

Case Law update

Above scale costs in summary prosecutions

The Facts

In the recent case of *Maher v Commissioner of Police*¹, the District Court considered the issue of when a successful party should be awarded 'above scale' costs in summary matters.² The appellant (a solicitor) was charged with assault occasioning bodily harm (a punch) arising out of a disagreement at a party. He spoke to police on the night and later provided a statement to the effect that while he admitted punching the complainant, he acted in self-defence. He was not charged until two years after the incident.

Before his summary hearing, the appellant's lawyers requested that police obtain a statement from an eye-witness, a Mr Kyle, however the police did not do so in a timely way or properly consider its contents. Mr Kyle gave evidence at the hearing which corroborated the appellant's version and was considered by the Magistrate to be of some force.

At the conclusion of the evidence, the Magistrate dismissed the charge on the basis that the appellant had successfully established self-defence. The appellant then made an application for above scale costs, however the Magistrate declined to make any costs orders. The refusal to award costs was the subject of this appeal.

The Issue

The grounds of the appeal were that the Magistrate did not properly take into account the considerations under s158A(2) *Justices Act* or in the alternative, the Magistrate erred in finding that they were irrelevant. Further, the Magistrate erred in finding that the case was not of 'special importance' and therefore higher costs (than those prescribed by the *Justices Regulation 2014*) could not be awarded.

It was held by the Court that for some factors in section 158A, the absence of a negative factor did not mean that the factor was irrelevant, but rather, could be considered in favour of the defendant. For example, because the complaint was dismissed on the basis of insufficiency of evidence (rather than on technical grounds), this was a factor tending to support a costs order.

¹ [2020] QDC 45.

² In Magistrates Court criminal proceedings, unless the successful party can demonstrate that the proceedings were of special difficulty, complexity or importance, the amount of costs that can be awarded is dictated by the scale provided for in Schedule 2 of the *Justices Regulation 2014*.

Another supporting factor was the fact that the reason that the prosecution was unsuccessful (the strength of the appellant's self-defence argument) should have been obvious to the prosecutor, or at least easily discoverable.

In respect of special importance, the Court held that this case fell into that category because the appellant was, objectively:

'...a member of a profession which required mandatory reporting and in respect of which, had he been found guilty, the professional consequences could well have been significant. This is so despite the fact that the incident did not occur in a professional setting.'

Conclusion

This decision is of interest in respect of above scale costs orders generally. Moreover, the judgement also suggests that professional persons who must disclose that they have been charged (as opposed to convicted) to a regulatory body, may have grounds to argue for above scale costs if they are successful in having the charge dismissed.

Gilshenan & Luton are recognised experts in the area of criminal law and professional misconduct. For further inquiries or assistance, please contact Natalie Smith, 07 3361 0215, Gilshenan & Luton Legal Practice.