IN THE CHILDREN'S COURT OF VICTORIA

AT MELBOURNE

CRIMINAL DIVISION

JL Applicant

v.

THE DIRECTOR OF PUBLIC PROSECUTIONS Respondent

Application by the Young Person pursuant to s.356(6) of the *Children, Youth and Families Act 2005* (Vic)

MAGISTRATE:	HER HONOUR MAGISTRATE STYLIANOU
DATE OF HEARING:	11 June & 12 July 2019
DATE OF DECISION:	29 July 2019
CITED AS:	*JL v DPP* [2019] VChC 2

REASONS FOR DECISION

Catchwords: Accused charged with Category A serious youth offence of aggravated carjacking and additional charges – application by child pursuant to s.356(6)(a) of the *Children, Youth and Families Act 2005* (CYFA) for the charges to be heard and determined summarily in the Children's Court – timing of application during committal hearing – largely circumstantial evidence – application for the additional charges to be 'uplifted' by reason of exceptional circumstances should the application for summary jurisdiction be refused – adequacy of sentencing options under CYFA to respond to the offending – whether there is a 'substantial and compelling reason' why the charge should be heard and determined summarily – JL a highly vulnerable young person due to a combination of factors, including significantly compromised adaptive functioning – application for summary jurisdiction granted.

APPEARANCES:	Counsel
For the Applicant:	Mr L J D Howson
For the Respondent:	Mr N Goodenough

HER HONOUR:

The Application

1. The Applicant JL is aged 17 years. He has been charged with numerous offences including aggravated carjacking with the use of an imitation firearm proscribed by s.79A of the *Crimes Act 1958*. It is an offence alleged to have occurred on 29 October 2018 when the applicant was aged 16 years and four months.

2. The offence of aggravated carjacking[1] is defined by s.3(1) of the *Children, Youth and Families Act 2005* (CYFA) as a Category A serious youth offence.[2]

3. Pursuant to s.356(6) of the CYFA:

> "If a child is charged before the Court with a Category A serious youth offence committed when the child was aged 16 years or over, other than murder, attempted murder, manslaughter, child homicide, an offence against section 197A of the Crimes Act 1958 (arson causing death) or an offence against section 318 of the Crimes Act 1958 (culpable driving causing death), **the Court must not hear and determine the charge summarily** unless[3] –
>
> (a) the child or the prosecution requests that the charge be heard and determined summarily; and
>
> (b) the Court is satisfied that the sentencing options available to it under this Act are adequate to respond to the child's offending; and
>
> (c) any of the following applies –

[1] Pursuant to s.79A *Crimes Act 1958.*
[2] Section 3(e)(ii) CYFA.
[3] Emphasis added.

(i) it is in the interests of the victim or victims that the charge be heard and determined summarily;

(ii) the accused is particularly vulnerable because of cognitive impairment or mental illness;

(iii) there is a substantial and compelling reason why the charge should be heard and determined summarily.

4. JL was aged over 16 years when the offence of aggravated carjacking was allegedly committed and accordingly this Court must not hear and determine the charge summarily unless certain preconditions as specified in s.356(6)(a), (b) and (c) are met.

5. Application is made by the defence on behalf of JL that the charges be heard summarily in this Court pursuant to s.356(6)(a). The defence relies on s.356(6)(b) and all three limbs of s.356(6)(c) in support of its application for summary jurisdiction.[4]

6. The prosecution opposes the defence application.

7. The issues to be determined are as follows:

(a) Is the Court satisfied that the sentencing options available to it under the CYFA are adequate to respond to the child's offending [s.356(6)(b)]? **And**, if so,

(b) Do any of the following apply:

(i) Is it in the interests of the victim or victims that the charge be heard and determined summarily; or

(ii) Is JL particularly vulnerable because of cognitive impairment or mental illness; or

(iii) Is there a substantial and compelling reason why the charge should be heard and determined summarily?

[4] The defence did not argue s.356(6)(c)(i) or (ii) in their written submissions.

Timing of the Application

8. A 'possible' application for summary jurisdiction was foreshadowed on the first day of a committal hearing in this matter. It was indicated by Mr Howson on behalf of JL that this Court was likely to be asked to consider an application at the conclusion of the committal hearing but prior to the Court determining the ultimate question on the committal. The committal hearing proceeded on 7 May 2019 but did not conclude. Having regard to the foreshadowing of a possible application for summary jurisdiction, the Court made orders for written submissions to be filed *if* an application was intended to be made at the conclusion of the committal. Written submissions were filed with the Court on 3 June 2019 by the defence arguing only s.356(6)(c)(iii) of the CYFA – that there is a substantial and compelling reason why the charge should be heard summarily. No mention was made in these defence submissions of any particular vulnerability having regard to the cognitive functioning of the accused despite the defence having at hand two psychological reports which were later tendered on the application. On 6 June 2019 submissions in response were filed by the prosecution.

9. The committal resumed on 11 June 2019. At the conclusion of the evidence and after submissions from both parties, Mr Howson on behalf of JL made application for summary jurisdiction, however there was not sufficient time after the committal hearing to hear the argument on the application. The defence tendered the two psychological reports.[5] The hearing was adjourned to 12 July 2019.

10. At the committal, seven witnesses were cross-examined on behalf of JL, including the victims of each of the offences and members of their family.

11. Whilst in my view it is undesirable, for a variety of reasons, to leave the making of this application to such a late stage in circumstances where there has not been any new material that has come to light prompting the application, the CYFA does not preclude

[5] Report dated 12 June 2014 from Mr Jake Kraska, Psychologist; Report dated 15 March 2019 from Ms Alice Lee, Senior Psychologist.

the making of an application for summary jurisdiction at this time nor did the prosecutor raise any objection in this regard. Accordingly, this Court has reserved its decision on the ultimate question at committal pending determination of this application. Should summary jurisdiction be granted, it leaves open the real and regrettable possibility that the victims and other witnesses will be called and cross-examined again, in the relatively near future at a summary contested hearing where no such right to committal ordinarily exists. There were no submissions made as to whether this is a matter that the Court may properly take into account as a relevant consideration on the application. The Court does note that this possible eventuality of the victims being cross-examined again post committal in any summary contested hearing does not assist JL in the application of s.356(6)(c)(i) of the CYFA.[6]

12. On 9 July 2019 the defence filed supplementary written submissions on the application, raising the "particular vulnerability" of the accused, and whilst not directly adverting to it, enlivening s.356(6)(c)(ii) of the CYFA.[7] On 10 July 2019, the prosecution filed written submissions in response.

13. The parties' written submissions on the application for summary jurisdiction were further supplemented by oral submissions at the hearing of the application at which time Mr Howson further sought to rely on s.356(6)(c)(i), based on what he argued to be the application of the rule in *Jones v Dunkel* as against the prosecution.

The other charges

14. In addition to the Category A serious youth offence (charge 2), JL appears before this Court charged with a further 10 charges arising out of four other incidents. Prior to the commencement of the committal proceeding the prosecution indicated it would not be making submissions in respect of four of those additional charges arising out of an incident that occurred on 30 October 2018.

[6] That is, that it is in the interests of the victim that the charge be heard and determined summarily.
[7] As later confirmed by Mr Howson in oral argument.

15. The remaining six charges are an attempted carjacking with an imitation firearm, alleged to have occurred on 29 October 2018, some 10 minutes before the Category A aggravated carjacking offence and approximately 500 metres away (charge 1); theft of motor vehicle and assault in company, arising out of the Category A serious youth offence on 29 October 2018 (charges 3 and 4 respectively); an aggravated burglary upon the house of an off-duty police officer in the early hours of the morning on 5 November 2018 (charge 9); theft of motor vehicle on 5 November 2018 (charge 10); and possession of a small quantity of cannabis at the time of JL's arrest on 13 November 2018 (charge 12).

16. The evidence relied on by the prosecution as against JL is largely circumstantial and the success of the prosecution in respect of these charges may depend on coincidence reasoning.

17. The hearing and determination of the additional charges, except the summary offence of assault in company, is subject to s.356(3) of the CYFA. Under that provision the indictable charges must be heard and determined summarily unless, at any stage, the Court considers the charge/s unsuitable by reason of exceptional circumstances to be determined summarily in the Children's Court. In this case, the prosecution has made application for the additional charges to be 'uplifted' by reason of exceptional circumstances should the applicant not succeed in his bid to have this matter determined by this Court. The prosecution makes the application, particularly having regard to the interplay of the evidence relevant to many of the charges.

The Co-Accused

18. AH was 17 years and 7 months at the time of the offending. The evidence against him is significant and includes very strong DNA evidence linking him to much of the offending including the Category A serious youth offence. He is now aged 18 years and has formally indicated an intention to plead guilty to a number of offences including aggravated carjacking. He will also make an application for summary jurisdiction, the argument listed to be heard by this Court on 1 August 2019.

19. MT was aged 17 years at the time of the offending. He was not charged with the Category A serious youth offence of aggravated carjacking. His charges, which included aggravated burglary, robbery and numerous counts of theft, were dealt with by way of diversion by the Dandenong Children's Court and he was discharged by that Court on 15 February 2019.

20. DB was aged 15 years at the time of the offending. His charges, which included aggravated carjacking, although not Category A given his age, attempted aggravated carjacking and numerous other deception charges proceeded as a plea of guilty at the Dandenong Children's Court. He received a 12-month Youth Attendance Order which he later breached and he was subsequently sentenced to detention in a Youth Justice Centre.

21. TG was aged 22 years at the time of the offending. His matter is proceeding as a plea of guilty in the County Court on 2 August 2019 for numerous charges which do not include aggravated carjacking.

Circumstances of the Alleged Offending

22. The allegations as they stand, as well as *some* of the evidence against JL, can be briefly summarised. However, the matter remains contested.

Attempted aggravated carjacking (charge 1) 29.10.18

23. On Monday 29 October 2018, at approximately 3:48am, the victim, KE, was driving her car with her 20-year-old daughter asleep in the front passenger seat. As the victim was in the process of parking her car at the Waves Apartments in Cowes, she observed a white vehicle that appeared to have followed her into the car park. Two male offenders, one of whom is alleged to be JL and the other co-offender AH, exited from the white car and approached the victim's car, one offender at the driver side and the other on the passenger side. AH and JL banged on the roof of the victim's car. AH, who had approached the victim from the driver's side, pointed a dark grey coloured

handgun toward her whilst she was seated inside her car. The victim moved her vehicle forward in an attempt to get away, then realised she would be trapped inside the car park, so she then reversed her car in an effort to take evasive action. AH continued to point the handgun toward the victim at this time. The victim drove her car to the Cowes police station and spoke to police. Amongst other things, the victim told police that the two youths were of different skin colour to each other and that one of them, alleged to be JL, was an African youth wearing a black top with a white logo on the front.

Category A Offence – Aggravated Carjacking – imitation firearm (charge 2)
Theft of Motor Vehicle and Assault in company (charges 3 and 4) 29.10.18

24. At approximately 3:58am, ten minutes after the attempted carjacking at the Waves Apartments, victim RB arrived at the Seahorse Motel car park and reversed his car into a parking spot. As he was in the process of taking his belongings from the boot of his vehicle, he was approached by four offenders one of whom it is alleged was JL, who made demand for the keys to his car, yelling "give us your keys or we will kill you". The offenders pushed the victim to the ground. Whilst on the ground, the victim held up the keys to his vehicle. One of the offenders snatched the keys out of the victim's hand. Whilst the victim was on the ground, one of the offenders stood over the victim and threatened to punch him whilst the other three went into his car. The victim noticed something metallic in the offender's hand. The offenders drove away in the victim's vehicle. A short time later the victim observed a black hand gun lying on the ground where his car had been parked. The victim attended at the Cowes police station where KE and her daughter, the victims from the earlier attempted carjacking, were also present.

25. Police attended at the Seahorse Motel, photographed and seized the imitation handgun and obtained DNA swabs.

26. CCTV footage from the Seahorse Motel shows the four offenders walking into the car park area of the Motel, shortly after the victim arrives in his car; the offenders loiter

near bushes to conceal themselves prior to stealing the car. The first offender, alleged to be AH, is depicted wearing a baseball cap, gloves, Nike shoes and is holding what appears to be a handgun in his right hand. The second male, alleged to be JL, is wearing a jumper with a small motif at the front, gloves, tracksuit pants and Nike shoes.

27. An analysis of the DNA sample taken from the imitation handgun found at the Seahorse Motel resulted in extremely strong support for the proposition that the DNA originated from AH. It is alleged by the prosecution that Call Charge records from the mobile telephones of AH and JL further indicate that these two offenders were in the same area at the same time. For instance, at 1:41am both offenders are in Balaclava, at 4:03am both offenders are in Cowes, at 4:07am both offenders are in Philip Island and at 4:12am both offenders are in Newhaven.

Aggravated burglary – person present (charge 9)
Theft of Motor vehicle (charge 10) 5.11.18

28. On Monday 5 November 2018 at approximately 5:05am, victim EB, an off-duty police officer, heard a noise coming from the back of his house in [location removed]. The victim grabbed his cricket bat and woke up his son. Both went to the back of the house and observed that the back door was open. The victim heard noises from the front of the house and the sound of car doors being slammed shut. The victim went to the garage where one of his vehicles had been parked; he opened the garage door and saw three cars in the street. The victim observed a male offender attempting to drive away in his car, which had been parked in the garage. There was another offender in the passenger seat. The victim attempted to restrain the male offender driver, punching him a number of times to the head and body. Eventually the offender managed to put the car into gear and drove off. Victim EB later observed that he had a small amount of blood on his hands.

29. Blood swabs taken from the victim's hands and from his shirt have been forensically examined with extremely strong support for the proposition that the blood originated

from AH. Photos from AH's phone at 1:13am and 1:38am on 5 November 2018 depict him and JL together with five other youths. JL is depicted in the photos wearing a black jumper with a small white motif at the front similar to that described by the victim in charge 1. Call charge records also support the proposition that AH and JL were together at the relevant time. The records indicate that at 12:44 am and 2:31am they were both in Hampton Park. At 3:35am and 4:18am both offenders were in Officer, at 5:33am both were in Hampton Park and at 5:40 am both were in Cranbourne. A video recording taken at 8:06pm on 5 November 2018 from AH's mobile phone depicts AH sitting in the driver's seat of a car with a bandage on his head – the prosecution alleging that this is a result from the injuries sustained when victim EB punched AH to the head as he sat in the victim's vehicle trying to put it into gear. JL is seen in the rear passenger seat of the same car, in the video, sitting diagonally behind AH.

30. As stated above, AH has indicated an intention to plead guilty to his involvement in this offending and did not cross-examine any witnesses at committal.

Adequacy of sentencing options under the CYFA

31. By way of his application requesting that the matter be determined summarily, JL has met the precondition required by s.356(6)(a) of the CYFA.

32. In his written submissions Mr Howson did not however address s.356(6)(b) – whether the sentencing options available to this Court under the CYFA are adequate to respond to JL's offending. In oral argument, in response to an enquiry from this Court, Mr Howson argued that whilst JL's criminal history was an important consideration, there were factors, including his cognitive functioning and physical disability which ought to persuade the Court that the sentencing options under the CYFA are adequate.[8] Mr Goodenough for the prosecution argued that the offending before the Court is serious as is the involvement of JL and that there are insufficient sentencing options available to this Court.

[8] Given JL's age, this Court has jurisdiction to impose three years detention on a single charge and four years detention on an aggregate sentence (pursuant to s.413(2)-(3) of the CYFA).

33. A report authored by senior psychologist Ms Alice Lee, dated 15 March 2019, was tendered by Mr Howson on the application. Ms Lee concludes that "it can be said with 95% confidence that, at this time, (JL's) true Full-Scale IQ lies between 67-75".[9] Ms Lee concludes that JL's presentation is consistent with mild intellectual disability. JL first came into contact with DHHS in 2017 who deemed him to be within the target group for DHHS support under the *Disability Act 2006*. Ms Lee states that JL was described as being "deeply affronted" by the determination that he is a person with a disability and has a history of difficulties in engaging with DHHS disability support workers.[10]

34. Furthermore, Ms Lee confirmed that JL suffered an injury at birth to his left arm which caused limited ability in the use of his arm, including his hand and fingers. He presents with restricted range of movement and mobility in his arm, for instance he is unable to raise his arm above his shoulder or use his fingers to pick up small items.[11]

35. More significantly however, Ms Lee concludes that JL displays significant deficits in his *adaptive* functioning. In Table 3 at page 16 of her report, Ms Lee describes JL's adaptive functioning more specifically. This table depicts her assessment of JL's 'receptive' communication skills as equivalent to that of a child aged three years and two months. His 'expressive' communications skills are age equivalent to three years and three months. JL's 'personal' daily living skills are age equivalent to four years and eight months. His 'community' daily living skills - the highest performing skills in the table - are age equivalent to nine years and ten months. His 'interpersonal relationship' subdomain in the area of 'socialisation' is equivalent to four years of age and his 'coping skills' equivalent to three years and two months. Whilst noting this 'adaptive functioning' assessment was not often seen in psychological reports, the prosecutor did not call for the psychologist for cross-examination and furthermore, the prosecutor did not take issue with the expertise of the psychologist or with her conclusions.

[9] P. 12 para [27] of Lee Report.
[10] P. 4 para [5] of Lee Report.
[11] P. 3 para [3] of Lee Report.

36. Having regard to the very significant adaptive deficits and the age equivalent level at which JL operates, any sentence imposed by this Court on a finding of guilt must be tempered by his personal circumstances including the unchallenged conclusions of Ms Lee.

37. The prior criminal history of JL is not as voluminous as the 53 pages suggest at first blush. The mass of pages appears to be the result of what looks like an administrative repetition, multiple times, of the order imposed in one matter as opposed to the volume in the number of charges for which he has previously been sentenced. He has had six prior substantive appearances before the Children's Court and the most serious disposition he received was an eight-month sentence in a Youth Justice Centre on 11 May 2018 for attempted aggravated burglary. It is also relevant to sentence that he was aged only 16 years and 4 months at the time of the current alleged offending, and not far beyond the age which brings this offending into the Category A.

38. An assessment of whether this Court has adequate sentencing options to respond to JL's offending that constitutes the Category A serious youth offence is a difficult exercise, particularly in circumstances when many matters remain unknown at present. For instance, whether the matter will resolve to a plea and if so on what factual basis, or whether JL will be convicted after trial.

39. Aggravated carjacking is a serious offence that carries a maximum penalty, for adults, of 25 years imprisonment. Furthermore, the nature of the offending as it currently stands before this Court is serious. The aggravated carjacking was committed in company, where the victim was targeted as he alighted from his car in the early hours of the morning when he was alone. He was pushed to the ground and threatened, and an imitation firearm was used. It was a bold, violent confrontation aimed at intimidating the victim to gain access to his car. However, for JL there are also powerful factors that will operate in reduction of any sentence imposed, particularly having regard to the matters raised above and in particular his very significant deficits in adaptive behaviour. These are all factors to which I will return later in my decision, but each is relevant to sentence.

40. Sentencing considerations under the CYFA are also markedly different to those that apply to adults. General deterrence for instance, is not a relevant consideration in the imposition of sentence by this Court.[12]

41. Whilst accepting that 'like' cases can only be of limited assistance, neither party referred this Court to other cases involving the sentencing of either children or adults for charges which include aggravated carjacking.

42. Notwithstanding JL's concerning criminal history and the seriousness of the offending in this matter, I have ultimately concluded that on balance, the sentencing options available under the CYFA are adequate to respond to JL's offending for the matters specifically relevant to him that I have referred to above.

Is it in the interests of the victim that the matter be heard summarily?

43. Mr Howson argued that the Court should apply the rule in *Jones and Dunkel* given what he argued to be the failure of the prosecution to call the victims on the application, or at least secure their view in so far as s.356(6)(c)(i) is concerned. I do not accept this argument. This is not a criminal trial and the Court is not here tasked to determine whether the prosecution has proved its case against the accused beyond reasonable doubt. This is a defence application on the question of jurisdiction.

44. In any case, the prosecutor submitted that requests had been made of the informant to obtain the view of the victim in the aggravated carjacking and that no further information had been received from the informant in that regard. As I have stated above, I agree with the prosecutor that the rule in *Jones and Dunkel* has no work to do against the prosecution in this application in the manner as advanced by Mr Howson.

[12] See e.g. *CNK v The Queen* (2011) 32 VR 641; [2011] VSCA 228 at [7]-[15] (applied in *R v JH* [2012] VSC 13 at [7] and *Bradley Webster (a pseudonym) v The Queen* [2016] VSCA 66 at [12], [24], [27] & [76]).

45. I also accept the prosecutor's submission that there is no evidence before the Court upon which I can sensibly conclude that it is in the interests of the victim that the matter be heard summarily. In particular I repeat my earlier comment that the possible eventuality of the victims being cross-examined again post-committal in any summary contested hearing does not assist JL in this regard.[13]

Is the accused particularly vulnerable because of cognitive impairment or mental illness?

46. Whilst not specifically referred to in his written submissions, in oral argument Mr Howson sought to rely on s.356(6)(c)(ii) based on the conclusions of Ms Lee in her report dated 15 March 2019. In particular he referred to Ms Lee's view that JL's *"adaptive functioning difficulties are attributable to his cognitive difficulties and his physical impairment, and as such are likely to be enduring"*.[14] Mr Howson submitted that whilst the legislation specifically refers to a particular vulnerability "because of cognitive impairment" in JL's case, he argued, JL's physical impairment and his cognitive functioning could not be distinguished in so far as the extent to which each contributed to his adaptive difficulties and that s.356(6)(c)(ii) could still therefore apply.

47. The Court notes however, that Ms Lee says, further, that JL's "*current adaptive skill deficits is consistent with his cognitive and physical impairment and potentially contributed by other environmental factors (eg. History of poor engagement in education, lack of opportunities to practice and use certain adaptive skills in a custody setting).*"[15]

48. Furthermore, in so far as the application of s.356(6)(c)(ii) is specifically concerned, the Court notes that Ms Lee explains that "*adaptive behaviour is generally considered to refer to an individual's ability to effectively meet personal and social sufficiency. In contrast to cognitive ability, which is considered to be relatively stable over time,*

[13] See [11] above.
[14] P. 19 para [44] of Lee report.
[15] P. 18 para [43] of Lee report.

adaptive functioning skills can deteriorate or improve as a result of changes to the environment, physical or emotional trauma or other events or intervention. When assessing adaptive skills, having the ability is a necessary but not sufficient condition for the satisfactory performance of required activities…As such, adaptive functioning is a measure of what an individual 'does', not what they may have the 'ability' to do."[16] Accordingly, it is my view that any particular vulnerability of JL based on his adaptive functioning cannot be said to simply be "because of cognitive impairment". Whilst I am satisfied that JL is a highly vulnerable young person, I am not satisfied that the link between his particular vulnerability and his cognitive impairment has been demonstrated in a way such as to render applicable s. 356(6)(c)(ii).

Is there a substantial and compelling reason why the charge should be heard and determined summarily?

49. The written submissions for JL filed on 3 June 2019 addressed only s.356(6)(c)(iii) of the CYFA. In a nutshell, it was submitted that if this Court does not find that 'a substantial and compelling reason' has been shown under s.356(6)(c)(iii) of the *CYFA*, then "it follows that, all things being equal, if the same facts and circumstances…(are relied upon)"[17] the County Court will not/cannot find 'exceptional circumstances' to exist under s.32(2C) of the *Sentencing Act 1991* (*Sentencing Act*) having regard to the higher hurdle imposed by the test of 'exceptional circumstances'. It was submitted "the practical and legal effect of the two provisions is that if a child applicant fails to establish 'substantial and compelling reasons' then, upon a plea of guilty or a finding of guilt, he will be sentenced to adult prison upon the determination that a confinement is necessary"[18] because of the operation of s.32(2C). It was then effectively submitted that in and of itself "the prospect of sending the applicant to adult prison" which, it was argued, inevitably follows from the above reasoning, "constitutes a 'substantial and compelling reason' for him to have his matter dealt

[16] P. 15 para [35] of Lee Report.
[17] Defence submissions, undated, filed 3 June 2019 at [10].
[18] Ibid.

with summarily, where a rights-compliant sentence is available"[19]. No other factor or basis was put forward by Mr Howson as to how this Court may be satisfied that a substantial or compelling reason exists why this matter should be heard and summarily.

50. In response, and in summary, the prosecution in written submissions referred to the case of *DPP v Hudgson*[20] as to the interpretation of 'substantial and compelling' and to s.356(7) which reinforces the intention of Parliament that these matters should not normally be heard and determined summarily. The Prosecution also referred to the seriousness of the offending and to the decision of this Court in *DPP v PT*[21] in submitting that the defence argument necessarily invites the Court to engage in speculation.

51. The defence reasoning, whilst perhaps initially attractive, is ultimately not persuasive and, with respect, flawed.

52. Firstly, it is a basic principle of statutory interpretation that in interpreting a provision of an Act, a construction that would promote the purpose or object underlying the Act is to be preferred to a construction that would not promote that purpose or object. Further, consideration may be given to any matter that is relevant including explanatory memoranda or other documents "laid before or otherwise presented to any House of Parliament".[22] The phrases 'substantial and compelling reason' in s.356(6)(c)(iii) of the CYFA and 'exceptional circumstances' in s.32(2C) of the *Sentencing Act* not only appear in different Acts of Parliament each with a different 'purpose or object', different explanatory memoranda and Second Reading speeches, but also within contextually different provisions. Furthermore, even within each of these two Acts of Parliament, the phrase exceptional circumstances appears numerous times, each within a different context particular not only to the Act within

[19] Defence Written Submissions 3 June 2019.
[20] [2016] VSCA 254.
[21] [2018] VChC 7.
[22] Section 35 *Interpretation of Legislation Act 1984*.

which it appears but also specific to the section to which it relates.[23] It cannot be assumed that Parliament intended that the satisfaction of exceptional circumstances in one provision will always and necessarily amount to exceptional circumstances within the context of a different provision even in the same Act.[24] The same reasoning applies to any suggestion that failure to establish 'a substantial and compelling reason' under s.356(6)(c)(iii) of the CYFA before the Children's Court on a jurisdictional issue must inevitably lead to a failure to establish 'exceptional circumstances' under s.32(2C) of the *Sentencing Act* before the County Court on a sentencing issue. The inquiry before this Court is jurisdictional in nature and an exercise which may be demarcated from the exercise of discretion by a sentencing judge in another Court post-committal and subsequent to any finding of guilt.

53. Secondly, it must be remembered that, at this stage, the charges remain contested. The defence argument invites this Court to speculate about numerous matters before it can entertain the conclusion it is invited to reach. Firstly, the defence argument presupposes that:

    (a) JL who is currently contesting these charges, will either at some stage plead guilty or will be found guilty after trial;

    (b) the County Court will sentence JL to a term of imprisonment;

    (c) there will be no change to the charges or at least the factual basis upon which JL may plead guilty or be found guilty (if that contingency eventuates) to which the Court must have regard in determining sentence;

[23] For instance references to 'exceptional circumstances' *in the CYFA alone* - ss.356(3)(b), 356A which prescribes matters to which the Court must have regard in finding exceptional circumstances specifically under that provision; ss.363(1), 422(1)(b), 430(2)(a), 430P(8)(a), 458(1AAD), 460A(2)(a), 460B(2)(a), 460C(3)(a), 465, 531(2)(b), and s.516(5) which also prescribes matters (which are in fact different to those prescribed in s.356A) that may be considered in finding exceptional circumstances under that provision.

[24] By way of further example of the variety of contexts within which these phrases appear, 'exceptional circumstances' and 'compelling reasons' are phrases both found within s.460B(2) of the CYFA which deals with the circumstances in which the Youth Parole Board may determine to cancel parole.

(d) the passage of time that will be inevitable between this application and any finding of guilt will also not bring about any change in circumstances that can be put to the County Court in its determination of sentence and in its determination whether exceptional circumstances under s.32(2C) of the *Sentencing Act* exist if the County Court deems a term of imprisonment appropriate.

54. At this stage there is no proper basis for making these assumptions. Therefore, this Court cannot speculate about how any of the matters in paras (a)-(d) above might eventuate, or about how the County Court might go about interpreting s.32(2C). Accordingly, this Court cannot base its decision as to the existence of a substantial and compelling reason on a 'prospect' that the County Court might sentence JL to adult imprisonment. This form of conjecture would go well beyond consideration of the direct inquiry before this Court on the information available at this time.

55. However, I have ultimately come to the conclusion that s.356(6)(c)(iii) applies. This is so, primarily because of JL's significantly compromised adaptive functioning, described briefly above and more comprehensively described in the unchallenged report of Ms Lee. This Court has previously ruled on the meaning of 'substantial and compelling reason' in s.356(6)(c)(iii) in various decisions, most recently in *WB v DPP*.[25] So too has the County Court in *PT v DPP*.[26] In *WB v DPP* (at [44]), Judge Chambers expressly distinguishes the interpretation of 'substantial and compelling circumstances' in *Hudgson's case* and concludes: "*I do not consider the test requires either rare or unforeseen circumstances or imposes more than a 'relatively high' burden…".* I do not intend to expand further, beyond what was said in those decisions.

56. Whilst Ms Lee has indicated that adaptive functioning may improve over time, at this stage, JL remains a highly vulnerable young person due to a combination of a number of factors. The Court must base its determination on JL as he appears before the Court at this time and as assessed most recently in March 2019. He is not only assessed as

[25] [2019] VChC 1. This judgment is reproduced on the Children's Court website www.childrenscourt.vic.gov.au.
[26] [2019] VCC 836.

having a mild intellectual disability which in my view, in and of itself, would not ordinarily render applicable any limb of s.356(6)(c), he also has a physical disability and, additionally, due to a variety of factors, not all of which have been enumerated in Ms Lee's report, his current adaptive skill deficits largely place him at an age equivalent level between 3-5 years of age. Significantly, in the socialisation domain, subdomain 'interpersonal relationships' he is operating at a level of four years of age and in the subdomain 'coping skills' he is operating at an age equivalent of three years and two months. Ms Lee also opines "*[JL] will likely have difficulties understanding the nuances of social relationships and continues to be susceptible to negative peer influences*".[27] The senior psychologist concludes that because many of JL's adaptive functioning difficulties are attributable to his cognitive difficulties and physical impairment, they are likely to be enduring.[28]

57. In arriving at my decision I have also taken into account JL's chronological age at the time of the alleged offending, being 16 years, and the fact that it is not being suggested by the prosecution that he was the bearer of the imitation firearm used in the offending.

58. For these reasons I am satisfied that there is a substantial and compelling reason why the Category A serious youth offence should be heard and determined summarily and I make this determination having also had regard to the intention of Parliament as reinforced by s.356(7) of the CYFA.

59. Accordingly, JL's application for summary jurisdiction is granted.

[27] P. 19 para [44] of Lee report.
[28] Ibid.