Court of Criminal Appeal
Supreme Court
New South Wales

Case Name:	**Constantinidis v R; Lazar v R (Costs)**
Medium Neutral Citation:	[2022] NSWCCA 248
Hearing Date(s):	On the papers
Date of Orders:	24 November 2022
Date of Decision:	24 November 2022
Before:	Gleeson JA; Fagan J; Lonergan J
Decision:	Certificates granted pursuant to ss 2 and 3 of the *Costs in Criminal Cases Act*
Catchwords:	CRIMINAL PROCEDURE – costs – application for certificate under *Costs in Criminal Cases Act 1967* – successful appeal against conviction – where the Crown case critically dependent upon the credibility of Witness B – institution of proceedings unreasonable
Legislation Cited:	*Costs in Criminal Cases Act 1967* (NSW) *Crimes Act 1900* (NSW)
Cases Cited:	*Constantinidis v R; Lazar v R* [2022] NSWCCA 4 *Cox v R (No 2)* [2017] NSWCCA 129 *Fejsa v R* (1995) 82 A Crim R 253 *Higgins v R (No 2)* [2022] NSWCCA 82 *R v Dunne* (Supreme Court (NSW), 17 May 1990, unreported) *R v Johnston* [2000] NSWCCA 197 *R v Manley* [2000] NSWCCA 196
Category:	Costs
Parties:	Achilles Constantinidis (Applicant) Ian David Lazar (Applicant) Regina (Crown)
Representation:	Counsel: T Game SC with D Barrow (Applicant Constantinidis) C Parkin (Applicant Lazar)

	M Kumar SC (Crown)
	Solicitors: Wright and Strickland Solicitors (Constantinidis) Murphy's Lawyers (Applicant Lazar) Solicitor for the Director of Public Prosecutions (Crown)
File Number(s):	2016/00013067 2014/00320266
Publication Restriction:	No

JUDGMENT

1 **THE COURT:** On 11 February 2022 this Court set aside findings of guilt against each of the applicants on the charge jointly laid against them under s 319 of the *Crimes Act 1900* (NSW), that between 7 August 2012 and 30 September 2012 they did an act with intent to pervert the course of justice. The charge had been tried by judge alone in the District Court. The appeal was upheld on the ground that the findings of guilt at first instance were unreasonable and unsupported by the evidence: *Constantinidis v R; Lazar v R* [2022] NSWCCA 4 (the principal judgment). It was ordered that findings of not guilty be entered.

2 Each applicant now applies for a certificate under ss 2 and 3 of the *Costs in Criminal Cases Act 1967* (NSW) that:

> in the opinion of the Court […]—
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> (a) if the prosecution had, before the proceedings were instituted, been in possession of evidence of all the relevant facts, it would not have been reasonable to institute the proceedings, and
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> (b) that any act or omission of the defendant that contributed, or might have contributed, to the institution or continuation of the proceedings was reasonable in the circumstances.

3 Mr Constantinidis' application was filed on 15 March 2022, accompanied by written submissions. The exchange of the Crown's submissions and Mr Constantinidis' submissions in reply was completed on 20 June 2022. Mr Lazar's application was filed on 6 September 2022, also with submissions. By that date the members of the Court who had decided the appeal had not fully considered Mr Constantinidis' application. It was resolved to await receipt of the Crown's submissions in Mr Lazar's costs application and then to determine both applications together. The Crown filed submissions opposing Mr Lazar's application on 11 November 2022

4 The applicants have not tendered on their applications any evidence of additional "relevant facts"; nor has the Crown. The reasonableness or otherwise of the institution of the criminal proceedings is therefore to be decided on the hypothesis that, before laying the charge against each applicant, the

prosecution was in possession of the evidence of all relevant facts as that evidence emerged up to the conclusion of the trial. The Crown has not submitted that any act or omission of either applicant contributed, or might have contributed, to the commencement or continuation of the prosecution.

5 The prosecution case was critically dependent upon the accuracy and truthfulness of the evidence of Witness B. In allowing the appeal the Court held that it was not open to the learned trial judge to have accepted Witness B's evidence beyond reasonable doubt. The Crown submits that in those circumstances the present applications for costs certificates are governed by the consideration that where proof of a charge depends upon the credibility of one or more witnesses it will generally be reasonable for the prosecution to proceed so that the issue of credibility may be determined by a tribunal of fact rather than by the pre-emptive assessment of a prosecutor. The following extracts from the cases disclose limits to that general proposition.

Cases concerning "not … reasonable to institute the proceedings"

6 The precedential value of past decisions of this Court either granting or refusing a costs certificate following a successful appeal is limited by the Court's disinclination to formulate general rules or criteria concerning when "it would not have been reasonable to institute the proceedings". That reluctance was expressed in *Fejsa v R* (1995) 82 A Crim R 253 at 255 as follows:

> This Court too has never sought to lay down any all-embracing definition of the circumstances in which it would (to adapt the language of the statute) be unreasonable within the meaning of s 3(1)(a) of the Act to have instituted proceedings. In our opinion, it would be unwise to attempt to do so. The circumstances of the different cases vary to such an extent that, unless such a definition were expressed in terms of such generality as to be of no assistance in the particular case, it may well cause an injustice in the case whose circumstances have not been foreseen.
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> There is nevertheless a helpful discussion of various situations which do not make it reasonable to prosecute (in the context of s 3(1)(a)), in the decision of Blanch J in *McFarlane v R* (Supreme Court of NSW, 12 August 1994, unreported). It was not reasonable to prosecute, the judge said, merely because there had been a reasonable cause to suspect that the accused was guilty, thus justifying an arrest: Nor was it reasonable to prosecute merely because the usual test adopted by prosecution agencies throughout Australia had been satisfied - namely that there was a reasonable prospect of conviction:

> nor was it reasonable to prosecute merely because the magistrate (presumably with all of the relevant facts before him or her) had declined to hold, pursuant to s 41(6) of the *Justices Act 1902* (NSW), that a jury would not be likely to convict the accused. Nor was it reasonable to prosecute merely because there was at the trial (again, presumably with all of the relevant facts before the trial judge) a prima facie case to go to the jury, because such a decision necessarily disregards all of the evidence which favours the accused.
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> We agree with all that Blanch J said, and we would for ourselves add that, conversely, merely because this Court enters a judgment of acquittal in favour of an accused does not mean that it was not reasonable to have prosecuted him, because sometimes that course is followed rather than to order a new trial if (for example) the accused has already served most of the sentence imposed upon him.
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> Blanch J held in that case that it had been unreasonable to have prosecuted the accused because the evidence favouring him was "overwhelmingly strong". We agree with Blanch J that, in such circumstances, it would be open to find that it had been unreasonable to prosecute, although we stress that he did not suggest (and nor do we) that a certificate will be granted to a successful accused only where the evidence favouring him is "overwhelmingly strong"

7 *R v Manley* [2000] NSWCCA 196 is presently relevant only for the Court's reiteration that there cannot be laid down any "all-embracing definition" of circumstances in which it would not be reasonable to institute a prosecution. In *R v Manley* Wood CJ at CL cited *Fejsa v R* and said this:

> [14] Given the wide variety of cases that might arise for consideration, I am similarly reluctant to attempt any exhaustive definition of the test. It seems to me that the section calls for an objective analysis of the whole of the relevant evidence, and particularly the extent to which there is any contradiction of expert evidence concerning central facts necessary to establish guilt, or inherent weakness in the prosecution case. Matters of judgment concerning credibility, demeanour and the like are likely to fall on the other side of the line of unreasonableness, being matters quintessentially within the realm of the ultimate fact finder, whether it be Judge or Jury.

8 The circumstances that justified the grant of a certificate in that case have no parallel in the prosecution of Messrs Constantinidis and Lazar. The Court's decision in *R v Manley* is not an illustrative guide to how the present application should be decided. The applicant in that case was prosecuted for the murder of his infant son in circumstances where guilt depended upon proving that fatal injuries were inflicted at a particular time. On that issue, Simpson J held (Wood CJ at CL agreeing) that "the conflict in the testimony of the Crown's own medical witnesses, if fully analysed, shows that it would not have been reasonable to institute the proceedings".

9 In *R v Johnston* [2000] NSWCCA 197 this Court quashed the applicant's convictions on three counts of sexual intercourse without consent, with a girl of 15 years. The Crown case was dependent upon the evidence of the complainant, who said that all three instances occurred within half an hour. She did not complain to anyone until five years after the alleged events. Her evidence was contradicted in material respects by three other witnesses. Simpson J (Wood CJ at CL agreeing) held as follows (emphasis added):

> [25] The evidence of each of these witnesses, individually, was capable of casting considerable doubt on the reliability or the credibility of the complainant. It is obvious that the delay in complaint would have been the cause of some disadvantage to the applicant in the presentation of the evidence and this was a factor relevant to the jury's consideration of their evidence. The Court of Criminal Appeal held that the trial judge inadequately directed the jury about the possible effects of delay on the applicant's capacity to defend the charges. In addition, when the Court considered the weight of the combined evidence of the three witnesses, it concluded that the convictions could not be sustained. In part this was contributed to by the deficiencies in the directions about delay, the Court concluding that the jury probably discounted the evidence of those witnesses because of uncertainty in their accounts of the detail of the events.
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> [26] The next step for present purposes is to assume that the Crown was, prior to the institution of the prosecution, in possession of the evidence of the three witnesses. On that assumption, can it be said that it would not have been reasonable to charge the applicant? I think not. **The Crown was in possession of an apparently credible complaint of serious criminal offences.** A responsible Crown Prosecutor in possession of the evidence both of the complainant and the three defence witnesses would be obliged to make some assessment of the potential reliability of each. The period of delay was a relevant factor affecting that reliability, requiring careful scrutiny.
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> [27] The need for such scrutiny was even more apparent in relation to the evidence of the applicant's wife, whose credibility, as well as reliability, was open to question. The scrutiny required was that of a jury properly instructed.
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> [28] The Crown Prosecutor making that evaluation would not assume that the jury would be inadequately directed on the question of delay. This feature of this case clouds the issue because the defective directions were one circumstance which led the Court to conclude that the convictions could not be sustained.
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> [29] This was a case which hinged, ultimately, on an evaluation of the evidence of the witnesses as given in the trial. That was a matter properly committed to a jury. Notwithstanding this Court's conclusion that, in the event, the convictions were unsustainable, it has not, in my view, been shown that the institution of the proceedings was not reasonable.

10 In *Cox v R (No 2)* [2017] NSWCCA 129 an application for a costs certificate was made after the applicant's conviction on a single count of sexual

intercourse with a boy of seven years was quashed on the ground that the jury's verdict was unreasonable and unsupported by the evidence. The complainant's evidence was critical to the Crown case. It was affected by multiple conflicts and retractions and was inconsistent with evidence from other sources concerning contextual events. In finding that it was not reasonable for the prosecution to have been instituted, the Court said this (some citations omitted, emphasis added):

> [8] […] We] have taken into account observations of various judges at first instance and on appeal that suggest that where a case turns on questions of credibility the conclusion that the institution of the proceedings was not reasonable will less readily be made. There can be no hard and fast rules in this area and the determination turns on the facts and circumstances of each case. So much is clear from decisions such as *R v Dunne* (Supreme Court (NSW), 17 May 1990, unreported), *R v Cardona* [2002] NSWSC 823 and *R v Krishna* [1999] NSWSC 525 where certificates were granted even though the cases turned on questions of the credibility of the witnesses. In the first of those cases, David Hunt J (as his Honour then was) observed:
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> > In a majority of [cases involving an assessment of the credibility of the witnesses] it would be quite reasonable for the prosecution to allow those matters to be decided by the jury. It would, however, be different **where the word upon which the Crown case depended had been demonstrated to be one which was very substantially lacking in credit.**

11 In *Higgins v R (No 2)* [2022] NSWCCA 82 the applicant had been found guilty following a trial by judge alone of three sexual assaults of a male pupil at a school where the applicant taught. The offences were alleged to have been committed some 44 years before the trial. The findings of guilt were quashed. Several grounds of appeal were upheld, including that the guilty findings were unreasonable and unsupported by the evidence. The Court found that the institution and continuance of the prosecution was not unreasonable on account of any one or more of the following circumstances: long delay before complaint, paucity of corroboration of the complainant, the applicant's consistent denial of the charges, his good character, inconsistencies in statements made by the complainant's mother who was called to substantiate some surrounding events.

12 The Court concluded its reasons for dismissing the costs of certificate application as follows (emphasis added):

> [31] This leaves to be addressed the issue of the credibility of the complainant. As explained above, it will generally be reasonable for a prosecutor to allow questions of credibility in a "word on word" case to be decided by a jury. **This is not a case where the complainant's account has been shown to be "plainly wrong"** as was the case in *Cox v R (No 2)* [2017] NSWCCA 129. As Payne JA said in the principal judgment:
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> > The question posed by this ground is one of fact which the Court must decide by making its own independent assessment of the evidence and determining whether, notwithstanding that there is evidence upon which the trial judge might have convicted, nonetheless it would be dangerous in all the circumstances to allow the verdict of guilty to stand. I have concluded that this is such a case. This is one of those rare cases where the evidence in the record itself contains discrepancies, displays inadequacies, is tainted and otherwise lacks probative force in such a way as to lead me to conclude that, even making allowance for the advantages enjoyed by the trial judge, there is a significant possibility that an innocent person has been convicted. It follows that the applicant is entitled to be acquitted of all charges.

Unreasonableness of the prosecution in the present case

13 Unlike the situation in *R v Johnston*, the Crown in the present case was not "in possession of an apparently credible complaint". Witness B's complaint was, from the outset, apparently doubtful. Doubts arose, first, from his character and antecedents: see [83] of the principal judgment. Secondly, the first of his statements containing the allegations was not made until more than two years after the events, on 27 November 2014, and then in the context of Witness B seeking a discount on sentence for further serious offending of his own: [85]. Likewise, his second statement was made when he faced charges for yet further offending: [86]. Thirdly, Witness B made no mention of the alleged involvement of Mr Constantinidis, whom he ultimately alleged played a part substantially equal to that of Mr Lazar, until his third statement nearly three years after the alleged events: [87].

14 From this unpromising start, a reasonable decision to prosecute the applicants would have required some independent corroboration of Witness B. Preferably that would take the form of direct evidence from another source to confirm the conversations by which the applicants allegedly enlisted him, or at least circumstantial evidence to support an inference that those criminal

conversations must have taken place. In fact, the Crown had no corroboration of Witness B in any respect.

15 Concerning Mr Constantinidis' alleged oral request that Witness B should interfere with DSC Roberts' investigation, Witness D was unable to give supporting evidence of having heard any probative conversation at Mr Constantinidis' Windsor home: [88]-[91]. The Crown had no intercept recordings of phone conversations between Mr Constantinidis and Witness B. Either he could not, or would not, give evidence of what was said in those conversations, or his testimony about them would not have assisted the Crown case. That is apparent from the fact that the Crown made no attempt to lead from Witness B any recollection of what was said his calls with Mr Constantinidis: [27]-[28], [111]-[112].

16 Concerning Mr Lazar's alleged request to Witness B and payment of instalments of $50,000 and $49,000, there was no independent evidence to confirm the testimony of Witness B. The large number of intercepted calls on Mr Lazar's phone made no reference to Witness B having been requested to interfere in the investigation, nor is the content of those intercepts circumstantially supportive of an inference that such a request must have been made.

17 The Court considered the transcripts of intercepted calls in detail for the purpose of determining the grounds of appeal. It was found that the calls do not accord, in any respect, with the allegation that the applicants requested Witness B to deflect DSC Roberts from his investigation. In particular, the McGillicuddy call was not open to the interpretation that Witness B was thereby implementing such a request from Mr Constantinidis. On the contrary, the McGillicuddy call supports reasonably possible alternative inferences that Witness B had been asked by Mr Constantinidis to do something quite different from what was alleged, or that Witness B acted on his own initiative: [114]-[116].

18 The prosecution's endeavour to marry the content of the intercepted calls with Witness B's narrative was foredoomed to failure, as should have been apparent

from an analysis of the calls in light of the evidence Witness B would give. Counsel for both Mr Constantinidis and Mr Lazar submit that the Crown case based upon Witness B's evidence in conjunction with the intercepted calls was "incoherent". That is a fair characterisation.

19 In addition to Witness B's uncreditworthy antecedents, the delay and self-interest from which his police statements emerged and the absence of independent evidence to corroborate him, his account of having been engaged by the applicants to corrupt or intimidate DSC Roberts was inherently incomplete and implausible. The main grounds for disbelieving him are recorded in the principal judgment at [125]-[142], [159].

20 On the hypothesis that when the criminal proceedings were instituted the Crown was in possession of Witness B's evidence as given by him at the trial, together with evidence of surrounding circumstances that contribute to his testimony being unbelievable in the respects identified, this was a case like *Cox v R (No 2)* and *R v Dunne* (Supreme Court (NSW), 17 May 1990, unreported), where "the word upon which the Crown case depended [has] been demonstrated to be one which was very substantially lacking in credit". Adopting the expression used by Wood CJ at CL in *R v Manley*, there was "inherent weakness in the prosecution case". It was not reasonable to institute the proceedings.

Certification

21 For these reasons, pursuant to ss 2 and 3 of the *Costs in Criminal Cases Act*, the Court will certify substantially in the terms sought by each applicant respectively as follows:

(1) Grant a certificate to the applicant, Achilles Constantinidis, under s 2(1) of the *Costs in Criminal Cases Act 1967* (NSW), that certificate to specify that in the opinion of this Court it would not have been reasonable to institute the proceedings relating to the alleged offence under s 319 of the *Crimes Act 1900* (NSW), if the prosecution had, before the proceedings were instituted, been in possession of evidence of all the relevant facts.

(2) Grant a certificate to the applicant, Ian David Lazar, under s 2(1) of the *Costs in Criminal Cases Act 1967* (NSW), that certificate to specify that in the opinion of this Court it would not have been reasonable to institute the proceedings relating to the alleged offence under s 319 of the *Crimes Act 1900* (NSW), if the prosecution had, before the proceedings were instituted, been in possession of evidence of all the relevant facts.

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