38/91

SUPREME COURT OF VICTORIA

DEL VECCHIO v STERLING

O'Bryan J

26, 28 June 1991

COSTS – INFORMATION DISMISSED – *PRIMA FACIE* CASE – CHARGE DISMISSED AS UNSAFE TO CONVICT – APPLICATION FOR COSTS – WHETHER GENERAL RULE AS TO COSTS APPLICABLE – WHETHER CIRCUMSTANCES OF DISMISSAL THE 'ORDINARY' CASE.

1. When dealing with the question of costs upon the dismissal of a charge, it is not relevant to consider how the verdict of 'not guilty' was reached. Nor is it open to a court to withhold costs because of a lurking suspicion that the defendant was probably guilty but not proved to be so beyond reasonable doubt.

2. Accordingly, a magistrate was in error in refusing an application for costs where, upon a 'no case' submission he ruled there was a *prima facie* case but dismissed the charge because the prosecution evidence was lacking in weight.

O'BRYAN J: [1] This is an appeal from a decision given in the Magistrates' Court at Frankston on 23rd January 1991. The appellant pleaded not guilty in the Court to a charge of theft of property belonging to his employer on 29th June 1990.

At the close of the respondent's case counsel for the appellant made a "no case" submission. The learned Magistrate ruled that although there was a *prima facie* case the evidence was so lacking in weight that in the exercise of his discretion he would dismiss the charge. The learned Magistrate apparently applied the test stated by McGarvie J in *Wilson v Kuhl* [1979] VicRp 34; [1979] VR 315 at 319. There, his Honour said:

> "In a case where there is evidence which, if accepted, would provide evidence of each element of the charge, a magistrate may still in some cases be entitled to exercise a discretion to dismiss the information without calling on the defendant. Where technically there is evidence on which the defendant could lawfully be convicted but the magistrate concludes that there is a mere scintilla of evidence or that the evidence is so lacking in weight or reliability that no reasonable tribunal could safely convict on it, he may dismiss the information: *Benney v Dowling* [1959] VicRp 41; [1959] VR 237; [1959] ALR 644 at p242; *Mooney v James* [1949] VicLawRp 6; [1949] VLR 22; [1948] 2 ALR 369 at p32; Practice Note, [1962] 1 All ER 448; [1962] 1 WLR 227."

The decision in *Kuhl* omits reference to a decision of McInerney J in *Commissioner for Corporate Affairs v Green* [1978] VicRp 48; [1978] VR 505; (1978) 3 ACLR 289; [1978] ACLC 40-381, delivered eight months earlier. There, his Honour said:

> "But on a no case submission, that is, when at the close of the case for the prosecution, a submission is made that there is 'no case to answer', the question to be decided is not whether on the evidence as it stands the accused ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted. This is really a question of law. *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654; [1955] ALR 671 @ 658; *Downard v Babington* [1975] VicRp 85; [1975] VR 872; (1975) 31 LGRA 314 @ 875."

[2] One may ask why the learned Magistrate did not simply rule against the "no case" submission when he found there was a *prima facie* case and then require the appellant to indicate the course the defence intended to take. Had the appellant then elected not to call evidence the learned Magistrate could have determined the ultimate issue, whether the evidence was sufficient to support a conviction. Nevertheless the correctness of the decision to find the appellant not guilty is not before the Court.

When the charge was dismissed counsel for the appellant sought an order for costs pursuant to s131 of the *Magistrates' Court Act* 1989 and referred to *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534; 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287. Section 131 of the *Magistrates' Court Act* 1989 provides (so far as is relevant):

> "(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"

This section confers a wide and unfettered discretion upon the Court as to costs. The learned Magistrate refused to award costs to the appellant on the ground that the determination of these proceedings was not a determination in "ordinary circumstances". He added that it was seldom a Magistrate would exercise his discretion to dismiss a charge at the end of the prosecution case on the basis that the prosecution evidence was so lacking in weight and reliability as to make it unsafe to convict. It is from the decision refusing to order the respondent to pay the appellant's costs that an appeal was brought to this Court. **[3]** The question of law is,

> (i) whether the Magistrate erred discretion not to award costs party;
>
> (ii) whether there were circumstances out of the ordinary which justified the Magistrate's decision not to award the successful party his costs.

One needs no reminder of the principle stated by Kitto J in *Australian Coal and Shale Employees' Federation v The Commonwealth* [1953] HCA 25; [1953] 94 CLR 621 at 627:

> "... in respect of decisions involving discretionary judgement there is a strong presumption in favour of the correctness of the decision appealed from, and that that decision should therefore be affirmed unless the Court of Appeal is satisfied that it is clearly wrong."

Cf. *House v R* [1936] HCA 40; (1936) 55 CLR 499 at 504-505; 9 ABC 117; (1936) 10 ALJR 202.

Notwithstanding this principle, the High Court has on occasions laid down "guidelines" as to the manner in which a discretionary judgement should be exercised. Cf. *Norbis v Norbis* [1986] HCA 17; (1986) 161 CLR 513; [1986] FLC 91-712; 65 ALR 12; (1986) 60 ALJR 335; (1986) 10 Fam LR 819; *Latoudis v Casey (supra).* The decision in *Latoudis* is directly in point although the statutory provision which was the subject matter of that case was s97 of the *Magistrates (Summary Proceedings) Act* 1975. Section 97 was replaced by s131 of the *Magistrates' Court Act* 1989. For all practical purposes s97 is not significantly different from s131.

In *Latoudis*, a majority of three Judges held that ordinarily, a court of summary jurisdiction, in exercising a statutory discretion to award costs in criminal proceedings will make an order for costs in favour of a successful defendant. All five members of the Court gave examples of **[4]** circumstances which might lead a Court to depart from the ordinary rule and refuse costs to a successful defendant. These examples were not intended to be, nor could they be, exhaustive of circumstances which might lead a Court to refuse to award costs to a successful defendant.

I do not believe that the learned Magistrate relied upon any of the examples mentioned by the Justices when he refused to award costs to the appellant. When the learned Magistrate said that his determination of the proceeding was not a determination in "ordinary circumstances" he obviously intended to distinguish the case from a case which would normally require an order for costs to be made in favour of a defendant. Mason CJ in *Latoudis* said (at CLR 542):

> "In ordinary circumstances it would not be just or reasonable to deprive a defendant who has secured the dismissal of a criminal charge brought against him or her of an order for costs".

The question then arises, did the learned Magistrate regard the manner in which the appellant was found not guilty as entitling him to depart from what may be regarded as the general rule that an order for costs should be made in favour of a successful defendant? Mason CJ (at 544) said:

> "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".

The inference I feel compelled to draw from the words of the learned Magistrate is that he formed the view the appellant was not wholly vindicated by the decision because the evidence had established a *prima facie* case and **[5]** that this circumstance was relevant to the question of costs. In other words, in determining how the discretion should be exercised the learned Magistrate deemed it relevant to consider how the verdict was reached.

In my opinion, it was not a relevant consideration to costs to conclude that the verdict of not guilty did not wholly vindicate the appellant.

If this was the underlying reason of the learned Magistrate, as I think it must have been, in my opinion, his discretion as to costs miscarried as the following passage in the judgment of Dawson J in *Latoudis* shows: Dawson J said (at CLR 560):

> "In many cases defendants quite properly escape conviction without having positively established their innocence. However, to differentiate cases of that kind from those in which a defendant has established his innocence, and not merely raised a doubt by making an order for costs against the informant in the one case but not the other, would be invidious and inconsistent with a presumption of innocence."

It would seem that the learned Magistrate was drawing a distinction between a case in which a defendant had established his innocence by evidence and the case before him which failed because the evidence for the prosecution was unsatisfactory and not because the appellant positively established his innocence.

The law in this country does not recognise a "second class" or "not proven" verdict of acquittal as a reason for depriving a person of costs.

It is not open to a Court to withhold costs because of a lurking suspicion that the defendant was probably guilty but not proved to be so beyond reasonable doubt. This was not a verdict in favour of the appellant based upon a technicality, a circumstance which might lead a Court to **[6]** refuse to award costs. In my opinion, the learned Magistrate took into account a matter which was not relevant to the exercise of his discretion, that the prosecution evidence was unreliable and unsatisfactory.

I am persuaded, therefore, that the discretion miscarried and the appeal must succeed. The first question of law will be answered in the affirmative, the second in the negative. The order of the Court will be that the order in the Court below as to costs will be set aside. The matter will be remitted to the Magistrates' Court at Frankston to be dealt with according to law. The Magistrate will determine the quantum of costs the appellant should receive. The respondent is ordered to pay the costs of the appeal.

APPEARANCES: For the appellant Del Vecchio: G Georgiou, counsel. Wright Smith, solicitors. For the respondent Sterling: Mr BM Dennis, counsel. JM Buckley, Solicitor for the DPP.
