37/91

SUPREME COURT OF VICTORIA

DPP v MOISIDIS

Smith J

6, 18 June 1991

COSTS – CRIMINAL PROCEEDINGS – SERIOUS CHARGES – SENIOR JUNIOR COUNSEL ENGAGED – CHARGES DISMISSED – APPLICATION FOR COSTS ALLOWED – COUNSEL'S FEES FULLY ALLOWED – DEFENDANT'S LOSS OF WAGES ALLOWED – WHETHER JUST AND REASONABLE – WHETHER OVER-COMPENSATORY: *MAGISTRATES' COURT ACT* 1989, S131.

M. pleaded not guilty to charges of intentionally causing injury and threatening to inflict serious injury. After a hearing lasting 7 days, the charges were dismissed and M. applied for costs which the magistrate allowed as follows: M's loss of wages @ $50 per day ($350) plus counsel's fees @ $2,000 per day ($14,000) making a total of $14,350. Upon appeal in respect of the quantum of costs—

HELD : Appeal dismissed.
1. The award of costs to a successful defendant is intended to be compensatory and may include the amount of wages lost as a result of the proceedings together with counsel's fees, provided that the amount awarded is just and reasonable in the circumstances.
***Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534; 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287; and**
***Commissioner for Corporate Affairs v Green* [1978] VicRp 48; [1978] VR 505; (1978) 3 ACLR 289; [1978] ACLC 40-381, applied.**

2. In exercising the discretion as to costs, it was open to the magistrate to take into consideration the complexity of the case, the serious nature of the charges, the range of penalties available in the event of conviction, the engagement of a senior junior barrister and the fact that there was a lot at stake for the defendant. In those circumstances, it could not be said that the allowing of the costs and fees claimed over-compensated the defendant or was not just and reasonable.

SMITH J: [1] On the 2nd November 1990 orders were made by the Magistrates' Court at Prahran in a number of informations. The informations can be identified and grouped as follows:

Forti v Moisidis
Cooke v Kotantonis
Love v Panagopoulos
Reed v John Tsakistaras
Gumley v Christos Tsakistaras

The defendants were charged with a variety of offences including unlawful assault. Mr Moisidis was also charged with intentionally causing injury and threatening to inflict serious injury. The charges arose out of an incident that occurred at the Checkpoint Charlie nightclub on the night of the 30th September 1989. At the conclusion of the evidence against the defendants, the learned Magistrate dismissed the informations.

Submissions were then put to him on behalf of the defendants as a result of which he made orders for costs against Mr Forti in all proceedings namely those in which he was informant and those in which he was not. The costs were determined and awarded as follows:

(i)	STACI MOISIDIS	
	Counsel's fees	$14,000.00
	Economic loss (wages), 7 days at $50 per day	$350.00
	TOTAL	$14,350.00
[2] (ii)	SPIROS KOTANTONIS	
	Counsel's fees	$2450.00

	Solicitor's fees allowed at	$550.00
		TOTAL $3000.00
(iii)	CHRISTOS TSAKISTARAS	
	Counsel's fees	$2,400.00
	Solicitor's fees allowed at	$800.00
	Economic loss (wages)	$350.00
		TOTAL $3,550.00
(iv)	JOHN TSAKISTARAS	
	Counsel's fees	$2,450.00
	Economic loss (wages)	$350.00
		TOTAL $2,800.00
(v)	PETER PANAGOPOULOS	
	Counsel's fees	$2,450.00
	Economic loss (wages)	$300.00
		TOTAL $2,750.00

Orders nisi to review were granted to the Director of Public Prosecutions in the proceeding in which Mr Forti was informant and to Mr Forti in respect of the proceedings in which he was not informant. This dichotomy results from the following provisions contained in s92 *Magistrates' Court Act* 1989:

> "92 (1) A party to a criminal proceeding (other than a committal proceeding) in a Court may appeal to the Supreme Court on a question of law, from a final order of the Court in a proceeding.
> (2) If an informant who is a member of the police force wishes to appeal under sub-section (1) the appeal must be brought by the Director of Public Prosecutions on behalf of the informant."

Thus in the proceedings in which Mr Forti was informant, the appeal is brought by the Director of Public **[3]** Prosecutions. In respect of the orders made against him for costs in proceedings where he was not informant, he argues that he should be regarded as a party to those proceedings but not an informant and therefore is the proper person to bring the appeal under s92(1).

The orders nisi in each proceeding listed the following questions of law as questions of law to be decided.

> "(i) (a) Did the Magistrate err in law in ordering Jeffrey Sydney Forti to pay the costs of all the proceedings that were before the Court and to which he was not a party?
>
> (b) Did the Magistrate fail to apply the appropriate principles of law to his consideration of the exercise of his discretion in respect of an order of costs?
>
> (c) Did the Magistrate err in failing to give reasons for his decision and the basis upon which he calculated the costs to be paid?
>
> (ii) Whether the learned Magistrate acted in breach of the rules of natural justice in that he failed to give the appellant an opportunity to be heard upon the question of whether he should be ordered to pay the costs of the Defendants in proceedings before the Court to which he was not a party and to be given an opportunity to seek separate representation?"

The learned Magistrate, in making the costs orders purported to exercise the power given to him under s131(1) of the Act. It states the following:

> "131(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."

[4] The defendants argued before the learned Magistrate that this section conferred a broad discretion to order costs and permitted the learned Magistrate to order costs against a person who was not a party on the record.

The material reveals that the learned Magistrate was informed that there had been several attempts, at various stages of the proceedings, to negotiate the abandonment of some of the

charges with a view to pleading guilty to one or more of the remaining charges and that they were made with Mr Forti. The material also reveals that on the 5th day of the Crown case when the learned Magistrate had indicated that he was having reservations about the strength of the Crown case, it was Mr Forti who insisted that the matters proceed even though the prosecuting officer expressed reluctance to continue. Counsel for the defendants warned him at that time that they would apply for costs if the informations were dismissed. The material also indicates that Mr Forti was the person who co-ordinated the investigation and the presentation of the case.

The Magistrate accepted the argument that the provisions of s131(1) were such as to confer the power upon him to order costs against Mr Forti in those matters in which he was not informant. Counsel for Mr Forti and the DPP did not wish to seriously challenge that conclusion. Thus he sought to rely upon it and base his case for saying that Mr Forti was a party for the purpose of s92 of the Act on the fact that the costs order was **[5]** made against Mr Forti. He argued that Mr Forti thereby became a party to the criminal proceedings. It was argued on behalf of the defendants that notwithstanding that the costs orders were made against Mr Forti he did not become a party to a criminal proceeding for the purposes of s92 of the Act.

The history of the legislation lends some support to the argument that the cost power created by s131 was intended to be wider than that previously given which was restricted to the power to award costs against an informant where an information was dismissed (see s97 *Magistrates (Summary Proceedings) Act* 1975 and s105(2) *Justices Act* 1958).

On the other hand, the study of the history of the legislation supports the view that the remedy of order to review has been narrowed in its scope and does not extend beyond parties strictly so called.

The previous provisions (s155(1) *Justices Act* 1958) gave the remedy to:

> "any person who feels aggrieved by the summary conviction or by any order of any Court of Petty Sessions."

Thus a prospective tenant who was affected by an order (*Dentry v Stott* [1947] VicLawRp 69; [1947] VLR 462; [1947] ALR 587) and a judgment debtor or competing claimant in respect of garnishee proceedings (*Hetherington v Driscoll* [1891] VicLawRp 79; (1891) 17 VLR 356 and *Hunt v Balfour* [1928] VicLawRp 71; [1928] VLR 488; 34 ALR 313; 49 ALT 289) have been held to be persons aggrieved in relation to orders in proceedings to which they were not parties (see also *Day v Hunter* [1964] VicRp 109; [1964] VR 845).

[6] In the ordinary course the expression in the present Act of "party to a criminal proceeding" would not include anyone other than the informant and defendant. The expression "party" is not defined in the legislation. This is to be compared, for example, with the *Supreme Court Act*, (s3(1)), where a party is defined to include "every person served with notice of or attending any proceeding, whether named on the record or not". The draftsman saw a need in that Act to extend the definition of party to include certain persons not named on the record. Researches into *Hansard* shed no light on the question but the contrast with the previous provision is such in my view that the proper conclusion is that it was intended to narrow the remedy to parties strictly so called.

I have come to the conclusion that the fact that Mr Forti was ordered to pay costs and that his name therefore appeared in the final order that was made, did not change his status in those proceedings where he was not the informant. He simply became a non-party against whom an order has been made. It follows, therefore, that Mr Forti did not have available to him the order to review provisions contained in s92 of the Act and to seek relief would have to do so by some other means – such as the use of prerogative writs. In that regard I note that he could argue that the power to order costs in s131 is limited to persons who are parties to the proceedings and that, as he argued before me, there was a denial of natural justice in respect of the making of the costs orders in those proceedings where he was not informant. In view of the **[7]** decision I have made on the preliminary point and the absence of argument before me on the scope of s131(1), I do not intend to express any concluded view as to whether s131(1) empowers a Magistrate to order costs against a person who is not one of the parties on the record.

I turn then to the order nisi to review granted to the Director of Public Prosecutions in respect of the order made in the proceedings brought by Mr Forti against Mr Moisidis The preliminary question that arose in the other matters does not arise in this matter, Mr Forti being the informant and the Director of Public Prosecutions being the proper party to apply for the order nisi and order absolute under s92 of the Act. I turn, therefore, to the other grounds. The second ground – that the Magistrate failed "to apply the appropriate principles in the exercise of his discretion" – is to be considered in the light of the principles that are well established for the determination of orders to review. In the context of costs decisions, the most relevant statement would appear to be that of McInerney J in *Commissioner for Corporate Affairs v Green* [1978] VicRp 48; [1978] VR 505; (1978) 3 ACLR 289; [1978] ACLC 40-381.

Where, as here, there are no detailed reasons given as to the steps taken in assessing and fixing the costs, the question to be asked is "What amount of costs could seem just and reasonable to a reasonable Magistrate on the facts before him, taking into account only relevant considerations". (*The Commissioner for Corporate Affairs v Green* above at 516). **[8]** The affidavit material, supplemented by an affidavit filed on the day of the hearing by the respondent, revealed that Mr Heliotis who appeared for Mr Moisidis before the Magistrate informed the Magistrate that Mr Moisidis had lost $50 nett per day by way of wages during the seven days of the hearing that had occurred. Further Counsel handed the back-sheet of his brief to the Magistrate and it showed a fee of $2,000 per day for seven days. The costs awarded by the Magistrate comprised and were determined as follows -

Counsel's fees	$14,000
Lost wages - 7 days @ $50 per day	$350.00
TOTAL	$14,350

The costs of the instructing solicitors was not claimed. The situation is one where there is no prescribed scale. Counsel was unable to identify one for me. Counsel for the DPP argued that the fees awarded to counsel were very large and quite out of proportion to those allowed to the other defendants ($2,400 and $2,450) and that therefore the Magistrate must have erred. It is established, however, that all barristers handed their back-sheets to the Magistrate and that counsel appearing for Mr Moisidis was a senior junior barrister and the barristers appearing for the other defendants were junior juniors.

The case was a complex case factually with a large number of charges brought against each of the defendants. So far as Mr Moisidis is concerned, he was facing very serious charges. In particular the charge of **[9]** intentionally causing injury related to an alleged stab wound inflicted upon a police officer. That offence carried a maximum penalty of 10 years imprisonment. While the Magistrate's powers were limited to imposing imprisonment of up to two years, it was open to the Magistrate to sentence the defendant up to that limit and in combination with other offences it was open to the Magistrate to sentence the defendant to a total of five years imprisonment. There was thus a lot at stake for Mr Moisidis.

The award of costs is intended to be compensatory (*Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534; 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287). There is nothing in the material before me that would suggest that it was not open to the learned Magistrate to take the view that the costs order he made would over-compensate Mr Moisidis for the costs he had incurred. It is to be noted that there was no application made for costs of preparation or conferences and no application was made for the costs of the instructing solicitor. The Magistrate's discretion is very broad (see *Latoudis* above). It must be exercised reasonably in accordance with the circumstances of the particular case. The costs to be awarded must be such as to the Court seem just and reasonable (*Latoudis* at 48). I am persuaded that the costs awarded could have seemed just and reasonable to a reasonable Magistrate taking into account only relevant considerations.

It was also sought to challenge the decision on the basis that the Magistrate did not give reasons **[10]** disclosing the basis upon which he arrived at the figure awarded for costs. In the light of the additional material filed during the hearing, this argument appears to have been met. It is clear that Mr Heliotis advised the learned Magistrate of certain figures for counsel's fees and lost wages and the learned Magistrate then asked the prosecutor whether he wished to query any of the amounts. The prosecuting officer Mr Iddles said he did not. The argument that took place was

directed to the other question of whether any costs order should be made at all. On the evidence it is reasonably clear how the Magistrate arrived at his decision and it was not necessary, in my view, for him to elaborate further in the circumstances.

It was also alleged that to claim lost wages was to, in effect claim damages and not to seek compensation for expenses incurred in defending the proceedings. (*Latoudis* at 50). It seems to me that this is taking an unduly narrow view of the concept of compensation. Accepting that Mr Moisidis lost wages, and the prosecutor did not contest that fact at the hearing before the Magistrate, it seems to me to follow that compensatory costs should include an amount to meet the sum for which he was out of pocket because he had lost wages as a result of the proceedings.

The final ground relates to an allegation of a denial of natural justice. In essence this argument for Mr Forti on the question of costs and that Mr Iddles was in a conflict position in that the other persons **[11]** against whom a costs order might be made were the other informants in those matters where Mr Forti was not the informant. That conflict argument cannot arise in the context of the proceedings against Mr Moisidis because Mr Forti was the informant. Thus this ground is also not made out.

I have come to the conclusion, therefore, that the appellants have not made out the grounds upon which they rely to support each of the orders nisi. Accordingly the orders nisi will be discharged with costs.

APPEARANCES: For the DPP: Mr R Downing, counsel. JM Buckley, Solicitor for the DPP. For the respondent Moisidis: Mr C Heliotis, counsel. T Lillis, solicitor. For the respondent Christos Tsakistaras: Mr Lombardi, counsel. Karamountas & Kiatas, solicitors. For the remaining respondents: Mr C Kilias, counsel. Legal Aid Commission Victoria.
