10/02; [2002] VSC 116

SUPREME COURT OF VICTORIA — COURT OF APPEAL

COLEMAN v DPP & COUNTY COURT of VICTORIA

Batt and Vincent JJ A, and O'Bryan A JA

27 June, 8 August 2002 — (2002) 129 A Crim R 107

CRIMINAL LAW – SENTENCING – SUSPENDED SENTENCE IMPOSED – SUBSEQUENT OFFENCE COMMITTED DURING OPERATIONAL PERIOD OF SUSPENDED SENTENCE – SUCH OFFENCE RELATING TO SMALL QUANTITY OF CANNABIS PUNISHABLE BY A FINE ONLY – WHETHER OFFENCE "PUNISHABLE BY IMPRISONMENT" – SUSPENDED SENTENCE BREACHED AND OFFENDER ORDERED TO SERVE SENTENCE – WHETHER COURT IN ERROR: *DRUGS, POISONS AND CONTROLLED SUBSTANCES ACT* 1981, S73(1); *SENTENCING ACT* 1991, S31(1).

Section 31(1) of the *Sentencing Act* 1991 ('Act') provides:

> (1) If at any time during the operational period of a suspended sentence of imprisonment, the offender commits, whether in or outside Victoria, another offence punishable by imprisonment, the offender is guilty of an offence for which he or she may be proceeded against on a charge filed by a prescribed person or a member of a prescribed class of persons.

On appeal to the County Court, C. was sentenced to a term of 2 months' imprisonment wholly suspended for 12 months. During the operational period of the suspended sentence, C. pleaded guilty to possession and use of a small quantity of cannabis and was convicted and fined. In respect of those offences the court had no power to impose a sentence of imprisonment. When the proceedings for breach of the suspended sentence came before the County Court, the judge found the breach proved and restored the sentence of imprisonment. Upon appeal—

HELD: Appeal allowed. Declaration made that County Court judge erred in finding C. guilty of the breach and restoring the sentence held in suspense.

C. was in possession of a small quantity of cannabis and entitled to a finding that this possession was not for any purpose related to trafficking. The maximum penalty which could lawfully have been imposed upon him for either offence was a monetary fine. The word "punishable" in s31(1) of the Act ordinarily refers to the potential for punishment and not its actual imposition. It is the commission of a "further offence" which attracts that potential penalty to which attention must be directed. The question was whether the commission of the further offence carried the possibility of a sentence of imprisonment. In C.'s case, he could not be properly described as having committed "another offence punishable by imprisonment" within the meaning of s31(1) of the Act. Accordingly, the judge was in error in finding otherwise.

BATT JA:

1. The facts are stated in the judgment of Vincent JA which I have had the benefit of reading. I agree with his Honour's conclusions and reasons but desire to express in my own words my views on some aspects of the case.

2. The first question is the meaning of the expression on which s31 of the *Sentencing Act* 1991 pivots, which is found in sub-s(1) of that section and substantially also in s27(4)(b), namely, "If ... the offender commits ... another offence punishable by imprisonment". The expression is to be interpreted in the context that the offender has already committed an offence which is punishable by imprisonment and for which he or she has indeed been sentenced to a term of imprisonment.[1] The expression directs attention to the offence which the offender in fact subsequently commits. Now, "punishable" is defined in *The Oxford English Dictionary*[2] as "Liable to punishment; capable of being punished" and specifically, of an offence, as "Entailing punishment"[3]. *Black's Law Dictionary*[4] defines the word, when used of a crime or tort, as "giving rise to a specified punishment". The question, then, is whether the offence which the appellant subsequently committed was liable to be, or capable of being, visited with punishment by imprisonment. Did that offence give rise to the possibility of punishment by imprisonment?

3. There are no reported decisions directly in point. Such decisions as there are on offences "punishable on indictment" show, on the whole, that one must consider the nature of the offence at the time when it is committed and ask whether it is one which *can be* punished on indictment, for it is to the intrinsic gravity of the subsequent offence that the relevant section is directed, not to the consequence which, as a matter of procedure and by the exercise of options or elections, in fact eventuates: *Wood v Reason*[5]*; Hastings v Folkestone Glassworks*[6]*; R v Guildhall Justices, Ex parte Marshall*[7]*;* and *NSW Crime Commission v D'Agostino*[8]. The notable exception to this is *R v Melbourne*[9]. That case did concern activating a suspended sentence. The offence could be punished by imprisonment if dealt with on indictment, but only by fine if dealt with summarily. It was held that whether the offender had committed another "offence punishable by imprisonment" was to be determined by whether he was dealt with summarily or on indictment. But the case is of no application here, for it does not answer the question relevant here, namely, what the offence is that was committed.

4. One must, then, construe the expression largely unassisted by authority. It is not a question of whether the offender was subsequently punish*ed* by imprisonment: compare *Hastings & Folkestone Glassworks Ltd v Kalson*[10]. In theory at least, the hearing of the charge for the subsequent offence could occur after the hearing of the charge for an offence under s31(1) or indeed might never occur. Nor is it a question of what offence the offender is *alleged* to have committed. In the present context whether the offender has committed a "triggering" offence is a question of the level of generality with which one describes the offence. As I see it, it is not whether the subsequent offence was of a kind or generic description that could be punished by imprisonment, but whether the particular offence actually committed was able to be visited with imprisonment. I am of this view in large measure because the principle on which s31 proceeds is that if, but only if, an offender exposes himself or herself again to the possibility of imprisonment the suspended sentence of imprisonment may, and (by virtue of sub-s(5A)) usually must, be activated by removal of the suspension. That is, the section is concerned with the intrinsic gravity of the subsequent offending. Further, the fact that the liberty of the subject is involved supports a narrower reading of the expression if it is considered to be ambiguous.

5. The next question is whether the appellant committed a "triggering" offence. Section 73(1)[11] of the *Drugs, Poisons and Controlled Substances Act* 1981, unlike s71(1) in the form considered in *R v Satalich*[12], creates only one offence: *R v Pantorno*[13], but an offender cannot be imprisoned where "the court", that is, the sentencer,[14] is satisfied on the balance of probabilities of the matters set out in paragraph (a) of the sub-section. It was tacitly accepted that, whether by reason of *res judicata* or issue estoppel or otherwise, we should proceed on the basis that whether the subsequent offence was one punishable by imprisonment was to be determined by reference to what occurred before, and what was held or found by, the magistrate. The respondent did, however, rely on the certificate as to the Magistrates' Court proceeding under s18(5) of the *Magistrates' Court Act* 1989, but it was ambiguous or inconclusive on the very point. As Vincent JA shows, the magistrate was, or must be taken to have been, satisfied as abovementioned. At the least and contrary to the opinion of the judge from whom this appeal is brought, an inferential or tacit finding was made. Thus, although the generic offence of having in one's possession a drug of dependence is capable of being visited with punishment by imprisonment, the specific offence of that general description which the appellant committed was not capable of being visited with punishment by imprisonment. Accordingly, he was not guilty of an offence under s31(1) of the *Sentencing Act* and the County Court judge was not entitled in law to find him guilty of such an offence or to go on to restore the sentence of two months' imprisonment which had been imposed by him on the appellant at Ballarat on 21 February 2001 and been held in suspense and to order the appellant to serve it.

6. I record that it was not suggested that the admission before the judge of a breach of the suspended sentence was a bar to the appellant's arguing to the contrary before us.

7. The question then arises whether any remedy is available to the appellant. The appellant sought relief in the nature of *certiorari* directed to the inferior court. That relief is only available where there is error of law on the face of the record or the inferior court was acting without jurisdiction. *[After dealing with this issue, His Honour continued …]*

10. It has, however, been held that, where relief in the nature of *certiorari* is not available, a

declaration may in appropriate circumstances be made: *Ainsworth v Criminal Justice Commission*[27]*;* and *Enfield City v Development Assessment Commission*[28]. Besides an order in the nature of *certiorari* and an order granting bail the appellant sought in his originating motion any other order that the court should see fit. Although that claim may not satisfy Rule 5.05 as specifying a declaration, and in particular an appropriately worded declaration, as part of the relief or remedy sought by the originating motion, it does, I think, enable this Court to treat appropriate declarations as within the general purview of the proceeding without the need for amendment. Whilst the reason for the non-availability of *certiorari* here is not the same as in *Ainsworth*, this, like it, is a case where the appellant has been legally wronged and, since the matter is not hypothetical, but a pardon may be sought, it is appropriate to grant declarations in the form proposed by Vincent JA.

VINCENT JA:

11. The appellant appeared before the Magistrates' Court at Ballarat on 11 January 2001 on one count of obtaining property by deception and one count of causing criminal damage. He was convicted on each charge and was sentenced to imprisonment for two months and placed on a community based order for a period of 12 months respectively.

12. An appeal to the County Court in respect of both of the convictions and sentences imposed was heard by a judge sitting at Ballarat on 21 February 2001. The convictions were upheld but his Honour set aside the sentences imposed in the Court below. The appellant was again sentenced to imprisonment for two months on the charge of obtaining property by deception; the judge directing that the service of the whole of this term be suspended for a period of twelve months. With respect to the offence of causing criminal damage, he re-imposed the sentence previously handed down.

13. On 6 September 2001 the appellant returned to the Magistrates' Court at Ballarat. He was, on this occasion, charged with possession of a drug of dependence, namely cannabis and the use of a drug of dependence, namely cannabis. He pleaded guilty to both charges.

14. In the circumstances, it is desirable to set out the entirety of the transcript of that proceeding:

> "DEFENCE COUNSEL (DF): I appear for the defendant your Worship, he's behind me, he pleads guilty to both charges however the charge of breach of suspended I am instructed will be withdrawn and pursued in the County Court.
> MAGISTRATE (M): I have only got one file in front of me which relates to two use and one possess.
> DF: Yes sir there was also a charge in the material I have of breach of a suspended sentence.
> M: Well it may be its disappeared out of my system if its going to the County Court it might have already been whipped off this system.
> DF: It might of followed its natural courses it might just have disappeared all together we can only hope.
> M: I'm sorry its just been incorrectly been put on the computer.
> DF: Should have quit while we were ahead."
> ***My Interpolation:*** *There is no suggestion in the transcript that the possibility that this charge may have been misconceived was considered by any of those involved.*
> "M: Yes thanks Senior.
> POLICE PROSECUTOR (PP): Your Worship at approximately 7.25 a.m. on Friday 6th July of this year the police attended at the address of 32 Albert Street, Sebastopol and there executed a search warrant issued under the Drugs Enforcement Control Substances Act. After gaining entry to the premises the police gave the defendant Coleman an opportunity to declare location of any illegal substances in the house prior to searching the property. Coleman then removed from a cigarette packet that was sitting on the bedside table a piece a silver foil contained a small quantity of cannabis. Police took possession of that, search of the address was conducted and located other items that were not relevant to this defendant and another male that resides at this address was charged with these items. The defendant was conveyed back to the Ballarat Regional response office and was interviewed in relation to the matter. During the interview the defendant made full admissions in relation to the possession and use of cannabis and stated that the foil contained just under ½ gram of cannabis. He stated that he bought it the previous night as a 1 gram stick for $20 from an unknown male at a hotel in Ballarat. He further stated that he smoked some of it the prior night at home from a bong and admitted that he was a regular user of cannabis and admitted that he smoked about a gram every one or two days as it helped him relax. That's the summary your Worship.
> DF: Fair summary your Worship.

M: Well I find those 2 charges proven. Is there anything known. What do you want me to do with the breach matter just adjourn it *sine die*?
DF: That would be good.
PP: Your Worship I was going to make an application for that charge to be withdrawn and ..
M: I was going to say that it would need to be re-issued I'll mark that withdrawn. Yes.
DF: Just in regard to the summary you probably already noted that the warrant and if not I will tell you now. The warrant wasn't actually issued with a view to searching any premises occupied by my client in particular the warrant was actually directed at the nominal occupier of the house.
M: [Counsel] he's got a modest amount of cannabis although he has a string of priors I would normally propose dealing with it by way of a fine.
DF: Certainly Sir his income is $160 Newstart allowance per week and on that basis that is also still undergoing counselling for drug problems and doing his best to get over this and I will say no more.
M: Thank you. Stand up please Mr Coleman. Mr Coleman I frequently say to people that it is still illegal in this state and I know a lot of people do smoke and a lot of people have it around the place but it is still illegal. You have got enough priors and you have been to court often enough to well understand that. However it is a very small amount and you were co-operative with the police and I will take into account your plea of guilty today. You will be convicted on each of these matters and you will be fined an aggregate fine of $400 and you need time to pay that?
DF: 2 months stay.
M: A stay of 2 months.
DF: As the court pleases.
M: Yes thank you, you are free to go."

15. It is to be observed that there was no discussion of, or challenge to the accuracy of the summary provided by the police prosecutor and it would appear to be clear that the sentence aggregate imposed was based upon the acceptance by the magistrate of the assertions made. For present purposes, these included the purchase by the appellant of a one-gram stick of cannabis (a very small quantity itself) and the smoking of half of it, leaving him in possession of the amount subsequently located by the police. The appellant had given an explanation that he smoked approximately a gram every two days. There was nothing in his version which could be perceived as inconsistent with the objectively ascertainable circumstances or which otherwise might have cast doubt upon it. Indeed, the very small amount involved was strongly suggestive of possession for personal use rather than some purpose connected with trafficking in the material. In that situation the inference that the possession by the appellant of cannabis was unrelated to involvement in trafficking in the material would seem to be irresistible and to have been accepted by the magistrate in the passage:

> "Mr Coleman I frequently say to people that it is still illegal in this State and I know a lot of people do smoke and a lot of people have it around the place but it is still illegal. You have got enough priors and you have been to court often enough to well understand that. However it is a very small amount and you were co-operative with the police and I will take into account your plea of guilty today."

16. The charges in respect of which the sentences were imposed arose under ss73 and 75 of the *Drugs, Poisons and Controlled Substances Act* 1981. Relevant portions of those sections read:

> **Section 73**
> "(1) A person who without being authorized by or licensed under this Act or the regulations to do so has or attempts to have in his possession a drug of dependence is guilty of an indictable offence and liable—
> (a) where the court is satisfied on the balance of probabilities that—
> (i) the offence was committed in relation to a quantity of cannabis or tetrahydrocannabinol that is not more than the small quantity applicable to cannabis or tetrahydrocannabinol;
>
> (ii) the offence was not committed for any purpose related to trafficking in cannabis or tetrahydrocannabinol—
> to a penalty of not more than 5 penalty units;"

This section has been the subject of attention by the Court on more than one occasion. Of importance for present purposes is the judgment of the Court of Appeal in *R v Pantorno*[29] where it was held a single offence had been created with three possible levels of penalty according to the circumstances. Two of these levels encompass the imposition of imprisonment. The third which is addressed by s73(1)(a) is applicable where the offender satisfies the Court on the balance of probabilities of the presence of the mitigatory factors of the possession of a "small quantity of cannabis" and that the offence was "not committed for any purpose related to trafficking" in the material.

> **Section 75**
> "A person who, without being authorized by or licensed under this Act or the regulations to do so uses or attempts to use a drug of dependence is guilty of an offence against this Act and liable—
> (a) where the court is satisfied on the balance of probabilities that the offence was committed in relation to cannabis or tetrahydrocannabinol—
> to a penalty of not more than 5 penalty units;"

A "small quantity of cannabis" is defined as 50.0 grams in Part 2 of Schedule II of the Act.

17. Accordingly, the appellant was in possession of a "small quantity" of cannabis and entitled on the material before the Court to the finding that this possession was not for "any purpose related to trafficking". The maximum penalty which could lawfully have been imposed upon him for either offence to which he pleaded guilty in that circumstance was a monetary fine. Nevertheless, he was charged with breaching the order suspending his earlier sentence. The relevant portions of the Charge and Summons served upon him read:

> "1. The defendant, within the operational period of a suspended sentence imposed at the County Court at Ballarat on 21/02/01 committed further offences punishable by imprisonment and is therefore in breach of the suspended sentence." The attached schedule asserts that: "At the County Court of Victoria at Ballarat the defendant was convicted of obtain property by deception & criminal damage and was sentenced on the charge of obtain property by deception to 2 months' imprisonment wholly suspended for a period of 2 years. It is now alleged that the defendant has breached the Order by the commission of further offences: On the 6/09/01 at the Magistrates' Court at Ballarat the defendant was convicted of possess cannabis (the commission date of the offences being 6/07/01) and was fined $400.00."

18. I observe that the charge refers to "further offences punishable by imprisonment" although, on the least favourable view of the situation from the appellant's perspective, only one such offence could possibly have been committed. The reference is repeated in the schedule. I also note that the penalty for these "offences" is said to have been a fine of $400 whereas an aggregate penalty was imposed for the two different offences involved.

19. The power to suspend in whole or part a sentence of imprisonment which would otherwise have been imposed upon an offender has been conferred upon the County Court by s27 of the *Sentencing Act* 1991. Before such a disposition can be ordered a number of conditions must be satisfied. They include the formation of the view by the sentencer that the imposition of a sentence of imprisonment is appropriate in the circumstances, regardless of whether or not an order for suspension is made. In other words, the situation must be one, having regard to all relevant sentencing principles and factual considerations, in which a sentence of imprisonment is called for.

20. Breaches of such Orders are addressed by s31 under which:

> "(1) If at any time during the operational period of a suspended sentence of imprisonment, the offender commits, whether in or outside Victoria, another offence punishable by imprisonment, the offender is guilty of an offence for which he or she may be proceeded against on a charge filed by a prescribed person or a member of a prescribed class of persons."

Although there is no authority directly in point, the position is, I think, reasonably clear. As can be observed, it is not required in terms that the offender has committed a further offence in respect of which a sentence of imprisonment *has been imposed.* If that had been the legislative intention, a different form of words would almost certainly have been employed. "Punishable" as a matter of standard English language usage would ordinarily refer to the potential for punishment and not to its actual imposition. It is the commission of a "further offence" which attracts that potential penalty to which attention must be directed. Emphasis has been placed upon the consideration that, having been accorded the opportunity of avoiding incarceration, although the offender's earlier conduct was of such a seriousness that a sentence of imprisonment had to be imposed, there has been further criminal behaviour of a significant kind; the standard being the commission of an offence which carries the *possibility* of a sentence of imprisonment. Accordingly, as I see it, no question arises as to whether, in the individual case, incarceration would be appropriate in the proper exercise of sentencing discretion.

21. As earlier stated, the offence created by s73 is punishable by imprisonment in circumstances where the offender fails to establish on the balance of probabilities that the mitigatory factors of a small quantity and possession for a purpose unconnected with trafficking are present. Their presence was not the subject of any dispute or serious doubt in the present matter. Could the appellant then be properly described as having committed "another offence punishable by imprisonment" within the meaning to be attributed to that expression in Section 31 of the *Sentencing Act*? In my view, the answer to the question must be – No. As a matter of basic common sense and fairness, to reach the conclusion that an individual had committed such an offence when there was not even a theoretical possibility that imprisonment could have been lawfully imposed appears to me to be absurd. The legislature is not to be taken to have intended to achieve such a result in the absence of a clear expression to this effect. The expression must, I consider, be read as a whole and be taken to incorporate any aggravating or mitigatory factors contained in the statute creating the offence upon which the *possibility* of a sentence of incarceration can depend.

22. Precisely what took place when the breach proceeding came on for hearing before the County Court judge is not known. No recording of what transpired was made and the material before us contains no description of the matters put before his Honour. It seems that the hearing was brief and importantly that no argument was advanced before the judge to the effect that, in the undisputed circumstances of the matter, no sentence of imprisonment could lawfully have been handed down in the Magistrates' Court. Whether or not his Honour was informed of the very small quantity of cannabis involved or of the appellant's explanation for its possession does not emerge. However, I consider that these matters were almost certainly not drawn to his attention, having regard to his very considerable experience as a member of the County Court Bench.[30] Seemingly without any explanation being provided to him of the circumstances, which of itself is somewhat troublesome as I wonder to what matters the judge had regard in the exercise of his discretion, his Honour reinstated the original sentence of imprisonment.

23. Subsequently, appreciating what had occurred, the appellant's solicitor sought from the judge sitting in the Practice Court an order in the nature of *certiorari* to quash the order reinstating the sentence. *[His Honour then dealt with the proceeding before Beach J and continued]...*

29. Obviously, as in the case of any other criminal charge coming before the County Court, all of the elements of the offence involved must be established before a conviction may be recorded or a penalty imposed but generally speaking the jurisdiction of the Court to consider the matter is not dependent upon their presence. In my view, it could not be described as "an essential condition" for the existence of jurisdiction to determine whether there had been a breach of the order suspending sentence in the present case that a trafficking offence had been committed. The imposition of a suspended sentence is one of a range of dispositions available to a sentencing judge under the *Sentencing Act*. The legislation sets out the circumstances under which such a disposition can be made and identifies those which if established would constitute a breach. The Judge was clearly empowered to determine whether a breach of the order had been committed.

30. Unfortunately in that situation the only form of relief which appears to be available and of practical utility to the appellant would be the making of orders and declarations in the following form:

31. 1. Appeal allowed.

32. 2. Set aside orders made by Beach J. and in lieu substitute:

> (1) A declaration that the offence of having in his possession a drug of dependence, namely, cannabis, contrary to s73(1) of the *Drugs, Poisons and Controlled Substances Act* 1981 of which the plaintiff, Jason Coleman, was convicted at the Magistrates' Court of Victoria at Ballarat on 6 September 2001 was not "an offence punishable by imprisonment" within the meaning of s31(1) of the *Sentencing Act* 1991 because, as the said Magistrates' Court of Victoria must be presumed to have found on the agreed facts, the offence was committed in relation to a quantity of cannabis that was not more than the small quantity applicable to cannabis and was not committed for any purpose relating to trafficking in cannabis, and for that the maximum penalty was not more than 5 penalty units.
>
> (2) A declaration that the offence the subject of declaration (1) was the further offence alleged in the

schedule to the charge for an offence under s31(1) of the *Sentencing Act* 1991 (referred to as s31(2) in the charge sheet), which was laid by or on behalf of the Director of Public Prosecutions against the plaintiff on 12 November 2001.

(3) A declaration that his Honour Judge Crossley in the County Court at Melbourne on 22 November 2001 on the hearing of the charge referred to in declaration (2) erred in finding the plaintiff guilty of the offence under s31(1) and ordering the plaintiff to serve the sentence of two months' imprisonment which he had imposed on the plaintiff in the County Court at Ballarat on 21 February 2001 but had ordered to be suspended.

(4) An order that each party bear his or its own costs of the proceeding.
3. Order that each party bear his or its own costs of this appeal.

O'BRYAN AJA:

33. I have had the advantage of reading the judgments of Batt JA and Vincent JA. I agree with their Honours' reasons and conclusions and do not wish to add anything. I agree in the suggested orders proposed by Vincent JA.

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[1] *Sentencing Act*, s27(1), (3), (5) and (8).
[2] 2nd edn. The suffix -able, appended to a transitive verb, makes an adjective with the senses "able, liable, allowed, worthy, requiring or bound to be", or "capable of being".
[3] Similarly as to the last meaning, Garner, *A Dictionary of Modern Legal Usage,* 2nd edn, 718.
[4] 7th edn (ed Garner), 1247.
[5] [1977] 1 NSWLR 631 at 647.
[6] [1949] 1 KB 214 at 221.
[7] [1976] 1 WLR 335 at 338.
[8] [1998] NSWSC 455 (1998) 103 A Crim R 113 at 117.
[9] (1980) 2 Cr App R (S) 116.
[10] At 221.
[11] Compare s75. The offence against s73(1) was the only subsequent offence relied on by the prosecution.
[12] [2001] VSCA 106; (2001) 3 VR 231; (2001) 124 A Crim R 335.
[13] [1988] VicRp 28; [1988] VR 195 reversed on a point not argued and without affecting this decision: *Pantorno v R* [1989] HCA 18; (1989) 166 CLR 466; 84 ALR 390; 38 A Crim R 258; 63 ALJR 317. In making the statement in the text I have disregarded the alternative "or attempts to have" in s73(1). *Cheng v R* [2000] HCA 53; (2000) 203 CLR 248 at 262; 175 ALR 338; (2000) 74 ALJR 1482; 115 A Crim R 224 is not directly applicable (though the structure of the legislation is similar) because the joint judgment was contrasting the objective facts of quantity with subjective knowledge of the quantity.
[14] *R v Pantorno* at 200.
[27] [1992] HCA 10; (1992) 175 CLR 564 at 581-582 and 595-596; (1992) 106 ALR 11; (1992) 66 ALJR 271; 59 A Crim R 255.
[28] [2000] HCA 5; (2000) 199 CLR 135 at paras.[22] and [58]; (2000) 169 ALR 400; (2000) 60 ALD 342; (2000) 106 LGERA 419; (2000) 74 ALJR 490; (2000) 21 Leg Rep 19.
[29] [1988] VicRp 28; [1988] VR 195.
[30] This view is supported by paragraph 11 of a further affidavit in support of the application sworn by Marcus Dempsey, a solicitor in the employ of Victorian Legal Aid to the following effect:
"I am informed by counsel who appeared on the plaintiff's behalf both at the Magistrates' Court proceedings and in the breach proceedings in the County Court [counsel] by telephone on the 10th of January 2002, that the issue of whether or not the offence alleged to be the breaching offence was 'punishable by imprisonment' within the meaning of the *Sentencing Act* (Vic) 1991 was not raised."

APPEARANCES: For the appellant Coleman: Mr S Johns, counsel. Victoria Legal Aid, solicitors. For the first respondent DPP: Mr T Gyorffy, counsel. Ms K Robertson, solicitor for Public Prosecutions.
