

IN THE CHILDREN'S COURT OF VICTORIA
CRIMINAL DIVISION

VICTORIA POLICE

Informant

V

KE

Accused

MAGISTRATE: FLEMING
DATE OF HEARING: 21/5/2021
DATE OF DECISION: 4/6/2021
CASE MAY BE CITED AS: Victoria Police v KE [2021] VChC 1

REASONS FOR DECISION

Catchwords: Accused is 16 years old, charged with two Category B serious youth offences, home invasion (Ianelli brief), carjacking (Gambuzza brief) – application by informants pursuant to s 356(3)(b) of the *Children, Youth and Families Act 2005* to uplift matter – 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 applicant do not constitute exceptional circumstances.

APPEARANCES: Counsel
For Victoria Police Mr. Spiteri
For the Accused Ms. Jeronimus

HER HONOUR:

1. KE is the accused in this matter. He is 16 years of age.
2. KE is charged with two Category B serious youth offences. In January 2021, S/C Ianelli charged KE with home invasion (contrary to s 77A of the *Crimes Act 1958*). In January, S/C Gambuzza charged KE with carjacking (contrary to s 79 of the *Crimes Act 1958*).
3. KE has outstanding indictable offences charged by S/C Stewart.
4. KE is currently remanded on the Gambuzza charges.

CIRCUMSTANCES OF THE ALLEGED OFFENDING

McKinnis Brief

5. On 28 September 2020, KE was arrested for an assault. The alleged victim was walking on a footpath along a creek in Hoppers Crossing. KE walked towards the victim and said "I'll bash you with one arm, I'll bash you cunt, do you know who I am?" KE punched the victim to the face. The punch broke the skin on the victim's nose and caused bleeding. The victim was knocked to the ground. KE continued to be abusive, spat on the victim and then left.
6. KE presented himself to police and made full admissions to his offending. He was charged and bailed.

Ianelli Brief

7. On 5 January 2021 at 2.49 am KE, in company with three others, attended premises in Strathmore. There the accused rummaged through cars. One of the co-accused KK had a 30 cm long silver bladed knife tucked in his waistband. KE and KK took off their shoes and entered the home through an unlocked door. They stole car keys and a handbag from the premises.

8. It is alleged that half an hour later at 3.20 am KE and his three co-accused went to another residential property 450 metres from the first home. There, they entered the front yard and entered the home through an unlocked door. They stole car keys and a vehicle was stolen.
9. In a subsequent interview, KE made full admissions to the offending. He admitted to taking his shoes off to remain quiet and said that he knew his co-accused had a knife in his possession when they broke into the premises.

Stewart Brief

10. On 11/1/2021 KE was charged with 37 charges. The offending is alleged to have occurred between 4 and 10 January 2021.
11. On 7/1/21 at about 11.45 pm, it is alleged that the victim was walking home. KE was with co-accused and yelled "give me all your shit or I'll stab you". KE was holding a bladed weapon that was about 10-12 centimetres long. KE thrust the knife towards the victim to intimidate him. The victim refused to hand over his property. The co-accused struck the victim to the face.
12. On 8/1/2021 at about 1.30 am, KE and the same co-accused went to residential premises in Altona North. KE switched off the mains power. KE or his co-accused used torches to light the front room of the property. The victims were awoken and screamed. One of the accused yelled "Give me your money, I have a gun". The victims got on the ground and crawled into the bathroom and called the police. The accused smashed the bedroom window and then fled when one of the victims said that they had called police.
13. On 8/1/2021 between 1.30 am and 2.00 am, KE and the same co-accused went to another residential property in Altona North. They stole a Mastercard from a parked car. In the five hours that followed, they used the stolen credit card to make six purchases totalling \$1,415. They attempted to set up an Uber account with the Mastercard to get a lift.

14. On 8/1/2021 at approximately 2.00 am, KE and the same co-accused went to another residential property 450 metres away. They entered the property through the rear door while the victim slept. Once inside they stole keys to the victim's car. They went to the victim's bedroom and woke him. They ran from the home driving off in the victim's car.
15. On 8/1/2021 at about 6.23 am, KE and an unknown co-accused went to a residential premises in Corio. They entered the shed and stole keys from inside a car and two motorbikes. The victim got in a separate car and went to find the motorbikes. He found one in flames nearby. The victim saw KE and his co-accused and approached them, KE ran off. The victim attempted to restrain the co-accused, KE returned and threatened to damage the victim's vehicle. KE kicked the car's side mirror breaking it.
16. On 9/1/2021 at 4.30 pm, KE and the co-accused went to a residential premises in Tarneit. The victim was at home sleeping. KE and the co-accused entered the property and stole the victim's bankcards, garage remote and three house keys. Later that day, between 5.20 pm and 6 pm, KE and the co-accused used the stolen card to purchase goods to the value of \$444.
17. On 10/1/2021 at 1.00 am, KE and an unknown co-accused went to a residential address in Hoppers Crossing. The occupants were sleeping. KE and the co-accused entered the address and stole car keys and other property.
18. On 10/1/21 at 3.40 am, a female victim was alone in her car at Hoppers Crossing. KE and a co-accused walked past the victim in her car, doubled back and one of the accused holding a large silver kitchen knife opened the car door. The victim was told to get out of her car. She refused and tried to close the door, there was a struggle while one accused shouted "get out of the fucking car" while pointing the knife at the victim. The victim was able to pull the door shut and lock it. KE and the co-accused fled.

19. On 10/1/2021 at approximately 5.00 am, KE and a co-accused went to a residential address in Hoppers Crossing. They attempted to commit an aggravated burglary by trying to open a bathroom window. The victim was asleep inside the premises. The victim woke up and turned on the light. The accused and co-accused fled.
20. On 10/1/2021 between 3.00 am and 5.00 am, KE and a co-accused went to another residential property in Hoppers Crossing. The victim was asleep. They entered through a laundry door and stole a set of car keys. They stole the victim's BMW car.
21. On 11/1/2021 at approximately 1.30 pm, police saw KE driving the stolen BMW. Police tried to stop the car. KE drove onto the incorrect side of the road.
22. On 11/1/2021 at 2.10 pm, KE was arrested at his home. He was on bail for the McKinnis brief. He was interviewed and made full admissions to all of the offending.
23. On 14/1/2021 KE was released on bail on the Ianelli and Stewart briefs.

Gambuzza Brief

24. On 28/1/2021 and 29/1/2021 between 11.00 pm and 4.00 am, KE and two co-accused broke into a home in Point Cook. They stole car keys and then stole the car at the property.
25. On 29/1/2021 at about 4.45 am, KE and two co-accused went to a residential premises in Altona North and kicked the rear panel of the back door of the garage. The noise woke the victim, she turned the light on and they fled.
26. On 29/1/2021 at about 8.10 am (carjacking) the victim, who is a 94 year old man, opened the gate to his property in Altona North. He got in his vehicle. He was intending on visiting his wife who was in palliative care. As he got into his car, three males approached him. Prosecution allege that KE led the three

accused. The accused yelled at the victim who was forcibly dragged out of his car. The victim held onto his car. The three accused drove off in the victim's car. The victim suffered grazing to his right knee and a bruised hand. The CCTV has been viewed by this Court.

27. KE was interviewed and made admissions to each of the offences. KE admits to being present but denies pushing the victim. Prosecution submit that the CCTV footage provides a more accurate account of what happened.
28. KE was on three sets of bail at the time for the informants McKinnis, Stewart and Iannelli.

BAIL

29. Bail was refused by the Children's Court on the Gambuzza brief. KE appealed this decision and Kaye JA refused bail. Reasons for Kaye JA's decision¹ have been provided to this Court.

THE LEGISLATION

30. Section 356(3) of the *Children Youth and Families Act 2005* ('CYFA') provides that if a child is charged with an indictable offence, other than murder, attempted murder, manslaughter, child homicide, homicide by firearm, an offence against s 197A of the *Crimes Act 1958* (arson causing death) or an offence against s 318 of the *Crimes Act 1958* (culpable driving causing death), the Court must hear and determine the charge summarily, unless -
 - (a) before the hearing of any evidence the child objects; or
 - (ab) subsection (6) applies;² or
 - (b) at any stage the Court considers that the charge is unsuitable by

¹ Kaye JA Bail Decision [2021] VSC 175

² Section 356(3)(ab) relates to Category A serious youth offences with which the accused has not been charged.

reason of exceptional circumstances to be determined summarily.

31. A charge that is not heard summarily by reason of s 356(3)(b) must proceed to committal and the Court must give reasons for declining to determine the charge summarily.

EXCEPTIONAL CIRCUMSTANCES

32. Exceptional circumstances exist if the Court considers the sentencing options available to it are inadequate to respond to the child's offending.³
33. In determining whether the sentencing options available to the Court are inadequate to respond to the child's offending the Court must have regard to the matters set out in section 356A(2).
34. The meaning of "exceptional circumstances" has been considered in the context of s 356 in a number of matters in the Supreme Court and in the Court of Appeal.
35. In the decision of *K v Children's Court of Victoria and Anor*⁴, Justice T Forrest extracted the relevant principles from these authorities, summarising them as follows:⁵
 - (a) the Children's Court should relinquish its embrative 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, the antecedents of the alleged offender or features particular to him or her
 - (d) the most important criterion is the overall administration of justice that

³ Section 356A(1)

⁴ [2015] VSC 645

⁵ *Ibid* at [26]

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.

36. Consistent with the authorities, Justice Forrest stated that a consideration of “exceptional circumstances” must be determined on the facts of each case.⁶

PROSECUTION SUBMISSIONS

37. Prosecution contends that the proceedings should be uplifted for reasons including the seriousness of the offences, the volume of the offences and that the Children’s Court sentencing options are inadequate.

38. Further, that the impact on the victims is an aggravating feature of the offending.

39. Prosecution submits that the accused’s insight is critical to his prospects of rehabilitation and asserts that the accused has limited insight. Prosecution referred to the bail decision of Kaye JA.⁷ Kaye JA heard evidence from Ms Alexander from Youth Justice who in cross examination said that “[KE] has not established a level of insight into the wrongfulness of the offending conduct with which he is charged however he does have an understanding of the hurt that he has caused to his family”⁸. Kaye JA did not have the Clinical Neuropsychologist’s report.

40. Kaye JA observed with concern the conduct of the accused while on remand.

⁶ Ibid at [27]

⁷ [2021] VSC 176

⁸ Ibid para [46]

The evidence is that KE has been engaged in a number of incidents while in detention. I have heard that there have been three incidents during a two-week period.

41. The prosecution asserts that the Court should uplift the proceedings in relation to KE on the basis of the overall circumstances as they relate to him. These include the volume of offending; the serious nature of the offending; the violent and invasive course of conduct; the multiple victims across numerous locations; that the offending constitutes very high harm to the community and individual victims; the offending is 'well outside' that typically or usually encountered within the Children's Court jurisdiction; the vulnerability of the victims, including elderly victims, female victim and sleeping victims and KE's apparent lack of remorse and or victim empathy.
42. It is the contention of the prosecution that even taking a reluctant approach the only sentence reasonably open to the Court is a Youth Justice Centre order for a substantial term and that therefore the proceeding should be uplifted.

DEFENCE SUBMISSIONS

43. It is conceded by Defence that the carjacking charge and the factual circumstances surrounding it are serious, in particular the age and vulnerability of the complainant, but that objectively it is not the worst example of this offence given the offence was of short duration, it was opportunistic, the victim was pulled from his vehicle as opposed to punched and kicked and that there was minimal force used.
44. Further, the Defence asserts that the home invasion charge while serious is not the worst example of this offence. Defence asserts that the victim was not awake or confronted by the accused; KE entered silently rather than breaking through windows and doors and that he left as soon as he heard the victims. Defence contends that all of the remaining matters are the type of offending that

this Court routinely deals with.

45. Further, the Defence submits that this Court has sufficient sentencing power to deal with the accused in the Children’s Court jurisdiction.

EVIDENCE OF MS SCOTT (CLINICAL NEUROPSYCHOLOGIST) & MS ALEXANDER (YOUTH JUSTICE)

46. The Court has heard evidence from Ms. Scott, Clinical Neuropsychologist⁹ and Ms. Alexander, Youth Justice. Reports from Orygen Mental Health Service and Parkville College were also tendered.
47. Ms. Scott undertook an assessment of KE and provided a report.¹⁰ It is a comprehensive assessment. Ms. Scott assesses KE to have an IQ of 72. His scores across various measures were more comparable with those of the average nine year old.
48. Ms. Scott reported that there was improvement in KE’s behaviour after medication for ADHD was commenced.
49. Ms. Scott rejected the Prosecution contention that KE was the “ring leader” and described KE as “highly vulnerable to manipulation and would be an easy target of victimisation”.¹¹
50. Ms. Scott reported that KE was at “high risk of unintentional breaches and failures to follow commands due to his inattention, restlessness and impulsivity”¹².
51. Ms. Scott states “the risk of victimisation and harm would be much greater in an adult custodial setting, [KE’s] cognitive abilities are closer to those of a nine

⁹ Laura Scott Clinical Neuropsychologist MSc Report dated 10/5/2021

¹⁰ Report of Laura Scott Clinical Neuropsychologist MSc dated 10/5/2021

¹¹ Ibid page 13

¹² Ibid page 15

year old child. This, combined with his social immaturity and diminutive stature, would place him at a very significant disadvantage in an adult jail.”¹³

52. Ms. Scott describes KE’s Acquired Brain Injury as having occurred in March 2020 after a car accident. KE sustained head injuries including a fractured skull, bruising to the brain; however the hospital records did not disclose a severe brain injury.
53. Ms. Scott’s assessment was that KE’s behaviour was probably attributable to his ADHD and not to his ABI and that, given the progress he has made while on the ADHD medication, he has good prospects of rehabilitation.
54. Ms. Alexander has been the worker for KE since he was granted bail on 14/1/2021. Ms. Alexander stated that at first, KE had very poor engagement and missed two appointments. In her evidence Ms. Alexander said that KE “did not seem to understand”. While at first the accused did not engage, the evidence is that he is much improved. The young person has found detention to be traumatic and upsetting. Ms. Alexander described the conditions in detention as unprecedented, she had never before known of such lengthy lockdowns that the young people were experiencing. In her first assessment, Ms. Alexander assessed KE as unsuitable. In her second assessment for Kaye JA, she assessed KE as suitable. Ms. Alexander was aware of KE’s behaviour in custody but now describes KE’s behaviour as “vastly improved, excellent, compliant, engaging” and that there have been no further incidents since 3/4/2021. Ms. Alexander said that she feels KE’s insight has improved since his first assessment and her belief is that he has the capacity to improve his insight; however Ms. Alexander was concerned as to how he could do so in custody. Ms. Alexander said that KE did not want to return to custody. Ms. Alexander said that KE’s personal circumstances have now changed given the attitude of his mother and the number of services that are now in place.

¹³ Ibid page 14

55. In an assessment completed by [location removed] Mental Health (Orygen Assessment) dated 26/2/2021, the author writes “[KE] reported that he does not wish to engage in this type of offending in the future. He reported wishing that he had not done these crimes. He acknowledged the seriousness of the offending and expressed remorse for the impact of his crimes on the victims.”

FINDINGS

56. The Prosecution case against the accused involves allegations of extremely serious offending. In considering the gravity of the offence, it is notable that for adults the offence of home invasion contrary to s 77A *Crimes Act 1958* carries a maximum penalty of 25 years imprisonment. The charge of carjacking contrary to s 79 *Crimes Act 1958* carries a maximum penalty of 15 years imprisonment. Taking the prosecution at its highest, the allegations against the accused are very serious.

57. I have read the victim impact statements and note the serious impacts the alleged offending has on the multiple victims. It is notable that the victim impact statements refer to emotional injury and that there would not appear to have been physical injury to these victims. The injuries to the 94 year old victim in the Gambuzza brief included grazes to his knee and a bruised hand. Concerningly, this victim was an incredibly vulnerable person and this is an aggravating feature in spite of the relatively minor physical injuries. I accept that there is an absence of other aggravating features found in other cases of carjacking, such as the use of a weapon or evidence of extensive planning.

58. A further aggravating feature is that KE was on three sets of bail at the time of the alleged offending in the Gambuzza brief. Counsel for KE submitted that while KE was on bail that Youth Justice involvement was in its infancy and that Youth Justice were not able to gain traction in working with KE between 14/1/2021 and 28/1/2021. Further, that supervised bail was a novel concept to

KE, he having been granted bail on 28/9/2020 (McKinnis brief) with two conditions relating to curfew and prohibition on contacting prosecution witnesses.

59. KE has spent more than 100 days in detention. Kaye JA expressed that his period of custody has involved a particular degree of hardship, due to staff shortages at Parkville Youth Justice Centre (PYJC). KE has been subject to multiple lockdowns at PYJC, albeit for relatively short periods. Further, during the COVID-19 pandemic he has not been able to have personal visits from his family or been able to participate in programs.
60. I have heard evidence about the role of the accused in the conduct and note that while the Prosecution allege KE was the oldest of the offenders and the “ring leader”, this is refuted by the evidence of Ms. Scott who has assessed KE with an IQ of 72 a score that was more comparable with those of a nine year old. I found Ms. Scott to be an impressive witness. Ms. Scott’s assessment is that KE presents with a “globally reduced level of cognitive function. Areas of particular weakness include reading, higher attentional and executive functions (particularly impulse control and self monitoring), These impairments are seen in the context of relatively preserved (though still quite low) basic attention span, working memory, basic speed of processing, intellectual abilities, memory, social cognition and aspects of executive function (including idea generation, abstract reasoning, planning and organisation). Behaviourally, [KE] presents as somewhat immature, restless and impulsive with perseverative tendencies. This profile is obtained in the context of mild depressive symptoms.”¹⁴
61. KE has no prior criminal history.
62. Relevant to the application is a consideration of the factors personal to KE. There is force in the Defence’s reliance on Ms. Scott’s assessment. While KE’s assessed IQ does not fall within the range of a person with an intellectual

¹⁴ Clinical Neuropsychologist Laura Scott Report at page 11

disability, Ms. Scott's evidence is that 97% of children who are the same age as KE would perform better, that he is in the 3rd percentile of the population. Further, the presence of an ABI and the assessment that KE suffers from ADHD means that his cognitive disability impacts his reasoning, problem solving, judgement and learning. If the charges are found proved, these considerations will be highly relevant to sentencing, particularly as to KE's moral culpability.

63. Also relevant is that KE has family support and has been supported in Court by his family during the course of this proceeding.
64. Also relevant to sentencing will be KE's age, his absence of priors and his prospects of rehabilitation. KE was 16 years and 3 months at the time of the offending where Gambuzza is the informant. I note that, when assessed by Orygen in January 2021, he expressed remorse for his actions. Further, the evidence of Ms. Alexander is that he has demonstrated, in recent times, positive steps towards his rehabilitation.
65. The sentencing principle of parity is directly relevant given that it is alleged that KE did not commit the offences alone. It is noted that the co-accused are younger¹⁵ than KE. One of the co-accused has been sentenced to a Youth Supervision Order for 10 months, the other co-accused is on supervised bail and may be making an application for Diversion. The Prosecution do not make application to uplift any of the other co-accused.
66. These matters must be balanced against the severity and gravity of the alleged offending in determining this application.
67. Exceptional requires something more than special and the circumstances must be 'very unusual'¹⁶. I am satisfied that the nature, circumstances and gravity of KE's alleged offending is serious but not to the point of very unusual. I consider that the Children's Court has sufficient sentencing options available to the Court

¹⁵ 14 and 15 years of age

¹⁶ *K v Children's Court of Victoria* [2015] VSC 645, [26]

under the *CYFA* and that those options are adequate to respond to this particular child's offending.¹⁷ I am satisfied that, in the event that the charges are proved, taking into considering factors including the age of the accused, his cognitive functioning and prospects of rehabilitation, his absence of prior criminal offending that this Court has adequate sentencing power.

68. The offences before the Court include two Category B offences. While they are serious matters they are not intended to be uplifted unless there are exceptional circumstances.¹⁸ Counsel for the Prosecution has referred to the Second Reading speech in relation to the Children and Justice Legislation Amendment (Youth Justice Reform) Bill 2017.¹⁹ The words expressed therein are pertinent to cases such as this one. This Court however in exercising its discretion is of the view that the accused's offending, while serious, is not exceptional and is the type of matter that is routinely dealt with in this Court. This Court should only relinquish jurisdiction with great reluctance. The Category B offences and the associated offences are the type of offending that this Court deals with on a regular basis. I am not satisfied that they are exceptional.

69. The application for uplift pursuant to s 356(3) of the *CYFA* is refused.

ORDERS:

Application for Uplift refused

Matter adjourned for consolidated plea hearing on 11/6/2021

¹⁷ In particular, the most severe sentence open to the Children's Court on a finding of guilt of the charged offences is detention in a youth justice centre for an aggregate period of four years: see s 413(3)(b) *CYFA*.

¹⁸ s 356(3)(b) and s 356(8) *CYFA*

¹⁹ This Bill inserted Category B serious youth offences into the *CYFA*