IN THE CHILDREN'S COURT OF VICTORIA

CRIMINAL DIVISION

THE DIRECTOR OF PUBLIC PROSECUTIONS

v.

JM

Application by DPP pursuant to section 356(3)(b) of the *Children, Youth and Families Act* 2005 (Vic)

MAGISTRATE:	HER HONOUR MAGISTRATE STYLIANOU
DATE OF HEARING:	17 October 2018
DATE OF DECISION:	1 November 2018
CITED AS:	DPP v JM
MEDIUM NEUTRAL CITATION:	[2018] VChC 5

REASONS FOR DECISION

Catchwords: Accused charged with being an accessory after the fact to murder, assault at common law and possessing a drug of dependence – application for uplift of the charges under s.356(3)(b) of the *Children, Youth and Families Act* 2005 – whether the charges are unsuitable by reason of exceptional circumstances to be heard and determined by the Children's Court – prosecution submission that the offending of JM is inextricably linked with that of the principal offender – very different matters to be proved in respect of JM and co-accused – sentencing options available to the Children's Court under the CYFA adequate to respond to JM's alleged offending – application for uplift refused.

APPEARANCES:	Counsel	Solicitors
For the Applicant:	Ms Kristie Churchill	John Cain, Solicitor for OPP
For the Defence:	Mr Simon Moglia	Dotchin Tan Lawyers

HER HONOUR:

The Charges and the Application

1. The accused, "JM", is 16 years old. JM has been charged with accessory after the fact to murder[1] (charge 1), assault at common law (charge 2) and possessing a drug of dependence, namely methylamphetamine (charge 3). The charges arise out of an incident which occurred on 21 July 2018 during which the victim, 19 year old "AB", was stabbed in the foyer of an apartment building and died shortly thereafter. JM's co-accused, 17 year old "YK", has been charged with her murder.

2. Given the nature of the charge against YK, his case will proceed to committal in this Court and will ultimately be tried in the Supreme Court.

3. The Children's Court has prima facie jurisdiction to hear and determine summarily the charges in relation to JM[2].

4. The Director of Public Prosecutions applies pursuant to s.356(3)(b) of the *Children Youth and Families Act* 2005 ("CYFA") for charges 1 and 2 against JM to proceed by way of committal hearing.

5. It was submitted on behalf of the DPP at the hearing on 17 October 2018 that the application to uplift is contingent on JM pleading not guilty and this matter proceeding to trial. The application would "probably" not be pursued by the DPP if the matter was to resolve to a plea of guilty to these charges[3].

6. The charges against JM are disputed and the application to uplift the charges is opposed by the defence on behalf of JM.

[1] Under s.325 *Crimes Act* 1958
[2] Section 356 *Children Youth and Families Act* 2005
[3] Submission made by prosecutor at the Hearing on 17 October 2018

7. The issue to be determined is whether the charges are unsuitable by reason of exceptional circumstances to be determined by the Children's Court.

Circumstances of the Alleged Offending

8. The allegations against JM can be briefly summarised.

9. On Saturday 21 July 2018, AB was present at a party being held in an apartment in A'Beckett Street in Melbourne. At approximately 4.27am, YK and JM, along with several other males, attended the party. These males were not invited and upon their arrival were asked to leave by numerous females at the party. AB's mobile phone was stolen, causing her to become angry and demand the return of her phone. The males eventually left the apartment, followed by AB who was having a verbal altercation with one of the males.

10. The police summary of material facts[4] states that surveillance footage depicts, at 5.09am, AB involved in a physical altercation with JM and YK, where she was kicked, kneed and punched. AB was fighting back and punching JM.

11. The prosecution alleges that at some stage whilst JM had hold of AB, YK takes a step back, removes a knife from his clothing and lunges forward, stabbing AB once in the chest[5]. JM is not charged with being complicit in AB's murder.

12. By written submissions[6] and in argument on 17 October 2018, the prosecution further allege that JM assaulted AB after she was stabbed. As to what constitutes this further alleged assault is not entirely clear. The police summary of material facts states that "the deceased continues to be held by [JM] and uses her left arm to strike him several times."[7]

[4] Tendered by the prosecution on the application
[5] Police Summary of Material Facts [37(i)]
[6] Prosecution submissions dated 8 August 2018 at 18 (iv)
[7] Police Summary of Material Facts [37(j)]

13. AB retreated to the apartment where she collapsed in the doorway and died shortly thereafter.

14. When AB retreated to the apartment the surveillance depicts the group of males push and shove each other as they make their way to and enter the lift. Whilst in the lift, YK gestures to JM to be quiet and JM is seen to beckon at YK with a hand gesture. YK then hands JM a knife, alleged by the prosecution to be the murder weapon. This knife has not been found.

15. The timeline provided by the DPP[8] as to what the CCTV footage depicts is that AB is stabbed at approximately 5:16:14am. At 5:16:41am the victim retreats into the apartment doorway; at 5:17:52am the offender gestures to YK in the lift; at 5:17:59 am JM takes possession of the knife in the lift. At 5:20am JM leaves the apartment block. At 5:25am, paramedics and police enter the apartment. AB is found to be pulseless, with no electrical activity in her heart. She was declared deceased at 5:30am.

16. The act relied upon by the prosecution as constituting charge 1, accessory after the fact to murder, is JM "taking possession of the murder weapon and leaving the building with it"[9].

17. The prosecution submits that charge 2, common law assault, encompasses the alleged assault by JM both before and after she was stabbed.

Legislative Framework

18. Section 356(3) of the CYFA provides:

> *If a child is charged before the Court with an indicatable offence, other than murder, attempted murder, manslaughter, child homicide, an offence against 197A of the* ***Crimes Act 1958*** *(arson causing death) or an offence against*

[8] Prosecution Submissions dated 23 October [5(II)]
[9] Ibid

*section 318 of the **Crimes Act 1958** (culpable driving causing death), the Court must hear and determine the charge summarily unless-*

(a) before the hearing of any evidence the child objects; or

(ab) subsection (6) applies; or

(b) at any stage the Court considers that the charge is unsuitable by reason of exceptional circumstances to be determined summarily.

19. Section 356A of the CYFA provides:

(1) For the purposes of section 356(3)(b), exceptional circumstances exist, in relation to a charge referred to in section 356(3) in respect of a child, if the Court considers that the sentencing options available to it under this Act are inadequate to respond to the child's offending.

(2) In determining whether the sentencing options available to the Court under this Act are inadequate to respond to the child's offending, the Court must have regard to –

(a) the seriousness of the conduct alleged, including the impact on any victims of the conduct and the role of the accused in the conduct; and

(b) the nature of the offence concerned; and

(c) the age and maturity of the child, and any disability or mental illness of the child, at the time of the offence and the time of sentencing; and

(d) the seriousness, nature and number of any prior offences committed by the child; and

(e) whether the alleged offence was committed while the child was in youth detention, on parole or in breach of an order made under this Act; and

(f) any other matter the Court considers relevant.

The Prosecution Submissions[10]

20. The DPP submits that s.356A as it applies to s.356(3)(b) is not restrictive or exhaustive as to how exceptional circumstances may be found by the Court to exist. By written submissions[11], and expanded upon in oral argument, the prosecution says that exceptional circumstances exist in this case warranting an uplift, primarily for two reasons:

(i) The offending involving this accused is inextricably linked with the principal offender; and/or

(ii) If found guilty, the sentencing options available to this Court might well be insufficient[12].

21. As to the first limb, (i) above, it was further elaborated in oral argument on behalf of the DPP that the overall administration of justice calls for the uplift of the case against JM for 3 reasons:

(a) The time and expense of running two trials; and that "the same trial will be required to be run in two separate jurisdictions";[13]

(b) There is still DNA and other forensic evidence outstanding and it is still unknown what the fact in issue in the trial will be (although the prosecutor

[10] Expanded upon under the heading "Consideration - Maximum Penalty Applicable to Charge 1"
[11] Prosecution Submissions dated 8 August 2018
[12] Ibid. p.3
[13] Prosecution Submissions dated 8 August 2018

later conceded that this would, in any event, be no bar to holding two trials);

(c) The victim's family and some of the witnesses would be subjected to two trials.

22. It was accepted on behalf of the DPP that whilst it was submitted that "the offending involving this accused is inextricably linked with the principal offender" the charges against JM were very different. JM is not charged with having any role to play in the murder of AB or being complicit in any injury to AB.

23. As to the second limb, (ii) above, the prosecution submitted that if JM was found guilty of both charges 1 and 2, the sentencing options available to this Court will not be sufficient. This submission is somewhat inconsistent with the submission of the prosecutor to this Court on 17 October 2018 that this uplift application was contingent on the accused pleading not-guilty and that the application would "probably" not be made if the matter resolved to a plea of guilty to these offences. In any case, a number of reasons relevant to the circumstances of the offending were enumerated in the prosecution written submissions[14], including the seriousness of the offence of being an accessory after the fact to murder, the taking possession of and secreting the murder weapon shortly after the stabbing of the deceased, assaulting the deceased before and after she is stabbed and fleeing the scene without rendering assistance to the deceased. The prosecution further submitted that this offending was committed in breach of a Youth Supervision Order imposed less than three weeks earlier for serious offending[15]. By way of further written submissions[16] the prosecution added that JM's prior criminal offending demonstrates a history of violent and antisocial behaviour and that charge 1 carries a 20 year maximum penalty, both of which, it is

[14] Ibid at 18
[15] Ibid
[16] Dated 23 October 2018

argued, are relevant matters for the Court in considering the sufficiency of its jurisdiction.

24. The prosecution referred the Court to *D (a Child) v White*[17] which considered the meaning of "special reasons" in an earlier form of this provision as opposed to "exceptional circumstances", and to the decision of Forrest J in *K v Children's Court of Victoria and Ors*[18] where relevant and important principles were expounded. Reference was also made by the prosecution to a decision of this Court in *VicPol v BM*.[19] In *BM's case* the accused child was aged 18 years as at the date of the application to uplift and had been charged with culpable driving which necessitated that the matter be heard in a higher jurisdiction. The application in that case was to uplift additional charges in relation to the same young person that were said to be inextricably linked to the time and execution of the culpable driving charges. In *BM's case* the Magistrate determined that the offences sought by the DPP to be uplifted were "rendered exceptional by their nexus to the subsequent fatality" and that they were "so linked to the purported alleged motive and to the fact in issue (as to whether the culpable driving was dangerous or culpable)" that it would be artificial to separate the hearing of the charges.

<u>The Defence Submissions</u>[20]

25. On behalf of JM it was submitted that s.356A of the CYFA is in fact prescriptive and restrictive in how exceptional circumstances may be found to exist under s.356(3)(b) of the CYFA.

26. The defence submitted that "the only way the test may be satisfied is by the Court's positive consideration that the sentencing options are inadequate."[21]

[17] [1988] VR 87
[18] [2015] VSC 645
[19] 24 May 2018 (unpublished), Hodgson M.
[20] Expanded upon under the heading "Consideration - Maximum Penalty Applicable to Charge 1"
[21] Defence written submissions dated 20 August 2018

27. The defence argued, citing *R v Taylor*[22] as authority, that the maximum penalty applicable to charge 1 under s.325 of the *Crimes Act* 1958 is not 20 years, but 5 years, because JM, it is submitted by the defence, could not be found guilty of assisting an offender in relation to murder for 2 reasons[23]:

    (a) The evidence does not disclose that his alleged assistance occurred after AB's death; and

    (b) It must be shown that JM knew of the death before he could be culpable as an accessory (after the fact) to murder.

28. It was further argued on behalf of JM that even if the Court were to take into account the increased maximum penalty of 20 years, that the likely sentence to be imposed "would nevertheless be within the Court's jurisdictional limit".[24]

29. It was submitted by the Defence that whilst JM's prior criminal history is concerning, it did not demonstrate such a history of violence that the current offending could not be dealt with appropriately in this Court. Further, that he has been sentenced by this Court on two prior occasions, and on both occasions he received a Youth Supervision Order without conviction. Furthermore, that "he is not a mature offender and does not represent one of those very unusual cases that must be sent to the adult courts".[25]

30. The Defence also referred[26] the Court to *K v Children's Court of Victoria*[27] and the summary of the relevant principles arising under s.356 CYFA as stated by T Forrest J.

[22] Unreported Vic CCA 22 June 1989 (Young CJ, Gray and McDonald JJ)
[23] Defence Further submissions (undated)
[24] Ibid
[25] Ibid
[26] Defence Submissions dated 20 August 2018
[27] Op.cit

Consideration

31. In enacting s.356A, Parliament has mandated for the Children's Court to have regard to the adequacy or otherwise of the sentencing options available to it by reference to the factors in s.356A(2) of the CYFA in determining whether exceptional circumstances exist under s.356. It is unclear whether s.356A prescribes merely one way in which exceptional circumstances may be found to exist, or whether it prescribes the only way.

32. On the face of it, the legislation appears restrictive and prescriptive. However, a myriad of issues and complexities may arise in the hearing of serious criminal offences. Ultimately, the most important criterion must be the overall administration of justice, as it affects the community as well as the individual. That being the case, it is perhaps unlikely that s.356A was intended by Parliament to exclude any other consideration other than the adequacy of the sentencing options available to this Court in determining whether exceptional circumstances exist. In *DPP v JT*[28], Chambers J said that the sentencing considerations in s.356A "are to be considered in addition to other matters relevant to the exercise of the Court's discretion as summarised in *K v Children's Court of Victoria*." There have, however, also been recent contrary interpretations on this issue by this Court.[29]

33. The meaning of 'exceptional circumstances' has been considered in the context of s.356 of the CYFA in a number of cases in the Supreme Court and the Court of Appeal some of which have been referred to by each of the parties to this application, including *D (a child) v White*[30], *A Child v A Magistrate of the Children's Court and Ors*[31] and *DL (A minor by his litigation guardian) v A Magistrate of the Children's Court*[32]. In

[28] 5 July 2018 (unpublished) at [20], per Chambers J
[29] See for instance *VicPol v LV*, 19 October 2018 (unpublished), Children's Court of Victoria.
[30] Op.cit
[31] Unreported, Supreme Court of Victoria, Cummins J, 24 February 1992
[32] Unreported, Supreme Court of Victoria, Vincent J, 9 August 1994

K v Children's Court of Victoria and Anor[33] to which both parties have referred, Justice Forrest extracted the relevant principles from these authorities summarising them as follows:

(a) the Children's Court should relinquish its embracive 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.

34. Vincent J went on to say that "the authorities resound that each case of 'exceptional circumstances' must be determined on its own facts".[34]

35. Given JM's age, this Court has jurisdiction to impose 3 years detention on a single charge and 4 years detention on an aggregate sentence.[35]

[33] Op.cit
[34] At [27]
[35] Section 413 CYFA

Maximum Penalty applicable to Charge 1

36. The parties disagree about the maximum penalty applicable to charge 1. JM has been charged under s.325 of the *Crimes Act* 1958.

37. The charge before the Court, reads: "the accused at Melbourne on Saturday, 21 July 2018, knowing or believing [YK] to be guilty of a serious indictable offence did without lawful authority or reasonable excuse do any act for the purpose of impeding the apprehension/prosecution/conviction/punishment of [YK]."

38. Section 325(1) of the *Crimes Act* 1958 provides:

> Where a person (in this section called the principal offender) has committed a serious indictable offence (in this section called the principal offence), any other person who, knowing or believing the principal offender to be guilty of the principal offence or some other serious indictable offence, without lawful authority or reasonable excuse does any act with the purpose of impeding the apprehension, prosecution, conviction or punishment of the principal offender shall be guilty of an indictable offence.

39. Section 325(4) of the *Crimes Act* 1958 provides:

> A person convicted of an offence against subsection 1 shall be liable –
>
> (a) If the principal offence is one for which the penalty is level 1 imprisonment (life) to level 3 imprisonment (20 years maximum); or
>
> (b) In any other case, to imprisonment for a term which is neither-
>
> (i) more than 5 years in length; nor
>
> (ii) more than one half the length of the longest term which may be imposed on first conviction for the principal offence.

40. As previously identified, the maximum penalty is disputed by the Defence based on what it argues must and can be proved by the prosecution for this offence to be made out.

41. The prosecution alleges that the 'serious indictable offence' referable to charge 1, is murder, and that therefore the maximum penalty applicable to charge 1, is 20 years under s.325(4)(a) of the *Crimes Act* 1958. It is the prosecution case that AB dies shortly after the principal offender, YK, stabs her, and that it is therefore "arguable that the act of taking the knife and leaving the building with it occurred after the victim had died and after the murder was complete".[36]

42. The defence argues, inter alia, that the prosecution cannot prove that JM's assistance to YK came after AB had in fact died, and that therefore the prosecution cannot prove that JM was an accessory after the fact to murder. The defence argues that, at most, the prosecution can only prove that JM's assistance to YK came after a serious indictable offence other than, at that stage, murder had been committed. To this end, the defence argues, that the evidence does not disclose that the act relied on by the prosecution to make out charge 1 – that is 'taking possession of the knife and leaving the building with it' occurred after AB had in fact died, as opposed to, AB at that stage, being only seriously injured. Accordingly, the defence argues that the maximum penalty applicable to charge 1, is 5 years, as per s.325(4)(b) of the *Crimes Act* 1958.

43. The maximum penalty is of course relevant to the application before the Court but not determinative.

44. I do not intend to make a finding as to the strength of charge 1 or whether it will ultimately be made out as it is currently being pursued by the prosecution. For the purposes of this application, I accept the prosecution submission that the maximum

[36] Prosecution written submissions dated 23 October 2018

penalty in respect of this charge, as it is maintained by the prosecution, is 20 years imprisonment.

The Adequacy of the Sentencing Options under the CYFA

45. It is disconcerting but the reality, that children all too often appear before this Court for serious offences such as rape and armed robbery where the prescribed maximum penalty is 25 years imprisonment. This Court routinely hears and determines such cases.

46. In the case of *DL*[37] a Magistrate had declined to hear and determine summarily multiple charges of rape of a young woman, some charges relating to the accused's own actions and others relating to his alleged complicity in the actions of four young adults, who it was said, had participated in the episode. It was alleged that the child offender had committed the offences of rape in the presence of co accused which compounded the gravity of the serious offences with which he was charged. Vincent J found that the Magistrate was in error in declining jurisdiction to hear and determine the case and the matter was returned for summary hearing in the Children's Court.

47. In this case, whether or not JM assisted the principal offender, after AB died or moments before, and the extent of his knowledge at that time, will, if a charge of accessory after the fact is proven against JM, be significant sentencing considerations. The offending is clearly serious notwithstanding the stage at which JM assisted the principal offender or the extent of his knowledge at the time, given that on the evidence it appears JM at least knew that AB was bleeding and, on the evidence of at least one witness, that she had been stabbed. It is also serious that JM is alleged to have assaulted the victim both before and after she was stabbed, this comprising the basis for charge 2, also subject to the uplift application.

[37] Op.cit

48. JM's criminal history did not commence until April this year. Despite his prior criminal offending, which is in itself, undoubtedly serious, he has not previously been convicted of an offence and he has not previously been sentenced to a term of detention. He has been sentenced by the Children's Court on 2 previous occasions. Firstly, on 19 April 2018 where he was released on a Youth Supervision Order without conviction and subsequently on 3 July 2018 where he was also released on a Youth Supervision Order without conviction. He is aged 16. I have taken into account that if proven, this offending breaches the Youth Supervision Orders imposed by this Court. I have also taken into account the fact that the second Youth Supervision Order was imposed just a few weeks prior to this current alleged offending to which the application of the DPP relates. Any other outstanding charges are yet to be proven.

49. Whilst JM has very quickly progressed to the mid-higher level of sentences available to this Court, even taking the prosecution case at its highest, and considering all matters under s.356A(2), I do not consider that the sentencing options available to this Court under the CYFA are inadequate to respond to JM's offending.

Other Exceptional Circumstances

50. Given the lack of clarity regarding the restriction, if any, imposed by s.356A as to when exceptional circumstances may be found to exist and given also the decision of this Court in *DPP v JT*[38]*,* I now turn to whether there are any other matters which may amount to exceptional circumstances under s.356. I am not persuaded by the prosecution submission that the offending of JM is so inextricably linked with that of the principal offender such that the proper administration of justice dictates that they be heard together. As conceded by the prosecution, the alleged offending and the matters to be proved in respect of JM on the one hand and AK on the other, are very different.

[38] Op.cit

51. The other matters relied upon by the prosecution in support of the application to uplift such as the time and expense of running two trials, the fact that DNA or other forensic evidence may still be outstanding, that some of the witnesses and the family would be subjected to two trials and that the fact in issue at the trial is still unknown, are all matters that bear weight. However, as Vincent J explained in *DL*[39]:

> "It must be borne in mind that a legislative scheme has been devised with respect to the conduct of proceedings involving young persons…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 appropriate where adults are involved. It is only where special, unusual or exceptional circumstances exist of a kind which render unsuitable the determination of a case in the jurisdiction established with this difference in mind, that the matter should be removed from that jurisdiction to the adult courts."[40]

52. Whilst the additional matters relied upon by the prosecution in support of the application to uplift these charges beyond the jurisdiction of this Court are important considerations, they are not special, unusual or exceptional. In *D (A Child) v White*[41], the Court said "As the Act invests the Court with embracive jurisdiction in respect of children it should only be relinquished reluctantly. The reason to do so must be special; not matters of convenience or to avoid difficulties…the power should be exercised sparingly."[42] In that case a possible joint trial of co-conspirators rather than individual hearings was a significant matter involving the administration of justice. In the case before this Court, JM and YK are not charged as co-conspirators. The nature of the prosecution case against each of them is inherently different.

[39] Op.cit
[40] Op.cit (p.4)
[41] Op.cit. In that case, the accused were charged as co-conspirators.
[42] Op.cit (p.93)

53. There may well be considerations which emerge, as this matter progresses further, which affect and change the complexion of the proceedings. This Court may decline to hear a case if *at any stage*, the Court considers that the charges are unsuitable to be determined summarily by reason of exceptional circumstances[43].

54. The prosecution application pursuant to s.356(3)(b) of the CYFA is refused.

[43] Section 356(3)(b) CYFA