SUPPLEMENTARY PAPER ON COSTS IN CRIMINAL CASES

I last presented this paper in 2012 at the Legal Aid Commission Conference. A comprehensive paper was prepared at that time. Copies have been provided to you.

I have been asked to present this paper again after another speaker was unfortunately required to withdraw from the conference. Given the time limitation I have not been able to update my earlier paper for this conference. However I have conducted a quick review of cases since 2012 and I have included a brief note about some of them below. It is not comprehensive and should be read as a supplement to my main paper.

Of the cases I have noted, the most significant is JC v DPP [2014] NSWCA 228.

CRIMINAL PROCEDURE ACT

General

O'Brien v Hutchinson [2012] NSWSC 429

Justice Beech-Jones discusses the availability of relief in the Supreme Court pursuant to section 69 of the Supreme Court Act against the refusal by a magistrate to refuse costs.

Wang v Farkas [2014] NSWCA 29

Costs cannot be recovered by a self-represented legal professional for his/her time. They are not "professional costs."

Section 214

AB v Constable Joshua Hedges [2013] NSWSC 814

An application for costs involving section 214 cannot be resolved by a consent order.

Western Freight Management v RMS [2013] NSWSC 260

The disclosure of a statutory defence is a relevant consideration for section 214(1)(c).

RB v DPP [2015] NSWSC 248

The focus of the enquiry for section 214(1)(a) and (c) is the investigation and not the fairness of the hearing.

Kogarah City Council v El Khouri [2014] NSWLEC 196

Exceptional circumstances in section 214(1)(d) is not restricted to conduct by a prosecutor that leads to an unfair hearing. In this case the exceptional circumstances was the failure by the prosecutor to adduce evidence to prove an element of the offence.

COSTS IN CRIMINAL CASES ACT

JC v DPP [2014] NSWCA 228

The issue in this case is when, for the purpose of section 2(1)(a) of the Costs in Criminal Cases Act, does the trial commence. The Court of Appeal considered this issue in light of section 130 of the Criminal Procedure Act. Accordingly the trial commences on the presentation of the indictment and the arraignment of the Accused. In this case that occurred at the time the trial was fixed for hearing.

This case is contrary to the decision in R v Carrick [2003] NSWSC 313, and mentioned in my paper.

The effect of this decision is to allow an application for costs pursuant to the Costs in Criminal Cases Act as long as the indictment has been presented and the accused arraigned. This may be as early as the first mention in the District or Supreme Court.

Beatson v R [2015] NSWCCA 17

The CCA considered an application in a circumstantial case.

At [14]:

The case law on applications under the CCC Act does not provide a single bright line test as to when it would be unreasonable for a prosecution to have been instituted. Rather, the cases indicate that where the issue is word against word which involves an assessment of credibility, then generally it would be less likely that the requisite affirmative opinion would be formed that it was unreasonable for the prosecution to be instituted. By contrast, if there were expert or highly technical evidence from which it was apparent that the Crown case was incapable of making out the elements of the offence then it might be more likely that the requisite affirmative opinion would be formed that it was unreasonable for the prosecution to be instituted.

R v Moore [2015] NSWSC 1263

Hamill J summarises test at [5] – [6]:

5. *The section requires the decision maker to assume that the hypothetical prosecutor had knowledge of "evidence of all the relevant facts" at the time of the institution of the proceedings. The question is whether, in the light of that retrospectively obtained knowledge, "it would not have been reasonable to institute the proceedings".*

6. *A number of propositions can be gleaned from the cases: –*

1. *The provisions represent a "middle course" between two extremes:* Allerton v DPP *at 161-162, citing the second reading speech introducing the provision. One extreme is the common law and English position where costs were granted in criminal cases only in exceptional circumstances:* Attorney-General of Queensland v Holland *(1912) 15 CLR 46 at 49. The other extreme is where costs almost automatically follow the event:* Latoudis v Casey *(1990) 170 CLR 534.*
2. *The provisions are intended "to create an environment in which earlier rigid resistance to the reimbursement of costs incurred by an acquitted defendant was diminished":* R v Manley *at [74] (Simpson J).*
3. *The provisions allow the Court to relieve a person who has been acquitted (or discharged following the withdrawal of proceedings by the DPP) of the financial burden of defending themselves in criminal proceedings without casting any criticism on police or prosecutors. Because of the retrospective wisdom implicit in s 3(1)(a), the provisions "when applied judicially permit courts to make orders in appropriate cases without any innuendo arising from the making, or the refusal to make such orders that would be critical either of the Prosecutor or the accused": see* Allerton v DPP *at 560 – 561.*
4. *The prosecution cannot resist a certificate on the basis of some "ill-defined community interest in bringing a particular accused, or kind of matter, before the courts": see* R v Manley *at 206-207 (per Wood CJ at CL); see also* R v Pavey *at 401.*
5. *"It is not sufficient to establish the issue of unreasonableness in favour of an applicant for a certificate that, in the end, the question for the jury depended upon word against word; in a majority of such cases, it would be quite reasonable for the prosecution to allow those matters to be decided by the jury; it would be different where the word upon which the Crown case depended had been demonstrated to be one which was very substantially lacking in credit":* Mordaunt *at [36].*
6. *A decision to prosecute is not "reasonable" simply because there was a prima facie case, or because there were reasonable prospects of a conviction, or because a magistrate committed the matter for trial:* R v Warwick Ian MacFarlene *cited with approval in* R v Fejsa *255.*
7. *The applicant's silence is not a disentitling factor under s 3 (1)(b). In other words, the failure of an applicant to participate in a recorded interview is not a matter that*

"contributed, or might have contributed, to the institution or continuation of the proceedings": see R v Manley *at [74] – [76];* R v Dunne*;* R v Pike and others *[2010] NSWDC 224 at [12].*

At [28] Hamill J said:

The hypothetical prosecutor envisaged by s 3 is assumed to have possession of the relevant facts and evidence. But that prosecutor is not to be attributed with the ability to predict what factual findings will be made either at trial or on the voir dire*, let alone to be able to predict the exercise of discretion residing in the trial judge.*

MOSELY COST APPLICATIONS

My paper does not include reference to "costs" applications following on from the decision in R v Mosely (1992) 28 NSWLR 735. They are conditional stay orders pending the payment of costs "thrown away."

See also:

R v Fisher [2003] NSWCCA 41

R v Bucksath [2000] NSWCCA 135

R v Beeby [1990] NSWCCA 30

R v Michael John Issakidis [2015] NSWSC 834

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