IN THE CHILDREN'S COURT OF VICTORIA
AT MELBOURNE
CRIMINAL DIVISION

THE DIRECTOR OF PUBLIC PROSECUTIONS

v.

PT

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

MAGISTRATE: HER HONOUR MAGISTRATE STYLIANOU

DATE OF HEARING: 18 October 2018, 20 November 2018

DATE OF DECISION: 29 November 2018

CITED AS: DPP v PT

MEDIUM NEUTRAL CITATION: [2018] VChC 7

REASONS FOR DECISION

Catchwords: Accused charged with Aggravated home invasion defined as a Category A serious youth offence in s.3 of the *Children, Youth and Families Act 2005* (CYFA); presumption of uplift to a higher court unless certain preconditions are met – application pursuant to s.356(6)(a) CYFA for charges to be heard and determined summarily in the Children's Court – accused aged 17 years and 9 months at the time of offending – adequacy of this Court's powers to respond to offending – whether it is in the interests of the victims that the charge be heard and determined summarily – whether there is a 'substantial and compelling reason' why the charge should be heard and determined summarily – 'special reasons' exception under s.10A *Sentencing Act 1991* – application of s.23(3) of the *Charter of Human Rights and Responsibilities Act 2006* – 'young offender' under s.32(2C) *Sentencing Act* 1991 – high threshold and heavy burden set by the legislature in s.356(6)(c)(iii) of the CYFA and reinforced by s.356(7) – application for summary jurisdiction refused.

APPEARANCES: Counsel

For the Applicant: Mr P.J. Pickering

For the Defence: Ms J. Garner

HER HONOUR:

The Charges and the Application

1. PT was born on 12 August 2000. He is now aged 18 years. He has been charged with numerous offences arising out of an incident which occurred on 10 June 2018. The matter has resolved to a plea of guilty to three charges: Aggravated home invasion[1] (charge 1), theft of motor vehicle (charge 2) and theft (charge 3). PT was aged 17 years and 9 months at the time of this offending.

2. The offence of aggravated home invasion pursuant to s.77B of the *Crimes Act* 1958 is defined by s.3 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

[1] S. 77B *Crimes Act* 1958
[2] Section 3(e)(ii) CYFA
[3] Emphasis added

(c) any of the following applies –

(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. PT was aged over 16 years when the offence of aggravated home invasion was committed and accordingly this Court does not have prima facie jurisdiction to hear the charges. Put another way, 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 PT that the charges be heard summarily in this Court pursuant to s.356(6)(a). The defence relies on s.356(6)(b) and (c)(i) and (iii) in support of its application for summary jurisdiction.

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) Is it in the interests of the victim or victims that the charge be heard and determined summarily [s.356(6)(c)(i)]? **or**,

(c) Is there a substantial and compelling reason why the charge should be heard and determined summarily [s.356(6)(c)(iii)]?

8. It is *not* being submitted on behalf of PT that s.356(6)(c)(ii) applies – that is, it is not being submitted that PT is particularly vulnerable because of cognitive impairment or mental illness.

<u>The Co-Accused</u>

9. There are three other co-accused. CA, approximately two months older than PT; born on 10 June 2000, who turned 18 on the date of the offending; WK, born 25 December 1998, aged 20 at the relevant time; and RD, born 20 November 2002, aged 15 years when the offending occurred.

10. The charges against CA and WK will be heard and determined by the County Court.

11. Given that RD was not aged 16 or over at the time of the offending, the Children's Court has prima facie jurisdiction to hear and determine the charges against him.

<u>Circumstances of the Alleged Offending</u>

12. The allegations against PT can be briefly summarised.

13. On Sunday, 10 June 2018 at approximately 5:15am, the four offenders have attended and entered a residential address in Pakenham. The offenders entered the property through the front door. It is unknown whether the front door was unlocked, but it is alleged by the prosecution that a large hole in the plaster behind the front door is consistent with the shape of the internal door handle, suggesting there was a large degree of force.

14. Victim KS was in the house at the time, together with his pregnant wife, his five year old daughter and his elderly mother. Victim KS and his wife and five year old daughter were asleep in the master bedroom, located through the first door to the right of the entrance hallway. The elderly woman was asleep in her bedroom, near the rear of the house.

15. After gaining entry, the four offenders have made their way through the house, causing damage to a number of walls. The offenders have then confronted the elderly woman outside her bedroom. She observed them smashing photographs off the wall, with one offender holding a stick and another holding a knife. She described the knife to be "long like my forearm, maybe a foot long". Frightened, she sought refuge in her bedroom closing the door behind her.

16. The four offenders have continued through the house and entered the master bedroom where KS and his heavily pregnant wife and five year old daughter were sleeping, and began demanding the keys to the car.

17. KS woke up and saw one of the offenders standing over him. His wife observed the three other offenders standing in the doorway of the master bedroom. She hid their five year old daughter under the covers of the bed.

18. The offenders have then located the keys to the victims' vehicle, hanging on a wall just outside the master bedroom door and they left, stealing the victims' car which was parked on the nature strip outside the address.

19. After the offenders left, victim KS observed three slash marks in the bed head where he was sleeping with his wife and daughter. The prosecution allege that these slash marks were made by a knife carried by the offenders.

20. At approximately 5:41 am the victims' car was observed at a Caltex Service Station in Longworry. One of the offenders has filled the car with petrol to the value of $71.16 and decamped, not making any attempt to pay for the fuel.

21. After the arrest of three of the offenders later that morning, and an analysis of the phone of PT, the police located information, including:

    (a) A photograph depicting PT wearing, inter alia, black gloves whilst holding a large machete;

(b) A video recorded at 5:13am on Sunday 10 June 2018 from inside a car, wherein PT is making comments “I’m pinging off my head bro”. Comments are made by other co-accused about attending at the next servo, and another male is heard commenting “kick down doors bro, kick down doors.”

(c) A ‘Facebook Messenger’ message sent from one of the co-offenders at 4:47am read “Ahaha we’re stealing a car rn”.

22. Admissions were made by one of the co-accused that someone in the group of offenders during this incident was in possession of “fuckin’ a big machete…I don’t remember who had it but I remember seeing it”.

Defence Submissions

23. By way of further written submissions[4], the defence provided an analysis of the legislative provisions; referred to the Second Reading Speech delivered by Ms Pulford on 8 June 2017; the Explanatory Memorandum to the *Children and Justice Legislation Amendment (Youth Justice Reform) Bill* 2017; and to the cases of *DPP v Hudgson*[5], *Gul v The Queen*[6], *Re Ceylan*[7], and *Re Alsulayhim*[8].

24. The defence submitted that “no guidance is given in either the Second Reading Speech or in the Explanatory Memoranda as to how subsection 356(6)(c) is to be interpreted”[9].

25. It was submitted on behalf of PT that the test ‘forceful and therefore convincing’ proffered by Beach J in *Ceylan*, “is appropriate”[10] as to how this Court ought to construe the term ‘substantial and compelling’ in s.356(6)(c)(iii). It was further

[4] Defence submissions (11 pages) dated 2 November 2018, Exhibit 4 on the application.
[5] [2016] VSCA 254
[6] [2017] VSCA 153
[7] [2018] VSC 153
[8] [2018] VSC 570
[9] Defence submissions (11 pages) dated 2 November 2018 [15]
[10] Ibid [20]

argued that "a substantial and compelling reason may consist of a combination of a number of factors, including the objective seriousness of the offending as well as the history and personal circumstances of the child. Further, as the Court of Appeal said in *Hudgson,* the Court must consider the cumulative impact of the circumstances and that 'compelling' connotes powerful circumstances of a kind wholly outside what might be described as 'run of the mill' factors."[11] The defence also argued that "the Court should nevertheless avoid substituting other expressions for the words in the Act, which must be construed in the context of the Act as a whole, bearing in mind its purposes".[12]

26. In summary, the defence submitted that:

    (a) The Children's Court has an adequate range of sentencing options[13].

    (b) The request of the victims that PT's matter be heard in the County Court "does fall within the terms of section 356(6)(c)(i)"[14] but that "this must be balanced against the fact they have not yet had the opportunity of participating in a Children's Court Group Conference which may change their view"[15].

    (c) The 'cumulative effect' of a number of factors referable to PT "is well beyond run of the mill" and amounts to a substantial and compelling reason why the charges should be heard and determined summarily[16]. The factors relied upon were stated as follows[17]:

        - *"the availability of a total sentence of 4 years YJC for the offending provides the Children's Court with more than adequate powers of punishment";*[18]

---

[11] Defence Submissions dated (11 pages) 2 November 2018 [20]
[12] Ibid
[13] Ibid [27]
[14] Ibid [24]
[15] Ibid [18]
[16] Ibid [27]
[17] Quoted as they appear in the Defence Submissions (11 pages) dated 2 November 2018
[18] Ibid.

- *"PT has no prior convictions";*
- *"PT has recently turned 18 years of age with a severe risk of damaging stigma if he receives a custodial sentence of any kind, particularly a custodial sentence in adult prison";*
- *"On 7 September 2018 at the Melbourne Children's Court PT was sentenced without conviction, to a probation order for 12 months for offences that occurred prior to the current offences, including seven offences of robbery, one offence of armed robbery, and offences for obtaining property by deception and failing to answer bail"*
- *"Prior to sentencing on 7 December 2018, PT participated in a Children's Court Group Conference";*
- *"PT is a good candidate to participate in a Group Conference in relation to these offences";*
- *"PT is currently complying with a Probation Order imposed on 7 September 2018 [see Youth Justice Progress Letter dated 17 October 2018]";*
- *"It is not alleged that PT has committed any further offences since his release on bail on 7 September 2017."*
- *"PT has already served 87 days pre-sentence detention for these offences";*
- *"Any further custodial sentence would undermine the rehabilitative progress already made by PT"*
- *"PT comes from a refugee background";* The Court notes that according to the pre-sentence report of 6 July 2018, PT arrived in Australia when he was aged 5 years.[19]
- *"The Youth Justice Pre-Sentence Report dated 6 July 2018…notes that PT witnessed his mother being the victim of family violence [page 5]";*
- *"That report also noted that PT identifies himself as a father figure in the family home, supporting his mother to care for the younger children and keeping order in the home [page 5]";*

[19] P.6

- *"PT has self-harmed on occasions [page 5 of that report]";* The Court notes that according to the pre-sentence report of 6 July 2018, whilst on remand PT met with the custodial Youth Health and Rehabilitation Service and no mental health issues or self-harm thoughts were then identified.[20]
- *"PT has the strong support of his family, including his mother and aunt";*
- *"PT will be pleading guilty in accordance with the plea offer accepted by the OPP. That offer was made at the first reasonable opportunity";*
- *"PT exhibited good behaviour whilst in custody on remand between 12 June and 7 September 2018 (see the Appendix to these submissions)";*
- *"It is not alleged in relation to these charges that PT possessed any weapon in the course of the offending, nor that he drove the stolen motor vehicle or that he filled the vehicle with petrol';*
- *"In all the circumstances, PT may be said to have demonstrated good prospects of rehabilitation, which should be encouraged in the sentencing process";*
- *"It would be open to the County Court to sentence PT under the Act rather than the Sentencing Act";*
- *"In all the circumstances, it is likely that the County Court would sentence PT under the Act;"*
- *"In any event, the County Court would be bound to sentence PT as a young offender";*
- *In all the circumstances, it is extremely unlikely that the County Court would impose a sentence of YJC exceeding a total of 4 years";*
- *"There is reasonable opportunity PT will receive a non custodial sentence allowing him to continue with the current Probation Order";*
- *"It is in the interests of justice that PT be sentenced at the earliest reasonable opportunity";*

A number of these factors, including the immediately preceding matter, were not further expanded upon.

[20] P.6

27. In enumerating these factors, the defence included as a matter to consider in determining whether a substantial and compelling reason exists, the availability of an aggregate total sentence of 4 years YJC for the offending. In doing so, the defence has conflated the requirement of s.356(6)(b) on the one hand and the requirement of s.356(6)(c)(iii) on the other. The adequacy of the sentencing power of this Court and the existence of a substantial and compelling reason warranting summary jurisdiction are separate considerations under s.356(6).

28. By way of an Annexure to the written submissions[21] the Defence isolated two of the above factors and expanded upon them. In relation to demonstrating a 'substantial and compelling reason' reliance was placed on:

    (a) *The group conferencing outcome report dated 31 August 2018*; The Defence summarised and further highlighted PT's engagement and respect of the Group Conference process and PT's two letters of apology to two of the victims;

    (b) *PT's conduct and behaviour whilst on remand at the Parkville Youth Justice Centre in the period between 12 June and 7 September 2018;* Amongst other things, the Defence brought to the Court's attention the view of the Co-Ordinator of the African Education Program at Parkville College as at 5 September 2018 that he had "seen a drastic change" in PT's behaviour and that it was "quite evident that he has learned from his time in the precinct and started to take steps in the right direction"[22].

29. On 20 November 2018, this matter returned to Court. PT was not present, having been remanded in custody the night before, for offences including affray and criminal damage, alleged to have occurred on 10 November 2018. Those matters were to return before the Moorabbin Magistrates' Court on 28 November 2018. The

[21] Defence (4 pages) Appendix dated 2 November 2018, Exhibit 4 on the Application.
[22] Ibid p.4. See also Exhibit 3, letter dated 5 September 2018 of Mr John Kuot, South Sudanese Australian Youth.

Court was reluctant to hear any further argument in the absence of PT, however his counsel sought to raise some new matters.

30. Ms Garner, who again appeared for PT on 20 November 2018 provided two additional documents in support of the application. The first was a letter from Parkville College dated 25 October 2018[23], which speaks to PT's behaviour whilst in custody and his performance at Parkville prior to his release on 7 September 2018. The second is the *Charter of Human Rights and Responsibilities Act* 2006 (Charter). Ms Garner relied on s.23(3) of the Charter to advance an additional consideration going to establishing a 'substantial and compelling reason' why this matter should be heard summarily.

31. The specific aspect of s.23(3) relied upon by Ms Garner was that "*children should be provided with opportunities to continue education while in detention"*. The defence argument, put simply, is that if this application for summary jurisdiction was not successful before this Court, and PT was convicted of these offences in the County Court and sentenced to detention, it is not guaranteed that PT would be placed in juvenile detention as opposed to adult custody given s.32(2C) of the *Sentencing Act* 1991. If he was placed by the County Court in adult custody, then he would not, it was submitted, be "provided with opportunities to continue education while in detention". In this regard, Ms Garner specifically referred to the unavailability of Parkville college if a young person is placed in adult custody.

32. Today, 29 November 2018, PT remains in custody for the new alleged offences with which he has been charged. The next Court date in respect of those matters is 17 December 2018 at Moorabbin Magistrates' Court. Those charges remain unproven. They are relevant only in so far as they reflect on one of the factors relied on in earlier submissions by the Defence that "it is not alleged that PT has committed any further offences since his release on bail on 7 September 2018". I do not otherwise take them into account in this application.

---

[23] Exhibit 5

Prosecution Submissions

33. The prosecution also referred this Court to *Hudgson* noting that in that case the Court of Appeal found that the reasons relied upon by the defence, such as parity, delay, the effects of Post-Traumatic Stress Disorder, the effect on the offender's family of his incarceration and prospects of rehabilitation, "fell well short" of giving rise to "substantial and compelling circumstances" within the meaning of s.10A(2) of the *Sentencing Act* 1991.

34. With reference to the intention of Parliament, having regard to the Second Reading Speech of 25 May 2017, the prosecutor submitted that the words "substantial and compelling" in s.356(6)(c)(iii) imposed a heavy burden on the applicant, and one not capable of being lightly discharged. The prosecutor noted that in this Second Reading Speech the Attorney General said that the test in s.356(6)(c)(iii) is "*similar to the 'special reasons' exception available under the statutory minimum sentence provisions in the Sentencing Act*" with which the case of *Hudgson* was concerned.

35. In so far as the assistance that can be garnered from the Second Reading Speech delivered by the Attorney General in May 2017, as to the test of 'substantial and compelling reason' under s.356(6) CYFA, and in response to the prosecution submission, Ms Garner on 20 November 2018 maintained that no guidance could be garnered from it as s.356(6) CYFA deals with a different jurisdiction to that which s.10A of the *Sentencing Act* 1991 applies. Ms Garner further argued that s.356(6) refers to "substantial and compelling *reason*" as opposed to "substantial and compelling *circumstances*" to which s.10A refers. This, she submitted indicates that it is a different test. Mr Pickering for the prosecution, maintained on 20 November 2018, the guidance that could be garnered from the Second Reading Speech in accordance with his oral argument on 18 October 2018 as well as the prosecution written submissions[24].

[24] Exhibit C

36. The prosecutor sought to distinguish the case of *Ceylan* by noting that it was 'a bail case' interpreting the phrase 'compelling reason' in s.4(4) of the *Bail Act* 1977, and that Beach J himself had not overlooked the fact that 'substantial and compelling reason' as opposed to 'compelling reason' were not identical phrases.

37. The prosecution submitted that in interpreting 'substantial and compelling reason', this Court should follow the Court in *Hudgson* in defining the phrase to mean "powerful circumstances of a kind wholly outside what might be described as 'run of the mill' factors, typically present in offending of this kind", and "rare or unforeseen in cases of this type"[25].

38. In response to the brief Charter argument advanced by the defence, Mr Pickering accepted that if PT was sentenced to a term of detention in adult custody by the County Court, that Parkville College would be unavailable to him.

39. Ultimately, it was argued by the prosecution that the various factors enumerated on behalf of PT[26] are not in any way unusual or rare or unforeseen in cases of this type and that accordingly, the applicant had not shown a substantial and compelling reason why the matter should be heard summarily.

40. By written submissions dated 8 October 2018 the prosecution further stated that the victims in this matter were "particularly vulnerable and have requested that the matter be dealt with by the higher Courts. The victims in this matter include a father, a pregnant mother, an elderly grandmother and a 5 year old child"[27].

41. The Court was also urged to accept that this aggravated home invasion is a serious example of this offence. Even if it could not be proved that PT had the knife whilst in the house, the case against each of the four accused was put on a complicity basis. The prosecution contends that PT was "highly involved" in the offending, "messaging

[25] Prosecution Submissions dated 8 November 2018 [20], Exhibit C
[26] Ibid [27]
[27] Ibid

his friends about it and taking videos", and that there was a degree of planning for this offence.

42. It was further submitted on behalf of the prosecution that the charge of aggravated home invasion carries a maximum penalty of 25 years imprisonment and that the co-accused who are aged 18 and over, will receive a mandatory minimum 3 year custodial term unless they are able to show substantial and compelling circumstances pursuant to s.10A(2)(e) *Sentencing Act* 1991.

Consideration

s.356(6)(b) CYFA:

The adequacy of the sentencing options available to this Court under the CYFA

43. Whilst PT has no prior criminal history, he has a subsequent matter (for offending that pre-dated the current offences) for which he received a Probation Order without conviction on 7 September 2018.

44. The offences which led to the imposition of the Probation Order included 7 charges of robbery, a charge of attempted robbery, another for obtaining property by deception and one charge for failing to answer bail. Those offences occurred on 24 February 2018, 3 March 2018 and 20 April 2018.

45. Prior to being sentenced for those matters, PT participated in a Group Conference conducted on 15 August 2018 at Parkville Youth Justice Centre, subsequent to the aggravated home invasion, in respect of those other offences. I accept the Group Conference went very well and that, amongst other things, the Group Convenor noted in his outcome report dated 31 August 2018, that PT "has demonstrated he has deepened his understanding of the impacts on the victims and community". I have taken into account the full contents of that outcome report tendered in support of the application before this Court.

46. Pursuant to s.416(3)(b) and (c) of the CYFA, in determining sentence for those earlier offences - ultimately the Probation order without conviction - the Court was bound to have regard to the fact of PT's participation in the Group Conference, as well as have regard to any group conference report (that being the outcome report dated 31 August 2018). The Court was also bound under s.416(3)(a) to have regard to PT's behaviour during the deferral period, when he remained on remand. Accordingly, those matters were also taken into account in the imposition of the sentence which PT received without conviction on 7 September 2018. I have also considered the letter form Parkville College dated 25 October 2018 which speaks very highly of PT's behaviour on remand.

47. I have had regard to the Pre-Sentence report dated 6 July 2018, as well as the Deferral of Sentence Report dated 4 September 2018, tendered on this application, noting that they were prepared for PT's Court appearance where he was sentenced to the Probation Order. These are also matters to which the Court must have had regard, under s.416(3) in determining that earlier sentence.

48. Given PT's age, this Court has jurisdiction to impose 3 years detention on a single charge and 4 years detention on an aggregate sentence.[28]

49. The factors relied on by the defence in support of the application for summary jurisdiction, summarised in paragraph 26(c) above, are important considerations in mitigation. All those matters personal to PT, as well as the lack of prior criminal history, lead to the conclusion that the sentencing options available to this Court are adequate to respond to PT's current offending.

50. However, that is not the end of the enquiry as the preconditions in s.356(6)(a)-(c) are largely conjunctive. Put another way, s.356(6) embodies three cumulative limbs of which the Court must be satisfied, for this application to succeed. Accordingly, even if I am satisfied as to the adequacy of the sentencing options available to this Court

[28] Section 413 CYFA

to respond to PT's offending, I must in addition also be satisfied as to the existence of at least one of three factors in s.356(6)(c).

s.356(6)(c)(i):

Is it in the interests of the victim/s that the charge be heard summarily?

51. The prosecution has submitted that the victims have expressed a preference that the matter *not* be dealt with summarily.

52. On behalf of PT it has been argued that the matter may progress more quickly if dealt with summarily by this Court and that as such this would be in the interest of the victims.

53. Depending on the outcome of this application, this matter will proceed as a plea of guilty, either in this Court or the County Court. Despite the above submissions, there are no matters before the Court upon which it could be sensibly determined that it is in the interests of the victims that the charge be heard summarily.

s.356(6)(c)(iii):

Is there a substantial and compelling reason?

54. Section 356(7) of the CYFA provides:

> "In determining whether there is a substantial and compelling reason why the charge should be heard and determined summarily, the Court must have regard to the intention of the Parliament that a charge for a Category A serious youth offence should not normally be heard and determined summarily."

55. Neither party could refer this Court to any judicial interpretation of the term "substantial and compelling reason" as it specifically applies to s.356(6)(c)(iii) of the CYFA.

56. The Second Reading Speech to the *Children and Justice Legislation Amendment (Youth Justice Reform)* Bill 2017 is however, of assistance. It recites s.356(7) by confirming that "in determining whether there is a 'substantial and compelling reason', the Court must have regard to Parliament's intention that a charge for a serious youth offence as described should ordinarily be heard and determined in a higher Court". The Second Reading Speech further states that "<u>this is similar to the 'special reasons' exception available under the statutory minimum sentence provisions in the *Sentencing Act* 1991".</u>

57. I am not persuaded by the Defence submission on 20 November 2018 that the Second Reading Speech delivered by the Attorney General in May 2017 cannot by its terms guide this Court, or that reference to the word "reason" in s.356(6)(c)(iii) CYFA as opposed to "circumstances" in s.10A(2)(e) renders obsolete any guidance that can be garnered from it. The Second Reading Speech sheds light on the intention of Parliament in enacting the test in s.356(6) and specifically confirms a "*presumption that category A offences be heard in the higher courts*".

58. The Second Reading Speech is also of assistance because whilst there has been no judicial interpretation of the phrase 'substantial and compelling reason' as it specifically applies to s.356(6) of the CYFA, there has been judicial interpretation of the phrase 'substantial and compelling circumstances' referable to s.10A(2)(e) of the *Sentencing Act* 1991 which deals with 'special *reasons* relevant to imposing minimum non-parole periods'. Section 10A(2)(e) of the *Sentencing Act* 1991 as at it stood at the time of the second Reading Speech back in May 2017, stated that "….a court may make a finding that a 'special *reason*' exists if there are *substantial and compelling circumstances* that justify doing so". The case of *Hudgson* analysed these words, as they apply to the *Sentencing Act* 1991, which the Second Reading Speech made clear, is a 'similar' test to that found under s.356(6)(c)(iii).

59. In *Hudgson*, the DPP appealed a decision of the County Court on numerous grounds, one of which was that the judge at first instance had erred in finding that there were *substantial and compelling circumstances* that justified making a finding that a

special reason existed not to impose a minimum non-parole period of 4 years. One of the matters referred to by the Director in relation to this ground was the Second Reading Speech by the Attorney General when he introduced the *Crimes Amendment (Gross Violence) Bill* 2012. The Director submitted that the Attorney General had said that the Bill "recognises that there may be *rare and unforeseen circumstances* where it would be clearly outside the intention of Parliament for the offender to be sentenced to a non-parole period of four years or more".

60. The Court of Appeal in *Hudgson* determined that:

> *"It was plainly the intention of Parliament that the burden imposed upon an offender who sought to escape the operation of s.10 should be a heavy one, and not capable of being lightly discharged…the word 'compelling' connotes powerful circumstances of a kind wholly outside what might be described as 'run of the mill' factors, typically present in offending of this kind".*[29]

61. As submitted by the prosecution in this case, the matters relied upon by the defence in *Hudgson* as giving rise to 'substantial and compelling circumstances' which the judge at first instance found to meet that description, fell "well short"[30] in the view of the Court of Appeal, of doing so. The Court further noted that there was nothing 'compelling' about them in the sense required and that the matters relied upon were not 'rare' or 'unforeseen' in cases of this type. Accordingly, the Court found that no special reason had been demonstrated.

62. Section 10A and specifically, s.10A(2)(e) of the *Sentencing Act* 1991 has, since, *Hudgson* and the Second Reading Speech [of the *Children and Justice Legislation Amendment (Youth Justice Reform) Bill* 2017] in May 2017, been amended. This was apparently a consequence of the legislature determining that the section was not

[29] *Hudgson* Op.cit [111-112]
[30] Ibid [115]

being applied by the Courts as had been intended by Parliament.[31] In its amended form, s.10A(2)(e) prescribes a more stringent test in satisfaction of 'substantial and compelling circumstances'[32].

63. It is clear of course, that this Court is not here applying or directly considering s.10A of the *Sentencing Act* 1991, either as it then was, or as recently amended. However, some guidance can be garnered from the Second Reading Speech in 2017 in which it was stated that the 'substantial and compelling reason' exception in the CYFA is similar to the 'special reasons' exception under s.10A of the *Sentencing Act* 1991 (as the section then was). As the prosecution identified in written submissions,[33] s.10A(2)(e) will be relevant for PT's co-offenders aged 18 years and over, who will receive the mandatory minimum three year custodial term unless they are able to show "substantial and compelling circumstances"[34]. In accordance with the transitional provisions, the amendments to s.10A(2)(e) are prospective in their operation and only apply to the sentencing of offenders for offences committed after the commencement of the relevant provisions.

64. It is also clear that corresponding amendments have not been made to s.356(6)(c) of the CYFA. So far as it could be ascertained, it appears this is the first judicial determination or application of these provisions of the CYFA.

65. In relation to the specific Charter argument made by way of brief oral submissions by the Defence on 20 November 2018, at least three matters arise. Firstly, on the face of it, s.32(2C) of the *Sentencing Act* 1991 would arguably apply to PT, as he is a

[31] For the avoidance of doubt as to what Parliament had intended 'substantial and compelling circumstances' to mean in s.10A of the *Sentencing Act* 1991, the provision was recently amended by section 79 of the *Justice Legislation Miscellaneous Amendment Act* 2018, which commenced operation on 28 October 2018. In the Second Reading Speech on 21 June 2018, referable to this amending legislation, the Attorney-General said: *"The Bill … refines and narrows those special reasons which, if proven, mean a Court is not bound to impose a certain statutory minimum sentence… The changes are necessary to address concerns by the government and the community that these laws are not being applied as intended by the Courts, and to provide additional clarification and guidance to Courts in applying what should be limited special reasons…"*

[32] Section 10A(2)(e) of the *Sentencing Act* 1991 now specifies that "…*a court may make a finding that a special reason exists if …there are substantial and compelling circumstances that are exceptional and rare and that justify doing so.*"

[33] Exhibit B, Prosecution Submissions 8 October 2018 [11]

[34] Section 10AC *Sentencing Act* 1991

'young offender' "who at the time of being sentenced is under the age of 21 years"[35]. However if this application is refused, there is perhaps an argument to be made to the County Court as to whether it was intended by Parliament that s.32(2C) apply to children, that is, as 'young offenders' aged under 18 or in PT's case, a young offender aged 18 at the time of sentence but under 18 years at the time of the commission of the offence, for whom the CYFA continues to apply. The Court notes that the Second Reading Speech in May 2017 referable to s.356(6) makes reference to limiting *dual track sentencing* for serious young offenders aged *18-21*, not to children per se. In that regard, this matter is perhaps further complicated, albeit not necessarily so, by the fact that PT will be 18 years of age as at the time of sentencing. The Court also notes that the Statement of Compatibility issued at the Second Reading Speech of the Bill that introduced the s.356(6) amendments states: "*the bill, as introduced to the Legislative Assembly, is compatible with human rights as set out in the charter*". This Court did not have the benefit of any submissions on these matters beyond the brief oral submissions as previously summarised.

66. Secondly, and in any case, this Court cannot speculate about how the County Court might deal with PT if this application is refused. It will be a matter for the County Court whether, upon conviction of these offences, PT serves a term of detention, and if so, whether s.32(2C) applies to him, and if so, whether PT then serves that term in youth or adult detention. The argument in relation to the specific aspect of s.23(3) of the Charter relied upon in this case, can equally be made to the County Court.

67. Thirdly, if in fact s.32(2C) does properly apply to PT, (putting aside any other arguments that could then be made to the County Court) there is no evidence before this Court that should PT be detained in an adult facility after order of the County Court, that he would not be provided with "*opportunities to continue education"* while in adult detention. It is accepted that PT would not have access to Parkville College, but there is no evidence before this Court that consequent to this, PT would not be provided "with opportunities to continue education while in detention".

[35] S.3 *Sentencing Act* 1991

68. The case of *Ceylan*, which was referred to and relied upon by the defence, considered the term 'compelling' reason in the context of the *Bail Act* 1977. Beach JA in *Ceylan* referred to the case of *Hudgson* as well as the case of *Gul*[36]. In *Gul*, the meaning of the phrase 'substantial and compelling' was considered as it appears in s.16 of the *Jury Directions Act* 2015, dealing with the situation when a judge might properly give a direction on other misconduct evidence. In interpreting the phrase 'substantial and compelling reason' in the context of the *Jury Directions Act* 2015, Ashley and Priest JJA said:

> *Although one must be careful of substituting for the statutory language, reasons will not be substantial and compelling unless they are of considerable importance and strongly persuasive in the context of the issues at trial.*[37]

69. Their Honours' analysis in *Gul* provides guidance in interpreting the phrase 'substantial and compelling' in the CYFA, however there is no directly corresponding provision in the *Jury Directions Act* 2015 reinforcing what the intention of Parliament is, in interpreting "substantial and compelling reason", as there exists by virtue of s.356(7) of the CYFA. Section 356(7) of the CYFA makes it clear that in determining whether there is a substantial and compelling reason why the charge should be heard summarily, the Court must have regard to the intention of Parliament that a charge for a Category A serious youth offence *should not be heard and determined summarily.*

70. As identified by the prosecution in this case, the interpretation ascribed to 'compelling' by Beach JA as 'forceful and convincing', did not overlook what was said in *Gul* and *Hudgson*. However, as made clear by Beach JA, those decisions, unlike the legislation before him in *Ceylan*, concerned, as also before this Court, the composite expression, 'substantial *and* compelling'.

---

[36] Op cit

[37] *Ceylan* Op cit [43]

71. I accept the submission of the prosecution that the threshold of 'a substantial and compelling reason' specifically referable to s.356(6)(c)(iii) of the CYFA, was intended by Parliament to impose a high hurdle on an offender seeking to invoke the Court's jurisdiction under this limb.

72. The offending in respect of which this application is made, is grave. It was committed early in the morning, as a family, including a five year old child, a heavily pregnant woman and an elderly woman lay asleep at home. The four offenders were armed with a knife, they smashed photos off the walls, made demands for car keys, slashed a bedhead with the knife and left only when they located the keys to the family car, which they then stole.

73. I have had regard to all matters relied upon and tendered on PT's behalf in this application.

74. The factors referred to on behalf of PT as having the 'cumulative effect' of amounting to 'a substantial and compelling reason' will be important factors in mitigation on any plea. Some of the matters, such as the fact of PT's participation in a group conference for other offending and the success of the group conference as well as PT's behaviour whilst on remand, have already served him well and were matters which the Court was bound to take into account in imposing the sentence PT received on 7 September 2018. They remain relevant matters in a plea in respect of the current offending.

75. However, I am not persuaded that in combination these factors overcome the high threshold and heavy burden set by the legislature in s.356(6) of the CYFA and reinforced by s.356(7). Whilst they are relevant factors which have not been overlooked in this application and which should not be overlooked in any plea in mitigation, I am not persuaded that they amount to 'a substantial and compelling reason' within the meaning of s.356 of the CYFA.

76. Accordingly, the application by the Defence that this case be determined summarily, is refused.