

IN THE CHILDREN'S COURT OF VICTORIA

AT MELBOURNE

CRIMINAL DIVISION

AH

Applicant

v.

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

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

MAGISTRATE: HER HONOUR MAGISTRATE STYLIANOU

DATE OF HEARING: 1 August, 24 September and 1 November 2019

DATE OF DECISION: 11 November 2019

CITED AS: *AH v DPP* [2019] VChC 3

### REASONS FOR DECISION

**Catchwords:** Accused charged with Category A serious youth offence of aggravated carjacking and additional charges – application by child pursuant to s.356(6)(a) of the *Children, Youth and Families Act 2005* (CYFA) for the charge to be heard and determined summarily in the Children's Court – application by the prosecution for the additional charge of attempted aggravated carjacking to be 'uplifted' by reason of exceptional circumstances should the application for summary jurisdiction be refused – adequacy of sentencing options under CYFA to respond to the offending – whether there is a 'substantial and compelling reason' why the Category A serious youth offence should be heard and determined summarily – application for summary jurisdiction refused – exceptional circumstances found and the charge of attempted aggravated carjacking also uplifted.

APPEARANCES: Counsel

For the Applicant: Mr J. Portelli

For the Respondent: Mr N. Goodenough

HER HONOUR:

**The Application**

1. The Applicant AH is aged 18 years. He has been charged with numerous offences including aggravated carjacking with the use of an imitation firearm proscribed by s.79A of the *Crimes Act 1958*. It is an offence alleged to have occurred on 29 October 2018 when the applicant was aged 17 years and seven months. AH has indicated an intention to plead guilty to this offence.
2. The offence of aggravated carjacking is defined by s.3(1) of the *Children, Youth and Families Act 2005* (CYFA) as a Category A serious youth offence.<sup>1</sup>
3. Pursuant to s.356(6) of the CYFA:

“If a child is charged before the Court with a Category A serious youth offence committed when the child was aged 16 years or over, other than murder, attempted murder, manslaughter, child homicide, an offence against section 197A of the Crimes Act 1958 (arson causing death) or an offence against section 318 of the Crimes Act 1958 (culpable driving causing death), **the Court must not hear and determine the charge summarily unless<sup>2</sup> –**

- (a) the child or the prosecution requests that the charge be heard and determined summarily; and
- (b) the Court is satisfied that the sentencing options available to it under this Act are adequate to respond to the child’s offending; and

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<sup>1</sup> Section 3(1)(e)(ii) CYFA.

<sup>2</sup> Emphasis added.

(c) any of the following applies –

- (i) it is in the interests of the victim or victims that the charge be heard and determined summarily;
- (ii) the accused is particularly vulnerable because of cognitive impairment or mental illness;
- (iii) there is a substantial and compelling reason why the charge should be heard and determined summarily.

4. AH was aged over 16 years when the offence of aggravated carjacking was committed and accordingly this Court must not hear and determine the charge summarily unless certain preconditions as specified in s.356(6)(a), (b) and (c) of the CYFA are met.

5. Application is made by the defence on behalf of AH pursuant to s.356(6)(a) that the charges be heard summarily in this Court. The defence relies on s.356(6)(b) and the third limb of s.356(6)(c) in support of the application for summary jurisdiction.<sup>3</sup>

6. The prosecution opposes the defence application.

7. The issues to be determined are as follows:

(a) Is the Court satisfied that the sentencing options available to it under the CYFA are adequate to respond to the child's offending [s.356(6)(b)]? **And**, if so,

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

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<sup>3</sup> S. 356(6)(c)(iii). The defence did not submit that s.356(6)(c)(i) or (ii) were applicable.

8. If the Court is not satisfied as to (a) and (b) above, the Court must then determine a further question in respect of a related indictable offence pursuant to s.356(3) of the CYFA which will be explored below.

### **Background**

9. This matter was listed to proceed to committal hearing on 7 May 2019 for both AH and co-accused JL. AH only sought to cross-examine the informant. After cross-examination of several witnesses by counsel for JL on 7 May 2019, the committal was adjourned to 11 June 2019.
10. On 11 June 2019, counsel for AH, Mr Portelli, indicated he would not be seeking to cross-examine any witnesses and indicated AH's intention to plead guilty to several charges including the Category A offence. At this time, he also indicated that an application would be made that the plea be heard summarily.
11. The matter was adjourned to 1 August 2019 at the request of AH's counsel who, without objection from the prosecutor, had sought a six week adjournment for the purpose of obtaining a neuropsychological report in support of the summary jurisdiction application. Mr Portelli indicated to the Court that defence had obtained neuropsychological reports in around 2016 and 2017 but that these reports were inconclusive. Mr Portelli further submitted that AH had suffered a recent traumatic head injury in custody and that this needed to be further explored by an updated assessment.
12. On 1 August 2019 Mr Portelli tendered a report from Susan Carey, neuropsychologist dated 11 May 2017 "for background only"<sup>4</sup> and a further report from Dr Loretta Evans, clinical neuropsychologist, dated 26 July 2019.<sup>5</sup> Dr Evans noted that "*Ms Carey concluded there was insufficient evidence that AH had an acquired brain injury or*

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<sup>4</sup> As submitted by Mr Portelli.

<sup>5</sup> The report previously referred to from 2016 was not tendered.

*intellectual disability contributing to his offending behaviour and any deficits did not have a causal link to his offending*". Dr Evans herself concluded that she *"did not find sufficient evidence to conclusively determine the presence of a traumatic brain injury as a consequence of recent head injury or alleged seizures"*.<sup>6</sup> Neither Ms Carey or Dr Evans made any diagnosis of PTSD which Mr Portelli had previously suggested AH was afflicted by.<sup>7</sup> On 1 August 2019 Mr Portelli submitted that the report from Dr Evans was "defective" and sought a further adjournment to 24 September 2019 so that a psychiatric report could be obtained. The prosecution did not oppose the application for adjournment.

13. On 24 September 2019, the psychiatric report had yet to be obtained by the defence and AH refused to attend at the return hearing of his application for summary jurisdiction. Mr Portelli sought a further adjournment, to facilitate the provision of the psychiatric report and also his client's attendance at Court. Without any opposition from the prosecution the matter was further adjourned to 1 November 2019 on which date AH appeared, the Court heard further submissions, and a psychiatric report authored by Dr Hemlata Ranga dated 7 October 2019 was tendered by Mr Portelli.

### **The other charges**

14. In addition to the Category A serious youth offence, AH has indicated an intention to plead guilty to various other charges, including an attempted aggravated carjacking with an imitation firearm. This attempted aggravated carjacking occurred approximately 10 minutes prior to the Category A offence and only some 500 metres away.
15. The hearing and determination of the offence of attempted aggravated carjacking with the use of an imitation firearm<sup>8</sup> as well as that of the other indictable offences is subject to s.356(3) of the CYFA. Under that provision these charges must be heard and

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<sup>6</sup> Evans Report [50].

<sup>7</sup> Having regard to a neuropsychological report which Mr Portelli said he was in possession of but which has not been tendered.

<sup>8</sup> As well as the other indictable offences to which AH has indicated an intention to plead guilty.

determined summarily unless, at any stage, the Court considers the charges unsuitable by reason of exceptional circumstances to be determined summarily in the Children's Court. In this case, the prosecution has made application for the related charge of attempted aggravated carjacking that occurred a few minutes prior to the category A offence to be 'uplifted' by reason of exceptional circumstances should the applicant not succeed in his bid to have this matter determined by this Court.

16. The defence concedes the existence of exceptional circumstances in respect of the application of the prosecution to 'uplift' this offence, should summary jurisdiction be refused to the defence in respect of the category A offence. Put simply, AH agrees that given the proximity of time, place and circumstance, the two charges should be heard together.

17. The remaining charges to which AH has indicated an intention to plead guilty are not being pursued by the prosecution for uplift and accordingly are not directly relevant to this application.

### **The Co-Accused**

18. JL was aged 16 years at the time of the offending. He has been charged with aggravated carjacking and attempted aggravated carjacking and a number of other offences. He was granted summary jurisdiction by this Court on 29 July 2019 having regard to a number of factors but particularly his significant deficits in adaptive functioning. He has entered a plea of guilty to the carjacking offences and a number of others and returns to this Court on 21 November 2019.

19. MT was aged 17 years at the time of the offending. He was not charged with the Category A serious youth offence of aggravated carjacking. His charges, which included aggravated burglary, robbery and numerous counts of theft, were dealt with by way of Diversion by the Dandenong Children's Court and he was discharged by that Court on 15 February 2019.

20. DB was aged 15 years at the time of the offending. His charges, which included aggravated carjacking, although not Category A given his age, attempted aggravated carjacking and numerous other deception charges proceeded as a plea of guilty at the Dandenong Children's Court. He received a 12-month Youth Attendance Order which he later breached and he was subsequently sentenced to detention in a Youth Justice Centre.
21. TG was aged 22 years at the time of the offending. His matter proceeded as a plea of guilty in the County Court on 2 August 2019 for numerous charges which did not include aggravated carjacking.

### **Circumstances of the Offending**

22. These can be summarised briefly. A police summary was tendered by way of assistance to the Court although it is noted both parties deferred to the witness statements on the police brief, particularly those of the victims.

#### ***Attempted aggravated carjacking (charge 1) 29.10.18***

23. On Monday 29 October 2018, at approximately 3:48am, the victim, KE, was driving her car with her 20-year-old daughter asleep in the front passenger seat. As the victim was in the process of parking her car at the 'W' Apartments in Cowes, she observed a white vehicle that appeared to have followed her into the car park. Two male offenders, one of whom was co-offender JL and the other alleged to be AH, exited from the white car and approached the victim's car, one offender at the driver side and the other on the passenger side. AH and JL banged on the roof of the victim's car. AH, who had approached the victim from the driver's side, pointed a dark grey coloured handgun toward her whilst she was seated inside her car. The victim moved her vehicle forward in an attempt to get away, then realised she would be trapped inside the car park, so she then reversed her car in an effort to take evasive action. AH continued to point the handgun toward the victim at this time. The victim drove her car to the Cowes police station.

***Category A Offence – Aggravated Carjacking – imitation firearm (charge 2)***

**29.10.18**

24. At approximately 3:58am, ten minutes after the attempted carjacking at the ‘W’ Apartments, victim RB arrived at a nearby Motel car park in Cowes and reversed his car into a parking spot. As he was in the process of taking his belongings from the boot of his vehicle, he was approached by four offenders one of whom it is alleged was JL, who made demand for the keys to his car, yelling “give us your keys or we will kill you”. The offenders pushed the victim to the ground. Whilst on the ground, the victim held up the keys to his vehicle. One of the offenders snatched the keys out of the victim’s hand. Whilst the victim was on the ground, one of the offenders stood over the victim and threatened to punch him whilst the other three went into his car. The victim noticed something metallic in the offender’s hand. The offenders drove away in the victim’s vehicle. A short time later the victim observed a black hand gun lying on the ground where his car had been parked. The victim attended at the Cowes police station where KE and her daughter, the victims from the earlier attempted carjacking, were also present.
25. Police attended at the Motel, photographed and seized the imitation handgun and obtained DNA swabs.
26. CCTV footage from the Motel shows the four offenders walking into the car park area of the Motel, shortly after the victim arrives in his car; the offenders loiter near bushes to conceal themselves prior to stealing the car. The first offender, alleged to be AH, is depicted wearing a baseball cap, gloves, Nike shoes and is holding a handgun in his right hand. The second male, alleged to be JL, is wearing a jumper with a small motif at the front, gloves, tracksuit pants and Nike shoes.

**Is the Court satisfied that the sentencing options available to it under the CYFA are adequate to respond to the child’s offending [s.356(6)(b)]**

27. By way of his application requesting that the matter be determined summarily, AH has

met the precondition required by s.356(6)(a) of the CYFA.

28. Aggravated carjacking is a serious offence that carries a maximum penalty, for adults, of 25 years imprisonment. Furthermore, the nature and gravity of the offending as it currently stands before the Court is serious. The aggravated carjacking was committed in company, when the victim was targeted as he alighted from his car in the early hours of the morning when he was alone. He was pushed to the ground and threatened, and at the time, AH had with him an imitation firearm.
  
29. Significantly, AH was on parole at the time. AH had been released on parole in January 2019 after being sentenced by the County Court on 22 May 2017, to 2 years 6 months youth detention for culpable driving causing death, negligently causing serious injury and theft of a motor vehicle. At the time of the aggravated carjacking AH was also subject to a Good Behaviour Bond imposed by Dandenong Children's Court on 24 August 2018. AH has had various other Court appearances, including the imposition followed by cancellation (due to breach) of a 12 month Youth Supervision Order between April and June 2018. It is notable that the very first sentence imposed upon AH by the Children's Court was a term of detention for various offences but primarily involving dishonesty. His criminal history is concerning and he immediately advanced to the top end of the hierarchy of sentences imposed by this Court.
  
30. It is however, also significant that AH has indicated his intention to plead guilty in the current matter before the Court and he did so prior to the cross-examination by him of any witnesses at committal. Additionally, there exist powerful factors that will moderate and operate in reduction of any sentence imposed. AH comes from a refugee background having been born in Iraq. He was aged two when the war began, and his family moved to Australia when he was aged seven years. Both AH and his family experienced the conflict in their country, the effects of which persisted when they arrived in Australia. The unrest in Iraq continued to directly affect members of their extended family that remained living there which in turn impacted on AH and his family in Australia.

31. Additionally, the psychiatric report from Dr Ranga makes a diagnosis of PTSD and borderline personality disorder, albeit Dr Ranga is somewhat guarded in his conclusions *“I had only limited collateral information for this assessment. The diagnoses and treatment plan may need to be reviewed if further medical/psychiatric information can be arranged from the mental health treating team in Malmsbury”*.<sup>9</sup> It is noted that Dr Ranga made the diagnoses having met and assessed AH on ‘videolink’ on 30 September 2019.<sup>10</sup> The duration of the ‘videolink’ assessment is not indicated within Dr Ranga’s report. Nonetheless, the prosecution did not take issue with the conclusions of Dr Ranga. In referencing the diagnosis, the report says *“In my opinion he presents with current diagnosis of PTSD and Borderline Personality Disorder. I did not get an impression of an independent mood disorder however he presents with symptoms of anxiety and depression that can be associated with PTSD and BPD.”*<sup>11</sup> As conceded by the defence this report does not specify what impact the diagnosed PTSD has upon AH. In any case, the diagnosis, if accepted by a sentencing Court would of course be a relevant consideration in moderation of any sentence imposed on AH.

32. AH has completed various certificates whilst in custody and has received at least five student of the week awards whilst attending Parkville college. Ms Sheales from Parkville College speaks highly of AH, noting that she is constantly *“impressed with his class work and the level of maturity that he is showing towards his education and development”*.<sup>12</sup> These matters are to AH’s credit and they are also relevant to his prospects of rehabilitation and accordingly to the sentence ultimately imposed on him for these offences.

33. Sentencing considerations under the CYFA are different to those that apply to adults. General deterrence for instance, is not a relevant consideration in the imposition of sentence by this Court. Given AH’s age, this Court has jurisdiction to impose 3 years detention on a single charge and 4 years detention as an aggregate sentence.<sup>13</sup>

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<sup>9</sup> Ranga Report [40].

<sup>10</sup> Ibid [5].

<sup>11</sup> Ranga Report [31].

<sup>12</sup> Letter from Parkville College dated May 5 2019, Exhibit 6 Bundle of documents.

<sup>13</sup> Section 413 CYFA.

Notwithstanding AH's concerning criminal history and the seriousness of the offending in this matter, I have ultimately concluded, not without some hesitation, that on balance, the sentencing options under the CYFA are adequate to respond to AH's offending in respect of the Category A offence and the attempted aggravated carjacking charge.<sup>14</sup>

**Is there a substantial and compelling reason why the charge should be heard and determined summarily?**

34. By way of his counsel's submissions, in summary, AH relies on his background, the diagnosis by Dr Ranga of PTSD and borderline personality disorder, "the long term psychological trauma if he receives a custodial sentence in an adult prison"<sup>15</sup>, the statement he made to police, his strong family support, and 'parity' with his co-offenders as a combination of factors. AH submits that these factors together constitute a substantial and compelling reason as to why the charges should be heard and determined summarily.

35. Whilst the prosecution does not dispute that AH's background has been "troubled" and "difficult"<sup>16</sup> the prosecution argues that these matters "do not rise to substantial and compelling reasons".<sup>17</sup> Furthermore, the prosecutor submitted that the statement made by AH to police "*is not regarded as truthful and has not been relied on by the prosecution. Further, it was of no assistance to police in identifying other offenders or furthering the investigation*".<sup>18</sup> The prosecutor also referred to Dr Ranga's report wherein he states that AH is a "street smart young man of average intellect"<sup>19</sup> and whilst noting the diagnosis made by Dr Ranga, submitted that these factors did not meet the threshold of constituting a substantial and compelling reason.

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<sup>14</sup> Of course, if summary jurisdiction is granted and a larger consolidation of charges beyond these two offences leads to a different conclusion, this Court can at that stage, find exceptional circumstances and 'uplift' this matter.

<sup>15</sup> Defence Supplementary Submissions – Exhibit 2 at [8].

<sup>16</sup> Prosecution further submissions in response - Exhibit B at [4].

<sup>17</sup> Ibid [5].

<sup>18</sup> Ibid [8].

<sup>19</sup> Ibid [6], Ranga Report at [26].

36. It is clear that in the statement made by AH to police he seeks to entirely exculpate himself from any involvement in the offending to which he has now indicated an intention to plead guilty. Whilst the Court accepts that in December 2018 and January 2019 AH *“was targeted by other young people in custody due to rumours he had provided information to the police in relation to these matters”*,<sup>20</sup> the statement he made to the police appears to have been self-serving and according to the prosecution, of no assistance to the investigation. It is nonetheless regrettable that this has had such a negative impact on AH in custody. It is encouraging however that AH more recently told Dr Ranga that *“he gets along with the other people in the centre and he denied any difficulties or challenges with the staff... he did indicate that others usually leave him alone because of his physique and appearance. He said he’s unsure why that is but suspects that ‘maybe it’s because I look strong and people don’t want to mess with me’”*.<sup>21</sup>

37. In so far as the defence relies on trauma related to adult custody, in support of establishing substantial and compelling reason, the Court notes, as it has before in applications of this kind, that this Court cannot speculate on whether the County Court might sentence a young person to adult detention.<sup>22</sup> This Court cannot base its decision, even in part, as to the existence of a substantial and compelling reason on a ‘prospect’ that the County Court might sentence AH to adult imprisonment.

38. The diagnosis of PTSD and Borderline Personality Disorder as described by Dr Ranga is noted by this Court as a relevant consideration to the question at hand, but in my view, on the evidence before me, it does not bring AH over the hurdle intended by Parliament as specified by s.356(6) and reinforced by s.356(7). This remains so, even when it is viewed in combination with AH’s family support and relevantly, his background, which will be important considerations in mitigation of any sentence during a plea hearing. The submission made in relation to ‘parity’ is not of great weight in this application having regard to the specific presentation relevant to co-accused JL,

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<sup>20</sup> As reported by Youth Justice in a progress report to the Court dated 29 July 2019.

<sup>21</sup> Ranga report [30].

<sup>22</sup> *DPP v PT* [2018] VChC 7 at [66].

and the charges, ages, criminal history and personal circumstances of the other co-accused, none of whom but for JL required determinations pursuant to s.356(6).

39. For these reasons, the application for summary jurisdiction is refused.

40. Having regard to the time, place and surrounding circumstances of the charge of attempted aggravated carjacking, I find, pursuant to s.356(3)(b) of the CYFA that exceptional circumstances exist and accordingly this charge will accompany the Category A offence so that they will be heard together. In arriving at my decision I have taken into account the defence concession as to the existence of exceptional circumstances, s.356A of the CYFA and the decision of Justice Forest in *K v Children's Court of Victoria and Ors*<sup>23</sup> wherein His Honour notes numerous relevant considerations but importantly, and ultimately, the overall administration of justice.<sup>24</sup>

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<sup>23</sup> [2015] VSC 645.

<sup>24</sup> In *DPP v JT* (Children's Court of Victoria, 5 July 2018, unpublished), Chambers J said that the considerations in s. 356A are to be considered in addition to other matters relevant to the Court's discretion as summarised in *K v Children's Court of Victoria*, op cit.