

IN THE CHILDREN'S COURT OF VICTORIA

AT MELBOURNE

CRIMINAL DIVISION

Court Reference: G10910299

Director of Public Prosecutions

Applicant

v

E

Respondent

JUDGE: HER HONOUR JUDGE CHAMBERS

DATE OF HEARING: 8 AUGUST, 2016

DATE OF JUDGEMENT: 18 AUGUST, 2016

CASE MAY BE CITED AS: DPP v E

REASONS FOR DECISION

Catchwords: Accused charged with intentionally causing serious injury in circumstances of gross violence, reckless conduct endangering life, prohibited person use firearm, armed robbery – application by DPP pursuant to s.356(3)(b) of the *Children, Youth and Families Act (Vic) 2005* to uplift matter – consideration of whether there are exceptional circumstances that warrant the Court refusing to hear the matter summarily – ruling that the matters relied upon by the applicant do constitute exceptional circumstances – Application granted.

APPEARANCES:

Counsel

Solicitors

For the Applicant:

Ms J Malobabic

John Cain for the OPP

For the Respondent:

Mr L Gwynn

Theo Magazis & Associates

Her Honour:

1. The accused in this matter was born on 30 December 1997 and is now 18 years old. He was 17 years of age at the time of the current alleged offending. He faces charges from three separate incidents which are alleged to have occurred on the following dates:

11 July 2015

- Armed robbery;

12 July 2015

- Theft of Motor Vehicle;

18 October 2015

- Intentionally cause serious injury – in circumstances of gross violence;
- Reckless conduct endangering life;
- Prohibited person use firearm (encompassing two firearms)

2. The Director of Public Prosecutions applies pursuant to s356(3)(b) of the *Children, Youth and Families Act (Vic) 2005* (“the Act”) for the charges arising from the incidents on 11 July 2015 and 18 October 2015 to proceed by way of committal hearing on the basis they are unsuitable by reason of exceptional circumstances to be determined summarily in the Children’s Court. The application does not relate to the charge of theft of a motor vehicle allegedly committed on 12 July 2015.
3. Through his Counsel, the accused has indicated he intends to plead guilty to the charges.

CIRCUMSTANCES OF THE ALLEGED OFFENDING

4. The allegations against the accused can be briefly summarised.
5. On 18 October 2015 at approximately 2.40am, the male victim drove to and parked a Mercedes sedan in Huntly Court, Langwarrin. His de facto partner and a male friend were also in the car. Huntly Court, Langwarrin is a residential area and backs onto the victim’s home.
6. The prosecution alleges that the accused, driving a Subaru WRX black sedan, drove slowly into Huntly Court, Langwarrin and parked next to the Mercedes. He left his car armed with a sawn-off shotgun, walked to the front of the Mercedes and discharged five shots through the front windscreen of the Mercedes in the direction of the driver.
7. The accused immediately returned to the Subaru WRX and drove around the corner to wait for the Mercedes to pass.

8. Due to injuries sustained by the victim, the male passenger then drove the Mercedes towards the Frankston Hospital to seek treatment for the victim. It is alleged that the accused followed the Mercedes and on Cranbourne-Frankston Rd, drew alongside the car and fired a further shot into the rear window. No further injury was sustained as a result of this further shot.
9. It is alleged that at 1.45am on the same night, uniform patrol members observed the accused's Subaru WRX pull over in Tangerine Drive, Narre Warren South. However, as the police approached the car, the accused is said to have driven off at speed to evade police. A short pursuit occurred, but the Subaru WRX could not be located.
10. Police examined the crime scene after the shooting and located five spent ammunition cartridges. A subsequent search of a Narre Warren South property in November 2015, where the accused had been staying, located a "Winchester .22 Hornet" ammunition box containing 18 rounds, three "Bronzewing 'Terminator'" 12 gauge shotgun shells, further ammunition, a black imitation firearm, a pen pistol and a "Winchester 243" ammunition round. The black Subaru WRX driven by the accused on 18 October 2015 was parked outside the address.
11. The sawn off shotgun has not been recovered.
12. On 4 April 2016, the accused was interviewed by police and made full admissions about his role in the shooting on 18 October 2015. He said he shot at the driver using five rounds of ammunition. He said he then "waited until they got on another main road and then let the 12 gauge off into the back of the car". The accused said he was acting in retaliation for an earlier incident where he believed the victim had stabbed a friend of his over a debt arising from the sale of the Mercedes, which was a stolen vehicle. He said he was aiming the firearm at the victim who was seated in the driver's seat and that he thought he hit him two or three times. He said he shot at the car again as it drove towards the Frankston Hospital, then did a U-turn and went home and tried to sleep. At one point, the accused said there were others with him in the car, but declined to disclose their identity.
13. The accused was charged and has been remanded since 4 April 2016.
14. The armed robbery is alleged to have been committed on 11 July 2015. The prosecution alleges that on that date the accused was a passenger in a white station wagon in the company of two co-accused. The male victim was driving a silver Porsche in Nicholson St, Carlton South when he was struck in the rear by the one of the co-accused who was driving the station wagon at low speed. Both drivers then got out of their vehicles. When the victim was kneeling down to inspect the damage to the rear of his Porsche, the prosecution

alleges the accused got out of the rear-passenger seat and approaching the victim from behind, grabbed him around the shoulders, wrapped his left arm around the victim and with his right hand produced a black firearm, which he jabbed into the victim's stomach demanding the keys to the Porsche. The demand was repeated about three times. Fearing he may be shot, the victim told the accused the keys were in the Porsche. One of the co-accused then drove off in the Porsche, and the accused walked back to the white station wagon, which then sped away.

15. On 31 October, 2015 the accused was arrested by police in relation to the armed robbery and made a 'no comment' record of interview. However, on 4 April 2016 when interviewed for unrelated matters, he made full admissions concerning the offending on 11 July 2015 and 18 October 2015.

LEGISLATION

16. Section 356(3) of the Act provides that if a child is charged with an indictable offence, other than murder, attempted murder, manslaughter, child homicide, an offence against s.197A of the Crimes Act (arson causing death) or an offence against s318 of the Crimes Act (culpable driving causing death), the Children's Court must hear and determine the charge summarily unless either:
- (a) before the hearing of any evidence the child objects; or
 - (b) at any stage the Court considers that the charge is unsuitable by reason of exceptional circumstances to be determined summarily.
17. A charge that is not heard summarily by reason of s.356(3)(b) must proceed to committal and the Court must give reasons for declining to determine the charge summarily.

EXCEPTIONAL CIRCUMSTANCES UNDER S356 OF THE ACT

18. The meaning of 'exceptional circumstances' has been considered in the context of s.356 of the Act in a number of matters in the Supreme Court and the Court of Appeal, most notably in *D (a child) v White*¹, *A child v A Magistrate of the Children's Court and Ors*² and *DL (a minor by his litigation guardian) v A Magistrate of the Children's Court*³.

¹ [1988] VR87

² Unreported, Supreme Court of Victoria, Cummins J, 24 February 1992

³ Unreported, Supreme Court of Victoria, Vincent J, 9 August 1994

19. In the recent decision of *K v Children's Court of Victoria and Anor*⁴, Justice T Forrest extracted the relevant principles from these authorities, summarising them as follows at paragraph [26]:
- (a) the Children's Court should relinquish its embrative jurisdiction only with great reluctance;
 - (b) the gravity of the conduct and the role ascribed to the accused are important matters but are not the only factors to be considered;
 - (c) other factors for consideration may include the maturity of the offender, the degree of planning or its complexity, and the antecedents of the alleged offender or features particular to him or her;
 - (d) the most important criterion is the overall administration of justice – that is, justice as it affects the community as well as the individual;
 - (e) the nature of the evidence to be called may render a matter unsuitable for summary determination – evidence about political motivation, or forensic or scientific evidence, may fall within this class;
 - (f) “exceptional” in this statutory context means more than special, it means very unusual.
20. Consistent with the authorities, Justice Forrest stated at paragraph [27] that a consideration of ‘exceptional circumstances’ must be determined on the facts of each case.
21. Moreover, when considering whether exceptional circumstances exist, the circumstances personal to the accused are also relevant, including:
- (a) the accused's age, experience, maturity and the characteristics of his or her intelligence and personality;
 - (b) his or her antecedents or features particular to him or her; and
 - (c) the accused's age relative to the categorisation of a ‘child’ as defined by the Act⁵.
22. As to the context in which exceptional circumstances must be considered, in the decision of *DL*, Justice Vincent observed as follows⁶:

⁴ [2015] VSC645

⁵ *A Child v A Magistrate of the Children's Court*, Supreme Court of Victoria, unreported 24/2/1992 at page11-12

“It is sufficient, I think, to state that for very good reasons, our society has adopted a very different approach to both the ascertainment of and response to criminality on the part of young persons to that which is regarded as appropriate where adults are involved. It is only where very special, unusual, or exceptional circumstances exist of a kind which rendered unsuitable the determination of a case in the jurisdiction specifically established with this difference in mind, that the matter should be removed from that jurisdiction to the adult courts.”

THE CONTENTIONS OF THE PARTIES IN RELATION TO THE APPLICATION

The Applicant's submissions

23. The prosecution, in its written submissions and expanded upon in oral argument, relies upon a number of factors in order to establish that both sets of charges are unsuitable to be determined summarily. The prosecution submits that a combination of factors render the case exceptional:

- The nature and gravity of the alleged offences, reflected in the maximum penalties set by parliament, including 25 years' imprisonment for armed robbery and 20 years' imprisonment for intentionally causing serious injury in circumstances of gross violence⁷ and 10 years' imprisonment for both reckless conduct endangering life and a prohibited person using a firearm;
- That the prosecution case, noting the indication of a plea of guilty, is a strong one;
- That the objective gravity of the offending should be considered in light of the accused's prior criminal record, including prior convictions for violent offending and the imposition of a Youth Attendance Order on 26 June 2015; three weeks prior to the alleged armed robbery on 11 July 2015.
- That the armed robbery on 11 July 2015 is a serious example of armed robbery, where the victim was approached from behind, grabbed by his shoulders and a firearm was pointed at his stomach.
- That the offending on 18 October 2015 involved a significant escalation in violence and was attended by aggravating features, including the accused's admission that he planned to shoot the victim as an act of revenge.

⁶ At page 4

⁷ The prosecution concedes that s10(1) and 2(b) of the *Sentencing Act 1991*, requiring the fixing of a non-parole period of four years for a s15A offence, does not apply to a person who is under the age of 18 at the time of the commission of the offence.

- That the sentencing power of the Children's Court is limited to an aggregate term of three years in youth detention. However, such a sentence would fail to reflect the objective gravity of the offending and would be wholly inadequate in light of the criminality involved. Further, that this is a case where the sentencing court would need to consider the fullest possible range of sentencing options.

The Accused's submissions

24. The application is opposed by the defence.
25. Counsel appearing for the accused, Mr Gwynn, emphasised that the Children's Court, as a specialist Court, should only surrender its jurisdiction with "great reluctance". Moreover, that the threshold test of "exceptional circumstances" is a high one.
26. Particular reference was made to the decision of Justice Beale in *C (by his litigation guardian) v CCV and others* [2015] VSC 40 and reliance placed on paragraph [2] of that decision:

"Rape is a most serious offence but Parliament has decided that rape charges against children should ordinarily be heard in the Children's Court. The two rape charges brought against the plaintiff are not at the upper end of the spectrum of rape offences: they are mid-range instances of that offence. Further, the plaintiff's criminal history is limited. Most importantly, he has no priors for sexual offences and has never been sentenced to detention. Having regard primarily to these considerations and the principle that the Children's Court should only surrender its jurisdiction with "great reluctance", Her Honour's decision to refuse a summary hearing was a jurisdictional error".

27. Similarly, Mr Gwynn submitted that despite imposing a maximum penalty of 25 years, Parliament has not removed the offence of armed robbery from the jurisdiction of the Children's Court. To the contrary, the Children's Court not uncommonly deals with offences of armed robbery. Further, that this instance of armed robbery, where a firearm was not discharged or any injury sustained, is in the mid-range of seriousness. Moreover, that the plea of guilty – in light of the admissions made by the accused to the offending – would be given significant weight, and is of relevance in displacing any contention of inadequate sentencing power.
28. As to the charges arising from the incident on 18 October 2015, Mr Gwynn appropriately conceded that the circumstances of the offending were serious but placed reliance on two factors which, it is submitted, are relevant to sentence. First, the injury sustained by the victim was not at the higher end of the spectrum of serious injury. This is conceded by the prosecution. Second, that the plea of guilty to the charges arising from the incident would

attract a significant sentencing discount which would “loom large in the sentencing synthesis”.

29. The principle contention of the accused is that the Children’s Court would have adequate sentencing power with which to deal with the separate charges, noting that the Children’s Court can impose a sentence of two years’ detention in relation to a single charge or three years’ detention in the case of an aggregate sentence⁸.

THE ACCUSED

30. The accused is now 18 years of age. He was born in Australia and is one of four children. His parents are Samoan and were foster parents to two other children. When he was a teenager, his mother left the relationship with his father and he was raised by his father for a period of three years. His parents subsequently reunited, and remain supportive of the accused. The accused was educated until Year 9, and subsequently worked as a machine operator and commenced a traineeship in building work. Mr Gwynn advised the Court that the accused began to use methylamphetamine when he was in his mid-teens.
31. The accused first appeared in the Children’s Court in June 2012 on a charge of recklessly causing serious injury for which he was placed on 6 months’ probation. The charge related to an offence committed on 11 September 2011 when he punched a student at school with a closed fist to the right side of the victim’s face. The victim required surgery for a fractured jaw as a result of the assault.
32. The accused has priors for shop theft and possessing a prohibited weapon, theft and possession of cannabis, for which he received and completed two good behaviour bonds, one in 2013 and the other in 2014.
33. On 26 June 2015, the accused was sentenced by the Dandenong Children’s Court to a 12 month Youth Attendance Order on a consolidation of 14 charges. Two of the charges were drug related - possessing cannabis and methylamphetamine. The other charges are relevant and include attempted armed robbery, theft of a motor vehicle, attempted theft of a motor vehicle and driving-related offences including reckless conduct endangering life and serious injury.
34. A summary of that offending has been provided for the purposes of this application.
35. On 12 March 2015, the accused and a co-accused stole a silver 2004 Mazda 6 sedan from residential premises. They stole petrol for the car from a service station. Later that day, police intercepted the accused and tried to arrest him, but he resisted arrest, entered the

⁸ Children, Youth and Families Act 2005, s. 413

stolen car and drove it directly towards the police as he sped away. About an hour later, police again attempted to intercept the accused in the stolen car but he drove away at speed, driving from lane to lane in heavy traffic.

36. On 13 March 2015 the accused together with a co-accused, drove the stolen car to an Early Learning Centre in Hampton Park at 6.45am where the male victim had just dropped off his child. The accused approached the victim carrying an imitation silver handgun and, pointing it at the victim, demanded money. The accused then drove off from the area. Police later attempted to intercept the accused while he was driving the stolen car, but he did not pull over. A pursuit was terminated by police when the accused drove onto the wrong side of the road on Western Port Highway in Lynbrook.
37. The accused had been on bail at the time of these offences.
38. On 15 March 2016, the accused was sentenced on a breach of the Youth Attendance Order imposed in June 2015 for further offending, including theft of a motor vehicle, robbery and recklessly causing injury. He was sentenced to a further 12 month Youth Attendance Order on that date.
39. Whilst not directly relevant to this application, the accused also faces charges listed in the Magistrates' Court for unlawful assault/assault in company allegedly committed in January, 2016 and an aggravated burglary allegedly committed in March 2016. These matters are yet to be finalised.

CONSIDERATION

40. The two sets of charges against the accused involve allegations of extremely serious offending.

Charges arising from the alleged offending on 11 July, 2015

41. On any view, this was a serious example of an armed robbery. It is said the accused, armed with a firearm, approached the victim from behind and grabbed him by the shoulders, wrapped his left arm around the victim and pointed the firearm at his stomach, whilst repeatedly demanding the keys to his Porsche. He was 17 years and 7 months old at the time. I do not accept the characterisation of this offending as a mid-range instance of armed robbery.
42. Relevantly, the accused had been sentenced less than three weeks earlier, on 26 June 2015, to a 12 month Youth Attendance Order by the Dandenong Children's Court. A Youth Attendance Order is the most intensive supervisory order available in the sentencing hierarchy under s360 of the Act, short of detention. The accused was sentenced on that

occasion for serious and relevant offending, including theft of a motor vehicle and armed robbery involving the use of an imitation handgun.

43. The two adult co-accused were sentenced for their role in the armed robbery by the County Court on 8 April 2016. The adult accused were each sentenced to 12 months' imprisonment and a Community Correction Order of two years duration. I have been provided with the sentencing decision of the County Court in that matter. It is relevant to note that both co-accused were sentenced on the agreed basis that they were aiding and abetting the commission of the armed robbery and that neither was aware that the accused had a firearm until it was produced. The nature and gravity of the offending alleged against the accused is therefore significantly more serious than that for which the co-offenders were sentenced.
44. I have considered the decision of Justice Beale in *C (by his litigation guardian) v CCV and Ors* to which I was referred by Mr Gwynn. There, as here, the charge carried a maximum penalty of 25 years imprisonment. Notwithstanding the maximum penalty, for the reasons set out by the Court, the two rape charges were considered suitable to be dealt with in the Children's Court. Significantly however, the accused in that matter was described as having a "limited" criminal history and importantly, no priors for sexual offences.
45. In contrast, the accused in this application has a relevant criminal history, dating back to 2012 for offences of violence, including recklessly causing serious injury, reckless conduct endangering life, reckless conduct endangering serious injury and attempted armed robbery.
46. Whilst I accept there is force in Mr Gwynn's submission as to the weight to be given to the accused's plea in this matter, there are other significant sentencing considerations. These include the nature and gravity of the offending, the prior findings of the Children's Court for offences of violence and notably, the fact the alleged offending is said to occur soon after the accused was sentenced to a Youth Attendance Order for other violent offending.
47. In considering the accused's age relative to the definition of 'child' in the Act, it is significant in considering the application to note that he was 17 years of age at the time of the offending, not a 13 or 14 year old.
48. I am satisfied that exceptional circumstances exist within the meaning of s356(3) of the Act and that the charge of armed robbery should be fixed for committal hearing. In so deciding, I consider the sentencing court needs to be able to consider the fullest possible range of sentencing options available, not limited to two years' detention on the single charge of armed robbery, in determining an appropriate sentence.

Charges arising from the alleged offending on 18 October 2015

49. The offending alleged to give rise to the charges of intentionally causing serious injury in circumstances of gross violence, reckless conduct endangering life and a prohibited person using a firearm is particularly grave and demonstrates a significant escalation in violent offending by the accused. The repeated discharge of the firearm directed at the victim in a residential area, allegedly as part of a planned assault on the victim as an act of revenge, highlights the gravity of the offending. The accused was 17 years and 10 months old at the time and was under a 12 month Youth Attendance Order imposed by the Children's Court on 26 June 2015 when the alleged offending was committed.
50. The victim suffered a serious injury as a result of the incident. Transferred from the Frankston Hospital to the Alfred Hospital, he underwent surgery to remove firearm pellets and to clean his wounds. He sustained superficial puncture wounds to his right chest and left shoulder and multiple superficial abrasions to his chest. Some residual shrapnel remains in his left shoulder. The victim says he has been left with ongoing pain to the right side of his chest.
51. Mr Gwynn submits that the victim's injuries, as outlined, are not at the higher end of the range that fall within the definition of a 'serious injury' under the s15 of the *Crimes Act 1958*. Whilst this is accepted by the prosecution, I do not consider this factor alone significantly mitigates against a finding that this is a grave example of intentionally causing serious injury in circumstances of gross violence and, when viewed in the context of the accused's criminal history, requires the imposition of a sentence that reflects the objective gravity of the offending behaviour.
52. Although an aggregate term of three years' detention could be imposed by the Children's Court for all these offences, the Court is nonetheless restricted to an individual term of two years for the specific charge of intentionally causing serious injury in circumstances of gross violence. Given the age of the accused at the time, his prior criminal history and the fact the alleged offence was committed whilst under a Youth Attendance Order of the court, I do not consider such a limitation on sentencing powers to be appropriate.
53. I also consider that the overall administration of justice – "that is, justice as it affects the community as well as the individual"⁹, is advanced by the sentencing court being in a position to consider the fullest range of sentencing options, and to make appropriate orders for cumulation, having regard to all relevant sentencing principles, including that of totality. In combination, I consider these matters make the charges unsuitable for determination summarily.

⁹ *K v Children's Court of Victoria & Anor* [2015] VSC 645 at [26]

54. The Application for uplift pursuant to s 356 (3) of the Act is granted and the matters fixed for committal hearing in this Court.

Judge A Chambers
President
Children's Court of Victoria