



# Précis Paper

## Cost Orders in the Local Court

A discussion of cost orders in criminal cases within the Local Court

### Discussion Includes

- The traditional common law position
- Impact of the current relevant statutory provisions
- Recent case examples of cost orders in criminal cases
- Avenues available in NSW for an accused person to pursue costs

## Précis Paper

### Cost Orders in the Local Court

In this edition of BenchTV, Richard Thomas (Barrister – Silk Chambers, Canberra) and Dasith Vithanage (Associate – AR Conolly & Company) discuss an order for costs in criminal cases in the Local Court of NSW for accused person's professional costs when that case is thrown away or withdrawn as a result of failed prosecution.

#### The traditional common law position

1. The traditional common law position has been that the Crown neither takes nor gives costs, however there have been some statutory amendments that have changed that position. In New South Wales, the relevant legislation is the *Criminal Procedure Act 1986* (NSW) and the *Costs in Criminal Cases Act 1967* (NSW).
2. It is only where the prosecution fails that there will be an issue of costs. Under the *Criminal Procedure Act 1986* (NSW) (the Act), the main sections to be aware of are sections 205, 208, 212, 213 and 214. Section 216 may also sometimes be relevant where there is an adjournment. In those circumstances you may get the costs of an adjournment because there has been some failure on the prosecution to follow the correct procedure.

#### Impact of the current relevant statutory provisions

3. Where the prosecution has misfired for some reason, there is also the issue of how the Local Court is going to dispose of the matter. The usual situation in the Local Court is that if the prosecution decide that they are unable prove an element of the offence, the prosecution may seek to withdraw the charges.
4. If the charges are withdrawn and dismissed under s 208 of the Act, the accused is still at risk of further prosecution. This means that the prosecution is effectively reserving to itself the right to re-prosecute at a later time, when it obtains the correct evidence. When this situation develops you must consider s 205 of the Act which provides that where a charge is dismissed under s 205, the accused is entitled to a certificate saying the charges have been dismissed, and when this occurs the accused cannot be re-prosecuted.
5. The prosecution reserving a right to prosecute could be seen as an abuse of process that would bring the legal system into disrepute. There are grounds to argue that the abuse of process rules, for example in the decisions of *Jago v District Court (NSW)* (1989) 168 CLR 23 and *Walton v Gardiner* (1993) 177 CLR 378, force dismissal of charges under

s 205, There may also be other tortious actions to consider as a result of a failed prosecution which may give an accused right to damages.

6. The basic rule in most Australian jurisdictions is that there is no obligation on the police to investigate something properly or reasonably. This means that the actual investigation is not able to be attacked but you may be able to claim costs if the investigation has misfired.
7. Under the Act, if the charges are dismissed there may be a right to payment of costs. Section 212 provides that costs may be payable in light of s 214. The qualification on the ability to get costs paid under the Act is under s 214(1) which effectively provides that the investigation, the institution of the proceedings and the continuation of proceedings must have been reasonable. This test is the same under the *Costs in Criminal Cases Act 1967* (NSW).
8. In the Local Court you firstly seek to obtain a costs order under s 213 or 214 of the Act, and if you are unsuccessful on that route, you would then argue under the provisions within the *Costs in Criminal Cases Act 1967* (NSW). The distinction is that under the Act, if an order is made for costs it is made for the prosecutors to pay your costs, whereas under the *Costs in Criminal Cases Act 1967* (NSW), the court gives you a certificate certifying costs. You then take that certificate to the Attorney-General and the Attorney-General will determine whether you get your costs, and if so how much. Under the Act, it is the professional costs that are thrown away, and the quantum is determined by the Magistrate or between the parties. Generally, under the *Costs in Criminal Cases Act 1967* (NSW), you will receive less and it will take longer compared to an order under the *Criminal Procedure Act 1986* (NSW).

#### Recent case examples of cost orders in criminal cases

9. In *Woods v R* [2017] NSWCCA 5, the accused had been prosecuted in relation to a prohibited drug, the problem being that the drug was not prohibited under the legislation. Ultimately the Court of Criminal Appeal ruled that the offence was unknown to law. Given that the offence was unknown to law, the accused was entitled to a certificate under the *Costs in Criminal Cases Act 1967* (NSW). The significant point about being entitled to a certificate is the question about when the accused was discharged and the Court found that because the indictment was quashed, he was discharged.
10. *DAO v R (No 3)* [2016] NSWCCA 282 concerned historical sexual assault charges and for one of the complainants the Court ultimately found that the evidence that the prosecution sought to rely upon was insufficient or misconceived. The Court held that the accused was entitled to a certificate under the *Costs in Criminal Cases Act 1967*

(NSW). Here, the legal issue relating to the entitlement turned on the fact that the indictment had a number of charges, and while some had been quashed, there were a number of charges that were still live. This meant the Crown was seeking to argue that the accused had not been discharged because the indictment was still alive. It was held that the accused was dismissed only in relation to the charges that had been quashed. The same result in both of the above cases would have been achieved if the *Criminal Procedure Act 1986* (NSW) applied.

11. *Errol Peter Pavy* (1997) 98 A crim R 396 was a shaken baby case, and there were two counts the accused was charged with. On the second count, the Court held that there was no evidence in the Crown brief capable of proving the second count, and therefore no reasonable prosecutor could maintain that count. In relation to the first count, there was medical evidence that dealt with the cause of the baby's death. On this, the Court held that the medical evidence directly raised an issue which supported the accused defence, i.e. that the baby was likely dead when the accused picked the baby up. In those circumstances a reasonable prosecutor would not have continued with the matter, thereby satisfying s 214(1) of the Act.

#### Avenues available in NSW for an accused person to pursue costs

12. If you have prosecution that appears not to be proceeding very well, the difficulty is that there is a fine balance between not making admissions or compromising your defence and yet protecting your client in relation to costs. In an attempt to maintain this balance you may:
  - I. Make an application for a stay application
  - II. Think about a way to put the prosecution on notice without compromising your case
13. In the Local Court, to protect your client you want the matter dismissed under s 205 of the Act with a certificate which protects your client. Ideally you will want to identify the gaps in the prosecution's evidence that will demonstrate that the prosecutor has acted unreasonably and entitle you to a costs order. In order to argue with the Crown over the quantum, you will need to have a proper bill of costs. You must establish the proper basis for costs.
14. The large amount of costs in a matter may well be an argument against simply a withdrawal, however the Court does have the power to control an abuse of its processes. If you can have some charges dismissed you may still be entitled to a costs certificate or an order for costs in relation to the charges that are dismissed.

15. In *Director of Public Prosecutions (Cth) v Ngo* [2012] NSWSC 1521 there was a legal issue as to the definition under the *Criminal Code Act 1995* (Cth) of 'proceeds of crime'. There were highly contested arguments from either side, and in those circumstances you cannot say that it is unreasonable to lay a prosecution. In that situation you are not going to achieve costs through s 214 of the Act or through the *Costs in Criminal Cases Act 1967* (NSW).
16. What is necessary is to think carefully about the prosecution's case in the sense of whether there is sufficient evidence, and whether the prosecutor is acting reasonably.

## **BIOGRAPHY**

### **Richard Thomas**

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Richard Thomas was admitted as a solicitor and called to the Bar in 1978. He has contributed to many law reports including Australia and New Zealand Insurance Law Reports, Medical Law International and Lexis Nexis. In addition he has written various book and legal articles as well as being Editor of Benchmark Criminal Weekly review. Aside from the law, Richard is actively involved in equestrian activities.

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## **BIBLIOGRAPHY**

### **Cases**

*Jago v District Court (NSW)* (1989) 168 CLR 23

*Walton v Gardiner* (1993) 177 CLR 378

*Woods v R* [2017] NSWCCA 5

*DAO v R (No 3)* [2016] NSWCCA 282

*Errol Peter Pavy* (1997) 98 A crim R 396

*Director of Public Prosecutions (Cth) v Ngo* [2012] NSWSC 1521

### **Legislation**

*Costs in Criminal Cases Act 1967* (NSW)

*Suitors Fund Act 1951* (NSW)

*Criminal Procedure Act 1986* (NSW), sections 205, 208, 212, 213 & 214