

SUPREME COURT OF QUEENSLAND

CITATION: *Atkinson v Gibson (No 2)* [2010] QCA 378

PARTIES: **ATKINSON, Simon James**
(applicant/appellant)
v
GIBSON, Patrick Darren
(respondent/respondent)

FILE NO/S: CA No 37 of 2010
DC No 2 of 2008
DC No 208 of 2008

DIVISION: Court of Appeal

PROCEEDING: Application for Leave s 118 DCA (Criminal) – Further Order

ORIGINATING COURTS: District Court at Cairns

DELIVERED ON: 23 December 2010

DELIVERED AT: Brisbane

HEARING DATE: 25 August 2010

JUDGES: McMurdo P, Fraser JA and Mullins J
Judgment of the Court

ORDERS: **1. There be no order as to costs in the District Court in Appeals No 2 of 2008 and No 208 of 2008.**

2. Set aside the costs order made in the Magistrates Court at Cooktown.

3. Direct that the Magistrates Court at Cooktown proceed with the hearing of the public nuisance charge according to law.

4. Order that the applicant pay 60 per cent of the respondent's costs of the application and the appeal to this Court, to be assessed on the standard basis.

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – BY LEAVE OF THE COURT – COSTS ORDERS – where the Court granted the applicant leave to appeal and allowed the appeal against orders made in the District Court on appeal from the Magistrates Court – where the Magistrate ordered the applicant to pay the respondent's costs – where the District Court had dismissed the appeals and ordered the applicant to pay the respondent's costs – where on appeal to this Court the applicant succeeded in two respects and failed

in two other respects – where this Court granted leave to appeal because of the public importance of the public nuisance ruling – whether there should be an order as to costs in the Magistrate’s Court – whether there should be an order as to costs in the District Court – whether there should be an order as to the costs of the application for leave to appeal and appeal against the applicant in this Court

Atkinson v Gibson [2010] QCA 279, related

COUNSEL: M B Lehane for the applicant/appellant
J D Henry SC for the respondent

SOLICITORS: Department of Public Prosecutions (Queensland) for the applicant/appellant
O’Reilly Stevens Bovey Lawyers for the respondent

- [1] **THE COURT:** In an earlier judgment¹ the Court granted the applicant leave to appeal and allowed the appeal against orders made in the District Court. The District Court had dismissed appeals against a Magistrate’s order dismissing a public nuisance charge following a ruling that there was no case to answer on that charge, the Magistrate’s acquittals of the respondent on charges of assaulting police and obstructing police, and the Magistrate’s substantial costs order in the respondent’s favour. This Court ruled that there was a case to answer on the public nuisance charge and set aside the Magistrate’s order dismissing that charge. The Court did not grant the applicant leave to appeal against the District Court’s orders dismissing the applicant’s appeal against the acquittals of assaulting police and obstructing police.
- [2] The Court also set aside the costs order in the District Court and directed each party to file written submissions as to the appropriate consequential orders, including as to costs in the Magistrates Court, District Court and in this Court. The parties have since filed written submissions.

Consequential orders and costs in the Magistrate’s Court

- [3] In the earlier decision the Court indicated that the appropriate orders appeared to be to grant leave to appeal, allow the appeal, set aside the orders of the Magistrate dismissing the public nuisance charge and the costs order, remit those matters to the Magistrates Court at Cooktown, and direct that court to proceed with the hearing of that charge and the determination of the appropriate costs order according to law.² The respondent’s written submissions accepted that those orders should be made unless the prosecutor decided to discontinue the further prosecution of the public nuisance charge. Rather, the applicant has foreshadowed an intention to pursue the public nuisance charge on remittal to the Magistrate’s Court and contends that the appropriate orders are those previously indicated. Orders to that effect should be made.

District Court costs

- [4] The applicant having failed entirely in his appeals to the District Court, the District Court judge ordered the applicant to pay the respondent’s costs of those appeals.

¹ *Atkinson v Gibson* [2010] QCA 279.

² *Atkinson v Gibson* [2010] QCA 279 at [12], [68], [71].

Her Honour fixed the costs at \$9,222 against the respondent's actual costs of \$15,250. The result of the proceedings in this Court is that the applicant should have succeeded in the appeals to the District Court in two respects (the challenges to the order of the Magistrate dismissing the public nuisance charge and the Magistrate's costs order) and failed in two respects (the challenges to the acquittals on the assault and obstruct police charges).

- [5] The applicant argued that no costs should be awarded against the applicant in relation to the appeals to the District Court. The respondent argued that the "already discounted" costs order in the District Court should stand or that the applicant should pay at least \$7,625 (50 per cent) of the respondent's actual costs of \$15,250 in the District Court. The respondent argued that the applicant substantially succeeded only on one issue because the applicant's success on the costs order was merely consequential upon his success in relation to the public nuisance charge.
- [6] Each party should be regarded as having had a broadly similar measure of success in the District Court, even though the necessity to set aside the Magistrate's substantial costs order is consequential upon this Court's decision to set aside the Magistrate's dismissal of the public nuisance charge. There is no clearly apparent basis for distinguishing between the issues with reference to the extent of each party's preparation and argument on each issue. In these circumstances there should be no order as to costs in the District Court.

Costs in this Court

- [7] The applicant argued that there should be no order for costs against the applicant in this Court having regard to the fact that the point upon which the applicant succeeded consumed most of the parties' time in preparing to argue the appeal and attracted most argument during the hearing of the appeal. The respondent contended that the applicant should be ordered to pay the respondent's costs of the application and appeal or, if there is to be any reduction to allow for the applicant's success on the public nuisance offence ruling, that the applicant pay 60 per cent of the respondent's costs. The respondent argued that the applicant succeeded only in respect of the public nuisance offence ruling and only in a consequential way in relation to the costs issue; that the applicant could have but did not seek to appeal only upon the public nuisance point; that the applicant unsuccessfully sought to set aside the respondent's acquittals on the charges of assault and obstruct police, notwithstanding the findings in the courts below; and that a significant part of the applicant's argument for leave to appeal on the public nuisance issue concerned the general public importance of the issue and did not bear upon the individual case of this respondent.
- [8] The costs issue in this Court differs from that in the District Court because the Court granted leave to appeal only because of the public importance of the public nuisance ruling (in which the executive, represented by the applicant, had a particular interest) and because the applicant sought leave to challenge the respondent's acquittals in a second appeal despite the absence of a substantial basis for challenging the concurrent findings in the respondent's favour in the courts below. There should nonetheless be some reduction in the costs awarded to the respondent to recognise the applicant's partial success in this Court. The appropriate order is that the applicant pay 60 per cent of the respondent's costs of the application for leave to appeal and the appeal to this Court.

Proposed orders

- [9] The following orders are made in addition to orders 1, 2 and 3 made on 15 October 2010:
1. There be no order as to costs in the District Court in Appeals No 2 of 2008 and No 208 of 2008.
 2. Set aside the costs order made in the Magistrates Court at Cooktown.
 3. Direct that the Magistrates Court at Cooktown proceed with the hearing of the public nuisance charge according to law.
 4. Order that the applicant pay 60 per cent of the respondent's costs of the application and the appeal to this Court, to be assessed on the standard basis.