14/13; [2013] VSCA 53

SUPREME COURT OF VICTORIA — COURT OF APPEAL

DPP v BATICH

Warren CJ, Redlich and Whelan JJA

30 January, 20 March 2013

SENTENCING – JUDICIAL REVIEW – TRANSFER OF PROCEEDING FOR INDICTABLE OFFENCE FROM COUNTY COURT TO MAGISTRATES' COURT – 'GLASSING' OFFENCE – CAUSING SERIOUS INJURY RECKLESSLY – SCOPE OF DISCRETION TO TRANSFER INDICTABLE OFFENCE FOR SUMMARY HEARING – WHEN 'APPROPRIATE' TO TRANSFER PROCEEDING – WHETHER SENTENCE OF TWO YEARS' IMPRISONMENT REASONABLY OPEN – WHETHER DECISION TO TRANSFER MADE FOR IMPROPER PURPOSE – MEANING OF 'ADEQUACY' IN S29(2)(B) *CRIMINAL PROCEDURE ACT* 2009 (VIC) – DIRECTOR SIGNIFICANTLY ALTERED POSITION FROM THAT TAKEN BEFORE THE TRIAL DIVISION JUDGE – INDEMNITY COSTS AWARDED: *CRIMINAL PROCEDURE ACT* 2009 (VIC) SS28, 29 AND 168; *SENTENCING ACT* 1991 (VIC) S27(2B).

HELD: Appeal dismissed. The DPP to pay the respondent's costs on an indemnity basis.
1. An order to transfer proceedings to the Magistrates' Court would not be 'appropriate' and would be made for an improper purpose if the sole or actuating motive for doing so was to avoid the operation of s27(2B) of the *Sentencing Act*. That is not to say that the presence or absence of a sentencing option may not be a relevant factor in deciding whether transfer is appropriate.

2. A transfer would not become appropriate merely because the very bottom of the range fell within the Magistrates' Court's jurisdiction. To then order a transfer would remove the sentencing magistrate's ability to impose a sentence that fell within most of the range that was reasonably open. The magistrate would be prohibited from re-transferring the matter in those circumstances. Unless a judge is of the view that a sufficient portion of the range fell within the Magistrates' Court's jurisdiction so that the range of sentences available to the magistrate was adequate, it was not appropriate to make such an order.

3. Allowing the sentencing practice for this offence was to be as dictated in *Winch v R* [2010] VSCA 141, one reasonable view of the circumstances of the offence and matters personal to the respondent left open that a sentence of two years or less was within a sound exercise of the sentencing discretion. That was the opinion of the judge who ordered the transfer. On the basis of the narrow argument pressed before Bell J, his Honour rightly reached that conclusion. Therefore the Director's narrow basis for impugning the judge's decision to order that the charge be heard summarily failed as also did the Director's modified submission that because part of the range fell outside the Magistrates' Court's jurisdiction, no transfer could be made.

WARREN CJ, REDLICH and WHELAN JJA

1. By a summons filed 14 November 2012 the applicant, the Director of Public Prosecutions ('the Director'), seeks leave to appeal the refusal of judicial review by a judge of the Trial Division from an order of the County Court. The summons seeks leave to appeal, if leave to appeal is required; and, among other things, that the appeal be heard and determined upon return of the summons. No submissions were heard as to the need for leave, and the hearing proceeded as if it were the substantive appeal. Insofar as leave is necessary, in our view leave should be granted, but, for the reasons set out below, the appeal should be dismissed.

The background

2. The first respondent (the respondent) was presented in the County Court on a single count of recklessly causing serious injury.[1] The matter was remitted to the Magistrates' Court for sentencing.

3. At the time of the offending the respondent was 18 years old and out at a Melbourne city nightclub with four male friends. At about 11.30 pm the respondent's group moved to a smoking area. The complainant was also present at the nightclub with seven friends, one of whom was called Zach. Some of that group went to the smoking area and claimed to recognise the respondent

and his group of friends from a fight a couple of months earlier. The complainant's friends went inside the nightclub and told the rest of their group. The complainant and his friends then went out to the smoking area.

4. Zach, accompanied by the complainant and the rest of his friends, approached the respondent and his group and asked if they recognised him. When they said 'no', Zach said they should 'because they beat me and my mate up the other night'. The complainant then approached the respondent's group and asked: 'Why do you guys have a problem with all my mates for?'

5. The complainant and another male started grappling with one another. A security officer attempted to stand between the two men. This went on for a few seconds. The complainant was hit on the side of the face by a glass. The respondent was observed shaking a glass out with his right hand and then smashing the glass on the left side of the complainant's face. On one view of the available evidence the respondent, who was not fighting with the complainant, reached over the arms of the complainant and the man with whom he was grappling and thrust the glass into the complainant's face. A short while later the respondent told one of his companions that he did not know what had happened, that someone had grabbed him and hit him and that he (the respondent) had 'glassed him'. The police were called and observed the respondent to be holding a t-shirt in his right hand covered in blood. They further observed the respondent to have a gash running down his right hand and swelling on the upper lip. The respondent was arrested. He later gave a record of interview where, *inter alia*, he was asked: 'What was your intention when the glass was struck to the victim's face?' The respondent answered: 'self-defence'.

6. The complainant was hospitalised and treated for eight separate facial lacerations: to the left side of the head (two), eyebrow, upper eyelid, glabella, chin (two) and lower eyelid. The complainant underwent microsurgery to the frontal nerve branch of the damaged facial nerve.

7. The respondent entered a plea of guilty to one count of recklessly causing serious injury in the County Court.

8. An important background feature of this matter was that by virtue of s27(2B) of the *Sentencing Act* 1991 (Vic) (the 'Sentencing Act') the County Court was precluded from imposing a suspended sentence with respect to the charge.[2] A further background feature was the statement of the Court of Appeal in *R v Winch*[3] where after giving a summary of sentences in glassing cases up to that time,[4] the Court stated that offenders should anticipate significant custodial sentences. The President, and Redlich JA (Ashley JA agreeing on disposition for different reasons) said:

> [54] Glassing cases should, in our view, be treated as being in the same category as other RCSI offences which involve the use of a dangerous weapon likely to produce serious injury. There is no warrant for placing these cases in a lower category of seriousness where an immediate custodial sentence is not ordinarily required.
>
> [55] It follows, in our view, that sentencing judges should not regard themselves as constrained to follow the course disclosed by the glassing cases to which we have referred. Those advising clients in the future whether or not to plead guilty to RCSI in a glassing case should ensure that no assumption is made about the availability of a suspended sentence. For all the reasons we have given, a person who comes to be sentenced for RCSI, on a plea of guilty, for a 'glassing' offence – even with all the mitigating features to which we have referred – should proceed on the assumption that he or she will be required to spend a significant period of time in actual custody.[5]

The hearing in the County Court

9. On the first hearing of the plea, the County Court judge expressed the opinion that it was open for him to impose a suspended sentence. After discussion, his Honour concluded a suspended sentence was not an option in light of the relevant legislative amendment.[6] His Honour determined to refer the respondent for an assessment of his suitability to serve a sentence in a Youth Justice Centre.[7] His Honour made plain that he did not wish to sentence the respondent to gaol.[8] After some discussion with counsel about Community Correction Orders the plea was adjourned.

10. By the time of the next hearing a report had been provided assessing the respondent as a suitable candidate for a Youth Justice Centre Order.[9] The report also noted that the respondent

would benefit from avoiding the penal system. It was observed:

> [The respondent's] rehabilitation would be better served in a community setting. [The respondent] 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.[10]

11. On the next hearing the County Court judge raised at the outset that he was contemplating remitting the case to the Magistrates' Court pursuant to s168 of the *Criminal Procedure Act* 2009 (Vic) (the 'CPA'). That section provides that the Court may transfer charges to the Magistrates' Court if certain criteria are met. It states:

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

12. Section 168(1) largely mirrors s29(1) of the CPA which sets out when the Magistrate may hear and determine an indictable offence summarily. The criteria in s29(2) are those to which the Magistrate must have regard when considering whether a charge should be heard summarily under s28 of the CPA.

13. The list of criteria in s29(2) of the CPA are:

> (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.

14. In the Magistrates' Court, by virtue of the fact that the matter would be heard and determined summarily, the Magistrate would retain the power to impose a suspended sentence together with other sentencing options, including detention in a Youth Justice Centre. Plainly, the County Court judge was influenced by the Youth Justice Centre assessment report.[11] His Honour raised a wide range of matters whilst engaging with counsel. His Honour noted that a Community Correction Order would be unsuitable and vulnerable to intervention by the Court of Appeal (in all likelihood referring to the statements in *Winch*).[12]

15. If the matter was heard and determined summarily then the maximum sentence that could be imposed on the respondent would be two years' imprisonment.[13]

16. The County Court judge made a number of observations concerning the absence of a power in the County Court to suspend sentences which may explain why the Director initiated judicial review proceedings. Some of these remarks had an arguable relevance to those grounds of the application for judicial review which raised 'improper purpose' or 'irrelevant consideration.' Those observations need not be considered as they are now of no relevance in the light of the way in which the Director sought to impugn the judge's decision before Bell J and on appeal.

17. There was a shift of the focus before Bell J and in this court from examining what importance, if any, the absence of the power to suspend a sentence assumed in the judge's thinking, to whether a proceeding could be transferred if only part of the sentencing range fell within the Magistrates' Court's jurisdiction. This change removed the considerations of 'improper purpose', 'irrelevant consideration' or 'abuse of process' as grounds for challenging the judge's

order. Those grounds are usually invoked to challenge the exercise of the power for a purpose other than the purpose for which the power is conferred[14] or where the nature of the subject matter or the general interpretation of the relevant act makes it plain that certain matters would not be germane to the matter in question and must be disregarded as irrelevant collateral matters.[15]

18. What was of significance to the Director's ultimate submissions was that the judge expressed the view in a number of ways that the Magistrate's power to impose two years' gaol was 'more than adequate' or sufficient for the respondent in all the circumstances.[16] The County Court judge approached the question whether a magistrate could impose a sentence of two years' gaol by asking whether such a sentence was open.[17] The prosecutor attempted to dissuade the judge from remitting the matter to the Magistrates' Court and also sought to provide a range of sentence consistent with *R v MacNeil-Brown*.[18] His Honour declined to receive a range and next proceeded to deliver his ruling.

19. For reasons which Bell J set out in detail, and to which we refer below, the County Court judge found that the transfer was appropriate and made orders accordingly, remitting the matter to the Magistrates' Court.

The judicial review

20. The Director sought judicial review of the County Court judge's decision pursuant to Order 56 of the *Supreme Court (General Civil Procedure) Rules* 2005 ('the Rules'). The questions of law raised by the Director were:

> 1. In making the order transferring the charge in Indictment B13063849 to be transferred to the Magistrates' Court at Melbourne to be heard and determined summarily:
>
> A. Did his Honour make the order for an improper purpose, namely, to circumvent the operation of S27(2B) of the *Sentencing Act* 1991, which prohibited him from imposing a suspended sentence in respect of a charge of recklessly cause (*sic*) serious injury, which required the imposition of a custodial sentence, the determination of which he was seized of in the proceedings before him?
>
> B. Did his Honour in making the order take into account an irrelevant consideration, namely that he had no jurisdiction to pass a suspended sentence in respect of the charge of recklessly causing serious injury, where a custodial sentence was called for, the determination of which he was seized of in the proceedings before him?
> C. Has his Honour refused to exercise his jurisdiction to sentence the Respondent?
>
> 2. Is his Honour's order an abuse of process of the County Court?[19]

21. These questions all sought an answer in the affirmative before Bell J and on appeal. For reasons which will shortly be explained, the Director cannot now sustain the submission that any of these questions of law should be answered in the affirmative.

22. At the judicial review hearing before Bell J, the Director reviewed authorities concerning 'glassing' cases, relying upon *Winch* in particular, and submitted:

> a sentence of imprisonment of 2 years or less was outside the range and could not be imposed. This precluded this matter being heard in the Magistrates' Court.[20]

As indicated earlier, the maximum penalty the Magistrates' Court could impose is two years' imprisonment.

23. In the course of oral submissions before Bell J, senior counsel for the Director made a relevant and important submission. It was conceded that if, consistently with current sentencing practice, a sentence of two years' imprisonment or less was open, then the sentencing judge could properly transfer the charge under s168 of the CPA.[21] That led Bell J to approach the question of the validity of the judge's decision to transfer the proceedings in the following narrow way:

> [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.[22]

24. Ultimately, applying that test, Bell J rejected and dismissed the Director's proceeding. His Honour held:

> [43] The reasons show that the judge transferred the proceeding to the Magistrates' Court after considering all of the various matters specified in ss29 and 168 of the *Criminal Procedure Act*. His Honour [the County Court judge] 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.[23]

25. Justice Bell also considered current sentencing practices (on the basis of the way the Director had put the matter). His Honour concluded, after reviewing the authorities relied on by the Director:

> [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 [respondent] (18 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.[24]

26. Finally, as to irrelevant considerations, Bell J concluded that the sentencing judge had properly exercised the power under s168 of the CPA. His Honour held in 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.[25]

The submissions before this Court

27. The Director appealed the decision on five grounds. They may be summarised as:

- Error of law in finding that the County Court judge effected the transfer to the Magistrates' Court for proper reasons;
- Error in concluding that a sentence of two years was within the acceptable range;
- Error by giving weight to non-glassing cases in considering current sentencing practices;
- Failing to find improper purpose by the sentencing judge; and
- Failing to hold that the County Court judge failed to exercise jurisdiction.

28. In oral argument on appeal it was conceded by the Director that the test proposed before Bell J was not a sufficient means of testing whether the purpose was improper and that the test must be broader. It was now said that if it was reasonably open to a magistrate to conclude that a sentence in excess of two years could be imposed, transfer under s168 was impermissible. The Director submitted that the appropriate question was whether a sentence of two years' imprisonment or more was open and consistent with current sentencing practice. He contended that unless the upper end of the range of appropriate sentences was two years or less, that is, unless the entire range fell within the Magistrates' Court's jurisdiction, a judge could not order a transfer to the Magistrates' Court pursuant to s168. He submitted that a sentence in excess of two years' imprisonment was open, having regard to current sentencing practice and the circumstances of this case, and therefore the County Court judge erred in exercising the s168 power. It will be appreciated that this approach significantly differed from that put to Bell J below.

29. The Director acknowledged that the argument had not been run that way before Bell J.[26] Indeed, he conceded that an error had been made in the narrow way the matter was crafted and run on review.[27] For the reasons which follow, neither the test which Bell J was asked to apply nor the one raised on appeal provides a correct guide as to when it will be appropriate for an order to be made to transfer jurisdictions.

30. The Director suggested that this was an important case because the outcome would affect future consideration of ss29 and 168 and the exercise of jurisdiction, including the maximum penalty (albeit that the Magistrates' Court is limited to two years' imprisonment). We were informed that considerations as to settlement of future cases by prosecutors would be affected.

Improper purpose

31. Insofar as the Director relied upon improper purpose, he expressly disavowed any suggestion of malice, or ulterior motive or purpose on the part of the sentencing judge. That is to say, it was never submitted or suggested that in remitting the matter to the Magistrates' Court the sentencing judge was attempting to avoid and obviate the amendment to s27(2B) of the *Sentencing Act*. The Director's submissions were appropriately respectful of the integrity of the judicial role. Improper purpose was only submitted in the strict administrative law sense,[28] namely, the sentencing judge misapplied s29. This was properly so.

32. As we have already noted, the original questions raising improper purpose and irrelevant considerations fell away as issues as a consequence of the narrow test which was formulated before Bell J. On appeal the Director did not return to those original questions but advanced another, also less than satisfactory test for ascertaining the existence of an improper purpose. Before leaving those questions we should state that an order to transfer proceedings to the Magistrates' Court would not be 'appropriate' and would be made for an improper purpose if the sole or actuating motive for doing so was to avoid the operation of s27(2B) of the *Sentencing Act*.[29] That is not to say that the presence or absence of a sentencing option may not be a relevant factor in deciding whether transfer is appropriate.

Sections 29 and 168

33. Section 168 of the CPA requires the court to have regard to the matters in s29(2) when considering whether it is appropriate to transfer a matter to the Magistrates' Court to be heard summarily. The matters in s29(2) include a range of factors relating to both processes and penalties; and s29(2)(d) allows the transferring court to consider 'any other matter that the court considers relevant.' Having had regard to the matters in s29(2), if the court considers the charge is appropriate to be determined summarily, and if the accused consents, under s168 the County Court 'may' order transfer. The court therefore has a broad discretion to weigh a range of considerations going to whether an order for transfer should be made.

34. We observe in particular, that s29(2)(b) requires the court to have regard to 'the adequacy of sentences available to the court, having regard to the criminal record of the accused'. Self-evidently, if none of the sentences available in the jurisdiction to which the offence is transferred are adequate, it would not be appropriate to transfer the charge, even if consideration of other factors referred to in s29(2) supported a transfer.

35. On the modified submission advanced by the Director on this appeal, a judge could only remit an offence to the Magistrates' Court if a sentence greater than two years could not reasonably be imposed. That is, the entire sentencing range which is open must be within the jurisdiction of the Magistrates' Court. That formulation of the test and the one made before Bell J must both be rejected. Whether a transfer is 'appropriate' or is made for an improper purpose is not to be determined by asking whether any part of the range of sentences falls outside the Magistrates' Court's jurisdiction or whether any part of it falls within that jurisdiction. In other words, it is not to be determined by deciding whether the extremities of the range fall within or outside the Magistrates' Court's jurisdiction.

36. The issue as to sentencing range is expressly dealt with in s29(2)(b) of the CPA. Section 29(2)(b) requires the court to have regard to 'the adequacy of sentences available to the court.' In our view 'adequacy' means 'acceptability' or 'sufficiency'.[30] The 'adequacy of sentences available to the court' calls for a consideration of the maximum term of imprisonment available within the Magistrates' Court and the types of sentences that are available.[31] 'Adequacy' involves a judgment as to whether in the circumstances an acceptable or sufficient level or measure is met or exists. It does not require a conclusion that every possible contingency is covered. Indeed, to impose such a requirement would substitute perfection for adequacy. 'Adequacy' itself is not an absolute measure. 'Adequacy' might be met by circumstances which are barely adequate or more than adequate. 'Adequacy' is the relevant consideration, but the degree of adequacy may bear on the significance of that consideration.

37. Under s168, there is no power to transfer unless the judge determines that the matter is appropriate to be determined summarily having regard to the matters in s29(2). That involves a consideration of the adequacy of the available sentences in the Magistrates' Court. Even if the judge concludes it is appropriate that the charge be determined summarily (and there is consent), s168(1) provides that the County Court 'may' order a transfer. In exercising that discretion to so order or not to so order, the judge can take into account all the circumstances of the case and all the sentencing dispositions open to be imposed, and not open to be imposed, in each jurisdiction.

38. A transfer would not become appropriate merely because the very bottom of the range fell within the Magistrates' Court's jurisdiction. To then order a transfer would remove the sentencing magistrate's ability to impose a sentence that fell within most of the range that was reasonably open. The magistrate would be prohibited from re-transferring the matter in those circumstances.[32] Unless a judge is of the view that a sufficient portion of the range falls within the Magistrates' Court's jurisdiction so that the range of sentences available to the magistrate will be adequate, it will not be appropriate to make such an order.

39. We are fortified in our conclusion that to impose the requirement contended for by the Director would be to impose a requirement inconsistent with the statutory language by the fact that magistrates must also apply the criteria in s29(2)(b) when deciding whether certain specified indictable offences may be heard and determined summarily under s28 of the CPA. The effect of acceptance of the Director's contention would be to not only prohibit transfer unless the Magistrates' Court had the jurisdiction to impose the entire sentencing range, it would also mean

magistrates could not hear and determine indictable offences summarily under s28 of the CPA unless they were satisfied that the entire sentencing range was within their jurisdiction. A review of the authorities in relation to the operation of s28 of the CPA and its predecessors[33] reveals that no such proposition has ever been suggested previously, much less accepted.[34]

40. In our view, the legislature did not intend to constrain the transfer capacity, found in ss29(2) and 168, by the introduction of s27(2B) of the *Sentencing Act*.

41. Restrictions upon the imposition of suspended sentences have been imposed progressively over several years. The *Sentencing (Suspended Sentences) Act* 2006 provided for specific matters which had to be addressed, and required the existence of exceptional circumstances, and that reasons be given, where a suspended sentence was to be imposed for a 'serious offence' as defined. Then, the *Sentencing Amendment Act* 2010 provided that a court must not make an order suspending the whole or a part of a sentence of imprisonment for a 'serious offence' as defined. The *Sentencing Further Amendment Act* 2011 expanded that prohibition on the imposition of suspended sentences to a new group of offences defined as a 'significant offence'. One of this new group was the following:

> an offence against section 17 of the *Crimes Act* 1958, (causing serious injury recklessly) unless heard and determined summarily;[35]

42. These amendments expressly preserved the capacity of the Magistrates' Court to suspend sentences of imprisonment in respect of certain significant offences, including causing serious injury recklessly.[36]

43. Parliament must be taken to have known of the operation of ss168 and 29 of the CPA at the time of passing the *Sentencing Further Amendment Act* 2011. That Parliament chose not to amend ss168 or 29 at the time of introducing these amendments suggests that it was not Parliament's intention that s27(2B) proscribe the operation of s168. If Parliament had intended to constrain the transfer power in this way, it would have done so by express provision. Instead, Parliament expressly provided that the prohibition would not apply where the offence was heard summarily, either pursuant to s28 applying the criteria in s29, or pursuant to s168 applying the criteria in s29.

44. Thus, the Director's contention that the County Court judge erred because he could not transfer the proceeding unless the entire sentencing range was available in the Magistrates' Court is wrong, in our view. And, there is nothing contrary to, or inconsistent with, the applicable legislative provisions if a judge transfers a charge, to which the legislative prohibition on suspended sentences would otherwise apply, to the Magistrates' Court to be heard summarily, if that is done pursuant to, and in accordance with, s168. That is expressly provided for in the relevant legislation.

Current sentencing practices

45. The Director focused on the sentencing indication in *Winch* to argue that the only appropriate sentence in this case was a custodial one. A range was submitted to this court of three years and six months' imprisonment at the upper end to two years six months' at the lower end.[37]

46. The Director relied on a comparative analysis of glassing cases post-*Winch* to make out this submission. However, the statements in *Winch* do not lay down a mandatory minimum sentence, rather in that case the court made a statement of principle. Each case will need to be considered individually albeit within the context of current sentencing practices.

47. Here, there were relevant mitigating factors that left it open to the County Court judge to determine that sentences within the jurisdictional limit of the Magistrates' Court (imprisonment for up to two years and other options) were open.[38]

48. The respondent's circumstances differentiated him from the offenders in the cases relied on by the Director.[39] He was notably younger, was arguably acting in self-defence, had no prior criminal history, had high rehabilitation prospects and had been assessed as vulnerable if a custodial sentence was imposed. In our view, Bell J appropriately considered all these matters and disposed of the submission in a manner that was open and does not reveal error.

The outcome of the appeal

49. Allowing the sentencing practice for this offence is to be as dictated in *Winch*, one reasonable view of the circumstances of the offence and matters personal to the respondent left open that a sentence of two years or less would be within a sound exercise of the sentencing discretion. That was the opinion of the judge who ordered the transfer. On the basis of the narrow argument pressed before Bell J, his Honour rightly reached that conclusion. Therefore the Director's narrow basis for impugning the judge's decision to order that the charge be heard summarily must fail. Nor are we persuaded by the Director's modified submission put to this court that because part of the range fell outside the Magistrates' Court's jurisdiction, no transfer could be made.

50. We would dismiss the appeal.

The discretion to grant relief under Order 56

51. Even if we had accepted the Director's submissions and found that the grounds of appeal were made out, we would have refused to grant relief.

52. The Director made an application for judicial review in the Supreme Court pursuant to Order 56 of the Rules, seeking relief in the nature of *certiorari* or mandamus. Both parties before us submitted this relief was discretionary even if the grounds are established.[40]

53. When considering whether to exercise the discretion appellate courts are reluctant to interfere with criminal courts generally but this attitude may be qualified where the prosecutor has no other form of redress.[41] The court will also consider what matters were conceded, or acquiesced in, by the Director.[42]

54. After weighing up all of the relevant factors, in the circumstances of this case we would not have exercised our discretion to grant relief. The Director significantly changed his argument before this court. He ran his case on a basis inconsistent with matters conceded before the judge on review. Given the respondent's personal circumstances and in particular his age, the limitations upon a disposition by way of sentence to custody in a Youth Justice Centre, and the amount of time that he has spent awaiting a resolution to this matter, we would have exercised our discretion to refuse relief even if a ground had been made out.

Costs

55. The respondent seeks that the Director pay his costs of, and incidental to, this proceeding on an indemnity basis. The Director opposes the application. The Director submits that the respondent did not originally apply for the Magistrates' Court to hear his matter, that the question of whether the County Court judge had the jurisdiction to make the impugned order is a matter of public importance and that it was 'obvious' that the order would be appealed but the respondent 'was prepared to take the chance'.[43]

56. This court has a discretion to award costs on an indemnity basis.[44] The court might choose to exercise that discretion on the basis of a significant or unusual feature of a case, or a special circumstance which justifies departure from the normal principle, or when a party persists on what should be seen as a hopeless case.[45] The categories of special cases are not closed.[46]

57. We agree with the Director that this application concerns an important issue of law and that clarifying current sentencing practices is a matter of public importance. We do not accept the Director's submission that it was 'obvious' the order would have been appealed.

58. In oral argument before this Court, the Director significantly altered his position from that taken before Bell J and conceded that an error had been made in the narrow way in which the case had been run on review. This alteration allowed this important question to be more fully ventilated.

59. In our view, the narrow submission ultimately pursued before Bell J and initially in this court was doomed to fail. The Director's modified position raised an important issue, but that issue was not raised until oral argument in the appeal and could not in any event be sustained. The manner in which the Director has pursued this application has not facilitated the 'just, efficient, timely and cost-effective resolution of the real issues in dispute.'[47]

60. As this court has observed in the past,[48] there are times where a respondent should not carry the burden where a State authority seeks to clarify legislation. Given the way the application proceeded, we consider this to be one such case.

61. In the circumstances we would therefore order that the Director pay the respondent's costs on an indemnity basis. Insofar as it is necessary to say so, the second respondent should bear its own costs.

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[1] The second respondent, while present at the hearing before this court, did not seek to be heard.
[2] That sub-section provides, *inter alia*, that a court may not make an order suspending a sentence of imprisonment imposed on an offender for a 'significant' offence. Per s3, a 'significant' offence includes recklessly causing serious injury unless heard and determined summarily.
[3] [2010] VSCA 141.
[4] Ibid Appendix A.
[5] Ibid [54]-[55].
[6] County Court transcript, 4 May 2012, 8-9, 10-11. See fn [2] above.
[7] Ibid 12.
[8] Ibid.
[9] From the Department of Human Services dated 25/05/12.
[10] Ibid 3 (Ex TS-4 to the affidavit of Temple Saville sworn 20/06/12).
[11] County Court transcript, 6 June 2012, 2-3.
[12] Ibid 3.
[13] *Sentencing Act* 1991 (Vic) s113.
[14] *The Queen v Toohey; Ex parte Northern Land Council* [1981] HCA 74; (1981) 151 CLR 170; 38 ALR 439; (1981) 56 ALJR 164.
[15] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1; [1948] 1 KB 223; [1947] 2 All ER 680; (1947) 63 TLR 623; (1947) 177 LT 641; (1947) 112 JP 55; [1948] LJR 190; (1947) 45 LGR 635.
[16] County Court transcript, 6 June 2012, 6-13.
[17] Ibid. 13.
[18] [2008] VSCA 190; (2008) 20 VR 677; (2008) 188 A Crim R 403.
[19] Director's written submissions [2.1].
[20] Plaintiff's outline of submissions [5.11].
[21] Supreme Court transcript, 22 October 2012, 14-6, 20-1, 28, 36-7.
[22] *Director of Public Prosecutions v Batich* [2012] VSC 524.
[23] Ibid.
[24] Ibid.
[25] Ibid.
[26] Court of Appeal transcript, 30 January 2012, 15.
[27] Ibid 20.
[28] In the sense that 'decisions are impeachable for improper purpose only where the relevant power is purposive or, at least, where some purposes are forbidden': see Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (5th ed, 2012) 315.
[29] *Curwen & Ors v Vanbreck Pty Ltd* [2009] VSCA 284 [38]- [42].
[30] The *Oxford Dictionary of English* (2nd ed. Revised, 2005) defines adequate as 'satisfactory or acceptable in quality or quantity'. The *Macquarie Concise Dictionary* (4th ed. 2006) defines adequate as 'equal to the requirement or occasion; fully sufficient, suitable, or fit'.
[31] That is a consideration more likely to be relevant in the case of a court transferring an indictable matter to the Magistrates' Court as it is the Magistrates' Court that has sentencing options unavailable to a higher court.
[32] CPA s168(3).
[33] The predecessor of s28 was s53(1) of the *Magistrates' Court Act* 1981. Section 53(1) was preceded by s69 of the *Magistrates' Court Act* 1971, which was introduced by *Magistrates' Court (Jurisdiction) Act* 1973. Section 69 was a re-enactment, with amendments, of s102A of the *Justices Act* 1958 and was in different terms to s53(1) and s28.
[34] See *Scrofani v Duke* [1991] VicSC 505; *DPP v Cowling* [1994] VicSC 162; *Stratton v Bestaburgh Pty Ltd* [1994] VicSC 535; *Otte v Magistrates' Court of Victoria and Ors* [1996] VicSC 553; 89 A Crim R 223; *R v Ray & Anor* [2000] VSC 430; *Van Phuc Diep v Appeal Costs Board* [2003] VSC 386; 146 A Crim R 151; 20 VAR 376; *DPP v Verigos* [2004] VSC 97; 145 A Crim R 82; *Onus v Sealey* [2004] VSC 396; 149 A Crim R 227; *Clayton v Hall & Anor* [2008] VSC 172; 184 A Crim R 440; *Jeffrey v Schubert & Anor* [2012] VSC 144; *Strangio v Magistrates' Court of Victoria & Anor* [2012] VSC 333.
[35] *Sentencing Further Amendment Act* 2011 s 3.
[36] Victoria, *Parliamentary Debates*, Legislative Assembly, 21 December 2010, 17 (The Hon. Attorney-General).
[37] Court of Appeal transcript, 30 January 2013, 2-3 and 5-6.
[38] Other options included: a youth justice centre order; a youth residential centre order; or a community corrections order.

[39] 'Sentenced RCSI "glassing" offences committed after 17 June 2010', Table A to the Applicant's Outline of Argument.
[40] First Respondent's Further Submissions on the Question of Refusal of Relief on Discretionary Grounds, filed 31 January 2013 and Applicant's Further Submissions on the Question of Refusal of Relief on Discretionary Grounds, filed 4 February 2013 ('Applicant's further submissions'). And see: Aronson and Groves, above n 28, 798-800; *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57; (2000) 204 CLR 82, 89, 105-9, 136-7 and 144; (2000) 176 ALR 219; (2000) 75 ALJR 52; (2000) 62 ALD 285; (2000) 21 Leg Rep 6; *Re McBain; Ex parte Australian Catholic Bishops Conference & Anor* [2002] HCA 16; (2002) 209 CLR 372, 394, 410, 415-423 and 465-6; (2002) 188 ALR 1; (2002) 76 ALJR 694; [2002] EOC 93-207; (2002) 23 Leg Rep 2.
[41] See, eg, Aronson and Groves, above n 28, 800 citing, *inter alia*, *Chief Executive Officer of Customers v Jiang* [2001] FCA 145; (2001) 111 FCR 395; 111 FCR 395; (2001) 183 ALR 604 and *South Australia v Russell* [1994] SASC 4491; (1994) 62 SASR 288; (1994) 71 A Crim R 497.
[42] See, above n 28, Aronson and Groves, 802.
[43] Applicant's further submissions, filed 4 February 2013, para [2][a]-[e].
[44] Rules Order 63.
[45] See *Colgate-Palmolive Co v Cussons Pty Ltd* [1993] FCA 536; (1993) 46 FCR 225, 233-4; (1993) 118 ALR 248; (1993) 46 FLR 225; 28 IPR 561 and the cases cited therein and *Australian Electoral Commission v Towney (No 2)* (1994) 54 FCR 383, 388.
[46] *Ugly Tribe Co Pty Ltd v Sikola* [2001] VSC 189 [8] (Harper J).
[47] *Civil Procedure Act* 2010 (Vic) s7.
[48] See, eg, *Secretary to the Department of Justice v LMB; Secretary to the Department if Justice v PMY* [2012] VSCA 143 and *Secretary to the Department of Justice v XQH* [2012] VSCA 72 [14]-[15] citing examples from the High Court in *Maurice Blackburn Cashman v Brown* [2011] HCA 22; (2011) 242 CLR 647 [43]; (2011) 277 ALR 654; *Amaca Pty Ltd v Booth* [2011] HCA 53; 283 ALR 461, [150]; 86 ALJR 172; (2011) 10 DDCR 96; *Australian Crime Commission v Stoddart* [2011] HCA 47 [42]; *Minister for Immigration and Citizenship v SZGUR* [2011] HCA 1; (2011) 241 CLR 594 [45]; (2011) 273 ALR 223; (2011) 119 ALD 1; (2011) 85 ALJR 327.

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