IN THE CHILDREN'S COURT OF VICTORIA

AT MELBOURNE

CRIMINAL DIVISION

Revised
Not Restricted
Suitable for Publication

Court Reference: K10730115

Commonwealth Director of Public Prosecutions — Applicant

-v-

LS[1] — Respondent

In the matter of an application by the prosecution under s.356(3) of the *Children, Youth and Families Act 2005*

JUDGE:	HER HONOUR JUDGE CHAMBERS
HELD	MELBOURNE
DATE OF HEARING:	23 OCTOBER 2019
DATE OF JUDGEMENT:	15 NOVEMBER 2019
CASE MAY BE CITED AS:	CDPP v LS [2019] VChC 7

REASONS FOR DECISION

Catchwords: Accused charged with sexual penetration of a child under the age of 12 (3 charges), sexual assault of a child under the age of 16 (4 charges), sexual activity in the presence of a child under the age of 16 (2 charges), produce child pornography (5 charges) and transmit child pornography using a carriage service (5 charges) – application by the prosecution pursuant to s.356(3) of the *Children, Youth and Families Act 2005* (Vic) for the charges to be uplifted to an adult jurisdiction – consideration of whether there are exceptional circumstances that make the charges unsuitable to be heard and determined summarily in the Children's Court – application refused.

APPEARANCES:	Counsel	Solicitors
For the Applicant:	Mr K Armstrong	Ms Naomi Schmitz, CDPP
For the Respondent:	Mr A Waters	Claudia Grimberg Lawyers

[1] To ensure there is no possibility of the identification of the child accused or the victims of sexual offending, this judgement has been anonymised by the adoption of a pseudonym in the place of the name of the respondent.

Introduction

1. LS was born in 2001 and is now 18 years old. At the age of 17, LS gave birth to a daughter, who remained in her care.

2. LS is charged with the following offences, allegedly committed when she was 17 years old,[2] between 19 November 2018 to 2 December 2018:

   (a) producing child pornography contrary to s.474.20(1)(a)(ii) of the *Criminal Code Act 1995* (Cth) ("the *Criminal Code*") (5 charges);

   (b) transmitting child pornography using a carriage service contrary to s.474.19(1)(a)(ii) of the *Criminal Code* (5 charges);

   (c) sexual penetration of a child under the age of 12 contrary to s.49A of the *Crimes Act 1958* (Vic) ("the *Crimes Act*") (3 charges);

   (d) sexual assault of a child under the age of 16 contrary to s.49D(1) of the *Crimes Act* (4 charges)*;* and

   (e) sexual activity in the presence of a child under the age of 16 contrary to s.49F of the *Crimes Act* (2 charges).

3. LS's daughter, then aged between four to five months of age, is the victim of the alleged offending.

4. The Commonwealth Director of Public Prosecutions (CDPP) applies pursuant to s.356(3)(b) of the *Children, Youth and Families Act 2005* (Vic) ("the CYFA") for each of the charges to be subject to a committal proceeding in the Children's Court on the basis that they are not suitable by reason of exceptional circumstances to be heard and determined summarily. The application made by the CDPP is opposed by LS.

The Legislation

5. The relevant provisions of the CYFA for the purposes of this application are ss.356(3)(b) and 356A, which provide:

[2] Accordingly, LS falls within the definition of a "child" under s.3 of the *Children, Youth and Families Act 2005* (Vic).

*"**356 Procedure for indictable offences that may be heard and determined summarily***

*(3) If a child is charged before the Court with an indictable offence, other than murder, attempted murder, manslaughter, child homicide, an offence against s197A 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;

(ab) subsection (6) applies;

(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."

*"**356A Exceptional circumstances***

(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.

6. The other relevant legislative provision is s.20C of the *Crimes Act 1914* (Cth) ("CCA") as LS is charged with both State and Federal offences. Section 20C of the CCA provides:

> ***"20C Offences by children and young persons***
>
> *A child or young person who, in a State or Territory, is charged with or convicted of an offence against a law of the Commonwealth may be tried, punished or otherwise dealt with as if the offence were an offence against a law of the State or Territory."*

7. The CDPP filed supplementary submissions with the Court on 3 November 2019 in which it submitted that s.20C enables the Children's Court to exercise sentencing powers under both the CYFA and the CCA. This submission is dealt with later in my reasons.

Circumstances of the offending

8. For the purposes of this application, the allegations against LS can be summarised. The "essential conduct giving rise to the charges" is not in dispute.[3] The only area of dispute is whether the penetration offences under s.49A of the *Crimes Act* are capable of being proved.

9. The summary that follows is taken from the Statement of Facts prepared by the Australian Federal Police (AFP).

10. In March 2019, the National Crime Agency contacted the AFP about a UK offender, [name removed] who, when interviewed by authorities, stated he had been engaged online with females aged between 17-19 years, some younger, and had "coerced them into filming themselves engaged in progressively degrading sexual acts, with the inference that if they refused, he would send the videos to their family and friends."[4]

11. Examination of the UK offender's electronic devices led to the identification of LS, and the forensic examination of her mobile phone by the AFP. The UK offender and LS had chatted online and LS had sent him 62 images and videos of herself engaged in 'various sexual acts'[5] in exchange for money. During one online exchange on 19 November 2018, the UK offender said he would pay LS £2800 for "10 videos and a bunch of pics I'll ask you for".

[3] Defence Outline of Submissions dated 11 October 2019, paragraph 4.
[4] AFP Statement of Facts, paragraph 3.
[5] Ibid, paragraph 6.

12. During these exchanges, the UK offender became aware that LS was the mother of a baby and asked that she send him videos of her carrying out sexual acts with her child.[6] WhatsApp messages between the UK offender and LS between 19-20 November 2018, summarised below, capture this exchange:[7]

LS: *Idk if I can do tomorrow morning I have a daughter*
UK: *Her age?*
LS: *6 months*
UK: *In your room*
LS: *Yes correct*
UK: *A selfy with her please*
….
LS: *Good morning x*
UK: *Tell me when you're able to poop*
LS: *Can I do something else instead?*
UK: *Its either that or you be a naughty mummy for me?*
LS: *Like what?*
UK: *Naughty mummy x*
UK: *Being naked around her and stuff*
LS: *Doing?*
UK: *Playful stuff etc. Or my poop x*
LS: *Look I can't do these I'm sorry*
UK: *Please*
LS: *And I'll never bring my daughter into this stuff*
UK: *So it's poop then x*
LS: *She's innocent. As I can't do that either*
UK: *Pick one. So I can pay you.*
LS: *I can't*
UK: *Please think about it*
LS: *Can't you pay me less*
UK: *No*
LS: *OK*

[6] Ibid, paragraph 6.
[7] Ibid, paragraph 28.

13. LS ultimately complied with the request made by the UK offender. The charges that are the subject of this application relate to the images recorded by her engaged in sexual conduct either with or in the presence of her infant daughter, which she then sent to the UK offender online:

(a) [date removed] – the video runs for 42 seconds and depicts LS topless and with her breasts exposed, standing over her daughter who is awake and lying on her back on a bed, naked except for a bib. The video commences with LS's head between her daughter's open legs. LS's arm is against the infant's left leg, keeping it in place. LS lowers her head between the baby's legs and is depicted licking the infant's vagina and anus. As LS performs this act, she looks in the direction of the recording device. The infant can be heard crying however LS continues to lick the baby's vagina.[8]

(b) [date removed] – a video recording that runs for 2 minutes and 1 second depicting LS recording herself engaged in sexual acts described variously as "caressing", "fondling" and "rubbing" her breasts, vaginal and anal areas. LS is wearing a singlet style dress which she pulls up to under her chest area exposing a G-string. At one point she places her hands on each of her buttocks and spreads them apart. The recording depicts a bedroom, in which there is a white baby cot. Although her daughter cannot be seen, it is alleged LS is present in the room as the baby is heard to make noises.[9]

(c) Date not specified – video lasting 7 seconds depicting LS recording herself, naked, seated near a cot holding her daughter who is awake, naked and in the crook of her arm. The video commences with LS saying, "I'm a dirty mummy pedo for you daddy". She then places her left hand onto her daughter's vagina.[10]

(d) Date not specified – video lasting 17 seconds depicting LS recording herself digitally penetrating and masturbating her own vagina while her daughter is held in the crook of her left arm. The baby is awake, naked and her vagina can be seen.[11]

(e) Date not specified – video lasting 38 seconds depicting LS recording herself naked leaning over her daughter who is awake, naked from the waist down and lying on her

[8] Ibid, paragraphs 14-16.
[9] Ibid, paragraphs 17-25.
[10] Ibid, paragraphs 32-33.
[11] Ibid, paragraphs 34-35.

back on a bed. LS is depicted licking the infant's vagina for an extended period glancing up at the recording device whilst doing so.[12]

(f) Date not specified – video lasting 55 seconds depicting LS naked with her breast exposed leaning over her daughter who is awake, naked and lying on her back on bed. LS repeatedly licks the infant's vagina and is seen to spit saliva onto it. She continues to lick the baby's vagina. At one point, she raises her head to look in the direction of the recording device and smile. The baby can be heard making a noise while LS licks her vagina.[13]

14. A total of 29 Child Exploitation Material (CEM) files were identified upon examination of two seized items, of which 23 were images and 6 were videos. The files were categorised using the Australian National Victim Image Library (ANVIL) with 10 of the images and 5 of the videos classified at category 3, 1 image classified at category 2 and one video classified at category 4. The remaining videos and images were classified at category 7 (non-illegal).

15. The charges allege that the offending occurred during the period 19 November 2018 to 2 December 2018. During that period, WhatsApp exchanges between the UK offender and LS provide additional context to the offending and the involvement of the UK offender in the offending of LS:

> *UK offender: Are you going to be a naughty mummy for me? Properly x. Doing as I ask, so I can pay you today*
> *LS: Ok*
> *UK offender: Tell me when you are with her and you're both naked. And I'll tell you some quick things to do now.*
> *LS: Ok I am*
> *UK offender: Take a quick pic with your tits and face showing first stick you tongue out please next to her. Then a pic of her naked x and you naked faces down. Show her pussy to d.*
> *LS: No I can't*
> *UK offender: You can, no-one else will see. X. All my girls do this for me.*
> ...

[12] Ibid, paragraphs 36-38.
[13] Ibid, paragraph 38.

UK offender: And again, have your hand on her pussy x. Then again show your pussy x. A few more pics naked with her with your faces down. Will you be comfortable filming her.

LS: Filming what? Please don't ever show anyone this stuff. And don't send these as examples to other girls. OK what do you want me to film.

16. At the end of the WhatsApp chat on 20 November 2018 the following exchange occurs:

UK offender: I need your name

LS: Why? Tell my why. I need to know. My name is (insert name) Hello

LS: So when we finish this off. Are you really gunna pay me

...

UK: Make a 5 minute sex video with her filmed portrait. Do anything and everything. Both of you naked. Do your best.

LS: idk what you mean. Like what.

UK offender: Be a pedo mummy

LS: Like play with myself and everything with her in it

UK offender: Playing with her too both you naked.

LS: No Noooo!

UK offender: Wait what. What do you mean it's not nice. You ate her ass

LS: To touch her

UK offender: ? You already did

LS: Yeah but that's not putting things on her

UK offender: I'm just asking for a long ass video

LS: Good night. I'm just going to hand myself in. So she can go live a better life with someone else.

UK offender: You'll be fine.

17. At the time of the alleged offending, LS was 17 years of age. She had no prior convictions.

Exceptional Circumstances under s. 356(3) of the CYFA

18. Section 356A was inserted into the CYFA, with effect from 26 February 2018, pursuant to s.5 of the *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017.*[14]

[14] Division 2 of Part 2 of the amending Act.

19. Prior to the enactment of s.356A, the meaning of "exceptional circumstances" had been considered in the context of s.356(3) of the CYFA (and its antecedent provisions) in decisions of the Supreme Court and the Court of Appeal, most notably in *D (a child) v White*,[15] *A Child v A Magistrate of the Children's Court*[16] and *DL (a minor by his litigation guardian) v A Magistrate of the Children's Court*.[17]

20. In the decision of *K v Children's Court of Victoria and Anor*,[18] Justice T Forrest extracted the relevant principles from the authorities, summarising them as follows at paragraph [26]:

    (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 particular features peculiar 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.

21. Consistent with the authorities, Justice T Forrest stated at paragraph [27] that a consideration of "exceptional circumstances" must be determined on the facts of each case.

22. In enacting s.356A, it is clear that Parliament intended the Children's Court to have regard to the adequacy or otherwise of the sentencing options available to it by reference to the factors set out in s.356A(2) of the CYFA in determining whether exceptional circumstances exist. In

[15] [1988] VR 87.
[16] Unreported, Supreme Court of Victoria, Cummins J, 24 February 1992.
[17] Unreported, Supreme Court of Victoria, Vincent J, 9 August 1994.
[18] [2015] VSC 645.

many respects, these considerations reflect many, but not all, of the relevant principles extracted by Justice T Forrest in *K v Children's Court of Victoria and Anor*. In doing so, Parliament has directed the Court to the considerations that are relevant to a determination of whether the sentencing options available to the Children's Court are adequate to respond to the offending.

23. However, as I have previously determined,[19] I do not consider that s.356A is intended to confine exceptional circumstances in s.356(3) to cases where the Children's Court considers the sentencing options inadequate to respond to the offending. Rather, it is a non-exhaustive list of the criteria to be considered in determining that one circumstance – namely, inadequacy of sentencing options under the CYFA – which may constitute exceptional circumstances under s.356(3) of the CYFA. The other criteria outlined by the Supreme Court in *K v Children's Court and Anor* remain relevant, including the principle that the Children's Court should only "relinquish its embracive jurisdiction" with "great reluctance" in exceptional, or very unusual circumstances and that, in its considerations, the overall administration of justice is the most important criterion. Equally however, an absence of adequate sentencing options may, of itself, constitute exceptional circumstances.[20]

24. This construction of s.356A, and its interrelationship with s.356(3) of the CYFA, was not contested by either party to this application.

Submission of the Applicant

25. The prosecution, in its written submissions dated 15 August 2019, and expanded upon in oral argument on 23 October 2019, relies upon a combination of factors to submit that the charges are unsuitable to be heard and determined summarily in the Children's Court. The prosecution submits that these factors, together, render the case exceptional:

    (a) The serious nature of the offences as reflected in the maximum penalty of 25 years' imprisonment[21] for the charge of sexual penetration contrary to s.49A of the *Crimes Act* and of 15 years' imprisonment for each of the offences of producing and transmitting child pornography contrary to the *Criminal Code.* The submissions refer to the objective

[19] *DPP v JT* (Unpublished, Children's Court of Victoria, 5 July 2018).
[20] *K v Children's Court & Anor* [2015] VSC 645 at [32].
[21] Pursuant to s.49A(4) of the *Crimes Act 1958,* for a person sentenced under the *Sentencing Act 1991*, the offence is a Category 1 offence requiring the imposition of a custodial order for the offence with a standard sentence of 10 years under s.49A(3).

gravity of the offence of producing and transmitting child pornography as reflected in the sentencing principles for those offences outlined in *DPP v Garside*[22];

(b) The unusual features of this offending, combined with aggravating features that contribute to the serious nature of the offences, in particular:

- the age and vulnerability of the victim, being only four months' old;
- the fundamental breach of trust by LS as the mother of the child, leading to a high degree of moral culpability;
- the role of LS as both the person performing the sexual acts and filming them for distribution, and the exploitative nature of the offences;
- the evidence that the offences were committed for financial gain;
- the transmission of the images/videos, despite being told the UK offender would be likely to share these with others[23]; and
- the repeated nature of the offending and the fact the alleged penetrative offences were accompanied by other sexual acts with or in the presence of her daughter;

(c) That these matters combine to place this offending at the top end[24] or at least the higher end[25] of the range of offences of this nature;

(d) That LS, at 17 years of age at the time of the alleged offending, is at the upper age range relative to the characterisation of a "child" under the CYFA;

(e) That the overall administration of justice – justice as it affects the community as well as the individual – requires the full range of sentencing options to be available to reflect the objective gravity of the offending, and to enable the "paramount sentencing consideration of general deterrence"[26] to be given prominence in any sentence to be imposed;

(f) That because the sentencing powers of the Children's Court are limited under the CYFA to a maximum sentence of three years' detention on any one offence and an aggregate

[22] [2016] VSCA 74.
[23] Informant's submissions dated 15 August 2019 and the reference at footnote 12 to the WhatsApp chatlog, 20 November 2018 where prior to transmitting Video 1, the UK offender states: *"Do you mind being shared…with my pedo mates"* to which LS replies, *"nope"*.
[24] Informant's submissions dated 15 August 2019 at paragraph [15].
[25] Submission of Mr Armstrong on 23 October 2019.
[26] Ibid, paragraph [18].

of four years' for more than one offence,[27] the Court lacks adequate sentencing options to respond to LS's offending.

Submissions of the Respondent

26. The defence submissions on behalf of LS emphasise, as a starting point, that the Children's Court should only surrender its jurisdiction "with great reluctance". Moreover, that the threshold test of 'exceptional circumstances' is a high one.

27. The submissions contest the prosecution's characterisation of this offending being at the top or upper end of the range of offences of this nature. Whilst the objective seriousness of the offending is not disputed, on behalf of LS it is argued that - in this case - the evidence of grooming by the UK offender and his role in directing her offending behaviour is a powerful mitigating factor. It is submitted that the role played by the UK offender reduces LS's overall moral culpability for the offending, particularly having regard to her youth and specific vulnerability.

28. It is submitted that whilst child pornography offences are, as a category, treated as very serious and would usually attract substantial penalties, cases such as *Garside* are of less relevance in the sentencing of a child accused or a young offender, particularly having regard to the fact general deterrence has no role to play in the sentencing of a child under the CYFA: *CNK v R.*[28] The submissions place reliance on the decision of the Court of Appeal in *Webster (a pseudonym) v the Queen*[29] and the observations of Maxwell P and Redlich JA about the distinct sentencing considerations that apply when sentencing children, including for serious offences, stating at [7]:

"What is so distinctive, and so important, about juvenile justice is that it requires a radically different balancing of the purposes of punishment. The punitive or retributive considerations which are appropriately applied to adults must be largely set to one side".

29. Defence submit that guidance on the adequacy of the sentencing options available to the Court in this case can be found in the decision of *DPP (Cth) v Dylan Hutchison (a pseudonym).*[30] In *Hutchison,* the Court of Appeal dismissed an appeal against a community correction order imposed in the County Court on an adult sentenced for the sexual abuse of his half-sisters,

[27] Section 413 of the CYFA.
[28] (2011) 32 VR 641.
[29] [2016] VSCA 66.
[30] [2018] VSCA 153.

who at the time of the offending were aged 3 and 16 months but where the offences had been committed when the offender was himself aged 16 years of age. One of the mitigating factors referred to by the Court of Appeal, constituted by Priest, Beach and Ashley JJA, was the age of the respondent at the time, stating at paragraphs [55]-[56]:

"As the appellants properly conceded, there were powerful mitigating circumstances that the judge was required to give appropriate and proper weight to in arriving at a sentence… First, there was the fact that the respondent was only a little over 16 years of age at the time he committed the offences in relation to his half-sisters. Rehabilitation was a powerful mitigating factor in relation to such a young offender, notwithstanding the objective seriousness of his offending."

30. The submissions also rely upon LS's youth, the absence of any prior criminal history and her prospects of rehabilitation as evidenced by her compliance with bail supervised by Youth Justice since 22 March 2019, including engagement with psychologist Ms Rachel Chan. Further reliance is placed on LS's personal circumstances, submitting that her *"early and formative years [were] marked by chaos, instability, significant neglect and emotional abuse"*[31] and on the opinion of Professor Buist, a psychiatrist who assessed LS for related child protection proceedings and found that as a result of her traumatic upbringing, she is *"best understood as having complex PTSD"* and of fitting the *"DSM-V borderline personality disorder criteria"*.[32]

31. Balancing these considerations, it is submitted that with up to four years' detention available under s.413 of the CYFA, the Children's Court has *"more than adequate"* sentencing options available to it to respond to LS's offending. Indeed, it is submitted that a non-custodial disposition is open to the Court in this case. Further, that the overall administration of justice is best served with dealing with LS in the jurisdiction specifically designed to deal with children.

Section 20C of the CCA

32. At the hearing of the application on 23 October 2019, the parties were given an opportunity to file supplementary submissions on the application of s.20C of the CCA to the determination of this application.

[31] Defence submissions dated 11 October 2019 at paragraph [24].
[32] Professor Buist's report dated 22 May 2019, paragraph headed "Personality".

33. In the supplementary submissions dated 3 November 2019, the CDPP argues that s.20C of the CCA enables the Children's Court to impose a sentence under the CYFA but does not exclude or override the application of other provisions of Part IB of the CCA which apply to the sentencing of federal offenders generally. Specifically, the CDPP submits that the sentencing consideration of general deterrence under s.16A(2)(ja) of the CCA applies to the sentencing of a child whether in the Children's Court or in an adult court. In summary, this submission is made by reliance on the concept of "surrogate federal law" as discussed in the cases of *Solomons v District Court (NSW)*,[33] *Putland v R* (2004),[34] *R v Pham*[35] and *Mok v DPP (NSW)*.[36] The CDPP concedes that s.20C has not been considered in this specific context but contends that "it falls within the same class of provisions discussed by Gordon J in *Mok* and should be interpreted in accordance with the approach described by Gleeson CJ in *Putland* and applied by the High Court in *Pham.*" Of course, if this submission is correct, the sentencing options available to the Children's Court for the federal offences extend beyond those available under the CYFA.

34. In response, the defence contend that s.20C of the CCA has the effect that when applied, relevant State laws become applicable and that in the context of this case, the CYFA is the applicable State legislation. Further, that when determining the appropriate sentence pursuant to the CYFA, the Court must apply as far as practicable the sentencing considerations under s.362(1) of the CYFA, and in accordance with the reasoning in *CNK v R*,[37] this excludes consideration of general deterrence. Moreover, whilst s.20C would allow the Court, should it choose, to sentence pursuant to the CCA, it is argued that it is more appropriate that this Court "exercise its discretion pursuant to s.20C to hear these charges *as if those charges were offences against a law of this State".*[38]

Consideration

35. Undoubtedly, the offences with which LS is charged are serious. The maximum penalties set by Parliament reflect the objective seriousness of the offences, notably the maximum penalty of 25 years' imprisonment for the s.49A *Crimes Act* penetration charges. There is also force in the submission of the CDPP that the circumstances of this offending, involving the production and distribution of child exploitation material by the mother of the infant victim,

[33] (2002) 211 CLR 119 at [20].
[34] 218 CLR 174 at [7].
[35] (2015) 256 CLR 550 at [22].
[36] [2016] HCA 13 at [84].
[37] (2001) 32 VR 641.
[38] Defence Further Submissions dated 6 November 2019.

is highly unusual offending and involves a serious breach of the trust, care and protection an infant is entitled to expect from a parent.

36. I have viewed the video material relied upon by the prosecution for the purposes of considering this application. Whilst not expressing a view as to the strength of the prosecution case in relation to the penetration offences, there is no doubt the offending conduct alleged is a very serious instance of this type of offending. As the prosecution highlight, this was not one-off offending, but repeated offending over a period of days, and undertaken by LS for financial gain, although the promised payment to LS never eventuated.

37. However, as stated in *K v the Children's Court of Victoria,* the objective seriousness of the conduct and the role ascribed to the accused are not the only factors to be considered. These objective factors only look at the offending conduct and exclude matters personal to the offender that, in this case, are highly relevant to an analysis of the adequacy of the sentencing options. It is for the reasons that follow that I am satisfied the Children's Court does have adequate sentencing options to respond to LS's offending having regard to s356A(2) of the CYFA. I am not satisfied that exceptional circumstances are established on that basis.

38. Firstly, as is fairly accepted by the prosecution, in this case LS's conduct must be considered in the context of the evidence of grooming and coercion of the UK offender. This does, in my view, reduce her moral culpability to some degree.

39. Secondly, she is a young person with no prior criminal history.

40. Thirdly, upon the detection of this offending, she suffered immediate and significant consequences, including the immediate removal of her daughter from her care pursuant to an order of the Family Division of the Children's Court and was remanded in custody on 20 March 2019 until being bailed subject to youth justice supervision on 22 March 2019, to which she remains subject.

41. Fourthly, the fact she was seventeen at the time of the offending and is therefore regarded as a "child" herself under the CYFA, is highly relevant to sentencing. The law recognises that the youth of an offender should be a primary consideration for any sentencing court but particularly when regard is had to the sentencing considerations under s.362 of the CYFA, where general deterrence has no role to play in sentencing. In the case of a young offender, rehabilitation is usually more important than general deterrence, even where it applies; rehabilitation is recognised to benefit the community as well as the offender. One of the

important reasons underlying these principles is that young people may be more prone to acting in an ill-considered fashion, without thought of the consequences, when their brains are still maturing.[39]

42. Further, the fact that the offending is objectively serious or unusual is not, of itself, determinative of the adequacy of sentencing options available to the Children's Court. Indeed, some of the authorities referred to in this decision were determined in the context of serious criminal offending by young offenders. In *Webster*, for instance, the appellant was resentenced by the Court of Appeal to a 12-month youth attendance order under the CYFA after being found guilty of seven charges of rape, following a contested hearing. In doing so, the Court of Appeal allowed the appeal against a sentence of two years' youth detention imposed on appeal from the Children's Court by the County Court. At the time of the offending, the appellant was 17 years old and the victim was 15 years old. In that decision, Maxwell P and Redlich JA stated at paragraph [6]:

"This appeal highlights, once again, the difficult task which confronts a sentencing court when imposing sentence for serious crimes committed by a young offender. In such a case, there is – or, at least, there appears to be – an acute conflict between sentencing considerations. On the one hand, conventional considerations of just punishment and denunciation point towards a custodial penalty, because serious offences are seen to require the uniquely punitive sanction of loss of liberty. On the other hand, the public interest in the rehabilitation of an offender is never greater than in the case of a young offender."

43. In the case of *C (by his litigation guardian) v the Children's Court of Victoria & Ors*,[40] Justice Beale found the decision of the Children's Court to uplift charges under s.356(3) of the CYFA was a jurisdictional error in circumstances where the appellant, aged 17 years, was charged with 18 offences including two charges of rape, intentionally causing injury, using a carriage service to harass contrary to the *Criminal Code*, false imprisonment and attempt to procure sexual penetration by threats. In that case, the appellant had a limited criminal history but was on a youth supervision order at the time of the offending. He had no priors for sexual offending and had never received a sentence of detention. The Supreme Court found it was not reasonably open to the Court to find exceptional circumstances in the circumstances of this case, notwithstanding the objective seriousness of the charges.

[39] *DPP v Codey Herrmann* [2019] VSC 694 at [94].
[40] [2015] VSC 40.

44. The decision in *Hutchison* provides guidance on the adequacy of the sentencing options available in responding to serious sexual offending, including federal child pornography charges, by a young person. In that case, the Court of Appeal dismissed an appeal against the imposition of a 3 and a half year community correction order imposed on a 19-year-old for two charges of incest, committing an indecent act with a child under 16 years, possessing child pornography contrary to state law and using a carriage service to produce child pornography contrary to the *Criminal Code*. The offending in that case occurred when the respondent was "a little over 16 years of age" and the victims were his half-sisters who were 3 years and 16 months old respectively.

45. The facts in *Hutchison* giving rise to the charges were also objectively serious. Video images of the respondent's actions had been captured on a camera used by him and then produced during on-line conversations with a person claiming to be a 17-year-old girl "Sara" who was in fact an adult British male who was grooming the respondent. The offending against his 3-year-old half-sister involved the respondent pulling down her pyjama bottoms and masturbating his erect penis, at one point touching the victim's bottom with his penis. The offending against his 16-month-old half-sister involved attempting to get her to touch his penis, pushing and thrusting his penis towards her fact and masturbating in front of her fact, at one point his penis briefly touching her mouth and at another point, her nose.

46. In that appeal the Court considered the contention of the prosecutors (both the CDPP and the DPP) that only an immediate term of imprisonment was appropriate to respond to the objective seriousness of the offending. The Court of Appeal in dismissing the appeal, stated at paragraphs [54]-[56]:

"The respondent's offending was undoubtedly very serious. If all one knew were the objective facts of his offending then one would almost certainly conclude that the only sentence open was one of immediate imprisonment. Sentencing, however, is not nearly so simple. In this case, like many others, there were a myriad of competing considerations that had to be synthesised by the sentencing judge in order to arrive at a result that was just in all the circumstances.

...

First, there was the fact that the respondent was only a little over 16 years of age at the time he committed the offences in relation to his half-sisters. Rehabilitation was a powerful mitigating factor in relation to such a young offender, notwithstanding the objective

seriousness of his offending. If the respondent's offending had been detected at or about the time of its commission, he would have fallen to be sentenced under the provisions of the Children, Youth and Families Act 2005, where general deterrence would have played no part in the sentencing process. As the judge put is, there was every prospect that the respondent would have received 'some form of order without conviction'". (emphasis added)

47. Here, the CDPP seeks to distinguish the decision in *Hutchison* to argue that the circumstances of this case are far more serious and that, unlike this case, *Hutchison* was predominantly dealing with State offences "which were by far the most serious". I do not accept this submission. In my view, the nine State offences alleged against LS are just as serious, if not more so having regard to the maximum penalties applicable to those offences, than the 10 Federal offences which, on a plea, are likely to be 'rolled' up into two offences or attract a significant degree of concurrency. Both cases are examples of serious breaches of trust, involving serious sexual offending against vulnerable victims, and where there was evidence of grooming of the young offenders.

48. There are other matters personal to LS that I also accept are highly relevant to any sentence likely to be imposed. These are set out in the reports of two psychiatrists, Professor Anne Buist and Dr Adam Deacon in his report dated 21 May 2019. Although neither report was prepared for the purposes of a plea, they express opinions that are likely to be relevant material in mitigation of sentence. Dr Deacon's findings from the DHHS and other material provided to him, is that LS was *"raised in adverse conditions marked by alleged exposure to parental dysfunction, domestic violence, drug use and neglect".* For the purposes of his report, Dr Deacon was asked to assess risk to the victim if contact were to occur with her mother, and recommended LS's mental status be evaluated. DHHS, in the context of its child protection proceedings, arranged for that to occur through Professor Buist. Professor Buist's report also outlines a childhood marked by chaos, instability, significant neglect and physical and emotional abuse. She states:

"[LS]'s severe neglect and childhood abuse means that her personality was developing through a time when she did not have a safe base, and the trauma and fear of the vulnerable child was up front and centre in this process. As such, she is best understood as having complex PTSD – ie, chronic post-traumatic stress disorder which has integrated itself into how she sees and operates in the world. She fits the DSM V borderline personality disorder

criteria, with poor sense of self, fear of being alone, self-harm, anxiety and transient dissociative symptoms (the pseudo – hallucinations)…"

49. The CDPP submits limited weight can be placed on these opinions, particularly having regard to the DHHS information provided to the experts, arguing that of the ten reports made to child protection during LS's childhood, only one matter was substantiated. I have read the documents intitled *"LS (Mother) – Child Protection History"*. In my view, the material supports the findings of the experts, notwithstanding the absence of substantiation by DHHS and the fact no child protection proceeding had been initiated. There is certainly material to suggest that LS suffers from complex PTSD as a result of her early childhood deprivation, with a basis to find she meets the criteria for a borderline personality disorder.

50. The weight which may be given to these factors in mitigation of sentence will be more readily apparent once appropriately formulated plea material and expert evidence is available. The Court will then be best placed to assess the degree to which any of these factors operate to reduce LS's moral culpability for the offending. That said however, as the recent decision of the Supreme Court in *DPP v Codey Herrmann*[41] indicates, the presence of a borderline personality disorder may well be of significance to reduce sentence particularly if the diagnosis enlivens *Verdins* type considerations.

51. Fundamentally, the prosecution submission is premised on its contention that, whatever sentencing regime is imposed on LS, general deterrence should be an important sentencing consideration. It is on this basis that the CDPP argues that the administration of justice – as it serves the community and the individual – is best met. In other words, that in sentencing LS the sentencing court should impose a sentence that will operate to deter others who may be inclined to offend in a similar manner.

52. It is clear however, that even where an adult court is sentencing a child accused, it must first determine that the sentencing dispositions under the CYFA are inadequate before it can move to sentence under the principles of *Sentencing Act 1991*,[42] including the application of general deterrence. In this case, for the reasons given I am satisfied that the sentencing options under the CYFA are adequate to respond to this offending, despite the objectively serious nature of the offences.[43] Given this finding, I have not proceeded to determine the extent (if any) to which s.20C enlivens power in this Court to exercise sentencing powers under the CCA given

[41] [2019] VSC 694.
[42] See, for instance, *DPP v Anderson* [2013] VSCA 45 at [47].
[43] Noting that s.356A(2) refers to the sentencing options available to the Court under this Act.

the agreed position that it enables the Court to exercise State law in the determination of the federal offences.

53. [Details removed].

54. For the reasons given, I am not satisfied that the charges are unsuitable by reason of exceptional circumstances to be heard and determined summarily and the application to uplift the charges pursuant to s.356(3) of the CYFA is refused.

Judge A Chambers
President
Children's Court of Victoria