11/04; [2004] VSC 115

SUPREME COURT OF VICTORIA

JUNEK and ANOR v BUSUTTIL and ANOR

Kellam J

13 August 2003; 7 April 2004

CRIMINAL LAW – CHARGES DISMISSED ON SUBMISSION OF NO CASE – APPLICATION FOR COSTS – FINDING BY MAGISTRATE THAT DEFENDANTS BROUGHT PROSECUTION UPON THEMSELVES OR THEIR CONDUCT WAS SEEN TO BE REPREHENSIBLE – APPLICATION FOR COSTS REFUSED – WHETHER MAGISTRATE IN ERROR: *MAGISTRATES' COURT ACT* 1989, S131.

J. and Z. were charged with offences of handling stolen goods and one charge of receiving property reasonably suspected of being the proceeds of crime. At the hearing, the magistrate upheld a 'no case' submission and dismissed the charges. Upon an application for costs being made, the magistrate refused to award costs on the ground that the defendants failed to produce records of the business as to how the goods came into their possession amd that they chose not to answer questions about the goods. Upon appeal—

HELD: Appeal allowed. Order refusing costs set aside and referred to the Magistrates' Court for determination of the amount payable for costs by the Chief Commissioner of Police.
1. *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534; (1990) 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287 establishes the principle that in summary proceedings a successful defendant should ordinarily be awarded his or her costs. In challenging a magistrate's order to refuse costs, the appellant must establish that it was not open to the magistrate to find that the circumstances were "not ordinary".

2. In the present case, the magistrate concluded that the failure of both defendants to produce business records disentitled both of them to costs. Furthermore, because each defendant chose to adopt the course of not answering questions or referring to documents, they could not complain that their costs were refused. In each case neither was relevant to the issue of costs and it was not open to the magistrate on those grounds to deprive the defendants of their costs.

3. Having regard to the fact that the Magistrate found that there was no case to answer on the basis of his finding that essential elements of the charges brought against each of the appellants were not established by the evidence, and in circumstances where it cannot be said that either of them brought the prosecution upon themselves by reason of their conduct after the offence, or where their conduct could be seen to be reprehensible, it was not open to the Magistrate to find that the circumstances were not ordinary and refuse to award the defendants their costs.

KELLAM J:
1. Both appellants have appealed on a question of law under s92 of the *Magistrates' Court Act* 1989 against the refusal of a Magistrate to make an order for costs in their favour.

Background
2. In April 2002 the first appellant, Tomas Junek ("Junek") was charged by police with two counts of handling stolen goods under s88(1) of the *Crimes Act* 1958 and one count of receiving property reasonably suspected of being the proceeds of crime, on a specified date, under s123 of the *Confiscation Act* 1997. The first charge pursuant to s88(1) of the *Crimes Act* alleged that Junek on 23 May 2001 dishonestly assisted in the retention by or on behalf of another, of a stolen Mazda Astina sedan belonging to one Jason Polido, believing it to be stolen. The second charge pursuant to the same section alleged that Junek dishonestly assisted in the retention by or on behalf of another, of a stolen Subaru WRX motor vehicle belonging to one Steven Nikolovski, believing it to be stolen. The charge under s123 of the *Confiscation Act* 1997 alleged that on 23 May 2001 Junek received property, namely cars and car parts reasonably suspected of being the proceeds of crime.

3. These matters came on for hearing before a Magistrate sitting at Dandenong on 15 November 2002. On the same date and at the same time the second appellant, Haysam Zayat ("Zayat")

appeared before the Magistrate likewise charged with counts identical to those laid against Junek. Junek and Zayat both consented to the charges alleged against them under the *Crimes Act* being heard by the Magistrate.

4. The evidence before the Magistrate consisted of the evidence of a Mr Polido (spelt Politto in the transcript of the proceedings) and the informant in each case. Mr Polido gave evidence that he was the owner of a Mazda Astina motor car which was stolen on the night of 16 May 2001. He reported the theft to police. On 27 July 2001 he was telephoned by police and asked to attend at the Knox police station where he looked at a disassembled Mazda motor car. In the course of giving his evidence before the Magistrate he said that at the time that he had seen the disassembled car at the police station, "I thought the body and everything else was my car, but since then I have seen a lot of others that are identical to mine with everything the same." Mr Polido gave evidence before the Magistrate that he had subsequently told Police that he did not believe that what he saw was his car. He told the Magistrate that he was unable to say that the car he saw at the police station was his.

5. Sergeant Paul Busuttil, the informant in the proceedings against Junek, gave evidence that on 23 May 2001 he, in company with other police attended upon factory premises situated at Wayne Court in Dandenong ("the premises") to execute a search warrant. He gave evidence that both appellants were present at the premises at the time of his attendance. Sergeant Busuttil gave evidence that he observed cars, engines, engine parts, trims, doors, tyres and "bits and pieces of cars all over the place".

6. Sergeant Busuttil gave evidence that Junek was arrested subsequently on 29 May 2001 and taken to Dandenong Police Station where he was interviewed formally. The record of interview was tendered before the Magistrate. In the course of the interview Junek admitted being the owner of a panel shop and of an "import compliance business" which was conducted at the factory premises. He said he was the sole owner of the business and that he had no business partners. He said that the second appellant Zayat had "come in to help me" in the business, but "not as a partner". However, in relation to specific allegations about motor vehicle bodies and parts found at the premises, Junek relied upon his right to silence.

7. Detective Senior Constable Majstorovic, the informant in the proceedings against Zayat, gave evidence that he attended upon the premises with Sergeant Busuttil on 23 May 2001. Likewise he observed various motor vehicle parts at the premises and formed "a suspicion" that some of them were from stolen vehicles. In particular he gave evidence that he had inspected a Mazda Astina motor car body which had an engine in it, the number of which he said, did not match "anything on the Victorian data base for VicRoads". He gave evidence that he had observed on the ground next to the Mazda motor car body another engine which "enquiries" revealed had an engine number that "came up to an outstanding stolen motor vehicle being a Mazda Astina registered to Jason Polido". Under cross-examination, Detective Senior Constable Majstorovic agreed that he had not personally checked any data base but had obtained the number of Mr Polido's engine from a stolen car report based upon what Mr Polido had told another police officer. Subsequently he produced a certificate from VicRoads which demonstrated that registration records held by that organisation showed that the Mazda motor car owned by Mr Polido had been registered originally with an engine number which matched the engine number found by him on the floor of the premises next to the Mazda motor car.

8. At the conclusion of the cases brought against each of the appellants, each of them, through his counsel submitted at first that there was no case to answer in relation to the charge of receiving property brought under s123 of the *Confiscation Act* 1997, principally on the basis that there was no evidence of handling or receipt of stolen goods on the date alleged. Upon that submission being made, the prosecutor sought to amend the charge to a charge of possession of property that may be reasonably suspected of being the proceeds of crime. The application to amend was opposed by counsel for both appellants and the Magistrate declined to make any order amending the charge on the basis that it was a summary offence and that such an amendment would materially "alter the charge" and was out of time. He then dismissed that charge. In relation to the remaining charges of handling stolen goods laid against each of the appellants under the *Crimes Act ,* submissions of no case to answer were made on a number of grounds, but principally on the basis that there was no evidence that the cars and car parts the subject of the charges, were stolen.

The Ruling of the Magistrate that there was No Case to Answer

9. The Magistrate accepted the submission made before him that in each case there was no case to answer. He said:

> "The only car which comes close to satisfying me that there is (sic) stolen goods is the one where the witness said that he had his car stolen, and as has been submitted, it was - he was unwilling to say that it was his car that was in the workshop. The only – the next step from there is that the engine numbers match up, but as has also been submitted that evidence is not strong enough, because of the way in which the system operates, for me to be satisfied beyond reasonable doubt that that particular engine, has well, is stolen … The way that I see it is that that's the major hurdle obviously, proving that the vehicles were stolen, and I'm not satisfied beyond reasonable doubt that they were stolen. But there are other things such as – that I have to have evidence that the accused knew or believed that the goods were stolen. Well, there are no admissions from the men of anything like that, and no suggestions, apart from the inferences that I am being asked to draw, which I can't. Or that the handling was dishonest. So on that basis, each of the charges are dismissed."

Accordingly, it is apparent that the Magistrate decided that there was no case to answer on the basis that the prosecution had not produced evidence of a number of the elements of the charges of handling stolen goods, namely that he was not satisfied there was evidence that they were stolen, that there was no evidence that each of the appellants knew or believed the goods were stolen, nor was he satisfied that either of them had acted dishonestly.

The Costs Application to the Magistrate

10. Upon the Magistrate finding that there was no case to answer any of the charges against them, both of the appellants through their counsel applied for an order for costs in their favour. The Magistrate stated immediately that he did not "intend to award costs". Subsequently however, he heard argument from each member of counsel appearing for the appellants in support of the application for costs. In the course of those submissions, the Magistrate was referred to the decision of *Larrain v Clark*[1] in which case, Smith J had concluded, in circumstances which bore some similarity to the present case, that a Magistrate had erred in not making an order for costs in favour of the person charged. After hearing submissions the Magistrate ruled that the application for costs was refused.

The Reasons of the Magistrate for Refusing to Award Costs

11. The reasons for the decision of the Magistrate to refuse costs as they appear in the transcript are as follows

> "In my view, the ruling in the matter of *Larrain v Clark* can be distinguished from the present case. In that particular case it was a domestic situation where one would not expect and it would be most unusual for records to be kept. In this particular situation, we have a business where business records would expect to be kept. Secondly, in the ruling of *Larrain v Clark*, there was a very strong inference, if not a statement, in the ruling that the charges should never have been - the defendant should never have been charged. Thirdly, in *Larraine v Clark*, the defendant gave detailed answers to questions after initially refusing to answer the questions. We then come back to the original authority on costs in these matters and the case of *Latoudis v Casey* in which the Court said, and I am referring to p565 170 CLR (1990): "Now, in a particular case, there may be good reasons connected with the prosecution such that it would not be unjust or unreasonable that a 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 the charge is laid and refuses that 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 *(Reg v Dainer, ex parte Milevich*). This has nothing to do with the right to silence in criminal matters. The 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 where an explanation might have avoided the prosecution." In this particular case, the evidence before me is that this is a small business run out of a small factory. Consequently I am of the view that each of the defendants should have had at their fingertips by way of records kept by the business exactly when, where and how they came into the possession of these motor vehicle parts. They have chosen to adopt the course of not answering those questions or referring to those documents. Had they done so, the charges in my view would not have been laid. They had chosen to adopt a course - no doubt had they chosen to adopt the course of referring to those documents, no doubt the charges would not have been laid, assuming of course that those records were in existence. Both the defendants chose not to avail themselves of that opportunity given to them. They cannot now complain that their costs are refused. All charges are dismissed and the application for costs is refused."

12. After the Magistrate handed down his ruling the following exchange took place between counsel for Zayat, and the Magistrate.

> "Counsel: Your Worship, I'm not cavilling and I don't want you to reverse your ruling, but I'm conscious – I do tell your Worship that there will be an appeal, and I don't want it to be raised on appeal that I didn't seek to bring the matter to your attention. There is no evidence whatsoever that my client, as distinct from the other gentleman, had any role in this business, had any access to papers. There is no evidence he was anything but a client or a customer of the business. I do raise that for your attention, not because I'm seeking to cavil or change your ruling, but I don't want a subsequent court to say to me that I didn't bring a matter as basic as that to your attention. No one has suggested that we are part of this business at all, or that we had access to any of the papers of this business. His Worship: I've drawn that conclusion from the record of interview. Counsel: You can't use that record of interview against my client at Court. I just raised that for your consideration. His Worship: I'm only drawing it from the point of view of costs. Thank you."

The Question of Law

13. The sole question of law stated pursuant to the Rules by the Master in the appeal of Junek is:

> "Did the Magistrate err judicially in the exercise of his discretion to refuse an award of costs to the successful defendant?"

14. In relation to the appeal of Zayat the Master stated the first question of law to be in the same terms as that above but in addition stated a further question of law to be:

> "Did the Magistrate err, in having regard to the Police record of interview of one Tomas Junek (the subject of another proceeding), as a basis for refusing to order costs?"

15. It is clear that the second question of law raised on the appeal of Zayat relates to the conclusion reached by the Magistrate that Zayat was involved in the business conducted by Junek because of matters stated by Junek in his record of interview.

The Submission of the Appellants

16. Mr Nash QC and Mr Lavery of counsel who appear for both appellants submit that the exercise of the discretion by the Magistrate in relation to the question of costs miscarried. It is submitted that the reasons given by the Magistrate for refusing costs are flawed in logic and that the Magistrate misinterpreted the principles set out in *Latoudis v Casey*[2], in concluding, as they submit he did, that the exercise of the right to silence or partial exercise of the right to silence deprived the appellants of an order for costs.

The Submission of the Respondents

17. Mr Dennis of counsel submits that there was material to support the decision of the Magistrate and that insofar as the Magistrate relied upon matters said by Junek in his record of interview about the role played by Zayat, those matters although inadmissible in the substantive proceeding against the second appellant, were properly the subject of consideration by the Magistrate on the question of costs. He submits that the appellants have a heavy onus to satisfy in seeking to overturn the exercise of a discretion by the Magistrate[3].

The Discretion of the Magistrate to award costs

18. Section 131 of the *Magistrates Court Act* 1989 provides that costs of proceedings in the Court are to be in the discretion of the Court. The relevant parts of s131 are 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.
>
> (2) Sub-section (1) applies unless it is otherwise expressly provided by this or any other Act or by the Rules or the regulations.
>
> (2A) In exercising its discretion under sub-section (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.

(2B) The Court must not make an order awarding costs against a party in the exercise of its discretion under sub-section (1) on account of any unreasonable act or omission by, or on behalf of, that party that the Court is satisfied resulted in prolonging the proceeding without giving that party a reasonable opportunity to be heard.

(2C) If the Court determines to award costs against an informant who is a member of the police force, the order must be made against the Chief Commissioner of Police."

19. In *Latoudis v Casey*[4] the majority of the High Court stated the principles applicable to the exercise of the discretion given by s131 of the Act. That decision establishes that, "... in ordinary circumstances, an order for costs should be made in favour of a successful defendant."[5]

20. The Chief Justice, Mason CJ, said further[6]:

"However, there will be cases in which, when regard is had to 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."

21. In relation to such after events conduct Toohey J said[7]:

"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, where 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."

22. Mason CJ in his judgment expressed agreement with Toohey J in the following terms[8]:

"I agree with Toohey J that, if a defendant has been given an opportunity of explaining his or her version of events before charges are 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".

23. Likewise McHugh J said[9]:

"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 proceeding ... 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. A successful defendant cannot be deprived of his or her costs, however, because the charge is brought in the public interest or by a public official, because the charge is serious or because the informant acted reasonably in instituting the proceedings or might be deterred from laying charges in the future if he or she was ordered to pay costs. Nor can the successful defendant be deprived of his or her costs because the conduct of the defendant gave rise to a suspicion or probability that he or she was guilty of the offence the subject of the prosecution. Hence, in most cases the successful defendant in summary proceedings, like the successful party in civil proceedings, should obtain an order for costs in respect of those issues on which the defendant succeeds".

24. Since the decision of the High Court in *Latoudis*[10] was handed down, it has been the subject of consideration by the Supreme Court of Victoria in a variety of circumstances, and on a number of occasions. In *Parker v Kelly*[11], Marks J concluded that the refusal of a Magistrate to award costs should not be set aside. After referring to the judgment of Mason CJ in *Latoudis*[12],

Marks J said:

> "The result, I think must be that in order that the Magistrate exercised his discretion correctly in accordance with the guidelines of the High Court, and to have refused the costs of the applicant, he needed to find that the circumstances were not ordinary."

25. Marks J concluded that the failure of the appellant to give the explanation which he later gave in evidence, at the time he was interviewed by police, was sufficient foundation to constitute an exception to the "guidelines" established by the High Court.

26. The issue was further considered by the Full Court of the Supreme Court in *Redl v Toppin*[13]. The appellant had been charged with offensive behaviour and using insulting words arising out of an incident which occurred at a religious meeting in Swanston Street. Brooking J said:

> "The law, as laid down in *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 ... Having regard to what is said in *Latoudis v Casey* about the scope of 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 order 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 a 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 ... 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 decision of the High Court. Nor am I concerned with conduct which prolongs the proceedings unreasonably. I am speaking of conduct which 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. ... One certainly could not bring this case within a "misconduct" exception to the general rule in the sense to 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 to defraud the public on a large scale. That case can be dealt with when it arises".

27. In the same case Eames J said:

> In exercising his or her discretion so as to refuse an order of 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 (lead 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.

28. Having expressed the opinion that the Magistrate had taken irrelevant considerations into account Eames J said:

> "Having said this, however, one should not be taken as adopting or laying down any categoric proposition that conduct falling short of justifying conviction could never be 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 consider in the circumstances of this case. It could well be, for example, that where a case was dismissed 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 the 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 for costs".

29. In *Larrain v Clark*[14], Smith J heard an appeal under s92 of the *Magistrates' Court Act* against the refusal of a magistrate to order costs. The appellant had been charged under s26 of the *Summary Offences Act* 1966 with having actual possession of property (ie videotapes) suspected of having been stolen. The Magistrate dismissed the charges on a no case submission but declined to make a cost order in favour of the appellant. Smith J said:

> "The mere exercise of the right to silence does not deprive a successful defendant of his or her costs".

In the case before him, the appellant had failed to identify who had supplied the videotapes to him. Smith J said,

> "...the critical matter is whether the failure to identify the supplier of the videos was something that would have entitled the Magistrate to find that the appellant was disentitled from receiving compensation for his costs. In my view, it would not. The case is not one whether withholding of information prevented investigation by the informant of the matters in respect of which the question was asked. (See *R v Dainer* (1988) 91 FLR 33). The informant in this case could have investigated the explanation by questioning the persons who had hired the alleged videos in the first place. This may have led to a more difficult and protracted enquiry but the refusal to give the information did not prevent it. It was also not a case where the withholding of information (such as alibi information) would affect the case generally. The information only affected the issue of the reasonableness of the explanation. Further, as noted above, the refusal to give the information could not properly affect the assessment by the appellant of the crucial threshold question on which the case failed whether there was reasonable suspicion that the goods in question were stolen or unlawfully held at the time they were in the possession of the appellant."

30. In *Hehir v Bishop*[15], the appellant was charged with driving an unregistered motor vehicle on the highway. The charge was dismissed. The Magistrate declined to award costs as he considered that the decision in *Latoudis* should be limited to those cases in which there was a fact situation similar to that before the High Court. Ashley J said in referring to *Latoudis*:

> "It is true that the Court was there concerned in looking to the relevance or otherwise of a particular matter brought to account by a magistrate in exercising his discretion. But the guidelines which the majority developed were and were plainly intended to be of general usefulness. They were applied by the Full Court of this Court in *Redl*, a decision to which I earlier referred. In these circumstances it appears to me that his Worship in the present case acted in a wrong view of *Latoudis.* He should have considered whether the reasonable expectation of the appellant that he should have his costs in the circumstances was defeated by some such consideration as was identified by Mason CJ and by Toohey and McHugh JJ; or, to put it in slightly different language, but to the same intent, whether the ordinary situation that it would be just and reasonable that the successful defendant have his costs was displaced by some such consideration. The discretion of the Magistrate in my opinion miscarried."

31. In *Alexander v Renney*[16] Batt J said referring to the decision of the majority in *Latoudis*[17]:

> "The appellant in this case in challenging the Magistrate's orders must really say that it was not open to the Magistrate to find that the circumstances were not ordinary."

32. In *Nguyen v Hoekstra*[18] the Court of Appeal upheld the decision of a Magistrate not to award costs in circumstances where the appellant had been charged with an offence of unlicensed driving and in circumstances where the appellant had given to police a name that did not appear upon licence records. Upon subsequent investigation it was established by the informant that the appellant was in fact licensed but under a different name. The Court of Appeal concluded that it was open to the Magistrate in such circumstances to decide that the appellant had brought the prosecution upon himself and the decision of the Magistrate to refuse costs was upheld.

Conclusion

33. The issue before me is whether or not it was open to the Magistrate in the proper exercise of his discretion to refuse to make an award of costs to one or both of the appellants. *Latoudis v Casey*[19] establishes the principle that in summary proceedings a successful defendant should ordinarily be awarded his or her costs. As Batt J said in *Alexander v Renney*[20], the appellant in this case and in challenging the Magistrate's order must establish, that it was not open to the Magistrate to find that the circumstances were "not ordinary."

34. It is apparent that the Magistrate regarded the failure of the appellants to produce business records which would demonstrate the legitimate nature of the business conducted by one or other or both of them as the critical issue in the determination of whether or not a cost order should be made. He said, ".. each of the defendants should have had at their fingertips by way of records kept by the business exactly when, where and how they came into the possession of the motor vehicle parts". He said that had they produced such documents, "assuming of course that they were in existence" the charges "no doubt" would not have been laid. Although Junek had admitted to being the proprietor of the panel business conducted at the premises, this statement about the ability of each appellant to produce business records ignored the fact that there was no admissible evidence before the Magistrate that Zayat played any part in the business and thus no reason to conclude that he would have any records at his "fingertips". Furthermore, in circumstances where there was no evidence that such records existed this statement would appear to contain a suggestion that by reason of the failure of both the appellants to produce such documents, (and thus it might be inferred, prove their innocence) their conduct gave rise to a suspicion of guilt of the offence charged. Whilst, as the Magistrate observed, one ordinarily would expect a business of the nature of that conducted by the first appellant to have relevant documentation as to stock and receipt of goods, it is established clearly by *Latoudis v Casey* that a suspicion, or even a probability, that the accused is guilty of an offence is not a reason for the deprivation of costs. As stated above, a successful defendant cannot be deprived of his or her costs "because the conduct of the defendant gave rise to a suspicion or probability that he or she was guilty of the offence the subject of the prosecution."[21]

35. However, whether or not the Magistrate entertained such suspicion, clearly he concluded that the failure of both appellants to produce business records disentitled both of them to costs. No doubt, had either of them, at the hearing actually produced business records, which had not been shown to police, but which established that the receipt of car parts had been recorded in such a manner so as to rebut the allegations made against them, the Magistrate might well have been entitled to conclude that the appellants or one or other of them, by their conduct in the proceeding, had brought the prosecution upon themselves[22].

36. However, in my view it is an entirely different matter to conclude that the failure to produce documents, the existence of which, was not the subject of evidence, but was entirely speculative, was relevant to the issue of costs.

37. Furthermore, the conclusion reached by the Magistrate that because each of the appellants chose "to adopt the course of not answering ... questions or referring to documents" they could not "complain that their costs are refused" appears clearly to be a conclusion that the exercise of the right to silence by each of them was a relevant matter in relation to the issue of costs. In my view the only conclusion to be reached is that each of the appellants merely exercised his right to silence. Such a mere exercise of the right to silence cannot alone deprive a successful defendant of his or her costs.

38. The fact is that there was no evidence before the Magistrate of any obligation to keep records, nor was there any evidence that records were, or indeed were not kept. The prosecution case did not depend upon, or relate in any way to the existence of, or the non-existence of, any records. Neither of the appellants relied upon any records, or for that matter produced any other evidence, to rebut the prosecution evidence. There was no basis for a finding on the part of the Magistrate that production of records, about which there was no evidence, would have prevented the laying of the charges. Rather a reading of the transcript of the proceeding demonstrates that the prosecution case failed because the evidence adduced by the prosecution was insufficient to satisfy the Magistrate that the accused persons were guilty beyond reasonable doubt of the charges brought against them and in particular, because the Magistrate found that the essential elements of whether the prosecution proved that the goods had been stolen, and that the appellants knew or believed that the goods were stolen, and that they acted dishonestly, were not established in either case before him.

39. However, Mr Dennis submits that irrespective of whether or not the reasoning of the Magistrate in relation to the issue of the existence or otherwise of business records can be sustained, the order of the Magistrate can nevertheless be supported on another basis. He submits that the Magistrate was entitled to find that:

> "What was taking place at the factory on the subject date was a nefarious activity involved with the changing of the identification of motor vehicles for an illicit purpose, and if that view is to be taken ... then this is a case which would warrant refusal of costs on the basis of *Redl v Toppin*."

Furthermore Mr Dennis submits that had the Magistrate permitted the amendment of the charge brought against each accused under the *Confiscation Act* 1997, "it was open to a Magistrate to find on that evidence, the conduct was capable of proving possession". Mr Dennis submits on that basis that the refusal to grant an amendment is a "technical failure" of the prosecution case.

40. As is clear from a reading of the judgment of Brooking J in *Redl v Toppin*[23] referred to in paragraph 26 above, His Honour considered that in addition to conduct by a defendant which prolongs the proceedings unreasonably, or conduct of a defendant which brings the prosecution upon himself, which exceptions are clearly established by the High Court in *Latoudis v Casey*[24], a further exception exists in relation to conduct which is "sufficiently connected with the subject of the charge" and which "might be said to be so reprehensible ... that it would not be just to allow costs to follow the event". However, as Brooking J said, it is most difficult to state exhaustively and definitively what sort of conduct may justify a departure from the general rule.

41. It is clear, however, that there is no admissible evidence that Zayat was involved in the business conducted by Junek. My reading of the transcript indicates that the extent of the admissible evidence against Zayat is that he was present, when police attended upon the premises with a search warrant. In my view there is no basis upon which it might be established that Zayat was engaged in "reprehensible conduct" of the type contemplated by Brooking J in *Redl v Toppin*[25].

42. I have some sympathy with the view taken by the Magistrate as to the nature of the business conducted by Junek. The Magistrate may well have been entitled to entertain some suspicion about the enterprise. However, in circumstances where the Magistrate made a specific finding that he was not satisfied beyond reasonable doubt that the goods the subject of the charges were stolen, or that either of the accused persons knew or believed they were stolen, and that he was not satisfied that either of them had engaged dishonestly in the handling of the goods, it cannot be said that their acquittal by the Magistrate was based upon a mere technicality, of the type contemplated by Brooking J. Furthermore, I do not accept the submission of Mr Dennis that the fact that the charge brought under s123 of the *Confiscation Act* was not capable of being amended was a mere technical defect in the prosecution case. Whilst it is true that such an amendment would have made the task of the prosecution somewhat easier, it cannot be said that there would have been any certainty of conviction of either or both appellants. In particular, the issue of who had actual possession of the goods, the subject of the charge, would have been an obvious issue of contention.

43. Taking into account the approach of the Hight Court in *Latoudis v Casey*[26] it does not appear to me that the circumstances of the case before the Magistrate were such that it was open for the Magistrate to find that the circumstances were not ordinary. Whilst it is true that the one lay witness who appeared to give evidence on behalf of the prosecution appears to have recanted on his original statement to police, the prosecution nevertheless decided to bring the case against the appellants on the evidence which was available to it. It was that evidence which the Magistrate found to be insufficient to satisfy him beyond reasonable doubt that the appellants were guilty of the offence charged or indeed sufficient to find there was a case to answer. Accordingly, and notwithstanding the perhaps justified suspicions of the Magistrate as to the nature of the enterprise conducted by one or both of the appellants, such suspicions could not justify a departure from the principle laid down in *Latoudis v Casey*[27]. Where the Magistrate found that there was no case to answer on the basis of his finding that essential elements of the charges brought against each of the appellants were not established by the evidence, and in circumstances where it cannot be said that either of them brought the prosecution upon themselves by reason of their conduct after the offence, or where their conduct can be seen to be reprehensible, it was not open to the Magistrate to find that the circumstances were not ordinary.

44. It follows that each appellant has demonstrated error of law on the part of the Magistrate in the exercise of his discretion to refuse to award costs to each successful appellant. It is unnecessary for me to answer the second question of law raised on the appeal of Zayat as to whether the Magistrate was entitled on a question of costs to use the otherwise inadmissible evidence of Junek in his record of interview as to Zayat's role in the business conducted by Junek.

45. Both Mr Nash and Mr Dennis submit that the matter should be remitted back to the Magistrate, although Mr Dennis submits that it should resubmitted back to enable the whole issue of costs to be "reviewed". For the reasons set out above I conclude that each appellant is entitled to receive his costs of defending the proceedings. Not being in a position to determine the amount of costs, it appears necessary to remit the matter to the Magistrates' Court at Dandenong for determination of the amount to be awarded.

46. Subject to submissions of Counsel I propose to make the following orders:

(a) Appeal in each case allowed with costs.

(b) Order of the Magistrates' Court refusing the application for costs in each case be set aside and that in lieu of the said order, each appellant's costs of the proceedings in the Magistrates' Court be paid by the Chief Commissioner of Police in each case.

(c) Each case be remitted to the Magistrates' Court for determination of the amount payable for costs by the Chief Commissioner of Police.

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[1] Unreported, Supreme Court of Victoria, Smith J 13 July 1995.
[2] [1990] HCA 59; (1990) 170 CLR 534; (1990) 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R.
[3] See *Australian Coal and Shale Employees Federation v Commonwealth* [1953] HCA 25; (1953) 54 CLR 621 at 627.
[4] *supra.*
[5] Per Mason CJ at p544.
[6] *supra* at 544.
[7] *supra* at 565 to 566.
[8] *supra* at 544.
[9] *supra* at 569.
[10] *supra.*
[11] Unreported, Supreme Court of Victoria, Marks J, 16 July 1991.
[12] *supra.*
[13] Unreported, Supreme Court of Victoria, 1 April 1993.
[14] Unreported, Supreme Court of Victoria, Smith J, 13 July 1995.
[15] Unreported, Supreme Court of Victoria Ashley J, 20 April 1993.
[16] Unreported, Supreme Court of Victoria, Batt J, 21 August 1995.
[17] *supra.*
[18] 99 A Crim R 497.
[19] *supra.*
[20] *supra.*
[21] See *Latoudis v Casey* per McHugh J *supra* at 570.
[22] See *Latoudis* per Toohey J p565 and *R v Dainer* (1988) 91 FLR 33.
[23] *supra.*
[24] *supra.*
[25] *supra.*
[26] *supra.*
[27] *supra.*

APPEARANCES: For the appellants Junek and Zayat: Mr G Nash QC with Mr J Lavery, counsel. Balot Reilly, solicitors. For the respondents: Mr BM Dennis, counsel. Kay Robertson, Solicitor for Office of Public Prosecutions.
