CITATION:	*Harvey v Bofilios (No 2)* [2018] NTSC 32
PARTIES:	HARVEY, Alicia Brooke v BOFILIOS, John
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NO:	LCA 8 of 2016 (21456835)
DELIVERED ON:	18 May 2018
DELIVERED AT:	Darwin
HEARING DATE:	28 August 2017
JUDGMENT OF:	Grant CJ

CATCHWORDS:

CRIMINAL LAW – COSTS OF UNSUCCESSFUL PROSECUTION APPEAL

Unsuccessful appeal by prosecution against finding of not guilty – errors found on part of Local Court – error occasioned by conduct of prosecution case – reasons apparent from time appeal lodged why Local Court findings might not be disturbed – respondent did not induce prosecution of the appeal – respondent did not conduct appeal in a manner which occasioned unnecessary expense – costs follow the event – lump sum costs order appropriate.

Local Court (Criminal Procedure) Act (NT) s 77C, s 163, s 177, s 178
Local Court (Criminal Procedure) Regulations (NT) r 4, r 5
Supreme Court Rules (NT) O 1, O 63, O 83

Latoudis v Casey (1990) 97 ALR 45, *Mines v Doddrell* [1938] SASR 90, *Tipping v Heinemann* [1922] SASR 424, *Tonkin v Stanton (No 2)* (Unreported, Supreme Court of South Australia, No 950 of 1986, 17 July 1986), *Walters v Owens* (1973) 21 FLR 138, referred to.

REPRESENTATION:

Counsel:

Appellant:	DJ Morters
Respondent:	J Franz

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	Darwin Family Law

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

Harvey v Bofilios (No 2) [2018] NTSC 32
LCA 8 of 2016 (21456835)

BETWEEN:

ALICIA BROOKE HARVEY
Appellant

AND:

JOHN BOFILIOS
Respondent

CORAM: GRANT CJ

REASONS FOR JUDGMENT

(Delivered 18 May 2018)

[1] On 28 August 2017, I delivered the decision in an appeal brought by the informant pursuant to s 163(3) of the *Local Court (Criminal Procedure) Act* (NT) from an order or adjudication of the Local Court finding the respondent not guilty of three charges on information dated 9 December 2014.

[2] The appeal was brought on two grounds. The first was that the Local Court erred in finding that there was no case to answer on two of the charges on the basis that the prosecution had failed to adduce evidence that a dangerous drug was supplied as alleged in each of the charges. The second ground of appeal was that the Local Court erred in finding

that there was insufficient evidence that the respondent had supplied dangerous drugs as alleged in a third charge.

[3] I dismissed the appeal for the reasons described in *Harvey v Bofilios* [2017] NTSC 68, which are discussed further below. The respondent then made application for his costs of the appeal.

The statutory provisions

[4] The appeal was brought by the prosecution pursuant to s 163(3) of the *Local Court (Criminal Procedure) Act* (NT). The power to award costs on appeal is conferred by s 177 of the *Local Court (Criminal Procedure) Act*, which provides relevantly:

> (2) Upon the hearing of the appeal the Supreme Court may do any or all of the following:
>
> (e) subject to subsections (2A) and (2B), make such further or other order as to costs or otherwise as it thinks fit;
>
> (2A) For subsection (2)(e), the Supreme Court, when making an order for costs in relation to proceedings in the Local Court must apply the prescribed scale as mentioned in section 77C.
>
> (2B) However, if the Supreme Court considers the circumstances of the case, or the legal issues, are of an exceptional nature, the Court may order costs exceeding the prescribed scale.

[5] Section 178 of the *Local Court (Criminal Procedure) Act* goes on to provide:

> **If costs not paid according to order of Supreme Court, certificate to be granted**
>
> (1) When the Supreme Court makes any order as to the costs of the appeal it shall direct the costs to be paid to an Associate Judge or other proper officer of the Supreme Court, to be by Associate Judge or other proper officer paid over to the party

entitled thereto, and may state a time within which the costs are to be paid.

(2) If the costs are not paid within the time so limited (or if no time is so limited, then within 7 days) an Associate Judge or other proper officer of the Supreme Court, upon application of the party entitled to the costs of any person on his behalf, and on payment of the fee of 10 cents, shall grant to the party so applying a certificate that the costs have not been paid.

[6] Section 77C of the *Local Court (Criminal Procedure) Act* provides:

> **Limitation on amount of costs**
>
> 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.

Exercise of the discretion

[7] I have today delivered reasons in *Thyer v Whittington (No 2)* [2018] NTSC 31. That case concerns the award of costs in an appeal brought by a defendant pursuant to s 163(1) of the *Local Court (Criminal Procedure) Act*. Similar principles and considerations apply in both matters, and I will for ease of reference repeat some of the observations made in *Thyer v Whittington (No 2)* [2018] NTSC 31.

[8] The costs scheme contained in the *Local Court (Criminal Procedure) Act* (previously styled as the *Justices Act*) was originally based upon the scheme in the South Australian *Justices Act*. Under that scheme, the costs of an appeal are in the discretion of the Supreme Court. The general approach taken was that costs would follow the event and would be ordered in favour of the successful party, but a successful appellant might be deprived of costs if there was some reason for that

in the conduct of the matter. In *Tipping v Heinemann* [1922] SASR 424, for example, the successful appellant was deprived of costs because he had succeeded on a point not taken below and not raised in the notice of appeal.

[9] The practice of the Supreme Court of South Australia was at one stage to make no order with respect to the costs of appeals from convictions for minor indictable offences: see *Mines v Doddrell* [1938] SASR 90. The adoption of that practice was guided by the distinction drawn in the South Australian legislation between simple offences and minor indictable offences. That distinction no longer appears in the Northern Territory legislation. The position obtaining under the Northern Territory legislation was described by O'Leary CJ in *Lovering v Brough* (1985) 36 NTR 59 at 63-4 in the following terms:

> This is an appeal against sentence following the conviction of the appellant of a summary offence. That being so, the ordinary rule is that the loser pays: *Walsh v Doherty* (1907) 5 CLR 196 at 200 per Griffiths CJ; *Felstead v Giersch* (1976) 14 SASR 27 at 37, 38 per Bray CJ.

[10] In *Felstead v Giersch* (1976) 14 SASR 27, reference was also made to the earlier decision in *Hamdorf v Riddle* [1971] SASR 398. In that earlier case the Full Court of the Supreme Court of South Australia disapproved of the then prevailing practice by which costs were awarded against unsuccessful defendants as a matter of course, but were only awarded against unsuccessful complainants and informants

in summary criminal proceedings if it could be established that the prosecution of the proceedings was in some way unreasonable. The Court in *Hamdorf* observed (at 402):

> We think then, without attempting to fetter the discretion of courts of summary jurisdiction, that they should, in a general way, exercise their discretion as to costs in the way in which it is exercised in the trial of a civil action, but without discriminating between the costs of successful complainants and successful defendants at least to any greater extent than the civil courts distinguish between the costs of successful plaintiffs and successful defendants.

[11] The Court in *Felstead* concluded that the same approach should be taken in dealing with the costs of an appeal from the order of a court of summary jurisdiction. That approach had already been adopted in the Northern Territory by Forster J in *Walters v Owens* (1973) 21 FLR 138.

[12] The approach advocated in *Hamdorf* was later endorsed in *Latoudis v Casey* (1990) 97 ALR 45, in which the High Court held by majority decision that there was no sound basis for drawing a distinction in relation to the award of costs against an unsuccessful informant between summary proceedings instituted by a police or other public officer and those instituted by a private citizen. However, the successful party has no entitlement to a costs order. As McHugh J observed in *Latoudis* (at 69):

> Nevertheless, it needs to be stressed that, subject to any contrary legislative indication, costs in summary proceedings do not follow the event and that a successful defendant in such proceedings, like a successful party in civil proceedings, has no right to an order for

costs. As Viscount Cave LC pointed out in *Donald Campbell and Co Ltd v Pollak* [1927] AC 732 at 811-12:

> "A successful defendant in a non-jury case has no doubt, in the absence of special circumstances, a reasonable expectation of obtaining an order for the payment of his costs by the plaintiff; but he has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion, like any other discretion, must of course be exercised judicially, and the judge ought not to exercise it against the successful party except for some reason connected with the case."

[13] Although the expression of those principles in *Latoudis* was directed specifically to the award of costs in summary criminal proceedings, they are equally applicable to the conduct of appeals to the Supreme Court from an order or adjudication in summary criminal proceedings. They have application regardless whether the appeal is brought by the complainant/informant or the defendant, and regardless whether the appeal is successful or unsuccessful.

[14] As McHugh J observed by reference in *Latoudis*, there may be "special circumstances" which warrant a departure from the usual approach by which the successful party is awarded its costs of the appeal. In *Felstead* (at 38-9), Bray CJ catalogued a number of circumstances which might warrant a departure from the usual approach (including as to the quantum of costs). They include:

(a) where the complainant/informant does not attempt to support the decision of the court below, but merely submits to the decision of the appellate court;

(b) where the defendant has been sentenced to imprisonment by the court below, and seeks to have that imprisonment overturned on appeal; and

(c) where the successful party has acted unreasonably in the conduct of the proceedings.

[15] That was not intended to be an exhaustive listing of the circumstances in which the court might exercise its discretion not to award costs in favour of the successful party. The present case does not fall into any of those categories. The question then arises as to whether there is otherwise any reason for a departure in this matter from the ordinary rule that costs follow the event. In making that assessment, it is necessary to consider the basis on which the appeal was dismissed.

[16] So far as the first ground of appeal was concerned, counsel for the appellant was correct in the submission concerning criminal responsibility under the extended definition of "supply" where an accused intends to offer to supply a dangerous drug, and in relation to the sufficiency of evidence to establish that matter. For that reason, the decision of the Local Court was manifestly wrong in law. However, there had been clear fault on the part of the prosecutor at first instance in failing to have regard to the extended definition of "supply"; in conducting the prosecution case from the outset on the basis that the supply was constituted by the accused giving the drugs to

another person and the actual receipt of those drugs; and in adopting the defence's premise in the "no case" submission. Those factors militated against allowing the appeal on that ground notwithstanding the error disclosed.

[17] So far as the second ground of appeal was concerned, the finding was that the trial judge's rejection of relevant evidence was made in error. However, the Local Court's determination could only be disturbed on the ground of error of law or error of mixed fact and law. The entry of the acquittal on *Prasad* grounds was a determination of fact and not one of law or mixed fact and law. The appeal on that ground was dismissed for that reason.

[18] While it is correct to say that the appellant identified errors in both determinations against which the appeal was brought, there were also reasons apparent from the time the appeal was lodged as to why the circumstances might not warrant orders on appeal vitiating the determinations made in error. Ranged against that, it could not be said that the respondent in any way induced the prosecution of the appeal, or that the respondent conducted the appeal proceedings in a manner which occasioned unnecessary expense. There is no reason to depart from the ordinary rule that costs should follow the event.

The quantum of costs

[19] As extracted above, s 177(2) of the *Local Court (Criminal Procedure) Act* confers a power to "make such further or other order as to costs or otherwise as it thinks fit". That conferral comprehends both the power to award costs of the appeal and the power, where necessary, to vary any order made for the costs of proceedings before the Local Court. No question arises in this appeal concerning the costs of proceedings before the Local Court. The only matter with which this Court is presently concerned is the costs of the appeal proceedings.

[20] Section 177(2A) of the *Local Court (Criminal Procedure) Act* places a restriction on this Court's power to award costs in terms that "when making an order for costs in relation to proceedings in the Local Court [it] must apply the prescribed scale as mentioned in section 77C". That might appear on first reading to restrict the quantum of any order made for the costs of the appeal. On closer reading, the restriction is expressed to operate only in relation to the costs of the proceedings in the Local Court. The operation of the qualifying phrase "in relation to" does not, on a plain reading and literal interpretation, extend the restriction to the costs of the appeal.

[21] That raises the question of what approach this Court should take in the award and quantification of the costs of this appeal. Order 83 of the Supreme Court Rules stipulates the procedure for appeals to the Supreme Court, including appeals brought pursuant to the *Local Court*

(Criminal Procedure) Act. It contains no relevant provision in relation to costs (although it does provide for security for costs and directions concerning costs).

[22] This form of appeal (previously described as a "justices' appeal"), has sometimes been characterised as civil in nature. That is because the statutory right of appeal is to enter and invoke the aid of the Supreme Court to redress error, rather than an exercise of this Court's original criminal jurisdiction in the conduct of a trial on indictment. Even allowing for that characterisation, the scale of costs provided in order 63 of the *Supreme Court Rules* does not have application by default. Order 63 appears in Chapter 1 of the Rules. Rule 1.02 applies Chapter 1 to civil proceedings commenced under that Chapter. That form of civil proceeding does not include a justices' appeal.

[23] It is also the case that s 178 of the *Local Court (Criminal Procedure) Act* seems to contemplate the making of a lump sum costs order rather than an order for taxation of costs. That is because it requires a direction that the costs be paid to the proper officer of the Court, usually within a specified time. This is not to say that the Court could not, in appropriate circumstances, make an order for costs in the application of the scale of costs contained in the Appendix to order 63 of the *Supreme Court Rules*, and for taxation of those costs; but it may equally make a lump sum award based on its own ready reckoning of

the costs actually incurred by the successful party in the conduct of the appeal. That latter approach is usually adopted in this jurisdiction.

[24] In *Felstead v Giersch* (1976) 14 SASR 27, the Full Court of the Supreme Court of South Australia considered the basis on which costs should be awarded to a successful party in a justices' appeal. Bray CJ (with whom Mitchell J concurred) made the following observations in that respect (at 38):

> As I have said, we are concerned here with the quantum of costs, not with whether or not any order for costs should be made. There may be all sorts of reasons whereby in the normal exercise of a judicial discretion a judge will refuse costs or full costs to the successful party. Once he has decided that it is proper to award costs and that there is no special reason on the facts of the particular case why those costs should be less than full costs, I think that he should order taxation in the normal way, subject, of course, to the power he has to fix a lump sum instead; see Order 65, rule 17. There may well be all sorts of reasons for such a course. Often it can be seen that the case is a short and simple one which ought not to involve great expense. Often the successful party will prefer to accept a lump sum in order to avoid the trouble of taxation. But I do not think that the lump sum should be less than it normally would have been simply because the case is a justices' appeal. I do not think that there should be any "going rate" in this jurisdiction less than the appropriate "going rate" in other jurisdictions. I do not see why a successful party in a justices' appeal should have less chance of a full indemnity than a successful party in other jurisdictions.

[25] As the reasons given by Bray CJ in *Felstead* permit, the award of the costs of a justices' appeal (including the quantum of those costs) falls within the discretion of the appeal court. While the majority in *Felstead* expressed the expectation that costs would ordinarily be awarded on a party and party basis, the exercise of that discretion will

be informed by factors such as the length and complexity of the case, the added cost and inconvenience to which an order for taxation would give rise, and the interests of justice generally. It would appear that the decision in *Felstead* notwithstanding, in South Australia the discretion continued to be exercised to make lump sum costs awards in accordance with the scale applying in the courts of summary jurisdiction.

[26] Ten years after the decision in *Felstead*, the policy reasons underlying that approach were described by Johnston J in *Tonkin v Stanton (No 2)* (Unreported, Supreme Court of South Australia, No 950 of 1986, 17 July 1986) in the following terms:

> In the case of appeals pursuant to the provisions of the *Justices Act* there is a long tradition in the court of ordering costs on a scale (adjusted from time to time to take some account of changes in money value) which is considerably below the normal level of costs in other jurisdictions of the court. This tradition goes back almost 50 years in my own personal experience and in my experience the many Judges who have commented upon the practice have always justified it on the basis of the same policy reasons; namely, that it is important that ordinary people with limited or very few resources who feel that they have been wronged in some matter affecting their reputation and perhaps their liberty should not be prevented from coming to this court by fear of having to face the possibility of orders to pay costs which are really beyond them. And associated with this concept is the view that this particular jurisdiction affords to the court the important opportunity of reviewing the work of the Courts of Summary Jurisdiction which are the courts in which the overwhelming body of citizens are most likely to come into touch with the operation of the independent court system. For this reason also it is desirable that parties who feel aggrieved should not feel prevented from pursuing a remedy in matters so important as touching reputation and possibly liberty.

[27] Although those comments were not directed to prosecution appeals, there would be no reason in principle to apply a different approach to the award of costs in an unsuccessful prosecution appeal. Although the relevant Northern Territory legislation has been substantially amended over the years, the approach to the costs of justices' appeals remains informed by the nature of the proceedings and the historical practice in relation to such appeals. In most cases, no costs issue will arise by reason of the "knock for knock" arrangement between the office of the Director of Public Prosecutions and the various legal aid agencies. The issue only arises in circumstances where the defendant, whether as appellant or respondent in the appeal, is privately represented.

[28] The application of a prescribed scale in the courts of summary jurisdiction remains a feature in common with the cognate South Australian scheme. The scale in the Northern Territory is prescribed by reg 5 of the *Local Court (Criminal Procedure) Regulations*, which provides:

> **Limit on amount ordered for costs**
>
> (1) For section 77C of the Act, the amount that the Court may order for costs (the ***prescribed scale***) must not exceed:
>
> (a) for the first day of a hearing, including preparation of the case for the hearing and counsel fee – 1 500 financial units; and
>
> (b) for the second or a subsequent day of the hearing – 850 financial units.
>
> (2) In determining the amount for costs, the Court may have regard to the following matters:

(a) whether the complainant commenced and continued with the proceedings in good faith;

(b) whether the complainant failed to take steps to investigate a matter coming to, or within, the complainant's knowledge;

(c) the conduct of the investigation of the matters that led to the complainant making the complaint;

(d) if the Court dismissed the complaint – whether the dismissal was made on technical grounds and not on a finding that there was insufficient evidence to convict or make an order against the defendant;

(e) whether the defendant conducted the defence in a way that unreasonably prolonged the proceedings;

(f) whether the defendant was entitled to an acquittal but subsequently convicted on another charge.

(3) However, if the Court considers the circumstances of the case, or the legal issues, are of an exceptional nature, the Court may order costs exceeding the prescribed scale.

[29] The formula for calculating a "financial unit" for that purpose is fixed by reg 4 of the *Local Court (Criminal Procedure) Regulations*. The monetary value of a "financial unit" at the time at which the appeal was conducted was $1.00, and the costs allowable for a day's hearing, including preparation and counsel fee, were $1,500. Although, for the reasons given above, this Court is not limited to an award of the costs of an appeal in accordance with the prescribed scale, it does provide at least some reference or benchmark for this type of matter.

[30] The present matter was not of particular complexity. It was not suggested on behalf of the respondent that the circumstances of the case, or the legal issues, were of an exceptional nature, and nor do I consider that they were. It was not suggested on behalf of the

appellant that the respondent had conducted the proceedings on appeal in a manner that militated against an order for costs in its favour, and nor would there be any basis for such a suggestion. I consider that an order for taxation in the circumstances would be unduly onerous on both parties. Having regard to those matters, and my general understanding of costs in this jurisdiction, I award the respondent costs in the lump sum amount of $1,500.

Disposition

[31] I make the following orders:

1. Pursuant to s 177 of the *Local Court (Criminal Procedure) Act*, the appellant is to pay the respondent's costs of the appeal in the lump sum amount of $1,500.
2. Pursuant to s 178 of the *Local Court (Criminal Procedure) Act*, the appellant is to pay that amount to the Registry Manager of the Supreme Court within 28 days, which on receipt is to be paid to the solicitors for the respondent.
