11/05; [2004] VSC 530

SUPREME COURT OF VICTORIA

MANSBRIDGE v NICHOLS & ANOR

Williams J

6-8, 11, 13, 27 October, 8-11, 15-17 November, 17 December 2004

CRIMINAL LAW – CRUELTY TO ANIMALS – NUMBER OF CHARGES LAID – ACCUSED OWNER OF NUMBER OF SHEEP – ALLEGED THAT OWNER PERMITTED UNJUSTIFIABLE PAIN OR SUFFERING TO SHEEP – FAIL TO PROVIDE SHEEP WITH SUFFICIENT FOOD, DRINK, SHELTER, VETERINARY CARE – CHARGES FOUND PROVED BY MAGISTRATE – APPEAL TO COUNTY COURT – CHARGES FOUND PROVED BY JUDGE – DUPLICITY – MEANING OF – WHETHER CHARGES REFERRED TO MORE THAN ONE OFFENCE – WHETHER DUPLICITOUS – WHETHER DEFECT COULD BE CURED.

REASONS FOR DECISION – WHETHER JUDGE GAVE SUFFICIENT REASONS – NATURAL JUSTICE – INTERNAL TAPE RECORDING OF COUNTY COURT PROCEEDINGS NOT HANDED TO ACCUSED – WHETHER ACCUSED DENIED NATURAL JUSTICE – CHARGES FOUND PROVED ON APPEAL – COSTS ORDERED TO BE PAID ON COUNTY COURT SCALE "D" – WHETHER REASONS ADEQUATE: *MAGISTRATES' COURT ACT* 1989, SS3(1), 27(1), 50(1), 83(1), 86(1); *PREVENTION OF CRUELTY TO ANIMALS ACT* 1986, SS9(1), 10(1), (2).

M. was the owner of a number of sheep. As a result of a complaint, N. an inspector with the RSPCA visited the property and saw a number of dead sheep. Subsequently, M. was charged with 7 offences of cruelty under s9 of the *Prevention of Cruelty to Animals Act* 1986. At the hearing before the magistrate, M.'s counsel argued that the particulars given in respect of the charges created uncertainty in that they referred to the same act or omission in relation to different charges. At the conclusion of the case the magistrate found the charges proved and imposed penalties.

M. appealed to the County Court and at the end of legal argument, written submissions were handed to the judge which raised the issues of uncertainty, duplicity or lack of particularity. In his lengthy reasons for judgment, the judge made detailed references to the charges, the defences raised for and on behalf of the appellant, particulars, submissions of counsel and findings. The judge found the matters proved and imposed penalties and an order for costs on the County Court civil scale "D". Upon application for review—

HELD: Application granted in relation to 3 of the charges and the costs order. Such orders quashed and remitted to the County Court for hearing and determination in accordance with law.

1. The degree of detailed reasoning required of a tribunal depends upon the nature of the determination, the complexity of the issues and whether the issues are ones of fact or of law or of mixed fact and law, and the function to be served by the giving of reasons. As to the last matter, reasons which are required to enable a right of appeal on questions of fact to be exercised might not be required if an appeal is limited to questions of law. The extent of the duty to give reasons will depend upon the way in which the case has been conducted.

***Perkins v County Court of Victoria* [2000] VSCA 171; (2000) 2 VR 246; (2000) 115 A Crim R 528, applied.**

2. The reasons given by the judge in the present case were not inadequate in relation the defences raised by the defence. In the findings made and the way in which certain evidence had been treated, the judge gave sufficient reasons to inform the parties as to the process of his reasoning to the conclusion that the defence of honest and reasonable mistake had not been made out.

3. In relation to the submission that the judge should have preserved a court-made recording of the appeal proceeding so as to amount to a breach of natural justice, there was no evidence as to the completeness or accuracy of the recording nor the resultant detriment from the court's refusal to make a copy available. In those circumstances the appellant had not been denied natural justice.

4. In relation to the submission that the charges were defective because they were duplicitous, there is no duplicity if a charge refers to one act of cruelty having certain characteristics as opposed to more than one such act. The distinction, broadly speaking, is between a statute which penalises one or more acts, in which case two or more offences are created, and a statute which penalises one act if it possesses one or more forbidden characteristics. In the latter case there is only one offence, whether the act under consideration in fact possesses one or several of such characteristics.

***Romeyko v Samuels* (1972) 2 SASR 529; (1972) 19 FLR 322, applied.**

5. Where a charge alleged that the appellant did knowingly or negligently do or omit to do an act between certain dates, the charge was defective in that it referred to two offences – by the commission of an act or by an omission with proscribed characteristics. Such a charge was patently duplicitous and could not be saved by the operation of s27(1) or s50(1) or (2) of the *Magistrates' Court Act* 1989. Each act of cruelty should have been the subject of a separate charge.

6. The reasons given by the judge for the making of the costs order were inadequate in that there was no explanation given for awarding costs on the County Court civil scale, the scale "D" being the highest, the items included in the calculation of the total, and the reason why the amount of $30,000 was "taxed off".

WILLIAMS J:

1. This is an application by originating motion for declarations and relief in the nature of *certiorari* in relation to orders of the second defendant, the County Court of Victoria at Hamilton. The challenged orders were made after an unsuccessful appeal by the plaintiff ("Mrs Mansbridge") from the decision of the Magistrates Court at Hamilton convicting her of offences under the *Prevention of Cruelty to Animals Act* 1986 ("the Act") and awarding costs in favour of the first defendant ("Mr Nichols").

The material before the Court

2. Mrs Mansbridge relies upon her affidavits sworn on 3 December 2003 and 30 April 2004 respectively, together with their exhibits.

3. Mr Nichols relies upon:

(a) his affidavit sworn on 23 April 2004; and

(b) the affidavits of Michael Russell Coldham of his solicitors sworn on 23 April 2004 and 12 October 2004, respectively, together with their exhibits.

4. The second defendant has filed no material and has agreed to abide by the outcome of the application.

The Act

5. The Act relevantly provided:

"**9. Cruelty** (1) A person who—...
(c) knowingly or negligently does or omits to do an act with the result that unnecessary, unreasonable or unjustifiable pain or suffering is caused to an animal; or ...
(f) is the owner of or has the possession or custody of an animal which is confined or otherwise unable to provide for itself and fails to provide the animal with proper and sufficient food, drink and shelter; or ...
(i) is the owner of or has the possession or custody of a sick or injured animal and knowingly, negligently or unreasonably fails to provide veterinary or other appropriate attention or treatment for the animal; or ... commits an act of cruelty upon that animal and is guilty of an offence.
Penalty: 60 penalty units or imprisonment for 6 months.

(2) It is a defence to a charge under sub-section (1) against an owner of an animal to prove that, at the time of the alleged offence, the owner had entered into an agreement with another person by which the other person agreed to care for the animal.

10. Aggravated cruelty (1) A person who commits an act of cruelty upon any animal which results in the death or serious disablement of the animal commits an act of aggravated cruelty upon that animal and is guilty of an offence.
Penalty: 120 penalty units or imprisonment for twelve months.

(2) A person who is guilty of an offence under sub-section (1) may be liable to the penalty for that offence in addition to or instead of any other penalty to which the person is liable under section 9."

6. Mrs Mansbridge was charged with eight offences under the Act and convicted of seven. Because she challenges the formulation of the charges, I will set them out and refer to the particulars provided as well as to relevant submissions made in the Magistrates' Court and the County Court.

The charges

7. The charges were in the following terms:

> "1. The defendant at Hamilton between 11/08/2001 and 11/09/2001 did commit an act of cruelty upon an animal, to wit a merino sheep, in that she did knowingly or negligently do or omit to do an act with the result that unnecessary, unreasonable or unjustifiable pain or suffering was caused to the animal.
>
> 2. The defendant at Hamilton between 11/08/2001 and 11/09/2001 did commit an act of cruelty upon an animal, to wit a merino sheep, in that she was the owner of or did have possession or custody of an animal which was confined or otherwise unable to provide for itself and failed to provide the animal with proper and sufficient food, drink and shelter.
>
> 3. The defendant at Hamilton between 11/08/2001 and 11/09/2001 did commit an act of cruelty upon an animal, to wit a merino sheep, in that she was the owner of or did have possession or custody of a sick or injured animal and knowingly, negligently or unreasonably failed to provide veterinary or other appropriate attention or treatment for the animal.
>
> 4. The defendant at Hamilton on or around 11/09/2001 did commit an act of aggravated cruelty upon an animal, to wit a merino sheep, in that she did commit an act of cruelty which resulted in the death or serious disablement of the animal.
>
> 5. The defendant at Hamilton between 11/08/2001 and 11/09/2001 did commit an act of cruelty upon animals, to wit a flock of merino sheep, in that she was the owner of or did have possession or custody of the animals which were confined or otherwise unable to provide for themselves and failed to provide the animals with proper and sufficient food, drink and shelter.
>
> 6. The defendant at Hamilton between 11/08/2001 and 2/10/2001 did commit an act of cruelty upon animals, to wit a flock of merino sheep, in that she was the owner of or did have possession or custody of sick or injured animals and knowingly, negligently or unreasonably failed to provide veterinary or other appropriate attention or treatment for the animals.
>
> 7. The defendant at Hamilton on or around 11/09/2001 did commit an act of aggravated cruelty upon animals, to wit 12 merino sheep, in that she did commit an act of cruelty which resulted in the death or serious disablement of the animals."

The particulars

8. After a written request for further and better particulars of the charges, on 20 June 2002 Mr Nichols' solicitors had supplied Mrs Mansbridge's solicitors with the following further and better particulars of each of the charges:

> A. As to [charge 1]:
> (i) over a period of time between 11 August 2001 and 11 September 2001.
> (ii) on the defendant's property at 4985 Strathkellar Road, Hamilton.
> (iii) (a) failing to provide sufficient food, water and shelter;
> (b) failing to provide acceptable animal husbandry in the form or appropriate fleece harvesting;
> (c) failing to administer veterinary treatment in the form of lice and worm control;
> (d) failure to administer appropriate attention;
> (e) failure to provide adequate stock numbers for the size and/or condition of the property;
> (f) failure to destroy any cast animal in a humane manner;
> (iv) from the observations and statements of Inspector Nichols and Dr Rainsford and the post-mortem results obtained by Dr Rainsford.
>
> B. As to [charge 2]:
> (i) over a period of time between 11 August 2001 and 11 September 2001;
> (ii) on the defendant's property at 4985 Strathkellar Road, Hamilton;
> (iii) (a) failing to provide sufficient food, water and shelter;
> (b) failure to provide adequate stock numbers for the size and/or condition of the property;
> (iv) from the observations and statements of Inspector Nichols and Dr Rainsford and the post-mortem results obtained by Dr Rainsford.
>
> C. As to [charge 3]:
> (i) over a period of time between 11 August 2001 and 11 September 2001;
> (ii) on the defendant's property at 4985 Strathkellar Road, Hamilton;
> (iii) (a) failing to administer veterinary treatment in the form of lice and worm control;
> (b) failure to administer appropriate attention;

(c) failure to destroy any cast animal in a humane manner;
(iv) from the observations and statements of Inspector Nichols and Dr Rainsford and the post-mortem results obtained by Dr Rainsford.

D. As to [charge 4]:
(i) on 11 September 2001;
(ii) on the defendant's property at 4985 Strathkellar Road, Hamilton;
(iii) (a) failing to provide sufficient food, water and shelter;
(b) failing to provide acceptable animal husbandry in the form or appropriate fleece harvesting;
(c) failing to administer veterinary treatment in the form of lice and worm control;
(d) failure to administer appropriate attention;
(e) failure to provide adequate stock numbers for the size and/or condition of the property;
(f) failure to destroy any cast animal in a humane manner;
(iv) from the observations and statements of Inspector Nichols and Dr Rainsford and the post-mortem results obtained by Dr Rainsford.

E. As to [charge 5]:
(i) over a period of time between 11 August 2001 and 11 September 2001;
(ii) on the defendant's property at 4985 Strathkellar Road, Hamilton.
(iii) (a) failing to provide sufficient food, water and shelter;
(b) failure to provide adequate stock numbers for the size and/or condition of the property;
(iv) from the observations and statements of Inspector Nichols and Dr Rainsford and the post-mortem results obtained by Dr Rainsford.

F. As to [charge 6]:
(i) over a period of time between 11 August 2001 and 2 October 2001;
(ii) on the defendant's property at 4985 Strathkellar Road, Hamilton
(iii) (a) failing to administer veterinary treatment in the form of lice and worm control;
(b) failure to administer appropriate attention;
(iv) from the observations and statements of Inspector Nichols and Dr Rainsford and the post-mortem results obtained by Dr Rainsford.

G. As to [charge 7]:
(i) on 11 September 2001;
(ii) on the defendant's property at 4985 Strathkellar Road, Hamilton;
(iii) (a) failing to provide sufficient food, water and shelter;
(b) failing to provide acceptable animal husbandry in the form or appropriate fleece harvesting;
(c) failing to administer veterinary treatment in the form of lice and worm control;
(d) failure to administer appropriate attention;
(e) failure to provide adequate stock numbers for the size and/or condition of the property;
(f) failure to destroy any cast animal in a humane manner;
(iv) from the observations and statements of Inspector Nichols and Dr Rainsford and the post-mortem results obtained by Dr Rainsford;
("the particulars").

Background

9. Mr Nichols, an inspector employed by the RSPCA, was the informant in the prosecution of Mrs Mansbridge in the Magistrates' Court. A report had been received by him from a Mr Warburton in relation to a number of dead sheep he had observed in a paddock on Mrs Mansbridge's Hamilton property when riding his motorcycle in the vicinity.

10. On 11 September 2001 Mr Nichols attended the property in the company of a District Veterinary Officer, Dr Rainsford, and two police officers. The party had inspected the subject sheep and photographs were taken by Mr Nichols. Dr Rainsford conducted an autopsy on one of the dead sheep ("the post-mortem sheep") and took samples from five other dead sheep.

11. At the hearing of the charges at the Magistrates' Court, on 10 October 2002, the issue of the sufficiency of the particulars was raised by counsel for Mrs Mansbridge and by counsel representing her husband ("Mr Mansbridge"). Mr Mansbridge also faced charges relating to the subject sheep at that time, although those charges were subsequently withdrawn after Mrs Mansbridge's ownership of the sheep was established. The transcript of the relevant exchanges between counsel and the Magistrate was exhibited to the affidavit of Mr Nichols. Each party sought to use it to support submissions in this Court as to whether or not Mrs Mansbridge had been denied procedural fairness in the County Court appeal.

12. The sheep the subject of each charge were identified in the Magistrates' Court at the request of counsel for Mrs Mansbridge. Her counsel also argued that the particulars created uncertainty, in that they might have referred to the same act or omission in relation to different charges. He mentioned the possibility of resulting "overt duplicity" but went on to say:

> "But until someone actually turns their mind to it it's very hard to run a case such as this. But, look, ordinarily – my friend knows his case, he will probably be able to tell you – just say how it is that he puts his case and if he can point to an act of what he says to be cruelty in relation to any particular animal it might be something we can just cope with."

13. Counsel for Mrs Mansbridge submitted that it was duplicitous "to put a number of sets of facts and encompass those in one charge". He urged the court to order particulars in relation to the charges or to strike them out and allow the prosecution to file fresh charges.

14. Counsel for Mr Nichols contended that the defence was trying to delay the proceeding for tactical reasons. He maintained that the particulars in relation to each charge were not identical, as had been asserted. He submitted that he could not make an election because s9(1) of the Act set out the different ingredients of the different proscribed acts of cruelty. He suggested that the evidence should be called and that counsel for Mrs Mansbridge and her husband could seek to have the matter stood down if they were "embarrassed about anything".

15. His Worship accepted the prosecution's submissions that each charge was quite separate. He refused to adjourn the hearing. Counsel for Mrs Mansbridge stated that he did not want an adjournment. More discussion ensued and eventually the evidence commenced, with the apparent concurrence of counsel for Mrs Mansbridge.

16. The particulars were amended, by consent, before the commencement of the evidence, by the deletion of the references to shelter in charges 2 and 5. Although no amendment was made, counsel for Mr Nichols also informed the court that he would not rely upon the reference in paragraph (c) of the particulars to charge 3 to "failure to destroy any cast animal in a humane manner." I note at this point, however, that counsel for Mr Nichols told this Court that his recollection was that he did not rely upon that particular of any of the charges, apart from the first.

17. The Magistrate convicted Mrs Mansbridge of seven offences under the Act and dismissed the eighth charge. She appealed from the orders to the County Court.

18. It was common ground that there was no evidence of the issues of uncertainty, lack of particularity or duplicity being raised in oral argument in the County Court. Counsel for Mrs Mansbridge, however, contended in this Court that he did raise the issues in the County Court in written submissions handed up at the end of the argument ("the written submissions"). In so far as it was necessary for the purposes of her case, counsel for Mrs Mansbridge argued that the written submissions were incorporated into the record by his Honour's acknowledgment that he had read them.

The written submissions

19. The written submissions included the following statements relied upon by counsel for Mrs Mansbridge:

> (a) as to charge 1:
> "This charge is in relation to the cast sheep 'in the sticks' or 'paddling' sheep.
> The precise crime in (sic) unstated but it is presumed to be failing to inspect the sheep often enough.":
>
> (b) as to charges 3 and 6:
> "It is to be noted that only one act or omission can be contained in the one charge. The prosecution is not permitted to switch from knowingly to negligently to unreasonably at whim.
> The omission should be specified."
>
> (c) as to charge 4:
> "This charge subsumes all the elements in charge 2 or in the alternative charge 3, and requires further proof that the act or omission must have 'resulted in', in this case, death.
> ...
> The inadequacies in charges 2 and 3 are all present in this charge.

(d) as to charge 7:
"This charge subsumes all the elements in charge 5 or in the alternative charge 6, and requires further proof that the act or omission must have 'resulted in', in this case, death."

20. Counsel for Mrs Mansbridge submitted that he would have addressed the issues of uncertainty, duplicity or lack of particularity in his oral submissions to his Honour, but conceded that the Court could not take that submission into account as evidence of the fact that the alleged oral submissions had been made. The submission was contested by counsel for Mr Nichols, but no relevant evidence was adduced by either side.

The reasons

21. On appeal, Mrs Mansbridge was convicted again of the seven offences the subject of the Magistrates' Court convictions. She was fined the sum of $1000 in relation to the convictions in respect of each of the charges of commission of an act of cruelty under s9(1) of the Act and fined $2000 in relation to each of the two charges of aggravated cruelty. She was also disqualified from having custody of any sheep for a period of two years from 30 August 2003 and ordered to pay costs in the sum of $55,000.

22. The judgment of the County Court was delivered on 14 July 2003. In his reasons for decision ("the reasons") his Honour made detailed reference to the evidence on the appeal. The reasons were recorded in Mrs Mansbridge's 3 December 2003 affidavit, as well as in those filed on behalf of Mr Nichols. To the extent that the material was inconsistent, it was agreed that the version provided by Mr Coldham should be adopted. The reasons are too lengthy to be included in full, but I will set out relevant parts.

23. A significant section of the reasons contained most of his Honour's findings and conclusions. Mr Coldham's 23 April 2004 affidavit records that after referring to the evidence, his Honour went on to say:

> "(cc) The charges were as follows: * Count 1 - Sticks sheep [a sheep found cast down in an area of the property known as "the sticks"]. * Count 2 - Post-mortem sheep * Count 3 - Post-mortem sheep * Count 4 - Post-mortem sheep * Count 5 - Other sheep (apart from the post-mortem sheep) * Count 6 - The 12 carcases * Count 7 - The 12 carcases. I note the following findings on all the evidence. (1) The paddock pasture was billiard table like and inadequate; (2) The paddock pasture was overburdened substantially by excessive flock numbers on 11 September 2002; (3) There was no evidence of supplementary feeding to be seen in the paddock; (4) If any supplementary feeding did take place it was inadequate; (5) The sheep were 'hollow'; (6) The sheep were 'confined' in terms of s.9(1)(f) of the Act, despite the condition of the boundary fence along the railway line; (7) The sheep suffered from lice infestation; (8) The sheep numbered four or five in the samples sent to Gribbles Pathology for analysis were found to have carried a 'high' or 'very high' parasite burden; (9) Many of the sheep in the flock were overburdened with wool, and had not been shorn for at least 14 months or more; (10) The wool burdened sheep had not been crutched, pizzled or wigged; (11) There were 13 carcases in the paddock on 11 September 2001 on the visit by the RSPCA inspector, Mr Nichols, and Dr Rainsford, the District Veterinarian Officer; (12) The sheep described by Sean Mansbridge in his evidence as the 'sticks' sheep was not humanely disposed of [when it should have been] and struggled for a long time before it died; (13) The sheep the subject of the post-mortem examination conducted by Dr Rainsford was heavily infected with parasites; (14) The sheep were not adequately drenched. (dd) To describe the sheep as in an appalling condition is an understatement. Mr Warburton could observe their condition to such a level that he reported their condition to the RSPCA. Mrs Mansbridge made no attempt to observe her flock of sheep. If she had done so on 10 or 11 September 2001, she would have seen what Mr Warburton had seen. Mrs Mansbridge was grossly negligent in the care of the sheep. Counts 4 and 7 elements are made out. I find the offences proved."

24. Mrs Mansbridge sought to rely upon a defence under s9(2) of the Act, as well as a defence of honest and reasonable mistake in a state of facts which if true would have resulted in her acquittal; see: *He Kaw Teh v R*[1].

25. She based her argument that the statutory defence was available upon an alleged agreement with her son, Mr Sean Mansbridge, to the effect that he would care for the subject sheep during the relevant period. Her defence of honest and reasonable mistake would appear to have been grounded upon her alleged belief that Mr Sean Mansbridge was caring properly for the animals.

26. It was common ground that the following passage from the 23 April 2004 Coldham affidavit

should be adopted as reflecting what was said by his Honour in relation to the alleged statutory defence:

> "There is a specific defence under the Act under s9(2). That is not an excuse, but a defence. I find this defence is not available, on Mrs Mansbridge's and Sean's evidence. The terms of the agreement were that Mrs Mansbridge said 'I cannot handle both situations and was he willing to help me'. There was some attempt in re-examination of Mrs Mansbridge to rescue the conversation. Sean adopted his mother's evidence."

27. In an exchange between his Honour and counsel for Mrs Mansbridge, after submissions had been made in relation to penalty, counsel for Mrs Mansbridge asked whether his Honour had read the written submissions provided by counsel for Mrs Mansbridge on the last sitting day of the hearing. His Honour confirmed that he had. Counsel for Mrs Mansbridge inquired as to whether the defence of honest and reasonable mistake was available in relation to the charges. His Honour stated that it was. When asked whether the defence applied to the case, his Honour stated that it did not. In response to an inquiry his Honour stated that he had found that a request had been made by Mrs Mansbridge but that no agreement had been made.

The grounds

28. Counsel for Mrs Mansbridge initially relied upon a written statement of the grounds for relief. After submissions from each party, counsel for Mrs Mansbridge produced a more abbreviated statement of the grounds dated 22 October 2004 ("the grounds") which incorporated changes and additional matters which had been canvassed in his oral argument. He relied upon his initial written statement of grounds in relation to his arguments about the challenged orders as to costs.

The alleged defences

29. The grounds first challenged the court's failure to find that alleged defences had been established. It was initially put in the grounds that, having heard certain submissions by counsel for Mrs Mansbridge and having made a certain finding of fact, the court had erred by not finding the defences established. However, counsel for Mrs Mansbridge abandoned that argument during the course of his oral submissions.

30. Counsel for Mrs Mansbridge nevertheless urged the Court to quash the convictions on the basis that the reasons for the findings that neither defence was made out were inadequate and amounted to a "constructive failure to exercise jurisdiction" or an error of law apparent on the face of the record. He also argued that the court's failure to preserve and make available the tape recording of the hearing constituted a breach of a "fundamental requirement of natural justice".

31. Counsel for Mr Nichols argued that his Honour had given sufficient reasons for his decisions in light of the charges, the particulars, the evidence and the arguments put to him on the appeal which were referred to in the judgment. Counsel also submitted that the learned judge had no obligation to make available an internal recording of proceedings made by the Court. He argued that, as his Honour had read from notes, it was reasonable to infer that his reasons had been recorded and he noted that Mrs Mansbridge had made no request for the notes.

The duty to give reasons

32. In *Perkins v County Court of Victoria*[2] Buchanan JA (with whom Phillips and Charles JJA agreed) expressed the view that the requirements of natural justice did not extend to the form in which a decision was pronounced. Buchanan JA also held that there was no general principle that a court's failure to give reasons amounted to a vitiating error of law[3].

33. Buchanan JA considered the criteria for the adequacy of reasons stating[4]:

> "The degree of detailed reasoning required of a tribunal depends upon the nature of the determination, the complexity of the issues and whether the issues are ones of fact or of law or of mixed fact and law, and the function to be served by the giving of reasons. As to the last matter, reasons which are required to enable a right of appeal on questions of fact to be exercised might not be required if an appeal is limited to questions of law. … The extent of the duty to give reasons will depend upon the way in which the case has been conducted. A judge may properly limit himself to determining facts which are in issue and dealing with the points which have been taken and the submissions made in relation to them. (See *Soulemezis v Dudley (Holdings) Pty Ltd* [1987] NSWLR 247 at 270 per Mahoney JA) The court conducting a judicial review by way of *certiorari* is limited to the record of the court or tribunal subject to the review. The evidence and the submissions made to the County Court judge

> can be considered only if they emerge from the record of the County Court and, as will be seen, the record extends no further than the judge's reasons."

34. In *Soulemezis v Dudley (Holdings) Pty Ltd*[5] McHugh JA had noted that it was beside the point that a finding was erroneous:

> "What is decisive is that his Honour's judgment reveals the ground for, although not the detailed reasoning in support of, his finding of fact. But that is enough in a case where no appeal lies against the finding of fact."

35. Counsel for Mr Nichols submitted that it was evident from his Honour's findings of fact and his conclusions that neither the defence under s9(2) nor that based upon an honest and reasonable mistake had been made out.

Constructive failure to exercise jurisdiction

36. Counsel for Mrs Mansbridge relied upon the decision of the New South Wales Court of Appeal in *Fleet v District Court of NSW & Ors*[6], urging the Court to find that his Honour had constructively failed to exercise his jurisdiction as a result of the inadequacy of the reasons in relation to the alleged defences and in other respects.

37. In *Fleet* the defendant challenged his conviction by a District Court judge of an offence of aggravated cruelty to a dog under s6(1) of the *Prevention of Cruelty to Animals Act* 1979 (NSW). An act of "aggravated cruelty upon an animal" was committed under s4(3) of the New South Wales statute if a person committed an act of cruelty upon the animal resulting in its death, deformity or serious disablement or it being in such a physical condition that it was cruel to keep it alive. In a joint judgment, Mason P, Priestley and Handley JJA examined the judge's findings and, in the paragraph relied upon by counsel for Mrs Mansbridge throughout his submissions, said:

> "50. The problem with these findings on the aggravated cruelty charge is that they bear no direct relationship to the elements of the offence as disclosed in the statute. There was no finding of a specific fact or omission, no finding of contravention of any identifiable part of s5(3) [setting out ways of committing such an act], and no finding of the causal factor in s4(3). These absences may in large part have been due to the blatantly ambiguous form of the charge and the lack of assistance given to her Honour by the prosecution. However, the absence of findings on critical aspects of the complicated offence means that the learned judge constructively failed to exercise her jurisdiction (*Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416 at 420; (1947) 64 WN (NSW) 107; 16 LGR (NSW) 82; *Re Wakim; ex parte McNally* [1999] HCA 27; (1999) 198 CLR 511; (1999) 163 ALR 270; 151 FLR 270; (1999) 73 ALJR 839 at [102]; 17 ACLC 1; 24 Fam LR 669; 31 ACSR 99; (1999) 10 Leg Rep 2)."

38. In the passage referred to by their Honours in *Ex parte Hebburn Ltd* Jordan CJ said:

> "It was contended, however, that ... at the worst all that the magistrate had done was to make a mistake of law in construing the section, and the fact that a tribunal has made such a mistake in exercising its jurisdiction does not amount in law to a constructive failure to exercise it. I quite agree that the mere fact that a tribunal has made a mistake of law, even as to the proper construction of a statute, does not necessarily constitute a constructive failure to exercise jurisdiction: *R v Minister of Health* [1939] 1 KB 232 at 245-6). But there are mistakes and mistakes; and if a mistake of law as to the proper construction of a statute investing a tribunal with jurisdiction leads it to misunderstand the nature of the jurisdiction which it is to exercise and to apply 'a wrong and inadmissible test': *Estate and Trust Agencies (1927) Ltd v Singapore Investment Trust* ([1937] AC 898 at 917; [1937] 3 All ER 324); or to 'misconceive its duty' or 'not to apply itself to the question which the law prescribes':*The King v War Pensions Entitlement Appeal Tribunal* ([1933] HCA 30; (1933) 50 CLR 228 at 242-3; 39 ALR 533; (1933) 7 ALJR 169; or 'to misunderstand the nature of the opinion which it is to form': *R v Connell* ([1944] HCA 42; (1944) 69 CLR 407 at 432), in giving a decision in exercise of its jurisdiction or authority, a decision so given will be regarded as given in purported and not real exercise of jurisdiction, leaving the jurisdiction in law constructively unexercised and the tribunal liable to the issue of a prerogative writ of mandamus to hear and determine the matter according to law: *R v Board of Education* ([1910] 2 KB 165."

39. Counsel for Mr Nichols disputed the contention that his Honour had failed to exercise his jurisdiction. He made detailed reference to the charges, the particulars, the submissions of counsel, the findings of the County Court and to his Honour's conclusions. He submitted that the court had made appropriate findings and had addressed the correct questions, generally, and, in particular, in relation to the argued defences.

Conclusion

40. I am not persuaded that the reasons were inadequate in relation to the alleged defences. It follows that I am not persuaded that his Honour constructively failed to exercise his jurisdiction in the sense in which the court found had been the case in *Fleet.*

41. In my view, it can be discerned from the reasons that his Honour found that there had been a request made by Mrs Mansbridge that Mr Sean Mansbridge assist her in caring for the sheep, but that the requisite agreement under s9(2) of the Act had not been made and so the statutory defence had not been made out.

42. It is also apparent that having made those findings, his Honour took the view that the prosecution had proved that Mrs Mansbridge had not held an honest and reasonable belief that Mr Sean Mansbridge was caring properly for the subject sheep. As counsel for Mr Nichols pointed out, his Honour had also found that Mrs Mansbridge had not inspected the sheep during the relevant period and that she had, therefore, been unable to disagree with the evidence of Dr Rainsford's observations as to their state on 11 September 2001. His Honour referred to Mrs Mansbridge's evidence that she could have checked the condition of the sheep, but did not do so. He also noted Mr Sean Mansbridge's evidence to the effect that he had agreed with his mother's evidence that she had told him that she could not deal with the sheep and had asked whether he was willing to assist.

43. I note that, when questioning his Honour about the availability of the defence, counsel for Mrs Mansbridge addressed the issue by directing his enquiries to the existence of both a request that assistance be given and the making of an agreement between mother and son. There was no reference in the reasons, or in the questions asked by counsel for Mrs Mansbridge, to any other direct evidence of the alleged mistaken belief, apart from that which related to the alleged agreement and must have been rejected.

44. In light of the description of the ambit of the requirement to give reasons for decision in the authorities, the court's findings and his Honour's general rejection of the evidence of Mr Sean Mansbridge, in my view, his Honour gave sufficient reasons to inform the parties as to the process of his reasoning to the conclusion that the defence of honest and reasonable mistake was not made out.

45. In the context of his submissions relating to the adequacy of the findings as to the alleged defences, counsel for Mrs Mansbridge also submitted that his Honour should have preserved a court-made recording of the proceeding and that his failure to do so represented a breach of "a fundamental requirement of natural justice". He relied upon the decision in *Wood v Marsh*[7] when arguing that a tribunal of fact exercising criminal jurisdiction should ensure that adequate reasons are given at the time the decision is made and are properly recorded.

46. In *Wood v Marsh* Malcolm CJ was referring to a challenge to the decision of Justices of the Peace on the basis that no reasons for decision had been given. In a passage relied upon by counsel for Mrs Mansbridge to establish a duty to provide the recording, the Chief Justice stated:

> **"**In the present case, there is no record of the reasons or sentencing remarks of the Justices. Where there are no recording facilities available, it is important that the Justices ensure that they or an officer of the Court makes a note of the reasons for decision and sentence in any case. It is a fundamental requirement of natural justice that a tribunal of fact, particular one exercising criminal jurisdiction, should ensure that adequate reasons, whether for conviction or for sentence are given at the time the decision is made and properly recorded: cf *Harling v Hall* (1997) 94 A Crim R 437 at 443 and 444 per Anderson J; and *Ladlow v Hayes* (1983) 8 A Crim R 377 at 388 and 389 per Walters J."

47. Counsel was unable to point to any other authorities supporting his argument.

48. I am not persuaded that I ought to find that his Honour denied natural justice to Mrs Mansbridge by refusing to hand over the internal tape recording of the proceedings before him. Even if the failure to provide an accurate recording of a hearing could constitute a denial of natural justice, there was no evidence as to the completeness or accuracy of any recording made and the resulting benefit or detriment to the parties from the court's refusal to make it available. This is not a case where no reasons had been provided, as was *Wood v Marsh.* Further, there was no

evidence as to any injustice caused to Mrs Mansbridge, in the circumstances in which she had been represented at the hearing and both she and the solicitor for Mr Nichols had been able to provide evidence on affidavit in relation to the lengthy reasons provided by his Honour. Moreover, I take into account that I was informed by counsel that there had been no request made to the court for any notes made by his Honour.

Duplicity

49. The grounds went on to deal in turn with each of the convictions, arguing that they should be quashed for a number of reasons.

50. Each of the charges was said to have been defective because it was patently and latently duplicitous. It was put that, as a result of the alleged duplicity there was:

> (a) an error of law apparent on the face of the record; and
>
> (b) jurisdictional error by failure to accord procedural unfairness.

Charge 1

51. Counsel for Mrs Mansbridge argued that charge 1 was patently duplicitous as it alleged that an act of cruelty had been committed by Mrs Mansbridge as "she did knowingly or negligently do or omit to do an act" between certain dates. He submitted that a number of offences were encompassed within that allegation, as it was not clear whether an act or an omission was the subject of the charge and what state of mind was alleged.

52. There will be no duplicity if a charge refers to one act of cruelty having certain characteristics, as opposed to more than one such act. The relevant distinction was pointed out by Bray CJ in *Romeyko v Samuels*[8]:

> "The true distinction, broadly speaking, it seems to me, is between a statute which penalises one or more acts, in which case two or more offences are created, and a statute which penalises one act if it possesses one or more forbidden characteristics. In the latter case there is only one offence, whether the act under consideration in fact possesses one or several of such characteristics. Of course, there will always be borderline cases and if it is clear that Parliament intended several offences to be committed if the act in question possesses more than one of the forbidden characteristics, that result will follow."

53. In my view, the reference to the relevant state of mind described a characteristic of the proscribed act or omission constituting an offence under s9(1)(c) of the Act. However, I consider that charge 1 should have specified what offence Mrs Mansbridge had committed, whether by her act or by a failure to act. On its face, the charge might arguably be defective as patently duplicitous by referring to two offences: by the commission of an act or by an omission with the proscribed characteristics. It also might be open to challenge as lacking sufficient particulars to identify the crime alleged against Mrs Mansbridge.

54. In *Walsh v R*[9] Phillips and Buchanan JJA explained at [40]:

> "As we apprehend it, a count is bad for duplicity if it charges more than one offence; on the other hand, if the count charges but one offence and evidence is led of more than one instance of such offending, then the verdict, if against the accused, will be uncertain. This last is sometimes called latent uncertainty because it depends, not so much upon the terms of the count, as upon the case sought to be made by the Crown. Suffice it to refer in this connection to *Johnson v Miller* ([1937] HCA 77; (1937) 59 CLR 467; [1938] ALR 104) and *R v Trotter* ((1982) 7 A Crim R 8)."

55. In *Johnson v Miller*[10] the complaint alleged one offence of selling alcohol from a hotel after hours. The particulars failed to select one sale and evidence was led of a number of occurrences each of which might have constituted a separate offence. Dixon J held that the facts fell "almost exactly" within the statement of Napier J in *Tucker v Noblet*[11] which his Honour quoted at the start of the following passage from his judgment:

> "'It may be possible that a case could occur in which the complaint is good', that is, I take it, apparently good if read apart from the circumstances of the case 'but evidence is admitted which gives rise to duplicity or uncertainty, and where there is some grave embarrassment or prejudice

> of such a character that it cannot be fairly met by any adjournment. If that should happen and the prosecutor should refuse to elect, I think that the court must have some inherent power to secure a fair trial and to prevent an abuse of its process. If all other means fail, the inherent power may extend so far as to justify a dismissal of the complaint: *O'Flaherty v McBride* ([1920] HCA 60; (1920) 28 CLR 283 at p288; 27 ALR 26). But that could only be as a last resort, and in a very unusual case.' ... in many cases, evidence of more than one offence cannot be admitted, and under one charge to take evidence of a number of separate instances of the commission of the same offence because each will indifferently fit the complaint is to pursue a course contrary to law. It cannot be enough to require the complainant to elect among the instances he has proved until after his evidence has been given in full. Where an information is so drawn as to disclose more than one offence and one set of facts amounts to each of the various offences covered by the charge, ... the proper course is to put the complainant to his election. In such a case to wait to the end of his evidence before doing so may cause no injustice. But it is the converse in the present case, where the question is whether the prosecutor should not be required to identify one of a number of sets of facts, each amounting to the commission of the same offence as that on which the charge is based. In my opinion he clearly should be required to identify the transaction upon which he relies and he should be so required as soon as it appears that his complaint, in spite of its apparent particularity, is equally capable of referring to a number of occurrences each of which constitutes the offence, the legal nature of which is described in the complaint. For a defendant is entitled to be apprised not only of the legal nature of the offence with which he is charged but also of the particular act, matter or thing alleged as the foundation of the charge. The court hearing a complaint or information for an offence must also have before it a means of identifying with the matter or transaction alleged in the document the matter or transaction appearing in evidence."[12]

56. Dixon J held that there would be a defect in the particularity of a complaint in circumstances of latent ambiguity where there had been no indication given by amendment, in particulars or by an election, as to which transaction, occasion or occurrence was its subject.

S 27(1) of the *Magistrates' Court Act* 1989

57. Counsel for Mr Nichols argued that, properly construed, s9(1)(c) created only one offence. He also responded generally that the charge was properly framed in light of the provisions of s27(1) of the *Magistrates' Court Act* 1989 ("the *Magistrates' Court Act*") as it followed the wording of s9(1)(c) of the Act.

58. Section 27(1) relevantly provided:

> "**Description in charge 27**
> (1) A charge must describe the offence which the defendant is alleged to have committed and a description of an offence in the words of the Act or subordinate instrument creating it, or in similar words, is sufficient."

59. In *Stanton v Abernathy*[13] the Court of Appeal of the New South Wales Supreme Court considered the validity of an information charging the defendant with one offence of giving evidence which he knew to be false. Gleeson CJ, with whom Priestley and Meagher JJA agreed, considered the operation of s145A of the *Justices Act* 1902 (NSW), an equivalent of s27(1) of the *Magistrates' Court Act*. The Chief Justice held that s145A "does not do away with the common law requirement that an information must identify the essential factual ingredients of the actual offence alleged to have been committed: *Smith v Moody* [1903] 1 KB 56; [1900-3] All ER Rep Ext 1274; *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467; [1938] ALR 104 and *Ex parte Graham; Re Dowling* (1968) 88 WN (NSW) 270; [1969] 1 NSWR 231."[14] His Honour went on to note that the courts had failed to precisely define the circumstances in which s145A would save an information.

60. It is a question of the proper construction of the statute as to whether or not it creates more than one offence. Alternative ways of committing the one offence may be the subject of a charge; see: *R v Ginies*[15]. However, in my view, charge 1 was defective, either because it was patently duplicitous, in that it referred to both an act and an omission by Mrs Mansbridge with certain forbidden characteristics. I am not persuaded that s27(1) of the *Magistrates' Court Act* saved it.

The effect of the particulars

61. The particulars referred to omissions, rather than acts, but did not cure the defect by identifying one transaction or occurrence constituting the alleged subject omission. Indeed, the particulars specified a number of omissions constituting a number of separate offences as the

subject matter of the charge. Subsequently, evidence relevant to a number of different offences was led. Accordingly, the particulars and the evidence revealed that charge 1 was also latently duplicitous or ambiguous.

S50(1) of the *Magistrates' Court Act* 1989

62. Counsel for Mr Nichols sought to call in aid the provisions of s50(1) of the *Magistrates' Court Act* to argue that any defect of lack of particularity would not have deprived the court of jurisdiction to convict Mrs Mansbridge. He relied upon the interpretation by Brennan J in *John L Pty Ltd v Attorney-General for New South Wales*[16] of a similarly worded provision in s6(1) of the *Supreme Court (Summary Jurisdiction) Act* 1967 (NSW).

63. S50 of the *Magistrates' Court Act* relevantly provided:

> "**50. Power to amend where there is a defect or error**
> (1) On the hearing of a proceeding the Court must not allow an objection to a charge, summons or warrant on account of any defect or error in it in substance or in form or for any variance between it and the evidence presented in the proceeding but the Court may amend the charge, summons or warrant to correct the defect or error. (2) An order must not be set aside or quashed only because of a defect or error in form but the Court may amend the order to correct the defect or error."

64. In *Stanton v Abernathy and Anor*[17] the information was held to be defective because of lack of particularity and latent duplicity. Gleeson CJ referred to s30 of the *Justices Act* 1902 (NSW), a provision in similar terms to those of s50(1) of the *Magistrates' Court Act*, and to relevant authorities, including *John,* and concluded that the technical invalidity of the information was overcome by s30. His Honour noted that the requirements of natural justice might however necessitate an order for particulars.[18]

65. He then went on to consider the effect of the duplicity:

> "In relation to the matter of duplicity, the relevant authorities are not easy to reconcile. There is a line of cases, commencing with *Rodgers v Richards* [1892] 1 QB 555, and continuing through *Ex parte Williams* (1909) 9 SR (NSW) 140; 26 WN (NSW) 9, and *Hedberg v Woodhall* [1913] HCA 2; (1913) 15 CLR 531; 19 ALR 95, which hold that duplicity is a defect in substance of a kind that falls squarely within the language of s30 and corresponding provisions elsewhere, and that a magistrate may not dismiss an information simply on the ground of duplicity. There is another line of cases, including *Edwards v Jones* [1947] KB 659; *Byrne v Baker* [1964] VicRp 57; [1964] VR 443; *Ex parte Graham; Re Dowling*; *R v Elliott* (1974) 8 SASR 329 and *Chugg v Pacific Dunlop Ltd* [1988] VicRp 49; [1988] VR 411, which hold that when a magistrate is confronted with an information which suffers from the defect of duplicity he or she should require the prosecution to elect, and if no election is made then the information is to be regarded as bad and should be dismissed. Attempts at reconciliation of the authorities are not made easier by references in the second group of cases to the possibility that those in the first group are no longer good law. However, as was noted above, Brennan J in the High Court has very recently followed and applied *Hedberg v Woodhall.*"[19]

66. His Honour held that the High Court's decision in *Johnson v Miller*[20] was applicable. He referred to the magistrate's duty to act fairly in a committal hearing and continued to state:

> "The authorities do not in my view justify a conclusion that the information is incurably defective, or not such as to found jurisdiction in the magistrate. However, the proper course now to be pursued, it being apparent that the prosecutor is alleging more than one offence, is for the prosecution to be required both to give further and better particulars in accordance with the following portion of this judgment, and either elect to charge the appellant with making one false statement to the exclusion of any others, or alternatively to frame and propound additional charges, laying one charge in respect of each alleged false statement. If the prosecution declines to adopt either of those courses, then the information should be dismissed."[21]

67. In this case there was no amendment of the charge, the particulars revealed ambiguity and no election was made by the informant after submissions pointing out the vice of the duplicitous nature of the charge by counsel for Mr and Mrs Mansbridge in the Magistrates' Court. The charge was not dismissed. The matter was not dealt with in the County Court and his Honour made his findings and convicted Mrs Mansbridge on the first charge, without specifying which crime was its subject, despite the reference in the written submissions to the nature of the offence not having been specified.

68. Each act of cruelty should have been the subject of a separate charge. In *Walsh v Tattersall*[22] Kirby J held that the statute allegedly contravened by the appellant created a separate offence each time a prohibited benefit payment was obtained and that the subject count was defective because of latent duplicity. Kirby J described the effect of the latent duplicity when he concluded:

> "As in *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467 at 498; [1938] ALR 104), the present appellant has few merits on his side; except legal merits, which are sufficient. This Court should adhere to its longstanding insistence that, save for statutory warrant and for the exceptional cases of continuing offences or facts so closely related that they amount to one activity, separate offences should be the subject of separate charges. The Act under which the appellant was charged clearly contemplated that obtaining each payment or benefit was a separate offence. Each should have been the subject of a separate charge. This was apparently the original intention of the police and perhaps the prosecutor. Unwisely and in my view, unlawfully, it was departed from. That departure resulted in a count which manifested the defect of latent duplicity. The significance of that defect was not really demonstrated until all of the evidence was produced. The result was that nobody — prosecutor, accused or magistrate — directed attention, or sufficient attention, to the ingredients of each individual offence. That is enough to strike at the validity of the trial." [23]

69. Notwithstanding any effect of s50(1) of the *Magistrates' Court Act* in relation to the charge itself, I consider that the conviction in relation to charge 1 was uncertain and there was a resulting denial of procedural fairness to Mrs Mansbridge. The conviction is therefore, liable to be quashed; see: *S v R*[24]*; R v Trotter*[25].

S50(2) of the *Magistrates' Court Act* 1989

70. Counsel for Mr Nichols, however, sought to rely upon what might be described as a privative provision in s50 (2) of the *Magistrates' Court Act* in support of an argument that *certiorari* would not lie to quash any of the challenged convictions, including that relating to charge 1, because the defect or error in the *order* was one of form. He relied upon the characterisation of the defect in a duplicitous *charge* as one of form by Kirby J and by Dawson and Toohey JJ in their joint judgment in *Walsh v Tattersall* [26].

71. Counsel for Mrs Mansbridge responded that the error was one going to the jurisdiction of the County Court and that a privative provision would not operate to deprive the Court of the power to grant *certiorari*, unless it did so in explicit terms[27]. He relied upon *Byrne v Baker*[28] and *Chugg v Pacific Dunlop Ltd*[29] to argue that the defect of duplicity in the charge went to the jurisdiction of the court and that, accordingly, *certiorari* would remain available in the absence of express words depriving the Court of its power to issue the writ.

72. Counsel for Mr Nichols responded that the Full Court in *Byrne v Baker*[30] had decided that prohibition was available because a denial of natural justice had resulted from the duplicity in the information and that it had expressly declined to decide as to the correctness of two cases in the Divisional Court[31] in which duplicity had been held to deprive justices of jurisdiction to allow an amendment or to proceed to conviction. He also referred to Gleeson CJ's summary of the authorities relating to the effect of a duplicitous charge in *Stanton v Abernathy*

73. Counsel for Mrs Mansbridge referred to the Full Court decision in *R v Chairman of General Sessions at Hamilton; ex parte Atterby*[32] in which s164 of the *Justices Act* 1957 was relied upon to prevent the quashing of a decision of the Hamilton court of petty sessions in circumstances in which it was held that there had been a denial of natural justice in the hearing. S164 made specific reference to the availability of *certiorari* providing that no proceeding "touching any order made ... - shall be vacated or quashed for want of form or be removed ... by *certiorari* or any other writ or process whatsoever into the Supreme Court". Lowe J held that the denial of procedural fairness was analogous to a defect of jurisdiction in relation to which relief by *certiorari* would remain available in accordance with a Privy Council ruling in *Colonial Bank of Australasia v Willan*[33].

74. In *Atterby*[34] Smith J held that there had been a want of jurisdiction on another basis, but relevantly also stated:

> "But I do not desire to be taken as expressing any dissent from the view that if there is, in some fundamental respect, a denial of the rights ordinarily allowed to a party in judicial proceedings, then the writ of *certiorari* may be available, notwithstanding that it has been `taken away' by statute."[35]

75. Counsel for Mr Nichols sought to distinguish *Atterby*[36], arguing that there a denial of the right to properly put a case gave rise to the want of procedural fairness considered analogous to a want of jurisdiction in all the circumstances. He contended that s50(2), however, applied in this case where, he argued, there was jurisdiction in the County Court to proceed to a conviction.

76. Counsel for Mr Nichols made extensive reference to the decision of the Full Court of the Supreme Court of South Australia in *R v Elliott; ex p Elliott*[37]. In *Elliott*[38] Bray CJ expressed the view that various authorities, including *Hedberg v Woodhall*[39] and *Byrne v Baker*[40], related to the jurisdiction of the court to proceed in a case after duplicity had come to light, rather than to the question of the jurisdiction of a court of summary jurisdiction to hear a proceeding commenced by a duplicitous complaint[41]. The Chief Justice held that, although the court may have had jurisdiction to embark upon the enquiry, it may have yet lacked the jurisdiction to make the order ultimately made.[42]

77. Bray CJ relevantly considered the effect of s186(2) of the *Justices Act* 1921-1972 (SA) which was in similar terms to s50(2), providing:

> "(2) No judgment, conviction, or order of a court, or other proceeding before justices, shall be quashed or set aside for any mere matter of form or technical error, or mistake in any name, date, or title, or in any matter of description only; but in all cases regard shall be had alone to the substantial merits and justice of the case."

78. The learned Chief Justice said:

> "Questions like the present however, are not mere matters of form or technical error within the meaning of sections like s186(2); see: *R v North* ((1852) 6 Dow, & Ry. K.B. 143), where a conviction in terms of an information bad for duplicity was quashed on *certiorari*, notwithstanding the provisions of a statute which said that in proceedings of the nature in question no advantage could be taken of a defect of form. Technical in one sense the point undoubtedly is, but it is not a mere matter of technical error, but one which, in my view, goes to the jurisdiction of the court."[43]

79. S50(2) does not expressly purport to affect the Court's power to grant relief by way of *certiorari*, as did s164 of the *Justices Act* 1957. It also expressly refers to a defect in form in the challenged *order*, as opposed to the charge. I have already stated my view that the conviction in relation to charge 1 was uncertain as a result of the latent duplicity or ambiguity revealed by the particulars and the evidence. As a result, in my view, Mrs Mansbridge had suffered procedural unfairness or a denial of natural justice and her conviction was liable to be set aside on the basis that the trial was fundamentally flawed, rather than because of any defect in form of the order. *Certiorari* is available to quash a decision of an inferior court in such a case; see *Craig v South Australia*[44]. In my view s50(2) does not apply to prevent the conviction in relation to charge 1 being quashed.

Refusal of *certiorari* in exercise of discretion

80. Counsel for Mr Nichols argued that, in any event, the Court should refuse *certiorari* in the exercise of its discretion, because, in his submission, Mrs Mansbridge had either abandoned the points now raised or had acquiesced in the conduct of the proceeding without raising the duplicity argument again at all, or at least until counsel's written submissions were made to his Honour at the end of the hearing.

81. In *Walsh v Tattersall*[45] Kirby J stated that it was not the common law that the objection to duplicity could not be taken first on appeal, despite some suggestions by writers to the contrary.

82. The issue of waiver and election was discussed by McInerney J in *R v Lilydale Magistrates' Court*[46]. His Honour summarised the authorities canvassed and concluded:

> "I think the ultimate question is whether on the whole of the facts the applicant is entitled to *certiorari* and I think this is particularly true where the challenge to the order is based on an allegation of a denial of natural justice. In such a situation the Court might well look to the overall question of the justice of the whole situation."[47]

83. Counsel for Mr Nichols referred to relevant authorities in which *certiorari* had been refused, which turned on their own facts[48]. He relied upon the decision of Sangster and Jacobs JJ to refuse the writ in *Stanton v Abernathy*[49]. Both Sangster J[50] and Jacobs J[51] held that *certiorari* should be withheld in that case because the defendant had acquiesced in the course of the trial,

consenting to all charges laid against him being heard together (including the six erroneously included in the duplicitous complaint) and, significantly, because the more appropriate remedy of an appeal was available to correct the error. Bray CJ, however, considered that *certiorari* should go when an excess or want of jurisdiction appeared on the face of proceedings, notwithstanding the "practical convenience" of the approach of the other members of the court.[52]

84. I am not persuaded that the relief should be refused. I am not satisfied that the point was abandoned, as was argued. Nor, in light of the written submissions made (albeit late in the piece) as to the need for specificity with regard to charge 1, can it be successfully argued that Mrs Mansbridge had waived her rights or elected not to take the point. Further, I take into account that there is no appeal available to Mrs Mansbridge from the decision of his Honour.

The foregone conclusion argument

85. Finally, counsel for Mr Nichols submitted that the writ should be refused because it would be futile to quash the conviction as the result of any further hearing would be a foregone conclusion. Suffice it to say that I am not persuaded by this argument. It is possible, in my opinion, that the admissible evidence relevant to any particular offence might not satisfy the court re-hearing the matter that the crime had been committed.

Charge 2

86. Charge 2 related to the post-mortem sheep. It was phrased in the words of s9(1)(f) of the Act which created the offence. Accordingly, it complied with the requirements of s27(1) of the *Magistrates' Court Act*. In my opinion, the words of s9(1)(f) create one offence which might be made out by proof that the owner of a sheep failed to provide it with proper and sufficient food, drink and shelter. The assertion that charge 2 was patently duplicitous was not made out.

87. I am not persuaded by the argument that the reference in the particulars to overstocking gave rise to latent duplicity or ambiguity. In my view, the reference to overstocking rather particularised the failure to provide sufficient food or drink to a confined animal which was otherwise unable to provide those things for itself. It was clear from the findings made by his Honour that he found the offence made out by reason of the observed condition of the sheep and the post-mortem results. Neither the particulars nor the evidence demonstrated any latent duplicity or uncertainty in the charge, in my view, and I am not persuaded that the conviction was affected by duplicity, ambiguity or uncertainty as contended.

Charge 3

88. Charge 3 also related to the post-mortem sheep. Counsel for Mrs Mansbridge challenged charge 3 as patently or latently duplicitous.

89. A single offence may be committed by two or more similar acts connected to each other and forming part of the same transaction: see: *DPP v Merriman*[53]. In my view, the charge, which followed the wording of s9(1)(i) of the Act creating the offence, could be interpreted as describing, as a single act of cruelty to a sick or injured animal, a failure to deal with its condition by providing appropriate treatment or attention, whether that be in the nature of requisite veterinary or other care, either knowingly, negligently or unreasonably. I am not persuaded that it was patently duplicitous.

90. Counsel for Mr Nichols made it clear at the outset in the Magistrates' Court that the reference in paragraph C(iii)(c) of the particulars to charge 3 to the failure to dispose of the animal humanely was not to be pursued.

91. Counsel for Mrs Mansbridge nevertheless argued that the charge was latently duplicitous because the particulars referred not only to failure to provide veterinary treatment in the form of lice and worm control, but also to failure to administer appropriate attention. Further, he argued that the particulars failed to specify the alleged mental element, not indicating whether it was alleged that Mrs Mansbridge failed to provide the attention or treatment "knowingly, negligently or unreasonably". He submitted that the particularised failure to administer veterinary treatment for lice and worm control amounted to one crime and the failure to administer appropriate attention to another.

92. Counsel for Mr Nichols responded that the offence was constituted by a composite activity

of failing to address the sickness or ailment of the post-mortem sheep. The sickness or ailment was its parasitic burden which should have been treated by veterinary and perhaps other means such as crutching the animal. The ailments included what was reported by Mr Nichols and Dr Rainsford, including the malnourished state of the post-mortem animal.

93. In my view, there was one offence described in s9(1)(i) and it was that of failing to provide the appropriate treatment for the animal. The particulars and the evidence did not reveal a latent duplicity or ambiguity in the charge. Accordingly, the conviction was not uncertain. His Honour accepted the evidence of Dr Rainsford and Mr Nichols as to the condition of the post-mortem sheep. He found that Mrs Mansbridge had been grossly negligent in the care of the sheep, making it clear that he found the criminal standard of negligence to have been established.

Charge 4

94. Charge 4 referred to a particular act of cruelty resulting in the death or serious disablement of the post-mortem sheep. The particulars relating to charge 4 combined the particulars of charges 2 and 3, with the addition of a particular of failure to provide acceptable animal husbandry in the form of appropriate fleece harvesting. However, the date on which the alleged act of aggravated cruelty was said to have occurred was given as 11 September 2001, whereas the particulars specified the period of time between 11 August and 11 September 2001 as that relating to charges 2 and 3. Once again, the charge was challenged as being patently and latently duplicitous.

95. The act of cruelty alleged to have *resulted in* the death or serious disablement was not specified in the charge, the particulars or the reasons. His Honour accepted Dr Rainsford's evidence, but Dr Rainsford had failed to identify the precise cause of death or disablement of the sheep. She found that the subject sheep were suffering from neglect. His Honour also accepted the evidence of Mr Nichols, but his evidence did nothing to identify the act of aggravated cruelty the subject of the charge and the conviction. His Honour found that Mrs Mansbridge had been grossly negligent in the care of her sheep and that the elements of the aggravated cruelty charges 4 and 7 had been made out.

96. I am persuaded by the submissions of counsel for Mrs Mansbridge that the charge was latently duplicitous or ambiguous and the conviction also therefore uncertain and liable to be quashed. There was in my view a denial of procedural fairness to Mrs Mansbridge by reason of the uncertainty of the conviction and the proceeding was fundamentally flawed.

97. For the reasons given in relation to charge 1, I am not persuaded that the conviction should not be quashed as a result of the operation of s50(2) of the *Magistrates' Court Act*.

98. Nor am I persuaded, in all the circumstances, that there was some waiver, acquiescence or election on the part of counsel for Mrs Mansbridge which should result in the remedy of *certiorari* being refused in the exercise of the Court's discretion. I note that I have taken into account in this regard the somewhat oblique references to duplicity in relation to charge 4 in the written submissions. No appeal is available and the uncertain conviction should not be allowed to stand.

99. I am further not persuaded that it would be futile to quash the conviction in the sense that it would be a foregone conclusion that Mrs Mansbridge would be convicted of an offence of aggravated cruelty. That will depend upon the elements of the offence with which she is charged and the evidence adduced at any re-hearing.

Charges 5 and 6

100. Charges 5 and 6 were in the same terms as charges 2 and 3, respectively, except that they related to the flock comprised of 12 of the 13 dead sheep, the post-mortem sheep having been excluded. The particulars were identical to those provided in relation to charges 2 and 3.

101. Counsel for Mrs Mansbridge made the same points in relation to charges 5 and 6 as were made in relation to charges 2 and 3. The arguments are rejected for the same reasons. I am not satisfied that the charges were defective by reason of any duplicity. I am not persuaded that the convictions were uncertain.

Charge 7

102. Charge 7 mirrored charge 4 save that it also applied to the dead sheep apart from the post-mortem sheep. Once again the particulars identified 11 September 2001 as the date of the offence whereas the particulars to charges 4 and 5 (which were included as particulars of charge 7) specified the period between 11 August 2001 and 11 September 2001 and 11 August to 2 October 2001, respectively, as the date of those alleged offences. The same challenges were mounted to the charge and to the conviction. I consider that the conviction is uncertain and the proceeding fundamentally flawed for the same reasons as those given in relation to charge 4.

103. For the reasons given in relation to other charges, I am of the view that s50(2) of the *Magistrates' Court Act* is also inapplicable. I am not persuaded that *certiorari* should be refused in the exercise of my discretion because of any alleged waiver or acquiescence or because a conviction on a specific charge of aggravated cruelty relating to the 12 sheep would be a foregone conclusion, rendering the remission of the charge futile.

Failure to give adequate reasons

104. Counsel for Mrs Mansbridge attacked each of the convictions on the basis that his Honour had failed to give adequate reasons and so had denied procedural fairness to his client. The alleged failure was said in each case to have been so fundamental as to have amounted to a constructive failure to exercise jurisdiction of the type identified by the court in *Fleet v District Court of NSW & Ors* [54].

Charges 1, 4 and 7

105. As I have found that the convictions in relation to charges 1, 4 and 7 should be quashed for uncertainty, it would seem futile to examine the adequacy of the reasons. It might perhaps be arguable that the reasons were adequate to explain the conclusions reached by his Honour, in light of the way in which the case was put to him. However, since I have concluded that the precise crime of which Mrs Mansbridge had been convicted had not been identified, it would appear logically to follow that the reasons were inadequate.

106. I do not propose to consider the challenge to the adequacy of the reasons in relation to those convictions any further.

Charges 2 and 5

107. It was submitted in the grounds and orally by counsel for Mrs Mansbridge that the reasons given in relation to the finding that the post-mortem sheep the subject of charge 2 and the rest of the dead sheep the subject of charge 5 were "confined" were inadequate.

108. I am not persuaded by this submission. His Honour found that the sheep were confined, notwithstanding the state of the fence. As counsel for Mr Nichols submitted, the reasons show that his Honour turned his mind to the question whether the sheep were confined taking into account evidence about the state of the fence and concluded that they were. That adequately explains his finding, in my view.

Denial of procedural fairness by admission of evidence relating to duplicitous charges

109. Counsel for Mrs Mansbridge also argued more generally that she had been denied procedural fairness in relation to any convictions which might otherwise survive his challenges because of the prejudicial effect of evidence given which related to any conviction quashed as duplicitous. I will first consider this submission in relation to the aggravated cruelty charges and then return to charge 1.

110. The conviction of the aggravated cruelty offence, the subject of charge 4, relating to the post-mortem sheep, was successfully challenged. The particulars of the offences the subject of charges 2 and 3 which also related to the post-mortem sheep were combined to form those provided in relation to charge 4, with an added particular of failing to provide acceptable animal husbandry in the form of appropriate fleece harvesting ("a fleece harvesting particular"). The convictions in relation to charges 2 and 3 were not quashed.

111. The conviction of the aggravated cruelty offence, the subject of charge 7, relating to the 12 other sheep, was also successfully challenged. The particulars of charge 7 were an amalgam

of those provided of charges 5 and 6 relating to the same 12 sheep with the addition of a fleece harvesting particular. The convictions in relation to charges 5 and 6 survived Mrs Mansbridge's challenges.

112. A fleece harvesting particular had also been included as a particular of charge 1 which related to the "sticks" or cast sheep. The conviction of the offence the subject of charge 1 was also quashed. The particulars of charge 1 included a reference to a failure to destroy a cast animal in a humane manner. There was no reliance upon such a failure in relation to the charges in respect of the post-mortem sheep or the flock as a whole which included the cast sheep. The remainder of the particulars of charge 1 mirrored those given in respect of all the sheep.

113. The reasons set out his Honour's summary of the evidence, his findings and resulting conclusions. He relevantly found that:

> "(9) Many of the sheep in the flock were overburdened with wool, and had not been shorn for at least 14 months or more; (10) The wool burdened sheep had not been crutched, pizzled or wigged; ... (12) The sheep described by Sean Mansbridge in his evidence as the 'sticks' sheep was not humanely disposed of [when it should have been] and struggled for a long time before it died."

114. Dr Rainsford and Mr Nichols gave evidence of their observations of the 13 dead sheep the subject of the convictions in relation to charges 2, 3, 5, and 6. Paragraph 11(c) of the 23 April 2004 Coldham affidavit records that part of the reasons in which his Honour referred to Mr Nichols' evidence of the inspection of the sheep by him and Dr Rainsford on 11 September 2001 as follows:

> "Mr Nichols, Dr Rainsford and the police walked to the rear paddock 200-300 metres from the house and Mr Nichols observed a flock of merino sheep with carcasses in the paddock in poor bodily condition, with tattered fleece, lice infestation and long wool, which had not been shorn for over 12 months, that there was no evidence of crutching, pizzling or wigging, that he took photographs, that the pasture was very short, there was a large amount of faeces in the paddock and no evidence of supplementary feeding."

115. Dr Rainsford's evidence included her opinion that a break in the wool shown in one of the tendered photographs of one of the sheep had indicated "major stress".

116. As the surviving convictions relating to charges 3 and 6 under s9(1)(i) of the Act concerned the offences of failing to provide "veterinary or other appropriate attention or treatment" for the 13 "sick or injured" animals, in my view, the evidence of the condition, (including the length) of the fleeces, the failure to shear, crutch, pizzle and wig the sheep in accordance with acceptable standards of animal husbandry may well have been relevant and admissible, in any event.

117. The only other particular which was not provided in relation to any other charge was that of the failure to dispose of the cast animal humanely, given in respect of charge 1. The relevant evidence would include evidence that the sheep was cast, that it had not been shot, that it was dead and that it had not been treated humanely in all the circumstances. In my view, (assuming that a charge in respect of one act of cruelty under s9(1)(c) would have been laid) relevant evidence that the animal the subject of charge 1 was indeed cast and dead would have been given, in any event, because its cast condition distinguished it from the 12 other sheep, the subject of charges 5 and 6. Further, evidence that all the 13 subject sheep had died, without having been shot, would also appear likely to have been adduced to rebut the evidence that he had humanely and appropriately destroyed the sick or injured animals which Mr Sean Mansbridge would presumably have given in the course of Mrs Mansbridge's defence to charges 3 and 6.

118. I am not persuaded that Mrs Mansbridge was denied procedural fairness by reason of the admission of evidence relevant to the charges giving rise to the quashed convictions.

The operation of s86

119. Counsel for Mrs Mansbridge finally argued that if one or more convictions were quashed, all should be quashed because the order of his Honour was not "severable". He based this submission upon a particular construction of s86 of the *Magistrates' Court Act* read in light of the definition of a "sentencing order" in s3(1).

120. The *Magistrates' Court Act* relevantly provided:

> "**3** (1) In this Act—
> 'order' includes judgment and conviction; ...
> 'sentencing order' means any order made by the Court following a finding of guilt and includes—
> (a) any order made under Part 3, 3A, 4 or 5 of the *Sentencing Act* 1991; and
> (ab) an aggregate sentence of imprisonment imposed in accordance with section 9(1) of the *Sentencing Act* 1991, or an aggregate fine imposed in accordance with section 51 of that Act, in respect of two or more offences; and
> (b) the recording of a conviction; ...
>
> **83. Appeal to County Court**
> (1) A person may appeal to the County Court against any sentencing order made against that person by the Court in a criminal proceeding conducted in accordance with Schedule 2. ...
>
> **85. Appeal operates as re-hearing**
> An appeal under section 83 or 84 must be conducted as a re-hearing and the appellant is not bound by the plea entered in the Magistrates' Court.
>
> **86. Powers of County Court on appeal**
> (1) On the hearing of an appeal under section 83 or 84, the County Court—
> (a) must set aside the order of the Magistrates' Court; and
> (b) may make any order which the County Court thinks just and which the Magistrates' Court made or could have made; and
> (c) may exercise any power which the Magistrates' Court exercised or could have exercised."

121. The notice of the County Court decision exhibited to Mrs Mansbridge's 3 December 2003 affidavit listed the eight charges under heading "Order/Conviction Appeal Against" and an aggregate fine was included as an item under the heading "Sentence Appealed Against". Under the heading "Result of Appeal" the convictions and individual fines imposed in relation to charges 1-7 were listed under the introductory words:

> "The orders of the Hamilton Magistrates Court on 18/12/2002 and the 3/February/2003 are set aside and in their stead the following orders are made:"

122. Counsel for Mrs Mansbridge relied upon the decision of Ashley J in *Rigoli v Minister for Agriculture & Anor*[55] in which his Honour stated that "it [was] not doubted that parts of decisions - ... of inferior courts ... may be brought up and quashed". Counsel argued that the construction of s86 for which he contended prevented the severing of any one of the convictions by the County Court. He relied upon the decision of the Court of Appeal New South Wales in *Parker v DPP*[56] in which the court quashed both the challenged imposition of a custodial sentence upon the claimant and the conviction by the District Court on appeal from his conviction and sentence in the Local Court. Kirby P with whom Handley and Sheller JJA agreed considered the operation of s125 of the *Justices Act* 1902 (NSW) which provided relevantly:

> "(1) The Court hearing any appeal under this Division shall determine the matter of every such appeal, and may adjourn the hearing thereof, and may *by its order*, confirm, quash, set aside, vary, increase, or reduce, the conviction, order, sentence, or adjudication appealed against, or make such other order in the matter, as to costs to be paid by either party ... as to the Court seems just... ."

123. The learned President held that the order of the District Court did not differentiate between "a finding of guilt (the conviction) and the imposition of penalty (the sentence)". His Honour continued:

> "It is not possible, at least under the legislation operating in this State, for this Court to differentiate between different decisions on the way to the final "order. Thus, it is not possible for this Court to uphold the particular rulings on evidence, procedural directions, the determination of guilt and the sentence differentially..." "

124. In a decision of the same court handed down shortly after *Parker,* in *Anderson v DPP*[57] Kirby P, with whom Meagher and Sheller JJA agreed reached a similar conclusion again based on the construction of s125 of the *Justices Act* 1902 (NSW). In *Anderson* the challenged order was one for forfeiture made *ultra vires* by the District Court on an appeal from the Local Court. The

court held that it was not possible to sever a conviction and fine related to the offence in respect of which the challenged order had been made.

125. Counsel for Mr Nichols argued that s86 of the *Magistrates' Court Act* was not in the same terms as s125 of the *Justices Act* 1902 (NSW) and it should not be construed so as to include all the convictions and sentences within the meaning of an "order" made by his Honour under s86 upon an appeal from a "sentencing order" as defined in s3(1).

126. Whether or not a number of convictions and sentences the subject of an appeal to the District Court to which s125 of the *Justices Act* 1902 (NSW) related would be regarded as part of one "order" was not the subject of decision in either of *Parker* or *Anderson.* The issue in each of those cases related to the severance of parts of what was held to constitute part of an order under s125 in relation to one offence. Suffice it to say that I consider the decisions distinguishable because the issue before me relates to the severability of orders relating to one conviction and sentence from another.

127. S86 provides for the making of any order which is defined as including a conviction in s3(1) on an appeal from a "sentencing order" of the Magistrates' Court. The "sentencing order" is defined to mean any order following a conviction, including an aggregate sentence of imprisonment or fine imposed in relation to a number of offences, such as that made by the Magistrates' Court in this case and the subject of the appeal, as well as the recording of a conviction. I am not persuaded that the reference to an order by the County Court on appeal in s 86 should be interpreted as referring to a number of convictions and sentences, as is submitted. Indeed the reference to one aggregate penalty following upon convictions of a number of offences and the absence of a reference to separate convictions and penalties within the definition would seem to militate against such an interpretation on the basis of the maxim: *expressio unius est exclusio alterius.* The quashing of one conviction should therefore not result in the quashing of every conviction recorded by his Honour at the same time, as argued by counsel for Mrs Mansbridge.

The costs order

128. The costs order was also attacked on the bases that his Honour had misconceived the extent of his powers and the nature of the function he was to perform. It was argued that the court's power to make a costs order against Mrs Mansbridge was restricted by the operation of s88AA(1) of the *Magistrates' Court Act* to the situation in which it had been determined that she had brought the appeal vexatiously, frivolously or in an abuse of process. In making the order in the absence of any such findings, it was submitted that the record disclosed an error of law, that the court had constructively failed to exercise its jurisdiction and that his Honour had committed a jurisdictional error. Counsel for Mrs Mansbridge also argued that, if the Court were to quash the convictions, the costs orders could not be severed and would also fall.

S88AA

129. I am not persuaded by the argument that his Honour lacked the jurisdiction to make an award of costs after the unsuccessful appeal as a result of the operation of s88AA(1) of the *Magistrates' Court Act* because s88A(2) would appear to expressly reserve to the court the power under s131 of the same act, as well as its power to order costs under the *County Court Act* 1958.

130. In *Lovejoy v Johnson; Lovejoy v Gainger*[58] Coldrey J considered the ambit of the statutory power to award costs under s131 of the *Magistrates' Court Act*:

> "It is clear that there are no Rules of Court governing the award of costs in criminal proceedings in the Magistrates' Court, and, as I have said, s31 of the *Magistrates' Court Act* 1989 confers the widest discretion on the Court in relation to, awarding costs and fixing their amount. In fixing costs a Magistrate may have regard to scales of costs relevant in civil proceedings but is certainly not bound or limited by them. As the authorities indicate, the governing principle to be applied is one of reasonableness."

131. It was acknowledged in submissions by counsel for Mr Nichols to his Honour that any costs order should not punish Mrs Mansbridge, but counsel urged the court to apply County Court civil scale "D", on the basis that there had been agreement as to the appropriateness of such an order in favour of Mr Mansbridge at the end of the proceedings in the Magistrates' Court against him. It was submitted *inter alia* by counsel for Mrs Mansbridge that the court had no jurisdiction

to impose costs calculated on the County Court scale for the Magistrates' Court proceedings and that, in any event, the lowest scale was the appropriate one to be applied.

132. His Honour acknowledged that costs caused him some anguish. He said in effect that that an award of costs caused financial pain and described the total amount sought as a "huge sum". His Honour compared the total amount of fines payable with the amount of costs sought and referred to "[t]he sad circumstances at the time of the inspection," also mentioning Mrs Mansbridge's health problems at the time. He acknowledged that costs were discretionary and went on to fix the amount at $55,000 having, according to Mrs Mansbridge's 3 December 2002 affidavit, "taxed off" $30,000.

133. In *Sobh v Children's Court of Victoria and Ors*[59] Mandie J held that a magistrate fixing the amount of costs after submission relating to individual items had failed to comply with an obligation to give adequate reasons for the exercise of his discretion when failing to explain his decisions in related to disputed items. Accordingly, it was not possible to conclude whether the decision was open to the magistrate, as a result of the deficiencies in the reasons.

134. In *Perkins,* citing *Penfold v Penfold*[60]*,* Buchanan JA stated that reasons might not be required in the case of a court's decision to award costs against a party[61]. Nevertheless, in my view, in this case the reasons given are inadequate in all the circumstances. The reasons fail to explain:

> (a) the basis for the decision to award costs on the County Court civil scale in relation to the Magistrates' Court hearing;
>
> (b) the basis for the choice of scale "D", being the highest scale;
>
> (c) the items included in the calculation of the amount, apart from reference to an amount calculated by agreement between the representatives of Mr Mansbridge and Mr Nichols; or
>
> (d) the basis for the decision to reduce a total amount of $85,829, calculated on scale "D", by the amount $30,000.

135. It is not possible to discern how his Honour took into account the submissions made by either barrister. It is not possible to determine whether there was an element of punishment involved in the award or whether the order was reasonable in all the circumstances. As a result it is not possible, in my view, to determine whether his Honour erred in fixing the amount awarded against Mrs Mansbridge. The order should be quashed and the issue of the costs of the Magistrates' Court and County Court proceedings remitted to the County Court for determination according to law.

Orders

136. I propose to make orders quashing the convictions relating to charges 1, 4 and 7 and the costs order and remitting those charges for hearing and determination in accordance with law in the County Court. I will hear counsel in relation to the form of the appropriate orders and in relation to costs.

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[1] [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553.
[2] [2000] VSCA 171; (2000) 2 VR 246; (2000) 115 A Crim R 528.
[3] [2000] VSCA 171; (2000) 2 VR 246 at 270; (2000) 115 A Crim R 528; see *Alcoa of Australia Ltd v McKenna* [2003] VSCA 182 at [22]; (2003) 8 VR 452.
[4] [2000] VSCA 171; (2000) 2 VR 246 at 273-4; (2000) 115 A Crim R 528.
[5] (1987) 10 NSWLR 247.
[6] [1999] NSWCA 363.
[7] [2003] WASCA 95; (2003) 139 A Crim R 475.
[8] (1972) 2 SASR 529 at 552; (1972) 19 FLR 322.
[9] [2002] VSCA 98 at [40]; (2002) 131 A Crim R 299.
[10] [1937] HCA 77; (1937) 59 CLR 467; [1938] ALR 104.
[11] (1924) SASR 326 at p340).
[12] (1924) SASR 326 at 488-90.
[13] (1990) 19 NSWLR 656; 48 A Crim R 16.
[14] (1990) 19 NSWLR 656 at 666; 48 A Crim R 16.
[15] [1972] VicRp 43; [1972] VR 349 at 400 per Winneke CJ, Little and Barber JJ.
[16] [1987] HCA 42; (1987) 163 CLR 508; 73 ALR 545; 61 ALJR 508; 27 A Crim R 228.

[17] (1990) 19 NSWLR 656; 48 A Crim R 16.
[18] (1990) 19 NSWLR 656 at 667; 48 A Crim R 16.
[19] (1990) 19 NSWLR 656 at 667-8; 48 A Crim R 16.
[20] [1937] HCA 77; (1937) 59 CLR 467; [1938] ALR 104.
[21] (1990) 19 NSWLR 656 at 671; 48 A Crim R 16.
[22] [1996] HCA 26; (1996) 188 CLR 77 at 112; (1996) 139 ALR 27; (1996) 70 ALJR 884; (1996) 88 A Crim R 496; (1996) 15 Leg Rep C4.
[23] [1996] HCA 26; (1996) 188 CLR 77 at 112; (1996) 139 ALR 27; (1996) 70 ALJR 884; (1996) 88 A Crim R 496; (1996) 15 Leg Rep C4.
[24] [1989] HCA 66; (1989) 168 CLR 266; 89 ALR 321 at 330; 45 A Crim R 221; 64 ALJR 126 per Dawson J; 333 per Toohey J and 337 per Gaudron and McHugh JJ.
[25] (1982) 7 A Crim R 8.
[26] [1996] HCA 26; (1996) 188 CLR 77 at 84; (1996) 139 ALR 27; (1996) 70 ALJR 884; (1996) 88 A Crim R 496; (1996) 15 Leg Rep C4 per Dawson and Toohey JJ and at CLR 102 per Kirby J.
[27] see *Coal Miners' Industrial Union of Workers of Western Australia v Amalgamated Collieries of Western Australia Ltd* [1960] HCA 68; (1960) 104 CLR 437 at 454; [1961] ALR 123; 34 ALJR 348 per Menzies J.
[28] [1964] VicRp 57; [1964] VR 443.
[29] [1988] VicRp 49; [1988] VR 411.
[30] [1964] VicRp 57; [1964] VR 443.
[31] *Hargreaves v Alderson* [1962] 3 All ER 1019; [1963] 2 WLR 31 and *Mallon v Allon* (1963) 3 All ER 843; [1963] 2 WLR 1053.
[32] [1959] VicRp 101; [1959] VR 800; [1959] ALR 1449.
[33] (1874) LR 5 PC 417.
[34] [1959] VicRp 101; [1959] VR 800; [1959] ALR 1449.
[35] [1959] VicRp 101; [1959] VR 800 at 809; [1959] ALR 1449.
[36] [1959] VicRp 101; [1959] VR 800; [1959] ALR 1449.
[37] (1974) 8 SASR 329.
[38] (1974) 8 SASR 329.
[39] [1913] HCA 2; (1913) 15 CLR 531; 19 ALR 95.
[40] [1964] VicRp 57; [1964] VR 443.
[41] (1974) 8 SASR 329 at 338.
[42] (1974) 8 SASR 329 at 341.
[43] (1974) 8 SASR 329 at 341.
[44] [1995] HCA 58; (1995) 184 CLR 163 at 175-6; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359 per Brennan, Deane, Toohey, Gaudron and McHugh JJ.
[45] [1996] HCA 26; (1996) 188 CLR 77 at 109-10; (1996) 139 ALR 27; (1996) 70 ALJR 884; (1996) 88 A Crim R 496; (1996) 15 Leg Rep C4.
[46] [1973] VicRp 10; [1973] VR 122.
[47] [1973] VicRp 10; [1973] VR 122 at 135.
[48] See eg *R v Williams & Ors* [1914] 1 KB 608 and *R v Magistrates' Court at Lilydale; ex parte Ciccone* [1973] VicRp 10; [1973] VR 122.
[49] (1990) 19 NSWLR 656; 48 A Crim R 16.
[50] (1974) 8 SASR 329 at 367-8.
[51] (1974) 8 SASR 329 at 375.
[52] (1974) 8 SASR 329 at 342.
[53] [1973] AC 584 at 607; (1972) 3 All ER 42; (1972) 56 Cr App R 766.
[54] [1999] NSWCA 363 at [50].
[55] (Unreported) Supreme Court of Victoria, 10 December 1997.
[56] (1992) 28 NSWLR 282; (1992) 65 A Crim R 209.
[57] (1992) A Crim R 277.
[58] (Unreported) Supreme Court of Victoria no 5819 of 1997 and no 5818 of 1997.
[59] (1994) 74 A Crim R 453.
[60] [1980] HCA 4; (1980) 144 CLR 311; (1980) 28 ALR 213; [1980] FLC 90-800; (1980) 5 Fam LR 579; 54 ALJR 142.
[61] [2000] VSCA 171; (2000) 2 VR 246 at 272; (2000) 115 A Crim R 528.

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