

39/12; [2012] VSC 524

**SUPREME COURT OF VICTORIA**

***DPP v BATICH***

Bell J

22 October, 1 November 2012

**PROCEDURE – DISCRETIONARY DECISION OF JUDGE OF COUNTY COURT TO TRANSFER INDICTABLE CRIMINAL PROCEEDING FOR SUMMARY HEARING AND DETERMINATION IN MAGISTRATES’ COURT – ‘GLASSING’ OFFENCE – CAUSING SERIOUS INJURY RECKLESSLY – YOUNG FIRST-OFFENDER PLEADING GUILTY – JUDGE TOOK INTO ACCOUNT THAT MAGISTRATES’ COURT DID, BUT COUNTY COURT DID NOT, HAVE JURISDICTION TO SUSPEND A SENTENCE OF IMPRISONMENT – WHETHER JUDGE COMMITTED JURISDICTIONAL ERROR – WHETHER DECISION MADE FOR IMPROPER PURPOSE OF CIRCUMVENTING PROHIBITION ON COUNTY COURT SUSPENDING A SENTENCE OF IMPRISONMENT – APPLICABLE SENTENCING PRINCIPLES, INCLUDING CURRENT SENTENCING PRACTICES – MAGISTRATES’ COURT COULD NOT IMPOSE SENTENCE OF IMPRISONMENT OF MORE THAN TWO YEARS – WHETHER OPEN TO JUDGE TO CONCLUDE THAT MAGISTRATES’ COURT HAD JURISDICTION TO IMPOSE APPROPRIATE SENTENCE – WHETHER TOOK INTO ACCOUNT IRRELEVANT CONSIDERATIONS – WHETHER FAILED TO EXERCISE JURISDICTION TO SENTENCE OFFENDER – WHETHER FAILED TO ACT IN ACCORDANCE WITH FUNDAMENTAL PRINCIPLE OF EQUAL JUSTICE – SCOPE OF DISCRETION TO TRANSFER INDICTABLE CRIMINAL PROCEEDING FOR SUMMARY HEARING AND DETERMINATION – ‘SIGNIFICANT OFFENCE’: *CRIMINAL PROCEDURE ACT* 2009 (VIC) SS28, 29, 168; *SENTENCING ACT* 1991 (VIC) S29(1)-(2B); *CRIMES ACT* 1958 (VIC) S17.**

1. Under s168 of the *Criminal Procedure Act*, a judge of the County Court or the Supreme Court has the discretionary power to transfer a criminal proceeding for summary hearing and determination by the Magistrates’ Court. Certain mandatory criteria must be taken into account, including the adequacy of sentences available in the Magistrates’ Court (s29(2)(b)).

2. The transfer discretion does not enable a proceeding to be transferred to the Magistrates’ Court where, according to the governing sentencing principles and current sentencing practices, that court does not have the jurisdiction to impose an appropriate sentence for the offence in the circumstances. However, the judge in the present case transferred the proceeding to the Magistrates’ Court after concluding that, according to those principles and practices, it was open to the Magistrates’ Court to impose an appropriate sentence for the offence which the accused pleaded guilty to committing.

3. In this application, the issue before the Supreme Court was not whether the judge would have made the same decision as the County Court judge but whether his Honour committed an error of law on the face of the record or a jurisdictional error in making the decision which he did. The County Court judge did not commit any such error. Taking into account that the Magistrates’ Court could not impose a sentence of imprisonment of greater than two years, it was open to his Honour to decide that that court could impose an appropriate sentence in the circumstances. In reaching that conclusion, it was relevant for his Honour to take into account that the Magistrates’ Court could suspend a sentence of imprisonment, even though the County Court could not do so. He did not err in law on the face of the record by misinterpreting the transfer provision, exercise the transfer discretion for the improper purpose of circumventing the prohibition on the County Court suspending a sentence of imprisonment, take into account irrelevant considerations or fail to exercise the jurisdiction of that court.

**BELL J: Introduction**

1. His Honour Judge Chettle considered that, as an appropriate disposition in a charge on indictment of causing serious injury recklessly, it was open to impose a sentence of imprisonment of no more than two years, wholly suspended. As the County Court of Victoria had no jurisdiction to impose a suspended sentence of imprisonment in respect of that offence, his Honour decided to transfer the proceeding for summary hearing and determination in the Magistrates’ Court, which had that jurisdiction. In this application for judicial review, the Director of Public Prosecutions contends that the decision of the judge was invalid and should be quashed because it was made for an improper purpose, because his Honour took irrelevant considerations into account and because he failed to exercise his jurisdiction to impose the appropriate sentence.

**Proceeding before trial judge**

2. The first defendant, Mathew Batich ('the accused'), was charged in the County Court on indictment that, when 18 years of age, he caused serious injury recklessly to Owen Dimeck ('the complainant') by 'glassing' him in the face during an altercation at a nightclub in November 2011. The accused pleaded guilty to that charge.

3. The circumstances of the offending were described in the summary of the prosecution opening which was given to the judge. The summary was based on the depositions which the judge had, but this court does not have, in evidence.

4. According to the summary, the accused attended at a nightclub in the central business district at about 11.30 pm with four friends and they went to the smoking room shortly afterwards. Also at about 11.30 pm the complainant attended the same nightclub with seven friends. Two of the complainant's friends saw the accused and his friends in the smoking area and recognised them to be a group who had been in a fight with the complainant's friends.

5. Shortly after midnight, the complainant and his friends went into the smoking area. One of the complainant's friends approached the accused and his group and asked whether they recognised him. He said they should because recently they beat up him and his mates. The complainant approached the group and said, 'what do you guys have a problem with all my mates for?' The complainant and 'another male' then started grappling with each other. A security guard was standing in the middle of the grappling men, attempting to break up the altercation. During that altercation, the complainant felt himself being hit with an object (the glass) on the left side of this face. He was bleeding 'a lot' to his face. The security guard heard the glass break.

6. On my reading of the summary, two accounts were given about precisely how that happened:

- One of the complainant's friends observed the accused lifting his arm over a person; the accused then 'smashed the glass' on the left side of the complainant's face. On this account, it seems the accused was not the male involved in the altercation with the complainant. He was apparently a third party who struck the complainant with the glass from 'over' the two altercating men.

- A witness said 'a guy c[a]me over the top of the guy he was grappling with and smash[ed] the glass'. On this account, the accused definitely was the male involved in the struggle with the complainant. He struck the complainant with the glass during the altercation. That is consistent with the accused's account, which was 'I don't know what happened', someone grabbed him and hit him and 'I glassed him'. He told the police that he struck the complainant's face with the glass in 'self defence'.

The summary did not attempt to reconcile these accounts.

7. The prosecution did not allege the accused was intoxicated at the time of the offence.

8. When the accused came on for sentence before the judge, he was 19 years of age. He had no previous convictions or charges and had nothing pending. His plea was supported by a substantial volume of supportive written testimony, including psychological reports, and other material attesting to his favourable family background, education and future prospects. In the judge's words, there was a 'courtroom packed full of people... supporting him'.

9. In that hearing, the judge initially believed, incorrectly, that he could impose a suspended sentence of imprisonment. His Honour then acknowledged that, under recent amendments to the sentencing legislation, the County Court could not do so. He therefore adopted the alternative course of having the accused assessed for suitability for detention in a Youth Justice Centre.

10. The accused was so assessed. The report set out this account by the accused of the circumstances of the offending:

Mr Batich stated that the altercation occurred shortly after arriving at the nightclub around midnight in the smoking area. Mr Batich sated [sic] that he and his friends were confronted by the victim and the victims' [sic] friends, with the victim initially addressing one of his friends about having known them and then turned to him. Mr Batich denied having any alcoholic beverages before the altercation and stated that he did not know and had never met the victim before the altercation. Upon being confronted by the victim, Mr Batich stated that the victims' [sic] friends surrounded him and after

indicating to the victim that he did not know him the confrontation turned physical recalling being hit before ending on the floor and when he got up the victim 'grabbed me by the throat and had me against a wall'.

This account goes further in a direction which is favourable to the accused than the accounts in the summary.

11. The report said the accused was suitable for detention in a Youth Justice Centre. It also made these observations about the desirability of keeping him out of the penal system:

Undeniably the offending before the Court is very serious. However, the writer respectfully suggests that Mr Batich would benefit from being diverted away from the penal system in its entirety and concur with psychological reports from Mr Stojcevski and Ms Warren who inform that Mr Batich's rehabilitation would be better served in a community setting. Mr Batich presents as a young man who is naïve about the criminal justice system, which would make him susceptible to undesirable influences in an adult custodial environment and at risk of becoming impressionable to older more sophisticated offenders.

12. When the proceeding resumed, the judge announced he was intending to transfer the proceeding to the Magistrates' Court. Influenced by the remarks in the assessment report, his Honour said he wanted to find an alternative to the immediate imprisonment of the accused and noted the Magistrates' Court had the power to sentence him to imprisonment for up to two years and also to suspend any such sentence. With the consent of the accused and against the strong opposition of counsel for the director, the judge decided to make the transfer order.

#### **Judicial review application**

13. By an amended originating motion, the director has brought an application for judicial review of the judge's decision under O56 of the *Supreme Court (General Civil Procedure) Rules* 2005 (Vic). He seeks from this court an order in the nature of *certiorari* or *mandamus* quashing the decision and order. In the director's submission, the case raises a fundamental question of public importance, namely the application of the principles of equal justice and consistency in sentencing.

14. The grounds relied on in the amended originating motion are:

- the judge committed an error of law on the face of the record in his interpretation of the transfer provision<sup>[1]</sup>
- the judge made the transfer order for the improper purpose of circumventing the statutory prohibition on the County Court suspending a sentence of imprisonment for the charge in question
- in making the order, the judge took into account an irrelevant consideration, namely that the County Court did not, and that the Magistrates' Court did, have jurisdiction to make an order suspending any sentence of imprisonment
- the judge failed to exercise the jurisdiction of the County Court to sentence the accused.

15. In his written and oral submissions, the director also relied on abuse of process. However, this ground was really just another way of characterising the other grounds relied on and it does not require independent consideration.

16. In response to certain actual and perceived personal criticisms of the judge in the director's case, the County Court was represented at the hearing in this court by senior counsel. Having regard to the case as actually put in the hearing by the director and the applicable principles,<sup>[2]</sup> I declined to receive any submissions from him.

#### **Error of law and improper purposes — Scope of transfer discretion**

17. It was common ground that, on the governing authorities,<sup>[3]</sup> the decision of the judge would have been in excess of jurisdiction, and liable to be set aside on judicial review, if it was made for a purpose, or for a substantial purpose among a number of purposes, which was beyond the scope and object of the enabling legislation. Determination of that issue requires examination, and proper interpretation, of s168 of the *Criminal Procedure Act* 2009 (Vic), under which the transfer decision was made.

18. This is s168, as material here:

(1) At any time except during trial, the Supreme Court or the County Court may order that a proceeding for a charge for an indictable offence that may be heard and determined summarily be transferred to the Magistrates' Court or the Children's Court (as the case requires) if—

- (a) the accused consents to the transfer; and
- (b) the court considers that the charge is appropriate to be determined summarily, having regard to—
  - (i) in the case of the Magistrates' Court, the matters in section 29(2); or
  - (ii) in the case of the Children's Court whether the Children's Court is required to hear and determine the charge summarily by section 356(3) of the *Children, Youth and Families Act 2005*.

(2) The court must not transfer a charge that the Magistrates' Court or the Children's Court has refused to hear and determine summarily unless there has been a significant change in the charges against the accused or in the prosecution case against the accused.

(3) If an order is made under this section, the transferred charge must be heard and determined summarily.

19. Section 168 is a new section with no statutory predecessor. Prior to the enactment of the provision, there was no mechanism by which the County Court or this court could refer a proceeding in respect of an indictable offence to the Magistrates' Court. Section 168 provides that mechanism.

20. The present case involved a transfer of a proceeding by the County Court to the Magistrates' Court. In such a case, s168(1)(b) requires consideration of s29(2). Section 29, as material to the present case, including sub-s(2) in full, provides:

(1) The Magistrates' Court may hear and determine summarily a charge for an offence to which section 28(1) applies if—

- (a) the court considers that the charge is appropriate to be determined summarily, having regard to the matters in subsection (2); and
- (b) the accused consents to a summary hearing.

(2) For the purposes of subsection (1)(a), the Magistrates' Court must have regard to—

- (a) the seriousness of the offence including—
  - (i) the nature of the offence; and
  - (ii) the manner in which the offence is alleged to have been committed, the apparent degree of organisation and the presence of aggravating circumstances; and
  - (iii) whether the offence forms part of a series of offences being alleged against the accused; and
  - (iv) the complexity of the proceeding for determining the charge; and
- (b) the adequacy of sentences available to the court, having regard to the criminal record of the accused; and
- (c) whether a co-accused is charged with the same offence; and
- (d) any other matter that the court considers relevant.

(3) A legal practitioner appearing for an accused may, on behalf of the accused, consent to a summary hearing of a charge for an indictable offence.

21. Section 29(2)(b) requires the transferring court to have regard to of the adequacy of sentences which are 'available' to the Magistrates' Court. As the parties to the present case acknowledged, by reason of that mandatory consideration it would not be appropriate for the County Court or this court to transfer a proceeding to the Magistrates' Court when the Magistrates' Court lacked the jurisdiction to give an appropriate sentence in the circumstances. Having regard to that consideration necessarily requires the transferring court to consider what the appropriate sentence might be, taking into account the applicable sentencing principles, including current sentencing practices, in respect of the particular offence.

22. Section 29(1) gives the Magistrates' Court a conditional jurisdiction to hear and determine summarily an indictable offence to which s28(1) applies. By s28(1)(a), that court may hear and determine summarily the indictable offences specified in sch 2, subject to s29 being satisfied. Item 4.1 of that schedule specifies an offence against s17 of the *Crimes Act 1958* (Vic), namely causing serious injury recklessly.

23. For the offence of causing serious injury recklessly, s17 of the Crimes Act specifies a

maximum penalty of imprisonment for 15 years. As the director submitted, the offence can attract substantial sentences of imprisonment<sup>[4]</sup> and the circumstances of offending can vary greatly. Further, in appropriate cases and because the circumstances of offending can vary greatly, it can attract lesser sentences, depending on those circumstances and the other sentencing considerations (see further below).

24. While ss28 and 29 of the *Criminal Procedure Act* conditionally permit the Magistrates' Court to hear and determine summarily a charge of committing that indictable offence, s113(1) of the *Sentencing Act* 1991 (Vic) provides:

If a person is convicted by the Magistrates' Court in a summary hearing of an indictable offence under s28(1) of the *Criminal Procedure Act* 2009, the maximum term of imprisonment to which the Court may sentence the offender is 2 years.<sup>[5]</sup>

Under s32(3)(a), the maximum period for which the Magistrates' Court may direct a young offender to be detained in a Youth Justice Centre is also two years.

25. By the combined operation of ss28 and 29 of the *Criminal Procedure Act*, the Magistrates' Court has the jurisdiction to hear and determine summarily a charge for an indictable offence, including a charge of causing serious injury recklessly, if it considers that doing so would be appropriate having regard to the matters specified in s29(2) and the accused consents. If the court does not consider it would be appropriate or the accused does not consent, the court has no jurisdiction to hear and determine the charge summarily.

26. By the combined operation of ss28, 29 and 168, at any time except during trial,<sup>[6]</sup> the County Court or this court may order that a proceeding for a charge for an indictable offence be transferred to the Magistrates' Court for hearing and determination summarily, if the court considers that doing so would be appropriate having regard to the matters specified in s29(2) and the accused consents. By s168(2), where the Magistrates' Court has refused to hear and determine a charge summarily, a transfer order must not be made unless there has been a significant change in the prosecution case. By s168(3), the decision of the County Court or this court that a charge be heard and determined summarily is determinative of that issue and the charge must be heard and determined by the Magistrates' Court in that manner.

27. In the present case, the director submits that, in determining whether the proceeding should have been transferred to the Magistrates' Court, the critical considerations were the nature of the offence (s29(2)(a)(i)) (recklessly causing serious injury), the manner in which the offence was committed (s29(2)(a)(ii)) (a glassing in a night club) and the adequacy of sentences available to that court (s29(2)(b)) (maximum of two years' imprisonment). He submits that, having regard to those considerations, it was not open to the judge to refer the proceeding to the Magistrates' Court. I accept that these were critical considerations. For reasons which I will give, it was also a relevant consideration that the County Court did not, while the Magistrates' Court did, have the power to suspend a sentence of imprisonment.

28. The parliamentary materials do not provide guidance on the scope of s168.<sup>[7]</sup> The director relies on the legislative guide to the *Criminal Procedure Act* which was issued by the Department of Justice after the Act was passed. The guide gives this explanation of the referral mechanism:

While it is not anticipated that the power will be used very often, it is designed to provide case management flexibility where the reason for the matter proceeding in the County Court or Supreme Court no longer exists, for example:

- where purely indictable charges against an accused are withdrawn by the DPP and the remaining charges are indictable which are triable summarily
- where an accused initially elects to go to trial but changes their mind and is willing to proceed summarily (and the offences are ones which are within the jurisdiction of the Magistrates' Court)
- where the charge that the DPP decides to proceed with is significantly different (involving lesser offences) than those on which the accused was committed for trial.<sup>[8]</sup>

29. On the basis of these comments in the guide, the director submits the purpose of the



provision is to permit the County Court or this court to transfer a proceeding in respect of an indictable offence to the Magistrates' Court when there has been a relevant change of circumstances and the charge is one that is appropriate to be dealt with summarily. Properly interpreted, I accept that the transfer provision covers those circumstances; but, as the language of ss29 and 168 indicate, it is not confined to those circumstances. The director submits the provision does not allow a judge of the County Court or this court to transfer a proceeding in respect of an indictable offence to the Magistrates' Court so that a sentence which is inappropriate in law may be imposed, thereby circumventing a limitation which has been imposed by law on the sentencing discretion of the transferring court. I accept that submission.

30. Turning to the suspension of sentences of imprisonment, s27(1) of the *Sentencing Act* empowers a court to suspend the whole or part of a sentence of imprisonment 'if it is satisfied that it is desirable to do so in the circumstances'. Section 27(1A) specifies matters which must be considered in making that determination. Under s27(2), a court can only make an order suspending a sentence of imprisonment if the period (or aggregate period) does not exceed three years in the case of the County Court or this court or two years in the case of the Magistrates' Court.

31. Following the enactment of the *Sentencing Further Amendment Act* 2011 (Vic), s27(2B) of the *Sentencing Act* provides that, despite s27(1), a court must not suspend a sentence of imprisonment in whole or in part 'for a serious offence or for a significant offence'.<sup>[9]</sup> By the definition in s3(1), a 'significant offence' includes an offence against s17 of the *Crimes Act*, being causing serious injury recklessly, 'unless heard and determined summarily'.

32. By the operation of the several provisions of s27 of the *Sentencing Act*, the courts have power to suspend sentences of imprisonment, subject to consideration of the specified matters. The power is not now available to the County Court or this court in respect of sentences for serious or significant offences being heard and determined on indictment. As the director submitted, Parliament has not made a custodial sentence mandatory in respect of the offences in this category.<sup>[10]</sup> However, the intention of Parliament is that a term of imprisonment which is imposed by the County Court or this court in respect of those offences must be served and cannot be suspended. The power to suspend a sentence of imprisonment continues to be available to the Magistrates' Court in respect of certain specified indictable offences heard and determined summarily which fall into the significant category, including causing serious injury recklessly. Because the maximum term of imprisonment which may be imposed by the Magistrates' Court is two years,<sup>[11]</sup> this power of suspension cannot be exercised in respect of a term of imprisonment in excess of that period.

33. The provisions of the *Sentencing Act* as amended leave no doubt that the amendments were deliberately intended to preserve the capacity of the Magistrates' Court to suspend sentences of imprisonment in respect of certain significant offences, including causing serious injury recklessly, whilst at the same time abolishing the capacity of the County Court and this court to suspend any sentences of imprisonment in respect of all serious and significant offences. That intention is confirmed in these passages from the second reading speech:

The bill abolishes suspended sentences for a range of additional serious crimes, namely: recklessly causing serious injury; commercial drug trafficking; aggravated burglary; and arson. These are all significant offences that frequently cause great damage and suffering to their victims and undermine the safety of our community. Recklessly causing serious injury is an offence committed when the offender knows that their conduct is likely to result in serious injury to their victim but goes ahead anyway. Examples of this offence include many of the horrific assaults captured on closed-circuit security cameras that Victorians have witnessed on their television screens in recent years ...

When this bill comes into effect, sentences of imprisonment imposed for these offences in the County or Supreme courts will no longer be able to be suspended. It is in these courts that the most serious cases involving these offences are tried.

The government is not saying that every person who commits one of these offences must go to jail. However, where a judge considers that a jail sentence is not appropriate, the judge will openly sentence the offender to a non-custodial sentence rather than being forced to go through the legal fiction of sentencing the offender to a period of imprisonment when the offender actually does not go to prison at all. As we have made clear in the past, under a coalition government, jail will mean jail.<sup>[12]</sup>

34. The power of the County Court and this court under s168 of the *Criminal Procedure Act* to

transfer a proceeding to the Magistrates' Court occupies its place in the sentencing framework, which I have described. The sentence which is available to the Magistrates' Court is a mandatory relevant consideration and may be a critical consideration. As the director submitted and the accused conceded, it would be improper for the County Court or this court to exercise the discretion to transfer a proceeding to the Magistrates' Court if that court does not possess the jurisdiction to impose an appropriate sentence in the circumstances. But if the Magistrates' Court does possess the jurisdiction to impose an appropriate sentence in the circumstances, the proceeding can legitimately be transferred to that court, depending on the other considerations. Under s168 and the provisions of the sentencing framework of which it is a part, there is no explicit or implicit prohibition on the proceeding being transferred to the Magistrates' Court where the appropriate sentence which may be imposed is a suspended sentence of imprisonment, even though the County Court and this court are now prohibited by legislation from imposing such a sentence.

35. In conclusion, where the specified conditions are satisfied and the relevant considerations are taken into account, s168 of the *Criminal Procedure Act* authorises the transfer of a proceeding by the County Court or this court to the Magistrates' Court. Among other things, the transferring court must be satisfied that the Magistrates' Court has the jurisdiction to impose an appropriate sentence. Transferring a proceeding to the Magistrates' Court so that the sentence will be less than is appropriate is not authorised by the provision, properly interpreted, and would involve exercising the discretions for an improper purpose in any event. But where the transferring court concludes that, consistently with the governing sentencing principles and current sentencing practices, it is open to the Magistrates' Court to give an appropriate disposition in the circumstances, and the other considerations are properly taken into account, it is not improper to refer the proceeding to the Magistrates' Court even though the transferring court lacks the power to give that disposition. That is what the judge did in the present case and he did not err in law on the face of the record in doing so.

#### **Purpose for which transfer order made**

36. The director submits that the trial judge referred the proceeding to the Magistrates' Court for the improper purpose of enabling the accused to obtain a suspended sentence of imprisonment which the County Court could not impose. It is not contended that the judge acted with malice or in bad faith.

37. The director's submissions as to the sequence of events at the hearing were supported by the evidence, not disputed by the accused and may be accepted. In short, on the first day of the plea hearing (4 May 2012), the judge had all of the relevant material before him and, in view of the nature of the offence, intended personally to sentence the accused to an immediate term of imprisonment. His Honour considered that detention in a Youth Justice Centre was the most appropriate option and referred the accused for assessment. On the second day (6 June 2012), the judge changed his mind and decided to refer the proceeding to the Magistrates' Court. One reason which his Honour gave for doing so was that the Magistrates' Court had sentencing powers which the County Court did not have, namely the power to suspend sentences of imprisonment.

38. In submitting that the judge acted for an improper purpose, the director points to the views which his Honour expressed on the first day that the offence was a significant offence which meant that he could not impose a suspended sentence and, further, that the accused had been guilty of a serious example of glassing which warranted an immediately effective custodial sentence. His Honour referred to Court of Appeal authorities which explained the serious nature of glassing offences.<sup>[13]</sup> Yet on the second day, the judge expressed the view that the Magistrates' Court could impose a sentence of imprisonment of two years 'which would be more than adequate in this case'.

39. During the hearing on the second day, the judge made several remarks on which the director relied. His Honour said that the Court of Appeal would give the accused 'five with a three' and that he wanted 'to find a way to avoid incarcerating this young man' if he could. The legislation took 'away any discretion that I might have [in] a one-off incident from a kid with a decent background with good rehabilitative prospects'. The Magistrates' Court could 'do what they like' but if 'perchance the magistrate incarcerated him you've got a right of appeal. I might even see it again'. As I said at the hearing and with respect to the judge, that was an unfortunate remark. His Honour said 'I think I don't want to sentence him... I want to send all this back to

a magistrate and let them have a look at it' and, in reference to the change in the sentencing legislation, 'why would a magistrate be able to give a suspended sentence for this and I can't?' The judge also declined to accept a submission from the prosecution on the range of penalties which might be appropriate.

40. These remarks were made by a busy trial judge in the course of a hearing. I accept the director's submission that the transcript of these remarks may be taken into account and I have done so.<sup>[14]</sup> However, having considered the transcript and the other evidence, I find that the reasons why the judge made the decision which he did, and his purpose in making the transfer order, are those which his Honour explained in his ruling.

41. The ruling was delivered on 6 June 2012 in these material terms:

I have been considering the matter since that date and the reality is that there are limitations on this court's power to dispose of the matter. The amendments to the *Sentencing Act*, making a suspended sentence, the imposition of a suspended sentence partially or in total prohibited. That prohibition does not relate to the Magistrates' Court who still have the power to impose suspended sentences, which in the circumstances is, in my view, an open disposition in this case.

I am of the view that it is appropriate pursuant to s168 of the *Criminal Procedure Act* to transfer this matter, make an order transferring this matter from the County Court to the Magistrates' Court, and I have had regard to the matters set out in s29 of the *Criminal Procedure Act*.

The offence is a serious offence obviously. However, the way in which the offence occurred, alleged to have been committed, involves in my view some aspect of what would have been excessive self-defence. Mr Batich was not the instigator of the violence that occurred, although he escalated it by taking the step he did.

It is not a complicated matter. It involves only one offence. It is not complex. The court below has adequate power to impose a gaol term if it seeks to do so. There are no co-accused. As a matter of fairness and justice I think it is artificial that he should be dealt with in this court and denied the opportunity of a sentencing disposition that would be open to him in the Magistrates' Court, and accordingly I propose to transfer the matter to the Magistrates' Court.

42. On my reading of these reasons, the judge viewed the facts regarding the circumstances of the offending in a way which was fair to the accused having regard to the terms of the summary. Even on the first account in that summary, the accused was not the instigator of the confrontation as the complainant and his larger group of friends approached and then confronted the accused and his friends. I will determine the judicial review application on the basis that, depending on how the difference between the two accounts is resolved and how the account of the accused in the pre-sentence report is considered (if at all), a sentencing court might find the facts to be more favourable to the accused, but probably not less favourable. In making that remark I am in no way intending to limit the sentencing court in making findings about the circumstances of the offending.

43. The reasons show that the judge transferred the proceeding to the Magistrate's Court after considering all of the various matters specified in ss29 and 168 of the *Criminal Procedure Act*. His Honour did not confine his attention to the sentence which might be imposed: he mentioned that the offence was serious and referred to the circumstances of the offending, that it was not a complex case and that there was only one offence and no co-accused. The judge's consideration of these matters was not the subject of criticism in this court.

44. His Honour also considered what disposition would be appropriate in the circumstances. He said the Magistrates' Court had the power to impose 'a gaol term' if it seeks to do so. He said a suspended sentence of imprisonment was 'an open disposition' in the case. Although in the ruling the judge did not refer to the two year limit on any sentence of imprisonment which the Magistrates' Court might impose, this limit had been referred to in the hearing and, as an experienced judge, his Honour would have been aware of it. As I read the ruling, his Honour considered that, consistently with the applicable sentencing principles (including current sentencing practices) as stated by the Court of Appeal, it was open to the Magistrates' Court to impose a suspended sentence of imprisonment of not more than two years as the appropriate disposition in the circumstances of the case. His Honour did not purport to direct the Magistrates' Court on what the appropriate



sentence might be. But he did not want the accused to be deprived of the opportunity of obtaining that disposition because the County Court could not suspend any sentence of imprisonment. After taking into account the other considerations, his Honour referred the proceeding to the Magistrates' Court because only that court could give that sentence. In my view, he did not act for an improper purpose in doing so. The transfer discretion was open to be exercised in that manner in those circumstances.

45. Taking into account the adequacy of sentences available to the Magistrates' Court necessarily requires the transferring court to consider what the appropriate sentence for the offence might be. But the transferring court must consider that issue for the purpose of determining whether or not to transfer the proceeding and not for the purpose of sentencing the accused. As the parties to the present case acknowledged, this aspect of the exercise of the transfer discretion requires the transferring court to consider whether it is reasonably open to the Magistrates' Court to impose an appropriate sentence, taking into account the applicable sentencing principles, including current sentencing practices, in respect of the particular offence. In my view, the judge properly exercised the transfer discretion in accordance with that approach.

46. The director submitted that the judge must have acted for the improper purpose of circumventing the prohibition on the County Court giving suspended sentences because it was not reasonably open to his Honour to conclude, in the circumstances of the case, that a sentence of imprisonment of not more than two years, or a suspended sentence of imprisonment, might be appropriate in respect of this offence of causing serious injury recklessly, taking into account the applicable sentencing principles, including current sentencing practices. As we have seen, that was the maximum sentence which the Magistrates' Court had the jurisdiction to give.

47. On these submissions, it seems unavoidable that, for the purpose of determining whether the judge acted for a legally improper purpose, I must consider whether it was reasonably open to his Honour to come to the conclusion which he did in relation to the sentencing disposition which was open. That will require some consideration of the sentencing authorities. I make clear, however, that I will undertake that consideration in the exercise of this court's judicial review jurisdiction. The consideration is made necessary by the submissions of the parties in relation to whether the judge properly exercised his discretionary power to transfer the proceeding to the Magistrates' Court. I will not be reviewing the merits of his Honour's consideration of the issues in the case or considering the matter as if I were a sentencing or appeal judge. The issue is not whether I would have decided that an appropriate sentence was one which the Magistrates' Court could give but whether it was open to the judge to reach the conclusion which he did. I will consider these issues under the heading of the director's submissions on equal justice in sentencing.

### **Equal justice in sentencing**

48. In the director's submission, which was carefully considered and persuasively argued by senior counsel, the decision of the judge to transfer the proceeding to the Magistrates' Court offended against the principle of equal justice that like offences should receive like sentences. He relied on the decision of *Stalio v The Queen*<sup>[15]</sup> in which Neave and Osborn JJA and King AJA cited<sup>[16]</sup> with approval this statement of Mason J in *Lowe v The Queen*:<sup>[17]</sup>

Just as consistency in punishment – a reflection of the notion of equal justice – is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community.<sup>[18]</sup>

49. I accept the premise of the director's submission that the principle of equal justice is of fundamental importance and of relevance to the exercise of the discretion in s168 of the *Criminal Procedure Act* to transfer a proceeding. I think this is helpful way of analysing the problem in the present case. The concept of equal justice which is applicable is the basic principle of horizontal equality that like cases should be treated alike, and unlike cases unlike. The concept is Aristotelian.<sup>[19]</sup> In the application of the principle, there is a 'threshold question of when two individuals are relevantly alike'.<sup>[20]</sup> In answering that question, it is necessary to identify the criterion or standard of sameness or difference: to 'say that two people are "equal" and entitled to be treated "equally" is to say that they both fully satisfy the criteria of a governing rule of treatment'.<sup>[21]</sup> In

the application of the principle, as in the sentencing context, matters of judgment are involved and two reasonable minds can differ about the conclusion.

50. The director contends that the judge treated the accused's case more favourably than a like case by transferring it to the Magistrates' Court where, because of the limitations on that court's sentencing jurisdiction, it could not be given the severity of sentence which was warranted for a case of that nature. There is inherent in that submission a judgment that, when regard is had to the sentences which were available, the accused's case was like cases which were appropriately dealt with in the County Court and not like cases which were appropriately dealt with in the Magistrates' Court. Determination of the director's submission requires critical evaluation of this judgment.

51. The applicable criteria and standards are to be found in the recent pronouncements in the Court of Appeal on sentencing in glassing cases. In the exercise of the transfer discretion, the judge sought to apply the principles which were stated in those pronouncements. His Honour's intention was to ensure that the offence before him, in its circumstances, would be treated equally in sentencing terms by comparison with like offences heard and determined in the Magistrates' Court, in their circumstances. In his view, taking into account the sentences which were available, the accused's case was like cases which were appropriately dealt with in the Magistrates' Court and not like cases which were appropriately dealt with in the County Court. As the sentencing options were less favourable in the County Court than the Magistrates' Court and that latter court had the power to impose a sentence which was objectively appropriate, the accused would be treated differently, ie unequally and therefore unjustly, if the proceeding were to be heard and determined in the County Court. In other words, by transferring the proceeding to the Magistrates' Court, his Honour was attempting to ensure, consistently with the principle of equal justice, that like cases could be dealt with alike. It was for that reason that he said:

As a matter of fairness and justice I think it is artificial that [the accused] should be dealt with in this court and denied the opportunity of a sentencing disposition that would be open to him in the Magistrates' Court.

52. The director's fundamental criticism of the decision of the judge was that it was not open to his Honour to conclude that, by reference to the sentencing principles enunciated by the Court of Appeal, it was open to the Magistrates' Court to impose a sentence which was appropriate for the accused's offence. He based that submission on *Winch v The Queen*,<sup>[22]</sup> *Trowsdale v The Queen*,<sup>[23]</sup> *Director of Public Prosecutions (Vic) v Gerrard*<sup>[24]</sup> and *Director of Public Prosecutions v Giannoukas*.<sup>[25]</sup>

53. In *Winch*, the appellant was charged on indictment in the County Court with causing serious injury recklessly. When very drunk and aged 26 years, he had made an unprovoked attack on the victim with a glass, leaving him permanently scarred. He pleaded guilty, was extremely remorseful and had no prior convictions. He appealed from his sentence of imprisonment for five years with a non-parole period of three years. The director conceded that the sentence was manifestly excessive, having regard to other cases.

54. Maxwell P and Ashley and Redlich JJA allowed the appeal. In a joint judgment, Maxwell P and Redlich JA (with which Ashley JA generally agreed) reviewed 16 glassing cases which had been the subject of sentences in the County Court between May 2007 and December 2009. Their Honours emphasised the very serious nature of glassing offences and that the offence of causing serious injury recklessly was committed where the offender had consciously disregarded a known risk.<sup>[26]</sup> Although the typical offender was young, generally of good character and full of remorse after the event, youth and rehabilitation must be subjugated to other considerations as such crimes were predominantly committed by youths and young men.<sup>[27]</sup> The serious nature of the offence will ordinarily call for an immediate custodial sentence and 'the full suspension of a custodial sentence will not ordinarily be an available sentencing option'.<sup>[28]</sup> Despite the 'powerful constellation of mitigatory features warranting a degree of clemency',<sup>[29]</sup> the accused was re-sentenced to imprisonment for two years and nine months with a non-parole period of 15 months, not suspended.

55. In *Trowsdale*, Bongiorno JA (Harper and Hansen JJA agreeing) upheld an appeal against sentence by an offender who had pleaded guilty in the County Court to a charge on indictment

of causing serious injury recklessly. When aged 19 years, the offender had made an unprovoked attack on the victim by throwing a glass at his face, causing very serious eye injuries. He had been sentenced to imprisonment for three years and nine months on a count of causing serious injury recklessly and imprisonment for twelve months on a count of making a threat to kill. With cumulation, the total effective sentence was imprisonment for four years, with a non-parole period of two years and three months. That was held to be manifestly excessive. Applying Winch, the sentence for the offence of causing serious injury recklessly was reduced to imprisonment for two years and nine months. The order for cumulation was not disturbed. With cumulation, the total effective sentence was reduced to imprisonment for three years, with a non-parole period of two years, not suspended.

56. In *Gerrard*, the offender was sentenced to imprisonment for two years, wholly suspended for three years, when he pleaded guilty to a charge on indictment of causing serious injury intentionally. When 37 years of age and very drunk, the offender had punched the victim twice to the head and ten minutes later had struck him to the side of the neck with a broken pot glass, causing very serious injuries and permanent scarring. Applying Winch, Neave, Redlich and Bongiorno JJA upheld the director's appeal on the ground that the sentence was manifestly inadequate. Having regard to 'the very exceptional combination of circumstances'<sup>[30]</sup> in mitigation, the offender was resentenced to imprisonment for three years, suspended.

57. In *Giannoukas*, the offender was charged on indictment with causing serious injury recklessly to which he pleaded guilty and was sentenced by the County Court to imprisonment for eighteen months, wholly suspended for two years. When aged 25 years, the offender had struck the victim to the right side of the face with a beer glass in response to the victim surging and throwing punches towards the offender. The Court of Appeal upheld the director's appeal on the ground that the sentence was manifestly inadequate. After discussing Winch and the subsequent decisions, Neave JA (Tate JA and Coghlan AJA agreeing) resentenced the offender to imprisonment for two years and six months, wholly suspended in view of 'the very strong mitigating factors which existed in th[e] case'.<sup>[31]</sup>

58. Having examined these decisions, I must reject the director's submission that it was not open to the judge to conclude that, consistently with the applicable sentencing principles (including current sentencing practices), and after taking into account the two year limit on the jurisdiction of the Magistrates' Court to impose a sentence of imprisonment and its jurisdiction to suspend any sentence of imprisonment, it was open to that court to give an appropriate sentence in the present case. The circumstances of the offending, the plea of guilty, the youth of the accused (eighteen years of age), his blameless past and his strong prospects of rehabilitation provide support for his Honour's analysis. The other considerations, including the nature of the offence and the undoubted permanent impact of the crime on the victim, did not, in my view, demand that his Honour come to a contrary view.

59. In conclusion, the applicable sentencing principles, including current sentencing practices, do not support the director's submission that his Honour transferred the proceeding to the Magistrates' Court for the improper purpose of circumventing the prohibition on the County Court imposing a suspended sentence of imprisonment. His Honour transferred the proceeding to the Magistrates' Court in the proper exercise of his discretion because he considered that it was open to that court to make an appropriate sentencing disposition. Taking into account the applicable sentencing principles and practices, it was open to his Honour to reach that conclusion, which was consistent with and not contrary to the fundamental principle of equal justice. I emphasise, however, that it will be for the sentencing magistrate to decide what sentence to impose and whether a sentence of imprisonment will be suspended. I should not be taken to have indicated that any particular sentencing disposition would or would not be appropriate.

#### **Taking irrelevant considerations into account**

60. The director submits that, in making the order, the judge took into account an irrelevant consideration, namely that the County Court did not, and the Magistrates' Court did, have jurisdiction to make an order suspending a sentence of imprisonment.

61. In *Craig v South Australia*,<sup>[32]</sup> it was held:

a failure by an inferior court to take into account some matter which it was, as a matter of law, required to take into account in determining a question within jurisdiction or reliance by such a court upon some irrelevant matter upon which it was, as a matter of law, not entitled to rely in determining such a question will not ordinarily involve jurisdictional error.<sup>[33]</sup>

As *certiorari* is a remedy which is available where jurisdictional error is established, it follows from *Craig* that relief of that nature cannot be granted merely on the ground that the judge in the present case took into account irrelevant considerations. The director's application on this ground must therefore be rejected.

62. However, I would not have upheld this ground even if it had been available.

63. The considerations which are relevant or irrelevant to the exercise of a statutory discretion are to be ascertained by reference to the principles stated by Mason J (Gibbs CJ and Dawson J agreeing) in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*:<sup>[34]</sup>

What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion ... If the relevant factors – and in this context I use this expression to refer to the factors which the decision-maker is bound to consider – are not expressly stated, they must be determined by implication from the subject-matter, scope and purpose of the Act. In the context of judicial review on the ground of taking into account irrelevant considerations, this Court has held that, where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except in so far as there may be found in the subject-matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard.<sup>[35]</sup>

64. The issue which this ground raises is whether it is irrelevant to the exercise of the transfer discretion in s168 of the *Criminal Procedure Act* to take into account that that transferring court does not have, and the receiving court does have, the power to suspend a sentence of imprisonment where, according to the applicable sentencing principles, this is a sentencing disposition which is open. Applying the statement of principle in *Peko-Wallsend*, on the proper interpretation of s168, this is a relevant consideration.

65. If I had adopted a contrary interpretation of s168, I would not have denied the relief sought on the ground that the respondent is a court. For the judge to have made a decision which was outside the limits of the functions and powers conferred on the County Court by that provision and to have done something which his Honour did not have the power to do would, on the authorities, have been a clear jurisdictional error.<sup>[36]</sup>

### **Failing to exercise jurisdiction**

66. The director submitted that the judge failed to exercise the jurisdiction of the County Court to sentence the accused. This ground must also be rejected on the basis of the proper interpretation of s168 of the *Criminal Procedure Act*. In my view, under that provision, the judge properly exercised the jurisdiction of the County Court to transfer the proceeding to the Magistrates' Court for the summary hearing and determination of the charge against the accused. When his Honour said 'I think I don't want to sentence [the accused]', he was indicating that he wanted to exercise the discretionary jurisdiction to transfer the proceeding to the Magistrates' Court, not that he was intending to refuse to exercise the jurisdiction of the County Court.

### **Conclusion**

67. Under s168 of the *Criminal Procedure Act*, a judge of the County Court or this court has the discretionary power to transfer a criminal proceeding for summary hearing and determination by the Magistrates' Court. Certain mandatory criteria must be taken into account, including the adequacy of sentences available in the Magistrates' Court (s29(2)(b)).

68. The transfer discretion does not enable a proceeding to be transferred to the Magistrates' Court where, according to the governing sentencing principles and current sentencing practices, that court does not have the jurisdiction to impose an appropriate sentence for the offence in the circumstances. However, the judge in the present case transferred the proceeding to the Magistrates' Court after concluding that, according to those principles and practices, it was open to the Magistrates' Court to impose an appropriate sentence for the offence which the accused pleaded guilty to committing.



69. In this judicial review application, the issue before me is not whether I would have made the same decision as the judge but whether his Honour committed an error of law on the face of the record or a jurisdictional error in making the decision which he did. I have concluded that the judge did not commit any such error. Taking into account that the Magistrates' Court could not impose a sentence of imprisonment of greater than two years, it was open to his Honour to decide that that court could impose an appropriate sentence in the circumstances. In reaching that conclusion, it was relevant for his Honour to take into account that the Magistrates' Court could suspend a sentence of imprisonment, even though the County Court could not do so. He did not err in law on the face of the record by misinterpreting the transfer provision, exercise the transfer discretion for the improper purpose of circumventing the prohibition on the County Court suspending a sentence of imprisonment, take into account irrelevant considerations or fail to exercise the jurisdiction of that court.

70. The director's application for judicial review will be dismissed.

<sup>[1]</sup> This ground was specified in the relief or remedy sought in the amended application and is inherent in the other grounds relied on.

<sup>[2]</sup> *R v Australian Broadcasting Tribunal; Ex parte Hardiman* [1980] HCA 13; (1980) 144 CLR 13, 35-36 (Gibbs, Stephen, Mason, Aickin and Wilson JJ); 29 ALR 289; (1980) 54 ALJR 314.

<sup>[3]</sup> *Westminster Corporation v London & North Western Railway Co* [1905] AC 426, 430 (Lord Macnaghten); *Thompson v Randwick Corporation* [1950] HCA 33; (1950) 81 CLR 87, 105-6 (Williams, Webb and Kitto JJ).

<sup>[4]</sup> See generally *Winch v The Queen* [2010] VSCA 141; (2010) 27 VR 658 (Maxwell P, Ashley and Redlich JJA); *R v Lovett* [2006] VSCA 5 (7 February 2006) (Ormiston, Buchanan and Ashley JJA); *Director of Public Prosecutions v Terrick, Marks and Spencer* [2009] VSCA 220; (2009) 24 VR 457; (2009) 197 A Crim R 474 (Maxwell P, Redlich JA and Robson AJA).

<sup>[5]</sup> Under s113(2) of the *Sentencing Act*, that limitation is subject to any contrary intention appearing in any other Act.

<sup>[6]</sup> Part 5.7 of the *Criminal Procedure Act* contains provisions with respect to the conduct of the trial, including s210 which specifies when a trial commences.

<sup>[7]</sup> The second reading speech does not mention the provision (Victoria, *Parliamentary Debates*, Legislative Assembly, 4 December 2008, 4969ff (Rob Hulls)) and the explanatory memorandum simply describes its contents (Explanatory Memorandum, *Criminal Procedure Bill* 2008, 64-65).

<sup>[8]</sup> Victoria, Department of Justice, *Criminal Procedure Act 2009: Legislative Guide*, 172.

<sup>[9]</sup> The *Sentencing Further Amendments Act* 2011 (Vic) relevantly came into force in 1 May 2011. The accused committed the offence to which he pleaded guilty on 1 November 2011.

<sup>[10]</sup> It follows that, if the judge in this case had considered that a custodial sentence was not called for, his Honour could have imposed a non-custodial sentence. However, as the judge recognised, this was a case in which a custodial sentence was called for. The issue is whether the judge committed a judicially reviewable error in transferring the proceeding to the Magistrates' Court where the accused could be sentenced to imprisonment for no more than two years and that sentence might have been suspended.

<sup>[11]</sup> Section 113(1) of the *Sentencing Act* (subject to any contrary intention appearing in any other Act: s113(2)).

<sup>[12]</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 21 December 2010, 17 (Mr Clark).

<sup>[13]</sup> *Winch v R* [2010] VSCA 141; (2010) 27 VR 658; *DPP (Vic) v Gerrard* [2011] VSCA 200; (2011) A Crim R 171.

<sup>[14]</sup> Under s10 of the *Administrative Law Act* 1978 (Vic), the stated reasons for decision of the trial judge are taken to form part of the record. The transcript of the hearing containing the judge's remarks may be considered for the purpose of understanding those reasons in that context: *Easwaralingam v Director of Public Prosecutions (Vic)* [2010] VSCA 353; (2010) 208 A Crim R 122, 127 [22] (Tate JA, Buchanan JA agreeing). The provision applies where the ground of review is error of law on the face of the record. That is only one of the grounds relied on in the present case. The other grounds are improper purposes, irrelevant considerations and failing to exercise jurisdiction (although it is inherent in the director's case on those grounds that the judge's decision was not authorised by the transfer provision, properly interpreted). In respect of those grounds, there is no limitation on referring to the transcript and I have taken it into account. Nonetheless, I think the ruling is the best evidence of the judge's reasons for making the transfer order.

<sup>[15]</sup> [2012] VSCA 120 (12 June 2012) (Neave and Osborn JJA, King AJA).

<sup>[16]</sup> *Ibid* [53].

<sup>[17]</sup> [1984] HCA 46; (1984) 154 CLR 606; 54 ALR 193; (1984) 58 ALJR 414; 12 A Crim R 408.

<sup>[18]</sup> *Ibid* 610-611.

<sup>[19]</sup> 'Equality in morals means this: things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unalikehood': Aristotle, 'Nicomachean Ethics' in Jonathan Barnes (ed), *The Complete Works of Aristotle: The Revised Oxford Translation* (Princeton University Press, 1984) vol 2, 1729.

<sup>[20]</sup> Sandra Fredman, *Discrimination Law* (Oxford, 2<sup>nd</sup> ed, 2011) 8.

<sup>[21]</sup> Peter Westen, 'The Empty Idea of Equality' (1982) 95 *Harvard Law Review* 537, 548-549.

<sup>[22]</sup> *Winch v The Queen* [2010] VSCA 141; (2010) 27 VR 658 (Maxwell P, Ashley and Redlich JJA) ('Winch').

<sup>[23]</sup> [2011] VSCA 81 (30 March 2011) (Bongiorno, Harper and Hansen JJA) ('Trowsdale').

<sup>[24]</sup> (2011) A Crim R 171 (Neave, Redlich and Bongiorno JJA) (*'Gerrard'*).

<sup>[25]</sup> [2011] VSCA 296 (7 October 2011) (Neave and Tate JJA, Coghlan AJA) (*'Giannoukas'*).

<sup>[26]</sup> *Winch* (2010) 27 VR 658, 664-5 [33]-[34] (Maxwell P and Redlich JJA).

<sup>[27]</sup> *Ibid* 664 [32], 667 [44].

<sup>[28]</sup> *Ibid* 669 [53].

<sup>[29]</sup> *Ibid* 660 [10], referring to the prosecution's submission.

<sup>[30]</sup> *Gerrard* [2011] VSCA 200; (2011) 211 A Crim R 171, 183 [50] (Neave JA, Redlich and Bongiorno JJA agreeing).

<sup>[31]</sup> *Giannoukas* [2011] VSCA 296 (7 October 2011) [67] (Neave JA, Tate JA and Coghlan AJA agreeing).

<sup>[32]</sup> [1995] HCA 58; (1995) 184 CLR 163; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359 (Brennan, Deane, Toohey, Gaudron and McHugh JJ) (*'Craig'*).

<sup>[33]</sup> *Ibid* 180; see also *Kirk v Industrial Court (New South Wales)* [2010] HCA 1; (2010) 239 CLR 531 571-573; (2010) 262 ALR 569; (2010) 84 ALJR 154; (2010) 113 ALD 1; (2010) 190 IR 437, (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (*'Kirk'*).

<sup>[34]</sup> [1986] HCA 40; (1986) 162 CLR 24; 66 ALR 299; (1986) 60 ALJR 560; (1986) 10 ALN N109 (*'Peko-Wallsend'*).

<sup>[35]</sup> *Ibid* 39-40 (footnotes omitted).

<sup>[36]</sup> *Craig* [1995] HCA 58; (1995) 184 CLR 163, 177; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359 (Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Re Refugee Review Tribunal; Ex parte AALA* [2000] HCA 57; (2000) 204 CLR 82, 141 [163]; (2000) 176 ALR 219; (2000) 75 ALJR 52; (2000) 62 ALD 285; (2000) 21 Leg Rep 6 (Hayne J); *Kirk* (2009) 239 CLR 531, 571 [66], 573-75 [72]-[74]; (2010) 262 ALR 569; (2010) 84 ALJR 154; (2010) 113 ALD 1; (2010) 190 IR 437 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

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