

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

Court Reference: H13414924

Victoria Police

Informant

v

FT

Accused

JUDGE: HER HONOUR MAGISTRATE BOWLES

DATE OF HEARING: 10 and 22 January 2018

DATE OF JUDGEMENT: 6 March 2018

CASE MAY BE CITED AS: Victoria Police v FT

MEDIUM NEUTRAL CITATION: [2018] VChC 2

REASONS FOR DECISION

Catchwords: Accused pleaded guilty to driving a motor vehicle with more than the prescribed concentration of alcohol under s 49(1)(f) of the *Road Safety Act 1986 (RSA)* and other offences under the *Road Safety (Drivers) Regulations 2009 (Regulations)* – mandatory penalties required for certain *RSA* offences, namely the s 49(1)(f) offence – construction of the *Children, Youth and Families Act 2005* and *RSA* – having regard to the public policy principles underpinning the *RSA* and specific licensing regime in the *RSA* and *Regulations* – ruling that the mandatory provisions in the *RSA* apply to children and young people who have been found guilty in the Children's Court of relevant road safety offences.

APPEARANCES: Counsel

For the Prosecutor: Senior Sergeant Ferdinands

For the Defence: Mr Patrick Indovino

## HER HONOUR:

1. FT has pleaded guilty to driving a motor vehicle with more than the prescribed concentration of alcohol in her breath (s 49(1)(f) *Road Safety Act 1986 (RSA)*), driving a vehicle without an experienced driver sitting next to her (*Regulation 46(2) Road Safety (Drivers) Regulations 2009*) and being a learner driver, failing to display "L" plates (*Regulation 47 Road Safety (Drivers) Regulations 2009*). She is now 18 years of age. She was 17.6 years of age when the offences were committed.
2. FT resides with her family. One of her parents is regrettably restricted to a wheelchair. FT completed Year 12 last year and works part-time at [employer name removed]. She has been accepted into a [title removed] tertiary course. As at 22 January 2018, FT had completed 100 hours of driving. She is required to complete 120 hours of driving before being eligible to sit for her driver's licence.<sup>1</sup> FT does not have a criminal history and there are no outstanding police matters. She pleaded guilty at the earliest opportunity, being at the first mention.

## THE CIRCUMSTANCES OF THE OFFENDING

3. At 3.02 am on 23 July 2017, FT was intercepted by police whilst she was driving in [location removed]. She was the holder of a Victorian learner's permit. "L" plates were not displayed on the vehicle. Her sister was in the front passenger seat. She is the holder of a probationary driver's licence and accordingly is not an 'experienced driver', as defined in *Regulation 21 Road Safety (Drivers) Regulations 2009*.
4. A preliminary breath test was administered on FT which tested positive for the presence of alcohol. She accompanied the police to the [location removed] Police Station and, at 3.52 am, she furnished a sample of breath. The breath analysing instrument recorded a reading of 0.039% concentration of alcohol.
5. On the evening in question, FT had attended an 18<sup>th</sup> birthday party and consumed three mixed drinks. She wanted to purchase some food at McDonald's and asked her sister to come with her when she drove to the store. As a result of a routine intercept by the police, she was requested to pull over. There was not anything untoward about her driving which attracted the attention of the police. When she was intercepted, she was co-operative with the police and frank about the alcohol she had consumed.

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<sup>1</sup> In this Decision, I have referred to FT's licence/permit as I am unaware as to whether she has obtained her driver's licence in the interim.

## THE ISSUE BEFORE THE COURT

6. Both parties agreed that the *RSA* applies to children and young people appearing before the Children's Court. The *RSA* includes a number of provisions which, when the criteria are satisfied, requires the Court to impose mandatory penalties. The question before the Court is whether the mandatory provisions apply to children and young people appearing before the Children's Court. In the circumstances of this case, if the mandatory penalties apply, as a result of the finding of guilt in respect of s 49(1)(f) *RSA*, the Court would be required to cancel FT's learner's permit or licence and disqualify her from obtaining one for a minimum of 3 months.<sup>2</sup> In addition after the period of disqualification has been served, upon applying for her learner's permit or licence, it would be mandatory for an alcohol interlock condition to be imposed for a period of 6 months.<sup>3</sup>
7. The prosecution submitted that the mandatory penalties in the *RSA* do apply in the Children's Court. The defence submitted that there was a discretion vested in the Children's Court for the mandatory provisions in the *RSA* not to apply and in the circumstances of this case, it was submitted that that discretion ought to be exercised and there should not be any interference with FT's learner's permit/licence.
8. Written and oral submissions were made by the parties. In summary, they were as follows.

## SUBMISSIONS MADE BY THE PROSECUTION

9. Section 516(1)(a) *Children, Youth and Families Act 2005 (CYFA)* provides that the Children's Court has jurisdiction to hear all summary offences against a child. FT has been charged with summary offences pursuant to the *RSA*. It was submitted that s 50 *RSA* applies to all accused, including a child who has contravened s 49(1)(f) *RSA* and, accordingly, the Children's Court is required to impose a mandatory minimum disqualification period.
10. Whilst s 50AAA refers specifically to the Magistrates' Court, the combined effect of ss 516 and 528 *CYFA* provides for the powers of the Magistrates' Court to be exercised in the Children's Court.
11. Reliance was also placed on s 29 *RSA* which provides that a person disqualified pursuant to the *RSA* by the Children's Court may appeal against the order.
12. The prosecutor also referred to s 356B *CYFA* which provides that the diversion scheme in the Children's Court does not apply to offences that attract a minimum or fixed

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<sup>2</sup> Section 50(1A) *RSA*

<sup>3</sup> Section 50AAA and Schedule 1B Item 14A *RSA*

sentence or penalty including cancellation or suspension of a licence or permit to drive a motor vehicle and disqualification under the *RSA*.

13. It was further submitted that the *RSA* is beneficial legislation and it is in the interests of community safety for the mandatory penalties to apply, that is, for FT's learner's permit/licence to be cancelled and for there to be a delay in her being able to obtain her licence. The cancellation period will also provide the opportunity for her to reflect and mature.

#### **SUBMISSIONS MADE BY THE DEFENCE**

14. There is no express reference in the *RSA* or the *CYFA* or the *Sentencing Act 1991* which specifically provides for the Children's Court to be compelled to cancel and disqualify FT's permit/licence. In the absence of clear legislative intent, the mandatory provisions cannot be said to apply to children and young people appearing before the Children's Court.
15. The matters to which the Children's Court is required to have regard when sentencing are significantly different to those in the adult jurisdiction.<sup>4</sup> Specifically principles of general deterrence,<sup>5</sup> denunciation and punishment are not relevant principles in the Children's Court. Reliance was placed on *R v M and Others* [2008] VChC 4 at [20] per Grant P (as he then was) -

*"We have a Children's Court because we accept, as a community, that young people should be dealt with differently to adults. The difference between the adult system and the system established for young offenders was discussed by Vincent J in the case of R v Evans [2003] VSCA 223... These considerations can and do lead to dispositions which would be regarded as entirely inappropriate in the case of older and presumably more mature individuals."*

16. The Children's Court applies a welfare model when sentencing young people. An overriding discretion in relation to a sentence to be imposed is consistent with the welfare model. The implications which flow from the imposition of a mandatory penalty operates more harshly against a child or young person<sup>6</sup> which is 'at odds' with the welfare model.
17. Whilst s 528 *CYFA* provides for the Children's Court to have jurisdiction to exercise the powers of the Magistrates' Court, that does not require that mandatory powers in the

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<sup>4</sup> Compare s 362 *CYFA* and s 5 *Sentencing Act 1991*

<sup>5</sup> *CNK v The Queen* [2011] VSCA 228

<sup>6</sup> For example, refer to Regulation 21 *Road Safety (Drivers) Regulations 2009* and paragraphs 42 – 44 herein.

Magistrates' Court must be exercised by the Children's Court.

18. Section 356B *CYFA* is not relevant to determining the issue before the court. The provision received Royal Assent on 26 September 2017 which was after the date of the offending. Pursuant to s 114 *Sentencing Act 1991* an increase in penalties applies to offences committed after the commencement of the provision effecting the increase. Reliance was also placed on *Kidman* [1915] 20 CLR 425 and *Polyukhovic* [1991] 172 CLR 510. It was submitted that when s 356B was introduced, it was an opportunity for Parliament to place beyond doubt that mandatory provisions apply to young offenders. However, Parliament did not and FT ought to be afforded the benefit of any doubt.

## THE DECISION

19. I was not referred to any authorities. It is my understanding that there has not been any Superior Court decision determining this issue.

20. I have considered the submissions made. In my view, having regard to:

- the provisions of the *Children, Youth and Families Act 2005*;
- statutory interpretation of the *Road Safety Act 1986*;
- the public policy principles underpinning the *Road Safety Act 1986*; and
- the specific licensing regime in the *Road Safety Act 1986* and the *Road Safety (Drivers) Regulations 2009*

that the mandatory provisions in the *Road Safety Act 1986* apply to children and young people who have been found guilty in the Children's Court of relevant offences contrary to the *Road Safety Act*.

I will provide my reasons.

### ***Children, Youth and Families Act 2005***

21. Pursuant to s 516(1) *Children, Youth and Families Act 2005*:

*"The Criminal Division of the Children's Court has jurisdiction –*

*(a) to hear and determine all charges against children for summary offences..."*

22. Section 516(3) *CYFA* provides that –

*"The jurisdiction given by subsection (1) is additional to any other jurisdiction given to the Criminal Division by or under this or any other Act."*

23. I do not accept the submissions made by Mr Indovino that the references to the

'Magistrates' Court' in the *Road Safety Act*, for example, in s 50AAA means that the mandatory provisions do not apply to the Children's Court. Section 528(1) *CYFA* provides –

*"The court has and may exercise in relation to all matters over which it has jurisdiction all the powers and authorities that the Magistrates' Court has in relation to the matters over which it has jurisdiction."*

24. I have had regard to s 360(5) *CYFA* –

*"If under any Act other than this Act, a court is authorised on a conviction for an offence -*

*(a) to make an order with regard to any property or thing the subject of or in any way connected with the offence; or*

*(b) to impose any disqualification or like disability on the person convicted;*

*then the court may, if it finds a child guilty of that offence, make any such order or impose any such disqualification or disability despite the child not being convicted of the offence."*

25. One interpretation of s 360(5) *CYFA* could be that the mandatory provisions in another Act do not apply to children appearing before the Children's Court. Section 360(5) includes the word "may". However, in my view s 360(5) *CYFA* means that the Children's Court is not required to record a conviction when making an order, for example, disqualifying a person from obtaining a licence. This interpretation is consistent with s 362(1)(d) *CYFA*, namely the need to minimise the stigma to the child resulting from a court determination.

26. The final provision in the *CYFA* to which I shall refer is s 356B *CYFA*. Section 356B excludes a person being charged with certain offences from being eligible for Diversion. Section 356B(1) provides –

*"This Division does not apply to –*

*(a) an offence punishable by a minimum or fixed sentence or penalty, including cancellation or suspension of a licence or permit to drive a motor vehicle or disqualification under the Road Safety Act 1986 or the Sentencing Act 1991 from obtaining such a licence or permit or from driving a motor vehicle on a road in Victoria but not including the incurring of demerit points under the Road Safety Act 1986 or regulations made under that Act or*

*(b) an offence against section 49(1) of the Road Safety Act 1986 not referred to in paragraph (a)."*

27. I have not had regard to this provision in determining the issue before the court, as it was not in operation as at the date of the offending. The Diversion provisions commenced operation on 20 December 2017. I note however that the exclusion of such offences from Diversion is consistent with the view which I have formed, namely that the mandatory provisions of the *RSA* do apply to children and young people guilty of relevant *RSA* offence/s.

### **Statutory interpretation of the *RSA***

28. Section 50 provides for the cancellation of a person's licence and learner's permit and disqualification from obtaining a licence or learner's permit if a person is guilty of a number of specified offences, including being guilty of an offence laid pursuant to s 49(1)(f) *RSA*. The language in s 49 and s 50 refers to "the person", "a person", "the offender" and "the accused".<sup>7</sup> The words "person", "offender" and "accused" are not defined in the definition sections in s 3(1), s 47A in Part 5<sup>8</sup> and nor in the interpretive provisions in s 48 *RSA*.

29. Unlike other provisions in the *RSA*, the words are not qualified by age,<sup>9</sup> for example, restricting these provisions to only apply to persons 18 years and older or specifying that they do not apply to those persons under the age of 18 years. The words therefore bear their ordinary meaning. A child or young person appearing before the Children's Court who is guilty of an offence pursuant to s 49 *RSA* is "a person", an "offender" and an "accused".

### **The public policy principles underpinning the *Road Safety Act 1986***

30. I accept the submission of the prosecution that the *RSA* is legislation which is directed to road users feeling safe on the roads.

31. The purposes of the *RSA* include the following –

*(a) to provide for safe, efficient and equitable road use; and*

*(ab) to set out the general obligations of road users in relation to responsible road use...*<sup>10</sup>

32. Part 5 of the *RSA* is titled '*Offences involving alcohol and other drugs*'. The purposes of Part 5 are contained in s 47. Section 47(a) includes –

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<sup>7</sup> Section 49(6) *RSA*

<sup>8</sup> Part 5 Offences involving alcohol and other drugs sections 47 - 58B

<sup>9</sup> Compare s 84F *Road Safety Act 1986* "... direct a person of or over the age of 18 years..."

<sup>10</sup> Section 1 *RSA*

*“The purposes of this Part are to –*

*(a) reduce the number of motor vehicle collisions of which alcohol and drugs are a cause...”*

33. Accordingly, the purposes include promoting safety on the roads and responsible road use. It is consistent with the purposes of the *RSA* that the mandatory provisions in the Act apply to young offenders appearing before the Children’s Court who have committed specified *RSA* offences.

34. The amendments introduced by the *Road Safety Amendment Bill 2014* included the mandatory cancellation and disqualification provisions and the mandatory interlock condition on persons in FT’s position, that is, a person holding a learner’s permit, before the court for a first offence and recording a reading under 0.05%. In relation to these provisions, on 24 May 2014 the then Minister for Roads, the Honourable Mr Mulder tabled a statement in accordance with the *Charter of Human Rights and Responsibilities Act 2006*.

35. The statement included the following –

*“The rationale for imposing stronger licence sanctions on drink-driving offenders under 26 years of age is that this group of offenders is more vulnerable due to inexperience compared with other driver groups and is overrepresented in traffic crashes resulting in serious injuries and deaths.”<sup>11</sup>*

36. In the Second Reading Speech, he stated as follows –

*“Victoria is an international leader in road safety... Reducing drink driving and drug driving is a major priority in Victoria’s Road Safety Action Plan 2013-2016... The government is responding to community views and the ongoing need to fight drink driving by expanding the alcohol interlock program from only drivers with repeat and high blood or breath alcohol concentration (BAC) readings to all convicted drink drivers. Interlocks are a vital tool in addressing drink driving... This bill addresses Stage 1 and will make interlocks mandatory for every first offender who has a probationary licence or learner permit... The bill will make licence cancellation mandatory for learner and probationary drivers with a first offence below 0.07 BAC... The minimum licence cancellation for a first offence under 0.05 BAC will be three months. The minimum interlock period for first offences will be six months, consistent with current provisions.”<sup>12</sup>*

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<sup>11</sup> Hansard Legislative Assembly 28 May 2014 at page 1740

<sup>12</sup> Hansard Legislative Assembly 28 May 2014 at pages 1741 and 1742



37. The statement, in accordance with the *Charter of Human Rights and Responsibilities Act 2006*, and the Second Reading Speech highlight the overriding public policy principle of community safety.
38. The requirement for the mandatory provisions to apply to young offenders is consistent with and furthers the public policy objective of community safety in the *Road Safety Act 1986*.

**The specific licensing regime in the *RSA* and the *Road Safety (Drivers) Regulations 2009***

39. It was submitted by Mr Indovino that the matters to be taken into account when sentencing a young offender pursuant to *CYFA*<sup>13</sup> as compared with the principles in the *Sentencing Act 1991*<sup>14</sup> militate against the mandatory provisions in the *RSA* applying to children and young people sentenced in the Children's Court. He specifically referred to general deterrence,<sup>15</sup> denunciation and punishment as not being applicable considerations in the Children's Court. He also relied, as I have indicated, upon *R v M and Others*<sup>16</sup> in which Grant P (as he then was) stated –

*“We have a Children's Court because we accept, as a community, that young people should be dealt with differently to adults. The difference between the adult system and the system established for young offenders was discussed by Vincent J in the case of R v Evans [2003] VSCA 223... These considerations can, and do lead to dispositions which would be regarded as entirely inappropriate in the case of older, and presumably, more mature individuals.”*

40. The general principle is that there are different considerations and principles which apply to sentencing children and young people in the Children's Court<sup>17</sup> as compared with sentencing offenders pursuant to the *Sentencing Act 1991*. Pursuant to s 362(1)(c) *CYFA*, for example, the Court is required to have regard to ‘*the desirability of allowing the education, training or employment of the child to continue without interruption or disturbance.*’ The mandatory cancellation of a learner's permit or licence could adversely impact on a child's employment, training or education.
41. A specific licensing regime is provided for in the *Road Safety (Drivers) Regulations*

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<sup>13</sup> Section 362 *CYFA*

<sup>14</sup> Section 5 *Sentencing Act 1991*

<sup>15</sup> *CNK v The Queen* [2011] VSCA 228

<sup>16</sup> [2008] VChC 2 (12/2/2008)

<sup>17</sup> The imposition of a disqualification is referred to in s 360(5) *CYFA*. Whilst it is not a sentencing order as detailed in s 360(1) *CYFA*, s 360 is in ‘Part 5.3 Sentences.’

2009<sup>18</sup> which places a more onerous obligation on younger applicants than others when seeking to obtain their driver's licences.

42. Regulation 21(2) provides that an applicant for a car driver licence must have held a learner's permit for a continuous period, not less than –
  - (a) 12 months for a person who is less than 21 years old; or
  - (b) 6 months for a person who is at least 21 years old but less than 25 years old; or
  - (c) 3 months for any other person.
43. There are additional requirements for an applicant for a car driver licence who is under the age of 21. Those requirements are contained in Regulations 22 and 31. They include that the applicant must have driven a minimum of 120 hours under the supervision of an experienced driver sitting beside them, that the 120 hours must include night driving and that the applicant must maintain a learner log book which must be provided to the Roads Corporation together with a declaration of completion.
44. The impact of the mandatory provisions in the *RSA* can operate more onerously on a young person than on an adult, for example, the requirement in Regulation 21(1)(a) for a person under the age of 21 to hold a learner's permit for a continuous period of 12 months before being eligible to apply for a driver's licence. If a person under the age of 21 has their learner's permit cancelled for 3 months, that person would be precluded from applying for their driver's licence for 15 months, not just for 3 months.
45. In light of the sentencing principles in the Children's Court, I have given this matter great consideration. Such an impact would ordinarily be counterintuitive, that is, for a young person to potentially be more harshly penalised than an adult.
46. However, in my view, the specific licencing regime in the Regulations and the purposes of the *Road Safety Act 1986* evince an intention by Parliament to override the general sentencing principles applicable to young people.

## **CONCLUSION**

47. For the foregoing reasons, in my view the mandatory provisions of the *Road Safety Act 1986* apply when children and young people are guilty of relevant *RSA* offence/s and are being sentenced in the Children's Court of Victoria.

Jennifer Bowles  
Magistrate

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<sup>18</sup> SR No. 95/2009