CITATION: *Brennan v Davies [2006]* NTMC 025

PARTIES:	MICHAEL DAVID BRENNAN
	v
	WILLIAM PATRICK DAVIES (COSTS ARGUMENT FILE 20326452)
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	Court of Summary Jurisdiction
FILE NO(s):	20326452
DELIVERED ON:	30th March 2006
DELIVERED AT:	Darwin
JUDGMENT OF:	Jenny Blokland SM

CATCHWORDS:

CRIMINAL LAW – COSTS
S77 *Justices Act (N.T.)*
Latoudis v Casey [1990] CLR 534
Daryl Paul Milton v Robin Lawrence Trennery [2000] NTSC 81
Cabal v United Mexican States and Another [2000] 174 ALR 747
Hansard, Legislative Assembly, Debates, 8 May 1991

REPRESENTATION:

Counsel:

Informant:	Mr Geary
Defendant:	Ms Truman

Solicitors:

Informant:	ODPP
Defendant:	Halfpenny's

Judgment category classification:	B
Judgment ID number:	[2006] NTMC 025
Number of paragraphs:	11

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

No. 20326452

BETWEEN:

MICHAEL DAVID BRENNAN
Plaintiff

AND:

WILLIAM PATRICK DAVIES
Defendant

(Delivered 30 March 2006)

Ms JENNY BLOKLAND SM:

Ruling on Costs

1. I completely accept that a person acquitted of a charge heard summarily would usually be entitled to their costs. This is very rarely an issue of any contention. In this case after a lengthy hearing, Mr Davies was acquitted of one charge of furnishing deceptive accounting records contrary to *S233(b) Criminal Code* and one count of obtaining property, namely $17,195.90 by deception. The circumstances of how he came to be charged and the reasons for acquittal are set out in my reasons published 28th November 2005. I won't revisit those reasons save to say that although the court acquitted Mr Davies, the published reasons stated:

> *"In my view, it is no wonder Mr Davies fell under suspicion and was investigated."*

Those reasons also stated:

> *"The defendant's failure to properly account for his leave; to assume he can take TIL; to return from leave to work and not document it*

and to cash up leave at various times is highly reckless. It is no wonder he has come under investigation."

2. I gather that partly as a result of those comments the Office of the Director of Public Prosecutions on behalf of the informant took the unusual step of opposing the defendant obtaining an order for costs. On behalf of the Defendant it was argued that by virtue of *Latoudis v Casey* [1990] 170 CLR 534, costs should be awarded to him. Although that would usually be the order, because of the conduct of the defendant as noted above, it did not, on the face of it, seem a naturally just result to order costs in his favour and I indicated to the parties that I thought it was in order to review the applicability of the authorities to this case.

3. *Section 77* of the *Justices Act* reads as follows:

(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.

(2) The Court shall not make an order for costs under subsection (1) if

(a) The defendant's actions or omissions in connection with the alleged offence were, in the opinion of the court-

(i) unreasonable in the circumstances; and

(ii) contributed to the institution or continuation of the proceedings;

(b) the defendant's actions or omissions during the course of the proceedings or in the conduct of the defence were, in the opinion of the court, calculated to unnecessarily prolong the proceedings or cause unnecessary expense; or

(c) in the opinion of the Court, there was sufficient evidence to support a finding of guilt but the defendant was entitled to an acquittal because of a minor procedural irregularity.

4. Prior to the 1991 amendments, (Act No 41, 1991), *S77 Justices Act* previously allowed the court to award "*just and reasonable*" costs to a successful prosecutor or defendant. The *Justices Act* was amended having regard to the High Court decision *Latoudis v Casey* [1990] 170 CLR 534. Mr Manzie (Attorney-General) summarized the background in the second reading speech (Hansard, Debates Wednesday 8 May 1991):

> *"In respect of the first [this] matter, 2 judicial approaches have developed. The Queensland view was that costs would be awarded against a failed police prosecution only in exceptional circumstances. The South Australian view was that costs would be awarded unless the defendant was at fault. The South Australian position has been adapted in the Northern Territory since 1988 in Tenthy v Curtis (NT Supreme Court). In Latoudis v Casey (1990) 65 ALJR 151, the High Court, by a 3-to-2 decision, said the South Australian position applies throughout Australia. In coming to its conclusion, the High Court did indicate a number of grounds where it would be appropriate to deny costs to an acquitted defendant, being situations where the accused was at fault. These are contained in paragraphs (a) and (b) of subsection (2) of section 77A.*
>
> *The committee considered that it was not appropriate to restrict the court's discretion beyond the common law, but did recommend that the exceptions to the general rule be put on a statutory basis. The committee also wished to add the following criteria: Where there is sufficient evidence to support a finding of guilt but the defendant is entitled to acquittal on account of a procedural or technical irregularity, the defendant should be left to pay his or her own costs."*

5. It is clear that the starting point is that costs in a criminal proceeding ought generally to be awarded to a successful defendant, unless there are particular reasons not to award them or one of the statutory exceptions applies. Her Honour Thomas J analysed the section in *Darryl Paul Milton v Robin Lawrence Trenerry* [2000] NTSC 81 applying *Latoudis v Casey* (supra) in support of the general rule adding that costs are awarded to indemnify a

successful defendant, not to punish the informant. Her Honour upheld a magistrate's decision not to award a successful defendant's costs on the grounds that the defendant had never volunteered a statement to police giving a version consistent with his innocence, nor did he tell police there were witnesses who could give evidence that he was not involved. Much of the argument concerned whether this ruling conflicted with the defendant's right to silence. The magistrate had found the defendant's actions unreasonable in the circumstances and contributed to the institution of proceedings. Her Honour determined this conclusion was a matter within the discretion of the magistrate and there was no error.

6. That is not the situation here. Here the defendant was co-operative with police, providing documents and a lengthy record of conversation. There is no way the defendant's *post* offence conduct can be said to have contributed to the institution or continuation of the proceedings; nor that the conduct of his defence was calculated to prolong the proceedings or cause unnecessary expense. It is clear ss77(2)(b) and (c) *Justices Act* do not apply.

7. The question here is whether the defendant' actions or omissions in connection with the alleged offence were *unreasonable in the circumstances* and *contributed to the institution or continuation of the proceedings*: ss77(2)(a)(i) and (ii) *Justices Act*. I am aware that in dermining costs in these circumstances, I should *look at the matter primarily from the perspective of the defendant*: *Latoudis v Casey* [1990] HCA 59, Mason CJ at para 13. Costs are compensatory and not awarded to punish the unsuccessful party. The fact that the charge and prosection are reasonably brought is an irrelevant consideration. Most of the discussion in *Latoudis v Casey* concerns conduct arising *after* the events that gave rise to the prosecution: (an example is *Milton v Trennery* Supra). I note that within *Latoudis v Casey* itself, Mason CJ said the magistrate was originally in error for basing his decision to refuse costs on the defendant's participation in the transaction which gave rise to the offence alleged. His Honour said "It

would have been different had the magistrate relied upon conduct of the defendant in the course of the police investigation of the case" [para 19].

8. The closest that any of their Honours' approach comes to approval for the proposition of examining the defendant's conduct during the transaction that gave rise to the offence is McHugh J who states [para 8] "… 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…". Although I have been critical of the defendant's conduct, I cannot conclude he *unreasonably induced* the charge.

9. Mr Geary suggested I read *Cabal v United Mexican States and Another*:([2000] 174 ALR 747) for the proposition that costs in criminal cases are subject to a broad discretion capable of justifying refusal to award costs in this case. I note Goldberg J essentially decides that the public interest in not dissuading persons in custody from applying for bail for fear of costs being awarded against them outweighs the general rule that a successful party is to be compensated for its costs. I can't conclude that there exists a similar countervailing public interest in this case.

10. In conclusion, although I have some sympathy with the argument opposing costs, the current state of the law circumscribes the exercise of the discretion to the point it would be an error not to award costs even in this case. I base that conclusion primarily on s77 *Justices Act* and *Latoudis v Casey* on which it rests.

11. I order the informant pay the Defendant's costs in the sum of $3,530. This decision will be emailed to the parties today without need for further appearance by them.

Dated this 30th day of March 2006.

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Jenny Blokland
STIPENDIARY MAGISTRATE