

Costs Against Police

ss212 – 216 Criminal Procedure Act (NSW)1986

I appear regularly in the Local Court and often see charges dismissed and adjournments granted because police aren't ready to proceed. Such events should always be followed by an application for a costs order against the police. Many lawyers seem to be unaware of the court's power to make such orders and how to make the application. This article seeks to explain the procedure in language that even lawyers can understand.

Power to Order Costs

Traditionally, the crown neither paid nor sought costs in criminal matters. It was assumed that police would never abuse their powers and bring charges without a proper basis. But that all changed in 1990 when Mr Latoudis¹ was refused a costs order and appealed all the way to the the High Court. Mason CJ held at 542:

'In ordinary circumstances it would not be just or reasonable to deprive a defendant who has secured the dismissal of a criminal charge brought against him or her of an order for costs. To burden a successful defendant with the entire payment of the costs of defending the proceedings is in effect to expose the defendant to a financial burden which may be substantial, perhaps crippling, by reason of the bringing of a criminal charge which, in the event, should not have been brought. It is inequitable that the defendant should be expected to bear the financial burden of exculpating himself or herself, though the circumstances of a particular case may be such as to make it just and reasonable to refuse an order for costs or to make a qualified order for costs.'

The NSW government foresaw a torrent of costs orders against the police and quickly amended the Criminal Procedure Act (CPA) to limit the circumstances in which the courts could make such orders.

Costs on Adjournment

I have attended court many times to appear in hearings that have not run. This was usually because the prosecution witnesses (and on one occasion, the informant) failed to attend court. If an adjournment is granted, then the Defence should always seek an order for costs under s216. This section gives the court power to order costs if there has been *'unreasonable conduct or delay'*.

During the application, the Office in Charge (OIC) should be called to give sworn evidence as to why the case is not ready to go and when they communicated this to the court and the Defence. If witnesses haven't attended court, the OIC should produce a copy of the subpoena and explain when and how the witness was served with it.

¹ Latoudis v Casey (1990) 170 CLR 534

The submissions should mention the presumption of innocence and quote the above passage from *Latoudis v Casey*.

Costs After a Hearing

Dismissal of a charge in the Local Court should always be followed by an application for costs. In fact, as a Panel Member, my agreement with Legal Aid requires me to apply for a costs order whenever a charge is dismissed. Yet many lawyers fail to make the application, even when the bench pointedly asks them, '*Is there an application?*'

The correct response is to say '*I apply for a costs order under section 213 Criminal Procedure Act. I submit that because*' : (take your pick from s214)

- (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 to 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) of exceptional circumstances relating to the conduct of the proceedings by the prosecutor, it is just and reasonable to award professional costs.

Representations

Police will oppose the application on the basis that they were unaware of the circumstances that caused the charge to be dismissed. Thus, a costs application is strengthened if the Defence has made representations to Local Area Command pointing out the weaknesses in the case and inviting the Commander to withdraw the charges.

Common weaknesses are identification evidence, poor character of the complainant, good character of the Defendant and past incidents involving the Defendant and the complainant. Such representations can be handed up in support of the application.

I am available every day if you have any interesting issues.

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