecution which was probably over and done with in a couple of hours now comes before this Court. The learned Judge to whom an appeal was taken on a question of law dismissed the appeal, being of opinion that, while the first circumstance relied on by the Magistrate was irrelevant, the second was a relevant one and a proper reason for refusing to award costs. I must say I have some sympathy with the view taken by the learned Magistrate in this case.

As I read the account of the evidence in the affidavits it seems to me that although no doubt motivated by religious conviction the appellant was behaving in a way which many would regard as anti-social. I imagine that if a roomful of people were asked whether it was fair and reasonable that, the case against him having failed, his costs should be paid by the police informant, quite a number would say that the appellant was not entitled to much consideration and that he should not get his costs, since his own **[3]** extraordinary and inconsiderate behaviour and his refusal to roll up his "banner with the strange device" and move on had led to his being brought before the court. But this is not the test we must apply. The law, as laid down in the *Latoudis v Casey*, is that a successful defendant to a summary criminal prosecution should ordinarily be awarded costs. What sort of conduct may justify a departure from the general rule is something which it is difficult if not impossible to state exhaustively and definitively. This case can be disposed of without essaying any such comprehensive statement.

Having regard to what is said in *Latoudis v Casey* about the scope of the exceptions to the general rule, the two considerations advanced by the learned Magistrate could not, whether taken separately or in conjunction, warrant the refusal of an award of costs. The appellant was behaving in a disagreeable and, some would say, anti-social way, by expressing his religious views in an inconsiderate and objectionable manner. However strongly he held his religious convictions; his conduct was to be censured; but that censure was not to be marked by a refusal of costs. What I shall for want of a better word call misconduct may, it seems to me, justify the refusal of an award of costs to a successful defendant in summary criminal proceedings provided that it is sufficiently connected with the subject of the charge. Compare *Ritter v Godfrey* (1920) 2 KB 47 at pp60-61; [1918-19] All ER 714.

I am here not concerned with conduct by which the defendant may be said to have brought the prosecution upon himself, in the sense in which this must be understood in the light of the **[4]** decision of the High Court. Nor am I concerned with conduct which prolongs the proceedings unreasonably. I am speaking of conduct might be said to be so reprehensible (I use a vague term advisedly) that it would not be just to allow costs to follow the event. What may be regarded as reprehensible for this purpose I do not attempt to state, for it is clear that the appellant's conduct could not be said to warrant the refusal of costs. He was charged with offensive behaviour and using insulting words; the supposed misconduct here is nothing more than the behaviour by word and deed which led to those charges and his persistence in that behaviour when asked to leave.

The learned Magistrate thought that on the informant's case the appellant could not properly be convicted of behaving in an offensive manner or using insulting words. The suggestion of misconduct can only be a suggestion that the appellant's acts and words, although not offensive or insulting, or, in the Magistrate's view, capable of being viewed as such, within the meaning of the *Summary Offences Act* nevertheless were to be condemned as misconduct for the purposes of the discretion as to costs. One certainly could not bring this case within a "misconduct" exception to the general rule in the sense in which I am speaking of that exception.

It is not, for example, as if a defendant charged with an offence of dishonesty is not proved to have committed the offence having regard to all the ingredients of the particular charge laid (the missing ingredients not being the "dishonesty" one) but is nevertheless shown by the evidence led to have embarked upon some grand scheme **[5]** to defraud the public on a large scale. That case can be dealt with when it arises. Nor does the appellant's failure to move on advance the argument against him. He was merely persisting in the behaviour complained of instead of desisting. True it is that if he had yielded to the informant's request all this would probably have been avoided. But the fact that a prospective defendant does not act on what may be a well meant suggestion, intended to spare him a prosecution, by desisting from the conduct ultimately held not to be capable of supporting the charges laid, cannot, in my judgment, be a proper ground for depriving him of costs. On this aspect of the case I differ from the learned primary Judge. I would allow the appeals.

NATHAN J: [6] I agree with the presiding judge, and at the risk of repeating, in other words, the judgment already pronounced, I go on to say that public expression or indeed proselytism for a view of the world, whether religious, political or social, invites an equally public response, and that is to be applauded in a social democracy such as ours. Accordingly, there was no need for

Mr Redl to desist from displaying his placard or to comply with the policeman's advice to leave the scene. An observation of that kind may not necessarily be true with respect to all public meetings. It is, in my view, valid in this case because the Magistrate found the policeman's request to Mr Redl to leave, and his refusal to do so, was not offensive and the placard not to constitute the expression of insulting words.

It cannot now be said his behaviour or expression of views justified conviction. Each case must be taken in the light of its own circumstances. In my view, this case cannot be taken as any authority to describe any of the circumstances in which it would be proper to refuse an order for costs. It cannot now be said his behaviour or expression of views justified conviction. Each case must be taken in the light of its own circumstances. In my view this case does not serve as a useful example of any class of case in which it might be proper to refuse to award costs. The various examples cited in *Latoudis v Casey* are illustrative and not exhaustive. Here, we are limited to examining whether the primary judge took an irrelevant factor into account when exercising his discretion as to **[7]** costs. I think he did. Redl's refusal to leave was part of his behaviour found not to be offensive, he should not have been, in effect, penalized because of it. There will be many cases where refusal to leave a meeting, or the display of placards will constitute offensive behaviour of the use of insulting words. Disruption for disruption's sake may be one of them. Each case must be specifically qualitatively assessed, and the discretion exercised in line with that assessment. Accordingly, I too would allow the appeal.

EAMES J: **[8]** *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534; 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287 is authority for the proposition that ordinarily a successful defendant will obtain an order for costs in proceedings before a Magistrates' Court. In exercising his or her discretion so as to refuse an order for costs, the Magistrate would be entitled to take into account as being a relevant factor, conduct of the defendant after the occurrence of the event which constituted the charged offence which brought proceedings to Court. Such conduct might include refusal to put forward information which may have led to a decision not to proceed with the prosecution at all. I interpolate, however, that that consideration would also need, in a given case, to be carefully weighed against other considerations, which might quite reasonably have led a person to decline to take advantage of such opportunity.

For example, a defendant who believed, on apparently reasonable grounds, that investigating officers had already determined to charge him and would therefore use any explanation given by him solely for purposes of manufacturing an answer to his explanation, rather than treating his explanation on its merits, may choose to exercise his right to silence. Such a person should not be penalized as to costs merely because that course was adopted and for that reason. As Mason J said at pp544, the error in *Latoudis'* case was that the Magistrate, rather than take into account the defendant's conduct during the investigation, regarded as a relevant factor the very conduct which had constituted, and was said to justify the fact that he had been charged. And yet that conduct had been held not to **[9]** constitute an offence. See also the judgment of Toohey J at 565 and McHugh J at 569-570, 571. Thus the Magistrate was, in *Latoudis'* case, in effect, determining that it was reasonable for police to have charged the appellant, an irrelevant consideration on the question of costs.

The fact is that the defendant was not guilty of the offence there charged and to penalize him on costs for such a reason would be to diminish the force and effect of his acquittal. The effect of the dismissal of the charges in the present case amounted to this: the defendant was, by holding his banner, doing no more than exercising a democratic right to protest and was committing no offence in so doing. His opinion, thus expressed, caused annoyance to those who disagreed with him. On the evidence before the Magistrate, any breach of the peace which might have occurred was more likely to have been occasioned by those who sought to deny the appellant the democratic right to protest. They chose to conduct a religious event in a public place so as to give public witness to their opinions; he chose to attend and to quietly – initially at least – disagree with those opinions by use of his placard and then to verbally challenge the opinions of those attending by saying that they were telling lies and would go to hell. It appears, although it is not entirely clear from the material before us, that the appellant's verbal statements may have arisen after attempts were made to interfere with his, until then, quiet protest by attempting to prevent his sign being filmed by television crews which were at the scene.

[10] In my opinion, it was an easy option for the police to choose to remove the appellant in these circumstances so as to pacify the crowd. But he had committed no offence, so the Court found, and the easy course was the wrong course to adopt. Those who choose to engage the public's attention to their cause by announcing their views in a public place cannot complain if others, who disagree with their views, choose to demonstrate the fact they are disagreeing. The tolerance of differing opinions is the hallmark of democracy.

Where disagreement, however, becomes offensive as a matter of law and/or challenges the peace of the community, there are ample laws to protect society, but a disagreement of opinion is not of itself an offence nor, in my opinion, a cause for a penalty, whether by way of conviction or by denial of an order for costs in circumstances where, ordinarily, there would be an entitlement to costs of the successful defendant. The Magistrate, in my opinion, took into account two irrelevant considerations: the first of those was identified and rejected by the learned primary Judge. In my opinion, the second consideration was also irrelevant and also vitiated the order made denying costs.

Having said this, however, I should not be taken as adopting or laying down any categoric proposition that conduct falling short of justifying a conviction could never been taken into account on the question of costs. Whether the High Court judgment has gone so far as to say this remains to be considered. But it is unnecessary to be considered in the circumstances of this case. It could well be, for example, that where a case was dismissed **[11]** solely because of a technical failure of proof on the part of the prosecution or where, for example, a charge was dismissed solely because of the non-attendance of a witness, that the circumstances out of which the charge arose might remain a relevant consideration together with other considerations on the question of costs.

I say nothing as to that and it would be inappropriate to attempt to lay down any rigid parameters of the range of relevant considerations which might come into play on an application of costs. It seems to me that in the field of criminal law, it is always dangerous, in any event, to state categoric propositions as to the ambit of the exercise of discretions. The discretion given by the Act remains and the High Court has done nothing to deny that discretion, but has identified some circumstances in which it can be said a discretion would be wrongly exercised. This was such a case and falls clearly within the ambit of irrelevant considerations so identified by the High Court. In my opinion this appeal should be allowed.

BROOKING J: The order of the Court in each case is in accordance with these minutes:

1. Appeal allowed with costs; 2. Order below set aside; 3. In lieu thereof order -
(a) that appeal be allowed with costs including reserved costs;

(b) that order of Magistrates' Court refusing defendant's application for costs be set aside and that in lieu of said order defendant's costs of proceedings in magistrates' Court be paid by informant;

(c) that case be remitted to Magistrates' **[12]** Court for determination of amount payable for costs by informant to defendant.

APPEARANCES: For the appellant/defendant Redl: Mr I Freckleton, counsel. Jean Ely & Associates, solicitors. For the respondent/informant Toppin: Mr SP Gebhardt, counsel. Director of Public Prosecutions.