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SUPREME COURT OF QUEENSLAND — FULL COURT

TURNER v RANDALL, ex parte RANDALL

Kneipp, Demack and Carter JJ

4 August, 9 September 1987 — (1988) 1 Qd R 726

COSTS – INFORMATION WITHDRAWN – PROSECUTOR UNABLE TO PROVE ELEMENT OF OFFENCE – APPLICATION BY DEFENDANT FOR COSTS – APPLICATION REFUSED – WHETHER MAGISTRATE'S DISCRETION MISCARRIED.

1. Where an application for costs is made upon the dismissal of an information, there is no rule governing the exercise of the court's discretion to the effect that a police officer who lays a complaint in his official capacity and who fails in that complaint should not have costs awarded against him except in exceptional circumstances.

***Smith v Robinson; ex parte Robinson* (1980) Qd R 372; and**

***Lewis v Utting;* ex parte *Utting* (1985) 1 Qd R 423; (1985) 17 A Crim R 139; MC 8/1986, followed.**

***Savage v Bozier;* ex parte *Savage* (1987) 1 Qd R 468; 24 A Crim R 249; MC 7/1987, distinguished.**

2. Where a charge was withdrawn after an admission by the prosecutor that he could not prove an element of the offence (which inadequacy of proof did not depend on questions of credibility or the fine balancing of issues but lay at the heart of the charge), the Magistrate's discretion as to costs miscarried in refusing to order costs against the informant.

THE COURT: ... **[729]** Turning next to ground (b)(ii), we have referred briefly to the matters raised in *O'Sullivan v Lunnon* (1986) 60 ALJR 672. It is clear from that decision that one issue that had to be proved is an intention to harass a person "because that person was performing duties ordinarily performed by him or her in the course of his or her employment in connection with the supply of electricity". It seems to be a fair assumption that the prosecutor was admitting that he could not prove that part of the charge. Clearly proof that some worker was harassed was some evidence of the intention, but the harassment had to be "because that person was performing duties". If this assumption is correct then the prosecution simply had no evidence about an essential part of the charge.

Section 158 of the *Justices Act* provides that when justices, instead of convicting or making an order, dismiss the complaint, they may by their order of dismissal order that the complainant shall pay to the defendant "such costs as to them seem just and reasonable". The words quoted are exactly the same as the words in s157 which empower justices to order a convicted defendant to pay costs.

This court in *Smith v Robinson, ex parte Robinson* [1980] Qd R 372, 373, per Lucas J made it perfectly clear "that there is no rule that a public officer", be he police officer or otherwise, "who lays a complaint in his official capacity and who fails in that complaint should not have costs awarded against him except in exceptional circumstances". He went on to say:

> "We do not intend to lay down any principles which should govern Magistrates in the exercise of their discretion to award casts on a dismissal of a complaint except to say that they must give their attention to the circumstances in each case and act according to the result at which they arrive."

Those statements of principle are binding and have to be followed unless and until they are displaced by a decision of the High Court. **[730]** Section 158 has been considered in two subsequent decisions of this Court, *Lewis v Utting, ex parte Utting* (1985) 1 Qd R 423 and *Savage v Bozier*, *ex parte Savage* (1987) 1 Qd R 468, at 476. Those cases did not in any way alter the general rules stated by Lucas J. In *Lewis v Utting, ex parte Utting* this court considered decisions in the Full Court of South Australia and in the Full Court of the Federal Court which were said to support a practice that generally a defendant acquitted in a court of summary jurisdiction should

have his costs unless there are reasons why he should be deprived of them. This approach was rejected by the Full Court for it would amount to laying down rules about how the discretion to award costs should be exercised, and such an approach had been rejected in *Smith v Robinson, Ex parte Robinson.* In *Savage v Bozier, ex parte Savage* Vasta J (with whom Connolly J agreed) said at 476:

> "It would folly then that I would consider it a most exceptional and rare case where an award for costs were made against a police officer who has been found to have acted with the utmost propriety in bringing a charge in respect of an offence against the person. In such cases the keeping of peace is of paramount community concern."

These remarks were made in a case where a woman complained to the police that she had been assaulted by a man with whom she was living. After interviewing the man, a police officer arrested him and charged him. At the hearing the Stipendiary Magistrate disbelieved the woman, dismissed the complaint and ordered the police officer to pay costs. Thus the remarks of Vasta J indicate relevant considerations arising out of the facts of the particular case, but in the light of this court's clear statements in *Smith v Robinson, ex parte Robinson* and *Lewis v Utting, ex parte Utting*, the remarks cannot be taken as laying down a rule about how the discretion ought to be exercised. In the present appeals, the prosecutor conceded that he could not prove an essential part of the charge. The people whose performance of their duties the section was designed to protect were not present. The arrests were made in circumstances where there was no evidence to support the charge. In those circumstances, the submissions made by the prosecutor to the Stipendiary Magistrate, to which I have referred, were hardly appropriate. The police were not acting in accordance with the legislation, and it is not possible to act with utmost propriety while making an arrest that cannot be sustained on the evidence that may be presented.

It seems that the Stipendiary Magistrate has failed to give due weight to the admission by the prosecutor that he could not prove an element of the offence and in the circumstances of these appeals his discretion has miscarried. The inadequacy of proof does not depend on questions of credibility or on the fine balancing of the issues. It lies at the heart of the charge. Consequently, in our opinion, his orders as to costs should be set aside, and the complainant in each instance should be ordered to pay costs.

In each case then the court would allow the appeal with costs, set aside the orders made and order that the complainant be dismissed with costs and remit the case to the Stipendiary Magistrate with a direction to assess a sum for costs in accordance with what seems to him to be just and reasonable.
