# Applications for costs after unsuccessful prosecutions

By Russell Sweet

## 1. Introduction

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application for professional costs incurred by an accused person to be paid by the state, upon a criminal charge being withdrawn by the prosecution or dismissed by the court.

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can be relied upon by an advocate for an accused person when charges brought against him by the prosecution are either withdrawn by the prosecution or dismissed by the court that will result in an accused person obtaining an order for costs.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

There are two statutes that contain provisions that give a court a discretion to make a costs order, upon a criminal prosecution failing or being withdrawn. 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professional costs to the Registrar of the Court, for payment to the accused person, if the matter is *dismissed* or *withdrawn*.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 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. Legislative provisions and the common law position regarding such an application for costs

An award of costs is commonly regarded as a means of penalising or discouraging any improper or unreasonable behaviour on the part of an informant in a prosecution and to make prosecutors more publicly accountable for their actions and to bring about a greater level of efficiency in the investigation and prosecution of criminal proceedings.[1]

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.[2]

The common law position was that the Crown neither paid nor received costs.[3]

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.

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 merit.[4]

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.[5]

### 4. The preparation of a costs application

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:

- the accused person is discharged as to the subject matter of the offence or the matter is withdrawn; or

- 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. This is so 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

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'.[6]

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.

### 4.2 That the proceedings were initiated without reasonable cause or in bad faith or were conducted by the prosecutor in an improper manner

It has been held that a party does not institute proceedings without reasonable cause merely because that party fails in the argument put to the court.[7] However, a proceeding will be instituted without reasonable cause if it has no real prospect of success or was doomed to failure.[8]

Moreover, it has been held with the question as to whether or not, at the time a proceeding was instituted it had 'no real prospects of success or was deemed a failure' is a question that is required to be determined as a matter of objective fact.[9] Moreover, it has been held 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.[10] Moreover, it has been held that in determining whether a prosecutor unreasonably failed to investigate, or to investigate properly any relevant matter, a court has 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 and would have suggested the proceedings should not have been brought.[11]

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.[12]

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. 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.[13]

There is authority to support the proposition that 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 of whether a jury would be reasonably likely to convict. Similarly it has been held equally that the test cannot be a test of reasonable suspicion which must justify an arrest and it cannot be the test which determines whether the prosecution is malicious.[14]

Furthermore, there is authority to support the proposition that, 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.[15]

Moreover, there is authority to support the proposition 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 and that 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.[16]

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.

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 of which the Crown acting reasonably, ought to have been aware*. [Emphasis added].

#### 4.3 The proceedings should not have been brought

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.[17]

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 it is just and reasonable to award professional costs

The application of the sub-section requires 'other exceptional circumstances' that specifically relate to the 'conduct of the proceedings by the prosecutor.'

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

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*, allows an application for costs to be made on an adjournment of committal proceedings.

Sections 118, 216 and 257F of *Criminal Procedure Act 1986*, 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.

## 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 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.[18]

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*.[19]

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 sections 2 and 3 of the Act should divide his or her task into two categories being the 'facts' aspect and the 'reasonableness' aspect, and that these considerations require that some care be taken in considering the two steps mandated by parliament.[20]

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'.[21]

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. [22]

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. [23]

### 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*'.

The meaning of the words *'all relevant facts'* is the subject of authority.[24] It has been held that 'all relevant facts' means:

> all the relevant facts as they finally emerge at the trial; the facts in the prosecution case and the facts in the accused's case together with those that emerge from cross examination of the prosecution witnesses' or from evidence called by the accused.[25]

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'.

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.

### 7.2 The reasonableness issue

In *Solomons v District Court of New South Wales*[26] 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', it must be remembered that the authorities establish that the primary test to be applied in determining whether a certificate should be granted is – 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, and that the 'institution of the proceedings' refers to the time of arrest or charge, not to some later stage such as committal for trial or finding of a Bill. [27]

The authorities support the proposition that in considering an application for costs under the *Costs in Criminal Cases Act 1967,* 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 or she was in fact charged.[28]

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 or she 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 or she 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. [29]

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.[30]

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.* [31]

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, or matters of judgment concerning credibility.[32]

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 or her 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. [33]

It has been held that it is fundamentally important in our system of criminal justice, where the prosecution has a wide discretion as to whether or not to institute or continue proceedings that the director of public prosecutions exercises his discretion with appropriate professional rigour.[34]

### 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 of which the accused was acquitted.

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 or her.

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 they are acquitted or the charge against them 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 General's Department actually paying the costs thrown away by the accused as a result of the unsuccessful prosecution 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 or her 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 General's 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 or her 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.

### Endnotes

1. Second Reading Speech Justices (Cross) Amendment Bill (Hansard Legislative Assembly 10 April 1991 at 1827 – speech of Attorney General Mr Dowd). See also the comments of Pain J in *Port Macquarie-Hastings Council v Lawlor Services Pty Limited*; *Port Macquarie-Hastings Council v Petro (No 7)* [2008] NSWLEC 75 (21 February 2008 per Pain J).
2. *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)].
3. *R v His Honour Judge Kimmins ex parte Attorney General* [1980] QD R 524 per Douglas J; *Attorney General for Queensland v Holland* (912) 15 CLR 56 at [49] and *Affleck v The Queen* (1906) 3CLR 608.
4. *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)].
5. *Latoudis v Casey* (1990) 170 CLR 534 at 542–543.
6. *JD v DPP and Ors* [2000] NSWSC 1092 (30 November 2000).
7. *Regina v Moore; ex parte Federated Miscellaneous Workers' Union of Australia* (1978) 140 CLR 470 per Gibbs J at 473.
8. *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.
9. *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]. *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.
10. *Kanan v Australian Postal & Telecommunications Union* (1992) 43 IR 257 at 264.
11. *Port Macquarie-Hastings Council v Lawlor Services Pty Limited*; *Port Macquarie-Hastings Council v Petro (No 7)* 4 [2008] NSW LEC 275 (21 February 2008) [supra] at para 63.
12. *In DJ v DPP* [supra] Hidden J [at para 28].
13. *Manley* per Wood CJ at CL [at 12], *Regina v Hatfield* [supra], *Mordaunt* [supra] at para 36[h].
14. See *R V Manley* [2000] NSWCCA 196 (26 May 2000) per Wood CJ at CL at paras 11 and 12 when his Honour referred to McFarlane (Supreme Court of New South Wales 12 August 1994 (unreported).
15. *Fejsa* (1995) 82 A Crim R 253; *Pavy* CCA (NSW) 9 December 1997 (unreported) and *NSW Treasurer v Wade* CA (NSW) 16 June 1994 (unreported).
16. *McFarlane* [supra] [at para 14].
17. See *DPP(Cth) v Neamati* [2007] NSWSC 746.
18. *Allerton v Director of Public Prosecutions* (pp.559-560).
19. *Pavy* (1997) 98 A Crim R 396.
20. *Ramskogler* [supra] Kirby P [at para 28].
21. *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* [supra].
22. *Mordaunt v DPP* [supra] per McColl JA [at 36(d)].
23. *Mordaunt v DPP* [supra] per McColl JA [36(e)].
24. *R v Tooes* [2008] NSWSC 291 (4 April 2008) Studdert AJ; *R v Williams* (1970) NSWLR 81.
25. *R v Tooes* [supra] [at para 5] per Studdert AJ.
26. *Solomons v District Court of New South Wales* [2002] HCA 47.
27. *Pavy* [supra].
28. *R v Cardona* (2002) NSWSC 823 per Hidden J and Pavy [supra].
29. *Manley* per Wood CJ at CL; at [12], *Regina v Hatfield* [supra] *Mordaunt* [supra] [para 36(h)].
30. *DJ v DPP* [2000] NSWSC 1092 per Hidden J at para 28.
31. *McFarlane* [supra], *Manley* per Wood CJ at CL at [12].
32. *Manley* [supra] per Wood CJ at CL at [14].
33. *R v CPR* [2009] NSWDC 219 (19 August 2009) per Goldring DCJ at 33-36 and at 39-40.
34. *R v CPR* [2009] NSWDC 219 (19 August 2009) per Goldring DCJ at 39-40. See also *R v KT* [2009] NSWDC 224 (23 July 2009) per Bennett SC DCJ; *Presland v DPP* [2009] NSWDC 178 (10 July 2009) Norrish QC DCJ [para 42].