

DIRECTOR OF PUBLIC PROSECUTIONS

v

SL

JUDGE: BELL J
WHERE HELD: Melbourne
DATE OF HEARING: 7 & 8 October, 24 November 2016
DATE OF RULING: 29 November 2016 (revised 5 December 2016)
CASE MAY BE CITED AS: *DPP v SL*
MEDIUM NEUTRAL CITATION: [2016] VSC 714

CRIMINAL PROCEDURE – human rights of child defendant charged with serious crimes in superior court – attempted murder and other charges brought against child aged 15 years in Supreme Court of Victoria – plea of guilty – defendant in detention on remand – identifying suitable arrangements for child’s detention when at court and procedures for conduct of directions and sentencing hearings having regard to child’s age – segregating defendant as child in detention from adult prisoners when at court – avoiding intimidation, humiliation and distress and ensuring child’s effective participation in criminal process – *Charter of Human Rights and Responsibilities Act 2006 (Vic)* ss 8(3), 17(2), 23(1),(2) and (3), 25(3), *International Covenant on Civil and Political Rights* arts 10(2)(b), 14(4) and 24(1), *Convention on the Rights of the Child* arts 37(c), 40(1) and (2).

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the prosecution	Mr P Rose QC	Office of Public Prosecutions Victoria
For the accused	Mr J Fitzgerald	Victoria Legal Aid

HIS HONOUR:

- 1 SL¹ is aged 15 years and charged with attempted murder, burglary and committing an indictable offence (that burglary) whilst on bail. These charges are being heard and determined in this court because the Children's Court of Victoria does not have jurisdiction with respect to six offences actually or potentially relating to the death of a person of which attempted murder is one.² The charges of burglary and committing an indictable offence whilst on bail are related to the charge of attempted murder and therefore the three charges are being heard together in this court. As there has been a plea of guilty to these charges, the function of the court will be to determine what sentence should be imposed upon SL, who is in detention on remand pending this sentence.
- 2 If the charges had been issued in the Children's Court, as would normally have been the case with a defendant who is a child,³ the proceeding would have been conducted under the *Children, Youth and Families Act 2005* (Vic), which (among other things) is exclusively directed towards the hearing and determination of criminal charges against, and the sentencing of, children. As the charges are to be heard and determined in, and SL is to be sentenced by, this court, the proceeding will have to be appropriately adapted to the circumstance that SL is a child defendant. While the proceeding must be conducted under the *Criminal Procedure Act 2009* (Vic) and the *Sentencing Act 1991* (Vic), which are not exclusively directed towards child-defendants, this does not prevent the court from doing so.
- 3 The *Charter of Human Rights and Responsibilities Act 2006* (Vic) recognises and protects the human rights of persons including children. As relevant to children, the general human rights that are so recognised and protected include equality before the law (s 8(3)), the right not to be treated in a cruel, inhuman or degrading way (s 10(b)), privacy (s 13(a)) and the right of all persons deprived of their liberty to be treated

¹ In view of the age of the defendant, this judgment has been anonymised and is expressed in gender-neutral language. 'SL' is a pseudonym.

² The offences that the Children's Court cannot hear and determine are murder, attempted murder, manslaughter, child-homicide, arson causing death and culpable driving causing death: s 516(1)(b) of the *Children, Youth and Families Act 2005* (Vic).

³ For present purposes, a child is a person under the age of 18 years: see the definition of 'child' in s 3(1) of the *Children, Youth and Families Act*.

with respect for the inherent dignity of the human person (s 22(1)). Of those rights, an aspect of equality before the law under s 8(3) is especially apposite here.

4 The Charter also recognises and protects human rights applying specifically to children. These are based on the fundamental principle of the best interests of the child,⁴ which is specified in s 17(2) as follows:

- (2) Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.

To that end, the Charter recognises and protects certain rights of children in relation to the criminal process. Section 23 thus provides:

23 Children in the criminal process

- (1) An accused child who is detained or a child detained without charge must be segregated from all detained adults.
- (2) An accused child must be brought to trial as quickly as possible.
- (3) A child who has been convicted of an offence must be treated in a way that is appropriate for his or her age.

It can be seen that, under s 23(1), segregation of detained children from detained adults is mandatory. Further, s 25(3) provides:

- (3) A child charged with a criminal offence has the right to a procedure that takes account of his or her age and the desirability of promoting the child's rehabilitation.

It can be seen that children have a positive right to age-appropriate and rehabilitation-focussed procedures in criminal cases. The right to age-appropriate procedures also arises as an aspect of the right to equality before the law in s 8(3) because failing to follow such procedures can lead to discriminatory exclusion (see below).

⁴ See generally *Secretary, Department of Human Services v Sanding* (2011) 36 VR 221, 227-230 [11]-[23] (Bell J).

5 The Charter binds government agencies⁵ generally and, as relevant here, courts (including this court) and tribunals in certain respects. Under s 6(2)(b), courts and tribunals are bound to apply the Charter to the extent that they have functions under pt 2, which is the part that includes the provisions that I have mentioned (ss 8(3), 17(2), 23(1), (2) and (3) and 25(3)), as well as s 7(2).

6 When hearing and determining criminal charges brought against children, this court clearly has functional responsibilities in relation to the procedures to be followed in relation to their hearings (see s 8(3) and 25(3)), their detention when at court and their trial and other treatment (see s 23(1), (2) and (3)). Under s 6(2)(b), when exercising those responsibilities the court must therefore apply the human rights specified in the Charter in relation to those matters.⁶ I am making this ruling in that light.

7 The human rights in the Charter that generally and specifically apply to children reflect the provisions of international treaties to which Australia is a party, including the *International Covenant on Civil and Political Rights*⁷ (the 'ICCPR') and the *Convention on the Rights of the Child*⁸ ('CROC'). These provisions in turn reflect the fundamental principle of the best interests of the child,⁹ which is itself-expressed in s 17(2) of the Charter (see above). It is generally recognised under these treaties, as it is implicitly recognised under the Charter, that children are especially vulnerable to physical and emotional harm and negative formative influence in criminal detention¹⁰ and to discriminatory exclusion in the operation of the processes of the criminal law, and that governments and courts must take and adopt all necessary

⁵ Termed 'public authorities': see s 6(2)(c).

⁶ Subject to contrary legislation, of which there is none relevant.

⁷ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁸ Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

⁹ Article 24(1) of the ICCPR provides:

(1) Every child shall have, without discrimination as to race, colour, sex, language, religion, national or social origin, property of birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

Article 3(1) of CROC provides:

(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

¹⁰ In relation to general protection against that vulnerability, see *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('the Beijing Rules')*, GA Res 40/33 (29 November 1985).

actions and procedures to protect them from that harm and influence and ensure their effective participation in those processes.

8 More specifically and in relation to detention, the provisions of s 23(1) of the Charter reflect art 10(2)(b) of the ICCPR, which provides:

- (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

Also relevant to the criminal detention of child defendants is art 37(c) of CROC, which requires state parties to ensure that:

- (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.

Of that requirement, the United Nations Committee on the Rights of the Child has said:

Every child deprived of liberty shall be separated from adults. A child deprived of his/her liberty shall not be placed in an adult prison or other facility for adults. There is abundant evidence that the placement of children in adult prisons or jails compromises their basic safety, well-being, and their future ability to remain free of crime and to reintegrate.¹¹

9 This court does not have cells that readily permit the segregation of child defendants in detention from adult defendants in custody. Unless I, as the trial judge, were to direct otherwise, a child defendant such as SL who has been brought to this court for a hearing might be detained before and after court, and during adjournments, in cells with adult defendants who are in custody. This would be contrary to the requirements of s 23(2) of the Charter (and Australia's international obligations). It is not in SL's best interests to be so detained and there is no demonstrable justification for doing so (see s 7(2)).

¹¹ Committee on the Rights of the Child, *General Comment 10: Children's Rights in Juvenile Justice*, 45th sess, UN Doc CRC/C/GC/10 (25 April 2007) [85].

10 In order to address these requirements and obligations, I will issue a direction (see below) for the segregation of SL from adult defendants when in detention at the court. I will do so in accordance with the court's obligations under the Charter (see s 6(2)(b)) and also taking into account the above provisions of the ICCPR and CROC as discretionary considerations.¹²

11 In relation to the procedures that should be adopted for directions and sentencing hearings, the purpose of the requirements in s 25(3) of the Charter (and its counterparts in the ICCPR¹³ and CROC¹⁴) is to ensure that children do not suffer discriminatory exclusion and can effectively participate in the legal process. In their application in the present circumstances, the requirements of s 8(3) have a similar purpose. As was also said by the Committee on the Rights of the Child:

A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms.¹⁵

It can be seen that the requirement to ensure effective participation has implications for most aspects of the conduct of directions and sentencing (and potentially other) hearings involving child defendants, including the information that is provided, the design and lay-out of the court room, whether counsel and the judge robe, whether and when counsel sit and stand, the language that is used and the length of hearing sessions, among other matters.

¹² See *Tomasevic v Travaglino* (2007) 17 VR 100, 114 [73] (Bell J); *Director of Public Prosecutions v TY (No 3)* (2007) 18 VR 241, 244-5 [48]-[51] (Bell J).

¹³ Article 14(4) provides that, in relation to children, the criminal 'procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation'.

¹⁴ Article 40(1) provides

(1) States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

Article 40(2) then sets out a number of minimum procedural guarantees in relation to criminal proceedings concerning children.

¹⁵ Committee on the Rights of the Child, *General Comment 12: The Right of the Child to be Heard*, 51st sess, UN Doc. CRC/C/GC/12 (20 July 2009) [34].

12 Where courts normally accustomed to trying adults have not appropriately adapted their procedures when trying a child, it has been held that the human right of the child to a fair trial has been breached.¹⁶ The general principle that is applied is that courts should take reasonable and necessary steps to ensure that the trial process does not expose a child defendant to avoidable intimidation, humiliation and distress and to assist him or her effectively to participate in the proceeding. Thus, in the leading case of *SC v United Kingdom*¹⁷ the European Court of Human Rights stated:¹⁸

The right of an accused to effective participation in his or her criminal trial generally includes, *inter alia*, not only the right to be present, but also to hear and follow the proceedings. In the case of a child, it is essential that he be dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings,¹⁹ including conducting the hearing in such a way as to reduce as far as possible his feelings of intimidation and inhibition.²⁰

In my view, this principle applies here.

13 The Children's Court is a specialist court whose procedures have been designed to take the needs of children into account and ensure their effective participation in hearings. In that connection, s 522(1) of the *Children, Youth and Families Act* provides:

- (1) As far as practicable the Court must in any proceeding –
 - (a) take steps to ensure that the proceeding is comprehensible to –
 - (i) the child; and
 - (ii) the child's parents; and
 - (iii) all other parties who have a direct interest in the proceeding; and

¹⁶ *V v United Kingdom* (1999) 30 EHRR 121 (European Court of Human Rights); *SC v United Kingdom* (2005) 40 EHRR 10 (European Court of Human Rights). These cases were decided under art 6(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14* (opened for signature 4 November 1950, ETS 5 (entered into force 3 September 1953)), which provides for the right to a fair trial.

¹⁷ (2005) 40 EHRR 10 (European Court of Human Rights).

¹⁸ *Ibid* 237 [28].

¹⁹ *V v United Kingdom* (1999) 30 EHRR 121, 150 [86].

²⁰ *Ibid* 151 [87].

- (b) seek to satisfy itself that the child understands the nature and implications of the proceeding and of any order made in the proceeding; and
- (c) allow –
 - (i) the child; and
 - (ii) in the case of a proceeding in the Family Division, the child's parents and all other parties who have a direct interest in the proceeding –

to participate fully in the proceeding; and
- (d) consider any wishes expressed by the child; and
- (e) respect the cultural identity and needs of –
 - (i) the child; and
 - (ii) the child's parents and other members of the child's family; and
- (f) minimise the stigma to the child and his or her family.

The design of the hearing rooms at the Children's Court also reflects the particular needs of children. The procedures specified in the provisions of s 522(1) as regards the conduct of proceedings in the Children's Court are clearly intended to give effect to the human rights principles to which I have referred. Without trying to turn this court into a children's court, I think they provide legitimate guidance as to the procedures that might be adopted by this court so as to comply with its obligations under the Charter and give effect to those principles.

14 Despite the general significance of procedures governing the sentencing of child defendants,²¹ this court does not have special statutory or other procedures or designated hearing rooms for the sentencing of (or indeed the hearing and determination of charges brought against) children in this court. Unless I, as the trial judge, were to direct otherwise, as a child defendant SL would be sentenced according to the general procedures and in a hearing room usually employed for adult defendants. In the present case, this too would be contrary to the requirements

²¹ See Arie Freiberg, Richard Fox and Michael Hogan, 'Procedural Justice in Sentencing Australian Juveniles' (1989) 15 *Monash University Law Review* 279; Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3rd ed, 2014) 925 [16.40] ff.

of ss 8(3) and 23(2) of the Charter (and Australia's international obligations) for SL's proceeding would be conducted in a hearing room and according to procedures that failed to take account of SL's age and particular circumstances. There is no reason for failing to do so.

15 In order to address these requirements and obligations and in accordance with these general principles, I will include in a procedural direction governing directions hearings and the sentencing hearing (see below) design elements for ensuring, so far as practicable in this court, the avoidance of unnecessary intimidation, humiliation and distress on the part of SL and SL's effective participation in the proceeding. In formulating the direction, I have taken into account the provisions and principles that I have discussed and also the Practice Direction applying to trials of children for serious crimes in the Crown Court in the United Kingdom.²²

16 That Practice Direction specifies this overriding principle:

Some young defendants accused of committing serious crimes may be very young and very immature when standing trial in the Crown Court. The purpose of such trial is to determine guilt (if that is in issue) and decide the appropriate sentence if the young defendant pleads guilty or is convicted. The trial process should not itself expose the young defendant to avoidable intimidation, humiliation or distress. All possible steps should be taken to assist the young defendant to understand and participate in the proceedings. The ordinary trial process should so far as necessary be adapted to meet those ends. Regard should be had to the welfare of the young defendant as required by [the child welfare legislation].²³

After dealing with the importance of pre-trial directions, it specifies these procedures for the usual conduct of the trial of child defendants:

The trial

9. The trial should, if practicable, be held in a courtroom in which all the participants are on the same or almost the same level.

10. A young defendant should normally, if he wishes, be free to sit with members of his family or others in a like relationship and in a place which permits easy, informal communication with his legal representatives and others with whom he wants or needs to communicate.

²² [2000] 1 WLR 659 (Lord Bingham of Cornhill CJ)

²³ Ibid [3].

11. The court should explain the course of proceedings to a young defendant in terms he can understand, should remind those representing a young defendant of their continuing duty to explain each step of the trial to him and should ensure, so far as practicable, that the trial is conducted in language which the young defendant can understand.

12. The trial should be conducted according to a timetable which takes full account of a young defendant's inability to concentrate for long periods. Frequent and regular breaks will often be appropriate.

13. Robes and wigs should not be worn unless the young defendant asks that they should or the court for good reason orders that they should. Any person responsible for the security of a young defendant who is in custody should not be in uniform. There should be no recognisable police presence in the courtroom save for good reason.

14. The court should be prepared to restrict attendance at the trial to a small number, perhaps limited to some of those with an immediate and direct interest in the outcome of the trial. The Court should rule on any challenged claim to attend

...

16. Where the court is called upon to exercise its discretion in relation to any procedural matter falling within the scope of this practice direction but not the subject of specific reference, such discretion should be exercised having regard to the principles in paragraph 3 above.²⁴

As Lasry J said in *CL (a minor) v Lee*,²⁵ 'these are very sensible directions and should be followed ... in any case where a child is to be dealt with on indictment'. However, for the reasons herein given, it is my view that, under the Charter (see also the ICCPR and CROC), as a child-defendant SL has a human right to procedures of this kind and the court has a legal obligation to ensure fulfilment of that right.

17 Dealing now with specific matters, the detention of SL as a child defendant on remand is to be subject to judicial oversight through reporting at regular directions hearings (not exceeding three-weekly). SL is to be referred to by SL's preferred first name (and gender) and not by any pejorative or descriptive term such as 'the prisoner'.

18 In relation to the detention of SL when in court (that is before and after court and during adjournments), SL is not to be kept with adult prisoners. SL is to be kept in

²⁴ Ibid 660-1 [9]-[16].

²⁵ (2010) 29 VR 570, 590 [86].

the ante-room to Court 7 (see below) when practicable and otherwise in the functional equivalent of that place. SL is not to be handcuffed.

- 19 In relation to the hearing room, Court 7 of this court is a civil court of a size and design that is appropriate in the circumstances (it is much smaller than our very large Victorian criminal courts, the acoustics are good, everybody except the judge is at the same level, the judge's bench is not too high, the accused can sit close to counsel etc). It is not quite as child-friendly as a hearing room in the Children's Court but is much more child-friendly than the hearing rooms of this court that are usually employed for adult defendants.
- 20 SL is to be given the opportunity to become familiar with Court 7, the custody arrangements and the hearing procedure before the sentencing hearing. This can conveniently be done at directions hearings.
- 21 Where possible, there is to be continuity of the judge and the hearing room and no change of any hearing dates unless for good reason. This will enable SL to develop some familiarity with and confidence in the judge and the court and enable the judge and the court to develop an appropriate relationship with SL.
- 22 During hearings, SL may sit near or with counsel, or with relatives or friends, as SL wishes. There is no dock in Court 7 but I would have directed that SL not be required to sit in a dock. Counsel are not to robe and I will not robe. Neither counsel nor judges wig in this court which would not have been appropriate in any event. Counsel are to speak from their seated positions. There will be regular breaks during hearings so that SL can maintain concentration and effective participation.
- 23 I expect counsel for SL to ensure that SL understands beforehand what procedure is to be adopted at hearings and that hearings are conducted so far as possible in a language that takes account of SL's age. I will also myself so ensure.

24 These arrangements shall be maintained unless different arrangements are required in SL's best interests or for other demonstrably justified reason, after consultation with me or (if I am not available) another judge.

25 Accordingly, I will direct that the custody of SL at this court is to be maintained and that directions and sentencing hearings are to be conducted according to the following procedures unless I or (if I am not available) another judge directs otherwise:

- (a) the detention on remand of SL is to be subject to regular judicial oversight;
- (b) at court, SL is neither to be handcuffed nor detained with adult prisoners;
- (c) directions and sentencing hearings are to be conducted in Court 7;
- (d) SL is to be given the opportunity to become familiar with the court precinct, Court 7 and the hearing procedures;
- (e) during hearings, counsel and I will not robe (neither counsel nor judges wig in this court) and will remain seated when speaking;
- (f) counsel for SL is to ensure that SL understands the procedure to be adopted at hearings and I as the judge will also so ensure;
- (g) SL may sit with counsel at hearings or with family or friends as SL wishes;
- (h) counsel for the prosecution and SL are to speak in a language that so far as possible can be understood by SL and I will also do so; and
- (i) the procedure at hearings is otherwise to be conducted in accordance with the principles explained in this ruling and, generally, all possible steps are to be taken to enable SL to understand and effectively participate in the proceeding.

These directions do not apply where something else is required in SL's best interests or on account of other demonstrable justification.

26 I will deal separately with attendance at hearings by non-participants in the proceeding because this is affected by a number of personal issues, including critical health issues, in relation to SL.