JURISDICTION	:	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	:	THE COURT OF APPEAL (WA)
CITATION	:	MOHAMMADI -v- BETHUNE [2018] WASCA 98
CORAM	:	MARTIN CJ MAZZA JA BEECH JA
HEARD	:	5 JUNE 2018
DELIVERED	:	22 JUNE 2018
FILE NO/S	:	CACR 207 of 2017
BETWEEN	:	AMIR SEYED MOHAMMADI Appellant AND MATTHEW BETHUNE CARLOS RIVAS Respondents

ON APPEAL FROM:

Jurisdiction	:	MAGISTRATES COURT OF WESTERN AUSTRALIA
Coram	:	MAGISTRATE M WHEELER
File Number	:	JO13803 OF 2016 PE65577 OF 2016

Catchwords:

Criminal law and procedure - Indictable offence with a summary conviction penalty - After the accused pleaded and after the matter set down for trial in Magistrates Court charge dismissed for want of prosecution - Whether accused successful for purposes of *Official Prosecutions (Accused's Costs) Act 1973* (WA)

Legislation:

Criminal Code (WA), s 5
Official Prosecutions (Accused's Costs) Act 1973 (WA), s 4(2)(c)

Result:

Appeal upheld
Order for respondents to pay appellant's costs in Magistrates Court made

Category: A

Representation:

Counsel:

Appellant	:	Mr S Vandongen SC & Mr C L J Miocevich
Respondents	:	Mr C S Bydder

Solicitors:

Appellant	:	C & G Miocevich Law Offices
Respondents	:	State Solicitor's Office

Case(s) referred to in decision(s):

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue [2009] HCA 41; (2009) 239 CLR 27
Aldi Foods Pty Ltd v Shop, Distributive & Allied Employees Association [2017] HCA 53; (2017) 92 ALJR 33
Carcione v Robson [2017] WASC 165
Certain Lloyd's Underwriters v Cross [2012] HCA 56; (2012) 248 CLR 378
Commissioner of Police v Eaton [2013] HCA 2; (2013) 252 CLR 1

Coverdale v West Coast Council [2016] HCA 15; (2016) 259 CLR 164
Edmunds v Starling [2013] WASCA 225; (2013) 235 A Crim R 182
Independent Commission Against Corruption v Cuneen [2015] HCA 14; (2015) 256 CLR 1
Mancini v Ward (1997) 93 A Crim R 456
Mohammadi v Bethune [2017] WASC 285
Probuild Construction (Aust) Pty Ltd v Shade Systems Pty Ltd [2018] HCA 4; (2018) 92 ALJR 248
Project Blue Sky v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355
SZTAL v Minister for Immigration and Border Protection [2017] HCA 34; (2017) 91 ALJR 936
Taylor v Owners of Strata Plan 11564 [2014] HCA 9; (2014) 253 CLR 531
Thiess v Collector of Customs [2014] HCA 12; (2014) 250 CLR 664
Trajkoski v Director of Public Prosecutions (WA) [2010] WASCA 119; (2010) 41 WAR 105

JUDGMENT OF THE COURT:

Introduction

1 The *Official Prosecutions (Accused's Costs) Act 1973* (WA) (the OPAC Act) provides, broadly speaking, for an entitlement to costs for a successful accused in criminal proceedings in a summary court. Section 4(2) of the OPAC Act provides for when an accused is successful. This appeal turns on the proper construction of s 4(2)(c), which deals with charges for indictable offences that are dismissed for want of prosecution.

2 The appellant faced charges of indictable offences that were triable summarily,[1] and that were to be tried summarily. The charges were dismissed for want of prosecution on the day of the trial.

3 The magistrate refused the appellant's application for costs on the ground that he was bound by a decision of a judge of the General Division of this court to conclude that there was no power to award costs. The appellant appeals against the refusal of his application for an order for costs. For the reasons that follow, we would uphold the appeal. While the magistrate was right to apply the decision of the General Division, we construe the relevant provision in a different manner, as explained below.

4 It is convenient to set out the background, before outlining the relevant statutory provisions.

Background

5 On 15 October 2016, the appellant was charged with an offence of being in possession of a thing reasonably suspected of having been unlawfully obtained, contrary to s 417(1) of the *Criminal Code* (WA) (the Code) (JO 13083/2016). On 23 November 2016, the appellant was charged with a further four offences, one of which (PE 65577/2016) was an offence of the same nature.

6 On 24 March 2017, the appellant pleaded not guilty to both these charges. They were set down for trial on 18 July 2017.

7 Section 417 of the Code provides that an offence against that section is a crime. Consequently, an offence against s 417 is an

[1] As explained below at [18], subject to an order to the contrary, and no such order was made.

indictable offence.[2] Section 417 of the Code provides for a summary conviction penalty. Thus, s 5 of the Code applies.[3] We will set out the terms of that section later in these reasons. Broadly speaking, s 5(2) provides that the prosecutor or the accused may, before the accused pleads to the charge, make an application that the charge be tried on indictment. No such application was made in this case.

8 On 18 July 2017, the day set down for the trial of the charges, the prosecutor informed the court that the prosecution intended to discontinue the prosecution of the charges. The magistrate then dismissed the charges for want of prosecution, pursuant to s 25 of the *Criminal Procedure Act 2004* (WA) (the CPA).

9 Counsel for the appellant applied to the magistrate for an order for costs.[4] In doing so, counsel acknowledged that the magistrate was bound to dismiss the application because he was bound by the recent decision of Pritchard J in ***Carcione v Robson***.[5]

10 The magistrate properly followed the decision in ***Carcione***, holding that, in light of that decision, the appellant was not 'a successful accused', and consequently dismissed the application.[6] The magistrate indicated that, were he not precluded from doing so by the decision in ***Carcione***, he would have ordered costs in favour of the appellant.[7]

11 The appellant appeals against the magistrate's refusal to make an order for costs.

12 On 26 September 2017, Hall J ordered that the appeal be dealt with by this court under s 13(2) of the *Criminal Appeals Act 2004* (WA). In essence, his Honour so ordered because the appeal challenges the correctness of the decision of Pritchard J in ***Carcione***.[8]

Statutory framework

13 Section 5 of the OPAC Act provides that, generally speaking, a successful accused in a summary court is entitled to his or her costs. Section 5 provides as follows:

> (1) Subject to this Act, a successful accused is entitled to his costs.

[2] *Interpretation Act 1984* (WA), s 67(1a).
[3] Code, s 5(1).
[4] Magistrates Court ts 2.
[5] ***Carcione v Robson*** [2017] WASC 165; Magistrates Court ts 2.
[6] Magistrates Court ts 3.
[7] Magistrates Court ts 3.
[8] See ***Mohammadi v Bethune*** [2017] WASC 285.

> (2) Where an accused is successful by reason of a decision of the summary court only, the summary court shall make an order as to the amount of his costs therein but the accused is not entitled to those costs unless and until the time for appeal therefrom has expired or an appeal therefrom is resolved in his favour.
>
> (3) Where an accused is successful by reason of a decision of the appeal court, the appeal court shall make an order as to the amount of his costs in the appeal court.
>
> (4) Where an accused is successful by reason of the appeal court reversing a decision of the summary court, the appeal court shall make an order as to the amount of the costs in the appeal court and in the summary court.
>
> …

14 An 'accused' is a person charged with an offence in an official prosecution.[9] An 'official prosecution' is defined to mean proceedings in a summary court (that is, the Magistrates Court or the Children's Court) against a person charged with an offence by a public official, and includes proceedings on appeal from that summary court.[10] 'Costs' means any expenses that are properly incurred by an accused in an official prosecution and are due and payable, or paid, by the accused to another person or as a court fee.[11]

15 Section 4(2) controls when an accused is successful. It provides as follows:

> (2) An accused -
>
> (a) subject to paragraph (c), is successful if -
>
> (i) he is acquitted of the charge, other than on account of unsoundness of mind;
>
> (ii) he is discharged from the charge under section 128(2) or (3) of the *Criminal Procedure Act 2004*;
>
> (iii) the charge is dismissed for want of prosecution; or
>
> (iv) his conviction of the charge is set aside;
>
> (b) is partly successful if -

[9] OPAC Act, s 4(1).
[10] OPAC Act, s 4(1).
[11] OPAC Act, s 4(1).

(i) he is convicted of a lesser offence than that with which he was charged; or

(ii) he is charged with several offences in the one prosecution notice and is successful in respect of one or some of them;

(c) is not successful if the charge is of an indictable offence and is dismissed for want of prosecution by the summary court -

(i) if section 5 of *The Criminal Code* applies to the charge - before the summary court decides under that section that the charge is to be tried on indictment; or

(ii) otherwise - before the summary court commits him for trial or sentence on the charge.

16 Section 4(2)(c) of the OPAC Act refers to s 5 of the Code. Section 5 of the Code provides as follows:

5. Summary conviction penalty, meaning and effect of

(1) This section applies if -

(a) a provision of this Code, or another written law, provides a summary conviction penalty for an indictable offence; and

(b) a person (the ***accused***) is charged before a court of summary jurisdiction (the ***court***) with committing the indictable offence in circumstances where the summary conviction penalty applies to the offence (the ***charge***).

(2) Despite section 3(2), the court is to try the charge summarily unless -

(a) on an application made by the prosecutor or the accused before the accused pleads to the charge, the court decides under subsection (3) that the charge is to be tried on indictment; or

(b) this Code or another written law expressly provides to the contrary.

(3) The court may decide the charge is to be tried on indictment if and only if it considers -

(a) that the circumstances in which the offence was allegedly committed are so serious that, if the accused

were convicted of the offence, the court would not be able to adequately punish the accused; or

(ba) that the circumstances in which the offence was allegedly committed are such that, if the accused were convicted of the offence, the *Sentencing Act 1995* Part 2 Division 2A would apply to the sentencing of the accused for that offence; or

(b) that the charge forms part of a course of conduct during which other offences were allegedly committed by the accused and the accused is to be tried on indictment for one or more of those other offences; or

(c) that a co-accused of the accused is to be tried on indictment; or

(d) that the charge forms part of a course of conduct during which other offences were allegedly committed by the accused and others and the accused or one of the others is to be tried on indictment for one or more of those other offences; or

(e) that the interests of justice require that the charge be dealt with on indictment.

(4) For the purposes of making a decision under subsection (3) the court -

(a) may require the prosecutor to provide any information the court needs and may hear submissions from both the prosecutor and the accused; and

(b) may adjourn the proceedings.

(5) If under subsection (3) the court decides that the charge is to be tried on indictment the court shall -

(a) give reasons for the decision; and

(b) deal with the accused in accordance with section 41 of the *Criminal Procedure Act 2004*.

(6) A decision cannot be made under subsection (3) after the accused has pleaded to the charge.

(7) A decision made under subsection (3) is final and cannot be appealed.

(8) If the court convicts the accused of the offence charged (whether after a plea of guilty or otherwise), the accused is liable to the

> summary conviction penalty provided for the offence, unless the court commits the accused for sentence.
>
> (9) If the court -
>
> (a) convicts the accused of the offence charged after a plea of guilty or otherwise; and
>
> (b) considers that any sentence the court could impose on the accused for the offence would not be commensurate with the seriousness of the offence,
>
> the court may commit the accused to a court of competent jurisdiction for sentence.
>
> (10) An accused who is committed for sentence under subsection (9) is liable to the penalty with which the offence is punishable on indictment.
>
> (11) For the purposes of this section and of any summary trial of the charge, the court must be constituted by a magistrate alone.

17 Section 3(2) of the Code provides that an indictable offence is triable only on indictment, unless the Code or another written law expressly provides otherwise. Section 5(2) is an express provision to the contrary.

18 Where s 5 of the Code applies, unless the court of summary jurisdiction determines that the charge should be tried on indictment, or unless the Code or another law provides that the charge may not be dealt with summarily, the charge must be tried summarily.[12] The court of summary jurisdiction can only consider whether the charge should be tried on indictment if an application under s 5 is made, either by the prosecution or by the accused, before the accused pleads to the charge.[13] A decision as to whether an indictable offence should be tried on indictment, rather than summarily, is 'final and cannot be appealed'.[14]

19 Under the CPA, an indictable charge that, by virtue of s 5 of the Code, or another written law, may be tried either on indictment or summarily is an 'either way charge'.[15] Section 40 of the CPA applies if the charge is an either way charge. In such a case, the court must give the prosecutor and the accused an opportunity to apply under s 5 of the Code for the charge to be tried on indictment.[16]

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[12] Code, s 5(2).
[13] Code, s 5(2), s 5(6).
[14] Code, s 5(7).
[15] CPA, s 3.

20 If the outcome of a s 5 application is that the court decides that the charge is to be dealt with on indictment, the court must deal with the accused in accordance with s 41 of the CPA.[17] If the accused subsequently enters a plea of guilty to the charge, the summary court must commit the accused for sentence to a superior court.[18] If the accused enters any other plea, or chooses not to enter a plea, the charge is adjourned to a 'disclosure/committal hearing'.[19] At the disclosure/committal hearing, the accused will either be required to enter a plea and will then be committed to a superior court for trial or sentence, or, if there has not been disclosure by the prosecution by the date of that hearing, the summary court must adjourn the charge to another disclosure/committal hearing.[20]

21 We will outline the reasoning in ***Carcione***, before turning to the parties' submissions in this appeal.

The decision in *Carcione v Robson*

22 After outlining the parties' submissions, Pritchard J turned first to the construction of the words 'if s 5 of [the Code] applies to the charge' in s 4(2)(c)(i) of the OPAC Act. Her Honour considered that the words after the dash in par (i) make it clear that the word 'applies' is to be understood as requiring consideration of whether s 5 is capable of application to the charge, and not whether s 5 'has been applied' in respect of the charge.[21] Whether a charge is one which is subject to s 5 of the Code was to be determined by reference to s 5(1) of the Code, which itself sets out when that section applies. Thus, her Honour concluded, s 4(2)(c)(i) refers to an 'either way offence'.[22]

23 Her Honour referred to some apparent anomalies arising from a literal interpretation of the words after the dash in s 4(2)(c)(i).[23] The judge referred to counsel's submission that the words following the dash in both pars (i) and (ii) should be understood as words of limitation or qualification on the exception from s 4(2)(a) which is created by each paragraph. Her Honour rejected that submission, particularly by reference to subpar (2). In that respect, once a summary court commits an accused for trial or sentence there was no prospect of

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[16] CPA, s 40(2).
[17] Code, s 5(5), CPA s 40(3).
[18] CPA, s 41(3).
[19] CPA, s 41(4).
[20] CPA, s 44.
[21] ***Carcione*** [52].
[22] ***Carcione*** [52].
[23] ***Carcione*** [53] - [54].

dismissal for want of prosecution, since the summary court no longer has jurisdiction to deal with the charge.[24] Her Honour concluded that the words after the dash in each paragraph are intended to refer to the entire period of time within which costs are likely to be incurred in the summary court when it is dealing with an indictable offence, whether an either way offence or an offence which must be tried on indictment.[25]

24 Accordingly, the words 'before the summary court decides under [s 5 of the [Code]] that the charge is to be tried on indictment' should be construed as meaning 'provided that the summary court has not determined, on an application under s 5 of the Code, that the charge should be tried on indictment'. Thus, the effect of s 4(2)(c)(i) is that an accused is 'not successful' if the charge is for an either way offence, and that charge is dismissed for want of prosecution, so long as, at that point, the summary court has not already determined that the charge be tried on indictment.[26] Further, if a s 5 application has not been made at all, then, if the summary court dismisses the charge for want of prosecution, the accused is 'not successful'.[27] The same result applies if a s 5 application is made and refused and the charge is subsequently dismissed for want of prosecution.[28]

25 Her Honour construed s 4(2)(c)(ii), starting with the word 'otherwise'. Her Honour construed 'otherwise' to mean in any other case not covered by s 4(2)(c)(i).[29] Thus, s 4(2)(c)(ii) applies to:

(1) indictable charges that are not either way offences; and

(2) charges for either way offences where the charge is dismissed for want of prosecution after the summary court has granted an application under s 5 and ordered that the charge should be tried on indictment.

26 Her Honour considered the question of legislative purpose.[30] She observed that a charge for an either way offence which a summary court has concluded should be tried on indictment is no different in principle from a charge for an indictable offence which must be dealt with on indictment.[31] The effect of the construction adopted reflected

[24] ***Carcione*** [55].
[25] ***Carcione*** [56].
[26] ***Carcione*** [57].
[27] ***Carcione*** [58].
[28] ***Carcione*** [59].
[29] ***Carcione*** [61] - [64].
[30] ***Carcione*** [66] - [68].
[31] ***Carcione*** [67].

the opening words of s 4(2)(c), namely that if an accused is facing a charge for an indictable offence (whether an either way offence or an offence which must be tried on indictment) and that charge is dismissed by a summary court, the accused will be 'not successful' for the purposes of the OPAC Act.[32]

27 Her Honour recognised that this construction might be susceptible to the criticism that pars (i) and (ii) do not add to or detract from what is encapsulated by the opening words of s 4(2)(c). Her Honour suggested that the likely explanation was Parliament's anticipation that if the terms of s 4(2)(c) had been limited to its opening words there may have arisen some doubt about whether an accused charged with an either way offence would be entitled to seek costs in the event that the charge was dismissed.[33]

28 Her Honour summarised the effect of her construction as follows:[34]

> Section 4(2)(c)(i) means that an accused will be 'not successful' if the accused is charged with an 'either way' offence, and that charge is dismissed for want of prosecution, provided that at that point, the summary court has not already determined, on an application under s 5 of the *Criminal Code*, that the charge should be tried on indictment. (That will thus include a case where an application under s 5 of the *Criminal Code* has not been made in respect of the charge at all, and a case where an application under s 5 has been made, and refused.)
>
> Section 4(2)(c)(ii) operates in relation to any indictable offence which has been dismissed for want of prosecution by a summary court, and which is not caught by s 4(2)(c)(i). It thus applies to charges for indictable offences to which s 5 of the *Criminal Code* does not apply, and to charges for 'either way' offences where those charges are dismissed for want of prosecution after the summary court has granted an application under s 5 of the *Criminal Code* and ordered that the charge should be tried on indictment. In either case, if the charge is dismissed before the summary court commits the accused for trial, the accused will be 'not successful' and thus not entitled to seek an order for costs.

The parties' submissions

29 The appellant's principal submissions include the following:

(1) In summary, s 4(2)(c)(i) should be construed to have the meaning it would have if it concluded with the words 'if at the

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[32] ***Carcione*** [68].
[33] ***Carcione*** [69].
[34] ***Carcione*** [70] - [71].

time the charge is dismissed it is still open to so decide'. On the appellant's construction, an accused will be a successful accused for the purpose of the OPAC Act if the accused faces an either way charge that is dismissed for want of prosecution in circumstances in which, and at a stage at which, it must be tried summarily.[35]

(2) It is important to notice that, under s 5 of the Code, the default position is that an either way charge must be tried summarily unless one of s 5(2)(a) or (b) applies. Also, a decision to try an either way charge on indictment cannot be made after an accused has pleaded to the charge.[36] Further, by s 5(7), a decision to try a charge on indictment is final and cannot be appealed.

(3) Thus, the power under s 5 to decide that a charge is to be tried on indictment is only exercisable for a limited period of time. If an accused enters a plea, or if an application is refused, the charge must be tried summarily and the court's power under s 5(2) and (3) is exhausted.[37]

(4) Contrary to the conclusion in ***Carcione***,[38] s 5 of the Code will not apply to the charge, for the purpose of s 4(2)(c)(i) if the summary conviction penalty does not apply to the offence. That will be so if a decision has already been made that the charge is to be tried on indictment.[39]

(5) The replication in s 4(2)(c)(i) of the words used in s 5(2)(a) of the Code reflects a legislative purpose of identifying a period of time that begins when an accused first appears in the summary court charged with an either way offence and ends when it would otherwise have been open to the magistrate to decide that the charge should be dealt with on an indictment, but for the fact that the charge was dismissed.[40]

(6) The appellant's construction is consistent with the purpose and object of the OPAC Act, including its general purpose of conferring on an accused who is successful in the summary

[35] Appellant's submissions [15].
[36] Appellant's submissions [32], referring to the Code, s 5(2)(a) and s 5(6).
[37] Appellant's submissions [33].
[38] ***Carcione*** [52].
[39] Appellant's submissions [40].
[40] Appellant's submissions [42].

court by reason of an acquittal order or a dismissal for want of prosecution the ability to claim their costs.[41]

(7) The legislative history of the OPAC Act and the Code supports the appellant's construction. That history reveals that the amendments made in 2004 to introduce s 4 in its present form reflect a policy decision, consistent with the historical legislative intent, that an accused should not be entitled to their costs when charged with an offence that can only be tried on indictment. Further, s 4(2)(c)(i) reflects a policy decision that, until it is finally clear that an accused charged with an either way offence is going to be tried summarily, the accused will not be entitled to their costs.[42]

(8) As Pritchard J correctly recognised in ***Carcione***, the construction adopted in that case leaves the words of par (i) and (ii) of s 4(2)(c) doing no work.[43]

(9) The appellant's construction also avoids the incongruous result that a person acquitted at trial for an either way offence that is dealt with summarily is entitled to costs, yet an accused will not be entitled to costs if the prosecution discontinue on the day of the trial.[44]

30 The respondents' submissions are to the following effect:

(1) The construction adopted in ***Carcione*** is correct.

(2) Section 5 of the Code remains applicable to an either way charge which the Magistrates Court is able to dismiss for want of prosecution, unless the court decides that the charge is to be tried on indictment. In the latter event, s 5 ceases to apply because the summary conviction penalty will no longer apply to the offence and so the second requirement of s 5(1) of the Code will no longer be fulfilled.[45] Thus, in the present case, s 5 of the Code remained applicable to the charges against the appellant after he had entered a plea of not guilty to each of them and they could only be tried summarily.[46]

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[41] Appellant's submissions [53].
[42] Appellant's submissions [57] - [62].
[43] Appellant's submissions [63] - [67].
[44] Appellant's submissions [69] - [70].
[45] Respondents' submissions [23], [26].
[46] Respondents' submissions [26].

(3) Consequently, the dismissal of the charges against the appellant for want of prosecution came within s 4(2)(c) of the OPAC Act and the appellant was, by operation of that provision, not successful.[47]

(4) As was held in ***Carcione***,[48] subpar (ii) of s 4(2)(c) captures all the other circumstances in which an indictable offence may be dismissed by the Magistrates Court for want of prosecution, including the dismissal of an either way charge to which s 5 of the Code applied until the court decided that the charge was to be tried on indictment.[49]

(5) This construction of s 4(2)(c) results in the consistent treatment of charges of indictable offences dismissed for want of prosecution by summary court for the purpose of the OPAC Act and reflects the position that either way charges remain charges of indictable offences.[50]

(6) As was held in ***Carcione***, properly construed, s 4(2)(c) of the OPAC Act has the effect that an accused is not successful for the purposes of that Act if the accused was charged with an indictable offence, whether or not an either way charge, and the charge was dismissed for want of prosecution.[51]

(7) The appellant's construction should be rejected because it requires words to be read into s 4(2)(c)(i) when it is unnecessary to do so to give the provision the effect Parliament evidently intended it to have.[52] When the words before the dash - namely, 'if s 5 of the *Criminal Code* applies to the charge' - are given their ordinary and natural meaning, s 5 of the Code continues to apply to an either way charge after the charge can only be tried summarily.[53]

(8) Pritchard J's explanation of the purpose of the inclusion of subpars (i) and (ii), in circumstances where, on her Honour's construction, those subparagraphs do not add to or detract from the opening words, should be accepted.[54]

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[47] Respondents' submissions [27].
[48] ***Carcione*** [60] - [65].
[49] Respondents' submissions [28].
[50] Respondents' submissions [29] - [30].
[51] Respondents' submissions [31].
[52] Respondents' submissions [32].
[53] Respondents' submissions [36].
[54] Respondents' submissions [40].

(9) While some observations as to possible legislative purpose are offered by the respondents, ultimately, given the difficulty of discerning a clear legislative purpose to the inclusion of subpars (i) and (ii), the safest course is to construe the provision without recourse to unnecessary speculation, not founded in the statutory text, as to that purpose.[55]

Statutory construction: general principles

31 The principles of statutory construction are well known and do not require detailed exposition. Statutory construction requires attention to the text, context and purpose of the Act.[56] While the task of construction begins and ends with the statutory text, throughout the process the text is construed in its context.[57] Statutory construction, like any process of construction of an instrument, has regard to context. As Kiefel CJ, Nettle and Gordon JJ recently explained in ***SZTAL***:[58]

> The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

32 The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute.[59]

33 The objective discernment of the statutory purpose is integral to contextual construction.[60] The statutory purpose may be discerned

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[55] Respondents' submissions [43] - [53].
[56] ***Thiess v Collector of Customs*** [2014] HCA 12; (2014) 250 CLR 664 [22] - [23]; ***Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*** [2009] HCA 41; (2009) 239 CLR 27 [4], [47]; ***Coverdale v West Coast Council*** [2016] HCA 15; (2016) 259 CLR 164 [21]; ***SZTAL v Minister for Immigration and Border Protection*** [2017] HCA 34; (2017) 91 ALJR 936 [14], [37].
[57] ***Project Blue Sky v Australian Broadcasting Authority*** [1998] HCA 28; (1998) 194 CLR 355 [69]; ***SZTAL v Minister*** [14], [37]; ***Probuild Construction (Aust) Pty Ltd v Shade Systems Pty Ltd*** [2018] HCA 4; (2018) 92 ALJR 248 [34].
[58] ***SZTAL v Minister*** [14] (footnotes omitted).
[59] ***Project Blue Sky v Australian Broadcasting Authority*** [69]; ***Independent Commission Against Corruption v Cuneen*** [2015] HCA 14; (2015) 256 CLR 1 [31].
[60] ***Thiess v Collector of Customs*** [23]; ***Taylor v Owners of Strata Plan 11564*** [2014] HCA 9; (2014) 253 CLR 531 [66]; ***SZTAL v Minister*** [38] - [39].

from an express statement of purpose in the statute, inference from its text and structure and, where appropriate, reference to extrinsic materials.[61] The purpose must be discerned from what the legislation says, as distinct from any assumptions about the desired or desirable reach or operation of relevant provisions.[62]

34 Discernment of statutory purpose is particularly significant in cases, commonly encountered, where the constructional choice presented is from 'a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural'.[63] In such a case, the choice 'turns less on linguistic fit than on evaluation of the relevant coherence of the alternatives with identified statutory objects or policies'.[64] As we will explain later in these reasons, we think this is such a case.

35 Thus, the material provisions of the Act must be understood, if possible, as parts of a coherent whole.[65]

36 Statutory texts enacted by the same legislature are to be construed, so far as possible, to operate in harmony and not in conflict.[66] Where two or more statutory enactments comprise the overlapping legislative scheme, the enactments should be construed accordingly, and the court should endeavour to produce a rational, sensible, efficient and just operation in preference to an inefficient, conflicting or unjust operation.[67]

The proper construction of s 4(2)(c) of the OPAC Act

37 There is a substantial degree of common ground in the parties' submissions as to how s 4(2)(c) is to be construed.

38 Paragraph (c) of s 4(2) is a qualification or exception to the operation of par (a) of s 4(2), defining when an accused is successful.

39 The opening words of par (c) contain two preconditions to its application:

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[61] ***Certain Lloyd's Underwriters v Cross*** [2012] HCA 56; (2012) 248 CLR 378 [25].
[62] ***Certain Lloyd's Underwriters v Cross*** [26].
[63] ***Taylor v Owners of Strata Plan 11564*** [66]; ***SZTAL v Minister*** [38].
[64] ***Taylor v Owners of Strata Plan 11564*** [66]; ***SZTAL v Minister*** [38].
[65] ***Aldi Foods Pty Ltd v Shop, Distributive & Allied Employees Association*** [2017] HCA 53; (2017) 92 ALJR 33 [16].
[66] ***Commissioner of Police v Eaton*** [2013] HCA 2; (2013) 252 CLR 1 [98].
[67] ***Trajkoski v Director of Public Prosecutions*** (WA) [2010] WASCA 119; (2010) 41 WAR 105 [50] - [52].

(1) the charge is of an indictable offence; and

(2) the charge is dismissed for want of prosecution.

Whether a charge is 'of an indictable offence' is governed by s 67 of the *Interpretation Act 1984* (WA). An offence designated (in the Act that creates the offence) as a crime or misdemeanour is an indictable offence. The phrase 'the charge is dismissed for want of prosecution' is to be construed as a reference to the charge being dismissed under s 25(3) of the CPA.

40 Subparagraphs (i) and (ii) provide for a further condition for the application of par (c) of s 4(2). The further condition relates to the timing of the dismissal of the charge for want of prosecution. Subparagraphs (i) and (ii) share a common structure. In each subparagraph, the words before the dash condition the application of the subparagraph, while the words after the dash refer to the timing of the dismissal of the charge for want of prosecution. The effect of each subparagraph is that if the charge is dismissed for want of prosecution during the period referred to in the words after the dash in the applicable subparagraph, par (c) of s 4(2) applies and the accused is not successful.

41 Both subpar (1) and subpar (2) use the word 'before' in the words after the dash. One meaning, perhaps the ordinary meaning, of 'before' when applied in this context is that:

(1) if the dismissal for want of prosecution occurs *before* the stipulated event, the subparagraph applies (such that an accused is 'not successful'); and

(2) if the dismissal for want of prosecution occurs *after* the stipulated event, the subparagraph *is not* applicable (such that a an accused is not deemed by the section to be 'not successful').

However, the events stipulated in subpars (i) and (ii) reveal that that is not the sense in which the word 'before' is used in these subparagraphs. The events stipulated could not be expected to mean that a subsequent dismissal for want of prosecution rendered an accused successful and so entitled to costs.

42 Rather, in each subparagraph, the words 'before [the stipulated event]' are used in a different sense, to connote the end point of a period

during which, if the charge is dismissed for want of prosecution, the accused is not successful.

43 All of these aspects of the proper construction of s 4(2)(c) are common ground between the parties.

44 The parties also agree as to the proper construction of s 4(2)(c)(ii). In particular, the parties agree that if the summary court decides, under s 5 of the Code, that the charge is to be tried on indictment, and if, thereafter, the summary court dismisses the charge for want of prosecution, subpar (ii) of s 4(2)(c) applies, and the accused is not successful. In other words, par (ii) of s 4(2)(c) governs two classes of indictable offences. It governs indictable offences that are not either way offences. It also governs either way offences after a decision is made that the charge is to be tried on indictment.

45 Insofar as s 4(2)(c)(ii) governs indictable offences that are not either way charges, its effect is that, if such a charge is dismissed for want of prosecution at any time, the accused is not successful.

46 On the respondents' construction, and on the construction adopted in ***Carcione***, the combined operation of pars (i) and (ii) of s 4(2)(c) produces the same result in relation to either way charges. On that construction, if an either way charge is dismissed by the summary court for want of prosecution at any time, the accused is not successful.

47 The issue between the parties relates to the duration of the period stipulated in subpar (i). On the respondents' construction, if no decision under s 5 of the Code for the charge to be tried on indictment has been made, the period in subpar (i) has not come to an end. On that construction, even if, under s 5 of the Code, a decision that the charge be tried on indictment is no longer possible, the period has not, and will never, come to an end. By contrast, on the appellant's construction, the period in subpar (i) comes to an end once there is no longer any possibility of the court deciding, under s 5 of the Code, that the charge is to be tried on indictment.

48 If subpar (i) were read in isolation, the ordinary meaning of its language can, we think, fairly be said to favour the respondents' construction. However, that is not how statutes are to be construed.[68] The text of the relevant provision is to be read in light of the Act as a whole. It is also to be read in its context and in light of the evident

[68] See [31] - [35] above.

purpose of the Act. In this case, the statutory context includes the provisions of s 5 of the Code, which are expressly referred to in s 4(2)(c). It also includes the provisions of the CPA which were enacted as part of an overlapping legislative scheme.[69]

49 When s 4(2)(c)(i) is read in this light, it seems to us that a number of related considerations make the appellant's construction preferable.

50 First, subpar (i) refers to a decision by the summary court, under s 5 of the Code, that the charge is to be tried on indictment. By s 5 of the Code, an either way charge *must* be tried summarily, unless the summary court decides the charge is to be tried on indictment.[70] Under s 5 of the Code, the power to make such a decision has a defined and limited duration. It ends when and if the court dismisses an application under s 5, or, if no such application is made, when the accused pleads.[71]

51 When the broad language of s 4(2)(c)(ii) is read in light of these features of s 5 of the Code, the apparent textual advantage of the respondents' construction is diminished. Once a point is reached when the summary court has no power to decide that the charge is to be tried on indictment, the characterising of a point in time thereafter as '*before* the summary court decides that the charge is to be tried on indictment' is not necessarily a natural or obvious sense of the word 'before' when used in this phrase.

52 Secondly, the appellant's construction is more coherent with the evident object and purpose of s 4(2), read as a whole. Section 4(2)(a) sets out the general position as to when an accused is successful. By par (a) of s 4(2), an accused is successful in any of four categories of cases:

(1) acquittal (other than on grounds of unsoundness of mind);

(2) discharge under s 128(2) of (3) of the CPA, which involve (respectively) upholding a plea that the offence charged is not an offence or a plea that the accused has a defence to the charge under s 17 of the Code;

(3) dismissal for want of prosecution; or

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[69] See [36] above.
[70] Code, s 5(2)(a). The other qualification, in s 5(2)(b), where the Code or another written law expressly provides to the contrary, may, for present purposes, be put to one side.
[71] Code s 5(2)(a), s 5(6), s 5(7).

(4) the conviction of the charge is set aside on appeal.

53 Paragraph (c) of s 4(2) creates the only exception to this general position. The exception relates only to the third of these categories of outcome. Thus, in terms, the other three categories do not exclude or qualify their application to an either way charge or to indictable offences generally.

54 An explanation for that can, we think, readily be discerned. Each of the other three categories of case can only occur *after* the accused has entered a plea to an either way charge and in circumstances where no order has been made, under s 5(3) of the Code, for the charge to be tried on indictment. None of these three categories can ever arise in relation to a charge of an indictable offence that is not an either way charge.

55 The respondents' submissions in this appeal[72] assert that the respondents' construction reflects the position that either way charges remain charges of indictable offences. Section 4(2) cannot be seen to reflect a policy that, for the purposes of costs, either way charges remain, and are to be treated in all circumstances and for all purposes, charges of indictable offences. A broad policy to that effect cannot sit with the text and effect of s 4(2)(a)(i), (ii) and (iv) because those paragraphs apply to either way charges so as to make an accused 'successful'.

56 On the appellant's construction of s 4(2)(c), s 4(2) reflects a coherent policy and has a coherent operation, as follows. Costs may be awarded in cases concerned with simple offences. Costs are not to be awarded for cases to be tried on indictment. Costs can be awarded for either way charges if, but only if, the offence is tried, or inevitably is to be tried, summarily. Otherwise, either way charges are treated like other indictable offences, for which costs cannot be awarded. The features of s 4(2)(a) that were outlined in [52] - [54] are consistent with, and lend support to, this view of the policy of s 4(2).

57 By contrast, on the respondents' construction, s 4(2) does not reflect a coherent policy and does not have a coherent operation. On the respondents' construction, either way charges are subject to a special exception in a case where such a charge is dismissed for want of prosecution, while such charges are encompassed by the other three categories of successful accused in s 4(2)(a)(i), (ii) and (iv) without any

[72] Respondents' submissions [30].

exception or qualification. For example, a person charged with an either way charge who is acquitted at trial is entitled to costs, yet there is no such entitlement if the prosecution simply discontinues on the trial day. The respondents could not suggest,[73] and we are unable to discern, a coherent rationale for a legislative scheme to this effect.

58 Thirdly, this view of the purpose of the OPAC Act is consistent with, and supported by, the legislative history.

59 Some of the legislative history of the OPAC Act was outlined in ***Edmunds v Starling***.[74] For convenience, we reproduce that outline:

> Prior to the commencement of the Act, a court of summary jurisdiction (then known as the Court of Petty Sessions) had the power to order a complainant to pay a defendant's costs if the complaint was dismissed and to order a defendant to pay a complainant's costs if the defendant was convicted: *Justices Act 1902-1971* (WA) s 151 and s 152. However, a practice had developed in that court of not awarding costs when a police officer was the complainant. On appeal, the Supreme Court was empowered to make such order as to costs as it deemed just, but no order for costs could be made against a justice or a police officer, except in the instance of an unsuccessful appeal brought by a police officer, or a successful police appeal involving, in the court's opinion, a point of law of exceptional public importance: *Justices Act* s 190, s 206 and s 219.
>
> In 1969, a reference was given to the Law Reform Committee to consider whether it was desirable to alter the law relating to the payment of costs to persons acquitted in prosecutions for criminal offences. The recommendations of the Committee were handed to government in a final report in August 1972. In that report it was noted:
>
> > that the Government intends to confine the scheme initially to summary trials and within that area costs would be awarded to acquitted persons except in special circumstances.
>
> In 1973, the *Official Prosecutions (Defendants' Costs) Bill*, which eventually became the *Official Prosecutions (Defendant's Costs) Act*, was placed before the Legislative Assembly. In his second reading speech, the Attorney General, the Hon T D Evans, said that the Bill:
>
> > provides for financial relief to an accused in a trial held in a Court of Petty Sessions or a Children's Court who is acquitted or who has the charge against him withdrawn, or in cases where the charge is not proceeded with.

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[73] Appeal ts 31.

[74] ***Edmunds v Starling*** [2013] WASCA 225; (2013) 235 A Crim R 182 [16] - [20].

> The scheme also includes appeals from summary trials and the appellate court may award costs where the defendant is successful by reason of his appeal.

At the conclusion of Mr Evans' speech he said:

> On numerous occasions over the past few years demands have been made for reform to end the injustice suffered by an acquitted person who has not been compensated. It is submitted that this Bill, which has been drafted as a result of considerable research and consultation with responsible sectors of the community, is a piece of legislation vital to the protection of the personal rights and freedom of the citizens within our community (*Western Australian Parliamentary Debates*, vol 200, 1973, No 3 at 3386).

Since it commenced operation in 1973, the Act has been amended. In 2004, it was renamed the *Official Prosecutions (Accused's Costs) Act 1973*. In that year, s 4(2), which defined who was a successful defendant, was repealed. The repealed section stated that a defendant is successful if a charge 'is dismissed, withdrawn, or struck out, or a conviction thereon is quashed'.

60 The Act was substantially amended by legislation passed in 2004[75] (which came into operation in 2005) as part of a suite of reforms to criminal procedural and adjectival laws in this State. Prior to the 2004 amendments, s 4(2)(a) of the OPAC Act,[76] provided that a defendant was successful if a charge 'is dismissed, withdrawn, or struck out, or a conviction thereon is quashed'. Also, prior to 2004 amendments, the effect of s 5 of the Code was that offences with a summary conviction penalty were to be dealt with on indictment unless the accused elected summary disposition and a decision was made that they could be dealt with summarily.[77]

61 If no order for summary trial had been made in relation to an indictable offence for which a summary conviction penalty was provided, the summary court had no power to make an order under the Act because the accused was not 'successful'.[78] In those circumstances, none of the limbs of s 4(2)(a) were applicable. However, although it does not appear to have been specifically decided, if, under that regime, a decision were made by a summary court that an indictable offence be tried summarily, and if, subsequently, the prosecution sought to

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[75] *Criminal Procedure and Appeals (Consequential and Other Provisions) Act 2004* (WA), s 56, s 80, s 82, s 86; *Courts Legislation Amendment and Repeal Act 2004* (WA), s 141, sch 1, cl 111.
[76] Which was then known as the *Official Prosecutions (Defendants' Costs) Act 1973* (WA).
[77] *Criminal Code*, reprint 10, as at 7 February 2003.
[78] ***Mancini v Ward*** (1997) 93 A Crim R 456, 458 - 460.

discontinue, the defendant would have been successful on the ground that the charge was 'withdrawn' under s 4(2)(a) of the OPAC Act as it then stood. That approach appeared to be favoured by Scott J in ***Mancini v Ward***.[79] Nothing in the text of, or extrinsic materials relating to, the 2004 amendments to the OPAC Act reveals an intention to remove the right of an accused to seek costs if the prosecution seek to discontinue an either way charge that was (by then) inevitably to be tried summarily.

62 Fourthly, as both Pritchard J in ***Carcione*** and the respondents acknowledge, the effect of the respondents' construction is that the words in subpar (i) and (ii) are, in effect, doing no work. Such a construction is to be avoided if possible.[80] In ***Carcione***, Pritchard J suggested that the likely explanation for the inclusion of subpars (i) and (ii) was to avoid doubt that may have arisen as to whether an accused charged with an either way offence would fall within the provision.[81] In our respectful opinion, it is difficult to give such an explanation any significant weight. The meaning and application of s 67 of the *Interpretation Act* seems to us to leave little room for doubt. As we have said, the effect of s 67 is that any offence designated as a crime or misdemeanour is an indictable offence. There is no basis to suppose that the stipulation of a summary conviction penalty for an offence, and the operation of s 5 of the Code and relevant provisions of the CPA, in any way qualify that position.

63 For these reasons, we prefer the appellant's construction.

Conclusion

64 For the above reasons, we would uphold the appeal and set aside the magistrate's decision. The parties agreed the amount of costs in the amount of $2,200. Consequently, we would make the following orders:

1. Leave to appeal be granted.

2. The appeal be upheld.

3. The decision of the magistrate to refuse the appellant's application for costs be set aside.

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[79] ***Mancini v Ward*** (460).
[80] ***Project Blue Sky v Australian Broadcasting Authority*** [71].
[81] ***Carcione*** [69].

4. Instead, it be ordered that the respondents pay the appellant's costs of the Magistrates Court proceedings, fixed in the sum of $2,200.

65 We would hear from the parties as to the costs of the appeal.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

DM
ASSOCIATE TO THE HONOURABLE JUSTICE BEECH

22 JUNE 2018