
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CHAMBERS

CITATION : CARCIONE -v- ROBSON [2017] WASC 165

CORAM : PRITCHARD J

HEARD : 17 NOVEMBER 2016

DELIVERED : 16 JUNE 2017

FILE NO/S : SJA 1069 of 2016

BETWEEN : DANE LAURENCE CARCIONE
Appellant

AND

RUTH NATALIE ROBSON
Respondent

ON APPEAL FROM:

Jurisdiction : MAGISTRATES COURT OF WESTERN
AUSTRALIA

Coram : CHIEF MAGISTRATE S A HEATH

File No : PE 50218 of 2015, PE 50220 of 2015

Catchwords:

Criminal procedure - Costs - Whether accused entitled to costs where charges for indictable offences are dismissed in summary court - 'Either way' offences - Effect of *Official Prosecutions (Accused Costs) Act 1973* (WA) s 4(2)(c)

Legislation:

Criminal Appeals Act 2004 (WA), s 9(1), s 9(2), s 10(3), s 14(2)

Criminal Code Act Compilation Act 1913 (WA), s 5, s 317(1), s 392(c),
s 392(d), s 401(2)(a)

Criminal Procedure Act 2004 (WA), s 3, s 25, s 40, s 41, s 43, s 44, s 123

Interpretation Act 1984 (WA), s 5, s 67(1a)

Magistrates Court Act 2004 (WA), s 11(2)

Official Prosecutions (Accused Costs) Act 1973 (WA), s 4(1), s 4(2)(a), s 4(2)(c)

Result:

Leave to appeal granted

Appeal dismissed

Category: B

Representation:

Counsel:

Appellant : Mr A D Wilson

Respondent : Mr E C I Fearis

Solicitors:

Appellant : Frichot & Frichot

Respondent : State Solicitor for Western Australia

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

Commonwealth v Baume [1905] HCA 11; (1905) 2 CLR 405

Mancini v Ward (1997) 93 A Crim R 456

Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28;
(1998) 194 CLR 355

Samuels v The State of Western Australia [2005] WASC 193; (2005) 30 WAR
473

Thiess v Collector of Customs [2014] HCA 12; (2014) 250 CLR 664

1 **PRITCHARD J:** On 17 August 2016, the Magistrates Court dismissed two charges against the appellant - charges PE 50218 and 50220 of 2015, pursuant to s 25 of the *Criminal Procedure Act 2004* (WA) (CP Act) after the prosecution indicated that it wished to discontinue those charges. Counsel for the appellant made an application for costs pursuant to the *Official Prosecutions (Accused Costs) Act 1973* (WA) (OPAC Act). That application was dismissed. The appellant says that that was an error of law, and now appeals against that decision. The appellant requires leave to appeal.¹

2 The appeal raises for consideration the proper construction of s 4(2)(c) of the OPAC Act.

3 For the reasons which follow, leave to appeal will be granted, but the appeal will be dismissed.

In these reasons for decision, I deal with the following matters:

1. The factual background and procedural history;
2. The procedure for dealing with indictable offences in the Magistrates Court;
3. The decision of the learned magistrate which is the subject of the appeal;
4. The ground of appeal;
5. Leave to appeal;
6. The proper construction of s 4(2)(c) of the OPAC Act; and
7. Why leave to appeal should be granted but the appeal should be dismissed.

1. The factual background and procedural history

The offences with which the appellant was charged

4 On 14 October 2015, the appellant was charged with three offences. Charge PE 50218 of 2015 alleged that on 11 October 2015 he unlawfully assaulted another person (the complainant) and did bodily harm, contrary to s 317(1) of the *Criminal Code Act Compilation Act 1913* (WA) (*Criminal Code*) (the AOBH charge).

¹ *Criminal Appeals Act 2004* (WA) s 9(1).

5 Charge PE 50219/2015 alleged that on 11 October 2015, he stole a wallet and cash from the complainant, and that he was in company with a co-accused, armed with a dangerous weapon, namely a knife, and that he did bodily harm to the complainant, contrary to s 392(c) and (d) of the *Criminal Code* (the aggravated armed robbery charge).

6 Charge PE 50220 of 2015 initially alleged that on 11 October 2015, the appellant entered a building without consent, and committed an offence, namely aggravated armed robbery, in circumstances where the appellant was in company with another person, contrary to s 401(2)(a) of the *Criminal Code*² (the burglary charge).

7 All three of the charges were for indictable offences but the AOBH charge was for an offence for which a summary penalty was also available. That meant that the AOBH charge was one which would be dealt with summarily, unless a court determined, pursuant to s 5 of the *Criminal Code*, that it should be tried on indictment. Offences of that kind are known as 'either way' offences.³ That option was not open in respect of the aggravated armed robbery charge and the burglary charge, both of which could only be tried on indictment. I discuss the legislative framework for dealing with the charges further below at [21] - [26].

The procedural history

8 A copy of the prosecution notice in respect of all three charges against the appellant was before the Court on the appeal. Although only the appellant was named in the prosecution notice, the appellant was prosecuted along with two alleged co-offenders, Mr Wolfe and Mr Clarke.

9 The prosecution notice indicates that the appellant first appeared before the Magistrates Court in respect of the three charges on 20 October 2015. On that occasion, an application was brought by the prosecution pursuant to s 5 of the *Criminal Code* for the AOBH charge to be dealt with on indictment (s 5 application). The s 5 application was granted on that day.

10 On 4 November 2015, 16 December 2015, 3 January 2016, 27 January 2016 and 9 March 2016, all three charges were listed for mention in the Magistrates Court.

² Prosecution Notice, orders made on 21 July 2016, ts 21 July 2016 pages 3 - 4.

³ *Criminal Procedure Act 2004* (WA) s 40.

11 On 20 April 2016, the prosecution discontinued the aggravated armed robbery charge and that charge was therefore dismissed for want of prosecution, pursuant to s 25 of the CP Act.

12 The remaining charges were listed for mention in the Magistrates Court on 6 May 2016, 10 June 2016, 1 July 2016 and 15 July 2016. On the latter occasion, the prosecutor advised the Court that the prosecution had agreed to amend the charges against Mr Clarke, who would then plead guilty to those charges, and that the prosecution intended to amend the charges against each of the other alleged co-offenders, including the appellant. The prosecutor indicated that 'it's likely that all charges will remain in this court'.⁴ The charges were then listed for mention the following week.

13 On 21 July 2016, the prosecution applied to amend the burglary charge against the appellant, so that it alleged that on 11 October 2015, the appellant entered a dwelling without consent and committed an offence therein, namely assault occasioning bodily harm, in circumstances of aggravation, namely that he was in company with another. There was no dispute that the effect of that amendment was that an alternative summary conviction penalty also applied to the burglary charge from that point, so that it was able to be dealt with summarily or on indictment. (In other words, from that point onwards, the burglary charge was for an 'either way' offence.)

14 Precisely what occurred after that amendment was made is a little unclear. A difficulty arose because not all of the co-accused, or their counsel, were present at the time the charges were called. However, the Court was advised by Mr Wolfe's counsel that her client intended to go to trial, and the prosecutor advised that it was expected that Mr Clarke would enter a plea of not guilty to the charges against him. In any event, having amended the burglary charge, the learned Chief Magistrate proceeded to deal with the appellant, whose counsel was present. He asked the appellant's counsel what the appellant was going to do with the charges 'now that they're here'.⁵ The appellant's counsel indicated that after an amended prosecution notice, and an amended statement of material facts, were provided, his client would plead not guilty.⁶ On that basis the learned Chief Magistrate said that he would 'put it to a trial allocation',⁷ by

⁴ ts 15 July 2016 page 3.

⁵ ts 21 July 2016 page 4.

⁶ ts 21 July 2016 page 5.

⁷ ts 21 July 2016 page 5.

which he appears to have meant that the matter would be listed for a further mention, for the purpose of listing the charges for trial.

15 However, a short time later, the matter was recalled. At that point, the prosecutor advised the Court that the prosecution had sought to amend the prosecution notice because it was anticipated that Mr Clarke would plead guilty to the amended charge, but that that was no longer the case, and in those circumstances, the prosecution no longer wished to amend the charge. The learned Chief Magistrate then observed that there was a 'difficulty that we have amended, and taken a plea to [an] amended charge'.⁸

16 The learned Chief Magistrate then told the prosecutor to discuss the matter with the appellant's counsel (who was no longer in court when the matter was recalled) and that in those circumstances, the learned magistrate indicated that he would list the matter for a further hearing date, that 'for the moment' he would leave the charge in its amended form, and 'we will go backwards from there'.⁹ The learned Chief Magistrate then put the matter (that is, both charges against the appellant) 'into this list'¹⁰ (that is, the list of 'Committal Mention' matters to be heard by the learned Chief Magistrate) the following week. The prosecution notice indicates that the charges were 'Remanded Magistrates Court Perth 28/07/2016 9am Committal Mention'.

17 Two things should be noted about what occurred on 21 July 2016. The first is that although the transcript does not indicate that the appellant himself indicated that he wished to plead not guilty, and although his counsel indicated that he intended to enter a plea of not guilty once an amended prosecution notice, and an amended statement of facts, were provided, the learned Chief Magistrate appears to have understood that the appellant was actually entering a plea of not guilty on that occasion.¹¹ That appears on the transcript itself (as I have noted above) and also appears from the prosecution notice where 'Not guilty plea entered' has been noted for the hearing on 21 July 2016.

18 Secondly, it appears to have been assumed that the amendment of the burglary charge (so that it was, thereafter, an 'either way' offence) meant that the AOBH charge and the burglary charge could proceed, together, to a trial in the Magistrates Court. There was no reference to the Court's

⁸ ts 21 July 2016 page 7.

⁹ ts 21 July 2016 page 7.

¹⁰ ts 21 July 2016 page 8.

¹¹ I note that, ordinarily, an accused is required to enter their own plea and that counsel is unable to do so on their behalf.

earlier decision, on the s 5 application in respect of the AOBH charge, that that charge be tried on indictment. It is apparent from the transcript of the hearing on 15 July 2016 that the prosecutor anticipated that the amendment of the burglary charge would enable both charges against the appellant to be tried in the Magistrates Court.

19 The AOBH charge and the burglary charge were listed for 'Committal Mention' on 28 July 2016 and 12 August 2016. Finally, the AOBH charge and the burglary charge were listed for 'Committal Mention' before the Magistrates Court on 17 August 2016. On that occasion, the prosecution advised that it wished to discontinue the prosecution of each of those charges. The AOBH charge and the burglary charge were then dismissed pursuant to s 25 of the CP Act.

20 In summary, then, the AOBH charge was one in respect of which an order pursuant to s 5 of the *Criminal Code* was made (on 20 October 2015). That charge was later dismissed for want of prosecution, on 17 August 2016. No s 5 application was ever made in respect of the burglary charge, and that charge was dismissed for want of prosecution on 17 August 2016.

2. The procedure for dealing with indictable offences in the Magistrates Court

21 This is a convenient point at which to recall how indictable offences may be dealt with in the Magistrates Court, because that procedure underlies the operation of s 4(2)(c) of the OPAC Act.

22 All indictable offences may be tried on indictment, but some indictable offences may be tried summarily, in some circumstances. Whether an indictable offence is able to be tried summarily will depend on whether s 5(1) of the *Criminal Code* applies to it. That section applies if the Code, or another written law, provides a 'summary conviction penalty' for an indictable offence, and the accused is charged before a court of summary jurisdiction (that is, the Magistrates Court or the Children's Court¹²) with committing the offence in circumstances where the summary conviction penalty applies to that charge.¹³

23 If s 5 of the *Criminal Code* applies, then unless the court of summary jurisdiction determines that the charge should be tried on indictment (or unless the *Criminal Code* or another law provides that the charge may not

¹² *Interpretation Act 1984* (WA) s 5.

¹³ *Criminal Code* s 5(1).

be dealt with summarily) the charge must be tried summarily.¹⁴ The court of summary jurisdiction can only consider whether the charge should be tried on indictment if a s 5 application is made - either by the prosecution or by the accused - before the accused pleads to the charge.¹⁵ A decision as to whether an indictable offence should be tried on indictment rather than summarily is 'final and cannot be appealed'.¹⁶ The default position is, therefore, that a charge for an 'either way' offence will be dealt with summarily unless the Magistrates Court orders that it be dealt with on indictment.

24 If an accused pleads not guilty in the summary court to an either way offence then no s 5 application can be made and the charge will be tried in the Magistrates Court. If a s 5 application is made before the accused enters a plea, then if the outcome of the s 5 application is that the charge should be dealt with on indictment, and 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.¹⁷ If, instead, the accused enters any other plea apart from a guilty plea, or chooses not to enter a plea at that stage, the charge will be adjourned to a 'disclosure / committal hearing'.¹⁸ (The intention is that before the accused is required to plead, or is committed for trial or sentence, the prosecution will provide disclosure of all evidentiary and confessional material which is relevant to the charge.¹⁹) At the disclosure / committal hearing, the accused will either be required to enter a plea and will thereafter 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

25 If a summary court convicts the accused of an either way offence, then the offender will ordinarily be liable to the summary conviction penalty, and will be sentenced in the summary court.²¹ However, in some cases, the summary court may determine that it is appropriate that the offender be committed to the District or Supreme Court for sentence,²² in

¹⁴ *Criminal Code* s 5(2).

¹⁵ *Criminal Code* s 5(2)(a) and s 5(6).

¹⁶ *Criminal Code* s 5(7).

¹⁷ *Criminal Procedure Act 2004* (WA) s 41(3).

¹⁸ A 'disclosure / committal hearing' is a hearing under s 44 of the *Criminal Procedure Act 2004* (WA).

¹⁹ *Criminal Procedure Act 2004* (WA) s 41(4).

²⁰ *Criminal Procedure Act 2004* (WA) s 44(1). It is also possible for the accused to be administratively committed for trial or sentence by the superior court, without the need for a disclosure / committal hearing, in some circumstances: *Criminal Procedure Act 2004* (WA) s 43.

²¹ *Criminal Code* s 5(8).

²² *Criminal Code* s 5(9).

which case the offender will be liable to the penalty which applies when the offence is punishable on indictment.²³

26 There are, therefore, two points at which consideration may be given to whether an indictable offence, which is able to be dealt with summarily, is not to be dealt with by a summary court. First, that question will arise if a s 5 application is made, provided that that application is made before the accused enters a plea to the charge. Secondly, the question may arise after the accused has been convicted in the summary court, and before the accused has been sentenced. The question of costs arising from the dismissal of the charge for want of prosecution clearly does not arise in the latter case.

3. The decision of the learned Magistrate which is the subject of the appeal

27 At the hearing on 17 August 2016, and after the AOBH charge and the burglary charge were dismissed, counsel for the appellant sought an order for costs on the basis that the appellant was a 'successful defendant' under s 4(2) of the OPAC Act. There followed a discussion as to the procedural history concerning the charges in the Magistrates Court, and whether the charges were within the summary jurisdiction of the Magistrates Court, as counsel for the appellant submitted. The learned Chief Magistrate was of the view that the charges had remained in the 'committal list'. That appears to have been a shorthand description for the list of charges before the Magistrates Court which required a disclosure / committal hearing. (It appears that such charges are listed, no doubt for convenience, in the same hearing list in the Magistrates Court.)

28 Having heard the submissions of counsel for the appellant, the learned Chief Magistrate then gave his decision (the Decision) in the following terms:

In my view, it [that is, the prosecution of both charges] has remained in this list. I'm not prepared to order costs. ... The charges I dismiss, but there will be no order as to costs.

... It has remained in the committal list.²⁴

4. The ground of appeal

29 The sole ground of appeal set out in the appellant's notice of appeal is:

²³ *Criminal Code* s 5(10).

²⁴ ts 17 August 2016, page 3.

The learned magistrate erred in law in refusing to make a costs order pursuant to the *Official Prosecutions (Accused's Costs) Act 1973* (WA) upon the discontinuance of charges PE 50218/15 and PE 50220/15 (the charges).

Particulars

1. Upon the discontinuance of the charges the defendant was a successful defendant within the meaning of s 4(2)(a) of the [OPAC Act];
2. The learned magistrate misconstrued the meaning of 'successful defendant' in s 4(2) of the [OPAC Act] in holding that he could not make a costs order because the matters are 'in the committal list' when he should have found that the accused was a successful defendant within the meaning of s 4(2)(c) of the Act because:
 - 2.1 both charges were within the summary jurisdiction of the magistrates court; and
 - 2.2 both charges were dismissed after the accused had entered not guilty pleas on the charges in the magistrates court,and should have held that the accused was entitled to his costs under s 5 of the Act.

5. Leave to appeal

30 The leave of the court is required before the appellant may appeal on the ground of appeal.²⁵ Leave must not be given unless the Court is satisfied that the ground has a reasonable prospect of succeeding.²⁶ Before leave may be granted, the Court must assess the ground as having a rational and logical prospect of succeeding, so that in effect it has a real prospect of success.²⁷

31 As I explain below, the meaning and operation of s 4(2)(c) of the OPAC Act is far from clear, and its proper construction has not been the subject of consideration at the appellate level. Having regard to the submissions advanced by counsel for the appellant I am satisfied that it can properly be said that the ground of appeal was one which had reasonable prospects of success, notwithstanding that I have reached the conclusion that the appeal should be dismissed.

²⁵ *Criminal Appeals Act 2004* (WA) s 9(1).

²⁶ *Criminal Appeals Act 2004* (WA) s 9(2).

²⁷ *Samuels v The State of Western Australia* [2005] WASCA 193; (2005) 30 WAR 473, 487 [56] (Steytler P, Wheeler & Roberts-Smith JJA).

32 For the sake of completeness, it is convenient to mention at this point that in the notice of appeal, the appellant sought an extension of time (of one day) in which to appeal. As the appeal was filed within the 28 day period permitted by s 10(3) of the *Criminal Appeals Act 2004* (WA), no extension of time is required.

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

33 Discerning the meaning of s 4(2)(c) of the OPAC Act requires consideration of the meaning of the words used, within the legislative context, which includes the legislative history and purpose.²⁸

34 Before turning to the meaning of the words used in s 4(2)(c) itself, it is appropriate to start by considering the broader legislative context. The OPAC Act confers a power to award costs to accused persons who are charged with offences and face proceedings in a summary court, but who are not convicted, in certain circumstances. Section 5(1) of the OPAC Act provides that subject to the OPAC Act, a 'successful accused' is entitled to his costs. The definition of a 'successful accused' is set out in s 4(2) of the OPAC Act.

35 It is appropriate to set out s 4(2) of the OPAC Act in full. It provides:

(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 -

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

²⁸ *Thiess v Collector of Customs* [2014] HCA 12; (2014) 250 CLR 664, 671 [22] (French CJ, Hayne, Kiefel, Gageler & Keane JJ).

- (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.

36 An 'accused' is a person charged with an offence in an official prosecution.²⁹ 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.³⁰

37 As s 4(2)(a) of the OPAC Act makes clear, one of the circumstances in which an accused will be a 'successful accused' (and thus will be entitled to seek an order that the prosecution pay his or her costs) is when the charges against the accused are dismissed for want of prosecution. That occurs when the prosecution indicates that it wishes to discontinue the prosecution of the accused for the charge.³¹

38 However, as s 4(2)(a) provides, that paragraph is subject to s 4(2)(c).

Paragraph 4(2)(c) of the OPAC Act - an exception from the position that an accused whose charge is dismissed by the summary court will be a 'successful accused'

39 Section 4(2)(c) thus carves out an exception from the general position established in s 4(2)(a) that where the charges against an accused are dismissed for want of prosecution in the Magistrates Court or the Children's Court, the accused will be considered to be a 'successful accused' for the purposes of the OPAC Act.

40 The terms of s 4(2)(c) make clear that the exception from that position will arise only if certain criteria are met. They appear in the

²⁹ *Official Prosecutions (Accused's Costs) Act 1973* (WA) s 4(1).

³⁰ *Official Prosecutions (Accused's Costs) Act 1973* (WA) s 4(1).

³¹ *Criminal Procedure Act 2004* (WA) s 25(3).

opening words of s 4(2)(c): the charge must be dismissed for want of prosecution by the summary court (that is, the Magistrates Court or the Children's Court), and the charge must be for an 'indictable offence'. The term 'indictable offence' is not defined in the OPAC Act. However, that term is defined in the *Interpretation Act 1984* (WA) as 'an offence designated as a crime or as a misdemeanour'.³² As I have already noted, some indictable offences are able to be dealt with summarily,³³ if they are 'either way' offences.

41 The question which arises for determination on the appeal is the effect of pars (i) and (ii) of s 4(2)(c).

The appellant's contentions

42 Counsel for the appellant submitted that the point at which to judge whether a charge was covered by s 4(2)(c)(i) or (ii) was the point in time at which a costs application was made under the OPAC Act.³⁴ Counsel for the respondent also submitted that a charge 'takes its character as it currently exists' at the time the application for costs is made.³⁵

43 Counsel for the appellant accepted that if a s 5 application is not made, and a charge for an 'either way' offence is dismissed for want of prosecution, the effect of s 4(2)(c)(i) is that the accused would be 'not successful' for the purposes of the OPAC Act.³⁶

44 Counsel for the appellant appeared to submit that if a s 5 application is made, and the court does not order that the charge be tried on indictment, s 4(2)(c)(i) no longer applies to that charge, because the court has decided that the charge not be tried on indictment, and it would no longer be open to the court to make a different decision.³⁷

45 Turning to the facts of this case, counsel for the appellant submitted that s 4(2)(c)(i) did not apply to the AOBH charge, because the learned Chief Magistrate had ordered that that charge be tried on indictment (although it was his submission that the Chief Magistrate later reversed that decision).³⁸ Further, counsel for the appellant submitted that once the appellant entered a plea to the AOBH charge and the burglary charge, the 'Magistrates Court[s] jurisdiction was engaged' and the charges should no

³² *Interpretation Act 1984* (WA) s 67(1a).

³³ cf the definition of 'indictable offence' in s 3 of the *Criminal Procedure Act 2004* (WA).

³⁴ ts page 46.

³⁵ ts page 31.

³⁶ ts page 13.

³⁷ ts page 16.

³⁸ ts page 9.

longer be equated with indictable offences for the purposes of the OPAC Act.³⁹ He submitted that 'when it's an either way charge, which is on the committal track, the accused can't expect to receive costs if discontinued whilst on that track. These charges got off that track'.⁴⁰ He submitted that that occurred once the learned Chief Magistrate ordered that the AOBH charge and the burglary charge be listed for a trial allocation date.⁴¹

46 In respect of the burglary charge, counsel for the appellant submitted that by the time that charge was dismissed, it had been amended so that it was an 'either way' charge. However, by that stage, the court had accepted the appellant's plea to the charge, with the result that s 5 of the *Criminal Code* was no longer capable of applying to that charge.⁴² Accordingly, he submitted that the burglary charge did not fall within s 4(2)(c)(i) of the OPAC Act.

47 Counsel for the appellant also submitted that neither the AOBH charge nor the burglary charge fell within s 4(2)(c)(ii) because the word 'otherwise' in that paragraph contemplates that the charge which is dismissed is one to which s 5 of the *Criminal Code* does not apply,⁴³ or in other words, to a charge for an offence which must be dealt with on indictment, whereas both the AOBH charge and the burglary charge were 'either way' offences to which s 5 of the *Criminal Code* applied.

The respondent's contentions

48 Counsel for the respondent submitted that s 4(2)(c)(i) dealt with all 'either way' offences, whether or not a s 5 application had been granted. He submitted that if a s 5 application were made, and not granted, and the charge was subsequently dismissed for want of prosecution, then s 4(2)(c)(i) would apply because the charge would be dismissed before the summary court had determined that the charge would be tried on indictment.⁴⁴ He also submitted that the same conclusion would apply if no s 5 application were made prior to an either way charge being dismissed for want of prosecution.⁴⁵

49 Counsel for the respondent also submitted that in the event that a s 5 application were made, and granted, but the charge was subsequently dismissed (as was the case with the AOBH charge), s 4(2)(c) 'should be

³⁹ ts pages 9 - 10.

⁴⁰ ts page 10.

⁴¹ ts page 16.

⁴² ts page 46.

⁴³ ts page 8.

⁴⁴ ts page 34.

⁴⁵ ts pages 34, 38.

read down, so that it effectively ceases its operation in relation to an either way charge being charged on indictment once the relevant decision under section 5 has been made'.⁴⁶ As to how s 4(2)(c)(i) should be read down in that circumstance, he submitted that the paragraph should be 'interpreted ... in such a way such that you achieve the same end as for an indictable only charge'.⁴⁷ He subsequently submitted that the words 'before the summary court decides' simply referred to the court having dealt with an either way offence. Alternatively, he submitted that if an application under s 5 were made, and granted, and then the charge was subsequently dismissed for want of prosecution, then at the point in time when the charge was dismissed, it could no longer be characterised as an offence to which 's 5 of the *Criminal Code* applies'.⁴⁸

- 50 As for s 4(2)(c)(ii), counsel for the respondent submitted that that paragraph applies only to an accused charged with an offence which can only be tried on indictment (ie not an 'either way' offence). He submitted that the effect of s 4(2)(c)(ii) is that if the summary court dismisses that charge for want of prosecution, no costs can be awarded to the accused.⁴⁹

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

- 51 It is apparent that there is a considerable degree of ambiguity in s 4(2)(c). Despite the best efforts of counsel to shed light on the proper construction of that paragraph, I find myself unable to agree entirely with the construction advanced by either the appellant or the respondent. My view as to the preferable construction of s 4(2)(c) is set out below.

- 52 Turning first to the construction of s 4(2)(c)(i), the words which appear before the dash refer to a charge to which s 5 of the *Criminal Code* applies. The word 'applies' is a form of the word 'apply' and has a variety of meanings. In the present context, it means 'to have a bearing or reference; be pertinent'⁵⁰ and 'to have a practical bearing upon something; to have valid or suitable reference',⁵¹ or in other words, a charge which is subject to s 5 of the *Criminal Code*. The words after the dash in paragraph (i) make 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. Whether a charge is one which is subject to s 5 of the *Criminal Code* will

⁴⁶ ts page 34.

⁴⁷ ts page 39.

⁴⁸ ts page 41.

⁴⁹ ts pages 29 - 30.

⁵⁰ *Macquarie Dictionary Online*.

⁵¹ *Oxford English Dictionary Online*.

be determined by reference to s 5(1) of the *Criminal Code* which itself sets out when that section 'applies'. In short, s 4(2)(c)(i) refers to an 'either way' offence.

53 The words after the dash in s 4(2)(c)(i) are especially ambiguous. At first blush, and if those words are given their literal meaning, they appear to suggest that a s 5 application will necessarily have the outcome that the charge is to be tried on indictment. But if s 4(2)(c)(i) is to apply, the dismissal of the charge must occur before a decision on a s 5 application is made. And before a s 5 application is made, its outcome cannot be known, because the summary court has a discretion under s 5(2) of the *Criminal Code* as to whether to order that the charge be tried on indictment.⁵²

54 Furthermore, if s 4(2)(c)(i) is given its literal meaning, it would give rise to an odd distinction in its application to 'either way' offences, namely that if the charge for an either way offence was dismissed after a s 5 application was made and granted, s 4(2)(c)(i) would not apply, so that (presumably) an accused would be entitled to seek an order for costs. On the other hand, if the either way charge was dismissed before a s 5 application was made, the accused would be 'not successful' and would not be entitled to seek an order for his costs. It is difficult to see any rationale for such a distinction between 'either way' offences. Furthermore, if a summary court has granted a s 5 application and ordered that an 'either way' charge should be dealt with on indictment, one might have expected that if that charge were then dismissed by the summary court, the question of costs would be dealt with in a manner more analogous to costs for indictable offences (which are not either way offences) which are dismissed. Yet the operation of s 4(2)(c)(ii) will have the result that if a charge for an indictable offence is dismissed by a summary court the accused will be 'not successful' and unable to seek an order for costs.

55 Another approach which appeared to underlie some of counsel's submissions in relation to the construction of s 4(2)(c) was 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. In my view, that is not the correct view of the effect of that punctuation. That becomes apparent upon closer consideration of s 4(2)(c)(ii). Leaving to one side, for a moment, the meaning of the word 'otherwise', to which I will return shortly,

⁵² *Criminal Code* s 5(3).

s 4(2)(c)(ii) refers to a charge of an indictable offence which is dismissed for want of prosecution by the summary court before the summary court commits the accused for trial or sentence on the charge. However, once the summary court commits an accused to a superior court for trial (in the event of a plea of not guilty) or sentence (in the event of a plea of guilty), the summary court no longer has any jurisdiction to deal with the charge.⁵³ Its role after that point is confined to compliance with the administrative steps of providing relevant documentation, including bail documents, to the superior court to which the charge has been committed. That much is apparent from s 44(1)(a)(iii) and s 44(2) of the CP Act.⁵⁴ There is thus no prospect that the summary court could dismiss an indictable charge for want of prosecution *after* the accused has been committed for trial to the superior court, and thus no prospect that the question of costs could arise from a dismissal for want of prosecution after that point. There is also a further difficulty that it would not be possible, in any event, for the summary court to dismiss the charge for want of prosecution before committing the offender for sentence, because committal for sentence presupposes that the accused has entered a plea of guilty,⁵⁵ after which point a dismissal for want of prosecution is not open. If the words after the dash in s 4(2)(c)(ii) are not, properly construed, words of limitation on the opening words of that paragraph, it is difficult to see why the words after the dash in s 4(2)(c)(i) should be understood to operate as words of limitation on the opening words of s 4(2)(c).

56 In my view, the better explanation for the words after the dash in each paragraph is that they are intended to refer to the entire period of time within which costs are likely to be incurred in the summary court when that court is dealing with an indictable offence (whether an 'either way' offence, or an offence which must be tried on indictment).

57 Accordingly, in my view, the words 'before the summary court decides under [s 5 of the *Criminal 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 *Criminal Code*, that the charge should be tried on indictment'. When read in conjunction with the opening words of s 4(2)(c), therefore, s 4(2)(c)(i) should be understood as providing that an accused will be 'not successful' if the charge is for an either way offence, and that charge is dismissed for want of prosecution, provided that at that point, the summary court has

⁵³ *Magistrates Court Act 2004* (WA) s 11(2).

⁵⁴ The position under the *Criminal Procedure Act 2004* (WA) is consistent with the position which applied prior to the enactment of that Act: see, for example, *Mancini v Ward* (1997) 93 A Crim R 456.

⁵⁵ cf *Criminal Procedure Act 2004* (WA) s 44(1)(a)(ii).

not already determined, on an application under s 5 of the *Criminal Code*, that the charge should be tried on indictment.

58 That construction of s 4(2)(c)(i) would also have the result that if a s 5 application has not been made, at all, in respect of a charge for an 'either way' offence, then if the summary court dismisses that charge for want of prosecution, the accused will be 'not successful' for the purposes of the OPAC Act.

59 Further, the same construction of s 4(2)(c)(i) would also have the result that if a s 5 application has been made, and refused, then s 4(2)(c)(i) will apply to that charge, so that if the charge is subsequently dismissed for want of prosecution, the accused will be 'not successful' for the purposes of the OPAC Act.

60 Turning next to s 4(2)(c)(ii), the ordinary meaning of the word 'otherwise' is 'under other circumstances; in another manner; differently; in other respects'⁵⁶ and 'in another case; in other circumstances; if not; else'.⁵⁷ I am unable to accept the submissions of both counsel that the word 'otherwise' in this context should be understood as referring simply to a charge to which s 5 of the *Criminal Code* does not apply, for the following reasons.

61 First, that construction relies, implicitly, on the assumption that the use of the dashes in s 4(2)(c)(i) and (ii) was intended to create a grammatical pattern which indicates that the word 'otherwise' in s 4(2)(c)(ii) refers to the situation which is the obverse of the words 'if section 5 of the *Criminal Code* applies to the charge'. For the reasons outlined above at [55], I am not persuaded that that was the intention behind the use of that punctuation.

62 Secondly, if the word 'otherwise' simply refers to a charge to which s 5 of the *Criminal Code* does not apply, or in other words, to an indictable offence, the word 'otherwise' would add nothing to the opening words of s 4(2)(c). Such a construction would be contrary to the well-established principle of statutory construction that a statute should not be construed so as to leave words in it with no work to do.⁵⁸

⁵⁶ *Macquarie Dictionary Online*.

⁵⁷ *Oxford English Dictionary Online*.

⁵⁸ *Commonwealth v Baume* [1905] HCA 11; (1905) 2 CLR 405, 414 (Griffith CJ); *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 [71] (McHugh, Gummow, Kirby & Hayne JJ).

63 Thirdly, albeit less significantly, had it been intended that s 4(2)(c)(ii) would operate only 'if section 5 of the *Criminal Code* does not apply' the drafter could simply have said so.

64 In my view, the word 'otherwise' in s 4(2)(c)(ii) should be given its ordinary meaning, understood by reference to the entirety of s 4(2)(c)(i). In other words, the word 'otherwise' should be understood to mean 'in any other case which is not covered by s 4(2)(c)(i)'. Construed in that way, s 4(2)(c)(ii) applies to charges for indictable offences to which s 5 of the *Criminal Code* does not apply (that is, offences which must be tried on indictment) 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.

65 In both cases, the words after the dash in s 4(2)(c)(ii) indicate that the accused will not be a successful accused for the purposes of the OPAC Act if the charge is dismissed for want of prosecution at any time before the summary court commits the accused for trial. (As I noted at [55], once a summary court commits an accused for trial to a superior court, its jurisdiction to deal with the charge ceases. After the committal occurs, it will not be possible for the summary court to dismiss the charge for want of prosecution.⁵⁹)

66 I turn to consider whether this construction of s 4(2)(c) is consistent with the legislative purpose. Unfortunately, there is very little to disclose how the Parliament envisaged s 4(2)(c) was to apply. Subsection 4(2)(c) in its current form was included in the OPAC Act by the *Criminal Procedure and Appeals (Consequential and Other Provisions) Act 2004* (WA). There is nothing in the second reading speech or the explanatory memorandum for the Bill for that Act which sheds light on the purpose of s 4(2)(c) or its intended operation. However, more general considerations of principle and purpose provide some support for the conclusion I have reached.

67 In principle, a charge for an 'either way' offence which a summary court has concluded should be tried on indictment under s 5 of the *Criminal Code* is no different from a charge for an indictable offence which must be dealt with on indictment. The construction I prefer has the result that a charge of either kind, if dismissed by a summary court for want of prosecution, will be dealt with in the same way for the purposes of costs. In addition, the construction of s 4(2)(c) which I prefer is

⁵⁹ See also *Magistrates Court Act 2004* (WA) s 11(2).

consistent with the approach to costs for charges dealt with on indictment before superior courts. A superior court is unable to award costs if the accused is acquitted or the prosecution is discontinued.⁶⁰

68 The construction I prefer has the result that the combined effect of s 4(2)(c)(i) and (ii) reflects 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.

69 That operation of s 4(2)(c)(i) and (ii) might be susceptible to the criticism that those paragraphs do not add to, or detract from, what is encapsulated by the opening words of s 4(2)(c). In turn, that outcome gives rise to the question why the Parliament considered it necessary to refer to the situations set out in s 4(2)(c)(i) and (ii). The most likely explanation, in my view, is that Parliament anticipated 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 that charge was dismissed. The inclusion of s 4(2)(c)(i) and (ii) appears to have been intended to remove any doubt that the costs outcome will be the same for all charges for indictable offences which are dismissed for want of prosecution in a summary court, whether or not those offences are 'either way' offences or offences which must be tried on indictment.

Summary

70 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.)

71 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

⁶⁰ *Criminal Procedure Act 2004* (WA) s 123.

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.

7. Why the appeal should be dismissed

72 Counsel for the appellant initially submitted that the learned Chief Magistrate erred in law because the appellant was a successful defendant within the meaning of s 4(2)(a)(iii) of the OPAC Act, and that s 4(2)(c)(i) and (ii) of the OPAC Act were not applicable. He submitted that after its amendment on 21 July 2016, the burglary charge was an 'either way' charge, to which s 5 of the *Criminal Code* applied.⁶¹ He submitted that 'in circumstances where no application was made under s 5 of the *Criminal Code*', the Magistrates Court's 'summary jurisdiction to deal with [both of] the charges was engaged when the appellant pleaded not guilty to the charges and was remanded to a trial allocation date' and both of the charges were dismissed for want of prosecution after the appellant pleaded not guilty.⁶² However, the latter submission overlooked the fact that the Magistrates Court made an order pursuant to s 5 of the *Criminal Code* in respect of the AOBH charge in October 2015.

73 Counsel for the appellant subsequently acknowledged that that was so.⁶³ He then submitted that after the learned Chief Magistrate amended the burglary charge, he acceded to both charges being dealt with in the summary jurisdiction of the Court, and in effect, revoked the earlier decision made pursuant to s 5 of the *Criminal Code* that the AOBH charge was to be tried on indictment.⁶⁴ Counsel for the appellant submitted that by accepting the appellant's plea to both charges on 21 July 2016, the Court 'had decided not to commit him to the District Court for trial, in effect recalling its earlier decision under s 5(3) [of the *Criminal Code*] with the consent of the parties'.⁶⁵ Counsel for the appellant submitted that s 4(2)(c)(i) did not apply because the charges were charges to which s 5 of the *Criminal Code* applied, and the charges 'were dismissed for want of prosecution after the court decided that the charges were to be tried summarily and not on indictment'.⁶⁶

⁶¹ ts pages 2 - 3.

⁶² Appellant's submissions [5].

⁶³ Appellant's Responsive submissions [1].

⁶⁴ Appellant's Responsive submissions [9].

⁶⁵ Appellant's Responsive submissions [16].

⁶⁶ Appellant's Responsive submissions [18].

74 I am unable to accept those submissions. In so far as the burglary charge is concerned, at the point at which the charge was dismissed for want of prosecution, the burglary charge was one to which s 5 of the *Criminal Code* applied, and no s 5 application had been made for that charge to be dealt with on indictment. Consequently, that charge was one to which s 4(2)(c)(i) of the OPAC Act applied, and the appellant was 'not successful' in respect of the dismissal of that charge for want of prosecution.

75 In respect of the AOBH charge, I have serious reservations as to whether a summary court has the power to revoke a decision under s 5 of the *Criminal Code*, especially as decisions of that kind are final, in the sense that they are not able to be appealed. However, that point was not argued, and in any event it is unnecessary to decide it.⁶⁷ The AOBH charge was for an 'either way' offence. Even if it is open to a summary court to revoke a decision under s 5 of the *Criminal Code* that an either way charge is to be tried on indictment, then the result in this case would appear to be that the dismissal of the AOBH charge for want of prosecution would be treated as having occurred when there was no extant decision by the Magistrates Court that that charge be tried on indictment. On that basis, s 4(2)(c)(i) would apply. The alternative conclusion, which I prefer, is that when the AOBH charge was dismissed, the Magistrates Court had determined that that charge should be tried on indictment. On that basis s 4(2)(c)(i) did not apply. However, the charge fell within the scope of s 4(2)(c)(ii) as the dismissal for want of prosecution occurred at a point in time before the Magistrates Court had committed the appellant for trial. On either basis, therefore, the appellant was 'not successful' in respect of the dismissal of the AOBH charge for want of prosecution.

76 The learned Chief Magistrate reached the conclusion that the appellant was 'not successful' in respect of the dismissal of both charges for want of prosecution. His reasons were, with respect, so brief that it is not possible to ascertain whether there was any error in his reasoning. However, his Honour reached the correct conclusion on the appellant's application for costs, and in my view, for that reason no substantial miscarriage of justice can be said to have arisen.⁶⁸

⁶⁷ In the event that the prosecution wished to amend a charge in respect of which a s 5 application had already been made and granted, no question of revocation of the s 5 decision would arise if the prosecution withdrew that charge, and issued a fresh charge against the accused for the either way offence which the prosecution wished to pursue before the summary court.

⁶⁸ *Criminal Appeals Act 2004* (WA) s 14(2).

77 The appeal should therefore be dismissed. I will hear the parties in relation to the orders which should be made.