Milton v Trenerry [2000] NTSC 81

PARTIES:	DARRYL PAUL MILTON
	v
	ROBIN LAWRENCE TRENERRY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	JA 10 of 2000 (9722400)
DELIVERED:	22 September 2000
HEARING DATES:	6 July 2000
JUDGMENT OF:	THOMAS J

CATCHWORDS:

APPEAL – APPEAL FROM MAGISTRATE – COSTS

Appeal from Magistrate – refusing to make order for costs – acquitted of unlawful assault – accused omitted to give information to police – whether unreasonable – whether police have responsibility to present case – police had prima facie case – exercising right to silence – Magistrate's discretion not in error – appeal dismissed

Criminal Code 1983 (NT), s 188(2)(a); *Justices Act 1928* (NT), s 77.

Norbis v Norbis (1986) 161 CLR 513, *House v The King* (1936) 55 CLR 499, *Cilli v Abbott* (1981) 53 FLR 108, *TTS Pty Ltd v Griffiths* (1991) 105 FLR 255 , *Petty & Maiden v The Queen* (1991) 173 CLR 95; cited.
Tenthy v Curtis (1988) 55 NTR 1, *Hamdorf v Riddle* [1971] SASR 398, *Barton v Berman* [1980] 1 NSWLR 63; referred to.
Latoudis v Casey (1990) 170 CLR 534, *Jones Ex Parte* (1906) 6 SR (NSW) 313; considered.

REPRESENTATION:

Counsel:

Appellant:	M Carter
Respondent:	J Adams

Solicitors:

Appellant:	Withnall Maley & Co
Respondent:	Office of the Director of Public Prosecutions
Judgment category classification:	C
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IN SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Milton v Trenerry [2000] NTSC 81
No. JA 10 of 2000 (9722400)

BETWEEN:

DARRYL PAUL MILTON
Appellant

AND:

ROBIN LAWRENCE TRENERRY
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 22 September 2000)

[1] This is an appeal from a decision of a stipendiary magistrate for the Northern Territory refusing to make an order for costs in favour of the appellant who was acquitted on a charge of unlawful assault contrary to s 188(2)(a) of the Criminal Code Act 1983 (NT).

[2] The defendant to the charge Darryl Paul Milton, hereinafter referred to as the appellant, had entered a plea of not guilty to the aforementioned charge. A reading of the transcript of proceedings before the learned stipendiary magistrate indicates that the hearing involved the calling of some ten witnesses, including the appellant in these proceedings, to give evidence. The hearing proceeded on various dates between 2 March 1999 and 20

January 2000 when the learned stipendiary magistrate delivered his reasons for decision. I cannot be certain that I have the whole of the transcript of proceedings before the Court of Summary Jurisdiction because the page numbers are not sequential. However, both counsel stated they did not consider it necessary that I read the transcript in the Court of Summary Jurisdiction for the purpose of resolving this appeal on the question of costs. The learned stipendiary magistrate acquitted the defendant of the charge. Mr Carter, on behalf of the appellant, made an application for the cost of the hearing before the Court of Summary Jurisdiction.

[3] The matter was further adjourned to enable the parties to argue the question of costs.

[4] On 7 February 2000, his Worship delivered reasons for declining to make an order for costs in favour of the appellant. The appellant appeals from this decision.

[5] The amended grounds of appeal filed on 8 May 2000 are as follows:

> "1. The learned Magistrate in his reasons for decision on the question of costs erred in fact by formulating and relying on a hypothesis, which was unsupported by the evidence.
>
> 2. The learned Magistrate erred in fact and in law in finding the Appellant's exercise of the right to silence was unreasonable in the circumstances.
>
> 3. In refusing to make an order for costs, the learned Magistrate so erred in the exercise of the discretion as to place the decision outside the ambit of a sound discretionary judgment in that he failed to attach sufficient weight to the appellant's fundamental right to silence.

4. Further, or in the alternative, by refusing to make an Order for costs, of the successful defendant, he thereby eroded, the fundamental right to silence, of all persons charged with offences and heard by Magistrates exercising jurisdiction under the Justices Act."

[6] Mr Carter, counsel appearing on behalf of the appellant, acknowledged from the outset that the appeal being against a discretionary decision, it is necessary to show the existence of an error whether of law or fact, to show the exercise of the discretion is outside the ambit of a sound discretionary judgment (*Norbis v Norbis* (1986) 161 CLR 513; *House v The King* (1936) 55 CLR 499.

[7] The power to award costs to a successful defendant is set out in s 77 of the Justices Act 1928 (NT) which provides 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."

[8] In *Tenthy v Curtis* (1988) 55 NTR 1 at 10 Kearney J stated:

> "... a defendant who obtains an order of dismissal in terms of s 77(1) is a successful party and should have his costs unless there are reasons he should be deprived of them."

and also at 10:

> "There are no reasons connected with this litigation to warrant the respondents being deprived of their costs. They did not bring these proceedings upon themselves nor are there any other considerations which would make it unjust to award them costs."

See also *Cilli v Abbott* (1981) 53 FLR 108 and *TTS Pty Ltd v Griffiths* (1991) 105 FLR 255).

[9] The background to this matter is as follows:

[10] The case before the learned stipendiary magistrate involved an alleged assault causing bodily harm. The offence is alleged to have occurred on 27 January 1997. An information was laid on 15 June 1998. The appellant pleaded not guilty to the charge.

[11] In his submissions to the Court, Mr Carter on behalf of the appellant summarised the factual background as follows:

[12] There were two nightclub security persons, who were in sequence charged with offences arising out of an unlawful assault committed in a nightclub in the city centre. All security staff were dressed in similar clothing. They all had short cropped hair. One of these security staff was charged with an

unlawful assault in the nightclub and acquitted. Mr Milton, the appellant in these proceedings, was also charged with unlawful assault and acquitted.

[13] The appellant's defence effectively was that it was not he who committed the assault, but the person who had been previously acquitted. The appellant gave evidence at the hearing of the charge that he was standing at the bar at the time the event occurred and witnessed part of the scuffle. Two other persons called in the appellant's defence also witnessed the scuffle. One of these witnesses was at the nightclub for the purpose of obtaining a lift home with the appellant and the other was there by coincidence.

[14] At the hearing of the charge, the appellant gave evidence and called the two aforementioned witnesses to substantiate his version of the events.

[15] The evidence for the prosecution was the victim, Peter McKenzie, who identified the appellant as his assailant and the victim's sister who was familiar with the appellant, in the sense that the appellant had previously been a customer at the video store where the victim's sister worked.

[16] This factual background recounted by Mr Carter was not challenged or disputed by Mr Adams, counsel for the respondent.

[17] In his reasons for decision dated 20 January 2000 the learned stipendiary magistrate stated that "this is primarily an identification case." The issue to be decided was whether the accused was the assailant. There were a number of witnesses called for the prosecution, the defendant gave evidence and the

defendant called two witnesses. His Worship analysed the evidence called for the prosecution and the defence. He detailed the conflicting evidence on the issue of identification noting that the two witnesses who were called for the defence gave evidence that the defendant was not involved. Essentially the learned stipendiary magistrate found that on the conflicting evidence before him regarding the identification of the assailant that he could not be satisfied beyond reasonable doubt that it was the appellant who committed the offence. The appellant was duly acquitted.

[18] In his reasons for decision dated 7 February 2000 on the application by the appellant for costs, the learned stipendiary magistrate referred to the provisions of s 77(2)(a) of the Justices Act as set out above.

[19] His Worship stated the appellant was acquitted and noted that this was largely because of the conflicting evidence as to his identification. The learned stipendiary magistrate noted that the appellant had never volunteered a statement to police or given the police a version of the events consistent with his innocence. Nor did he tell police that there were two witnesses who could give evidence that he was not involved. The learned stipendiary magistrate acknowledged the appellant's right to remain silent. However, he refused to order costs in favour of the appellant because the appellant had omitted to give such information to police. The learned stipendiary magistrate found this was unreasonable in the circumstances and contributed to the institution of these proceedings.

[20] Mr Carter, on behalf of the appellant, referred to the following passage in the learned stipendiary magistrate's reasons for decision delivered on 7 February 2000:

> "… I believe that had he volunteered such information then the – all of the available evidence would have been weighed very carefully, as it normally is, by the prosecuting authorities. And what would have then emerged would be a conflicting body of evidence where there were some witnesses giving a particular version and the accused and two other witnesses giving a different version."

[21] It is Mr Carter's submission that there is no evidential basis for that hypothesis. He stated that there was no evidence that is the normal practice of police and in stating this the magistrate made an error of fact. Mr Carter maintains it is also an error of law because it is an incorrect statement of police function. It is Mr Carter's submission that once the police had sufficient evidence to present a prima facie case to a court then they had a legal responsibility to present the case and let the court decide. It is Mr Carter's submission that to do otherwise places the police in the position of being the investigator and the jury (*Latoudis v Casey* (1990) 170 CLR 534 Dawson J at 549).

[22] Mr Carter relies for this proposition on the decision of Dawson J in *Latoudis v Casey* (supra) at 549 where His Honour cites a judgment of Darley J in *Jones; Ex parte* (1906) 6 SR (NSW) 313. However, a reading of the whole judgment of Dawson J does not disclose an approval for the statement in *Ex parte Jones* but rather it is but one of the cases discussed by Dawson J in reaching his conclusion (being in the minority) that a successful defendant

in a summary proceeding for an offence can have no expectation as a general rule, unlike a successful party in civil proceedings, that costs will be awarded in his favour.

[23] It is Mr Carter's statement that the police had a strong prima facie case against Mr Milton and that the following statement made by the learned stipendiary magistrate demonstrates a flawed understanding of the function of the police, when prosecuting a matter where they have a prima facie case. The finding of the learned stipendiary magistrate to which Mr Carter was referring appears at t/p 3 on 7 February 2000:

> "…. A conflicting body of evidence does leave plenty of scope for reasonable doubt. And in fact in this particular case, confronted with a conflicting body of evidence, I indeed did have a reasonable doubt and it was for those reasons that I acquitted the defendant. I believe that in this case the defendant's omissions to give information to the police, which may well have obviated the need for this prosecution, was unreasonable in the circumstances and did contribute to the institution of these proceedings. …."

[24] It is Mr Carter's submission that even if Mr Milton had informed the police of the identity of the two witnesses he was going to call to substantiate his defence the police would still have had a duty to present the case to the court as a prima facie case and let the court decide whether or not there was a reasonable doubt.

[25] Mr Carter submits there was nothing unreasonable about Mr Milton exercising his right to silence (*Petty & Maiden v The Queen* (1991) 173 CLR 95).

[26] Mr Adams, on behalf of the Crown, argues that the learned stipendiary magistrate's decision to refuse to make an order for costs was well within his discretion and that his decision was correct. It is the Crown submission that the police case continued for as long as it did because the appellant did not advise the police he had two witnesses who could give evidence, that he was not the assailant. Mr Adams pointed out that it was a long period of time between the date the charge was laid on 15 June 1998 to the date of the hearing of evidence which commenced on 6 May 1999 and the conclusion of the hearing in January 2000. It is the submission on behalf of the Crown that the appellant had plenty of opportunity to either advise the police himself or through some other person as to the existence of the two witnesses and that this may have resulted in the police not proceeding with the charge.

[27] Mr Adams submitted there are procedures in the prosecution process for an evaluation of the case and a decision may be made not to proceed. Mr Adams gave the example of the Crown entering a nolles prosequi – s 302 of the Criminal Code and referred to the fact that matters are from time to time withdrawn in the Magistrates Court.

[28] The Crown did not argue that in these circumstances it was unreasonable for the appellant himself to have declined to say anything in his record of interview. Rather the Crown case is that if police had been provided with the information that the appellant had two witnesses as to his defence the police may have elected not to proceed with the charge.

[29] The starting point in the Northern Territory is that costs in a criminal proceeding ought generally to be awarded to a successful defendant, s 77 *Justices Act* (*Hamdorf v Riddle* [1971] SASR 398). Costs are awarded to indemnify a successful defendant not to punish the informant. In *Latoudis v Casey* (supra) at 562 - 563 Toohey J:

> "What has emerged from a number of decisions is recognition that costs are awarded by way of indemnity to the successful party and, expressly or impliedly, that they are not by way of punishment of the unsuccessful party."

and at 565 – 566:

> "It is unnecessary to speak in terms of a presumption; it is enough to say that ordinarily it would be just and reasonable that the defendant against whom a prosecution has failed should not be out of pocket.
>
> Now, in a particular case there may be good reasons connected with the prosecution such that it would not be unjust or unreasonable that the successful defendant should bear his or her own costs or, at any rate, a proportion of them. To return to the examples given earlier in this judgment, if a defendant has been given the opportunity of explaining his or her version of events before a charge is laid and refuses the opportunity, and it later appears that an explanation could have avoided a prosecution, it may well be just and reasonable to refuse costs: see, by way of illustration, *Reg. v. Dainer; Ex parte Milevich*. This has nothing to do with the right to silence in criminal matters. A defendant or prospective defendant is entitled to refuse an explanation to the police. But if an explanation is refused, the successful defendant can hardly complain if the court refuses an award of costs, when an explanation might have avoided the prosecution. Again, if the manner in which the defence of a prosecution is conducted unreasonably prolongs the proceedings, for instance by unnecessary cross-examination, neither justice nor reasonableness demands that the successful defendant be indemnified, at any rate as to the entirety of the costs incurred. These illustrations are in no way exhaustive but what they point up is that a refusal of costs to a successful defendant will ordinarily be based upon the conduct of the defendant in relation to the proceedings brought against him or her."

[30] I accept that there are circumstances where if a defendant declines to say anything to police and does not inform them of the existence of witnesses as to his defence, this may well result in a court refusing to award him costs, even if he has been successful in obtaining an acquittal. This matter is in fact addressed by Mason CJ in *Latoudis v Casey* (supra) at 544:

> "I agree with Toohey J. that, if a defendant has been given an opportunity of explaining his or her version of events before a charge is laid and declines to take up that opportunity, it may be just and reasonable to refuse costs. Likewise, if a defendant conducts his or her defence in such a way as to prolong the proceedings unreasonably, it would be just and reasonable to make an award for a proportion of the defendant's costs."

[31] I do not accept the submission made by Mr Carter that there can be no prosecutorial discretion exercised and that once the prosecuting authorities have a prima facie case they must put the matter before the court irrespective of other evidence. There is in fact a prosecutorial discretion whether to proceed with a charge and it is now not possible to know whether that prosecutorial discretion to prosecute the appellant would or would not have been affected had the prosecution been informed of the existence of the two witnesses called for the defence.

[32] The statement relied on by Mr Carter to support his submission that once the prosecution have a prima facie case they must present this case to the court is in *Ex parte Jones* (supra) at 315 - 316):

> "… The proper course for the police to pursue, is, if they see that a *prima facie* case exists, to bring it before the Court which has jurisdiction to decide it. It is the duty of the magistrate to decide the

> case upon the evidence, and not of the police to determine whether the accused is guilty or not. In some countries the police have this duty charged upon them of making enquiries, and exercising *quasi* judicial functions, but that is not our system. Our system is that if there is apparently good ground to suspect that an offence has been committed, it is the duty of the police to lay a complaint and bring the accused before the magistrate."

[33] I note that the decision in *Ex parte Jones* (supra) has subsequently been rejected in *Hamdorf v Riddle* (supra) and *Barton v Berman* [1980] 1 NSWLR 63. A reading of the judgment of Dawson J in *Latoudis v Casey* (supra) does not demonstrate Dawson J embraced this principle but rather referred to it in the course of referring to a number of cases covering the development of the court's approach in different states of Australia to this issue of costs for a successful defendant.

[34] I accept the principle expressed in *Ex parte Jones* (supra) as quoted in the matter of *Latoudis v Casey* (supra) is a correct general statement of the role of prosecuting authorities and the court. This does not exclude a prosecutorial discretion whether or not to proceed with a charge. Such a prosecutorial discretion is in fact exercised from time to time. In *Ex parte Jones* (supra) was a statement made in the context of a concern expressed by Darley CJ that police may be reluctant to bring charges if this was at the risk of being personally responsible for the costs of a successful defendant. That may have been the case in 1906 but is not the position now (*Hamdorf v Riddle* (supra)). The present situation is that there is a discretion with the prosecution to charge and police officers are not in the ordinary course of

their duties personally responsible for costs awarded in favour of a successful defendant.

[35] I am not persuaded that the learned stipendiary magistrate was wrong when he referred to the prosecution being denied the opportunity to weigh all the evidence before deciding whether to proceed with a prosecution.

[36] The appellant could have arranged for information to be conveyed to the police or prosecuting authorities of the existence, including the name and address of the two witnesses he subsequently called in his defence, without there being any conflict with his right to silence.

[37] There may well be substance in the argument that even had the prosecution been aware of these witnesses, and their evidence, the charge would still have proceeded. However, that was a matter within the discretion of the magistrate and had he taken such a view then the learned stipendiary magistrate may well have awarded the appellant his costs.

[38] However, the learned stipendiary magistrate came to the conclusion that withholding of such information meant the prosecuting authorities were never given the opportunity to weigh the available evidence and consider whether or not to proceed with the charge.

[39] In arriving at such a conclusion the magistrate was exercising a discretion. The issue is not whether this Court agrees with his decision but whether in exercising the discretion in the way he did he has been shown to have been

in error either in law or in fact and that in exercising his discretion he went outside the ambit of a sound discretionary judgment (*Norbis v Norbis* (supra); *House v The King* (supra)).

[40] I am not able to find that the learned stipendiary magistrate made an error of law or fact nor am I persuaded that the discretion he exercised was outside the ambit of a sound discretionary judgment.

[41] For these reasons the appeal is dismissed.

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