PARTIES:	YUNUPINGU, James Gallarwuy
	v
	GOODSELL, Colin James
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT DARWIN
FILE NO:	JA15 of 1998
DELIVERED:	24 December 1998
HEARING DATES:	15 December 1998
JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

Criminal – procedure – appeal – costs – court's discretion – prior 'gentleman's agreement' on costs between legal representatives – agreement directed to the learned Magistrate – defendant later resiled from agreement – whether learned Magistrate thought that agreement debarred the defendant from applying for costs

Justices Act (1928) NT, s77 and s77(2)

Latoudis v Casey (1990) 170 CLR 534, referred to.
Robinson v Shoalhaven City Council (1985) 55 LGRA 135, Bignold J, distinguished.
Geoform Design Pty Ltd Architects v Randwick City Council, Land & Environment Court of NSW, unreported 19 May 1995, Pearlman J.

REPRESENTATION:

Counsel:

Appellant:	M Hardie
Respondent:	J Karczewski

Solicitors:

Appellant:	Martin Hardie
Respondent:	DPP

Judgment category classification:	
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. JA15 of 1998

BETWEEN:

JAMES GALLARWUY YUNUPINGU
Appellant

AND:

COLIN JAMES GOODSELL
Respondent

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 24 December 1998)

[1] This is an appeal against a decision of the Court of Summary Jurisdiction refusing to make an order as to costs in criminal proceedings after the appellant had been found not guilty (see generally s77 of the *Justices Act*). In ordinary circumstances an order for costs should be made in favour of a defendant against whom a prosecution has failed; refusal usually rests upon the conduct of the defendant before the charge is laid or in relation to the proceedings (*Latoudis v Casey* (1990) 170 CLR 534). The discretion has been fettered in the circumstances set out in s77(2) of the *Justices Act* (enacted after the High Court decision), but it is not suggested that any of those circumstances arise here.

[2] Relevantly, what had transpired between the complainant and the defendant, through their respective legal representatives, was somewhat unusual. At an early stage of the hearing it was agreed between Mr Elliott for the complainant and Mr Dalrymple for the defendant that neither side would seek costs. It is not doubted that that agreement was to prevail whatever the outcome of the proceedings, each party agreeing to forbear the right to apply for costs after the decision of the Court was known. Although there are some circumstances which may have led up to the agreement they are not relevant and it was not part of a compromise. It was put to his Worship and this Court that neither party thereby intended to create legal relations. It was regarded as a "gentleman's agreement" – binding as a matter of honour alone, not enforceable at law.

[3] After the close of evidence, and prior to his Worship delivering his reasons, counsel for the defendant informed counsel for the complainant of instructions to withdraw from the agreement in the following terms: "The arrangement was not to be followed through, at least as far as the defence was concerned". Mr Elliott for the complainant spoke to counsel then appearing for the defendant, Mr Levy, just prior to his Worship delivering his decision and informed him that the complainant considered himself bound by the agreement that each party bear his own costs, but was met with the reply: "Well that's a matter for you". The change of heart was brought about by different advice given when the agreement was made and after the conclusion of the hearing.

[4] The defendant's application for costs followed the finding in his favour. It was conceded by counsel for the defendant before his Worship that the agreement was a relevant consideration to the exercise of his discretion. (I declined to hear submissions on appeal that it was not relevant; to have done otherwise would have permitted the defendant to argue a new case on the appeal). No arguments on costs were directed to his Worship other than by reference to the agreement. It seems to have been accepted by the complainant that in the ordinary course an order would be made in the defendant's favour, but the agreement and the defendant's resiling from it were relevant. Neither counsel suggested to his Worship that the circumstances provided any clear guidance as to the outcome.

[5] In his reasons, his Worship expressly referred to the discretion, and to a number of examples of situations where an order in favour of a successful defendant had been refused, none of which were applicable. He went on to say that there was a further situation, that is, that the parties had made an agreement as to costs. His Worship found there was an agreement in the terms set out above, but made no reference to the defendant's change of heart. "I think that agreement is one that disqualifies a party from later seeking costs. I don't think it's appropriate to make an order for costs in that situation and I decline to exercise my discretion. There will be no order as to costs".

[6] It may be queried whether the learned Magistrate thought that the agreement debarred the defendant from applying for costs or whether it had the effect

that when the application was made it must be refused. Either way I consider that his Worship erred in law. It seems to me that an agreement that neither party in criminal proceedings would seek an order for costs can not have the effect of divesting the Court of its jurisdiction. That discretion is vested in the Court by the Parliament. It has prescribed the fetters on its exercise and they do not include reference to any such agreement. The jurisdiction of the Court can not be ousted by any such agreement and in the events which happened in this case, the defendant qualified to make his application.

[7] There have been cases in which agreements as to costs have been held to be relevant to the exercise of a Court's discretion. In *Robinson v Shoalhaven City Council* (1985) 55 LGRA 135, Bignold J. had before him an application to set aside a valid consent order that the applicant pay costs to the other party because of his later discovering the quantum which the other party sought. His Honour held that he had no jurisdiction to accede to the application, but concluded his remarks by saying that if he had the power he would have no hesitation in declining the relief, "on the ground that no valid reason had been advanced as to why the order for costs made by the consenting parties should be reversed". That case is distinguishable, the agreement having been carried into effect by the order of the Court. The other case referred to was *Geoform Design Pty Ltd Architects v Randwick City Council,* a decision of Pearlman J. in the Land and Environment Court of New South Wales, unreported 19 May 1995. A developer had sought

council consent to a development based on a particular proposal which was refused. The proposal changed and council resolved not to oppose the application provided the developer paid the council's and objector's costs thrown away. The Tribunal before whom the matter came made orders as agreed by the parties, but not as to costs. It was without jurisdiction to make any such order, such issues having to go to the Court. The matter of costs was referred to the Court and her Honour noted the agreement as to costs, but said that she would have to act judicially and that she was required to take into account all factors in the exercise of her discretion. Her Honour looked at the merits of the case and concluded that the substitution of the plans meant that the opposition to the development substantially evaporated; in those circumstances, the costs of the council and of the objector had been thrown away and entitled them to order as to costs. Account was also taken of the agreement which her Honour saw as being a compromise, remarking that encouragement should be given to litigants to settle. Accordingly, her Honour said the agreement should "be given some weight" and ordered the developer to pay the costs. I do not think this case assists either. It arose in different circumstances, that is, in the context of a compromise or settlement of issues going beyond but including costs. That is not the case here.

[8] The award of costs operates as an indemnity and the rationale of making a costs order is that it is just and reasonable that the successful party should be reimbursed for costs incurred for bringing or defending the action

(*Latoudis v Casey*). The exercise of the discretion is governed by considerations of justice and fairness, hence the general guidelines referred to in that case and largely reflected in the later legislation. Justice and fairness in this matter would ordinarily lead to an order being made in favour of the defendant, the only extraordinary consideration being the agreement and his resiling from it [9]. Why is it no longer just and fair that the defendant receive his costs? The complainant has pointed to no change in its position at trial or any other prejudice suffered. He can only rely on a broken understanding about costs. No doubt, as counsel for the complainant submitted, on appeal, in the light of this experience complainants may need to be more careful about entering into agreements like this, and that may lead to a hardening of attitude in cases where such an agreement might otherwise be thought to be appropriate. However, I do not think that that argument avails in this case.

[9] A number of issues were raised on the appellant's written outline of submissions which did not arise from the grounds of appeal. No time was spent on them at the hearing.

[10] The refusal of his Worship to order costs is set aside. Order the complainant to pay the defendant's costs of the proceedings in the Court of Summary Jurisdiction and on appeal.
