14/05; [2005] VSC 115

SUPREME COURT OF VICTORIA

SLATER v DPP

Bell J

17 March, 22 April 2005

SENTENCING – INTENSIVE CORRECTION ORDER BREACHED – OPTIONS OPEN TO SENTENCER – BREACH OF ORDER PROVED – PROCEEDING ADJOURNED FOR PRE-SENTENCE REPORT TO DETERMINE SUITABILITY FOR A FURTHER INTENSIVE CORRECTION ORDER – REPORT TENDERED TO COURT – OFFENDER SUITABLE FOR FURTHER ORDER QUALIFIED BY COMMENTS OF ASSESSING OFFICER – DETERMINATION BY SENTENCER THAT OFFENDER NOT SUITABLE FOR FURTHER ORDER – ORIGINAL ORDER CANCELLED AND OFFENDER COMMITTED TO PRISON FOR UNEXPIRED PORTION OF THE TERM – WHETHER SENTENCER IN ERROR: *SENTENCING ACT* 1991, SS19(1), 26(3A).

S. was convicted of certain offences and sentenced to six months' imprisonment by way of an intensive correction order (ICO). S. breached the ICO by failing to comply with a condition of the order. She was later committed to prison for the then unexpired portion of the sentence. S. appealed to the County Court. The judge found the charge proven and adjourned the proceeding for a further assessment to determine whether S. was suitable for a further ICO. When the assessment report was filed with the court, a box on page 1 of the report was clearly checked positively to the effect that S. was suitable for an ICO. However, comments on page 2 of the report indicated that S's suitability was heavily qualified and the comments expressed in guarded terms. After considering the report, the judge concluded that S. was not suitable for another ICO and committed her to prison for the unexpired portion of her sentence. Upon application for judicial review—

HELD: Application refused.

1. When a sentencer finds a charge proven that an offender has breached an ICO, the sentencer has to consider whether to impose a fine or not and then consider which of the three options specified in s26(3A) of the *Sentencing Act* 1991 ('Act') should be adopted. That is, whether the ICO should be varied, confirmed or cancelled.

2. Section 19 of the Act is a general provision that relates to the making of ICOs. On the other hand, s26 is a specific provision that relates to the manner in which the breach of an ICO is to be dealt with. S26(3A) sets out the powers of the court and these are different from the powers of a court when a person is convicted of an offence to which s19(1) applies. Any report sought by the court on the breach of an ICO is considered by the judge in the exercise of sentencing powers under s26(3A) not s19(1).

3. Upon a proper consideration of the whole of the circumstances, a sentencer, in a matter to which s26(3A) applies, might refuse to vary or confirm an intensive correction order despite a recommendation in a pre-sentence report to do so, and instead cancel the order and imprison the offender for the specified period. The sentencer might alternatively vary or confirm such an order and refuse to cancel it and imprison the offender even if this is not what the report recommended should happen. Section 26 leaves these matters to the proper consideration of the judge.

4. The contents of the report were matters for the judge to consider and balance. He had to reconcile its different parts and assess what it was really saying. In doing so, he had to take into account the qualifications expressed on page 2. Having regard to the report as a whole, it was open to the judge to conclude that it made clear that the plaintiff was not suitable for an intensive correction order. No error of law was committed by the judge in his consideration of the report in this regard nor in his making of the final order.

BELL J:

1. This is an application for judicial review brought under Order 56 of the *Supreme Court Rules* in respect of a decision of a judge of the County Court of Victoria made on 7 December 2004. The learned judge cancelled the plaintiff's intensive correction order and committed her to prison for the unexpired period of her term of imprisonment pursuant to s26(3A)(c) of the *Sentencing Act* 1991 (Vic).

2. The plaintiff was convicted on 24 June 2003 in the Stawell Magistrates' Court of the

offences of failing to answer bail (four counts), trafficking in amphetamines, possessing money being the proceeds of crime and possession and use of amphetamines. These offences occurred between 11 August 2002 and 10 June 2003. She was sentenced to serve a period of six months imprisonment by way of an intensive correction order.

3. On 23 June 2004, the plaintiff was convicted in the Horsham Magistrates' Court of the offence of breaching the intensive correction order. She was committed to prison for the then unexpired portion of her sentence, being 182 days. Immediately after that hearing, she entered an appeal to the County Court of Victoria and was granted bail on her own undertaking. The appeal was heard in the County Court at Horsham on 3 December 2004. It proceeded by way of an appeal against sentence only.

4. Section 26(1) of the *Sentencing Act* creates the offence of breach of an intensive correction order in the following terms:

> "(1) If at any time while an intensive correction order is in force the offender fails without reasonable excuse to comply with any condition of it or with any requirement of the regulations made for the purposes of this Subdivision, 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."

5. Sections 26(3A) and (3B) make provision for the manner in which the hearing of a charge under sub-s(1) is to be dealt with and, where the offender is found guilty of the offence, the sentencing powers of the court. They provide as follows:

> "(3A) If on the hearing of a charge under sub-section (1) the court finds the offender guilty of the offence, it may impose a level 10 fine and in addition must—
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> (a) vary the intensive correction order; or
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> (b) confirm the order originally made; or
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> (c) cancel the order (if it is still in force) and, whether or not it is still in force, commit the offender to prison for the portion of the term of imprisonment to which he or she was sentenced that was unexpired at the date of the offence under sub-section (1).
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> (3B) Despite anything to the contrary in sub-section (3A), if on the hearing of a charge the court finds the offender guilty of the offence and is satisfied that the offence was constituted, in whole or in part, by the offender committing, whether in or outside Victoria, another offence punishable by imprisonment during the period of the intensive correction order, it must, in addition to any fine it may impose under sub-section (3A), exercise the power referred to in paragraph (c) of that sub-section unless it is of the opinion that it would be unjust to do so in view of any exceptional circumstances which have arisen since the intensive correction order was made."

6. In the present case, the breach of the intensive correction order was constituted by the plaintiff's failure to comply with a condition of the order, not by the commission of an offence punishable by imprisonment. Therefore, s26(3B) did not operate to remove the discretions conferred by s26(3A).[1]

7. The judge found the charge to be proven. In consequence, he had to consider whether to impose a fine and, further, which of the three sentencing options specified in s26(3A) would be adopted. After hearing a plea in mitigation from counsel for the plaintiff, the judge determined to have her further assessed by the Office of Corrections to determine her suitability for a further intensive correction order. The judge adjourned the plaintiff's case for sentence on 7 December 2004. On that date, a pre-sentence report dated 3 December 2004 was supplied to the judge. The plaintiff was again legally represented, as was the firstnamed defendant. On this day, the judge made the decision for which judicial review is now sought.

8. The judicial review jurisdiction of the Supreme Court of Victoria referred to in Order 56 of the *Supreme Court Rules* applies to decisions, including sentencing decisions, of the County Court of Victoria.[2] The jurisdiction being discretionary, there is a principle that the Court might decline to grant the relief sought upon the ground that there was another equally effective and convenient remedy.[3] This is not a consideration in the instant case because there is no remedy available to the plaintiff other than judicial review under Order 56.[4]

9. Counsel for the plaintiff submitted that orders in the nature of *certiorari* quashing the

decision of the judge should be made. This submission was made upon the grounds that the judge made two reviewable errors:

> (1) An error of law on the face of the record; and
>
> (2) An error of jurisdiction.

(1) Error of law on the face of the record

10. The submissions made by counsel for the plaintiff depend upon a consideration of the reasons for decision of the judge. There was no transcript of those reasons. The only evidence of the reasons is that set out in paragraph 15 of the affidavit of the plaintiff dated 28 January 2005, upon the basis of which the proceeding in this Court were instituted.

11. Paragraph 15 of the plaintiff's affidavit is in the following terms:

> "15. His Honour in dismissing my Appeal stated that the Office of Corrections Report made it was clear that I was not suitable for an Intensive Corrections Order yet the report concludes that I was suitable. It did say that I had refused to consent to a condition that I now [sic] associate with Jason Yanner with whom I have been in a relationship for a number of years and while I did indicate to the Office of Corrections that I wished to maintain contact with him including visiting him in custody, I was agreeable to a condition that I not reside with him during the period of any Intensive Corrections Order if I was given the opportunity of being placed on such an Order. In any event on the same day as His Honour sentenced me, he also sentenced Jason Yanner to a period of imprisonment of 18 months with a minimum to be served of 12 months for other offences not related to me. As the term of the Intensive Corrections Order being considered in my case was significantly less than the minimum term His Honour sentenced Jason Yanner to, it would have been impossible for me to reside with him during the period of my Order anyway."

12. Relief in the nature of *certiorari* is available upon the ground that the decision-maker has committed an error of law on the face of the record.[5] However, in the absence of a statutory provision to the contrary, the record of an inferior court for the purpose of *certiorari* does not ordinarily include the reasons for the decision, whether or not these were recorded in a transcript or a statement of reasons.[6] In Victoria, there is a statutory provision to the contrary. Section 10 of the *Administrative Law Act 1978* (Vic) provides as follows:

> "10. Any statement by a tribunal or inferior court whether made orally or in writing, and whether or not made pursuant to a request or order under section 8, of its reasons for a decision shall be taken to form part of the decision and accordingly to be incorporated in the record."

In consequence, for the purpose of determining whether an error of law on the face of the record has been committed, this Court may consider an oral or written statement of the reasons for decision of a tribunal or inferior court.

13. The first question that arises is whether, in the absence of a transcript, reasons of a decision-maker as proved in an affidavit may be treated as part of a record for the purposes of s10 of the *Administrative Law Act*. In the present case, the Court cannot grant relief by way of judicial review for error of law upon the face of the record unless it is satisfied that reasons proved in this way form part of the record.

14. Section 10 of the *Administrative Law Act* does not deal in terms with the manner in which the written or oral statement of reasons may by proved. In that regard, the general laws of evidence apply. Therefore, where the statement was made in a written document, the statement may be proved by reference to the document.[7] Where the statement was made orally and transcribed, the statement may be proved by reference to the transcript.[8] Where the statement was made orally and not transcribed, the statement may be proved by reference to an appropriate affidavit, such as an affidavit of a person who was present when the reasons for decision were announced.[9] That person may be the applicant for judicial review, as in the present case, or their legal representative, as in other cases.

15. Although the plaintiff was therefore entitled to prove the statement of reasons of the judge by an affidavit, her affidavit gives a one-sentence account of those reasons. Where a plaintiff intends to prove, by affidavit, a non-transcribed oral statement of reasons for decision of a

tribunal or inferior tribunal so as to have them taken to be part of the record pursuant to s10 of the *Administrative Law Act*, the affidavit should give an adequate account of those stated reasons. The account must at least be sufficient to enable the Court to appreciate the substance of the reasons for the decision of which judicial review is sought.

16. Although the firstnamed defendant was represented in the proceeding before the judge, no answering affidavit was filed. Having regard to the scant nature of the account given of the judge's reasons in the plaintiff's affidavit, it is surprising that this course was taken, at least in the absence of an explanation. An application for judicial review for error of law on the face of the record is a proceeding *inter partes* and is adversarial in nature. If a plaintiff files an affidavit setting out a statement of reasons given orally and not transcribed, and the affidavit is not adequate and not answered, the Court may have to treat the affidavit, despite its inadequacy, as the only evidence available of those reasons.

17. In the present case the state of the evidence of the reasons for decision of the judge is unsatisfactory. So that the substance of the plaintiff's arguments may be addressed, the Court is prepared to assume that the plaintiff's account of the reasons for decision of the judge form part of the record under s10 of the *Administrative Law Act*. Upon this basis, it is necessary to consider whether the judge made an error of law on the face of the record. Counsel for the plaintiff submitted that an error of law was made in three alternative respects:

> (a) The judge cancelled the intensive correction order upon the basis that the plaintiff was considered not to be suitable for such an order by the Office of Corrections when, in fact, the Office of Corrections had found that she was considered to be suitable.
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> (b) The judge attached weight to the plaintiff's refusal to consent to the suggested condition by the Office of Corrections that she not associate with a certain person.
>
> (c) The judge considered himself to be bound by the adverse recommendation in the pre-sentence report.

(a) Plaintiff's suitability for intensive correction order

18. The pre-sentence report contained a box on page 1 that was clearly checked positively for the following statement: "Is suitable for an Intensive Corrections Order: Core conditions only". However, on page 2 the following comments appeared:

> "Tammy has agreed to the core conditions of an Intensive Corrections Order.

For Tammy to successfully complete an ICO it was put to her that;

> (1) She reside with her parents at 18 Eldridge Road, Red Cliffs – telephone 50224 2086 for the period of the order. Tammy consented to this condition. A discussion was had with Mr Shalders (Tammy's stepfather) and it appears they are supportive and strict, placing conditions upon Tammy that would support her in completing the order. However, she may quickly find these conditions overbearing and cause difficulties within the family unit which would require her to leave the residence. Particularly in relation to her ongoing contact with YANNER, which her parents strongly disapprove of.
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> (2) That Tammy have does not associate with Jason Yanner. Tammy *refused* to consent to this condition. Tammy claims she will not reside with YANNER but wishes to maintain contact by mail, telephone and visiting him in custody. Taking this into consideration it would appear highly likely that on his release Tammy would consider cohabitation with YANNER at which time her ability to complete an ICO would be totally negated. It is further noted that Tammy was at the Horsham Police Station visiting YANNER when the author attended the station.
>
> At this time Tammy has only been residing with her parents for 1 month and has had the concern of her appeal pending. Once this Court based motivation has been removed she would need to adhere to both her parents and corrections.
>
> Please note that whilst finding her suitable for the Intensive Corrections Order, this order will be managed strictly by the Mildura Corrections Centre and any deviance from the requirements will result in her being returned to the sentencing Judge."

19. Counsel for the plaintiff submitted that the judge was clearly wrong to sentence the plaintiff upon the basis that the Office of Corrections had "made it clear"[10] that the plaintiff was unsuited to a further intensive correction order. The positive checking of the box on page 1 of

the pre-sentence report showed that the Office of Corrections were of the opposite view.[11] It was submitted that, in proceeding upon that basis, the judge erred in law in that he failed properly to apprehend and discharge his function under s29(3A) of the *Sentencing Act.*

20. If the pre-sentence report contained only the checked box on page 1, there may be substance in the criticisms of counsel for the plaintiff and it would then be necessary to consider whether an error of law had been established. However, the report must be read as a whole. The statement that the plaintiff was suitable on page 1 was heavily qualified by the comments on page 2. The concluding paragraph of those comments was expressed in heavily guarded terms. The contents of the report were matters for the judge to consider and balance. He had to reconcile its different parts and assess what it was really saying. In doing so, he had to take into account the qualifications expressed on page 2. It is not established that he did not do so. Having regard to the report as a whole, it was open to the judge to conclude that it made clear that the plaintiff was not suitable for an intensive correction order. No error of law was committed by the judge in his consideration of the report in this regard.

(b) Refusal to consent not to associate with another person

21. Counsel for the plaintiff submitted that the judge erroneously attached weight to the refusal by the plaintiff to consent to a condition suggested by the Office of Corrections that she not associate with Mr Jason Yanner. A related submission was that Mr Yanner had, in any event, been imprisoned for a period of some 18 months with a non-parole period of 12 months so that such a condition would have been meaningless.

22. An application for judicial review of a sentencing decision by a judge of the County Court of Victoria is not in the nature of a re-hearing of the plaintiff's plea in mitigation.[12] Unless the plaintiff establishes that a judicially reviewable error was made, such as an error of law on the face of the record or a jurisdictional error, the grounds upon which judicial review might be granted will not have been made out.[13] The fact that the judge attached weight to a particular matter will not ordinarily constitute a reviewable error; where the matter was legally irrelevant, the position may be different, but this was not the case here.[14]

23. The evidence established that, prior to and on the same day as the judge sentenced the plaintiff, he sentenced Mr Yanner to a period of 18 months imprisonment with a non-parole period of 12 months. Counsel for the plaintiff submitted that, in consequence, it was not open to the judge to place weight upon the plaintiff's refusal to consent to the condition not to associate with him. This submission must be rejected. This matter fell entirely within the judge's consideration of the plaintiff's circumstances. At the time of sentencing the plaintiff, the judge could not have known whether Mr Yanner might successfully appeal against the sentence imposed upon him, whether he might be released on bail pending such an appeal and so on. The judge may have been concerned about the possibility of the plaintiff continuing the relationship by visiting Mr Yanner in prison. Moreover, even putting aside Mr Yanner's sentence, the fact that the plaintiff was not prepared to consent to the condition suggested by the Office of Corrections might reasonably have been taken into account by the judge. There was no error involved in this aspect of the judge's consideration.

24. I was informed by counsel for the plaintiff that the second sentence in paragraph 15 of the plaintiff's affidavit described matters put to this Court and not to the County Court judge. These matters are, therefore, of limited, if any, relevance in this Court. This Court was also informed that Mr Yanner had appealed his sentence because a co-accused had received a sentence of only six months imprisonment. This matter is likewise irrelevant.

(c) Section 19 of the *Sentencing Act*

25. Counsel for the plaintiff submitted that the judge erred in failing to appreciate that he could vary or confirm the intensive correction order under s26(3A) of the *Sentencing Act* even if, as he concluded, the Office of Corrections advised that the plaintiff was not suitable for such an order.

26. Counsel for the plaintiff submitted that, in the matter before the County Court judge, s. 19(1) operated to allow him to accept or reject the pre-sentence report and place the plaintiff on an intensive correction order if he considered that this was appropriate. It was submitted that the

judge did not appreciate that he had this discretion under this section. It was submitted that, if the judge had to act entirely under s26(3A), he did not appreciate that he had an equal discretion under that section.

27. Section 19 of the *Sentencing Act* provides as follows:

> "(1) If a person is convicted by a court of an offence and the court—
> (a) is considering sentencing him or her to a term of imprisonment; and
> (b) has received a pre-sentence report—
> the court, if satisfied that it is desirable to do so in the circumstances, may impose a sentence of imprisonment of not more than one year and order that it be served by way of intensive correction in the community."

28. Section 19 specifies two conditions that must be satisfied before a court can order that a sentence of imprisonment be served by way of intensive correction in the community. The first is that the Court is considering the imprisonment of the offender and the second is that it has received a pre-sentence report. Sections 96-99 of the *Sentencing Act* make provision in relation to the order, contents, distribution and disputing of pre-sentence reports.

29. Section 19 does not, in terms, have the effect that a court's jurisdiction to make an intensive correction order is dependent upon the receipt of a pre-sentence report that contains a positive, or any, recommendation that the offender is suitable for such an order. It is implicit in s19 and ss96-99 that it will ultimately be for the Court to determine whether the offender should be placed upon such an order. This decision will be made by the judge upon a consideration of the totality of the circumstances, which will include, but may not be confined to, the contents of the report. There may be few occasions where a court would make an intensive correction order in the face of an adverse pre-sentence report, but the legislation leaves that course open. One such circumstance could be that evidence provided to the Court, but not to the author of the report, showed that its factual foundation was faulty.[15]

30. As noted above, counsel for the plaintiff partly based his submissions upon the applicability of the provisions of s19(1) of the *Sentencing Act* to the sentencing of an offender under s26(3A). These submissions cannot be accepted because s19(1) does not apply to the hearing of charges for breach of an intensive correction order under s26(3A).

31. Section 19 is a general provision that relates to the making of orders by which sentences of imprisonment are to be served by way of intensive correction in the community. Section 19(1) specifies the conditions that govern the making of such orders and limits the term of the sentence, and order, to a maximum period of one year (see further below). On the other hand, s26 is a specific provision that relates to the manner in which the breach of an intensive correction order is to be dealt with. Section 26(3A) sets out the powers of a court on the hearing of a charge of breach under s26(1). These are different to the powers of a court when a person is convicted of an offence of a kind to which s19(1) applies. A court considering the sentencing options specified in s26(3A) may order a pre-sentence report under s96(1) because that provision allows a report to be made in these circumstances. Where a report is so ordered, s19(1) does not govern its use. The report is considered by the judge in the exercise of his or her sentencing powers under s26(3A), not s19(1).

32. Counsel for the plaintiff made a similar submission in relation to the judge's application of s26(3A), namely that the judge acted upon the basis that he was bound to follow a recommendation in a pre-sentence report. The terms of s26(3A) do not fetter the exercise of the Court's powers in this way. Neither do the provisions of ss96-99. Under s26(3A), the Court may fine and then must vary or confirm the order, or cancel the order and imprison the offender for the specified period, as the Court determines may be appropriate in the circumstances.

33. Depending upon the circumstances, the contents of a pre-sentence report may be a material, even a decisive, consideration in the exercise of the sentencing powers in s26(3A). The operation of s26(3A) is not different from s19(1) in this respect. Upon a proper consideration of the whole of the circumstances, the trial judge, in a matter to which s26(3A) applies, might refuse to vary or confirm an intensive correction order despite a recommendation in a pre-sentence report to do so, and instead cancel the order and imprison the offender for the specified period. The judge

might alternatively vary or confirm such an order and refuse to cancel it and imprison the offender even if this is not what the report recommended should happen. Section 26 leaves these matters to the proper consideration of the judge.

34. Counsel for the plaintiff submitted that the judge considered himself to be bound by the adverse recommendation in the report that the plaintiff was not suitable for an intensive correction order.[16] If the judge had considered himself to be so bound, he would not have properly performed the powers conferred by s26(3A) (or alternatively, s19(1)). However, on the evidence before this Court, it cannot be concluded that the judge approached the matter in this way. As already observed, the plaintiff's scant account of the judge's reasons is to the effect that the pre-sentence report made clear that the plaintiff was not suitable for an intensive correction order. The plaintiff's account does not state that the judge reasoned that he must therefore necessarily cancel the order and imprison the plaintiff for the specified period. Nor is there any basis for inferring that he reached that conclusion. The overwhelming likelihood is that the judge considered that, in all of the circumstances, including the contents of the report, it was appropriate for him to proceed under s26(3A)(c). In doing so the judge exercised the judgment that s26(3A) required of him, without error of law.

35. The plaintiff's submission that the judge committed an error of law on the face of the record must therefore be rejected.

(2) An error of jurisdiction.

36. The submissions of counsel for the plaintiff in support of this ground where in substance different ways of putting the propositions in the submissions already made in support of the first ground.

37. The first submission was that the judge committed a jurisdictional error in that he exceeded or failed properly to discharge his jurisdiction under s26(3A) of the *Sentencing Act* by misunderstanding the nature of the functions conferred by that section. This submission was based principally upon the plaintiff's criticisms of the manner in which the judge dealt with the issue of her suitability for a further intensive correction order and the pre-sentence report. For the reasons given above, it was not established that the judge misunderstood these functions or erred in law in the way that he dealt with that suitability or the report.

38. The second submission was that the judge committed a jurisdictional error by erroneously attaching weight to the refusal of the plaintiff to consent to the condition suggested by the Office of Corrections that she not associate with Mr Yanner. This submission must also be rejected as the judge's consideration of this issue was carried out entirely within his jurisdiction, the weight to be attributed to the relevant matters being a matter for him.

39. The third submission was that the judge committed a jurisdictional error by considering himself to be bound by the pre-sentence report when, under s19(1), or alternatively s26(3A), of the *Sentencing Act*, he was not so bound. It has already been concluded that the judge did not approach the matter in this way. This submission must be rejected upon the same basis.

40. The plaintiff's submissions that the judge committed a jurisdictional error must therefore be rejected.

41. The plaintiff's originating motion is dismissed with costs.

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[1] *Portelli* [2000] VSCA 248; (2000) 118 A Crim R 172.
[2] *Kuek v Wellens and County Court of Victoria* [2002] VSCA 31 at [4]; (2002) 35 MVR 543; *Sidebottom v County Court (Vic)* [2001] VSC 18; (2001) 117 A Crim R 574 at 578; see also *Thompson v His Honour Judge Byrne and Others* [1998] 2 VR 274 at 275; (1997) 93 A Crim R 69.
[3] *R v Hillingdon London Borough Council; Ex parte Royco Homes* Ltd [1974] QB 720 at 728; (1974) 2 All ER 643; [1974] 2 WLR 805.
[4] *Kuek* at [4]; *Sidebottom* at 578.
[5] *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163 at 180; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.
[6] *Craig* at 181.
[7] *Thompson* at 280 and the authorities there cited.

[8] *Hansford v Judge Neesham* (1994) 7 VAR 172 at 180; *Ioannidis v Guardian Holdings Pty Ltd* (1994) 8 VAR 140 at 146; *Sidebottom* at 579.
[9] *Ioannidis* at 146; *Kuek v Wellens and County Court of Victoria* [2000] VSC 326 (the decision at first instance) at [28] (the Court of Appeal noted without disapproval that the reasons for decisions were found in the plaintiff's affidavit); *Munro v Chris Brack and Anor* [2000] VSC 229 at [14]-[15]; (2000) 112 A Crim R 398; (2000) 31 MVR 273 (where the affidavit account of the reasons was found to be consistent with a video of the proceedings); the point was left open in *Hansford* at 180.
[10] See par 15 of the plaintiff's affidavit.
[11] There is a guarded comment to similar effect in the last sentence of the comments on page 2 of the pre-sentence report.
[12] *Sidebottom* at 580; see also *Kuek v Victoria Legal Aid* [2001] VSCA 80; (2001) 3 VR 289 at 293.
[13] *Kuek v Wellens* (at first instance) at [15].
[14] See generally *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 at 41-42; 66 ALR 299; (1986) 60 ALJR 560; (1986) 10 ALN N109.
[15] Section 99, which deals with disputing pre-sentence reports, contemplates that this might happen.
[16] See par 15 of the plaintiff's affidavit.

APPEARANCES: For the Plaintiff Slater: Mr A Marshall, counsel. Jeremy Harper & Associates, solicitors. For the Defendants: Ms R Carlin, counsel. Office of Public Prosecutions.
