Costs in criminal cases

Solomons v District Court of New South Wales & Ors [2002] HCA 47 (10 October 2002)

By Christopher O'Donnell

In this decision the High Court held that the provisions for the granting of a certificate under the *Costs in Criminal Cases Act 1967* (NSW) ('the Costs Act') are not available to defendants found not guilty of federal indictable offences in the District Court of New South Wales. The same principle, by analogy, applies to defendants found not guilty of federal indictable offences in the Supreme Court of New South Wales.

The appellant, at a trial in the District Court, by direction was found not guilty on two counts under the *Customs Act 1901* (Cth) of being knowingly concerned in the importation of a trafficable quantity of ecstasy. He applied for a certificate under sec 2 of the Costs Act, which empowers a New South Wales court to grant a costs certificate to a defendant acquitted or discharged as to a criminal offence.

In their joint judgment Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ noted the distinction between legislative provisions that confer jurisdiction and those that confer a power.

Provision for payment under a costs certificate is made in sec 4 of the Costs Act. This allows a person to whom a costs certificate has been granted to apply to the Director-General (formerly the under-secretary) of the Attorney General's Department for payment from the Consolidated Fund (formerly the Consolidated Revenue Fund) of costs incurred in the proceedings to which the certificate relates. The Costs Act does not confer a right to payment. The making of a payment and the amount is within the discretion of the Director-General (formerly the treasurer).

Keleman DCJ refused the appellant's application for a costs certificate, holding that he had no power to grant the certificate under the New South Wales Costs Act in respect of the prosecution on indictment of a person charged with an offence against a law of the Commonwealth. By a 2-1 majority the New South Wales Court of Appeal upheld the decision of Keleman DCJ. Although the High Court caused constitutional argument to be raised during the hearing of the appeal, only Kirby J dismissed the appeal on constitutional grounds. The other six justices, all of whom dismissed the appeal, determined the appeal solely by reference to the construction and application of secs 68 and 79 of the *Judiciary Act 1903* (Cth). The appellant argued that either or both of these provisions rendered provisions of the Costs Act applicable in criminal proceedings in the District Court involving the exercise of federal jurisdiction.

Sub-sec 68(2) of the Judiciary Act provides:

> The several courts of a state or territory exercising jurisdiction with respect to:
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> (a) the summary conviction; or
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> (b) the examination and commitment for trial on indictment; or
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> (c) the trial and conviction on indictment;
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> of offenders or persons charged with offences against the laws of the state or territory, and with respect to the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith, shall, subject to this section and to sec 80 of the Constitution, have the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth.

In their joint judgment Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ noted the distinction between legislative provisions that confer jurisdiction and those that confer a power. Their honours held that the 'better view' is that sec 2 of the Costs Act confers a power, which is not 'picked up' by sub-sec 68(2) of the Judiciary Act because that provision is limited to conferring on state courts exercising federal criminal jurisdiction 'the like jurisdiction' those courts have when dealing with state offences and is not concerned with the content of the powers to be exercised under that jurisdiction. None of the other sub-sections of sec 68 are capable of picking up the Costs Act.

Their honours also rejected the argument that sec 79 of the Judiciary Act rendered the Costs Act a surrogate federal law, the powers in which were then applicable in District Court proceedings involving the exercise of federal jurisdiction. Section 79 provides that:

> The laws of each state or territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all courts exercising federal jurisdiction in that state or territory in all cases to which they are applicable.

After noting the principle set out in The *Commonwealth v Mewett* (1997) 191 CLR 471 at 556 that sec 79 cannot operate selectively to pick up portions of an integrated state legislative scheme if to do so would give an altered meaning to the severed part of the state legislation, their honours stated that a certificate granted through the operation of sec 79 would have been granted by the operation of federal law on the Costs Act, not under that Act itself. But sec 79 cannot transmute sec 4 of the Costs Act in the same way because sec 79 does not apply to the state officials specified in sec 4 of the Costs Act. It only applies to state or territory courts exercising federal jurisdiction.

An additional reason given in the joint judgment for rejecting the appellant's sec 79 argument is that sec 79 cannot operate to require or empower courts exercising federal jurisdiction to pass beyond the limits of Chapter III of the Constitution. The granting of a certificate under sec 2 of the Costs Act would involve a court exercising federal jurisdiction moving beyond the limits of the judicial power conferred by Chapter III. It would be 'productive of a futility, not the resolution of any claim or controversy' and would not amount to an exercise of an administrative function 'truly appurtenant' to the exercise of judicial power.

McHugh J took a broader view of sec 2 of the Costs Act,

holding that it simultaneously confers both jurisdiction and power. However, he held that sub-sec 68(2) of the Judiciary Act does not invest a state court exercising federal jurisdiction with federal jurisdiction to grant a costs certificate under sec 2 of the Costs Act. McHugh J stated the reason for this as follows:

> state jurisdiction under sec 2 of the Costs Act gives the court or judge authority to determine whether the applicant, as a person acquitted of an offence against state law, has the right to be granted a certificate, which is a condition for a compensatory payment out of the Consolidated Revenue Fund of New South Wales. The grant requires the Under Secretary and Treasurer to give consideration to an application, made on the basis of the certificate, whether the applicant should receive a payment. Thus, there can be no 'like jurisdiction' in this context unless the applicant for a certificate has been acquitted of a federal offence and a federal law requires some official to consider whether the costs specified in the certificate should be paid. There is no federal law - and no state law - that authorises the reimbursement of costs after an acquittal and the grant of a certificate in federally invested criminal jurisdiction sec 79 of the Judiciary Act does not do so because, as will appear, it binds only courts, not state or federal officials.

McHugh J reached the same conclusion as that set out in the joint judgment that sec 79 of the Judiciary Act cannot pick up sec 2 of the Costs Act because the selective application of sec 2 in the absence of the other provisions of the Costs Act would give it a meaning different from that which it has in state jurisdiction.

Kirby J held, as a matter of legislative construction, that sub-sec 68(2) and sec 79 of the Judiciary Act on their face and according to their terms operated to pick up and apply the provisions of the Costs Act to the appellant's proceedings in the District Court. However, his Honour held that the provisions of the Constitution forbid the conclusion that the Judiciary Act provisions pick up the Costs Act in federal criminal proceedings in the District Court for the reasons set out in the following passage:

> The result is that, to the extent that the Judiciary Act might, read without appropriate regard to the Constitution, be thought to 'pick up' and apply the Costs Act to the appellant's proceedings, when the former Act is read alongside the Constitution, it cannot validly have such an operation. To read it in such a way would sever its link with the federal legislative powers that sustain it. Moreover, so read, it would conflict with a fundamental postulate of the Constitution that respects and upholds the control over the state Consolidated Revenue Fund of the state parliament, save to the extent that the federal Constitution or valid federal law expressly or implicitly provides otherwise. Here there is no such express or implied provision.