

**THE CIRCUMSTANCES IN WHICH AN ACCUSED PERSON  
CAN MAKE AN APPLICATION FOR COSTS  
FOLLOWING AN UNSUCCESSFUL PROSECUTION**

**1. INTRODUCTION**

The aim of this paper is to equip criminal lawyers, upon a criminal charge being withdrawn by the prosecution or dismissed by the Court, to make an application for professional costs incurred by an accused person to be paid by the State.

It has been my experience that many lawyers are unaware of the statutory provisions that can be relied upon by an advocate for an accused person when charges brought against him by the prosecution are either withdrawn by the prosecution or dismissed by the Court that will result in an accused person obtaining an order for costs.

Legal fees incurred in defending criminal cases are often substantial.

It therefore follows that, in discharging one's professional duty to a client, it is necessary that the criminal law practitioner be thoroughly conversant with the circumstances in which he or she can make an application for costs and, further, be aware of the statutory provisions and decided cases that are applicable in ensuring that an application for costs is properly prepared and presented to a Court.

**2. STATUTORY PROVISIONS UPON WHICH AN ADVOCATE FOR AN ACCUSED PERSON CAN RELY IN MAKING AN APPLICATION FOR COSTS**

There are two statutes that contain provisions that give a Court a discretion, upon a criminal prosecution failing or being withdrawn, to make a costs order. The *Criminal Procedure Act 1986* and the *Costs in Criminal Cases Act 1967* contain such provisions.

It is proposed to deal with the provisions in each of these Acts that allow for such an application to be made, to examine the circumstances in which such an application can be made and to examine cases decided in which each of the statutory provisions are considered in order to provide assistance to practitioners firstly; as to when an application for costs can be made and secondly; to ensure that such an application is properly presented, backed by appropriate authorities, in order to maximise the likelihood of a Court exercising its discretion to make an order for costs in favour of the accused person.

Section 213 of the *Criminal Procedure Act 1986* provides as follows:

*“213 A court may at the end of summary proceedings order that the prosecutor pay professional costs to the Registrar of the Court, for payment to the accused person, if the matter is **dismissed** or **withdrawn**.”*  
(Emphasis added).

Nevertheless, the discretion provided for in Section 213 of the *Criminal Procedure Act 1986* is circumscribed by Section 214 of the *Criminal Procedure Act 1986*.

That Section provides as follows:

*“214 Professional costs are not to be awarded in favour of an accused person in summary proceedings unless the Court is satisfied as to any one or more of the following:*

- (a) that the investigation into the alleged offence was conducted in an unreasonable or improper manner;*
- (b) the proceedings were initiated without reasonable cause or in bad faith or were conducted by the prosecutor in an improper manner;*
- (c) the prosecutor unreasonably failed to investigate (or investigate properly) any relevant matter of which it was aware or ought reasonably to have been aware and which suggested either that the accused person might not be guilty or that, for any other reason, the proceedings should not have been brought;*
- (d) that because of other exceptional circumstances relating to the conduct of the proceedings by the prosecutor, it is just and reasonable to award professional costs.”*

Sections 116 and 117 of the *Criminal Procedure Act 1986*, which are restricted in their application to committal proceedings, are almost identical to section 213 and 214 of the *Criminal Procedure Act 1986*. Similarly, section 257C which gives the Supreme Court the power to award costs to an accused person in summary proceedings before that Court, is almost identical to section 214 of the *Criminal Procedure Act 1986*.

The second statutory provision in which the Advocate for an Accused Person can rely upon to support his or her Application for Costs is Section 2 of the *Costs in Criminal Cases Act 1967*. That Section provides as follows:

**“2. Certificate may be granted**

1. *The Court or Judge or Magistrate in any proceedings relating to any offence, whether punishable summarily or upon indictment, may:*

(a) *where, after the commencement of the trial in the proceedings, a defendant is **acquitted** or **discharged** in relation to the offence concerned, or a direction is given by the Director of Public Prosecutions that no further proceedings be taken, or ...*

*Grant to that defendant a certificate under this Act, specifying the matters referred to in Section 3 and relating to those proceedings.”* (Emphasis added).

Nevertheless, in order to attract the discretion pursuant to Section 2 in the *Costs in Criminal Cases Act 1967*, the discretion to do so is restricted by Section 3 of the *Costs in Criminal Cases Act 1967*.

Section 3 of that Act provides as follows:

**“3. Form of Certificate**

1. *The Certificate granted under this Act shall specify that, in the opinion of the Court or Judge or Magistrate granting the Certificate:*

(a) *if the prosecution had, before the proceedings were instituted, been in possession of all of the relevant facts, it would not have been reasonable to institute the proceedings, and*

- (b) *that any act or omission of the defendant that contributed, or might have contributed, to the institution or continuation of the proceedings was reasonable in the circumstances.*"

Section 3A of the Costs in Criminal Cases Act 1967 is as the follows:

***"3A Evidence of further relevant facts may be adduced***

- (1) *For the purpose of determining whether or not to grant a certificate under section 2 in relation to any proceedings, the reference in section 3 (1) (a) to "all the relevant facts" is a reference to:*
- (a) *the relevant facts established in the proceedings, and*
  - (b) *any relevant facts that the defendant has, on the application for the certificate, established to the satisfaction of the Court or Judge or Magistrate, and*
  - (c) *any relevant facts that the prosecutor, or in the absence of the prosecutor, any person authorised to represent the Minister on the application, has established to the satisfaction of the Court or Judge or Magistrate that:*
    - (i) *relate to evidence that was in the possession of the prosecutor at the time that the decision to institute proceedings was made, and*
    - (ii) *were not adduced in the proceedings".*

**3. THE PURPOSE OF LEGISLATIVE PROVISIONS ALLOWING AN ADVOCATE FOR AN ACCUSED PERSON TO MAKE AN APPLICATION FOR COSTS AT THE CONCLUSION OF AN UNSUCCESSFUL PROSECUTION, THE COMMON LAW POSITION REGARDING SUCH AN APPLICATION FOR COSTS AND THE INTERPRETATION OF THE RELEVANT STATUTORY PROVISIONS.**

In the second reading speech of the *Justices (Costs) Amendment Bill* (*Hansard Legislative Assembly 10 April 1991*), which dealt with the introduction of Section 81 of the *Justices Act 1902*, (which has certain similarities with Section 3 of the *Costs in Criminal Cases Act 1967* and Section 214 of the *Criminal Procedure Act 1986*) Mr. Dowd, the then Attorney General, said at page 1827 of *Hansard*, that:-

*“The award of costs is commonly regarded as a means of penalising or discouraging any improper or unreasonable behaviour on the part of the informant of a prosecution ... (and at 1828) ... the amendments will make informants and prosecutors more publicly accountable for their actions and should result in a greater level of efficiency in the investigation and prosecution of criminal proceedings.”*

In *Port Macquarie-Hastings Council v Lawlor Services Pty Limited; Port Macquarie-Hastings Council v Petro (No 7)* [2008] NSWLEC 75 (21 February 2008) Pain J said [at 32]

*“The provisions relating to the awarding of professional costs to defendants who are acquitted or criminal proceedings are compensatory and designed to mollify the burden on companies and individuals who suffer the obligation of having to establish that a prosecution is not well founded.”*

Sections 116, 117, 212 213 and 257C of the *Criminal Procedure Act 1986* and the provisions of the *Costs in Criminal Cases Act 1967* are examples of reforming legislation with a beneficial purpose, designed to confer valuable privileges upon persons who are acquitted in criminal prosecutions instituted against them.

The common law position was that the Crown neither paid nor received costs.

In *R v His Honour Judge Kimmins ex parte Attorney General* [1980] Qd R 524 Douglas J quoted what Hart J said in *R v Knott* [1974] Qd R 58 at [65] where his Honour said:

*“The general rule in criminal cases is “that the Crown neither pays nor receives costs” Attorney General for Queensland v Holland (1912) 15 CLR 46 at [49] although there the Court was dealing with a matrimonial matter”.*

In *Holland* Barton J referred to *Affleck v The King* [at 56] where Griffith CJ said:

*“There is no doubt that at common law the Crown is by its prerogative exempt from the payment of costs in any judicial proceeding, and that this right cannot be taken away except by statute”.*

It is apparent that, by reason of the passage of the *Costs in Criminal Cases Act 1967* and Sections 116, 117, 213 214 and 257C of the *Criminal Procedure Act 1986*, Parliament has determined that the common law right of the Crown not to pay or receive costs should no longer be the law.

The provisions of such reforming legislation should not be narrowly construed so as to defeat the achievement of its general purposes; *Nadilo v Director of Public Prosecutions* (1995) 35 NSWLR 738 at 743 per Kirby P; *Allerton v Director of Public Prosecutions* (1991) 24 NSWLR 550 (at 559-560) per Kirby P, Meagher JA, Handley JA. *Mordaunt v Director of Public Prosecutions & Anor* [2007] NSWCA 121 per McColl at [36(a)].

In *Nadilo [supra]* Kirby P stated that:

*"The Costs in Criminal Cases Act 1967 (the Act) is reforming legislation with a beneficial purpose designed to confer valuable privileges upon persons who succeed in criminal prosecutions. The Act overcomes the normal rule that, by the royal Prerogative and by the common law, the Crown neither seeks nor pays costs in criminal proceedings. See Attorney General of Queensland v Holland (1912) 15 CLR 46; Latoudis v Casey (1990) 170 CLR 534; Ex parte Hivis Re Michaelis (1933) 50 WN (NSW) 90; Acuthan v Coates (1986) 6 NSWLR (CA).*

*The Act should therefore be given a beneficial construction. Its provisions should not be narrowly construed so as defeat the achievement of the Act's general purposes. But those purposes must be derived (in circumstances of disputed interpretation) from the words in which Parliament has expressed itself."* (Emphasis added)

Although the judicial officer dealing with an application for a Certificate need not be the trial judge, it is always preferable for such an application to be made to the judicial officer who determined the original proceedings on its merits: *R v Manley* [2000] NSWCCA 196; per Wood CJ at CL at [4], per Sully J (at [49]); *Solomons v District Court of New South Wales* (2002) 211 CLR 119 per McHugh J (at [47]) (footnote 42). . *Mordaunt v Director of Public Prosecutions & Anor* per McColl JA at [36(b)].

Costs orders are made against the Crown in favour of accused persons not to punish the Crown or a prosecutor but to compensate the accused.

In *Latoudis v Casey* (1990) 170 CLR 534 at 542 - 543 Mason CJ said:

*"It will be seen from what I have already said that, in exercising its discretion to award or refuse costs, a court should look at the matter primarily from the perspective of the defendant. To do so conforms to fundamental principle. If one thing is clear in the realm of costs, it is that, in criminal as well as civil proceedings, costs are not awarded by way of punishment of the unsuccessful party. They are compensatory in the sense that they are awarded to indemnify the successful party against the expense to which he or she has been put by*

*reason of the legal proceedings: Cilli v. Abbott, at p 111. Most of the arguments which seek to counter an award of costs against an informant fail to recognize this principle and treat an order for costs against an informant as if it amounted to the imposition of a penalty or punishment. But these arguments only have force if costs are awarded by reason of misconduct or default on the part of the prosecutor. Once the principle is established that costs are generally awarded by way of indemnity to a successful defendant, the making of an order for costs against a prosecutor is no more a mark of disapproval of the prosecution than the dismissal of the proceedings.”*

Furthermore, in *Latoudis v Casey [supra]* Toohey J stated:

*“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 they are not by way of punishment of the unsuccessful party”.*

Similarly, McHugh J in *Latoudis v Casey [supra]* stated that:

*“An order for costs indemnifies the successful party in litigious proceedings in respect of liability for professional fees and out-of-pocket expenses reasonably incurred in connexion with the litigation: Kelly v. Noumenon Pty Ltd (1988) 47 SASR 182, at p 184. The rationale of the order is that it is just and reasonable that the party who has caused the other party to incur the costs of litigation should reimburse that party for the liability incurred. The order is not made to punish the unsuccessful party. Its function is compensatory.”*

#### **4. THE PREPARATION OF A COSTS APPLICATION PURSUANT TO SECTIONS 116, 117 (COMMITTAL PROCEEDINGS) 213, 214 (SUMMARY TRIALS) AND 257C (SUMMARY JURISDICTION OF SUPREME COURT) OF THE CRIMINAL PROCEDURE ACT 1986**

Section 116 of the *Criminal Procedure Act 1986* sets out the circumstances in which costs can be awarded to an accused person at the end of committal proceedings. That provision gives a Magistrate discretion to order that the prosecutor pay professional costs to the Registrar, for payment to the accused person if:

- a) the accused person is discharged as to the subject matter of the offence or the matter is withdrawn; or

- b) the accused person is committed for trial or sentenced for an indictable offence which is not the same as the indictable offence the subject of the Court Attendance Notice.

The circumstances in which a Magistrate can make an order for costs at the conclusion of committal proceedings are set out in section 117 of the *Criminal Procedure Act 1986* which is identical to section 214 of the *Criminal Procedure Act 1986*.

Section 213 of the *Criminal Procedure Act 1986* gives the Court the power, at the end of summary proceedings, to order that the prosecutor pay professional costs to the Registrar of the Court for payment out to the accused person if the matter is dismissed or withdrawn.

However, the discretion to order costs in such circumstances is circumscribed by the matters set out in section 214 of the *Criminal Procedure Act 1986*.

Moreover, section 257C of the *Criminal Procedure Act 1986* provides that a Court may at the end of proceedings that are before the Supreme Court in its summary jurisdiction, where the Supreme Court has jurisdiction to hear and determine those proceedings in a summary matter, order that the prosecutor pay to the Registrar of the Court for payment to the accused person the professional costs of the accused person if the accused person is discharged or the matter is dismissed because the prosecutor fails to appear or the matter is withdrawn or if the proceedings are for any reason invalid.

Like sections 116 and 213 of the *Criminal Procedure Act 1986*, section 257C is circumscribed by section 257D of the Act, subsection 1 of which is identical to sections 117 and 214 of the Act.

In preparing an application for costs pursuant to section 116, 213 or section 257C of the *Criminal Procedure Act 1986*, it is necessary that an Advocate carefully examine the provisions of section 214(1)(a), (b), (c) and (d) in the case of a summary trial, or alternatively sections 117(1)(a), (b), (c) and (d) in the case of making an application for costs at the end of committal proceedings, in preparing submissions which would result

in a Court exercising its discretion to make an order for costs in favour of an Accused Person.

It is convenient to deal with the provisions of section 214(1)(a), (b), (c) and (d) individually.

**4.1 THAT THE INVESTIGATION INTO THE ALLEGED OFFENCE WAS CONDUCTED IN AN UNREASONABLE OR IMPROPER MANNER (SECTIONS 214(1) (a), 117(1) (a) and 257D (1) (a) OF THE CRIMINAL PROCEDURE ACT 1986)**

It is not necessary, in order to satisfy a Court that the provisions of 214(1)(a), namely that the investigation into the offence was conducted in an unreasonable or improper manner for the accused to prove that the investigation “*fell grossly below optimum standards*”.

No expression similar to the term “*fell grossly below optimum standards*” appears in section 214(1)(a). To apply such a test to the section is to place an unwarranted gloss upon its terms; *JD v DPP and Ors [2000] NSWSC 1092 (30 November 2000)*.

In *JD v DPP and Ors* Magistrate Williams had referred, in the course of giving a judgment in the Local Court, to the need for it to be proved that the investigation by the prosecution “*fell grossly below optimum standards*” when a costs application was made relying on section 214(1)(a).

Such a test was rejected by Hidden J who, in the course of giving his reasons for that conclusion, said [at 31]:

*“Obviously, an investigation which fails to meet optimum standards is not necessarily unreasonable. Equally, however, it might be classed as unreasonable even though it does not fall below those standards. In this case, his Worship did not have to characterise the undoubted shortcomings of the investigation in that way before determining that, in all the circumstances, its conduct was unreasonable. The test is purely objective. To find that the conduct of the investigation of a particular case was unreasonable does not necessarily impugn the general competence, far less the integrity, of those responsible for it”.*

It is difficult to isolate the principles to be applied in determining whether or not an investigation into an offence was conducted in an unreasonable or improper manner. Each case will turn on its own facts.

However, it is clear that an accused person does not have to prove that the investigation "*fell grossly below optimum standards*" in order to be successful in the costs application based on this ground. An example of a situation where it could be successfully argued that the investigation was conducted in an unreasonable or improper manner would be where the police failed to interview witnesses to an event that were called by the defence in its case which was able to lead exculpatory evidence from those witnesses or a situation where some vital part of an investigation was overlooked or evidence was tampered with by the police.

**4.2 THAT THE PROCEEDINGS WERE INITIATED WITHOUT REASONABLE CAUSE OR IN BAD FAITH OR WERE CONDUCTED BY THE PROSECUTOR IN AN IMPROPER MANNER (SECTIONS 214(1)(b),117(1)(b) and 257D(1)(b) OF THE *CRIMINAL PROCEDURE ACT 1986*)**

In *Port Macquarie-Hastings Council v Lawlor Services Pty Limited; Port Macquarie-Hastings Council v Petro (No 7) 4 [2008] NSWLEC 275 (21 February 2008)* Pain J considered the meaning of "*without reasonable cause or in bad faith or were conducted in an improper manner*".

At para 61 - 63 Pain J stated as follows:

*"61 In relation to whether the proceedings had been instituted (in the Local Court) without reasonable cause or in bad faith or were conducted in an improper manner (s 70(1)(b)), his Honour in Halpin considered the meaning of "without reasonable cause" and referred to Council of Kangan Batman Institute of Technology and Further Education v Australian Industrial Relations Commission (2006)156 FCR 275. His Honour stated at [57] –[60]: 57 Further, I do not consider that it can be said that the proceedings were "initiated without reasonable cause". In Council of Kangan Batman Institute of Technology and Further Education v Australian Industrial Relations Commission [2006] FCAFC 199; (2006) 156 FCR 275, the Full Court of the Federal Court at [60] stated:-*

*“The question therefore arises whether ... the plaintiff instituted the proceeding vexatiously or without reasonable cause. A party does not institute proceedings without reasonable cause merely because that party fails in the argument put to the Court: Regina v Moore; ; ex parte Federated Miscellaneous Workers’ Union of Australia [1978] HCA 51; (1978) 140 CLR 470 per Gibbs J at 473. The section reflects a policy of protecting a party instituting proceedings from liability for costs, but that protection may be lost. Although costs will rarely be awarded under the section, and exceptional circumstances are required to justify the making of such an order ... a proceeding will be instituted without reasonable cause if it has no real prospects of success, or was doomed to failure: Kanan v Australian Postal and Telecommunications Union (1992) 43 IR 257 per Wilcox J; see also Bostik (Australia) Pty Limited v Gorgevski (No 2) (1992) 36 FCR 439; Nilsen v Loyal Orange Trust (1997) 67 IR 180.”*

**58** *The question as to whether at the time the proceeding was instituted it had “no real prospects of success or was doomed to failure” is a question that is required to be determined as a matter of objective fact: Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Nestle Australia Limited ( 2005) 146 IR 379 at [4] citing Spotless Services Australia Limited v Marsh SDP [2004] FCA FC 155 at [13].*

**59** *The Full Court in Kangan (supra) at [63] stated:-*

*“[i]t is a matter of judgment, sometimes of fine judgment, in all the circumstances of a particular case whether a proceeding is brought without reasonable cause. The phrase ‘vexatiously or without reasonable cause’ was described by von Doussa J in Hatchett v Bowater Tutt Industries Pty Limited (No 2) [1991] FCA 188; (1999) 28 FCR 324 at 327 as ‘similar to the one applied by a Court on an application for the exercise of summary power to stay or strike out proceedings.’”*

**60** *In Canceri v Taylor (1994) 123 ALR 667, the Industrial Relations Court of Australia determined an application for costs by assessing whether or not at the time of instituting proceedings upon the facts apparent to the informant, there was no substantial prospect of success. The Court, per Moore J at 676, adopted the approach of Wilcox J in Kanan v Australian Postal & Telecommunications Union (1992) 43 IR 257 at 264:-*

***“It seems to me that one way of testing whether a proceeding***

*is instituted 'without reasonable cause' is to ask whether, upon the facts apparent to the applicant at the time of instituting the proceeding, there was no substantial prospect of success. If success depends upon the resolution in the applicant's favour of one or more arguable points of law, it is inappropriate to stigmatise the proceeding as being 'without reasonable cause'. But where, on the applicant's own version of the facts, it is clear that the proceeding must fail, it may properly be said that the proceeding lacks reasonable cause."*

62 *Wilcox J in Kanan* has been adopted in other criminal proceedings in addition to *Halpin*, see for example *Eslarn Holdings*.

63 *In relation to whether the prosecutor unreasonably failed to investigate (or to investigate properly) any relevant matter (s 70(1)(c)) in Halpin Hall J held he had to consider if the facts which it could be said the prosecutor failed to have sufficient regard to were facts that it ought reasonably to have been aware of would have suggested that the proceedings should not have been brought. As, despite those facts, he considered the prosecutor still had an arguable case he held this section did not apply.*" (Emphasis added)

Nevertheless, it is emphasised that sections 214(1)(b), section 117(1)(b) and section 257D(1)(b), unlike the section considered by the Federal Court in *Council of Kangan Batman Institute of Technology and Further Education v Australian Industrial Relations Commission (2006) 156 FCR 275*, contains no provision that "exceptional circumstances" are required to justify the making of an order for costs.

The question of whether or not the proceedings were instituted without reasonable cause has to be answered by reference to the quality of the evidence which the police had gathered, with an eye not only to enquiries which had been made **but also to those which should have been made**. In *DJ v DPP [supra]* Hidden J stated, [at para 28] that:

*"The question whether the proceedings were initiated without reasonable cause was to be answered by reference to the quality of the evidence which the police had gathered, with an eye not only to the enquiries which had been made but also to those which should have been made. It turned upon considerations different from (although related) those to which Black AJ had regard in determining whether the prosecution should be stayed as an abuse of*

*process. Quite apart from flaws in the investigation to which reference has been made, one can envisage other enquiries which should have been undertaken, preferably before a decision whether or not to lay charges was made. In particular, it could be argued that this was a case in which the authorities should have sought the advice from an expert such as Dr Waters". (Emphasis added)*

The reasonableness of a decision to institute proceedings is not based upon the test the prosecution agencies throughout Australia use as a discretionary test for continuing to prosecute namely, that a reasonable jury would be likely to convict. That the test cannot be a test of reasonable suspicion which might justify an arrest and it cannot be the test which determines whether Prosecution is malicious. *Manley per Wood CJ at CL [at 12], Regina v Hatfield [Supra], Mordaunt [Supra] at para 36[h].*

In *R v Manley [2000] NSWCCA 196* (26 May 2000) Wood CJ at CL referred to the requirement for proof, by an applicant, of unreasonableness for the institution of proceedings and to the consideration of that matter by Blanch J in *McFarlane (Supreme Court of New South Wales 12 August 1994 (unreported))*. At paragraphs 11 - 14 Wood CJ at CL stated that:

*"11 In an observation of immediate relevance for the present appeal, with which I would respectfully agree, his Honour said concerning a case that turned upon evidence of a highly technical nature:*

*"If a highly qualified expert in a medical field gives an opinion, such opinion would normally have to be accepted by a tribunal of fact unless there were other aspects of the case which would cause the opinion to be questioned. ...*

*If the hypothetical prosecutor instituting proceedings knew there were equally qualified experts who gave conflicting evidence in a case where that opinion was conclusive as to whether the prosecution should succeed, it seems to be questionable whether it would be reasonable to proceed with the prosecution."*

*12 Otherwise his Honour said:*

*"None of the reported cases addresses the question of what `reasonable' means in the context of the decision to institute proceedings. **Clearly a decision to institute proceedings is not based upon the test that prosecution agencies throughout Australia use as the discretionary test for continuing to prosecute, namely whether there is any reasonable prospect of conviction. Equally the decision is not governed by the test in s41(6) of the Justices Act applied by magistrates, namely whether no reasonable jury would be likely to convict. Equally the test cannot be a test of reasonable suspicion which***

*might justify an arrest and it cannot be the test which determines whether the prosecution is malicious.*

***In the ordinary course of events a prosecution may be launched where there is evidence to establish a prima facie case but that does not mean it is reasonable to launch a prosecution simply because a prima facie case exists. There may be cases where there is contradictory evidence and where it is reasonable to expect a prosecutor to make some evaluation of that evidence."***

13 *These observations have been cited with approval by this Court in Fejsa (1995) 82 A Crim R 253 and Pavy CCA (NSW) 9 December 1997 unreported, in the former of which the Court observed, as did the Court of Appeal in NSW Treasurer v Wade CA(NSW) 16 June 1994 unreported, **that it would be unwise to attempt to lay down any all-embracing definition of the circumstances in which it would be unreasonable to institute proceedings.***

14 *Given the wide variety of cases that might arise for consideration, I am similarly reluctant to attempt any exhaustive definition of the test. **It seems to me that the section calls for an objective analysis of the whole of the relevant evidence, and particularly the extent to which there is any contradiction of expert evidence concerning central facts necessary to establish guilt, or inherent weakness in the prosecution case.** Matters of judgment concerning credibility, demeanour and the like are likely to fall on the other side of the line of unreasonableness, being matters quintessentially within the realm of the ultimate fact finder, whether it be Judge or Jury."* (Emphasis added)

Accordingly, the fact that a prosecution may be launched where there is evidence to establish a *Prima Facie* case does not mean that it is reasonable to launch a prosecution because:

*"There may be cases where there is contradictory evidence and where it is reasonable to expect a Prosecutor to make some evaluation of that evidence.";*  
*McFarlane [supra] Manley per Wood CJ at CL at [12].*

In this context it is important to bear in mind that in *R v Pavy* (1997) 98 A Crim R 396 at 401 the Court of Criminal Appeal (Hunt CJ at CL, Smart and Badgery-Parker JJ) unanimously held that:

*"The legitimate interest which the community has in serious crimes being prosecuted by the Director of Public Prosecutions is not disputed. That cannot, in our judgment, make it reasonable as between the Crown and the accused/applicant **to prosecute in the face of significant***

***weaknesses in the Crown case which the Crown acting reasonably, ought to have been aware***". (Emphasis added).

**4.3 THAT THE PROSECUTOR UNREASONABLY FAILED TO INVESTIGATE (OR TO INVESTIGATE PROPERLY) ANY RELEVANT MATTER OF WHICH IT WAS AWARE OR OUGHT REASONABLY TO HAVE BEEN AWARE AND WHICH SUGGESTED THAT THE ACCUSED PERSON MIGHT NOT BE GUILTY OR THAT, FOR ANY OTHER REASON, THE PROCEEDINGS SHOULD NOT HAVE BEEN BOUGHT (SECTIONS 214(1)(c), 117(1)(c) and SECTION 257D(1)(c) OF THE *CRIMINAL PROCEDURE ACT 1986*)**

It is important, when making a submission under this sub-section, to ensure that submissions are made about what matters a Prosecutor unreasonably failed to investigate and to concentrate on investigations that should have been made and which suggested that the accused person might not be guilty or that, for any other reason, the proceedings should not have been brought.

In *DPP (Cth) v Neamati [2007] NSWSC 746* Magistrate O'Shane had dismissed a prosecution of six (6) offences alleging a breach of section 135.2(1) of the *Criminal Code (Cth)* of obtaining a financial advantage, knowing or believing that an accused person was not eligible to receive that advantage. The essence of the allegation made by the Prosecution was that the accused had obtained payments of Youth Allowance by deliberately understating the amount of money he was earning.

The accused pleaded not guilty. At the end of the prosecution case the defence made a no *prima facie* case submission. At the conclusion of the addresses on that submission O'Shane LCM adjourned the proceedings to consider the submissions.

O'Shane LCM later concluded there was no *prima facie* case as there was no evidence on the element of knowledge. Her Honour made an order that the prosecution pay costs incurred by the accused.

The Commonwealth Director of Public Prosecutions appealed against that decision.

During the course of giving judgment in *DPP (Cth) v Neamati*, Howie J stated [at 37 - 39] that:

*"37 The Magistrate quotes a largely irrelevant passage from Latoudis v Casey [1990] HCA 59; (1990) 170 CLR 534 and then states:*

*"Having regard to the fundamental issue which was at the core of the Court's decision on prima facie, and is at the core of this **consideration I am of the view that the Prosecution unreasonably failed to investigate a matter of which it should have been aware, and accordingly I am prepared to allow the claim on the basis of s 214(1)(c)**"*

*38 The Magistrate does not indicate what matter it was of which the prosecutor should have been aware. It cannot be the fact that it did not have a prima facie case. The Magistrate acknowledged earlier in the judgment that the failure to make out a prima facie case was not sufficient to justify the ordering of costs against the prosecutor. **But even if it were, how did the prosecutor unreasonably fail to investigate whether it had a prima facie case?** The matter to which she is referring could not possibly be the defendant's knowledge that he was not eligible for the benefits. How should the prosecutor have been aware of that matter? Nor could it have been the fact that the defendant was unaware that he was not eligible for the benefits? That was not proved to be a fact, let alone was it shown that the prosecutor ought to have been aware of it.*

*39 **But in any event the Magistrate fails to disclose how the prosecutor unreasonably failed to investigate any matter, whatever it might be, where the only issue was the defendant's state of knowledge of a particular fact?** The police sought to interview the defendant but he declined. What more might they have done to investigate his knowledge except to try to ascertain it from his actions in light of the information provided to him by the agency?"* (Emphasis added)

Ultimately, Howie J concluded [at para 41] that:

*"41 As I have already indicated, in my view the order for costs was unreasonable and was based upon findings of the Magistrate **that are either undisclosed or incomprehensible.** The result is that the appeal must be allowed and the orders of the Magistrate set aside. There should be an order that the defendant pay the plaintiff's costs. This is regrettable because, as a result of a ruling of the*

*Magistrate that could not even be supported by the defendant in this Court, the defendant has been put to the possibility of paying costs in this Court as well as paying his own costs in the proceedings before the Magistrate."*

The decision of Howie J in *DPP (Cth) v Neamati* demonstrates the need for an advocate, when preparing submissions pursuant to section 117(1)(c), 214(1)(c) or 257D(1)(c) of the *Criminal Procedure Act 1986*, to concentrate on presenting an argument as to why it was that a Prosecutor unreasonably failed to investigate a matter of which it should have been aware or, alternatively, to concentrate on preparing a list of reasons why it is asserted that the proceedings should not have been brought.

The preparation of such a list of points or argument upon those points requires the advocate to thoroughly analyse the evidence that has been presented by the Prosecution.

A good example of a situation where it can be asserted that the Prosecution failed to investigate a matter properly is in a sexual assault case where the evidence of the victim is uncorroborated and the evidence of that victim contains significant weaknesses being inconsistencies or matters that are contradicted by other evidence or where, for example, the victim has an extensive criminal history involving matters of dishonesty.

In such a case, where the evidence of the victim is not accepted by the Court or jury and the case is dismissed or withdrawn, it is clearly open to the defence to assert that, in the event that the veracity of the victim had been thoroughly considered by the Prosecution, the quality of the victim's evidence was such that there was significant weaknesses in it of which the Crown, acting reasonably was aware, or alternatively, ought reasonably to have been aware which suggested that the accused person might not be guilty, which material would bolster an argument that the proceedings should not have been brought for those reasons.

#### **4.4 THAT, BECAUSE OF OTHER EXCEPTIONAL CIRCUMSTANCES RELATING TO THE CONDUCT OF THE PROCEEDINGS BY THE PROSECUTOR, IT IS JUST AND REASONABLE TO AWARD PROFESSIONAL COSTS (SECTIONS**

**214(1)(d), 117(1)(d), AND 257D(1)(d) OF THE CRIMINAL PROCEDURE ACT 1986)**

In *Port Macquarie-Hastings Council v Lawlor Services Pty Limited*; *Port Macquarie-Hastings Council v Petro (No 7)* [supra] Pain J stated [at 64]

*"64 In relation to whether there were exceptional circumstances (s 70(1)(d)), Hall J in Halpin considered that the issue was whether or not there was any relevant conduct by the prosecutor suggesting it was "just and reasonable" to award costs in favour of the plaintiff. His Honour referred to Caltex Refining Co Pty Ltd v Maritime Services Board of NSW (1995) 36 NSWLR 552 in which the Court of Criminal Appeal considered that "just and reasonable" required that there be a fair hearing and that the terms of the order finally made were reasonable."*

It would appear that this particular ground which, if made out would support the exercise of the discretion by the Court to make an order for costs in favour of an accused person would be rarely used.

The application of the sub-section requires "*other exceptional circumstances*" that specifically relate to the "*conduct of the proceedings by the Prosecutor.*"

A good example of a situation where this particular sub-section could be relied upon is demonstrated in the recent documentary screened on SBS television called "*Every Family's Nightmare*".

In that case the accused, a boy of fifteen (15) years of age, was accused of raping a young lady, several times, in a busy Perth park, in broad daylight, close to the West Australian Police Academy.

Writing about the case in the Sydney Morning Herald, on 11 June 2010, Richard Ackland stated:

*"However, the forensic side of the case was a shambles. The accused's clothing, which the Police used as evidence, was contaminated. The crime scene wasn't immediately secured and it became contaminated. The pathology report showed an absence of young Patrick's DNA in the complainant's intimate samples, and vice versa. Still the Police and Prosecution insisted, despite the lack of DNA, it wasn't possible to exclude Waring. The fact he wasn't excluded meant a jury could infer there must be grounds for his inclusion."*

***It took 5 months to get the pathology report from the Police even though it could have been completed in 48 hours. The report did reveal DNA from a saliva mouth swab of a completely different male. That was not reported to the defence team...***

***Despite the discrepancies in her numerous versions of the supposed event the West Australian DPP pressed on with a case. The Crown opened with a statement that all of the claims by the complainant would be corroborated. None were. After a three week trial and jury deliberations of 10 hours the verdict came back: Not guilty.*** (Emphasis added)

Clearly, upon the facts of the Waring case, it could be argued that there were “*exceptional circumstances relating to the conduct of the proceedings by the Prosecutor*” in that:

- (a) The crime scene was not properly secured and the accused’s clothing was contaminated as a result of failure by the Police to secure the crime scene notwithstanding which the prosecution proceeded.
- (b) The pathology reports showed an absence of the accused’s DNA on the victim together with the absence of the victim’s DNA upon the accused.
- (c) It took the Police five (5) months to obtain a pathology report and that the Prosecution still proceeded in the face of that report revealing DNA upon the victim of a completely different male.
- (d) The presence of DNA from a saliva mouth swab of a “*completely different male*” was not disclosed by the Prosecution to the defence.
- (e) The Crown opened with a Statement that all of the claims by the Complainant would be corroborated but none were in fact corroborated.

The Waring case demonstrates how, in the hands of a properly prepared advocate, points can be made that would support a submission that the Court should exercise its discretion to make an order for costs under the sub-section.

However, hopefully, a submission based on section 214(1)(d) that there were “*exceptional circumstances*” relating to the “*conduct of the proceedings by the Prosecutor*” will be rare.

## **5. THE ASSESSMENT OF COSTS UNDER THE *CRIMINAL PROCEDURE ACT 1986***

In the event that the Court concludes that it is appropriate for it to exercise its discretion, to order the payment of costs pursuant to Section 213 of the *Criminal Procedure Act 1986*, the situation is that the Court can proceed to assess the costs in the matter.

Section 213(2) provides that the amount of professional costs is the amount that the Magistrate considers to be “*just and reasonable*”.

In order to provide evidence to the Court as to the amount of professional costs that is “*just and reasonable*”, an affidavit should be put on annexing to it all bills forwarded to the accused together with the costs of the hearing on the day that the charge was withdrawn or dismissed.

The Court can then consider the material contained in the Affidavit of the solicitor, together with the bills annexed to it, in determining whether the amount claimed for professional costs, as set out in that Affidavit, are “*just and reasonable*”.

## **6. MAKING AN APPLICATION FOR COSTS WHERE PROCEEDINGS ARE ADJOURNED (SECTIONS 118, (COMMITTAL PROCEEDINGS) 216 (SUMMARY TRIALS) AND 257F (SUMMARY MATTERS IN THE SUPREME COURT)) OF THE *CRIMINAL PROCEDURE ACT 1986*.**

Section 216 of the *Criminal Procedure Act 1986* gives the Court a discretion, in proceedings where there is a summary trial, to order costs on an adjournment if the Court is satisfied that the other party has incurred additional costs because of the unreasonable conduct or delays of the party against whom the order is made.

Section 257F of the *Criminal Procedure Act 1986* contains an identical provision which applies in the case of an adjournment of proceedings in cases that are heard in the

Supreme Court, in its summary jurisdiction, where that Court had jurisdiction to hear and determine those proceedings in a summary manner.

Section 118 of the *Criminal Procedure Act 1986* , which allows an application for costs to be made on an adjournment of committal proceedings, provides as follows:

**"118 Costs on adjournment**

*(1) A Magistrate may in any committal proceedings, at his or her discretion or on the application of the prosecutor or an accused person, order that one party pay costs if the matter is adjourned.*

*(2) An order may be made only if the Magistrate is satisfied that the other party has incurred additional costs because of the unreasonable conduct or delay of the party against whom the order is made.*

*(3) An order may be made whatever the result of the proceedings."*

Sections 118, 216 and 257F of *Criminal Procedure Act*, all of which allow for costs to be made on an adjournment, are almost identical to each other.

It is important to be aware that the Court has a discretion to order costs on an adjournment if it is satisfied that the other party has incurred additional costs because of the unreasonable conduct or delays on the part of a Prosecutor.

Examples that come to mind are a case having to be adjourned because the Police have failed to prepare a brief in time and a situation where a hearing commences and has to be adjourned because of the unavailability of a witness who was not subpoenaed by the Prosecution.

In *Inspector Spence v William Bevan Thompson [2009] NSWIRComm 205 (18 November 2009)* Kavanagh J was dealing with a case in which Inspector Ronald Spence of the WorkCover Authority of New South Wales instituted proceedings against William Bevan Thompson alleging breaches of the *Occupational Health and Safety Act 2000*.

The matter had originally been listed for hearing on 31 August 2009, however, on that day; issues related to the Agreed Statement of Facts in a related, prosecution, known

as the Black Cat Prosecution, arose. The Court determined, in the circumstances, that it was only fair that the Defendant, who had pleaded “*guilty*” to the same Agreed Statement of Facts, not have his matters heard in a hearing where facts arising from the same incident were in dispute.

The Prosecution pressed, notwithstanding the dispute as to facts, for the Prosecution to proceed on that day. Kavanagh J determined that this would not be fair in the circumstances given that the Prosecution had been on notice of a dispute between Black Cat Roofing and itself as to the agreed facts and in this matter Kavanagh J held that appropriate steps should have been taken to take the matter out of the list for hearing.

It was in these circumstances that the Defendant made an Application for Costs of the day on 31 August 2009. Kavanagh J, after referring to section 257F of the *Criminal Procedure Act* concluded [at 58]:

“58. *Given that the Prosecutor was on notice of the dispute with the other Defendant as to the agreed facts it would have been desirable to have this matter removed from that hearing list. I, therefore, order the Defendant be paid the costs on 31 August 2009 on the basis of a mention but I intend to incorporate this view in my orders.*”

Ultimately, Her Honour made an order that the Defendant pay the Prosecutor’s costs, save the costs of 31 August 2009, which costs of the Defendant for the mention, should be deducted from the Prosecutor’s costs.

## **7. THE APPLICATION PURSUANT TO SECTION 2 OF THE COSTS IN CRIMINAL CASES ACT 1967**

Section 2 of the *Costs in Criminal Cases Act 1967* gives a Court the power where, after the commencement of the trial in the proceedings, the Defendant is acquitted or discharged in relation to the offence concerned or a direction is given by the Director of Public Prosecutions that no further proceedings be taken or, where on appeal the conviction of the Defendant is quashed, to grant a certificate specifying the matters set out in section 3 of the Act.

Section 3 of the *Costs in Criminal Cases Act 1967* provides that certain matters that shall be specified in the Certificate.

**“3. Form of Certificate**

1. *The Certificate granted under this Act shall specify that, in the opinion of the Court or Judge or Magistrate granting the Certificate:*

(a) *if the prosecution had, before the proceedings were instituted, been in possession of all of the relevant facts, it would not have been reasonable to institute the proceedings, and*

(b) *that any act or omission of the defendant that contributed, or might have contributed, to the institution or continuation of the proceedings was reasonable in the circumstances.”*

The task of the court, when dealing with an application under Section 2 of the *Costs in Criminal Cases Act 1967*, is to ask the hypothetical question, whether, if the prosecution had evidence of all of the relevant facts immediately before the proceedings were instituted, it would not have been reasonable to institute the proceedings. *Allerton v Director of Public Prosecutions* (pages 559-560).

This task is to be viewed with the benefit of hindsight (the omniscient crystal ball) looking at the situation **at the time of the acquittal and not at the time that the criminal proceedings were commenced**; *Pavy* (1997) 98 A Crim R 396.

In *Ramskogler v The Director of Public Prosecutions of New South Wales* [1995] NSWSC 10 Kirby P, with whom other members of the Court of Appeal agreed, indicated that a judge considering an application for a certificate under section 2 and 3 of the Act should divide his or her task into two (2) categories being the “*facts*” aspect and the “*reasonableness*” aspect.

In *Ramskogler* [*supra*] Kirby P [at para 28] stated that:

*“...The judgment of Mahoney JA in The Treasurer in and for the State of New South Wales v Way & Anor (Court of Appeal, unreported, 16 June (1994); NSWJB 50) at P2 makes it clear that, in deciding whether to issue a certificate under the Act, a judge must make two findings with respect to section 3(a). First,*

*the judge must determine what Mahoney JA describes as the “facts issue”. That is, the judge must determine what were, within the Act were “all the relevant facts”. Secondly, the judge must decide the “reasonableness issue” he or she must determine whether, if it had known all the facts, the prosecution would have been acting “reasonably” in bringing the proceedings. **These considerations require that some care be taken in considering the two steps mandated by Parliament.***” (Emphasis added)

The judicial officer considering an application, pursuant to section 2 of the *Costs in Criminal Cases Act*, must determine what were “*all the relevant facts*” and assume the prosecution to have been “*in possession of evidence of*” all of them and must determine whether, if the prosecution had been in possession of those “*relevant facts*”, before the criminal proceedings were instituted, “*it would not have been reasonable to institute them*”. The Judicial Officer considering the matter must consider the position on the “*relevant facts*” as at the date that he considers the matter, with the benefit of hindsight, not the situation at the time that the police charged the accused.

An applicant for a Certificate must succeed on both the “facts issue” and the “reasonableness issue”; *Treasurer in and for the State of New South Wales v Wade & Dukes* (Court of Appeal, 16 June 1994, (unreported) BC9402561) per Mahoney JA (with whom Handley and Powell JJA agreed) *Ramskogler v Director of Public Prosecutions & Anor* (1995) 82 A Crim R 128 (at 134-135) per Kirby P; *Mordaunt v Director of Public Prosecutions & Anor [2007] NSWSC 121* per McColl [at 36(e)].

The applicant for a Certificate bears the onus of showing that it was not reasonable to institute the proceedings. It is not for the Court to establish, nor for the Court to conclude, that the institution of proceedings was, or would have been in the relevant circumstances reasonable. *Mordaunt v DPP [supra]* per McColl JA [at 36(d)].

The task of the Court in dealing with an application under the *Costs in Criminal Cases Act 1967* is to ask the hypothetical question whether, if the Prosecution had evidence of all the relevant facts immediately before the proceedings were instituted, it would not have been reasonable to institute the proceedings. *Mordaunt v DPP [supra]* per McColl JA [36(e)].

In *Mordaunt McColl* JA said, at paragraph 36(f) that:

*“The hypothetical question is addressed to evidence is addressed to evidence of all relevant facts; whether discovered before arrest or before committal (if any); after committal and before trial; during the trial; or afterwards admitted under Section 3A of the CCC Act; all of the relevant facts proved, whether they became known to the prosecution and whether or not in evidence at the trial, must then be considered by the decision-maker; Allerton (at 559-560); Manley per Wood CJ at CL (at [9]); the relevant facts include those relevant to the offences charged and the threshold question posed by S3(1)(a); other facts will also be relevant and admissible going, amongst other things, to the question posed by S3(1)(b) and to the ultimate question whether, assuming the Court is of the opinion required to be specified, it should exercise its discretion under S2: Gwozdecky v DPP (1992) 65 A Crim R 160 (at 164-165) per Sheller (with whom Mahoney JA and Hope AJA agreed)”.*

## 7.1 THE FACTS ISSUE

The task of the Court, when dealing with an application under the *Costs in Criminal Cases Act 1967*, is, firstly, to address the *“facts issue”*. Considerable care needs to be taken by an advocate in preparing an application for costs under the Act to isolate *“all the relevant facts”* that it is submitted that the Court should consider at the first stage of the inquiry namely ascertaining *“all the relevant facts”*.

In order to prepare such an application it is necessary to be familiar with the meaning of the words *“all the relevant facts”*.

In *R v Tooës* [2008] NSWSC 291 (4 April 2008) Studdert AJ considered the meaning of the words *“all the relevant facts”*. In so doing, His Honour referred to the judgment of Sugerman P with whose judgment O’Brien J agreed in *R v Williams* (1970) NSWLR 81.

At paragraph 5 of his judgment, Studdert AJ said:

*“5 In Williams Sugerman P, with whose judgment O’Brien J agreed, said as to the concept of “all the relevant facts” contained in s 3(1)(a):*

*“I draw attention in particular to the phrase: ‘been in possession of evidence of all the relevant facts’ and the emphasis which I have supplied is, I think, the emphasis with which the phrase must be read. This imports that there*

*were relevant facts, evidence of which was not in the possession of the prosecution, before the institution of the proceedings. What relevant facts? Not 'all' the relevant facts in any literal or absolute sense; omniscience is not to be attributed to the prosecution in the hypothetical inquiry which, I agree with Mr Bowie, is required. 'All the relevant facts' means, in my opinion, all the relevant facts as they finally emerge at the trial; the facts in the prosecution's case but, as well, the facts in the accused's case as those emerged from cross-examination of the prosecution's witnesses or from evidence called by the accused. That seems to me to be the nature of the hypothetical inquiry which is called for by s.3(1)(a). Suppose the prosecution before the proceedings were instituted had been in possession of evidence of the relevant facts in the accused's case as well as of those in its own - suppose it had been in possession of evidence of all the relevant facts and not merely of evidence of the relevant facts in its own case - would it have been reasonable to institute the proceedings?"*

It is important to remember that, when considering the "facts issue", an accused person can adduce evidence of matters that were not before the Court at the hearing, pursuant to section 3A of the *Costs in Criminal Cases Act 1967* which is headed "*Evidence of further relevant facts may be adduced*".

Section 3A of the *Costs in Criminal Case Act 1967* provides as follows:

***"3A Evidence of further relevant facts may be adduced***

*(1) For the purpose of determining whether or not to grant a certificate under section 2 in relation to any proceedings, the reference in section 3 (1) (a) to "all the relevant facts" is a reference to:*

*(a) the relevant facts established in the proceedings, and*

*(b) any relevant facts that the defendant has, on the application for the certificate, established to the satisfaction of the Court or Judge or Magistrate, and*

*(c) any relevant facts that the prosecutor, or in the absence of the prosecutor, any person authorised to represent the Minister on the application, has established to the satisfaction of the Court or Judge or Magistrate that:*

*(i) relate to evidence that was in the possession of the prosecutor at the time that the decision to institute proceedings was made, and*

*(ii) were not adduced in the proceedings.*

*(2) Where, on an application for a certificate under section 2 in relation to any proceedings, the defendant adduces evidence to establish further relevant facts that*

were not established in those proceedings, the Court or Judge or Magistrate to which or to whom the application is made may:

(a) order that leave be given to the prosecutor in those proceedings or, in the absence of the prosecutor, to any person authorised to represent the Minister on the application, to comment on the evidence of those further relevant facts, and

(b) if the Court, Judge or Magistrate think it desirable to do so after taking into consideration any such comments, order that leave be given to the prosecutor or to the person representing the Minister to examine any witness giving evidence for the applicant or to adduce evidence tending to show why the certificate applied for should not be granted and adjourn the application so that that evidence may be adduced.

(3) If, in response to an application for a certificate under section 2 in relation to any proceedings, the prosecutor or, in the absence of the prosecutor, any person authorised to represent the Minister on the application adduces evidence to establish further relevant facts that were not established in those proceedings, the Court or Judge or Magistrate to which or to whom the application is made may:

(a) order that leave be given to the defendant to comment on the evidence of those relevant facts, and

(b) if the Court or Judge or Magistrate think it desirable to do so after taking into consideration any of those comments, order that leave be given to the defendant to examine any witness giving evidence for the prosecutor or that authorised person”.

An example of “*further relevant facts*” is the material contained in the Court file or correspondence from the defence to the Prosecution making a submission that, having regard to the weaknesses in the Prosecution case, the case should be no billed.

Such evidence would not, ordinarily be before the Court during committal proceedings or a summary trial.

## **7.2 THE REASONABLENESS ISSUE**

In *Solomons v District Court of New South Wales [2002] HCA 47* the High Court confirmed that the onus is on the Defendant to establish that, in the light of evidence now available, it would not have been reasonable to institute proceedings.

In considering the question of “*reasonableness*”, that it must be remembered that, in *Pavy* (1997) 98 A Crim R 396 the Court of Criminal Appeal, (Hunt CJ, Smart and Badgery-Parker JJ,) had the following to say:

*“The primary test to be applied in determining whether a certificate [pursuant to section 2 of the Costs in Criminal Cases Act 1967] should be granted is to be found in the wording of Section 3(1)(a): **if the prosecution had been in possession of all the relevant evidence as it is now known before the proceedings had begun, would it have been reasonable to institute proceedings?**”*

*The section calls for: “A hypothetical exercise in the sense that the question that whether it would have been reasonable to prosecute at the time of [the] institution [of the proceedings] if the hypothetical prosecutor had possession of evidence of all the relevant facts including those established even after the trial and on [the] application (see *Allerton v DPP* (1991) 24 NSWLR 550 per Blanch J, McFarlane (unreported CCA 12 August 1994 NSW)”. **The “institution of proceedings” refers to the time of arrest or charge not to some later stage such as committal for trial or finding of a Bill**”.* (Page 399) (Emphasis added)

More recently, in *R v Cardona* [2002] NSWSC 823, Hidden J had the following to say about Section 3(1)(a):

*“A helpful summary of authorities on the approach to that question is to be found in the judgment of Simpson J in *R v Hatfield* [2001] NSWSC 334 at para 8-para 11. Although reference was made in submissions to material in possession of the Crown prior to trial, it is sufficient for present purposes to consider whether it would not have been reasonable for the prosecution to have instituted the proceedings in the light of evidence as it emerged at the trial. As Hunt J (as he then was) put it in *R v Dunne* (unreported, 17 May 1990), I must “Put myself in the hypothetical place of the prosecution possessed of knowledge of all the facts which have now become apparent”, examining the matter “**with the knowledge gained from such an omniscient crystal ball**” (at p3) it follows that the grant of a certificate would involve no reflection upon the conduct of those having responsibility for the prosecution.”*(Emphasis added)

Accordingly, on the reasoning in *Cardona* and *Pavy*, the court needs to determine whether or not, with the benefit of hindsight or the omniscient crystal ball, it would have been reasonable for the police to charge the accused at the time he was in fact charged.

An advocate preparing submissions on an application in which a certificate is sought, pursuant to section 2 of the *Costs and Criminal Cases Act 1967*, therefore needs to concentrate on the question of whether or not it was reasonable for the Police to charge the accused at the time he was in fact charged and to formulate a list of reasons as to why it is alleged, by the defence, that it was not reasonable for the Police to charge the accused at the time at which he was charged.

The reasonableness of a decision to institute proceedings is not based upon the test the prosecution agencies throughout Australia use as a discretionary test for continuing to prosecute namely, that a reasonable jury would be like to convict. The test cannot be a test of reasonable suspicion which might justify an arrest and it cannot be the test which determines whether the prosecution is malicious. *Manley* per Wood CJ at CL; at [12], *Regina v Hatfield [supra]*. *Mordaunt [supra]* [para 36(h)].

The question of whether or not the proceedings were initiated without reasonable cause has to be answered by reference to the quality of the evidence which the police had gathered, with an eye not only to enquiries which had been made but also to those which **should** have been made; *DJ –v- DPP [2000] NSWSC 1092* per Hidden J at para. 28.

Blanch J (as he then was), when dealing with a case involving Section 3(1)(a) of the *Costs in Criminal Cases Act*, which deals with the question of the reasonableness of instituting proceedings, had the following to say in *R –v- McFarlane (Supreme Court (unreported) 070036/93 12 August 1994)*:

*“The exercise to be undertaken in conformity with the Act is a hypothetical exercise in the sense that the question is whether it would have been reasonable to prosecute at the time of their institution if the hypothetical prosecutor had the possession of evidence of all relevant facts **including those established even after the trial and on this application** (see *Allerton –v- The Director of Public Prosecutions (1991) 24 NSWLR 550*)”.* (Emphasis added)

David Hunt J in *R –v- Dunne (unreported) Supreme Court of New South Wales BC 9002442 (17 May 1990)* put it in another way. His Honour said:

*“As I understand the provisions of Section 3, I have to put myself in the hypothetical place of the prosecution possessed of knowledge of all of the facts which have now become apparent, either at the trial or by way of additional evidence in the application, and I have to determine whether, **with the knowledge gained from such an omniscient crystal ball, it would have been unreasonable to institute the prosecution**”.* (Emphasis added)

The fact that a prosecution may be launched where there is evidence to establish a prima facie case does not mean that it is reasonable to launch a prosecution; there may be cases where there is contradictory evidence and where it is reasonable **to expect a prosecutor to make some evaluation of that evidence**. *McFarlane [supra]*, *Manley* per Wood CJ at CL at [12].

Moreover, Section 3 calls for an objective analysis of the whole of the relevant evidence particularly whether or not there is an inherent weakness in the prosecution case, matters of judgment concerning credibility (*Manley [supra]* per Wood CJ at CL at [14]).

It is important to bear in mind that, in circumstances where the evidence of a victim is uncorroborated, it can often be argued that it was incumbent upon the Prosecution to determine the reliability and veracity of the evidence of the victim, particularly where the evidence of the victim contains inconsistencies which would support a submission that, because of those inconsistencies, it was not reasonable for the accused to be charged at the time the proceedings were instituted against him because of significant weaknesses in the evidence of the victim of which the Crown was aware or ought reasonably to have been aware.

Criminal cases often consist of the evidence of the victim, the evidence of the accused together with a number of police officers. Many such cases are “*word versus word*”. Circumstances may arise where the “*word*” of the Crown’s principal witness, is seriously in question or where the evidence of a Crown witness is uncorroborated which should result in the advocate for the accused making an application for costs if the accused is acquitted or the proceedings are withdrawn by the prosecution.

In *R v CPR* [2009] NSWDC 219 (19 August 2009), which was a case resulting in an unsuccessful prosecution for rape with uncorroborated evidence from the alleged victim, Goldring DCJ stated [at para 33-36] that:

*“33 Here, the applicant says that, even though, on the complainant's evidence a prima facie case against him might be made out, there were so many inconsistencies in her evidence, and between her evidence and other evidence, that it was unreasonable to institute proceedings against him solely on the basis of that evidence.*

*34 In my opinion, the question of the credit of a single witness, on whose evidence the prosecution case depends, is a separate question from whether the prosecution should invariably accept what a complainant says in its entirety. In *Manley*, the Court indicated that questions of policy should not be considered. In the past, it is notorious that complainants in sexual assault cases were often not believed or given full credit for what they said. It is also notorious that there is considerable political pressure for greater participation by victims of alleged offences in the prosecution process. Notwithstanding what was said in *Manley* [2000] NSWCCA 196; [2000] 49 NSWLR 203, it seems obvious that policies adopted by the Director of Public Prosecutions are relevant considerations in determining whether or not it is reasonable to institute, or continue, a prosecution. There is no evidence before me of any policy relating to complainants in cases of alleged sexual assault.*

*35 It does not follow, however, that, notwithstanding the nature of any particular case, the prosecution is excused from its obligation in every case to exercise a professional discretion and to have full regard to all the evidence available, before making the decision whether or not to institute or continue prosecution. In this case, the fact that the prosecution case depended on the evidence of a single witness, the complainant, meant that the jury must receive a direction of the type described in *Murray* (1987) 11 NSWLR 12, 19(E). That direction requires that the jury apply special scrutiny to the evidence of that single witness before accepting it as the basis for finding a verdict of "guilty". In this case also there was a significant delay between the alleged events and the institution of proceedings. That required that the judge would have to direct the jury as to the prejudice to the defendant in facing a complaint of some age, where it would be difficult to test the prosecution case or to produce evidence favourable to the defence: *Longman v The Queen* [1989] HCA 60; (1989) 168 CLR 79.*

*36 Even if these two warnings were not required, and the prosecution would necessarily have been aware that they were, there were still significant inconsistencies in the prosecution case. Some of those arose from the different versions of events given by the complainant at different times, in particular her failure to mention specific incidents of sexual assault in some of the accounts that*

she gave. There were also inconsistencies between her account and that given by her brother D. The police had not investigated in such a way as would eliminate a possibility that some other friend of a brother of the complainant might have been the perpetrator. **Even in the absence of any evidence from the defence, it seems to me that the prosecution should have had serious doubts about the reliability of the complainant's evidence, not just limited to her identification of the alleged perpetrator, which was vital to its case, to the extent to which that evidence could convince any reasonable jury of essential elements of each of the charges beyond reasonable doubt.**" (Emphasis added)

Moreover, [at para 39-40] His Honour concluded that:

*"39 It is fundamentally important in our system of criminal justice, where the prosecution has a wide discretion whether or not to institute or continue proceedings, that the Director of Public Prosecutions **exercises his discretion with appropriate professional rigour**. It is important that people who claim to be victims of serious offences be treated with respect and not summarily disbelieved. However, the professional obligations of the prosecution mean that the accounts given by such people must be subjected to rigour, in order to determine whether it is reasonably possible that those accounts will satisfy a jury beyond reasonable doubt of the essential elements of the offences charged.*

*40 I am mindful that there is no clear universally applicable test of the reasonableness of instituting proceedings. However, in view of all the factors that I have considered, I conclude that it was not reasonable to institute proceedings against the applicant."* (Emphasis added)

After having considered the matter, as set out above and concluded that it was not reasonable to institute the proceedings, Goldring DCJ made an order for costs, pursuant to the *Costs in Criminal Cases Act 1967* in favour of the accused/applicant.

Similarly, in *R v KT [2009] NSWDC 224 (23 July 2009)* Bennett SC DCJ concluded [at para 56-59] that:

*"56 This was a matter upon which **the success of the prosecution depended entirely upon whether or not the complainant was to be accepted as accurate and credible beyond reasonable doubt** in respect of the allegation that the Applicant had penile vaginal intercourse with her against her express rejection of his proposal that they have sex. It is true that the direct evidence of whether or not the sexual intercourse was without consent could only have come from the complainant and the Applicant. **Had there been no other evidence, this would have been a case of word against word, which, in light of the aforementioned authorities, would have been a matter for determination by***

***the jury. I would not have been prepared to issue a certificate in those circumstances.***

*57 However there was a wealth of other direct evidence of facts and circumstances from which the only rational inference to draw in my opinion was that there was no sexual intercourse between the Applicant and the complainant without her consent such as she alleged.*

*58 I am of the opinion that if the prosecution had, before the proceedings were instituted, been in possession of evidence of all the relevant facts of which there was evidence at the close of the Crown case in the trial, it would not have been reasonable to institute the proceedings, and that there was no act or omission of the Applicant that contributed, or might have contributed, to the institution or continuation of the proceedings.*

*59 For these reasons I granted the certificate pursuant to s 2 of the Costs in Criminals Cases Act 1967.” (Emphasis added)*

Furthermore, in *Presland v DPP [2009] NSWDC 178 (10 July 2009)* Norrish QC DCJ stated [at para 42]:

*“42 The course of the trial from the applicant’s perspective and approach was largely plotted in Mr Gray SC’s opening address on behalf of the applicant immediately after the prosecutors opening. Having correctly characterised, in essence, what the Crown case was in relation to Mr Presland (see transcript p118 l.20 ff), he then set out in summary what he anticipated would emerge from the evidence (in the prosecution’s case as it turned out) identifying 8 points or issues (see p 118 l.35 – p1201.9) relevant to how the supposed logic of the Crown case fell down. That the matters Senior Counsel anticipated at the beginning of the trial unfolded (putting aside other technical or expert evidence in the trial that was capable of militating in favour of acquittal) underscores what might reasonably have been anticipated by the prosecution to put findings of guilt against Mr Presland beyond reach.”*

Ultimately, Norrish QC DCJ reached the conclusion that it would not have been reasonable to institute the proceedings against the Applicant because, had all the relevant facts been available to the Prosecution, they pointed away from Mr Presland as the person responsible for the horizontal cut and the welding, or, at least contradicted that conclusion and left his acquittal as inevitable.

## 8. CONCLUSION

A Certificate granted by a Court under the *Costs in Criminal Cases Act 1967*, in relation to the costs that were incurred by the accused in defending the proceedings, enables the accused to make an application to the Director General of the Attorney General's Department for payment from the Consolidated Fund for costs incurred in the proceedings to which the Certificate relates.

The granting of a Certificate by the Court does not guarantee that the accused will receive reimbursement for any costs incurred by him or her throughout the course of the proceedings in defending the charge which was withdrawn or the accused was acquitted of.

Such a decision is made by the Director General after he or she has considered the contents of any Certificate, granted by the Court, in the exercise of its discretion conferred by the *Costs in Criminal Cases Act 1967*.

It is because of the uncertainty as to whether or not a certificate granted under the *Costs in Criminal Cases Act 1967* will actually result in payment to an accused person, that it is preferable to attempt to persuade the Court to exercise its discretion pursuant to Sections 116, 213 or 257D of the *Criminal Procedure Act 1986* to make an order for costs in favour of the Accused for the legal costs incurred by him.

Unfortunately, in a criminal trial, that proceeds in either the District Court or the Supreme Court sections 116, 213 and 257D of the *Criminal Procedure Act 1986* have no application.

In proceedings of that sort the only statutory provision upon which an accused can rely to support an application for costs, in the event that he is acquitted or the charge against him is withdrawn by the prosecution, is the *Costs in Criminal Cases Act 1967* which, as set out above, results in a court issuing a certificate which may or may not result in the Director General of the Attorney Generals Department actually paying the costs thrown away by the accused as a result of the unsuccessful or a prosecution that was withdrawn.

Clearly, this is an unacceptable situation and one that requires immediate intervention from Parliament so that the right to make an application for costs by an accused person in an indictable matter is exactly the same as that which currently exists in the committal proceedings, summary trials in the Supreme Court and summary trials in the Local Court.

Similarly, an important difference between the *Costs in Criminal Cases Act 1967* and the *Criminal Procedure Act 1986* is that it is only in a costs application, made pursuant to the *Costs in Criminal Cases Act 1967*, that the task of the court is to consider the question of whether or not it was reasonable to institute the proceedings with the benefit of hindsight or the "*omniscient crystal ball*". Clearly, Parliament would be well advised to give consideration as to whether or not it is appropriate to apply such a test in a costs application made pursuant to the relevant provisions of the *Criminal Procedure Act 1986*.

In preparing an application for costs, whether under the *Costs in Criminal Cases Act 1967* or the *Criminal Procedure Act 1986*, it is important to look carefully at the statutory provisions and to formulate arguments as to why the Court should exercise its discretion to make an order in favour of the accused upon criminal proceedings against him either being withdrawn, dismissed or being the subject of a verdict of "*not guilty*" by a jury.

The facts in every case in which an application for costs is made by an accused person need to be carefully analysed so as to present arguments, in the case of an application under the *Criminal Procedure Act 1986*, as to whether or not and why:

- (a) The investigation into the alleged offence was conducted in an unreasonable or improper manner.
- (b) The proceedings were initiated without reasonable cause or in bad faith or were conducted by the Prosecutor in an improper manner.
- (c) The Prosecutor unreasonably failed to investigate (or investigate properly) any relevant matter of which it was aware or ought reasonably to have been aware

and which suggested that the accused person might not be “*guilty*” or that, for any other reason, the proceedings should not have been brought.

- (d) That, because of other exceptional circumstances relating to the conduct of the proceedings by the Prosecutor it is just and reasonable to award professional costs to the accused person.

The consideration of these questions and the presentation of submissions as to matters (a)-(d) above are central to the matter that must be carefully considered by an advocate namely the isolation of points that can be used, after consideration of all of the evidence in a case, to support a submission that some or all of the factors listed in (a)-(d) above are made out.

Moreover, it is important for the advocate to be aware that, in the event that a submission is made that the professional costs of an accused person should be paid by reason of the provisions in the *Criminal Procedure Act 1986*, the task of the **assessment** of those costs falls upon the Court exercising such a discretion and that, in these circumstances, Affidavit evidence must be available to enable the Court to assess those costs.

Such Affidavit evidence should include, as annexures to that Affidavit, all costs and disbursements incurred by an accused person in defending the proceedings up until the time that the order for costs, in favour of the accused, was made by the Court.

It is unfortunate that it is only in the case of an application for costs pursuant to the *Criminal Procedure Act 1986*, that the Court can immediately then proceed to assess those costs. There is no parallel provision under the *Costs in Criminal Cases Act 1967* where, even if a certificate is granted, the discretion as to whether or not to pay out to an accused person rests solely with a non judicial body, namely the Director General of the Attorney Generals Department. Such an anomaly arguably needs to be immediately addressed by Parliament.

Moreover, when preparing an application for costs pursuant to the *Costs in Criminal Cases Act 1967*, the central issue is whether or not if the Prosecution had, before the

proceedings were instituted, been in possession of all relevant facts, it would not have been reasonable to institute the proceedings.

In considering this question it is necessary, by reason of the authorities, to consider firstly; the facts issue and, secondly; the reasonableness issue together with any further relevant facts which may not have been the subject of evidence during the hearing but which are relevant on the costs application.

The professional costs that will be incurred by an accused person in defending a prosecution case brought against him by the State will be considerable.

Accordingly, the ability of the advocate to recognise the circumstances which would activate the discretion of the Court in making an order for costs in favour of the accused is an important part of the role of an advocate in criminal proceedings as is the necessity to carefully consider arguments that can be presented to support an application for costs.

**Russell Sweet**  
**Frederick Jordan Chambers**  
**Ground Floor**  
**53 Martin Place**  
**SYDNEY NSW 2001**  
**Telephone: 9229 7333**  
**Mobile: 0418 131 827**  
**Facsimile: 9221 6944**  
**Email: russell.sweet@fjc.net.au**  
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