

IN THE CHILDREN'S COURT OF VICTORIA
AT MELBOURNE

CRIMINAL DIVISION

OPP Applicant
v
BW Respondent

JUDGE: Grant
WHERE HELD: Melbourne
DATE OF HEARING: 6 May 2010
DATE OF JUDGMENT: 13 May 2010
CASE MAY BE CITED AS: OPP v BW
MEDIUM NEUTRAL CITATION: [2010] VChC 2

REASONS FOR DECISION

Catchwords: Accused charged with rape, false imprisonment and other offences – three adult co-accused – application by OPP pursuant to s.356(3)(b) of *Children, Youth and Families Act 2005* to conduct a committal proceeding – consideration of whether there are exceptional circumstances that warrant the Court refusing to hear the matter summarily – ruling that the matters relied upon by the prosecution do not constitute exceptional circumstances – matter fixed for summary hearing.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Applicant	Mr K Gilligan of Counsel	OPP
For the Respondent	Ms J Sutherland of Counsel	David Tonkin & Associates

HIS HONOUR:

Background

1. BW is now 18 years old. He was born on 30 December 1991. He has been charged with a large number of offences allegedly committed at Cowes on 10 October 2009. He was aged 17 at the time of the alleged offending. The offences include charges of rape, false imprisonment, indecent assault, recklessly cause injury and unlawful assault.

2. There are three alleged co-offenders –

- TC (Date of Birth 16/5/1991),
- RM (21/1/1991) and
- JR (7/9/1989).

3. The allegations against the accused have been summarised by the prosecution as follows – All the accused in this case belonged to the Under 19 (location removed) Football Club. On a weekend in October 2009, a house was rented for an end of season football trip. On 9 October 2010 all the accused went to a hotel where they met the complainant (DoB 28/7/1991) and her friend. The young women were invited to a party at the house where the accused men were staying. It is alleged that the young women returned to the house and later that night the complainant was dragged into an upstairs bedroom and a cupboard was placed against the door. The complainant tried to leave the room by climbing out onto the balcony but other males coming into the room from the balcony blocked her. The complainant was pushed onto the bed, held down and raped digitally and orally by the four accused men. She was forced to masturbate them. The complainant told the men she was bleeding and it was only when one of the onlookers switched on the light and they saw the blood that the incident stopped.

4. One of the co-accused, JR, has made a no comment record of interview. The other three accused dispute the complainant's account and maintain that all physical contact with the complainant was consensual. In a record of interview conducted with the police, BW made admissions to digital and oral penetration but maintained the acts were consensual and the complainant was not held down.

The Application before the Court

5. Section 356(3) of the *Children Youth and Families Act 2005* states –

If a child is charged before the Court with an indictable offence, other than murder, attempted murder, manslaughter, child homicide, defensive 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 hear and determine the charge summarily unless –

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

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

and the Court must conduct a committal proceeding into the charge and, in the circumstances mentioned in paragraph (b), must give reasons for declining to determine the charge summarily.

Prosecution submissions

6. Mr Gilligan, representing the OPP, makes application under section 356(3)(b) for the Court to conduct a committal proceeding into the charges against BW. He submits there are exceptional circumstances that warrant the Court's refusal to hear the charges summarily. Ms Sutherland, counsel for BW, opposes the application.

7. The prosecution submission relies particularly on what is described as a "gang rape situation where it is alleged that four accused perform acts of penetration at or around the same time". The prosecution highlight the following matters as being significant –

- other men are present in the room watching what is occurring,
- the complainant was unable to leave the room as the doorway was blocked and the window blocked, and
- the offending only ceased when the accused became aware the complainant was bleeding.

The prosecution maintain that all the accused seemed to play similar roles. In addition, the proper administration of justice is served by dealing with BW in the same venue and at the same time as the other three accused. This will avoid the possibility of inconsistent verdicts, will be convenient to all the witnesses and, if the charges are proved, allow parity

of sentence. In addition, BW was close to his 18th birthday at the time the offences were committed. Given the closeness in age of all the accused, (two of the co-offenders were 18 at the time of the alleged offending and the other was 20), it would be appropriate for all the accused to be dealt with together.

Defence submissions

8. The defence opposes the application. The defence maintains that the circumstances of this case are not exceptional. The authorities make it clear that the Children's Court should only surrender its jurisdiction with "great reluctance". Ordinarily, considerations of joint trials with adult offenders would not justify the removal of a matter from the Children's Court. The Children's Court deals with a number of rape cases every year and some of those cases involve adult co-offenders. This is not a complex case. There are no DNA issues and no evidence of pre-planning. The complainant has not identified BW. However, he has admitted in his interview that he was present and maintains he engaged in consensual acts. The prosecution argument that BW was close to his 18th birthday is not persuasive. One of the co-offenders is nearly twelve months older and another is more than two years older. The Court must also look at factors personal to the accused. BW is a young man with no prior convictions. He has a strong and supportive family and is in the third year of a plumbing apprenticeship. If he were dealt with summarily and found guilty, the Court would be able to impose an appropriate penalty. The Court should hear and determine the matter summarily.

Ruling

9. I agree with the submissions made by counsel for the accused.

10. I heard very clear and helpful argument from both counsel. I was referred to a number of authorities. The three main authorities are –

- D (a Child) v White (1988) VR 87 (a decision of Nathan J)
- A Child v A Magistrate of the Children's Court & Ors (unreported) per Cummins J, 24/2/1992.
- DL. (A Minor by his Litigation Guardian) and a Magistrate of the Children's Court Duncan Reynolds and a Magistrate of the Children's Court Susan Adele Blashki and Detective Constable John Cordell Barbour (unreported) per Vincent J, 9/8/1994

11. The authorities establish the importance of the following propositions in determining whether there are exceptional circumstances that justify a refusal to exercise summary jurisdiction –

- The Children’s Court should only relinquish its jurisdiction reluctantly.
- Considerations to do with the nature, significance and gravity of the alleged offence(s) will be critical in determining the issue but not necessarily conclusive. Circumstances personal to the offender must also be considered.
- Matters concerning the proper administration of justice are important. However, “ordinarily questions of consideration of joint trials with adults should not be a consideration justifying the removal of a matter from the Children’s Court to an adult court and ordinarily would not constitute an exceptional circumstance” (per Cummins J).

12. The decision of Vincent J in the case of *DL* (referred to in paragraph 10) is particularly relevant to this case. In that case, a magistrate had refused to hear and determine summarily multiple charges of rape of a young woman. Some of the charges related to the accused’s own actions and others related to his involvement in the actions of four young adults who participated in the episode. Vincent J allowed the appeal and returned the case for summary hearing in the Children’s Court. His Honour stated that he agreed, in broad terms, with the approach adopted by Nathan J and Cummins J and continued –

“Attention must be given to all of the circumstances which could reasonably be perceived as possessing relevance to the consideration of the question whether the Children’s Court is an unsuitable forum for the conduct of the proceeding. In the present case the gravity of the conduct and the role ascribed to the applicant in it, appear to be the central, if not the only, factors to which regard was had as these were the only considerations mentioned. They are clearly important features but it is obvious that, as has been indicated, there are other matters to which attention should have been given. No reference was made, for example, of the consideration of any personal factors relevant to the young accused.

In the circumstances where there is no indication that all the relevant factors were taken into account in the exercise of discretion, and where, on their face, the circumstances do not possess, in my opinion, any exceptional features, it is appropriate for this Court to intervene. “

His Honour also stated –

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

12. BW is charged with very serious offences including rape. The fact that it is alleged that there are three other co-offenders makes the offending particularly serious. However, as recognised by Vincent J, the Children’s Court does deal summarily with cases of rape where there are adult co-offenders. The fact that it is alleged that the offences were committed with adult co-offenders is not sufficient to maintain a finding of exceptional circumstances.

13. As far as the circumstances of this alleged offending is concerned, it is not alleged that BW played a more prominent role than his co-offenders, there is no evidence of pre-planning and there is nothing complex about the case. There are allegations of false imprisonment and recklessly cause injury but such allegations are a common feature of cases of this type. BW maintains a defence based on consent. He has no prior convictions. I am satisfied that the Children’s Court would have appropriate sentencing powers to deal with him if he were found guilty after trial.

14. The prosecution referred me to a recent decision of Magistrate Blashki in a case of A (unreported, Children’s Court of Victoria, 28/8/2008). In that case, A was charged with a number of counts of digital, anal and penile rape and attempted rape whilst in the company of four young adult co-offenders. It was alleged that A was instrumental in luring the victim to an isolated park where the offences allegedly occurred. He was 16 at the time and his co-offenders were aged 18,19 and 20. The magistrate determined there were no exceptional circumstances requiring the proceedings to be removed from the Children’s Court. Although that decision is not binding upon me, the prosecutor referred to it and sought to distinguish it on the basis that A was only 16 at the time of the alleged offending. That fact, it was submitted, differentiated that case from the current case. There is no doubt

that the age of BW is a relevant factor. I note that he is reasonably close in age to one of the co-offenders. On the other hand, another co-offender is close to twelve months older and the third is more than two years older. I am not persuaded that BW's age, when weighed with the other matters to do with the circumstances of the offending and BW's personal circumstances, require this Court to refuse a summary hearing. Finally, I say for completeness, that BW's claim for a summary hearing would be regarded as stronger than A's. A was found guilty of an offence of robbery in May 2008, was alleged to have played a prominent role in the offending and the victim in his case was under 18. Indeed, the grounds relied on by the prosecution in that case for establishing "exceptional circumstances" included the undesirability of a child witness giving evidence more than once. I note that the decision of Magistrate Blashki was not challenged on appeal.

14. The prosecution submitted that it was an important fact that there could be as many as 59 witnesses in this case. This argument is not a compelling one. Unlike the complainant in A's case, the complainant in this case is over 18 years old. Because there is no power to conduct "joint committals" for child and adult offenders for offences of rape, there will have to be a hearing in the Children's Court. The question for determination is whether it should be a committal hearing or a summary hearing.

15. I am satisfied, for the reasons detailed, that none of the matters relied upon by the prosecution – either alone or in combination – constitute exceptional circumstances requiring me to remove these proceedings from the jurisdiction of the Children's Court. I dismiss the application and order the matter be fixed for summary hearing.

16. I note this decision has been made "on the papers" (the brief of evidence provided to the Court and headed Operation – ZAFFRE) and without the benefit of hearing any evidence. Obviously, as section 356(3)(b) contemplates, the judicial officer who hears this matter may make a fresh assessment on the question of summary jurisdiction at any stage of the proceedings.

Judge Paul Grant
President
Children's Court of Victoria

13 May 2010