DISTRICT COURT OF QUEENSLAND

CITATION:	*SCA v Commissioner of Police* [2024] QDC 57
PARTIES:	**SCA** (appellant) **v** **COMMISSIONER OF POLICE** (respondent)
FILE NO:	D179/2022
DIVISION:	Appellate
PROCEEDING:	Section 222 Appeal
ORIGINATING COURT:	Magistrates Court at Maroochydore
DELIVERED ON:	26 April 2024
DELIVERED AT:	Maroochydore
HEARING DATE:	6 July 2023
JUDGE:	Long SC, DCJ
ORDER:	**The order made by the Magistrate on 28 November 2022 that there be no order as to costs, be set aside and instead, there be an order that the complainant pay the defendant costs in the sum of $1,750.00.**
CATCHWORDS:	APPEAL AGAINST FINDING OF MAGISTRATE – COSTS – Where the appellant was alleged to have committed domestic violence, in the nature of an offence of assault occasioning bodily harm, against her partner – Where the Magistrate found no offence occurred – Where the appellant made an application for costs – Where the Magistrate dismissed the application for costs – Whether the exercise of discretion as to costs miscarried
LEGISLATION:	*Justices Act 1886* ss 158, 158A, 158B, 222
CASES:	*House v R* (1936) 55 CLR 499 *McDonald v Queensland Police Service* [2018] 2 Qd R 612 *Latoudis v Casey* (1990) 170 CLR 534 *Murray v Radford* [2003] QCA 91
COUNSEL:	SA Lynch for the appellant MC O'Brien for the respondent

SOLICITORS: Butler McDermott for the appellant
Queensland Police Service Legal Service for the respondent

Introduction

[1] By notice filed 22 December 2022 the appellant appeals an order made in the Magistrates Court at Maroochydore on 28 November 2022, refusing the appellant's application for an award of costs pursuant to s 158 of the *Justices Act 1886* ("*Justices Act*"), upon the dismissal of the complaint or charge that on 20 July 2022, she committed the domestic violence offence of assault occasioning bodily harm of her female partner.

[2] The particularisation of the alleged act of assault was that on 20 July 2022 and as the complainant walked past the appellant, she burnt her by deliberately placing a "joint" or cigarette onto the complainant's left arm. In dismissing that charge at trial and after reviewing the evidence which had been presented to him, including that of the appellant in denial of her commission of the offence and the Magistrate's rejection of there being any objective support for the allegation in any of the tendered photographs taken later of the injury alleged to be the result of the defendant's act, the essential findings were as follow:

> "… in relation to the evidence of the complainant, I will have to say in relation to this assault, I rejected the version given by her in respect of the assault. There is simply no evidence – no reliable evidence that the defendant grabbed the victim's left arm, let alone lit a – placed a lit rolled cigarette into her left arm once, twice or at all.
>
> The evidence of the complainant was so unreliable that I could not conclude beyond all reasonable doubt that she was a witness of truth and/credibility and, in fact, I would have to conclude in relation to this incident, it was just a bare-faced lie that what she said to her friend was simply a matter of her trying to bolster her situation with her friend, the acquaintanceship, who was her practice manager. The practice manager's evidence of a courteous relationship is not supported by any reliable evidence of any controlling domestic

> violence relationship. There is just no evidence that I could – allow me to safely conclude beyond all reasonable doubt that I should accept the complainant's evidence.
>
> To the extent that there might have been tendencies of the defendant, at times, to be verbose in her responses or perhaps embellish some of her responses does not allow or detract from my assessment that she was telling the truth when it came to that incident. It simply did not happen as the complainant said it did. She is not guilty of the charge and should be acquitted."

[3] It is unnecessary to examine, in any detail, the evidence upon which these findings are premised. At trial, the complainant's credibility was particularly put in issue, including in that:

(a) immediately after the alleged offence she, the defendant and her son and others, went together on a vacation to Bali, where she there told a friend that the burn mark on her arm was caused by her "new curling wand", which lie the complainant admitted in her evidence-in-chief and sought to explain her reasons for doing so;[1]

(b) whilst in the complainant's statement given to police the allegation had been expressed in terms of the defendant burning her arm with a "joint", in her evidence this became a "rollie",[2] with her explanations in cross-examination being that "she didn't know exactly what was in it";[3]

(c) her allegation being pursued in circumstances where her relationship with the defendant had been fractured and where this allegation became part of the proceedings between the parties under the *Family Law Act 1975*;[4]

(d) the complainant had been suspended by AHPRA, from practising as a psychologist, with her understanding being that this had been the result of matters raised, in part, by the defendant;[5] and

(e) the complainant had struggled with opioid drug addiction and had a history of Medicare fraud in particular.[6]

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1 T1-13.13-20.
2 T1-10.12 and cf: 1-10.44, where it is expressed as "joint – rollie".
3 T1-20.13-14, with further questioning of her changes of description of the item with which she was burnt, in the context of her knowledge of assertions as hair follicle test results, through their Family Court proceedings.
4 T1-22.15-21.
5 T1-22.34-42.
6 T1-18.2 - T1-19.30.

[4] A circumstance particularly relied upon by the appellant as to the issue of costs is that on or about 2 September 2022, solicitors previously acting for the appellant made a submission to the prosecution raising a number of the issues which were subsequently explored at trial in respect of the credibility of the complainant. In respect of this charge, that submission relevantly contained the following:

> "The evidence our client will produce at trial will include:-
>
> (a) that the Defendant does not smoke marijuana and certainly she was not "*smoking a joint*" on the day alleged;
>
> (b) as part of her preparation to defend this charge (and the related DV matter) on Thursday, 25 August 2022, the Defendant attended AWDTS to undergo a hair follicle test which will show that she had not taken marijuana or any other illicit substance in the last three (3) months;
>
> (c) on 23 August 2022, a Witness (JJ) who is an associate of both the Complainant and the Defendant, signed and swore an Affidavit stating amongst other things that when holidaying in Bali with the Complainant and our client in late July 2022 the Complainant stated to her that the burn on her arm was caused when the Complainant burned herself with her hair straightener;
>
> (d) that Affidavit has been provided to Queensland Police in Court on 23 July 2022 when the domestic violence matter was mentioned. Attached is an unsigned copy of same.
>
> We suggest that at trial the evidence of the witness, JJ will outweigh any and all allegations by the Claimant in respect of this particular charge.
>
> Our client says that this particular allegation (together with all the other allegations) by the Complainant has been fabricated for the purposes of causing Police to file a domestic violence application in the misconception by the Complainant that she will be able (sic) exclude the Defendant from any involvement with the parties' only child …".

And also:

> "On issues of credit worthiness of the Complainant, the Prosecution is invited to consider the following:-
>
> (a) the Complainant has recent criminal history relating to illegal use of prescription drugs;
>
> (b) the Complainant has recent criminal history relating to illegal supply of prescription drugs;
>
> (c) the Complainant has recent history related dishonesty charges connected with her illegal involvement in prescription drugs;

(d) the Complainant has earlier history related to dishonesty with Medicare fraud including having to repay significant money back to Medicare;

(e) the Complainant is on the Suboxone program by reason of her prescription drug habit;

(f) the Complainant is a former psychologist who has been struck off by APRA (sic) as a result of her criminal history;

(g) our client says the Complainant continues to illegally use prescription drugs."

The appeal

[5] The appeal is brought pursuant to s 222 of the *Justices Act* and therefore and in the absence of new evidence, as may be allowed pursuant to s 223,[7] it is conducted as a rehearing on the record of the proceedings below. The obligation of the Court has been generally noted as follows:

> "A court of appeal conducting an appeal by way of rehearing is bound to conduct a 'real review' of the evidence given at first instance and of the judge's reasons for judgment to determine whether the judge has erred in fact or law. If the court of appeal concludes that the judge has erred in fact, it is required to make its own findings of fact and to formulate its own reasoning based on those findings."[8] (Citations omitted)

In an earlier cited decision,[9] it was observed in respect of a court conducting an appeal by rehearing on the record that:

> "Such courts must conduct the appeal by way of rehearing. If, making proper allowance for the advantages of the trial judge, they conclude that an error has been shown, they are authorised, and obliged, to discharge their appellate duties in accordance with the statute."

Such principles were expressly noted as being applicable to an appeal brought pursuant to s 222 of the *Justices Act* in *McDonald v Queensland Police Service*[10]

> *"*[46] A failure on the part of a District Court judge, on an appeal under s 222 of the *Justices Act* 1886, to conduct a rehearing

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7 Which here, has only been admitted, without objection, for the prospective re-exercise of discretion, should the appellant succeed in having the Magistrate's decision set aside.

8 *Robinson Helicopter Co Inc v McDermott* (2016) 90 ALJR 679, [2016] HCA 22, at [43].

9 *Fox v Percy* (2003) 214 CLR 118 at [27].

10 [2018] 2 Qd R 612 at [47].

> is an error of law, which would warrant the intervention of this Court to correct an injustice.
>
> [47] However, in this case, the District Court judge did conduct the appeal appropriately, in accordance with law, by way of a rehearing, in the technical sense of a review of the record of proceedings below, rather than a completely fresh hearing. It is well established that, on an appeal under s 222 by way of rehearing, the District Court is required to conduct a real review of the trial, and the Magistrate's reasons, and make its own determination of relevant facts in issue from the evidence, giving due deference and attaching a good deal of weight to the Magistrate's view. Nevertheless, in order to succeed on such an appeal, the appellant must establish some legal, factual or discretionary error." (citations omitted)

[6] The power to make the order, which is the subject of this appeal, is provided in the following terms, in s158(1):

> "**158 Costs on dismissal**
>
> (1) When justices instead of convicting or making an order dismiss the complaint, they may by their order of dismissal order that the complainant shall pay to the defendant such costs as to them seem just and reasonable."

Such a determination has been recognised as being in the nature of an exercise of judicial discretion and accordingly,[11] attracting the following principles, as recognised in *House v R:*[12]

> "The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary Judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such

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11 *Latoudis v Casey* (1990) 170 CLR 534, *Murray v Radford* [2003] QCA 91 at p 7.

12 (1936) 55 CLR 499, at 504-505. Cf: *Teelow v Commissioner of Police* [2009] QCA 84, at [20]-[21] and *Pullen v O'Brien* [2014] QDC 92 at [31]-[37].

> a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

Although and as is further noted below, there is express fettering of that exercise of discretion by s 158A, in requiring a form of evaluative exercise as to whether it is considered relevantly proper to award any costs to a successful defendant, this does not serve to alter the essentially discretionary nature of a decision as to what, if any, part of a successful defendant's costs may be awarded, because such evaluative judgement may be seen, as permitting of a determination within a range of legitimate views as to what may be relevantly proper, in any given circumstances.[13]

[7] The only ground expressed in the notice of appeal is that:

> "The learned magistrate erred in not ordering costs under ss 158, 158B(2) *Justices Act* to the Defendant upon dismissal of the complaint."

It must be observed that this, as a ground of appeal, is effectively meaningless in respect of any identification of contended error and particularly in the context of the discretionary nature of the order permitted by s 158. Accordingly, and although as will be discussed there remain other difficulties, unsurprisingly the appellant sought and was granted, without objection, leave to add the following ground of appeal:

> "The learned magistrate failed to give any or any appropriate consideration to the factors under s 158A of the *Justices Act*."

Principles as to costs under the *Justices Act*

[8] In respect of the issue of costs, it is useful to start with the following statement of principle in *Latoudis v Casey*:[14]

> "If one thing is clear in the realm of costs, it is that, in criminal as well as civil proceedings, costs are not awarded by way of punishment to the unsuccessful party. They are compensatory in the sense that they are awarded to indemnify the successful party against the expense to which he or she has been put by reason of the legal proceedings."

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13 Cf: *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32 at [1].

14 (1990) 170 CLR 534 at 543.

However, such compensation is not an inevitable consequence and the discretion to be exercised pursuant to s 158(1), is fettered by s 158A(1) as follows:

> **"158A Exercise of discretion in relation to an award of costs**
>
> (1) Despite section 158(1), justices who dismiss a complaint may make an order for costs in favour of a defendant against a complainant who is a police officer or public officer only if the justices are satisfied that it is proper that the order for costs should be made."

[9] Further and pursuant to s 158A(2), it is provided that:

> "In deciding whether it is proper to make the order for costs, the justices must take into account all relevant circumstances, including for example –
>
> (a) whether the proceeding was brought and continued in good faith; and
>
> (b) whether there was a failure to take appropriate steps to investigate a matter coming to, or within, the knowledge of a person responsible for bringing or continuing the proceeding; and
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> (c) whether the investigation into the offence was conducted in an appropriate way; and
>
> (d) whether the order of dismissal was made on technical grounds and not on a finding that there was insufficient evidence to convict or make an order against the defendant; and
>
> (e) whether the defendant brought suspicion on himself or herself by conduct engaged in after the events constituting the commission of the offence; and
>
> (f) whether the defendant unreasonably declined an opportunity before a charge was laid—
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> (i) to explain the defendant's version of the events; or
>
> (ii) to produce evidence likely to exonerate the defendant;
>
> and the explanation or evidence could have avoided a prosecution; and
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> (g) whether there was a failure to comply with a direction given under section 83A ; and
>
> (h) whether the defendant conducted the defence in a way that prolonged the proceeding unreasonably; and
>
> (i) whether the defendant was acquitted on a charge, but convicted on another.".

As observed in respect of these statutory provisions, in *Murray v Radford*,[15]

> "It may be accepted that, but for s 158A the discretion which magistrates have to order that the costs of a successful defendant be paid by an unsuccessful claimant will ordinarily be exercised in favour

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15 [2003] QCA 91 at p 7.

> of such a defendant. See *Latoudis v. Casey* (1990) 170 CLR 534. However that is not always the case. A discretion remains under s 158 to order otherwise. It is not necessary to consider how that discretion ought properly to have been exercised in a case such as this if s 158A did not apply.
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> There is no doubt that s 158A applied to this case because the complainant was a police officer. Under that section despite s 158(1) the magistrate may make a costs order such as the applicant says should have been made only if he is satisfied that it is proper that such an order should be made; and in so deciding he is obliged to take into account all relevant circumstances including but not limited to those enumerated in subsection (2). Section 158A is thus, plainly, a limitation on the discretion which s 158 permits to order costs against a complainant."

In this case s 158A is also applicable because the complainant was a police officer.

The approach to this appeal

[10] An immediate difficulty with the added ground of appeal is, as the respondent contends and if "the factors under s 158A" are, as the contentions for the appellant proceeded, taken to be the examples set out in s 158A(2), it is abundantly clear that the Magistrate gave consideration to such circumstances. A second difficulty lies in the tendency for a contention as to failing to give appropriate weight to any such factors, being no more than an argument about attribution of degree of weight and not within the principle derived from *House v R*.

[11] It is of importance to understand that for a costs order to be made under s 158(1) and having regard to s 158A, the issue will be as to whether there is satisfaction not just that the costs to be awarded are just and reasonable but also "that it is proper that the order for costs should be made", having taken "into account all relevant circumstances".

[12] It is also necessary to understand that the examples in s 158A(2) are not expressed in necessary expectation of arising in every instance of the application of s 158A. The point is exemplified here in understanding that there has been no suggestion either in this Court or below, that any of the circumstances set out in s 158A(2)(e), (g) or (h), relevantly arose in respect of this matter:

[13] Accordingly, a more promising approach and arguably within the breadth and imprecision of the amended ground of appeal, is as to whether the exercise of the Magistrate's discretion involved error, particularly, as the appellant ultimately contended, any failure to take into account any relevant circumstance or reliance upon any irrelevant circumstance. In any event, there was no objection from the respondent to this appeal proceeding in that way. Indeed, it was, correctly, the respondent's submission that it was necessary that it be demonstrated that the Magistrate's exercise of discretion had miscarried.

Consideration

[14] As the respondent further contended, it is necessary that any examination of the reasons of the Magistrate be approached by considering the overall effect of them and that a harsh approach, particularly in focus upon mere infelicities of expression, is to be avoided and particularly when, as here, the reasons are given ex tempore.[16] Ultimately, however, there should be expectation of exposure of the reasoning process to a relevant determination.

[15] The reasons given by the Magistrate for refusing the application made for a costs order below, began with him correctly noting that he had "to take into account all relevant circumstances". The Magistrate then proceeded to effectively work through the matters provided in s 158A(2), as a checklist. It is convenient to then set out what the Magistrate determined having regard to those considerations:

> "… *Whether the proceedings was brought and continued in good faith.*
>
> Look, I can only say the prosecutions, here did bring these proceedings and continue them in good faith. I mean, Sergeant Newman probably saw the evidence as much as I did or anyone else in the room and all he did was do his duty to try and highlight the best parts of that evidence and make submissions to me which would allow me to convict the defendant. And can I say that there was certainly nothing in the evidence that I was provided that would suggested it was in any way, not continued in good faith.
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> *Whether there was a failure to take appropriate steps to investigate something within the knowledge of the person bringing or continuing the proceeding*.

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16 Reference was made to *ZZB v The Queensland Police Service* [2023] QDC 60 at [16]-[18].

This is not a case where there was a magical witness, that the police did not find or did not go and interview.

Whether there was a technical order for dismissal.

Well, that does not arise in the circumstances.

Whether the defendant brought suspicion on himself or herself via conduct engaged in after the events committing the commission of the offence.

Given the large volume of documents that Mr Lynch and his solicitor seem to have sitting in front of them, I suspect that there could have been a bit more disclosed by way of submission to highlight to the prosecution some of the risks of their case and, certainly, the way some of those photographs were landing before Sergeant Newman, it was pretty clear that nobody was telling him what was coming and might – perhaps – if those things had been brought to the prosecutor's attention at an earlier point, the question of costs might have given rise to different issues from me, or a different response from me.

As for whether the defendant ought to have brought suspicion upon herself, well, I do not think that could be said that happened here.

Whether the defendant unreasonably declined an opportunity before the charge was laid to explain her version of the events.

When people who are not lawyers ask me about that decision I always highlight to them how difficult that decision is. It is a forensic decision that many lawyers would go different ways in trying to address what the defendant should do. But I would have to say, particularly given what Hawkes Lawyers have said, to some extent, in their submission, there was an ample opportunity for the defendant to sort of explain, hey you guys need to know something more about what has been going on here. There is a fair bit of other information that you should be taking into account, and she had a reasonable opportunity to do that.

Now she is not being punished for that today, because she has a right to silence, but that is the flip side of the costs submission. She did have that opportunity and she failed to take that opportunity. Whether that was on good legal advice or sound legal advice – I would probably agree that it was sound legal advice – she does not have to tell the police anything. But there was, in this situation, a rolled gold opportunity to raise these things with the police at an earlier time, particularly can I say, looking at the date she did a bail undertaking, it seemed she also had a DV application at that time, which had fair bit of information in it that she could have told them about or even given them a bit more detail about.

Whether there is a failure to comply with the practice direction.

No.

Whether the defendant conducted the defence in a way that prolonged proceedings unreasonably.

> Definitely not, in fact, compromises today to get the case finished today.
>
> She has been convicted – acquitted of one charge but, for some strange reason, which no-one is admitting to, there is another charge still pending and Magistrate Sternqvist did not answer my phone call. The best I could get was he said there was a reason. So there is another charge there and I suppose there will be a different submission from today, and there is a DV application sitting there."[17]

The Magistrate then concluded as follows:

> "So what can I say? In a – on frankness, I do not think the costs submission, whilst I know it has been made on instructions, I do not think it has got legs whatsoever. It is one of those cases where the police had a persuadable – a persuasive witness who was insistent that this is what happened, and they had evidence which they thought supported her version. Unfortunately, it was not enough, given the other information that was revealed today."[18]

[16] The first observation must be as to the absence of any express finding as the whether or not it was proper to make an order for costs, let alone any expressed reasoning to any such conclusion. Also and having regard to success in the proceeding upon the particular findings as to the absence of credibility of the complainant and that what had been alleged against the defendant "did not happen" and the underlying rationale of the particular power to award costs lying in compensation of a successful defendant, it is difficult to comprehend the Magistrate's observation that he thought "the costs submission" did not have "legs whatsoever", as other than being indicative of an erroneous approach to his exercise of discretion. There is also difficulty in discernment as to how any balancing of relevantly competing considerations was achieved in the approach expressed by the Magistrate.

[17] Here, that process must have been influenced, in some expressly unexplained way, by the approach of the Magistrate to the examples of potentially relevant circumstances set out in s 158A(2). Determination of the question as to whether or not it is proper to make an order for costs for a successful defendant, is not to be achieved by any accumulation of ticks or crosses against those specific considerations. As has been noted, the fact that they are expressed as examples of relevant circumstances, must come with an understanding that in particular cases,

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17 T 1-77.6 – 1-78.29, reproduced as transcribed, except in respect of paragraphing and so as to aid intelligibility.

18 D1-7.36-42 (reproduced as transcribed).

some or even many of the examples may not be applicable at all. Here and as already noted, it was correctly acknowledged that the type of circumstance set out in sub-paragraphs (e), (g) and (h) simply did not arise and such a situation does not provide any support for or detraction from any conclusion that it is proper to award costs.

[18] Generally, it is not only necessary to determine what are the relevant considerations, including but not limited to those of a type provided as examples in s 158A(2), but also to then determine the respective weight to be given to any competing effects of those considerations, in reasoning to a conclusion as to whether or not it is proper to compensate a successful defendant by an award of a particular costs order. Whilst that determination will necessarily be influenced by those relevant circumstances, there is no further guidance provided as to what may constitute propriety as to making such an award.

[19] The introduction of s 158A into the *Justices Act*, in 1992, [19] has been acknowledged as being responsive to the decision of the High Court in *Latoudis v Casey.*[20] The purpose in doing so was expressed, in the relevant explanatory notes,[21] as follows:

> "The proposed section 158A is required following the majority decision of the High Court in *Latoudis v Casey* (1990) 170 CLR 534, which held that ordinarily a court of summary jurisdiction, in exercising a statutory discretion to award costs in criminal proceedings, will make an order for costs in favour of a successful defendant. The High Court also held that a court, in exercising its discretion to award costs, should not be influenced by arguments, inter alia, that police and public officers will be deterred from prosecuting cases for fear of incurring costs.
>
> The intention of the new section is to ensure that justices have a discretion to award costs in favour of defendants when dismissing complaints made by police officers or public officers where it is proper that an award of costs should be made. In short, the intention of the section is to ensure that there is not a presumption either in favour of awarding costs or not awarding costs in cases where complaints are made by police officers or public officers, but that justices take into account all relevant circumstances and award costs only on the basis that it is proper for an award to be made."

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19 By s 91 of the *Justice Legislation (Miscellaneous Provisions) Act,* No 40 of 1992.

20 (1990) 170 CLR 534. See *Commissioner of Taxation v MacPherson* [2000] 1 Qd R 496 at [12].

21 Explanatory notes for the *Justice Legislation (Miscellaneous Provisions) Bill 1992,* at p 7 in reference to clause 85.

[20] Accordingly, it may be seen that what was intended was the recognition of factors largely of a type which may be regarded as tending against the propriety of awarding costs to a successful defendant and therefore in legislating against the effect statements made in various judgments in *Latoudis v Casey*, recognising at least a reasonable, if not ordinary, expectation that a successful defendant would be awarded costs.[22] However, the retention of a discretion without any immediate presumption does not serve to deny what was recognised by the majority in *Latoudis v Casey* as to the compensatory rather punitive basis upon which the power to award costs is premised. Therefore, the prospective compensation of a successful defendant necessarily remains as a substantially relevant circumstance tending towards the propriety of such an award.

[21] In addition, it may be seen that although all but sub-paragraph (b) of the specific examples provided in s 158A(2) are expressed in terms immediately inviting an answer providing a consideration having some negative effect to any conclusion as to such propriety of making an award of costs, some and particularly those which are not expressly directed at the position of "the defendant", may permit of countervailing considerations, to different effect in particular cases.

[22] Some but not all of the examples set out in s 158A(2) are expressed in terms which reflect the observation of Toohey J that "a refusal of costs to a successful defendant will ordinarily be based upon the conduct of the defendant in relation to the proceedings brought against him or her".[23] This observation follows the express acknowledgement of the recognition of circumstances of the kinds reflected in s 158A(2)(e), (f), and (h), as considerations which might provide good reason for such refusal, in the last instance, at least, as to the full proportion of the costs incurred.[24] Of the other judgments forming the majority view, Mason J agreed with these observations of Toohey J,[25] but the observations of McHugh J were expressed as follows:

> "Consequently, a magistrate ought not to exercise his or her discretion against a successful defendant on grounds unconnected with the charge or the conduct of the litigation. The fact that the informant has acted in good faith in the public interest or may have to meet the costs

22 (1990) 170 CLR 534, at 543-4 per Mason CJ, 546 per Toohey J and 569 per McHugh J.
23 (1990) 170 CLR 534, at 565-566.
24 Ibid at 565.
25 Ibid at 544.

> out of his or her own pocket is not a ground for depriving the defendant of his or her costs. Speaking generally, before a court deprives a successful defendant in summary proceedings of his or her costs, it will be necessary for the informant to establish that the defendant unreasonably induced the informant to think that a charge could be successfully brought against the defendant or that the conduct of the defendant occasioned unnecessary expense in the institution or conduct of the proceedings. Cf. *Ritter v. Godfrey*; *Sunday Times Newspaper Co. Ltd. v. McIntosh*; *Redden v. Chapman*; *Schaftenaar*; see also *McEwen v. Siely*. Thus, non-disclosure to investigatory police of a tape recording later successfully used in cross-examination of the informant's witnesses may be a relevant matter to be taken into account in determining whether the defendant should be awarded costs: cf. *Reg. v. Dainer*; *Ex parte Milevich*. A successful defendant cannot be deprived of his or her costs, however, because the charge is brought in the public interest or by a public official, because the charge is serious or because the informant acted reasonably in instituting the proceedings or might be deterred from laying charges in the future if he or she was ordered to pay costs. Nor can the successful defendant be deprived of his or her costs because the conduct of the defendant gave rise to a suspicion or probability that he or she was guilty of the offence the subject of the prosecution. Hence, in most cases, the successful defendant in summary proceedings, like the successful party in civil proceedings, should obtain an order for costs in respect of those issues on which the defendant succeeds."[26]

An earlier passage in the judgment of Toohey J serves to highlight the essential differences in approach between the majority and minority judgments:

> "The decisions referred to by Dawson J. show that the trend of Australian authority, certainly as found in decisions of the Federal Court of Australia, the Supreme Court of the Australian Capital Territory and the Supreme Court of South Australia, favours an award of costs to a successful defendant in summary proceedings unless the defendant's own actions have precipitated the prosecution (for instance, refusal to give an account to the police when it would be reasonable to do so, or failure to tell the police of a witness who could support the defendant's account of the incident); or the defendant has prolonged the proceedings unnecessarily by his or her approach to the conduct of the litigation; or some other relevant consideration is present which makes it unjust to award costs to him or her. To what extent those decisions constitute a statement of principles or guidelines for magistrates is a matter that has to be considered.
>
> What has emerged from a number of decisions is recognition that costs are awarded by way of indemnity to the successful party and, expressly or impliedly, that they are not by way of punishment of the unsuccessful party. *Puddy v. Borg* is to that effect. So too are *Anstee v. Jennings*; *Ex parte Hivis*; *Re Michaelis*; *Cilli v. Abbott*; *Barton v.*

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26 Ibid at 569-570 (citations omitted).

> *Berman*. In particular, those decisions reject or lend no countenance to the view that costs should not be awarded to a successful defendant in summary proceedings because to do so would discourage police officers from bringing prosecutions. The point was made succinctly by Mann J. in *Anstee v. Jennings*:
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> > "It may be worthwhile to point out that the order for costs in a Court of Petty Sessions or other costs should have nothing to do with the reasonableness of the informant's action. It is a matter of giving proper indemnity to a successful defendant for costs to which he has been put without lawful justification."[27]

On the other hand, the dissenting judgements of Brennan J,[28] and Dawson J,[29] are expressed in terms of giving particular weight to the potential personal exposure of a police officer to the payment of a successful defendant's costs of a failed prosecution, at least where there has been a reasonable performance of public duty in bringing the prosecution. Each recognised substantial arguments in either direction and Brennan J observed that:

> "The injustice in the system can be avoided only by legislation which commits public funds to defray the costs of unsuccessful prosecutions. If governments decline to make the necessary funds available, the courts are left with the unenviable task of deciding whether the interests of justice are better served by adopting one unjust practice rather than another."[30]

Whereas and in reflection of an understanding which if anything has even more resonance in the contemporary context, Toohey J expressly acknowledged the concession of the Solicitor-General for the respondent that "the court can assume that almost invariably the police will be indemnified out of the public purse" as a practice similarly appearing to apply throughout Australia.[31] As will be later discussed, in Queensland, such an eventuality is also subject to substantial curtailment as to the quantum of any award of compensation which can be achieved.

[23] As was recognised in *Latoudis v Casey,* considerations as to the reasonableness of the prosecution action appeared to underlie the practice in Victoria and the decision there in issue.[32] The types of circumstances referred to in s 158A(2)(a) and (c) particularly

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27 Ibid at 562-563 (citations omitted).
28 Ibid at 544-545.
29 Ibid at 559-561.
30 (1990) 170 CLR 534, at 545.
31 Ibid at 563.
32 Ibid at 559-560 and 563.

reflect such considerations but each is capable of either a positive or negative conclusion and therefore either supporting or detracting from of an award of costs. The circumstance referred to in sub-paragraph (b) is related, but expressed in terms of a factor, if present, that could only provide support for an award of costs; on the other hand the absence of engagement of this circumstance may be usually expected to accompany engagement of subparagraphs (a) and (c) under the general rubric of discernment of reasonable conduct in bringing and maintaining the prosecution. Some care in approach may be necessary, however, when, as may be more usually expected, such circumstances arise and there are conclusions that the prosecution was reasonably brought and maintained. In the first instance, any such considerations will need to be weighed against other positive considerations including the underlying purpose of compensating a defendant for the costs of successful conduct of the proceeding. Also and even before the clarification of the compensatory purpose of such awards, in *Latoudis v Casey,* it had been specifically recognised in Queensland that considerations as to the reasonableness of prosecution action in pursuit of public interest, whilst relevant, were not to be regarded as matters deserving of decisive weight.[33]

[24] The remaining examples may be seen as being more problematic:

(a) Sub-paragraph (d) is problematic because it is not clear as to what constitutes "technical grounds", as opposed to dismissal due to "insufficient evidence" and because it could hardly be thought that a dismissal of an allegation premised upon a lack of appreciation of applicable legal principle would place a successful defendant in any inferior position to achieving a dismissal upon there being insufficient evidence. Perhaps and to the extent that it appears to be expressed as an expected consideration tending to detract from a conclusion of propriety in making an order, a narrow interpretation of "technical grounds" may be required. There may also be some need to be circumspect about the bluntness of the comparative expression, in terms of "insufficient evidence", which may permit of a range of circumstances which might otherwise and more generally, attract quite differing attributions of weight as relevant considerations in the broader context. For example, contrasting a situation

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[33] See the references to *Lewis v Utting* [1985] Qd R 423 at 442, in *Latoudis v Casey* (1990) 170 CLR 534, at 539, 551 and 560.

where there has been a failure to call evidence to support an element of an allegation, as opposed to a situation where the conclusion is the benefit of the doubt being afforded to a defendant, in respect of an otherwise credible allegation, and as further contrast, a situation, like here, where there are critical findings made adversely to the credibility of the key witness upon whose evidence the prosecution depended. An appropriate approach under sub-paragraph (d) is limitation to circumstances which may be regarded as technical in the sense of not being related to any determination of the merits of the allegation, even if that is only upon the basis of affording the defendant the benefit of any reasonable doubt as to proof of the allegation.[34]

(b) On the face of the consideration expressed in sub-paragraph (g), it is possible that there could be relevant failure on the part of either party and therefore potentially giving rise to either a positive or negative consideration. This consideration was not originally included when s 158A was enacted in 1992. It was inserted in 2002,[35] along with the insertion of s 83A to specifically provide for directions hearings in matters dealt with under the *Justices Act*. Because s 158A is only engaged when a complaint is dismissed, it is somewhat difficult to envisage how any relevant consideration might arise under this sub-paragraph and for present purposes it suffices to note that there is no suggestion of anything so arising here.

(c) The simplicity of expression of sub-paragraph (i) masks what may, in cases where there is joinder of charges in a complaint pursuant to s 43 of the *Justices Act,*[36] be a myriad of mixtures of outcome which may give rise to at least some prospective apportionment as to what may be any proper award of costs.[37]

[25] In this context and returning to the expressed reasoning of the Magistrate, as has been noted, an immediate difficulty is in any overall assessment of how there was reasoning to a conclusion that it was not proper to make an award of costs. That in

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34 It may be noted that in *Latoudis v Casey* (1990) 170 CLR 534, at 556, Dawson J noted such a consideration, in reference to an earlier English practice note, it terms of circumstances where "the defendant is acquitted on a technicality which has no merit".

35 By s 59 of the *Criminal Law Amendment Act*, No 23 of 2002.

36 Or, in cases of allegation as to simple offences and/or breaches of duty, an order pursuant to s 43A of the *Justices Act*, that separate complaints be heard together.

37 Also bearing in mind the separate power under s 157 of the *Justices Act* for ordering the payment of costs by a defendant upon summary convictions and orders.

itself is an indication of error but other specific errors are also discernible. First, in what appears to be a sense of determinative weight being given to what was effectively found to be the reasonableness of the prosecution, without any expressed consideration of any countervailing consideration in the purpose of compensating the successful defendant. Quite apart from the effect of the elaboration, apparently to such effect, at the conclusion of the Magistrate's reasons, there is some disclosure of such an approach in the Magistrate's earlier exchange in the course of submissions being made for the defendant, where he posed the following questions:

> "What basis have I got to order costs under the *Justices Act*? I mean, is there any improper police conduct? Was there something that came to their attention that they should have acted upon sooner than today?"[38]

[26] Whilst the appellant did and continues to seek to place particular weight upon the pre-trial submission made to the prosecution, it must be said that none of her contentions have, in any clear way, articulated any particular basis for doing so, either in reference to any of the examples provided in s 158A(2), or otherwise. Such a submission is not to be treated as if it was an offer to settle civil proceedings. Here, the effect of the submission was to alert the prosecution to credibility issues in respect of the complainant's evidence, which were later ventilated in evidence at the trial and recognised in the rejection of the complainant's evidence. That rejection also came in the context of acceptance of the appellant's evidence. Whilst considerations as to reasonable prospects of success will influence prosecution determination as to whether to proceed with a particular matter, it must also be kept in mind that it is the function of an independent arbiter in the form of a court, to finally determine such allegations and particularly where they turn on questions of credibility.

[27] The appellant's contentions do not make clear any basis of relevance of this pre-trial submission to the question as to the propriety of making a costs order. For instance, it is not specifically contended and nor could it be concluded that sub-paragraph (b) was engaged or that this prosecution was continued other than in good faith. Accordingly, the pre-trial submission made for the defendant adds little to the need for recognition of the success of the appellant and the basis of that success, in

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38 T1-75.13-15.

engaging the underlying purpose of an exercise of power to compensate her for the expense incurred in achieving that success.

[28] To the extent that there appeared to be influence in the outcome from some findings against the appellant in respect of some example considerations which, if present, are particularly postulated negatively to a defendant's position, there also appears to be errors in approach:

(a) in respect of the example in s 158(2)(e) and although the question as to whether the defendant brought suspicion on herself by conduct engaged in after the events constituting the offence, was ultimately answered in the appellant's favour, the musings as to whether from some part of materials, the contents of which the Magistrate was unaware, he "suspect[ed] there could have been a bit more disclosed by way of submission to highlight to the prosecution some of the risks of their case", was irrelevant and there was nothing of any substance identified as being belatedly disclosed to the prosecution or the court;

(b) these musings and those which related to the Magistrate's social discourse on a suspect's decision in respect of exercising the right to silence, are also equally uninformative as to any engagement of s 158(2)(f) as a negativing consideration for a defendant's position. It is necessary to understand for engagement of this consideration there is necessity for findings not just that a defendant has declined an opportunity to explain that defendant's version of events or to produce evidence likely to exonerate that defendant, but that this occurred:

(i) "before a charge was laid";

(ii) "unreasonably"; and

(iii) that "the explanation or evidence could have avoided a prosecution".

Accordingly, the interspersion of considerations relating to the pre-trial submission is not to the point and there is no finding as to why an exercise of the right to silence before being charged, was unreasonable in the circumstances of this case. Most importantly, having regard to the dominance of credibility related issues in respect of a domestic violence relationship, as opposed to explanation or evidence which might provide or point to some more objectively

based response to an allegation,[39] there was no finding nor any apparent basis for any finding that any such explanation or evidence could have avoided a prosecution; and

(c) whilst it may be noted that some reference to other proceedings, in respect of a further charge and in respect of the *Domestic Violence and Family Protection Act*, may be traced to the defendant's pretrial submission, any such consideration and even more so, any views which may have been expressed by another Magistrate, were completely irrelevant to this exercise of discretion. It was only concerned with the proceeding then before the court. In that proceeding, the appellant was acquitted of the single charge which was before the court for hearing and therefore the consideration exemplified in s 158A(2)(i) did not arise. At the very least, there had been no conviction on any other charge.

Conclusions

[29] Accordingly, it must be concluded that the exercise of the Magistrate's discretion as to costs has miscarried and that the order refusing the application for costs should be set aside.

[30] As to any re-exercise of that discretion, in the light of the discussion of the relevant considerations which has already been set out, it may be noted that the competing considerations effectively resolve to being as to the respective attribution of weight to the underlying purpose of compensating the successful defendant, on the one hand, and on the other, that to be given to those considerations relating to the reasonableness of the conduct of the prosecution, particularly as may be reflected in positive answers to the questions raised in s 158A(2)(a) and (c). Otherwise it may be noted that there is nothing arising out of the issues noted in s 158(2)(a), (b) and (c) which would favour the defendant being awarded her costs and similarly there is nothing arising out of the remaining example considerations, which would tend to negative the propriety of doing so.

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[39] Cf: an example provided by McHugh J in *Latoudis v Casey* (1990) 170 CLR 534, at 569, "of a tape recording later successfully used in cross-examination of the informant's witnesses".

[31] Despite the criticism directed at such an approach, by Dawson J in *Latoudis v Casey*,[40] the statutory prescription for regard to the issues as to the reasonableness of bringing and maintaining any prosecution and also to adversely take into account, under s 158(2)(d), any dismissal not resulting from a determination of the merits of the matter, in the context of noting that the purpose of s 158A is to allow for an exercise of discretion which does not commence with any presumption either way, must mean that the weight to be attached to the countervailing consideration as to compensating a successful defendant, may be affected by the basis upon which the defendant has been successful. In that sense and as is the case here, more weight may be ascribed to this countervailing consideration where the outcome reflects conclusions extending beyond a defendant being afforded the benefit of any reasonable doubt. And, in any given case, the particular considerations will also be influenced by the broader context in which the allegation arises.

[32] In the circumstances of the findings made in this case and the broader context of the identified sensitivities of the breakdown of the relationship between the complainant and defendant and notwithstanding that, as has been noted to be the essence of such an exercise of discretion, reasonable minds could differ, it is appropriate to conclude that it is proper for the appellant to have an order compensating her for the costs of her successful defence of this allegation.

[33] In the proceeding below and due to the early interventions of the Magistrate, evidence of his erroneous approach to the exercise of discretion as to costs, the position as to the quantum of any prospective award was simply not contemplated.

[34] In this Court, the appellant presses for an award in excess of the scaled amounts available pursuant to the *Justices Regulation 2014*. The amount to be allowed is to be determined pursuant to s 158B of the *Justices Act*, which provides as follows:

> "**158B Costs for division**
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> (1) In deciding the costs that are just and reasonable for this division, the justices may award costs only –
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> (a) for an item allowed for this division under a scale of costs prescribed under a regulation; and

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40 (1990) 170 CLR 534, at 560, in terms of being "invidious and inconsistent with the presumption of innocence".

(b) up to the amount allowed for the item under the scale.

(2) However, the justices may allow a higher amount for costs if the justices are satisfied that the higher amount is just and reasonable having regard to the special difficulty, complexity or importance of the case."

[35] Without objection in this Court and for the purpose of any such re-exercise of discretion, the appellant tendered a copy of a costs assessment of her solicitors' costs, together with a copy of her Counsel's memorandum of fees for the trial conducted on 28 November 2022 and also a copy of a tax invoice sent to the defendant on 21 December 2022.[41] It is unnecessary to dwell upon any particular aspects of this material which may relate to some other matter,[42] or the actual quantum of the appellant's legal costs in respect of this proceeding. The material suffices to indicate that the actual legal costs would considerably exceed the allowable amounts under the scale in the Regulation. Therefore, the material serves the first purpose of satisfaction of the initial requirement that costs have been incurred so as to allow for compensation in the scale amounts, in full. As it may be noted that apart from the hearing on 28 November 2022, when the appellant was represented by Counsel, a solicitor also appeared for her on 26 September 2022, when this matter was set down for that hearing, subject to the application of s 158B(2), the appropriate allowances would be for item 1 in part 2 of schedule 2, being $1,500 for the hearing on 28 November 2022 and also item 3, being $250 for the court attendance on 26 September 2022. That is, in a total amount of $1,750.[43]

[36] It is necessary to also understand that in the context of the constraints imposed by this legislation, usually the application of s 158B(2) may be expected to allow for some increase referable to the scaled amounts, rather than any necessary adoption of indemnity for actual costs.[44] However, any such increased allowance requires satisfaction that "the higher amount is just and reasonable having regard to the special difficulty, complexity or importance of the case", which is to determined upon

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41 Respectively marked as Exhibits 1 and 2, in this Court.

42 Noting that there is some reference to an additional court appearance on 13 December 2022.

43 See s 19 of the *Justices Regulation 2014* and noting that by part 1, section 2 of schedule 2, it is provided that: "an item in part 2 covers all legal professional work, even if the work is done by more than 1 lawyer".
As discussed in *Palmgrove Holdings Pty Ltd v Sunshine Coast Regional Council* [2014] QDC 77 at [89].

objective rather than subjective considerations. [45] Here and as the respondent correctly contends, the appellant seeks to engage subjectively based considerations and there is no basis established for the engagement of s 158B(2) in terms of any special difficulty, complexity or importance of this case, as opposed to it being a fairly standard instance of its type.

[37] Ultimately, it was appropriately conceded for the appellant that the effect of s 232(4) of the *Justices Act*, is that she is unable to recover any costs incurred in respect of her success on this appeal.[46]

[38] Therefore, the appropriate order upon this appeal being allowed, is that the order made by the Magistrate on 28 November 2022 that there be no order as to costs,[47] be set aside and instead, there be an order that the complainant pay to the defendant costs in the sum of $1,750.00.

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45 See *Palmgrove Holdings Pty Ltd v Sunshine Coast Regional Council* [2014] QDC 77 at [83]. For the respondent reference was made to

46 AT1-57.29.

47 See the endorsement on the Bench Charge sheet.