

CITATION: *Walker v Fong* [2002] NTMC 019

PARTIES: Philip Russell Walker
v
William Desmond Fong

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Justices Act

FILE NO(s): 9929185

DELIVERED ON: 21 June 2002

DELIVERED AT: DARWIN

HEARING DATE(s): 7 February 2002, 19 April 2002, 22 April 2002

DECISION OF: Mr V M LUPPINO SM

CATCHWORDS:

Costs – Costs of adjournment – Whether the Court has power to make an order for costs of an adjournment in committal proceedings – Meaning of “proceedings”.

Statutory Interpretation – Application of various principles of statutory interpretation

Justices Act (NT) 1928 s 77B; Interpretation Act (NT) s 55; Crimes Act (Cth) ss 4G; Judiciary Act (Cth) 1903 s 68(1)

Latoudis v Casey (1990) 170 CLR 525; *R v Goia* (1988) 19 FCR 212; *O’Connell v Short* (1985) 20 A Crim R 111; *Crowe v Bennett* (1992) A Crim R 416; *R v Horsham Justices* [1982] 2 WLR 430.

REPRESENTATION:

Counsel:

Informant Mr Cantrill
Defendant: Mr Elliot

Solicitors:

Prosecution DPP
Defendant: Anthony Crane

Judgment category classification: B
Judgment ID number: [2002] NTMC 019
Number of paragraphs: 23

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 9928185

BETWEEN:

PHILIP RUSSELL WALKER
Informant

AND:

WILLIAM DESMOND FONG
Defendant

REASONS FOR DECISION
(Delivered 21st June 2002)

Mr V LUPPINO SM:

1. On 22 April 2002 I found a case to answer in this matter and ordered the defendant be committed for trial to the Supreme Court on a number of charges pursuant to s 29A(1) and 29B of the *Crimes Act 1914*.
2. The history of the matter is relevant to the current issue and is as follows. The defendant had originally been charged on two informations, one laid 20 December 1999 alleging two offences under s 71(1) of the Crimes Act and another information laid on 23 December 1999 alleging a further offence under that same section. The matter had initially been set down for an oral committal on 6 and 7 February 2001. On 2 February 2001 those dates were vacated by agreement between the parties but at the request of the prosecution. On that date alternative oral committal dates of 29 and 30 May 2001 were fixed. An order was made reserving to the 29 May 2001 the question of the costs thrown away for 6 and 7 February 2001.
3. The oral committal could not proceed on the appointed dates in May 2001 as two prosecution witnesses who had been summonsed to attend, failed to answer those summonses. Warrants of apprehension were ordered to issue in

respect of those witnesses on that date and the matter was adjourned pending apprehension of those witnesses. Ultimately those witnesses were apprehended and bailed to appear to give evidence. Fresh oral committal dates of 7 and 8 February 2002 were set. Fresh informations had been laid on 2 February 2002 alleging nine offences in total, four under s 29A(1) and five under s 29B in the alternative. Those were the charges which ultimately proceeded to a committal hearing before me commencing 7 February 2002.

4. At the conclusion of the committal hearing, Mr Elliott on behalf of the defendant made application for costs for the vacated hearing originally set for 6 and 7 February 2001. It was submitted (and I don't think it is disputed) that the hearing could not proceed on the February 2001 dates because of the unavailability of prosecution witnesses. The matter was only briefly argued before me. Mr Cantrill's submissions were made to me without the benefit of extended consideration as he had not been put on notice by Mr Elliott that an application for costs was to be made at that time. Mr Elliott in turn only made cursory submissions on the issue. As a result I reserved my decision as I was of the view that there was considerably more to the issue than the relatively brief argument before me disclosed.
5. The offences before the court are indictable offences by reason of s 4G of the *Crimes Act*. They could be heard summarily if both the prosecution and the defendant were to agree to that course. However the prosecution at least has not consented to the matter being disposed of summarily, hence the matter had to proceed by way of a committal hearing.
6. The rule at common law in criminal matters is that there was no power to award costs. *Latoudis v Casey* (1990) 170 CLR 535. It was held in *R v Goia* (1988) 19 FCR 212 that the principle covers not only proceedings where the guilt or innocence of the defendant is the issue, but also other proceedings of an interlocutory nature such as applications for change of venue, applications for stays, applications for severance, etc.

7. The starting point therefore is that absent some statutory power costs cannot be awarded in criminal matters.

8. There is no statutory provision in the *Crimes Act* itself and therefore by s 68(1) *Judiciary Act* (Cth) 1903, Northern Territory law applies. In the Northern Territory the only applicable statutory power, is that set out in the *Justices Act* 1928 (“the Act”). S 77-77C are relevant. These are set out in Division 5 of Part IV that deals with the summary jurisdiction of the Court. The parts of those sections relevant to the issue before me provide as follows:-

77. (1) Subject to subsection (2) and section 77A, where the Court finds a defendant not guilty of any offence on a complaint or a complaint is withdrawn, it may order the complainant to pay to the defendant such costs as it thinks fit.

77A. Subject to section 77C, where the Court finds a defendant guilty of an offence, it may order the defendant to pay to the complainant such costs as it thinks fit.

77B. Where a proceeding is adjourned, the Court may, whether or not the defendant is subsequently found guilty of the offence with which he or she is charged, make an order for costs against the party who requested the adjournment.

77C. The amount that the Court may order for costs under section 77, 77A or 77B shall not exceed the amount calculated in accordance with the prescribed scale.

9. The definition of complaint in s 4 of the Act is in the following terms:-

“Complaint” includes a charge of a minor indictable offence, if, and when, a court of summary jurisdiction proceeds to dispose of the charge summarily.

10. Accordingly an order for costs could not be have been made under s 77 as this matter was not disposed of summarily. In any event s 77 cannot apply to the current case as it is a prerequisite for an order under that section that there either be a finding of not guilty or that the complaint is withdrawn.

Similarly s 77A cannot apply as that requires a finding of guilt and in any event is only relevant in the case of an application for costs by the prosecution.

11. The only statutory power which therefore can have application is s 77B if that section can be interpreted to allow for an order for costs for an adjournment of a committal hearing for an indictable offence.
12. Section 77B is within Part IV (headed as “Summary Jurisdiction”) of the Act whereas committal hearings are regulated by Part V (headed as “Indictable Offences”). It is arguable therefore that s 77B is not intended to apply to committal proceedings.
13. A heading to an act is part of an act (s 55 *Interpretation Act* (NT) 1978) and can be considered as an aid to interpretation of an act. I think however that the definition of “complaint”, including as it does a reference to minor indictable offences, albeit limited to matters disposed of summarily, is inconsistent with the headings. However it is clear that an order for costs under Division 5 Part IV could be made in relation to an indictable offence heard summarily notwithstanding that Part V of the Act would then regulate that hearing, at least in part. I think the words of s 77B are clear and therefore the inconsistency in the heading is to be disregarded according to principles of statutory interpretation.
14. The next consideration is the use of the word “proceeding” in s 77B, a term which is not defined in s 4 of the Act. The definition of that word in Butterworths Australian Legal Dictionary is as follows:-

“An action commenced in a court. A proceeding is a proceeding in a court whether between parties or not, including an incidental proceeding in the course of, or in connection with the proceeding, and includes an appeal. Historically, the term “proceeding” was given a narrow interpretation to mean “invocation of jurisdiction of the court by process other than a writ” (*Herbert Berry Associates Limited v Inland Revenue Commissioners*) [1977] 1WLR 1437 at 1446; or “ an application by a suitor to a court in a civil jurisdiction

for its intervention or action” (*Cheney v Spooner*) (1929) 41 CLR532 at 538. This traditional legal meaning has been extended...to mean the steps and procedures that take place before an investigating magistrate, even though the task of the magistrate in issuing an extradition warrant is administrative as distinct from legal or judicial; *Forrest v Kelly* (1991) 105 ALR 397 at 408.”

15. This gives the word a very wide meaning sufficient in my view to cover committal hearings. The latter part of the above definition has some application here given that committal proceedings are also administrative in nature. I think it is indicative of Parliament’s intention that the section refers to a “*proceeding*” as opposed to a “*hearing*” or a “*trial*” or some other more confined word or term which describes the various types of matters which come before the Court of Summary Jurisdiction. It also makes no attempt to limit the application by reference to the originating process, whether that be an application, complaint or an information. Hence it would appear on its face that the section is able to have application both to summary matters and to indictable offences. I also draw support from *R v Horsham Justices* [1982] 2 WLR 430 where the same word in the phrase “...in any such proceedings...” in the *Contempt of Court Act* was held to apply also to committal hearings.
16. Moreover the word “proceeding” is used extensively throughout the Act. In particular the apparent meaning of the word as it appears in sections 26A(1), 28(1), 29, 35(1), 45, 54(1), 77(2), 106A(1) and (3), 116(1), 121A(1A), 130B(1)(b), 131(1), 133, 139, 163(1) and (3), 175, 176, 185(1)(b), 186(1) and (2), 201A(2)(a), (b) and (d), and 201A(4), I believe evidences an intention that the term is meant to include committal hearings. I determine this on application of the principle of statutory interpretation that an act must be looked at as a whole for the purposes of discerning its meaning. There is however one use of the word in one section of the Act which suggests the contrary namely in s 46, the power of the Court to deal with contempt of the Court. s 108A of the Act states that the power given by s 46 applies in the same manner in relation to committal hearings. That suggests

that the word “proceedings” in s 46 is not intended to refer to committal hearings given the separate statement of the existence of the same power in relation to committals in s 108A. The use of the word throughout the Act therefore arguably lacks total consistency, however by far an overall reading of the Act is in favour of an interpretation that “proceeding” in s 77B includes a committal hearing. This must be so on application of another principle of statutory interpretation, namely that interpretations which give the greatest harmony and the least inconsistency are to be preferred.

17. In light of the foregoing I am of the view that a committal hearing is a “proceeding” in this Court for the purposes of s 77B of the Act.
18. I do not think however that resolves the question as to whether this Court has power to award costs in the current situation. This is because section 77B goes on to state that an order can be made “... *whether or not the defendant is subsequently found guilty of the offence with which he or she is charged...*”. If there were any ambiguity as to whether section 77B were to apply to committal proceedings then I think that those latter words resolve that ambiguity. Like s 77(1), those words suggest that the power only exists where the Court of Summary Jurisdiction will finally dispose of the proceeding. A matter which is the subject of an indictment in the Supreme Court following a committal hearing in this Court will of course ultimately result in a finding in the Supreme Court. I think however that it goes too far to interpret s 77B in such a way that the power of the Court of Summary Jurisdiction to award costs can depend on the ultimate disposition of the matter in the Supreme Court. That would seem to offend against the doctrine of *functus officio* and it is difficult to see how Parliament could have intended that in the absence of specific words to that effect.
19. I have therefore come to the conclusion that this Court has no power to make an order for costs in committal proceedings based on s 77B of the Act.

20. There is authority however to suggest that the Court of Summary Jurisdiction has an inherent power and discretion to award costs for an adjournment of an information. *O'Connell v Short* (1985) 20 A Crim R 111. In that case, although it was acknowledged that a Court of Summary Jurisdiction has no powers other than those given by the statute, Zelling J decided that the issue before him based on what his Honour described as the inherent powers and discretions which necessarily repose in Courts of Summary Jurisdiction in the exercise of their admitted powers and jurisdictions. He held that he was not dealing with the existence of the power going to jurisdiction and that is distinction he made. He compared it to the inherent power to exercise a discretion to permit a change of plea, the inherent power to order particulars, the inherent power to set aside a subpoena, the inherent power to adjourn sine die and the inherent power to amend an information. These were found to be powers of a Court of Summary Jurisdiction in previous cases notwithstanding that on the facts of those cases the statutory power did not exist. Zelling J accordingly found that the power to award costs consequent upon an adjournment is one such inherent power.
21. There is contrary authority in *Crowe v Bennett* (1992) A Crim R 416, a decision of the Queensland Court of Appeal. *O'Connell v Short* was decision of a single judge of the Supreme Court of South Australia. In *Crowe v Bennett* it was held that in Queensland at least, Courts of Summary Jurisdiction do not have an inherent non statutory discretion to award costs. The case went on to decide, based on the interpretation of the precise wording of the appropriate statute, that the power given by the statute to award costs in the case of an adjournment applied whether the adjournment was in relation to a summary offence or an indictable offence. That may become relevant from the point of view of the interpretation of s 77B which I have discussed above.

22. In the event that *O'Connell v Short* is good authority in the Northern Territory then it would be my decision in any event not to award costs thrown away in favour of the defendant on discretionary grounds. This is on the basis of what occurred subsequent to the adjournment namely that there was a fresh information laid. As such, if it were not for the fact of the adjournment, the defendant may well have faced further and separate committal proceedings in relation to those charges. The defendant therefore has received the benefit of having the committal hearing for all of the charges heard together. Absent that the defendant may well have faced the prospect of an ex officio information in relation to the fresh charges. Leaving aside the efficacy of that approach, such a step might have been very much to the disadvantage of the defendant in that he would not have had the opportunity at the committal proceedings in respect of those charges to explore issues in relation to the evidence which the committal procedure would afford him.
23. For the foregoing reasons it is my ruling that even if the power to award costs exists as an inherent power following the principle of *O'Connell v Short*, in the exercise of my discretion I would decline the order for costs in any event.

Dated this 21st day of June 2002.

V M LUPPINO
STIPENDIARY MAGISTRATE