34/05; [2005] VSC 430

SUPREME COURT OF VICTORIA

DPP v MARELL

Dodds-Streeton J

12 October, 10 November 2005 — (2005) 12 VR 581

CRIMINAL LAW – DEALING IN PROPERTY REASONABLY SUSPECTED OF BEING PROCEEDS OF CRIME – CHARGES DISMISSED BY MAGISTRATE ON GROUND THAT PROSECUTION DID NOT PROVE BEYOND REASONABLE DOUBT THAT THE PROPERTY WAS THE PROCEEDS OF CRIME – WHETHER MAGISTRATE IN ERROR – SENTENCING – SUSPENDED SENTENCES – NOT RESTORED BY MAGISTRATE – "EXCEPTIONAL CIRCUMSTANCES" – MEANING OF – WHETHER EXCEPTIONAL CIRCUMSTANCES EXISTED – WHETHER MAGISTRATE IN ERROR – WHETHER CHARGES OF BREACH OF SUSPENDED SENTENCES SHOULD BE REMITTED TO THE MAGISTRATES' COURT FOR FURTHER HEARING AND DETERMINATION: *CRIMES ACT* 1958, S195; *SENTENCING ACT* 1991, S31(5A).

1. The language of s195 of the *Crimes Act* does not require the prosecution to prove that the property in question was the proceeds of crime. Rather, the prosecution was required to prove only that there were reasonable grounds to suspect that the property was the proceeds of crime. Where a magistrate held that s195 imposed on the prosecution the burden of establishing beyond reasonable doubt that the relevant property was the proceeds of crime, the magistrate fell into error.

2. "Exceptional circumstances" within the meaning of s31(5A) of the *Sentencing Act* 1991 ('Act') imply something unusual, special, out of the ordinary course, perhaps rarely encountered or outside reasonable anticipation or expectation. Although the relevant facts must be assessed on a case by case basis, in the present case, the different nature of the offences for which the suspended sentences were imposed and the length of the imprisonment already served by the respondent and an early guilty plea to some charges were not, individually or in combination, unusual, special or out of the ordinary course. They were not rarely encountered or outside reasonable expectation. Further, there is no other factor or aggregate of factors evident in the case which constitutes exceptional circumstances. While there may be debate about the scope of "exceptional circumstances" in relation to s31(5A) of the Act, and there is an element of discretion in relation to determining whether it would be unjust to restore a suspended sentence, in the absence of a finding of exceptional circumstances, the terms of s31(5A) mandate the restoration of the suspended sentence. Discretion, in that sense, is excluded.
***Kent v Wilson* MC14/2000; [2000] VSC 98, followed.**

DODDS-STREETON J:

The Appeals

1. In these appeals,[1] by notices of appeal dated 31 March 2005, the appellant, the Director of Public Prosecutions ("DPP"), appeals pursuant to s92(1) of the *Magistrates' Court Act* 1989 against the final orders made on 1 March 2005 by Mr M. Gurvich, Magistrate, in the Magistrates' Court at Geelong, whereby his Honour:

> (a) dismissed Charges, 2, 6, 7, 13 and 14, being five charges of dealing in property reasonably suspected of being proceeds of crime contrary to s195 of the *Crimes Act* 1958, in which the respondent, Tasman Marell, was the defendant.
>
> (b) Extended the periods of suspension in respect of the suspended sentences imposed in respect of Charge 3 in Case No. Q00004297 and Charge 3 in Case No. R00134737 which were the subject of two charges of breaching a suspended sentence order contrary to s31(1) of the *Sentencing Act* 1991, in which the respondent was the defendant.

2. The *Magistrates' Court Act* 1989 s92 provides:

> "(1) A party to a criminal proceeding (other than a committal proceeding) in the Court may appeal to the Supreme Court on a question of law, from a final order of the Court in that proceeding. ...
>
> (3) An appeal under sub-section (1)—
> (a) must be instituted not later than 30 days after the day on which the order complained of was

made; and
(b) does not operate as a stay of any order made by the Court unless the Supreme Court so orders.
(4) Subject to sub-section (3), an appeal under sub-section (1) must be brought in accordance with the rules of the Supreme Court.

(5) An appeal instituted after the end of the period referred to in sub-section 3(a) is deemed to be an application for leave to appeal under sub-section (1).

(6) The Supreme Court may grant leave under sub-section (5) and the appellant may proceed with the appeal if the Supreme Court –
(a) is of the opinion that the failure to institute the appeal within the period referred to in sub-section (3)(a) was due to exceptional circumstances; and
(b) is satisfied that the case of any other party to the appeal would not be materially prejudiced because of the delay.

(7) After hearing and determining the appeal, the Supreme Court may make such order as it thinks appropriate, including an order remitting the case for re-hearing to the Court with or without any direction in law.

(8) An order made by the Supreme Court on an appeal under sub-section (1), other than an order remitting the case for re-hearing to the Court, may be enforced as an order of the Supreme Court.

(9) The Supreme Court may provide for a stay of the order or for admitting any person to bail as it thinks fit."

3. The appellant appeals upon the following grounds:

1. The learned magistrate misdirected himself in holding that to prove a charge of dealing in property reasonably suspected of being proceeds of crime contrary to s195 of the *Crimes Act* 1958, the prosecution must prove beyond reasonable doubt that the goods were the "proceeds of crime" as defined in s193 *Crimes Act* 1958.

2. The learned magistrate erred in concluding that "exceptional circumstances" pursuant to s31(5A) *Sentencing Act* 1991 had arisen in this case since the imposition of the suspended sentences, so that it would be just not to restore the suspended sentences.

4. The questions of law identified are:

"1. Did the learned magistrate misdirect himself in holding that to prove a charge of dealing in property reasonably suspected of being proceeds of crime contrary to Section 195 of the *Crimes Act* 1958, the prosecution must prove beyond reasonable doubt that the property was the 'proceeds of crime' as defined in section 193 *Crimes Act* 1958?

2. Did the learned magistrate err in concluding that 'exceptional circumstances' pursuant to section 31(5A) *Sentencing Act* 1991 had arisen in this case since the imposition of the suspended sentences, so that it would be just not to restore the suspended sentences?"

The Hearing Below

5. At the hearing of the Magistrates' Court case No. SO2214189 at Geelong before His Honour, Mr Gurvich, Magistrate, on 16, 17, 22 and 25 February and 1 March 2005, the respondent, Mr Tasman Marell, was the defendant in relation to the following 17 charges:

Charge 1 - Traffick Methyl-amphetamine between 26 August 2005 and 16 September 2004 – contrary to Section 71AC *Drugs Poisons and Controlled Substances Act* 1981;
Charge 2 – Dealing in Property Suspected of Being Proceeds of Crime on 26 August 2004 – contrary to Section 195 *Crimes Act* 1958;
Charge 3 – Possess Amphetamine on 26 August 2004 – contrary to Section 73(1) *Drugs Poisons and Controlled Substances Act* 1981;
Charge 4 – Possess Ecstacy on 16 September 2004 – contrary to Section 73(1) *Drugs Poisons and Controlled Substances Act* 1981;
Charge 5 – Possess Cannabis L on 16 September 2004 - contrary to Section 73(1) *Drugs Poisons and Controlled Substances Act* 1981;
Charge 6 - Dealing in Property Suspected of Being Proceeds of Crime on 16 September 2004 – contrary to Section 195 *Crimes Act* 1958;
Charge 7 - Dealing in Property Suspected of Being Proceeds of Crime on 16 September 2004 – contrary

to Section 195 *Crimes Act* 1958;
Charge 11 - Possess ammunition without a licence on 16 September 2005 – contrary to Section 124(1)(a) *Firearms Act* 1996;
Charge 13 - Dealing in Property Suspected of Being Proceeds of Crime on 16 September 2004 – contrary to Section 195 *Crimes Act* 1958;
Charge 14 - Dealing in Property Suspected of Being Proceeds of Crime on 16 September 2004 – contrary to Section 195 *Crimes Act* 1958;
Charge 15 - Possess Housebreaking Implements on 16 September 2004 – contrary to Section 7(1)(g) *Vagrancy Act* 1966;
Charge 16 - Dealing in Property Suspected of Being Proceeds of Crime on 16 September 2004 – contrary to Section 195 *Crimes Act* 1958;
Charge 17 - Dealing in Property Suspected of Being Proceeds of Crime on 16 September 2004 – contrary to Section 195 *Crimes Act* 1958.

6. Charges 1, 2 and 3 were amended at the outset of the hearing before the magistrate, and further amendments were subsequently made to charges 2, 6, 7, 13, 14, 16 and 17. Charges 8, 9, 10 (and subsequently charge 12) were withdrawn. Mr Marell consented to summary jurisdiction in respect of charges 1, 3, 4 and 5.

7. Mr Marell pleaded guilty to charges 3, 4, 5 and 11.

8. The contested charges which remained were charges 1, 2, 6, 7, 13, 14, 16 and 17.

9. The prosecution case was presented by Senior Constable McKeon. Mr Hartnett of counsel, who appeared for the respondent, then put a "no case" submission in relation to the contested charges. The learned magistrate rejected the "no case" submission.

10. The learned magistrate found charges 1, 15 and 17 proven. He dismissed charges 2, 6, 7, 13 and 14.

11. His Honour then heard the respondent's plea in mitigation. Two charges of breaching a suspended sentence imposed for driving while suspended were then put before the Court and were the subject of a further plea. His Honour extended the suspension by twelve months on each of the charges and fined the respondent $500 on each of the charges.

12. The DPP now appeals against the magistrate's decision to dismiss charges 2, 6, 7, 13 and 14. The DPP also appeals from the magistrate's decision to extend the operational periods of the suspended sentences.

13. On charges 1, 3, 15, 16 and 17, the learned magistrate imposed an aggregate sentence of 270 days' imprisonment and suspended all save for 168 days. On charges 4 and 5, he imposed an aggregate fine of $1,000. On charge 11, he imposed a fine of $1,000.

14. It is not disputed that the learned magistrate dismissed charges 2, 13 and 14 because he took the view that, under s195 of the *Crimes Act*, the prosecution must prove beyond reasonable doubt that the relevant property is the proceeds of crime, having regard to the terms of s195 of the *Crimes Act*, combined with the definition of "dealt with" and "proceeds of crime" in s193(1) and the provisions of s193(2).[2]

15. The learned magistrate's reasoning on the construction of s195 of the *Crimes Act* is set out in detail in the transcript of the hearing.[3] His Honour there made reference to the terms of the legislation, the Second Reading Speech and the Explanatory Memorandum.

16. His Honour observed[4] that:

> "... counsel for the defendant submitted that in order to establish the offence under s195, it is incumbent upon the prosecution to prove that the property, the subject of the charge, is property which has been derived or realised directly or indirectly by any person from the commission of an indictable offence in the state in Victoria [sic]. Given the nature of the offence and the removal of any equivalent of s123(2) [of the] *Confiscation Act* 1997, but more critically perhaps the new requirements in s193(1) and (2) of the *Crimes Act*, I think the submission is correct."

17. The appellant contends that the learned magistrate's construction of s195 of the *Crimes Act* was in error. Mr Beale, counsel for the appellant, contended that s195 did not require proof that the relevant property was in fact "proceeds of crime", but merely that it was suspected on reasonable grounds of being proceeds of crime. The appellant further submitted that the learned magistrate's dismissal of charges 2, 6, 7, 13 and 14 was based solely on his erroneous construction of s195 and, as such, should be remitted for rehearing by the Magistrates' Court.

18. At the hearing of the appeals, Mr Croucher, counsel for the respondent, conceded that the learned magistrate's construction of s195 was in error. The respondent also conceded that as charges 2, 13 and 14 were dismissed solely on that basis, the appeals should be allowed in relation to those charges, which should therefore be remitted for rehearing.

19. Mr Croucher submitted, however, that the learned magistrate's dismissal of charge 6 was not based on his erroneous construction of s195. Further, he submitted that the dismissal of charge 7 was not based solely on that ground, but also on an independent, valid alternative ground. He contended therefore that the appeals should be dismissed in relation to charges 6 and 7, which should not be remitted for rehearing.

Construction of s195 of *Crimes Act*

20. Section 193 of the *Crimes Act* provides:

> "**193. Definitions**
> (1) In this Division—
> **'deal with'** includes receive, possess, conceal or dispose of;
> **'instrument of crime'** means property that is used in the commission of, or used to facilitate the commission of—
> (a) an offence referred to in Schedule 1 to the **Confiscation Act 1997**; or
> (b) an offence against a law of the Commonwealth that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence); or
> (c) an offence against a law of another State, a Territory or a country outside Australia that would have constituted an offence referred to in paragraph (a) if it had been committed in Victoria;
>
> **'proceeds of crime'** means property that is derived or realised, directly or indirectly, by any person from the commission of--
> (a) an offence referred to in Schedule 1 to the **Confiscation Act 1997**; or
> (b) an offence against a law of the Commonwealth that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence); or
> (c) an offence against a law of another State, a Territory or a country outside Australia that would have constituted an offence referred to in paragraph (a) if it had been committed in Victoria;
>
> **'property'** includes money and all other property real or personal including things in action and other intangible property.
> (2) For the purposes of the definitions of "instrument of crime" and "proceeds of crime", it is necessary to prove facts that constitute one or more offences referred to in paragraph (a), (b) or (c) of those definitions but the particulars of an offence need not be proven."

21. Section 194 of the *Crimes Act* provides:

> "**194. Dealing with proceeds of crime**
> (1) A person must not deal with proceeds of crime—
> (a) knowing that it is proceeds of crime; and
> (b) intending to conceal that it is proceeds of crime.
> Penalty: Level 3 imprisonment (20 years maximum).
> (2) A person must not deal with proceeds of crime knowing that it is proceeds of crime.
> Penalty: Level 4 imprisonment (15 years maximum).
> (3) A person must not deal with proceeds of crime being reckless as to whether or not it is proceeds of crime.
> Penalty: Level 5 imprisonment (10 years maximum).
> (4) A person must not deal with proceeds of crime being negligent as to whether or not it is proceeds of crime.
> Penalty: Level 6 imprisonment (5 years maximum).
> (5) It is a defence to a prosecution for an offence under this section if the accused satisfies the court that the accused dealt with the property in order to assist the enforcement of a law of the Commonwealth, a State or a Territory."

22. Section 195 of the *Crimes Act* provides:

"**195. Dealing with property suspected of being proceeds of crime**
A person who deals with property if there are reasonable grounds to suspect that the property is proceeds of crime is guilty of a summary offence and liable to level 7 imprisonment (2 years maximum)."

23. Section 196 of the *Crimes Act* provides:

"**196. Definition**
(1) In this subdivision—
"property" means property of a tangible nature, whether real or personal, including money and including wild creatures which have been tamed or are ordinarily kept in captivity and any other wild creatures or their carcasses if, but only if, they have been reduced into possession which has not been lost or abandoned or are in the course of being reduced into possession.

(2) For the purposes of this subdivision property shall be treated as belonging to any person—
(a) having the custody or control of it;
(b) having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest); or
(c) having a charge on it.

(3) For the purposes of this subdivision property which is subject to a trust shall be treated as belonging to the trustee or trustees and the person or persons who have a right to enforce the trust.

(4) For the purposes of this subdivision property of a corporation sole shall be treated as belonging to the corporation notwithstanding a vacancy in the corporation."

24. It was not disputed that the language of s195 of the *Crimes Act* did not require the prosecution to prove that the property in question was the proceeds of crime. Rather, the prosecution was required to prove only that there were reasonable grounds to suspect that the property was the proceeds of crime.

25. Despite the concession made by the respondent, it is necessary to consider the proper construction of the relevant legislation.

26. The terms of s195 of the *Crimes Act*, which is headed "Dealing with property suspected of being proceeds of crime" are to be contrasted with the terms of s194, which is headed "Dealing with proceeds of crime". Section 194 creates four offences. It prohibits a person from dealing with proceeds of crime knowing and intending to conceal that it is proceeds of crime,[5] knowing that it is proceeds of crime,[6] being reckless as to whether it is the proceeds of crime,[7] or being negligent as to whether or not it is proceeds of crime.[8]

27. The penalty prescribed for a contravention of s194 is level 6 imprisonment (5 years maximum).

28. In contrast, s195 provides that a person who deals with property if there are reasonable grounds to suspect that the property is proceeds of crime is guilty of a summary offence, and is liable to level 7 imprisonment (2 years maximum).

29. Section 193(1) defines "proceeds of crime", for the purposes of Division 2A of the *Crimes* Act, to mean "property that is derived or realised, directly or indirectly, by any person from the commission of" three types of offences, which are specified in subparagraphs (a) – (c).

30. Section 193(2) states "For the purposes of the definitions of "instrument of crime" and "proceeds of crime", it is necessary to prove facts that constitute one or more offences referred to in paragraphs (a), (b) or (c) of those definitions but the particulars of an offence need not be proven."

31. The Explanatory Memorandum for the *Crimes (Money Laundering) Bill* relevantly stated:

"The Bill creates offences for dealing with these types of property. New section 193(1) provides that "deal with" includes receive, possess, conceal or dispose of.

New section 193(2) provides that for the purposes of the definitions of "proceeds of crime" and"

instruments of crime", the prosecution needs to prove facts that constitute one or more of the offences referred to in those definitions. If these facts can be proved then the particulars (e.g. in some circumstances who committed the offence, or the date on which it was committed) need not be proven.

Dealing with proceeds of crime
New section 194 provides for offences for dealing with proceeds of crime. These offences will replace the existing offence in section 122 of the **Confiscation Act 1997**. The difference between the four offences in new section 194 is the fault element.

New section 194(1) prohibits a person dealing with proceeds of crime, knowing that it is proceeds of crime and intending to conceal that it is proceeds of crime. This is the most serious offence in this category, and it is punishable by a maximum penalty of 20 years imprisonment. The prosecution will be required to prove that the defendant intended to 'launder' the property, in the sense of disguising its illegal origins.

New section 194(2) prohibits a person dealing with proceeds of crime, knowing that it is proceeds of crime.

New section 194(3) provides that a person must not deal with proceeds of crime, being reckless as to whether or not it is proceeds of crime. The principles of recklessness have been developed by the courts at common law. To be reckless, a person must be aware that there is a substantial risk that the property is proceeds of crime, and decide to deal with the property any way despite this risk.

New section 194(4) provides that a person must not deal with proceeds of crime, being negligent as to whether or not it is proceeds of crime. Criminal negligence is not the same as civil negligence. The lack of care which may constitute civil liability will not be enough to make a person criminally responsible under the principles of criminal negligence developed by the courts at common law. To establish criminal negligence, the prosecution must prove that the accused person consciously and voluntarily dealt with property (although he or she failed to realise that it was proceeds of crime), and this occurred in circumstances which involved such a great falling short of the standard of care which a reasonable person would have exercised, and such a high risk that the property was proceeds of crime, that the accused person's conduct merits criminal punishment.

New section 194(5) provides that it is a defence to a prosecution under section 194 if the accused satisfies the court that he or she dealt with the property in order to assist in law enforcement. A similar defence applies in existing section 122 of the ***Confiscation Act* 1997**.

Dealing with property suspected of being proceeds of crime
New section 195 creates a summary offence for dealing with property if there are reasonable grounds to suspect that it is proceeds of crime. This replaces the existing offence in section 123 of the ***Confiscation Act* 1997**. The offence is a strict liability offence. Accordingly, it is intended that the common law defence of honest and reasonable mistake of fact should apply."

32. The *Crimes (Money Laundering) Bill* Second Reaching Speech relevantly stated:[9]

"Money laundering is a process of converting cash or other property derived from criminal activity to make it appear to be legitimately obtained. Criminals keep generating profits but distance themselves from the criminal activity that produces their wealth, making it harder to prosecute them and confiscate their ill-gotten gains.

Money laundering is a significant global problem. The International Monetary Fund estimates that the scale of money laundering worldwide is between 2 per cent and 5 percent of global gross domestic product. This is a problem that must be addressed by governments across the world. The Bracks government is taking action to attack this black economy.

The bill strengthens Victoria's laws against people who profit from or facilitate crime.

Like the recent amendments to the *Confiscation Act* 1997, this bill is part of the government's commitment to ensuring that those who engage in criminal activity as a business can be effectively dealt with under the law and do not profit from that activity.

Victoria currently has money laundering offences in part 14 of the *Confiscation Act* 1997.These existing offences relate to dealing with property, including money, that is derived from criminal activity. However, money laundering is more than just an aspect of the confiscation regime. The bill will relocate money laundering offences to the *Crimes Act* 1958. This reflects the seriousness of the offences and their application to a broad range of criminal activity.

A person will only be liable under these new offences if he or she is alleged to have committed an

offence on or after commencement of this bill.
For money laundering offences alleged to have been committed before the commencement of this bill, the existing offences in part 14 of the *Confiscation Act* 1997 will continue to apply.

Proceeds of crime
The bill creates four offences for dealing with proceeds of crime - that is, property (including money) derived from criminal activity. These offences will apply to people who deal with property, including money, and who know or who are reckless or criminally negligent about whether the property is the proceeds of crime.

This series of offences is similar to the existing money laundering offence in section 122 of the *Confiscation Act* 1997.

The most significant change is that for the most serious offence the prosecution will be required to prove that the defendant intended to 'launder' the property, in the sense of disguising its illegal origins. The bill will also clarify the fault elements of the offences by creating separate offences for each fault element.

The bill also creates a new offence comparable to the existing offence of dealing with property that may reasonably be suspected to be proceeds of crime.
.....

Extending money laundering laws to cover people dealing with instruments of crime will ensure that people who finance or otherwise facilitate crimes can be brought to justice. However, the laws will not cast the net so wide as to capture innocent Victorians. As a safeguard against the inappropriate use of the new laws, the bill requires the Director of Public Prosecutions to consent before a prosecution for dealing with property which subsequently becomes an instrument of crime can commence.

With regard to the offences of dealing with proceeds of crime and dealing with instruments of crime, it is necessary to show that the property was derived from or used in the commission of some other offence.

There may be circumstances in which it is possible to prove beyond reasonable doubt that property is derived from or used in a relevant offence, but it is not possible to prove the precise details of that offence.

For example, if a person is apprehended in possession of a large amount of money and the person admits that the money is the proceeds of an armed robbery but does not say which robbery the money was from, it may not be possible to prove when the robbery was committed or who committed it.

The bill clarifies that, as long as it is possible to prove that the money was derived from, or used in, an offence falling within certain categories, it is not necessary to prove all of the details of that offence.

In some cases, the facts may show that the property must have been derived from one of two (or possibly more) alternative offences, each of which is an offence referred to in the definition of 'proceeds of crime'. However, it may not be possible to say which one of those offences the property was derived from. In these cases, if it can be proved beyond reasonable doubt that the property must have been derived from one of the alternative offences, should not be necessary to prove which one [sic]. The same applies in the context of instruments of crime'.

Alongside the government's recent improvements to Victoria's confiscation laws, this bill is an important part of our commitment to ensuring that those who engage in criminal activity as a business can be effectively dealt with under the law and do not profit from that activity."

33. The statement in the Second Reading Speech that it is necessary to show that the property was derived from, or used in, the commission of some other offence apparently applied only in relation "to the offences of dealing with the proceeds of crime and dealing with instruments of crime" (that is, the offences established by s194 and s195 of the *Crimes Act*).

34. The Second Reading Speech also indicated that, in relation to those offences, it must be proved beyond reasonable doubt that property is derived from or used in a relevant offence. It indicated that the purpose of s193(2) was to relieve the prosecution from having to establish the particulars of the offence, such as the date of commission of an offence within subparagraphs (a) to (c), or the identity of the offender.

35. In relation to proposed s195, the Second Reading Speech stated that it was "a new offence comparable to the existing offence of dealing with property that may reasonably be suspected to be proceeds of crime".

36. The previous provisions equivalent to s195 of the *Crimes Act* were s123 of the *Confiscation Act* 1997 and s25 of the *Summary Offences Act*. Although expressed in different terms, each of those sections dealt with property reasonably suspected to be stolen or the proceeds of crime. Neither provision imposed any requirement that the prosecution prove that the relevant property was the proceeds of crime.

37. The logical distinction between, on the one hand, property which is "the proceeds of crime" as defined in s193(1) and, on the other hand, property which is merely suspected of being "the proceeds of crime" as defined, is clear. A provision prohibiting dealing with property which actually was the proceeds of crime and was suspected to be so, would more appropriately constitute an additional sub-category of s194. It would be unnecessary to enact a separate provision to cover that offence. Further, there would seem to be no reason why a person who dealt with the actual proceeds of crime while suspecting its character on reasonable grounds, should be held guilty only of a summary offence punishable by significantly less imprisonment than a person who had dealt with the actual proceeds of crime while being merely negligent as to whether or not it bore that character.

38. I conclude, on the basis of the plain meaning of the terminology used, the coherent relationship *inter se* of ss193, 194 and 195 of the *Crimes Act*, the statements in the relevant Second Reading Speech and Explanatory Memorandum and the established construction of previous, broadly equivalent statutory provisions, that s195 of the *Crimes Act* does not impose on the prosecution any burden of establishing beyond reasonable doubt that the relevant property is the proceeds of crime as defined in s193(1).

39. In holding that s195 of the *Crimes Act* imposed that requirement, and in dismissing charges upon that basis, the learned magistrate, in my opinion, fell into an error of law.

Charges 2, 13 and 14

40. It is undisputed that his Honour dismissed charges 2, 13 and 14 on the sole basis of the erroneous conclusion that s195 of the *Crimes Act* imposed on the prosecution the burden of establishing beyond reasonable doubt that the property in question was the proceeds of crime.

41. It follows that in relation to charges 2, 13 and 14 the appeal should be allowed and those charges should be remitted to the Magistrates' Court.

Charges 6 and 7

42. Mr Beale, for the appellant, contended that the learned magistrate also dismissed charges 6 and 7 on the sole ground of his erroneous construction of s195 of the *Crimes Act*. Mr Croucher, for the respondent, contended that charge 6 was dismissed on another basis and that although charge 7 was dismissed by reference to the erroneous construction, it was also dismissed on an alternative valid ground.

Charge 6

43. In relation to charge 6, the learned magistrate stated:

> "It is established that the jeans were the subject of a burglary and theft."

44. It is apparent from the transcript of the hearing below that his Honour relied, in that context, on the evidence of Ms Witty, a manager of a clothing store, who identified the jeans by their barcodes as items stolen from her store in the course of a burglary in August. The theft was verified by reference to a stock take.

45. His Honour then stated:

> "The defendant said he purchased them at a Sunday market in Belmont about two weeks prior to the 16th of September 2004, when the search warrant was executed. He did not try them on. He said he knew what size he was buying. He checked the measurement of the jeans and purchased

> the two pairs by size. He paid about $50 for each pair. In cross-examination he said he never wore the jeans and seemed puzzled as to why he would try them on before buying them. In this case, the evidence of the defendant is associated, I think, with considerable doubt, as far as I am concerned. I have real doubt as to his veracity as to the explanation as to this charge, as to the acquisition of the jeans but I am not satisfied beyond reasonable doubt in relation to that matter on the totality of the evidence."[10]

46. The learned magistrate had already stated that the jeans were the subject of a burglary and theft. His Honour was clearly satisfied beyond reasonable doubt that the jeans were the proceeds of crime.

47. His dismissal of charge 6 was not, in my view, based on an erroneous requirement that the prosecution establish beyond reasonable doubt that the jeans were the proceeds of crime. In my opinion, he dismissed charge 6 because (despite his stated doubts on the veracity of the respondent's explanation of his acquisition of the jeans), he was not satisfied beyond reasonable doubt on the totality of the evidence, that the charge was proved.

48. Mr Beale alternatively submitted that, if the magistrate did not dismiss charge 6 on the basis of the erroneous construction of s195, he dismissed it on the basis of an erroneous attribution of the onus of negating a defence. Mr Beale contended that the learned magistrate's observations apparently reflected the view that under s195 of the *Crimes Act*, the prosecution bore the burden of negating the defence of honest and reasonable mistake of fact; and that his Honour, despite his doubts on the evidence of the respondent, was not satisfied that that burden had been discharged.

49. Mr Beale argued that (contrary to the construction apparently endorsed by his Honour), under s195, the defendant bore the onus of establishing that the defence applied. Section 123 of the *Confiscation Act* (the predecessor of s195 of the *Crimes Act*) expressly imposed on the defendant the onus of establishing the defence of reasonable grounds for not suspecting that the property referred to in the charge was proceeds of crime. Mr Beale argued that under s195, the onus remained on the defendant, because the Second Reading Speech referred to s195 as "a new offence comparable to the existing defence of dealing with property that may reasonably be suspected to be the proceeds of crime."

50. He thus submitted, in essence, that the learned magistrate's dismissal of charge 6 was infected by error on the basis that his conclusion was due to the imposition of the onus on the prosecution.

51. Mr Croucher argued, persuasively in my view, that s195 did not impose the onus of establishing the defence on the defendant, as its enactment without the express reversal of the onus applicable at common law indicated a deliberate legislative intention to the contrary.

52. Moreover, the reference to "a comparable offence" does not necessarily indicate an identical provision, but may indicate one which is comparable in the sense that it entails both similarities and differences.

53. I am not satisfied that the learned magistrate's dismissal of charge 6 was predicated on an erroneous imposition on the prosecution of the onus of negating the defence. It is, in any event, unnecessary to decide that question. While it appears that on the better view, s195 imposes on the prosecution the onus of excluding the defence of honest and reasonable mistake of fact, in the present case, an alleged error of law on that basis is not a ground of appeal.

54. In my opinion, the appellant has not established that the learned magistrate's dismissal of charge 6 was based on the error of law alleged in the notice of appeal. The appeals in relation to charge 6 should be dismissed.

Charge 7

55. In relation to charge 7 the learned magistrate stated:

> "In relation to charge 7, the defendant, on the 16th September, 2004, did deal with property, namely a stainless steel Electrolux dishwasher and an Allenzi stainless steel gas cooker and hot-plate, reasonably suspected of being the proceeds of crime."

56. His Honour observed that the respondent had given evidence that he had "purchased them about three months prior to the search warrant from Harvey Norman on Melbourne Road. He said that there were manuals and warranty books at the premises".

57. He further noted that the respondent had testified to a distinct memory of paying $1,500 for the two items, but that "all his evidence in respect of this charge may be described as vague, evasive and completely unconvincing".

58. His Honour observed that the respondent had known of the charge for some time and it was reasonable to infer that, if the proof of his alleged purchase had been lost, a person in his position would find it helpful to find someone to attend the Harvey Norman store in order to obtain receipts or computer-generated evidence of the circumstances of the acquisition of the items.

59. The magistrate noted that while the respondent had implied that his receipts were destroyed or lost during the course of the police search of his residence, that had not been put to the police in cross-examination.

60. The learned magistrate also noted that it was impossible to believe that if the respondent had told his lawyers of the purchase, he would not know that obtaining proof of purchase would be important. Further, his evidence on how the goods were delivered to his residence was particularly "vague and unconvincing" and his evidence on where he got the money for the goods was characterised by "similar vague answers".

61. The magistrate concluded:

> "On this charge I have found the defendant's evidence wholly unconvincing. I do not accept it ... [T]he defendant has approached his defence on the basis of legitimate purchase which I am not prepared to accept on the totality of the evidence including his version of events. However, notwithstanding the foregoing and the poor evidence of the defendant, the prosecution, I think must meet the hurdle of the provisions of ss193 and 195 of the *Crimes Act*. Mr Hartnett contended the prosecutor was unable to point to a relevant indictable offence, which is, I think, a condition precedent if it is to succeed. No evidence of any burglary or theft was available in respect of the property in this charge. The prosecutor, I think, must be drawn to Charge 1 if it is to succeed".

62. Charge 1 was a charge in relation to trafficking in methylamphetamines.

63. His Honour went on to note that the defendant's evidence that "he acquired the property well before the period set out in the charge was not rebutted, but even if I were to ignore that evidence on this, which is probably reasonable given the general unpersuasive evidence in respect of this charge as well, the prosecutor has not persuaded me beyond reasonable doubt for the reasons expressed in relation to charge 2. The charge will be dismissed."

64. It is not disputed that the magistrate dismissed charge 2 (which related to $33,088.01 in cash found at the respondent's premises) on the basis of his erroneous construction of s195 of the *Crimes Act*. In relation to charge 2, the respondent had given explanation for his possession of the cash, which his Honour found unconvincing. He nevertheless concluded that charge 2 must fail as the prosecution was "unable to prove beyond reasonable doubt that the money, or most of it, was the proceeds of crime ... ".

65. An analysis of his Honour's observations in relation to charge 7 indicates that he unequivocally rejected the respondent's evidence, but notwithstanding his rejection of the defence "on the basis of the totality of the evidence including his [the respondent's] version of events", he dismissed the charge because the prosecution had failed to discharge the burden which his Honour had erroneously imposed upon the prosecution.

66. I am satisfied that the dismissal of charge 7 was based on the relevant error of law.

67. The appeal in relation to charge 7 should therefore be allowed, and the charge should be remitted for rehearing.

Exceptional Circumstances

68. The appellant also contended that the learned magistrate erred in concluding that "exceptional circumstances" within terms of s31(5A) of the *Sentencing Act* had arisen in this case since the imposition of the suspended sentences, so that it would not be just to restore them.

69. Mr Beale, for the appellant, submitted that unless exceptional circumstances within the meaning of s31(5A) of the *Sentencing Act* were identified, the restoration of a suspended sentence was mandatory. The Court had no discretion. The Court had a discretion, however, pursuant to s31(5A)(b), as to whether to order concurrency in relation to the restored suspended sentence, although *prima facie*, the restored sentence would be cumulative. Mr Beale submitted that in the present case, the factors identified by the learned magistrate were not exceptional. The only two factors which he identified in relation to the extension of the operation of the suspended sentences were the different character of the breaching offences and the period of imprisonment already served by the respondent. (The Certified Extracts of the Magistrates' Court[11] reveal that the learned magistrate nominated "different type of offence" as the reason for not restoring the suspended sentence.) The two factors identified, either separately or in combination, were incapable of constituting exceptional circumstances within the meaning of s31(5A).

70. Mr Beale relied in this context on *Kent v Wilson*.[12] In that case, Hedigan J found that a magistrate had erred in concluding that there were exceptional circumstances within terms of s18W(6) of the *Sentencing Act* (which is relevantly in identical terms to s31(5A) of the *Sentencing Act*.) The magistrate in *Kent v* Wilson had found that, although the defendant had pleaded guilty to failing to comply with the conditions of a combined custody and treatment order (by not reporting as directed for assessment and treatment on eight occasions), there were "exceptional circumstances", in that the defendant's behaviour since his release from custody was not typical, and hence "exceptional", when compared or contrasted with his previous behaviour. The magistrate noted that the defendant had been in employment, was learning a trade, worked six days a week and had adopted a different mode of living, thus making "exceptional" progress.

71. Hedigan J observed that the matters referred to by the magistrate could mean no more than that the defendant had improved his behaviour in society. His Honour doubted that "atypical" was a synonym for "exceptional" and observed that the legislature could not have intended that "the living of life in an ordinary way, neglecting the obligations to comply with the conditions, could constitute something exceptional, even though to do so may be considerably different from the pre-sentence behaviour".[13]

72. His Honour noted that if the magistrate's reasoning were correct, it would result in the absurdity that the worse the defendant's previous history, the easier it would be to establish exceptional circumstances. Such a construction would not promote the object and purpose of the legislation.[14]

73. Hedigan J observed that the *Sentencing Act* did not define "exceptional circumstances". He referred to his earlier decision in *Owens v Stevens*,[15] in which he had stated that

> "'exceptional' is defined, contextually, in the *Oxford English Dictionary*[16] as meaning 'unusual, special, out of the ordinary course'. This does not mean any variation from the norm. The facts must be examined in the light of the Act, the legislative intention, the interests of the prosecuting authority, the defendant and the victims. It may be that the circumstances amounting to exceptional must be circumstances that rarely occur and perhaps may be outside reasonable anticipation or expectation. Courts have been both slow and cautious about essaying definitions of phrases of this kind, leaving the content of the meaning to be filled by the *ad hoc* examination of the individual cases. Each case must be judged on its own merits, and it would be wrong and undesirable to attempt to define in the abstract what are the relevant factors."[17]

74. His Honour further noted that the "essential human normality" of behaviour, such as leaving home, getting a job and forming a relationship could not be exceptional. Rather, such circumstances were "merely changed circumstances" and were "not only not exceptional but, if not normal, at least commonplace".[18]

75. Possible exceptional circumstances contemplated by Hedigan J in relation to failure to report under a combined custody and treatment order included an incapacity for communication

due to being in a state of coma, the destruction of all prisons within the relevant classification, or a case in which the defendant had become an informer after release.[19]

76. His Honour rejected the view that there was, in that context, any sentencing discretion. The word "must" indicated that there must be

> "an actual finding of exceptional circumstances leading to the opinion that to return the person to custody would be unjust. ... The Court is not relieved of this exercise of power because there are circumstances which might, in the exercise of an ordinary sentencing discretion, be capable of being [taken] into account in deciding that it was appropriate to select the less severe option from the possible range of sentencing options. The circumstances must be exceptional".[20]

77. Mr Croucher contended, on behalf of the respondent, that the decision to restore a suspended sentence was a mixed question of law and fact.

78. He submitted that, despite the prescriptive terms of s31(5A) of the *Sentencing Act*, a degree of discretion necessarily inhered because it recognised an exception "if the Court is of the opinion that it would be unjust" in view of any exceptional circumstances, to restore the suspended sentence. As Batt JA stated in *DPP v Di Nunzio*:[21]

> " ... sentencing being inherently and *par excellence* a discretionary exercise it must be recognised that there is no one correct sentence. There is a range of sentences which are open to a sentencing judge in the exercise of a sound discretionary judgment and considerable autonomy in the exercise of the discretion must be accorded to a sentencing judge."

79. While there may be debate about the scope of "exceptional circumstances", and there is an element of discretion in relation to determining whether it would be unjust to restore the suspended sentence, in my opinion (and counsel for the respondent did not dispute), consistently with Hedigan J's holding held in *Kent v Wilson*, in the absence of a finding of exceptional circumstances, the terms of s31(5A) mandate the restoration of the suspended sentence. Discretion, in that sense, is excluded.

80. Mr Croucher further contended that the notion of exceptional circumstances was itself informed by the discretionary exercise which necessarily underpins sentencing.

81. He argued that, in the present case, the learned magistrate who was experienced, had decided on a total sentence after hearing all the evidence, and had plainly been minded to release the respondent immediately. The appellant did not now complain the total sentence was inadequate. Mr Croucher submitted that where the total sentence for a multiple count was "within the range" (including any partial suspension of sentence), it was not the established practice to appeal in relation to the sentence on a single count.

82. Mr Croucher further contended that his Honour's remarks indicated that he had regard to "the matters" referred to by counsel, in combination with the plea which he had heard, and the fact that the offence for which the suspended sentences were imposed was different in kind from those offences which had been found proved before him. The magistrate's failure expressly to refer to each element of the "exceptional circumstances" did not preclude the existence of exceptional circumstances. Mr Croucher contended that his Honour viewed the totality of "the matters" as constituting exceptional circumstances.

83. The transcript of the hearing reveals that in relation to the suspended sentences, counsel for the defence stated that

> "as I perceive the law, and without pointing to exceptional circumstances, there is little I can say about that, Your Honour, and one has to look at questions of totality and ... that is a matter that Your Honour can take into account".

84. Counsel referred to the fact that the suspended sentences were concurrent and on the basis of breach, the respondent faced a period of four months' imprisonment. As the respondent had already served 168 days (approximately 5½ months) in prison, and wished to undertake a course of rehabilitation, counsel requested a lenient sentence and sought that the respondent be "given his liberty at the earliest opportunity".

85. The learned magistrate, in response to defence counsel's submission, stated the purposes of sentencing and the factors to which the court must have regard. He referred to the serious nature of the charges and to the respondent's long record.

86. He referred to "the suspended sentences imposed on 15th of May 2003 in relation to driving whilst authorisation was suspended" and stated:

> "I think your counsel has been very realistic about those matters. He's right in terms of the approach of exceptional circumstances. However in this case what I propose to do, having regard to the period you have already served and the fact that these charges are different in nature or character from the suspended sentence although strictly speaking it wouldn't matter what the offence was as long as it carried a term of imprisonment.
>
> I will extend the period of the suspension by 12 months and on each of those charges, that is in respect of each, and on each of those charges you are fined $500. That is a total of $1,000 for the breach. Any sentence I impose now will be cumulative upon those matters."

87. His Honour then referred to the evils of drug trafficking, specific and general deterrence, the gravity of the offences, the respondent's culpability, and the fact that the respondent had pleaded guilty to some matters early in the trial but had put the prosecution to its proof in all matters until the case commenced. He noted that, against those matters, the respondent had now been in prison for 168 days, which was "a significant period but it is one which is less than the time I had in mind after hearing counsel's submissions".

88. The learned magistrate stated that "on those charges" the respondent would be sentenced to nine months' imprisonment which would be suspended save for the 168 days already served. He noted that the operational period for the suspended sentence was two years. He imposed a fine of $1,000 on the ammunition charge and $1,000 in relation to the possession of ecstasy and cannabis.

89. His Honour finally observed:

> "I should have emphasised in this matter I want to make it clear that I have not in any way sentencing [sic] the defendant treated [sic] with any of the matters for which he has been acquitted."

90. In my opinion, counsel for the defence adverted to the requirement of exceptional circumstances in such a way as to recognise that it was not satisfied. He did not point to any particular circumstance as exceptional. Rather, he indicated that there was little he could say about "exceptional circumstances", and sought leniency in all the circumstances of the case.

91. The learned magistrate subsequently adverted to "the approach of exceptional circumstances" in his discussion of the suspended sentences and observed that defence counsel had been "very realistic" and was "right" in terms of his approach, (which was to concede that he could say little about exceptional circumstances).

92. His Honour's observations do not expressly recognise that the test of exceptional circumstances must be satisfied pursuant to s31(5A) of the *Sentencing Act*. There is no reference to any circumstance which his Honour expressly identified as exceptional. On one view, his remarks may indicate that he did not regard the case as giving rise to any exceptional circumstances and recognised that defence counsel had correctly indicated that none could be identified and that rather, leniency should be sought.

93. Against that conclusion, his Honour indicated "different kind of offence" on the certified extract as the reason for not restoring the suspended sentences. His comments suggest that he was also influenced by the time that the respondent had already served in prison. He also referred to the respondent's guilty plea to some charges early in the trial. If, as Mr Crowther argued, he regarded all the unspecified "matters" in the respondent's favour as constituting "exceptional circumstances", an examination of the transcript of the hearing indicates that those three factors were the only factors identified by his Honour as counter-balancing the matters noted as adverse to the respondent.

94. In my opinion, Hedigan J's analysis of "exceptional circumstances" in *Kent v Wilson* is

persuasive and applicable to s31(5A) of the *Sentencing Act*. "Exceptional circumstances" within the meaning of s31(5A) imply something unusual, special, out of the ordinary course, perhaps rarely encountered or outside reasonable anticipation or expectation. Although the relevant facts must be assessed on a case by case basis, in the present case, I am satisfied that, as the appellant contended, the different nature of the offences for which the suspended sentences were imposed and the length of the imprisonment already served by the respondent and an early guilty plea to some charges are not, individually or in combination, unusual, special or out of the ordinary course. They are not rarely encountered or outside reasonable expectation. Further, there is no other factor or aggregate of factors evident in the case which constitutes exceptional circumstances.

95. As in *Kent v Wilson*, the learned magistrate in the present case may have conflated an exercise of the general sentencing discretion with the recognition of "exceptional circumstances". As Mr Croucher argued, his Honour apparently determined that in all the circumstances, the respondent should be released from prison immediately. Mr Croucher submitted that the immediate release of the respondent could have been achieved by restoring the suspended sentences by ordering that they be served concurrently with the sentence imposed in relation to the other charges. It would, however, have been necessary first to comply with the terms of s31(5A) of the *Sentencing Act*. Disregard or misapplication of the sub-section's requirements cannot be viewed as a technical deficiency.

96. As Hedigan J observed in *Kent v Wilson*, the relevant legislation

> "does not leave the magistrate at large to deliver a sentence which he or she deems to be in accordance with general sentencing principles. Those principles have been specifically modified by the Act. It is not permissible to label conduct as amounting to exceptional circumstances for the purpose of avoiding the return of the offender to gaol, unless they are such ... ".[22]

97. In the absence of exceptional circumstances, the restoration of the suspended sentences was statutorily mandated. No factor identified by his Honour, nor any other factor evident in the case, constituted exceptional circumstances.

98. It follows that, in my opinion, the learned magistrate, while clearly actuated by the laudable goal of fashioning a disposition which was just in all the circumstances, fell into an error of law in concluding that exceptional circumstances within the meaning of s.31(5A) of the *Sentencing Act* had arisen in this case. The appeals on that question should therefore be allowed.

Whether charges on suspended sentence should be remitted

99. Mr Croucher argued that if the magistrate had erred in finding "exceptional circumstances", the charges for breach of the suspended sentences should nevertheless not be remitted pursuant to the exercise of the Court's discretion under s92(7) of the *Magistrates' Court Act*. He contended that their remission would expose the respondent to stand for sentence twice on the same issue, which invoked the notion of double jeopardy applicable to all Crown appeals. Mr Croucher also emphasised that the magistrate had clearly come to the view that the respondent ought, in all the circumstances, to be released immediately and he could have fashioned that disposition on a basis not vulnerable to the present challenge. The overall sentence imposed was not challenged as manifestly inadequate.

100. Mr Beale, for the appellant, contended that the charges for breach of the suspended sentences should be remitted.

101. Mr Croucher acknowledged that there was no direct authority on whether the principles of double jeopardy applied to the case of appeal from a magistrate on a question of law, but submitted that they were relevant to the exercise of the discretion to remit.

102. In *R v Clark*,[23] the Court of Appeal summarised the principles applicable to Crown appeals. Charles JA, with whom Winneke P and Hayne JA agreed, stated:

> "1. An appeal by the Crown should be brought only in 'the rare and exceptional case' to establish some point of principle. The reason is that such appeals 'represent a departure from traditional standards of what is proper in the administration of criminal justice in that, in a practical sense, it is contrary to deep-rooted notions of fairness and decency which underlie the common law principle against double jeopardy'. (*Malvaso* at 234).

> 2. Occasions may arise for the bringing of a Crown appeal (a) where a sentence reveals such manifest inadequacy or inconsistency in sentencing standards as to constitute error in principle (*Everett* at 300; (b) where it is necessary for a court of criminal appeal to lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons (*Griffiths* at 310); (c) to enable the courts to establish and maintain adequate standards of punishment for crime; (d) to enable idiosyncratic views of individual judges as to particular crimes or types of crimes to be corrected; (e) to correct a sentence which is so disproportionate to the seriousness of the crime as to shock the public conscience (as to the last three, see *Osenkowski* at 213); (f) to ensure, so far as the subject matter permits, that there will be uniformity in sentencing (*Everett* at 306).
>
> 3. A court of criminal appeal dealing with any appeal against sentence, including by a prisoner, is not a court hearing the matter anew, and is not entitled to substitute its own opinion for that of the sentencing judge merely because it considers the sentence inadequate or excessive. It may only interfere if there is manifest inadequacy or it is shown that the sentencing judge fell into material error of law or fact. (*Allpass* at 562-3).
>
> *Allpass* is also authority for the following propositions:
> 4. When, in response to a Crown appeal, the court decides to re-sentence an offender, it ordinarily gives recognition to the element of double jeopardy involved (in twice standing for sentence) by imposing a sentence that is somewhat less than the sentence it considers should have been imposed at first instance.
>
> 5. An appellate court has an over-riding discretion which may lead it to decline to intervene, even if it comes to the conclusion that error has been shown in the original sentencing process. In this connection, the conduct of the Crown at the original sentencing proceedings may be a matter of significance."

103. In *R v Boxtel*,[24] the Court of Appeal dismissed the Crown's appeal against the length of a non-parole period, on the basis that the appellant had not discharged the burden of persuading the Court that the sentencing judge's discretion had miscarried.

104. Crockett and Hampel JJ in their joint judgment, observed that the appellant had not sought to challenge the head sentence, but only the length of the non-parole period.

105. Their Honours observed[25] that

> "a Crown appeal raises considerations which are not present in an appeal by a defendant seeking a reduction in his sentence ... a man has a vested interest in the freedom to which his subject [sic] to the sentence of the primary tribunal. A Crown appeal puts in jeopardy that vested interest. Moreover it puts it in jeopardy for the second time. It is this exposure to double jeopardy which led Deane and McHugh JJ to observe in *Malvaso v R*[26] that "it should not be forgotten that [a Crown appeal] represents a departure from traditional standards of what is proper in the administration of criminal justice in that, in a practical sense, it is contrary to the deep-rooted notions of fairness and decency which underlie the common law principle against double jeopardy".

106. In *Flaherty v DPP*,[27] Osborn J quashed the decision on sentence of a County Court judge made on appeal by the DPP from the sentences imposed on the plaintiff by a magistrate for convictions on charges to which he pleaded guilty. Osborn J referred to the principle of double jeopardy recognised in *R v Clarke*. He observed that although there was no Victorian authority bearing directly on the question whether the principle of double jeopardy should apply to appeals from a magistrate by way of rehearing in the County Court, the effect, particularly where the accused pleaded guilty was that he "stands twice for sentence".[28] He held that the principle of double jeopardy applied to appeals pursuant to s84 of the *Magistrates' Court Act* against sentence by the DPP.[29] Osborn J noted that the County Court judge had made no reference to the principle of double jeopardy and that it could be inferred that he paid no regard or no proper regard to the principle of double-jeopardy.[30] Therefore, Osborn J concluded that an error of law was established.

107. In *Willcoxson v Legal and General Insurance of Australia Ltd*,[31] an informant sought a review of a magistrate's dismissal of informations for offences alleged under the *Insurance Act* 1973 that the respondent, as a body corporate authorised under that Act to carry on an insurance business, had failed to lodge certain statements. Miles CJ held that the magistrate had fallen into error in holding that there was no evidence of an essential element of the charges (namely, that the respondent was, at the time of the alleged offences, a body authorised to carry on the business of insurance under the Act) sufficient to found a *prima facie* case. Miles CJ, despite that finding of error in the relevant sense, declined to exercise his discretion under the *Magistrates'*

Court Act 1930 (ACT) to remit the case to the Magistrates' Court. His Honour observed that "to make an order remitting the case to the Magistrates' Court involves an invasion of the rule against double jeopardy and is not to be taken lightly."[32] He observed that if the matter were remitted to a differently constituted Magistrates' Court, the prosecution would be permitted to re-open its case and to present new evidence, which could be unfair. Further, the course of events would be unpredictable if the case were to be remitted to the same magistrate. Miles CJ observed that the prosecution might have easily avoided that unsatisfactory state of affairs by tendering a certificate stating that the respondent was still authorised to carry on an insurance business at the initial hearing.

108. The discretion conferred by s92(7) of the *Magistrates' Court Act* is not, in terms, limited by reference to any particular factor. In the present case, the respondent has already been subject to the extension of the suspended sentences by 12 months.[33] While the present appeals are not appeals against sentence, the remission of the charges of breaching the suspended sentences would expose the respondent to "double jeopardy" and as Miles CJ observed, it should not be lightly undertaken. The learned magistrate's decision to release the respondent immediately could have been founded on an alternative, valid basis. Further, at the hearing of the appeals, the respondent conceded one of the two principal issues on appeal, whereby four charges were remitted for rehearing and did not pursue a foreshadowed application for leave to appeal on another matter.

109. In the unusual circumstances of this case, I do not consider that the charges of breaching the suspended sentences should be remitted to the Magistrates' Court.

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[1] Proceeding 5283 of 2005 was brought on behalf of Anthony Charles Quirke, the informant in respect of the charges determined by Magistrate Gurvich on 1 March 2005. For the avoidance of any uncertainty, two further proceedings (5281 of 2005 and 5282 of 2005) were instituted on behalf of the informants in respect of the charges in cases Q00004297 and R00134737, in which the original suspended sentences were imposed.
[2] Transcript of Proceedings, *Quirke v Marell* (Magistrates' Court, Magistrate Gurvich, 25 February 2005) at 510.
[3] Revised decision *Quirke v Marell* (Magistrates' Court, Magistrate Gurvich, 12 July 2005) at 7-17.
[4] Ibid at 13.
[5] s194(1).
[6] s194(2).
[7] s194(3).
[8] s194(4).
[9] Victoria, *Parliamentary Debates*, Legislative Assembly 6 November 2003 at 1609 (Rob Hulls, Attorney-General).
[10] Transcript of Proceedings, *Quirke v Marell* (Magistrates' Court, Magistrate Gurvich 25 February 2005) at 510-511.
[11] Certified Extracts, Magistrates' Court of Victoria at Geelong, Mr M. Gurvich, 1 March 2005.
[12] [2000] VSC 98.
[13] At [34].
[14] At [25].
[15] Unreported, Victorian Supreme Court, Hedigan J, 3 May 1991.
[16] 2nd Edition Volume V.
[17] At [22].
[18] At [29].
[19] At [35].
[20] At [34].
[21] [2004] VSCA 78 at [28]; (2004) 40 MVR 97; 78 ALD 97.
[22] At [41].
[23] [1996] VICSC 30; [1996] VicRp 83; [1996] 2 VR 520 at 522; (1996) 85 A Crim R 114.
[24] [1994] VicRp 54; [1994] 2 VR 98; (1993) 70 A Crim R 400.
[25] At 104.
[26] [1989] HCA 58; (1989) 168 CLR 227 at 234; 89 ALR 34; (1989) 64 ALJR 44; 43 A Crim R 451.
[27] [2003] VSC 234.
[28] At [23].
[29] At [25].
[30] At [33].
[31] (1990) 101 FLR 1; (1990) 6 ANZ Insurance Cases 60-980.
[32] At 7.
[33] Until March 2006.

APPEARANCES: For the appellant DPP: Mr C Beale, counsel. Solicitor for Public Prosecutions. For the respondent Marell: Mr M Croucher, counsel. Brugman Mellas, solicitors.