

IN THE CHILDREN'S COURT OF VICTORIA
AT MELBOURNE
CRIMINAL DIVISION

Court Reference: H13123163

Detective Senior Constable Matthew Le

Applicant

v

JA

Respondent

JUDGE: HER HONOUR JUDGE CHAMBERS

DATE OF HEARING: 25 January, 2018

DATE OF JUDGEMENT: 31 January, 2018

CASE MAY BE CITED AS: Le v JA

MEDIUM NEUTRAL CITATION: [2018] VChC 1

REASONS FOR DECISION

Catchwords: Accused charged with intentionally causing serious injury in circumstances of gross violence, robbery and other offences – application by Informant pursuant to s356(3)(b) of the *Children, Youth and Families Act 2005* (Vic) 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 constitute exceptional circumstances – matter fixed for committal hearing

APPEARANCES:

Counsel

Solicitors

For the Applicant:

Mr Marc Fiskén

VicPol Prosecutions

For the Respondent:

Mr Patrick Allen

Patrick Allen Law

HER HONOUR:

1. 'JA' is the accused in this matter. He is now 18 years old, having been born on 2 December, 1999. He has been charged with offences allegedly committed on 9 November 2017, three weeks before JA turned 18. The offences include intentionally causing serious injury in circumstances of gross violence contrary to s15A of the *Crimes Act 1958* (Vic), robbery contrary to s75 of that Act and committing an indictable offence whilst on bail contrary to s30B of the *Bail Act 1977* (Vic). JA has no prior criminal history.
2. The police informant applies pursuant to s356(3)(b) of the *Children, Youth and Families Act 2005* (Vic) ('CYFA') for an order that the charges be uplifted, submitting that exceptional circumstances exist which make this matter unsuitable to be determined summarily in the Children's Court.

CIRCUMSTANCES OF THE ALLEGED OFFENDING

3. The allegations giving rise to the charges can be briefly summarised.
4. On Thursday, 9 November 2017 at 11.00pm the victim in this matter, 'PD', was walking along [location removed] Road on his way home. PD is aged 47 years, and has a pre-existing diagnosis of dementia. At the intersection of [location removed] Avenue, PD came across JA and the co-accused who is aged 15 years, who were walking in the opposite direction. Until that time, the victim was not known to either accused.
5. CCTV cameras capture aspects of the interaction between the three at the intersection.
6. PD sat with both accused on the footpath and nature strip of the intersection, talking and smoking cigarettes for close to thirty minutes. PD then stood up and is seen to walk away from the intersection. PD walks with a distinct limp that is captured on the CCTV footage. The co-accused, followed by JA, follow the victim. Shortly after, the co-accused grabs the victim by his jacket and whilst holding his jacket, pulls him back to the intersection. At the intersection, the victim is spun to the ground. The co-accused then drags the victim along the ground by the collar to [location removed] Avenue. Until this point, the CCTV appears to show the accused walking behind the victim and co-accused.
7. At the intersection, the prosecution allege that whilst on the ground and holding a fence for support, JA knees the victim directly to the head, causing him to let go of the fence and fall to the ground. Once on the ground, the prosecution allege both JA and the co-accused repeatedly kick and knee the victim to the head, knocking him unconscious. Whilst prone on the ground, it is alleged that JA stomped twice on the victim's head. It is this conduct that is said to constitute the charge of intentionally causing serious injury in circumstances of gross violence by JA continuing to cause injury to the victim whilst he was incapacitated.

8. The prosecution allege that JA then stole a folding pocket knife that was in the victim's jacket which he handed to his co-accused, constituting the charge of robbery.
9. Two males driving along [location removed] Avenue observed the two accused standing next to the victim on the ground. They returned to the intersection and stopped their car to make inquiries about the victim's welfare. The victim was observed with facial injuries, bleeding heavily from his head and in difficulty breathing. The witnesses spoke with the accused who both denied knowing what had happened to the victim. The men then provided first aid to the victim to assist his breathing and called 000. JA and the co-accused told the witnesses they had a curfew and had to leave before police arrived. They left on foot and headed to [location removed] Station where they are captured on CCTV footage at 11.33pm.
10. The victim was taken by ambulance to the Royal Melbourne Hospital with extensive facial injuries, major facial swelling and persistent upper airway haemorrhaging.¹ He was placed in an induced coma for treatment and remained in a coma until 17 November, 2017 on which date he had surgery for multiple facial fractures, a broken jaw and a broken nose. It is not known, at this early stage, whether the victim suffered any permanent brain damage as a result of the assault. He will require extensive rehabilitation. A statement of the victim's carer indicates that the incident will have a profound impact on the victim's future quality of life, employment and level of independence.

THE LEGISLATION

11. Section 356(3) of the CYFA provides that if a child is charged 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 s318 of the *Crimes Act 1958* (culpable driving causing death) ('the excluded offences'), the Children's Court must hear and determine the charge summarily unless either:
 - (a) before the hearing of any evidence the child objects; or
 - (b) at any stage the Court considers that the charge is unsuitable by reason of exceptional circumstances to be determined summarily.
12. A charge that is not heard summarily by reason of s356(3)(b) must proceed to committal and the Court must give reasons for declining to determine the charge summarily.

¹ Patient Care Record, Royal Melbourne Hospital, 9 November, 2017 entry.

EXCEPTIONAL CIRCUMSTANCES UNDER SECTION 356 OF THE CYFA

13. The meaning of ‘exceptional circumstances’ has been considered in the context of s356 of the CYFA in a number of matters in the Supreme Court and the Court of Appeal, most notably in *D (a child) v White*,² *A child v A Magistrate of the Children’s Court and Ors*³ and *DL (a minor by his litigation guardian) v A Magistrate of the Children’s Court* (‘DL’)⁴ to which I have had regard.
14. In the decision of *K v Children’s Court of Victoria and Anor*,⁵ Justice T Forrest extracted the relevant principles from these authorities, summarising them as follows (at [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.*⁶
15. Consistent with the authorities, Justice T Forrest stated (at [27]) that a consideration of ‘exceptional circumstances’ must be determined on the facts of each case.

² [1988] VR 87.

³ Unreported, Supreme Court of Victoria, Cummins J, 24 February 1992.

⁴ Unreported, Supreme Court of Victoria, Vincent J, 9 August 1994.

⁵ [2015] VSC 645.

⁶ Citations omitted.

THE CONTENTIONS OF THE PARTIES IN RELATION TO THE APPLICATION

The Applicant's submissions

16. The prosecution, in its written submissions and expanded upon in oral argument, relies upon a number of factors in order to establish that the charges are unsuitable to be determined summarily. The prosecution submits that a combination of factors render the case exceptional:
- The nature and gravity of the alleged offence in that the accused, in concert with the co-accused, is alleged to have inflicted “serious violence on the victim that will have a life changing effect on him”;
 - That at 17 years, 11 months at the time of the alleged offence, the accused is at the upper limit of the age range of the Children’s Court; and
 - That the overall administration of justice, as it affects the community and the accused, is best served by the availability of the full range of sentencing dispositions available in a higher jurisdiction.
17. The prosecution accepts that JA has been diagnosed with an IQ of 66 placing him in the range of people with a mild intellectual disability and that this is a relevant consideration. However, it submits that this is factor that is outweighed by the gravity of the alleged offending and the age of the accused.
18. Further, that whilst the accused has no prior criminal history, the prosecution contends it is relevant that the serious offending alleged to have occurred 9 November 2017 represents a serious escalation in violent offending that is alleged to have been committed by the accused on 10 June and 14 June, 2017 and whilst the accused was on bail.

The Accused's submissions

19. The application is opposed by the accused.
20. The submissions of the defence place emphasis on the authorities which make it clear that the Children’s Court should only surrender its jurisdiction with ‘great reluctance’.
21. As to the context in which exceptional circumstances must be considered, the decision of *DL* is relied upon in which Justice Vincent observed as follows:

“[A] legislative scheme has been devised with respect to the conduct of criminal proceedings involving young persons. It is sufficient, I think, to state that for very good

reasons, our society has adopted a very different approach to both the ascertainment of and response to criminality on the part of young persons to that which is regarded as appropriate where adults are involved. It is only where very special, unusual, or exceptional, circumstances exist of a kind which render unsuitable the determination of a case in the jurisdiction specifically established with this difference in mind, that the matter should be removed from that jurisdiction to the adult courts.”⁷

22. Whilst acknowledging the serious nature of the alleged offending, the submissions on behalf of JA contend that certain aggravating features are absent in that the alleged offending was not prolonged, in fact, was over “in a matter of minutes”. The offending was not, it is argued, sophisticated or premeditated and is absent other aggravating features such as the presence or use of a weapon. Further, it is submitted the evidence is weak on the question of whether the victim was unconscious at the time JA is alleged to have stomped on him, or that he had any knowledge of the victim being unconscious. Moreover, it is submitted there is no evidence the offending was planned, or that the accused befriended the victim in order to assault him later. It is submitted that the offending conduct is not at the high end of seriousness for this type of offence.
23. It is further submitted that factors personal to the accused are also highly relevant, including the absence of any prior criminal history. Most significantly, the submissions refer to and rely on the neuropsychological assessment undertaken by Dr Linda Borg, Senior Clinical Neuropsychologist on 18 December, 2017. In her report dated 27 December 2017, Dr Borg concludes that JA “demonstrates a mild intellectual disability”, with a Full Scale Intelligence Quotient (IQ) of 66, with “symptoms consistent with a diagnosis of Intellectual Disability”. In her report, Dr Borg states:

“[JA] demonstrates a Full-Scale IQ of 66, placing him in the range of a mild intellectual disability. His literacy and intellectual functioning, places him at a Grade 3-4 level. Hence, his mental age and emotional maturity is equivalent to a 9-10 year old level. There does not appear to be evidence to indicate any form of learning difficulty, rather his neuropsychological profile is indicative of bilateral cognitive difficulties consistent with intellectual disability”.

24. It is submitted that JA’s previously undiagnosed intellectual disability, his age, his absence of priors combined with the availability of treatment for JA’s binge drinking problems in the context of a supportive and stable family environment are all highly relevant sentencing considerations, particularly having regard to his prospects of rehabilitation. It is also argued that the administration of justice is advanced by this matter remaining in this jurisdiction where the co-

⁷ At page 4.

accused has entered a plea and is to be sentenced in the Children's Court. It is submitted that having regard to the role of the co-accused, parity will be a relevant sentencing consideration.

25. The primary contention of Counsel for the accused is that the Children's Court, having regard to these relevant sentencing considerations, would have adequate sentencing options and range with which to deal with the charges, noting that the maximum sentence that can be imposed by the Children's Court is (with effect from 30 November, 2017) three years' detention in relation to a single charge or a maximum of four years' detention in the case of an aggregate sentence.⁸

ANALYSIS

26. 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 intentionally causing serious injury in circumstances of gross violence contrary to s15A of the *Crimes Act 1958* carries a maximum penalty of 20 years' imprisonment and that, other than where a special reason exists, a non-parole period of four years must be fixed under s10 of the *Sentencing Act 1991* (Vic). The charge of robbery carries a maximum penalty of 15 years' imprisonment.
27. Taking the prosecution case at its highest, the allegations against the accused are serious. It is said that JA together with the co-accused, violently and repeatedly assaulted a vulnerable victim by kneeling, kicking and punching him to the face. This occurs after the victim had walked away from the two and apparently without provocation. When the victim has fallen to the ground, appearing unconscious and unable to defend himself, the accused is alleged to stomp twice on his head resulting in significant facial injuries and bleeding. Despite the intervention of others, both accused leave the scene without lending assistance to the victim. The prosecution case is that the co-accused were complicit in the offending. The accused was on bail at the time of the offending for charges involving earlier alleged acts of violence.
28. I have previously outlined the injuries suffered by the victim. They were significant and serious facial injuries. Although the long-term effects of the head injury on his cognitive functioning is as yet unknown, the victim will require extensive rehabilitation. The offending will have a significant impact on his future quality of life.
29. I accept there is an absence of other aggravating features found in other cases of serious assault, such as the use of a weapon or evidence of extensive planning. However, this is also a case with other aggravating factors present, as I have outlined. The ability to point to absent

⁸ CYFA, s413. See also s52 of the *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017*, and Schedule 6, s1(3) of the transitional provisions.

aggravating features does not, in my opinion, preclude a characterisation of the alleged offending as a serious example of this type of offence, particularly having regard to the various circumstances that may constitute 'gross violence' under s15A(2).

30. Any consideration of the role ascribed to the accused must, given the early stage of these proceedings, be treated as a provisional assessment only. I note that the accused has not entered a plea to the charges and no findings have been made by the Court. Further, beyond a consideration of some of the material contained in the hand-up brief and having viewed the CCTV footage, I have not had the benefit of hearing evidence in the proceedings.
31. It is relevant however, that in his record of interview JA makes certain admissions to the offending. As to his role in the assault on the victim, JA says he "bashing him, stomping on his face", stating he "only stomped on his face once" not twice as alleged by the prosecution. The CCTV footage, whilst of a poor quality at times, appears to show JA stomping in the direction of the victim's head when the victim is prone on the ground. In my view, the prosecution case could not be described as weak in relation to the serious offence of intentionally causing serious injury in circumstances of gross violence. In contrast, the role ascribed to JA in relation to the robbery is not as strong, being largely reliant on the (presently) inadmissible admissions of the co-accused.
32. The accused was 17 years, and 11 months of age at the time of the offending. He has no criminal history but faces charges relating to two earlier incidents involving allegations of violent offending on 10 and 14 June, 2017.
33. The alleged offending on 10 June 2017 involves an assault on a victim in [location removed], of which the victim has no memory, having been left unconscious by the assault. The victim sustained multiple lacerations, bruising and swelling to the face requiring hospitalisation. Items stolen from the victim, including a bankcard, were used at [location removed] shopping centre to purchase various items. The accused has made admissions to being identified in CCTV footage at [location removed] shopping centre. The prosecution allege he is also identified in a photo taken on the victim's iPhone with an unidentified co-accused. With the limited information available to me, I am unable to assess the strength of the prosecution case in this matter.
34. The alleged offending on 14 June 2017 involved an alleged assault and affray committed at [location removed] shopping centre where it is alleged the accused punched the victim four times to the head, leaving him motionless on the ground. It is alleged the accused again kicked him to the head before leaving. The victim suffered a fractured eye socket and bruising to the face. In his record of interview, the accused made admissions to the offending and to punching

and kicking the victim as alleged. At the time of the alleged offending on 9 November 2017 he was on bail set by police following the 14 June assault.

35. If the alleged offences are proved, the charges the subject to this uplift application would represent a rapid escalation in violent offending behaviour by the accused, when on bail.
36. Also relevant to the application is a consideration of the factors personal to JA. There is force in the accused's submission that Dr Borg's assessment is of significance. Dr Borg has now assessed that JA, with an IQ of 66, falls within the range of someone with a mild intellectual disability. The accused's cognitive disability impacts, in the opinion of Dr Borg, on his reasoning, problem solving, judgement and learning. If the charges are found proved, these considerations will be highly relevant to sentencing, particularly as to JA's moral culpability.
37. Also relevant to sentencing will be the accused's age, his absence of priors and his prospects of rehabilitation. In that regard, I note that when assessed by Dr Borg he expressed remorse for his actions and in particular, whilst remanded and now on bail, has demonstrated positive steps towards his rehabilitation. JA's supervised bail progress report, prepared by Youth Justice on 24 January, 2018 outlines these positive steps including enrolling in a panel beating course, attending TAFE, engaging with YSAS drug and alcohol service and volunteering with his church. JA continues to be supported by his family.
38. As highlighted on behalf of the accused, where the offending is alleged to have occurred in company, the sentencing principle of parity is enlivened. However, it is notable here that the co-accused is significantly younger than the accused, being aged 15 at the time of the offending.
39. Whilst these matters are relevant and acknowledged, they must be considered and balanced against the severity and gravity of the alleged offending in determining this application. In my view, this is a grave example of the offence of intentionally causing serious injury in circumstances of gross violence. That this is a serious offence is reflected in the maximum penalties applicable to adults. The facial injury suffered by the victim was significant with potential life-long consequences. The accused was 17 years and 11 months old at the time of the offence, at the very upper range of the characterisation of a 'child' as defined in the CYFA.
40. Balancing each of these considerations, I am satisfied that exceptional circumstances exist within the meaning of s356(3) of the CYFA, and that the charges should be fixed for committal hearing. In doing so, I consider that the sentencing court needs to be able to consider the fullest possible range of sentencing options available under the *Sentencing Act 1991*⁹ should

⁹ Including under s586 of the CYFA which gives a higher court the power to sentence a child to detention in a youth justice centre under Subdivision (4) of Division 2 of Part 3 of the *Sentencing Act 1991*.

the charges be found proved, and not limited to the maximum jurisdictional limit of this Court. Other sentencing considerations, including the age of the accused, his cognitive functioning and prospects of rehabilitation, will also remain relevant and can be taken into account when sentencing.

41. I have referred to the fact this application is being heard at an early stage of these proceedings, noting that the matters are yet to resolve. If the charges were to resolve on less serious alternate charge/s or on an agreed basis other than as outlined in these reasons, then the question of jurisdiction may need to be further considered. If this were to occur following committal, the matter could be remitted to the Children's Court.
42. The application for uplift pursuant to s356(3) of the CYFA is granted. The charges will be fixed for committal hearing in this Court.

Judge A Chambers

President

Children's Court of Victoria