Miller v Police **[2020] SASC 20 (13 February 2020) – South Australian Supreme Court**

'Application made out of time' – 'Costs' – 'Intervention order' – 'Recording'

Charges: 1 x contravening a term of an intervention order

Case type: Application for permission to appeal out of time against an order for costs made by a Magistrate.

Facts: The male applicant was charged with contravening a term of an intervention order, the protected person was called at trial by the prosecution to give evidence. The evidence included the victim's recording of an offending phone call, a copy of which was tendered. After she gave evidence, the prosecution closed its case and she was released. The Magistrate found a case to answer and the matter was adjourned. During the adjourned period, the victim was charged with property damage to the applicant's vehicle. Consequently, the applicant applied for the witness to be recalled to cross-examine her further because of this behaviour. The Magistrate allowed the prosecution case to be reopened and reversed his ruling that there was a case to answer in order that the victim might be cross-examined. The victim could not be found as she had been released from giving further evidence. The Court issued a witness summons for her return, however, she was not served the summons. It was clear that she believed the matter was finished at least to the extent that her participation was concerned ([2]-[4]).

The applicant sought his costs. The Magistrate ordered that no costs should be allowed with respect to all appearances and work done up to and inclusive of the date of trial, but costs were granted for a number of hearing attendances after that date, albeit at an amount lower than that sought by the applicant ([9]).

A police officer who attended the scene gave evidence of two tranches of the appellant's brother, Stephen's, statements and conduct:

- The first tranche was that Stephen 'loudly told police to leave the property and shut the front door'.
- The second was that when told the appellant was arrested for assaulting the complainant, Stephen stated 'If she's saying those things she needs to be dealt with. She needs to learn the Aboriginal way'.

Issue: The applicant sought permission to appeal the Magistrate's orders as to costs. This application was made around 4 months out of time. The applicant submitted that he should be awarded appropriate costs up to the time the Magistrate found there was a case to answer, and that there should not have been a reduction to the costs awarded for work done after the trial date.

Held: The applicant submitted that he was successful in the matter as no conviction was recorded and no finding of guilt was made. As a result, he contended that costs should follow the event and that he should be awarded appropriate costs up to the time that the Magistrate found that there was a case to answer ([10]). The respondent submitted that the question of costs is discretionary, and noted s 189 of the Criminal Procedure Act 1921 (SA).

In his reasons, the Magistrate indicated that in allowing the case to be reopened for further cross-examination of the victim, the matter had not been completed. It is uncertain how that cross-examination would have impacted his decision to find a case to answer. The alleged offending behaviour was presented by the victim's evidence and by way of recording. It might go to the question of credit or her attitude towards the applicant, but it is difficult to determine a scenario where that would disturb the relatively low threshold of finding a case to answer. Additionally, the Magistrate had to consider that a permanent stay of proceedings is not necessarily a completion of the matter. In light of these difficulties, David AJ held that the Magistrate did not fall into error in exercising his discretion as to costs ([10]-[13]), and consequently, dismissed the appeal.