COSTS IN CRIMINAL PROCEEDINGS AFTER *LATOUDIS V. CASEY*

BY JOHN SARTORI*

A. *INTRODUCTION*

On 20 December 1990, the High Court published its reasons for judgment and decision in *Latoudis v. Casey*.[1] The appeal concerned the criteria to be applied by a court of summary jurisdiction in exercising its statutory discretion to award costs in criminal proceedings which have terminated in favour of an accused. In short, it was held by a majority[2] that, in ordinary circumstances where the prosecution has failed, it would not be just or reasonable to deprive a defendant who has secured the dismissal of a criminal charge brought against him or her in a court of summary jurisdiction of an order for costs.

This comment discusses the possible implications of that decision for Victoria. It is suggested that the reasoning adopted by the majority in *Latoudis v. Casey* may encourage defendants in criminal proceedings (including matters tried on indictment) to pursue an award of costs more often. In order to understand the reasons for this assertion, this comment will examine the reasons for judgment in *Latoudis v. Casey*, and what implications those reasons hold for other criminal proceedings. Broadly speaking, this comment will look at the circumstances when the Crown may be ordered to pay costs to a defendant in criminal proceedings, and the circumstances in which the Crown may obtain an order for payment of costs from such a defendant. Each of these broad sets of circumstances will be examined in the light of *Latoudis v. Casey*.

B. *WHEN COSTS MAY BE AWARDED AGAINST THE CROWN IN CRIMINAL PROCEEDINGS*

1. *Summary matters*

(a) *Latoudis v. Casey*

In relation to matters tried summarily, the position so far as costs are concerned was comprehensively considered in *Latoudis v. Casey*. Specifically, *Latoudis v. Casey* examined the circumstances in which a magistrate is to exercise his or her discretion pursuant to sub-s. 97(b) of the Magistrates (Summary Proceedings) Act 1975. This provision (now repealed) stated:

* Student of Law at the University of Melbourne. I am particularly grateful to the staff at the Melbourne Office of the Commonwealth D.P.P., and especially Mr Ken Wiltshire, for their helpful comments on earlier drafts. I would also like to thank Mr Julian Phillips of the Law School at the University of Melbourne for his criticism.

[1] (1990) 170 C.L.R. 534.

[2] *Ibid.* 542 *per* Mason C.J.; 565 *per* Toohey J.; 509 *per* McHugh J.

> Where the court dismisses the information or complaint, or makes an order in favour of the defendant the court may order the informant or the complainant to pay to the defendant such costs as the court thinks just and reasonable.

The majority held that a defendant has a 'reasonable expectation' of having an order for costs made in his or her favour if he or she is successful in defending himself or herself. It was considered that it would not be just or reasonable to refuse to order costs where a prosecution in the Magistrates' Court was unsuccessful in securing a conviction and an accused had incurred expense (often considerable) in successfully defending the charge or charges. In adopting this position, the majority approved of the approach of the South Australian and Australian Capital Territory Supreme Courts and the Federal Court.[3] The majority disagreed in principle with the approach that had developed in Victoria, New South Wales and Queensland which emphasized the unfettered nature of the discretion to award costs,[4] and thereby gave little guidance to magistrates in the exercise of their discretion.[5] All the judges stressed the point that giving guidance in how a discretion ought to be exercised did not necessarily fetter the unconfined nature of a discretion, but instead could lead to more consistent results.[6]

The approach the majority adopted was to look at the matter primarily from the defendant's perspective. If his or her behaviour was reasonable in the face of investigation and the charges being laid, and he or she was successful in defending his or her innocence, then he or she had a 'reasonable expectation' of obtaining an order for the payment of his or her costs. Accordingly, the majority emphasized that it is not the correct approach to look at the matter from the perspective of the informant. A practice had developed in Victoria, New South Wales and Queensland of considering the reasonableness of the informant's conduct. Although the reasonableness of the informant's conduct was not determinative of the issue,[7] if the informant had reasonably investigated the matter and had acted *bona fide*, then costs would generally not be awarded against him or her. This is no longer the correct approach.

The majority emphasized that costs are awarded by way of indemnity or compensation for professional fees and out-of-pocket expenses reasonably incurred in connection with the litigation.[8] It was reasoned that it is just and reasonable that the party who has caused the other party to incur the costs of

[3] South Australia: *Hamdorf v. Riddel* [1971] S.A.S.R. 398; A.C.T.: *McEwen v. Siely* (1972) 21 F.L.R. 131; Federal Court: *Cilli v. Abbot* (1981) 53 F.L.R. 108.

[4] As, for example, in *Puddy v. Borg* [1973] V.R. 626; *Barton v. Berman* [1980] 1 N.S.W.L.R. 63; *Acuthan v. Coates* (1986) 6 N.S.W.L.R. 472 (see also (1987) 11 *Criminal Law Journal 42);* and *Lewis v. Utting* [1985] 1 Qd R. 423.

[5] (1990) 170 C.L.R. 534, 562 *per* Toohey J.

[6] Here, all the judges cited *Norbis v. Norbis* (1986) 161 C.L.R. 513, 519 *per* Mason C.J. and Deane J., where they stated:

> The point of preserving the width of the discretion which Parliament has created is that is maximises the possibility of doing justice in every case. But the need for consistency in judicial adjudication, which is the antithesis of arbitrary and capricious decision making, provides an important countervailing consideration supporting the giving of guidance by appellate courts, whether in the form of principles or guidelines.

[7] *Vaux v. S. E. Dickens Pty Ltd* Unreported judgment of Vincent J. in the Supreme Court of Victoria, 16 March 1989.

[8] (1990) 170 C.L.R. 534, 543 *per* Mason C.J.; 563 *per* Toohey J.; 566 *per* McHugh J.

litigation should reimburse that party for the liability incurred. Costs are not awarded by way of punishment of the unsuccessful party. Accordingly, in the words of Mason C.J., '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'.[9]

By way of *obiter dicta*, the majority provided examples of circumstances where an order for costs in favour of a successful defendant might not be appropriate, or where an award of only a portion of the successful defendant's costs might be appropriate. In doing so, the majority emphasized the point that a defendant has no right to an award of costs.[10] Examples of where costs may not be awarded to a successful defendant included: where the defendant's action (by, say, refusing to give an account to investigators where it would have been reasonable to do so, or a failure to tell investigators of a witness who could support the defendant's account) precipitated the prosecution; or where the defendant unnecessarily prolonged the proceedings; or where the defendant declined unreasonably the opportunity to explain his or her version of the facts; (*per* Toohey J.;[11] Mason C.J.[12] agreed with him on this point, and stated that this was not intended as an encroachment on a defendant's right to silence). Such a list of examples was clearly not intended to be exhaustive.

The minority[13] arrived at a different conclusion for two main reasons. First, the minority considered that police informants might be deterred from performing their public duty to prosecute if there were a prospect that costs may be awarded against them. This was seen as a legitimate concern because police prosecute summary matters in their own names and are personally liable to pay the costs of the defendant if they are awarded against them[14] — notwithstanding that the Treasury may, and almost invariably does, in its discretion, make an *ex gratia* payment by way of indemnity to police officers who do have costs awarded against them.

A second reason given by the minority was that the higher standard of proof required in criminal cases (having to prove a defendant's guilt beyond reasonable doubt) might subtly be eroded by magistrates seeking to avoid having to award costs to a defendant who, while having been given the benefit of a reasonable doubt, is very probably guilty.

(b) *Relevance of* Latoudis v. Casey *to Current Legislation*

While the appeal dealt with sub-s. 97(b) of the Magistrates (Summary Proceedings) Act 1975, a provision which has now been replaced by sub-s. 131(1) of the Magistrates' Court Act 1989, it is clear that the same approach will be adopted in respect of sub-s. 131(1). Sub-s. 131(1) gives magistrates the

9 *Ibid.* 543.
10 *Ibid.* see, *e.g.* 569 *per* McHugh J.
11 *Ibid.* 565.
12 *Ibid.* 544.
13 Brennan and Dawson JJ.
14 It is my understanding that an undertaking has been given to Victoria Police that in each case where awards of costs against the informant are made, the circumstances will be examined and only in cases where the police officer has acted in bad faith will any *ex gratia* payment be denied.

discretion to determine by whom, to whom and to what extent the costs of all proceedings are to be paid. All the judges reasoned in general terms and did not expressly or impliedly confine their reasons to sub-s. 97(b). Mason C.J. noted that provisions similar in effect to sub-s. 97(b) operate in Victoria, New South Wales, Queensland, South Australia, the Australian Capital Territory and the Northern Territory.[15] He also noted that he need not take

> the trouble to set out the relevant statutory provisions [of the other States and Territories] ... because, with the exception of Tasmania, the courts have been given a general statutory discretion which has not been constrained, even by prescription of relevant considerations or criteria.[16]

Dawson J. (with whom Brennan J. generally agreed) specifically noted the similarity between sub-s. 97(b) and s. 131.[17] This was also the view of Toohey J.[18] A comparison between s. 97 of the Magistrates (Summary Proceedings) Act and s. 131 of the Magistrates' Court Act readily discloses the similarity in the terms of the discretion conferred on magistrates. Consequently, the conclusion that the majority reached is of relevance to s. 131 despite the fact that the decision was concerned with a provision which is now repealed.

Indeed, in a recent case in the County Court appealed from the Magistrates' Court, Judge Crossley ordered a policeman to pay $10,000 in court costs after a taxi-driver, charged with theft of $150 and assault, successfully appealed against his conviction by a magistrate.[19] Judge Crossley specifically referred to *Latoudis v. Casey* when making the award, implying a judicial recognition of its applicability to s. 131 of the Magistrates' Court Act.[20]

2. *Committals*

It is submitted that *Latoudis v. Casey* holds even wider implications for Victoria, for it seems that the *ratio* applies to committal proceedings as well as trials. Sub-s. 131(1) of the Magistrates' Court Act provides that:

> The costs of, and incidental to, all proceedings in the Court are in the discretion of the Court and the Court has full power to determine by whom, to whom and to what extent the costs are to be paid.

Section 3 defines 'proceedings' to include committal proceedings. Accordingly, it seems that a successful defendant to a committal proceeding (that is, someone who is discharged) may have a 'reasonable expectation' of an award of costs. Nothing in *Latoudis v. Casey* indicates that a distinction was intended to be drawn between committal proceedings and other criminal proceedings. Indeed, s. 3 of the Act would appear to preclude such a distinction being drawn. Moreover, *Barton v. Berman*[21] was referred to by Mason C.J.[22] and Toohey J.[23]

15 (1990) 170 C.L.R. 534, 537.
16 *Ibid.* 541.
17 *Ibid.* 547.
18 *Ibid.* 561.
19 *El-Fahkri*, 25 January 1991. Reported in the *Age*, 26 January 1991.
20 An appeal to the County Court from the Magistrates' Court operates as a rehearing and in such circumstances the County Court is vested with such powers that the Magistrates' Court exercised or could have exercised: ss 83-6 Magistrates' Court Act 1989.
21 [1980] 1 N.S.W.L.R. 63. This case was followed in *Acuthan v. Coates* (1986) 6 N.S.W.L.R. 472.
22 (1990) 170 C.L.R. 534, 539.
23 *Ibid.* 563.

(as well as by Dawson J.[24] in his dissenting judgment). This case concerned a refusal of the New South Wales Magistates' Court to award costs to a successful defendant in committal proceedings. Mason C.J. and Toohey J. refused to follow the approach adopted there.[25] So it seems that the decision applies with equal force to committal proceedings in Victoria.

3. *Magistrates' Court (Costs) Bill 1991*

While *Latoudis v. Casey* reflects the current position relating to the award of costs in summary matters, moves are already afoot to amend the Magistrates' Court Act 1989, in order to nullify its effect in criminal cases tried summarily. The Victorian Parliament is currently considering the Magistrates' Court (Costs) Bill 1991. Its purposes, as stated in cl. 1 of the Bill, are:

> (a) to limit the circumstances in which costs may be awarded in summary criminal proceedings; and
> (b) to protect certain public officials who have brought summary criminal proceedings from personal liability for costs by providing for the payment of costs from the Consolidated Fund.

The Second Reading speech by the Attorney-General made it clear that this Bill is intended to reverse the effect of *Latoudis v. Casey* in Victoria.[26] The reasons given by the Attorney-General for doing so are, first, that the prospective increase in cases where costs are awarded against the police will have 'a significant additional burden upon already strained [community] resources'.[27] Second, it was said to be 'unjust for a police officer who brings proceedings in the public interest and is in fact under a duty to bring offences before the court to be personally at risk for costs if the prosecution is unsuccessful'.[28]

In relation to this second reason, it has already been noted that the current practice sees the Treasury almost invariably, in its discretion, make *ex gratia* payments from the Consolidated Fund by way of indemnity to police officers who do have costs awarded against them. The Attorney-General observed this in his speech. He also observed, however, that the Treasury is not legally bound to indemnify police officers against whom awards of costs are made. Accordingly, the Attorney-General reasoned:

> It is a legitimate consideration that police might be deterred from doing their duty by the prospect of costs being awarded against them when charges are dismissed.[29]

This reasoning of the Attorney-General conforms very much to that of the minority in *Latoudis v. Casey*.

The means proposed to effect these changes are by the adoption of three principal amendments to the Magistrates' Court Act. First, it is proposed that a definition of 'public official' be inserted into sub-s. 3(1) of the Act. The definition would read

> 'public official' means a member of the police force or a person appointed by or under an Act whose functions or duties include the commencement or conduct of criminal proceedings.

24 *Ibid.* 550.
25 See *supra* n. 3 for other cases that adopted this approach.
26 Victoria, *Parliamentary Debates*, Legislative Assembly, 9 May 1991, 2043-5.
27 *Ibid.* 2044.
28 *Ibid.*
29 *Ibid.*

Second, it is proposed to amend s. 131 of the Magistrates' Court Act to insert a new sub-section, sub-s. (1A). Sub-s. 131(1) will then be made subject to sub-s. 131(1A), which will provide that the Court *must* not order that the public official (as defined) pay the whole or any part of the defendant's costs unless it is satisfied that:

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

By providing that the court must not award costs to a successful defendant unless any of the circumstances mentioned above are present, the Victorian Parliament will be restricting the circumstances in which magistrates may award costs in criminal proceedings. If, however, any of the circumstances are present, a magistrate will have the discretion to order that the prosecuting official pay the costs of the defendant, in whole or in part.

It is also worth noting that the amendments, if enacted, will direct the court to look at the circumstances surrounding the investigation and proceedings from the perspective of the reasonable police officer. This reverses the direction given by the High Court in *Latoudis v. Casey* where magistrates were told that they should look at the matter from the perspective of the acquitted defendant.[30]

The third proposed principal amendment contained in the Bill is the insertion of a new section in the Magistrates' Court Act, s. 131A. In short, s. 131A will, if enacted, provide that if a magistrate does make an award of costs against a public official (other than a person who is employed by a council within the meaning of the Local Government Act 1958 because such awards are already covered by that Act), it must grant a certificate to the defendant in respect of the costs so ordered: s. 131A(1). That certificate will entitle the defendant to have his or her costs reimbursed from the Consolidated Fund: s. 131A(2). The aim behind this proposed amendment is, in the words of the Attorney-General

> [to give] statutory force to the indemnity protection of police and other officials, which is presently considered on a case-by-case basis.[31]

Nonetheless, the indemnity given by the new s. 131A to public officials will not be a blanket one. While the certificate will entitle the defendant to be paid directly from the Consolidated Fund, the public official can be ordered in certain circumstances to reimburse the Consolidated Fund for the monies paid out to the defendant. These circumstances include where the court is satisfied on the balance of probabilities that the public official acted in bad faith or with gross impropriety or with gross unreasonableness: s. 131A(3). The court will have to give reasons if it decides to make a sub-s. 131A(3) order. Finally, a sub-s. 131A(3) order and a certificate granted to a defendant under sub-s. 131(A) will be suspended:

30 See text, *supra*. p. 155.
31 *Supra*. n. 26, 2045.

(a) during the period in which an appeal may be instituted; and
(b) if an appeal is instituted, until the determination of the appeal unless varied or revoked on appeal.

Thus, s. 131A, if enacted, will change the way in which the payment of costs awarded to sucessful defendants in summary proceedings are made. The defendant will seek payment from the Consolidated Fund and so will be in a more secure position financially in the event that costs are awarded to him or her. Moreover, police informants will only be personally liable to indemnify the Consolidated Fund against any costs paid out therefrom if their conduct was inappropriate in all the circumstances. A magistrate, therefore, will be required to determine whether there was in fact inappropriate conduct on the part of the informant. The amendments will be immediately effective on the proclamation of the Magistrates' Court (Costs) Bill.

4. *Matters dealt with on indictment*

Thus far, this article has discussed the direct consequences and implications of *Latoudis v. Casey*. As suggested, however, this decision may have the effect of encouraging successful defendants to pursue an award of costs in other criminal proceedings — including matters heard on indictment. It is submitted that *Latoudis v. Casey* holds out hope for successful defendants to such proceedings. Indeed, one may even go so far as to extract a wider *ratio* from *Latoudis v. Casey*: that in ordinary circumstances where a defendant to criminal proceedings has been successful and there is a general discretion in the particular court to award costs, the defendant has a 'reasonable expectation' of an award of costs. If this is so, then it is arguable that successful defendants to charges heard on indictment in the County Court may have a 'reasonable expectation' of an award of costs.

At common law, the Crown[32] is by its prerogative exempt from payment of costs in any judicial proceedings, and this exemption cannot be removed except by statute.[33] Moreover, common law courts had no inherent power to award costs.[34] In Victoria, where summary matters are concerned, there is a statutory basis for magistrates to award costs to successful parties contained in sub-s. 131(1) of the Magistrates' Court Act. As stated, such awards are still made against the informant and not the Crown since all summary matters are still prosecuted privately.[35] In relation to indictable matters heard on indictment, however, the current practice in both the County Court and the Supreme Court is not to award costs to successful defendants, except (perhaps) in exceptional

32 Charges prosecuted on indictment are prosecuted in the name of the Queen.

33 *Affleck v. R.* (1906) 3 C.L.R. 608, 630 *per* Griffith C.J.; *A.-G. (Qld) v. Holland* (1912) 15 C.L.R. 46; *Johnson v. R.* [1904] A.C. 817.

34 For an historical analysis, see Quick, R. W., 'Costs: The Historical Perspective' (1983) *Queensland Law Society Journal* 169 and 'Costs: The Historical Perspective II' (1983) *Queensland Law Society Journal* 277. Equity has an inherent power to award costs.

35 The Court in *Latoudis v. Casey* was assured that the Treasury may, and almost invariably does, in its discretion, make *ex gratia* payments by way of indemnity to police officers who do have costs awarded against them.

circumstances[36] (as was the practice in matters heard summarily in Victoria prior to *Latoudis v. Casey*).

It is arguable that this current practice is incorrect, at least in relation to defendants who are successful in the County Court. The practice in the County Court should follow that adopted in the Magistrates' Court after *Latoudis v. Casey*. This argument is based on a construction of the County Court Act 1958, bearing in mind the wider principle extracted from *Latoudis v. Casey*. Section 78A of the County Court Act provides:

> (1) The costs of and incidental to all proceedings are in the discretion of the court and the court may determine by whom and to what extent the costs are to be paid.
> (2) In due exercise of the discretion conferred by sub-section (1), in any proceedings before the court, the court may order a legal practitioner to pay the costs of the proceedings or a portion of the costs.

The wording of sub-s. (1) is very similar to sub-s. 131(1) of the Magistrates' Court Act. There is little doubt that the purpose of s. 78A was to confer a general discretion on the County Court to award costs. There is, however, a specific difference between the County Court Act and Magistrates' Court Act provisions, in that s. 3 of the latter statute defines 'proceedings' to include committal proceedings, and therefore, by implication, the term 'any proceedings' includes any criminal proceedings. In contrast, the County Court Act defines 'proceeding' in s. 3 as 'any matter in the court'.

Despite the differing definitions of 'proceeding', at first glance there seems to be little ground for reading down 'all proceedings' as it is used in s. 78A of the County Court Act to mean 'all civil proceedings'. Indeed, other sections in the County Court Act distinguish 'all proceedings', 'civil proceedings' and 'criminal proceedings'.[37] If the legislature had intended the discretion contained in s. 78A to be exercised only in civil proceedings, it could have expressly said so. Alternatively, were it intended that the word 'proceedings' relate only to civil matters, the legislature would not have found it necessary to qualify the word with the adjective 'civil' in other provisions.[38] Furthermore, Part VII of the County Court Act, in which s. 78A is located, while largely directed to civil proceedings, is certainly not exclusively so. Section 78 distinguishes between 'civil proceedings' and 'any proceedings'. The word 'proceedings' has generally

[36] In *R. v. Goia* (1988) 19 F.C.R. 212, dilatory conduct on the part of the investigating police of some six years and an order staying the criminal proceedings did not constitute exceptional circumstances. The test of what constitutes exceptional circumstances in relation to indictable offences seems to be stricter than when considering it in relation to summary offences. Hence, I have used the word 'perhaps' to suggest that the circumstances would seem to have to be most exceptional.

[37] Compare, for example, ss 4(1), 28A, 39, 46, 78 and 81.

[38] Judge Duggan of the County Court in a recent application for costs by a defendant on being acquitted, considered that the word 'proceedings' in s. 78A of the County Court Act did include criminal proceedings. He stated:

> After all, if this was not intended, the expression would relate to civil matters only. If it did, then there would be no need to qualify the same expression by the use of the word 'civil' in other provisions . . . (*Danci v. Director of Public Prosecutions*, 8 March 1991, unreported.)

been interpreted widely by the courts to include 'any proceedings of a legal nature'.[39] In one New Zealand case, McMullin J. said:

> The word 'proceedings' is a word which covers not only those steps taken on an information up to the moment of conviction but also includes steps taken on that information after conviction to the point where sentence is imposed.[40]

Therefore, it is suggested that 'all proceedings' in s. 78A includes criminal proceedings.[41]

If this initial argument is correct and 'all proceedings' does include criminal proceedings, then there is little reason to confine the *Latoudis v. Casey* principle that a successful defendant has a 'reasonable expectation' of an award of costs, only to charges heard summarily. It can be contended that, because there is no significant difference between the discretion conferred on County Court judges and magistrates respectively, such a principle should apply to charges heard on indictment in the County Court. As a consequence, it appears that the legislature intended to abrogate the common law rule that the Crown neither receives nor pays costs. In *Latoudis v. Casey*, Mason C.J. stated that:

> By conferring on courts of summary jurisdiction a power to award costs when proceedings terminate in favour of the defendant, the legislature must be taken to have intended to abrogate the traditional rule that costs are not awarded against the Crown.[42]

This statement begs the question: why should it only be in courts of summary jurisdiction that the granting of a general discretion to award costs should be taken to abrogate the traditional rule that costs are not awarded against the Crown, when the discretion is granted in similar terms in both the Magistrates' Court Act and the County Court Act? Is not the intention to abrogate the rule in the County Court just as apparent? The fact that the County Court did not have a general discretion to award costs in criminal proceedings prior to the enactment of s. 78A, whereas the Magistrates' Court had such a discretion prior to s. 131 of the Magistrates' Court Act, cannot justify the divergence in practice.

The history behind a section of an Act cannot of itself determine that Parliament intended differently from what the words of the statute clearly convey. To adopt the words of Tadgell J. in *R. v. Little; ex parte Fong*, the courts are only 'to some extent influenced by the history of the legislation' and their interpretation is 'by no means dictated by it'.[43] Accordingly, it is submitted that the words contained in s. 78A of the County Court Act seem, *prima facie*, clearly to give County Court judges a discretion to award costs in all proceedings,

[39] *R. v. Westminster (City) London Borough Rent Officer; ex parte Rendall* [1973] 3 All E.R. 119, 121 *per* Lord Denning M.R. In *Cheney v. Spooner* (1929) 41 C.L.R. 532, 567-7 Isaacs and Gavan Duffy JJ. stated:

> A 'proceeding', used broadly as it is in section 16 of the federal *Service and Execution of Process Act*, is merely some method permitted by law for moving a court or judicial officer to some authorised act, or some act of the court or judicial officer.

See also *Re Wheelan; ex parte Deputy Commissioner of Taxation* [1968] 11 F.L.R. 382, 384.

[40] *Elliot v. Auckland City* [1971] N.Z.L.R. 824, 828.

[41] It is interesting to compare the County Court judgment referred to *supra* n. 38, where Judge Duggan concluded that the word 'proceedings' in s. 78A did include criminal proceedings, with the judgment of Judge Neesham in *R. v. Dunkley; R. v. Fitzgerald* in the County Court (13 March 1991, unreported), where he concluded that the word 'proceedings' in s. 78A did not include criminal proceedings because that was not the intention of the legislature.

[42] (1990) 170 C.L.R. 534, 542. See also 538.

[43] [1983] 1 V.R. 237, 245.

including criminal proceedings. If this reasoning is correct, then in ordinary circumstances where a person is successful in defending a criminal charge heard on indictment in the County Court, he or she may have a 'reasonable expectation' of an award of costs.

While this argument is persuasive, there are possible counter-arguments. First, it is arguable that the *ratio* of *Latoudis v. Casey* is not as wide as has been suggested above, and that it is only in matters heard summarily that a successful defendant may have a 'reasonable expectation' of an award of costs. One reason the majority gave for its decision was that it was inequitable that the prosecution should be able to obtain an award of costs when it was successful, and that a successful defendant could only obtain such an award in exceptional circumstances.[44] This reason is applicable only to matters heard summarily because, as stated, the Crown neither asks for nor pays costs in matters heard on indictment. Accordingly, the need to balance the financial burden of legal costs is not present in the prosecution of matters heard on indictment.

It is submitted, however, that this argument is based on a fallacy in that it implicitly ignores the fact that legal costs are awarded by way of indemnity to the successful party. This was made clear in *Latoudis v. Casey*. If this is correct, it becomes clear that there is no need to balance the financial burden generally, but only a need to indemnify the successful party. Furthermore, the argument does not address the issue that if there is a discretion to be exercised, the judge must do so and must not simply apply an inflexible rule.

A second possible counter-argument lies in the construction of the County Court Act. Section 36A of the County Court Act outlines the criminal jurisdiction of the County Court. Sub-section (2) states that:

> Subject to sub-section (1) and unless otherwise expressly provided, the County Court shall have jurisdiction and powers with respect to indictable offences and the trial thereof as fully and amply to all intents and purposes as the Supreme Court of Victoria in the like matters and the general principles of practice and procedure observed for the time being in the Supreme Court of Victoria *with respect to the trial or determination* of indictable offences shall be adopted and applied in the County Court. [My emphasis]

It may be said that this provision cuts down the power of the County Court to award costs against the Crown in criminal trials heard on indictment, because the practice in the Supreme Court is not to award costs to a successful defendant. Before this assertion can be found to be valid, however, it must be made clear that the award of costs is part of the trial or determination of the indictable offence. It is submitted that it is not: costs between parties seem to be more a matter incidental to the trial or determination of the indictable offence.[45]

A third possible counter-argument is based on the presumption that the Crown

[44] See, for example, (1990) 170 C.L.R. 534, 563.

[45] It is interesting to note that Judge Duggan in *Danci* (*supra* n. 38), found that the County Court did not have jurisdiction to award costs because he concluded 'that s. 36A of that [County Court] Act requires this Court to follow the practice of the Supreme Court on this issue' notwithstanding the 'unrestricted language employed by s. 78A'.

In contrast, Judge Neesham in *R. v. Dunkley; R. v. Fitzgerald* (*supra* n. 40) based his decision that the County Court did not have jurisdiction to award costs in matters heard on indictment on the conclusion that Parliament did not intend to confer such jurisdiction on the County Court.

The differing reasons advocated by Judges Duggan and Neesham suggest the need for the matter to be resolved by a higher court or by legislative amendment.

is not bound by a statute unless it was expressly or implicitly intended that the Crown was to be bound. This presumption is not a strong one,[46] but it may be said that the County Court Act was not intended to bind the Crown except in so far as s. 78 expressly does so, and other sections implicitly bind it. Section 78 gives a majority of the County Court judges for the time being power to make rules for certain specified purposes, and sub-s. (3) provides that:

> The power given by this section shall extend and apply to all proceedings by or against the Crown.

Other sections may implicitly bind it: s. 36A, for example, implicitly binds the Crown in that it sets out the criminal jurisdiction of the County Court and the procedure to be followed (in so far as it is to follow that of the Supreme Court). Moreover, the purpose of the County Court Act would not be frustrated[47] were the Crown not bound except in so far as has been described above, since other legislation permits the Crown to be sued in certain civil matters and to be treated as if it were any other legal party to proceedings.[48] Indeed, cases such as *Re Powell*,[49] *R. v. Kimmins; ex parte A.-G. (Qld)*[50] and *R. v. Jackson*[51] suggest that there is a strong presumption against legislation such as s. 78A binding the Crown as it is effectively abrogating the prerogative of the Crown which exempts it from paying costs.[52]

This argument becomes more persuasive when it is considered in the light of other legislation dealing with the matter of costs in criminal proceedings involving indictable offences. Even if it were not accepted that the Crown was intended to be bound by all the provisions of the County Court Act, that is, s. 78A did not give power to County Court judges to award costs against the Crown in criminal matters, it may be said that the matter of costs in charges heard on indictment has already been comprehensively covered by other legislation. In other words, a fourth possible counter-argument may be based on the maxim of construction, *generalia specialibus non derogant* (general things do not derogate from special things). The effect of this maxim is that a specific enactment is not affected by a subsequent general enactment unless the earlier one is inconsistent with the later one, or unless there is some express reference in the later enactment to the earlier one.[53] If it is accepted that s. 78A of the County Court Act, which was not enacted until 1986 by the Courts Amendment Act 1986, is the general provision dealing with costs, it may also be said that the circumstances in which costs could be awarded in trials of offences heard on indictment had already been provided for in the Crimes Act 1958, namely, in s. 359 (which provides for an acquitted person to recover expenses incurred as a result of alterations of time and place of the trial) and in s. 545 (which provides

46 *Bropho v. Western Australia* (1990) 64 A.L.J.R. 374.
47 *Cf. Ibid.*
48 See, for example, Crown Proceedings Act 1958 (Vic.) and Part IX of the Judiciary Act 1903 (Cth).
49 (1894) 6 *Queensland Law Journal Reports* 36.
50 [1980] Qd R. 524.
51 [1962] W.A.R. 130.
52 *Quaere* whether or not a State can bind the Crown in right of the Commonwealth in this regard. A State may be able to do so through s. 68 of the Judiciary Act 1903 (Cth). This section has been interpreted broadly: see, for example, *Rohde v. D.P.P.* (1986) 161 C.L.R. 119.
53 *Jowitt's Dictionary of English Law*.

for an award of costs to the Crown where it is successful in an indictable offence). It may be said that these Crimes Act provisions cover the field in the awarding of costs to or against the Crown in the trial of indictable offences. Accordingly, the maxim would apply and s. 78A of the County Court Act would not apply to criminal matters.[54]

It is difficult to balance the strength of these latter interpretations of the County Court Act, against the argument that the ratio of *Latoudis v. Casey* is broad enough to bring within its scope s. 78A of the County Court Act, and that it was the intention of the Victorian Parliament to give County Court judges the power to award costs against the Crown in criminal trials heard on indictment. The two lines of argument are each persuasive, and it is difficult to determine which one has greater value. Because both are arguable, a defendant to a charge tried on indictment in the County Court may be encouraged to apply for an award of costs if he or she successfully defends himself or herself.

As mentioned, the practice followed in the Supreme Court of Victoria in awarding costs in criminal trials is that a defendant who successfully defends himself or herself against an indictable charge is not generally awarded costs. It is unlikely that *Latoudis v. Casey* will have any impact on this practice. While the Supreme Court has a general discretion to award costs by virtue of sub-s. 24(1) of the Supreme Court Act 1986, sub-s. (2) preserves the practice (rather than law) in criminal proceedings prior to the enactment of this section. That practice was not to award costs to a successful defendant.

There is one exception to this general rule of practice of not awarding costs to a successful defendant to an indictable charge. It is provided for in sub-s. 359(5) of the Crimes Act. Under this provision, a person acquitted may, on the certificate of a trial judge, recover any of his or her witness expenses incurred as the result of alterations in time and place of the trial ordered under sub-ss 359(1) and (1A). Sub-s. 359(5) provides strict limits on the amount recoverable.[55] Moreover, it should be noted that the provision applies to trials held both in the Supreme Court and in the County Court.

5. *Indictable offences triable summarily*

In relation to indictable offences triable summarily, it is worth noting the apparent inconsistency in the way in which the issue of costs may be dealt with. According to *Latoudis v. Casey*, if the matter is tried summarily in the Magistrates' Court and the defendant successfully defends himself or herself, then he or she has a 'reasonable expectation' of an award of costs. In contrast, if

[54] Support for such an interpretation may be found in *Fraser v. R.; Meredith v. R.* (1985) 1 N.S.W.L.R. 680, 688-9 *per* McHugh J. (quoting from *Butler v. A.-G. (Vic.)* (1961) 106 C.L.R. 268, 276 *per* Fullagar J.).

It is also worth noting that in *Australian Oil Refinery v. Cooper* (1987) 11 N.S.W.L.R. 277, 282, the suggestion was made by counsel that this doctrine *generalia specialitus non derogant* only applies to preserve specific rights, privileges and exceptions. The Court did not need to pursue this argument. Were it accepted, however, it may mean that the doctrine would not apply in the instance under consideration.

[55] Presently, the limit is $60, 'to enable him [the accused who is acquitted] to defray the charges and expenses of his witnesses': s. 359(5).

the indictable (but triable summarily) offence alleged to have been committed by the defendant, is in fact tried on indictment, the current practice dictates that the defendant, if he or she is successful, will be unable to recover his or her legal costs. Therefore, whether or not the Crown may have an award of costs made against it, in the event that it is unsuccessful in securing a conviction, will depend on whether the matter is tried summarily or on indictment. This inconsistent state of affairs provides further policy grounds for concluding that the current practice of not awarding costs to a successful defendant to a charge tried on indictment in the County Court is incorrect in law.

6. *Defendant's costs in successful appeal against sentence*

A further scenario in which costs may be an issue is where a defendant, convicted of a summary offence (and, therefore, not awarded costs), appeals successfully against the sentence imposed on him or her by the magistrate. Can that defendant be awarded the costs of the appeal — that is, can the Crown have an award of costs made against it in those circumstances?

It seems that *Latoudis v. Casey* will have little significance in such circumstances. Authorities suggest the defendant will continue to be unable to obtain an award of costs where he or she is convicted at trial but successfully appeals against sentence. The Full Court of the Federal Court in *R. v. J.* stated:

> It has never been the practice of appellate courts to award costs for or against the Crown in appeals against sentence, whether such appeals are brought by the Crown or by the person sentenced, except pursuant to special statutory schemes by which the costs of a successful respondent may be met from a fund.[56]

The Court, however, qualified this statement by stating:

> If it should appear to an appellate court that the Crown's presentation of the case to the sentencing judge either contributed to an error in the exercise of the sentencing discretion or led the defendant to refrain from dealing with some aspect of the case which might have rebutted the suggested error, an appropriate case might be made for an appellate court to make an award of costs against the Crown in a Crown appeal against sentence as a matter of justice to the sentenced respondent.[57]

These statements are supported by High Court *dicta* recognizing the longstanding practice not to award costs when a convicted person successfully applies for leave to appeal or succeeds on appeal.[58] But the High Court has also pointed out in *R. v. Whitworth* that an application for leave to appeal to the High Court by the Crown is an exceptional circumstance, 'and there is no reason the jurisdiction [to award costs] should not be exercised in appropriate cases'.[59] So it seems that the general rule is that a defendant who successfully appeals against sentence will not recover his or her legal costs.

56 (1983) 49 A.L.R. 376, 379. In Victoria, the relevant 'fund' is established under the Appeals Costs Fund Act 1964.
57 *Ibid.* 379.
58 *R. v. Whitworth* (1988) 164 C.L.R. 500, 501. See also *R. v. Martin* (1984) 58 A.L.J.R. 217.
59 (1988) 164 C.L.R. 500.

C. *WHEN COSTS MAY BE AWARDED TO THE CROWN IN CRIMINAL PROCEEDINGS*

Having discussed the possible implications that *Latoudis v. Casey* holds for the making of awards of costs against the Crown, it is necessary to turn to the implications which the decision may have for the circumstances where costs may be awarded to the Crown. The circumstances in which costs may be awarded to the Crown in criminal proceedings are largely the obverse of the circumstances when an award may be made against it.

It is necessary to bear in mind that, at common law, judges and magistrates had no power to award costs to either party. A statutory basis must exist for any award.[60]

1. *Matters tried summarily*

In relation to matters tried summarily, sub-s. 131(1) of the Magistrates' Court Act forms the basis for any award of costs in any proceedings.[61] It is the practice of the Crown[62] to ask for costs when the prosecution of the defendant of a summary offence results in a finding of guilt, and courts of summary jurisdiction in Victoria regularly award costs against unsuccessful defendants. Typically, the professional costs awarded are lower than the costs that would be payable on any reasonable assessment by the defendant on a party-party basis.[63] An order is usually made for court fees, the fees of witnesses including professional witnesses but excluding police officers, the costs involved in obtaining scientific evidence, service fees, and other proper disbursements. It seems that such a practice is likely to continue, given the decision in *Latoudis v. Casey*.

2. *Offences tried on indictment*

It is not the practice of the Crown to ask for costs in matters being tried on indictment in either the County Court or the Supreme Court. There are, however, a number of points to be made about this practice. First, while the practice of the Crown is not to ask for costs, there is certainly provision for costs to be awarded to the Crown where the person tried on indictment is convicted. Section 545 of the Crimes Act provides that where a person is convicted of treason or an indictable offence, the court may, in addition to any sentence passed, condemn such person to the payment of the whole of the costs or expenses incurred in or about the prosecution and conviction for the offence of which he or she is convicted. In practice, however, this provision is rarely invoked. There appear to

60 For an instance where a magistrate made an award of costs *ultra vires*, and therefore ineffectively, see *Queensland Fish Board v. Bunney; ex parte Queensland Fish Board* [1979] Qd R. 301.

61 Including, as explained above, p. 157, committal proceedings.

62 Of course, police officers still prosecute summary matters in their own name. Prosecutions of summary matters do not take place in the name of the Queen. The word 'Crown' has been used here for the sake of convenience only.

63 Party-party costs are those costs which are necessary or proper for a reasonable prudent person, endeavouring to get justice, but endeavouring to get it without the undue expenditure of money. (*Stanley v. Phillips* (1966) 115 C.L.R. 470, 478 *per* Barwick C.J.). Compare solicitor-client costs wherein all costs are allowed except those unreasonably incurred or those of an unreasonable amount.

be no reported Victorian cases which consider s. 545. The South Australian equivalent appears to have been considered on one occasion in detail in 1928. In *R. v. Whalland*,[64] Angas Parsons J. limited the circumstances in which an award of costs against a person convicted of an indictable offence could be made. He held:

> [A] useful working rule of practice for me to adopt will be not to make an order for costs against a person convicted of treason or felony until the prosecution satisfy me that the prisoner has adequate means to comply with the order to pay the costs, having regard to whatever debts he may owe and the liabilities which he ought to meet and which should take priority of the costs of the prosecution.[65]

In effect, the Court prevented the Crown from undermining the position of other creditors who may be owed money by the person convicted.

Moreover, the Court in *R. v. Whalland* went on to say that the order to pay costs, when made, is part of the sentence of the court and that the order should be taken into account in imposing a sentence of imprisonment.[66] This last proposition is of doubtful validity since *Latoudis v. Casey* makes it clear that orders for costs are made by way of indemnity to the successful party, and not by way of punishment of the unsuccessful party. But as against this, *R. v. Allen*[67] suggests that a Crimes (Confiscation of Profits) Act 1986 (Vic.) order is usually to be given little weight in the sentencing process, but not in all circumstances. The Full Court of the Victorian Supreme Court in *R. v. Allen* stated by way of example a set of circumstances where such an order may be relevant:

> [I]f . . . the crime was one involving a fraud of some millions of dollars, it might seem to have some real relevance when sentencing to be aware that a confiscation order had been made that was likely to be effective in the recovery of the amount of the fraud.[68]

Therefore, it is worth considering whether an order made under s. 545 was intended by the legislature to be more in the nature of a Crimes (Confiscation of Profits) Act 1986 order (or, for that matter, a Proceeds of Crime Act 1987 (Cth) order), or whether it was intended by the legislature to be a provision by which the court could indemnify the prosecution against its expenses incurred in securing the conviction of the defendant. *R. v. Whalland*[69] favours the former interpretation.

Second, there is a statutory basis to award costs to the Crown in the Supreme Court by virtue of sub-s. 24(1) of the Supreme Court Act. However, as mentioned, sub-s. (2) expressly preserves the practice in criminal proceedings which existed prior to the enactment of s. 24. This suggests that it will rarely be the case that costs will be awarded in the trial of charges heard on indictment in the Supreme Court. At any rate, it would be more appropriate for the Court to

64 [1928] S.A.S.R. 18; see also (1928) 2 *Australian Law Journal* 30.

65 [1928] S.A.S.R. 18, 25. Having found no cases on the provision under consideration except for some English cases (*e.g. R. v. Roberts* (1873) L.R. 9 Q.B. 77; *R. v. McClusky* (1921) 15 Cr. App. R. 148) on the United Kingdom equivalent, Angas Parsons J. went through the Court record to discover the circumstances under which the provision had been invoked.

66 [1928] S.A.S.R. 18, 25.

67 Unreported judgment of the Full Court of the Supreme Court of Victoria (Young C.J., Murphy and O'Bryan JJ.), 27 April 1989.

68 *Ibid.* 13.

69 [1928] S.A.S.R. 18.

award costs to the Crown where a person has been convicted of an indictable offence by the machinery provided in s. 545 of the Crimes Act.

Third, in relation to matters tried on indictment in the County Court, it is necessary again to consider s. 78A of the County Court Act in the light of *Latoudis v. Casey*. As stated, s. 78A is the general provision by which the County Court may award costs to any party in a proceeding. It was suggested above that *Latoudis v. Casey* may encourage successful defendants to charges heard on indictment in the County Court to seek an award of costs. The Crown, however, would have little need to resort to the same arguments as a successful defendant in order to obtain an award of costs, since the County Court (as with the Supreme Court) could award costs to the Crown where it has been successful in securing the conviction of a person for an indictable offence through s. 545 of the Crimes Act. As stated, s. 545 is a more appropriate provision by which a court may award costs to the Crown in charges tried on indictment.

D. *CONCLUSION*

From this analysis is, it can be seen that *Latoudis v. Casey* offers encouragement to successul defendants in criminal proceedings to recover their costs, or at least a part of them. Even if the Magistrates' Court (Costs) Bill is passed by the Victorian Parliament and becomes law, its effect is limited to criminal proceedings conducted in the Magistrates' Court. Accordingly, the implications of *Latoudis v. Casey* continue to be of much significance until such time that the issues raised have been judicially considered, or amendments to legislation are effected.