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SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

SHARP v BOWEN & MORAN; WATSON v RYAN

Winneke CJ, Adam and Anderson JJ

27 April 1973

CHILDREN – CHILDREN'S COURT – MALES AGED 16 YEARS OF AGE CHARGED WITH THE RAPE OF A FEMALE AGED 15 YEARS – CHARGES DEALT WITH SUMMARILY – EACH DEFENDANT CONVICTED AND DISCHARGED ON A THREE-YEAR BOND TO BE OF GOOD BEHAVIOUR – APPEAL BY POLICE AGAINST SENTENCES – SENTENCES ALLEGED TO BE MANIFESTLY INADEQUATE AND INSUFFICIENT – POWERS OF THE CHILDREN'S COURT – SENTENCING OPTIONS – COURT TO HAVE REGARD TO THE WELFARE OF THE CHILD – WHETHER OFFENCES CHARGED AND THE CIRCUMSTANCES WERE SUCH AS TO DEMAND AN IMMEDIATE ORDER FOR DETENTION IN A YOUTH TRAINING CENTRE – POWER CONFERRED ON CHILDREN'S COURT MAGISTRATE – MAGISTRATE'S EXERCISE OF POWER WAS NOT SO PLAINLY AND MANIFESTLY OUT OF PROPORTION – MAGISTRATE DID NOT FAIL TO EXERCISE THE DISCRETION CONFERRED BY LAW – SERIOUS CONSIDERATION SHOULD BE GIVEN BY CHILDREN'S COURT MAGISTRATES AS TO WHETHER CHARGES LIKE THESE SHOULD BE HEARD AND DETERMINED SUMMARILY: *CHILDREN'S COURT ACT* 1958, SS27(1), (3), 28(1)(d), (f).

HELD: Order nisi discharged.

1. In applying the relevant principles, the proper approach is to examine what the Magistrate did within the framework of the *Children's Court Act* ('Act'). Regard must be had to the factors set out in s27(3), to the fact that the charges were being dealt with summarily under the Act by the Magistrate in the exercise of the discretion given to him, and also to the alternative courses of action which were open to the Magistrate. Regard must also be had to the view that it was open on the whole of the material before him for the Magistrate to take the nature of the culpability of the defendants in question.

2. The Magistrate had to act within the framework of the Act he was administering; and having regard to the view he was entitled to take of the evidence, including the whole background of the defendants as disclosed by the reports before him, the Court was unable to say that it was satisfied that in exercising the statutory power conferred upon him by s28(1)(d) he took a course that was so plainly unjust or unreasonable, or so plainly and manifestly out of proportion to the circumstances of the case, as to require an inference to be drawn that he failed properly to exercise the discretion conferred upon him by law. It would be wrong to say that the Magistrate had no discretion except to act under s26(1)(f) of the Act, and if he acted otherwise he would be acting in an improper exercise of his discretion. That is what the informants' argument amounted to.

3. When cases of such a serious kind come before a Children's Court, the most serious consideration should be given by the Magistrate at the outset, and having regard particularly to the limited powers available to him, as to whether he should proceed to hear the charges summarily, or whether the nature of the charges and the circumstances in which the offences were committed are such as to require they be dealt with in the ordinary way on indictment where, if conviction resulted, undoubtedly very heavy punishments would normally follow. In the present cases, the Magistrate saw fit to proceed with the charges summarily, and no challenge was made or could be made in these proceedings to that exercise of the discretion of the Magistrate; and the Court was not in possession of the factors which induced him to take that course in the present cases.

WINNEKE CJ: This is the return of three orders nisi to review decisions of the Children's Court at Melbourne. The orders sought to be reviewed were made by the Children's Court at Melbourne on 29 September 1972 when there were three informations before the Court. Each information charged the defendant with the crime of rape, the defendants were each sixteen years of age, the prosecutrix was a girl aged fifteen years and each of the offences was alleged to have occurred at East Preston on 15 September 1972. The defendants Bowen and Ryan both pleaded guilty to the charges against them, and, in the result, each was convicted of the crime charged. The defendant Moran pleaded Not Guilty, but in the result he was convicted by the Special Stipendiary Magistrate who constituted the Children's Court of the offence of attempted rape.

In the Children's Court the three informations were, by consent, dealt with together, and likewise these three orders nisi to review were, by consent, heard together.

The defendant Bowen admitted three prior convictions, one on 13 October 1967, at the Melbourne Children's Court, being deemed in need of care and protection was liable to a life of crime, and shopbreaking; on 13 February 1970 at the Preston Children's Court a conviction for being unlawfully on the premises and at the Heidelberg Children's Court on 25 June 1970, a conviction for three charges of housebreaking and stealing and one charge of attempted housebreaking. The defendant Ryan admitted one prior conviction for using indecent language. The defendant Moran had no prior convictions.

After hearing the evidence of the prosecutrix and certain other evidence that was called before him, consisting of police evidence and certain character evidence, the Stipendiary Magistrate in each case convicted the defendant and ordered that each defendant be discharged on entering into a recognisance in the sum of $10 with one surety in the sum of $10 to be of good behaviour and to appear for punishment if called upon within three years, and before his nineteenth birthday.

In each case the defendant had been interviewed by police, and had made and signed a record of interview. From the material before the Magistrate, and such of it as has been placed on affidavit before this Court, it appears that the three defendants formed part of a group of eight young men who on this night had, or attempted to have intercourse with the prosecutrix.

There was evidence that on the night in question, after some disagreement with her mother, she had left her home, had gone to this particular vicinity and there got into conversation in the street with another young man. They were there joined by several others, some liquor was consumed, and eventually other young men arrived in a taxi cab. There was evidence that the girl was taken by one young man, who appears to have been the ringleader in the whole episode, named Simpson, into the grounds of the school. He used threats towards her and used violence upon her. It then appears that she was sexually assaulted by eight of these young people.

So far as the three defendants involved in these proceedings are concerned, it did not appear that they had taken any active part in the threats or violence that was used against the girl, but it did appear that they had taken advantage of the opportunity that was presented as a result of the actions of others to have intercourse, or to attempt to have intercourse, with the prosecutrix.

The orders nisi were based on one ground. It was:

> "That, the Magistrate, was in error in that the charge of rape having been proved to his satisfaction the order which he made pursuant to s28(1)(d) of the *Children's Court Act* 1958 was so manifestly inadequate and insufficient in the circumstances as to amount to a failure by the Magistrate properly to exercise his discretion."

As the record of conviction indicated that in the case of Moran the conviction was for attempted rape, Mr Graham for the informant sought leave to amend the information in his case. No objection being taken on behalf of the defendant Moran leave was granted and the ground of the order nisi in his case was amended to read:

> "That the Magistrate was in error in that the offence of attempted rape, having been proved to his satisfaction the order ... was so manifestly inadequate and insufficient as to amount to a failure by the Magistrate properly to exercise his discretion."

In making the orders he did, the Magistrate exercised the statutory power conferred upon him by s28(1)(d) of the *Children's Court Act*. That sub-section provides:

> "28(1) Where a child has been charged before a Children's Court with an indictable offence which the Court has in accordance with this Act proceeded to hear and determine ... and the charge has been proved to the satisfaction of the Court the Court may—
>
> (d) upon convicting him, discharge him conditionally on his entering into a recognizance in a nominal sum and with a surety or sureties to the satisfaction of the Court (including, if the Court so orders, the parent of the child) in such sum as the Court thinks reasonable and proper, to be of

> good behaviour and to appear for punishment if called upon within three years after the conviction and before his nineteenth birthday."

Section 20 of the *Children's Court Act* prescribes the powers that may be exercised. Where there is a conviction for an indictable offence punishable summarily, the relevant powers are those contained in sub-paragraph (d) to which I have already referred, or sub paragraph (e), upon conviction may order the defendant to pay a fine according to law, but not exceeding $100, or sub-paragraph (f):

> (f) upon convicting him for an offence for which apart from this section a sentence of imprisonment may be imposed otherwise than in default of payment of a fine—
>
> (ii) if he is of or over the age of fifteen years at the date of conviction, sentence him to be detained in a youth training centre for a period of not more than two years."

Where as in the present case convictions are recorded in respect of indictable offences, it will be observed that the powers of the Children's Court are circumscribed. Having convicted the defendants, the Magistrate was involved in determining what course to take in the exercise of a discretion; and, as I have said, it is the exercise of that discretion which is the subject of the ground contained in the orders nisi to review. In effect, it is contended for the informants that the Magistrate so exercised his discretion in these cases having regard to the nature of the offences and the circumstances in which they were committed that there must have been some failure properly to exercise the discretion according to law. When the exercise of a discretion is challenged, the principles which are to guide a reviewing Court in judgment of the exercise of the discretion are clearly established by decisions of the highest authority. The principles are conveniently summarised in the judgment of Kitto J in the case of *Australian Coal and Shale Employees' Federation v The Commonwealth* [1953] HCA 25; (1953) 94 CLR 621 at page 627. The learned judge there said:

> "I shall not repeat the references I made in *Lovell v Lovell* [1950] HCA 52; 81 CLR 513; [1950] ALR 944 to cases of the highest authority which appear to me to establish that the true principle limiting the manner in which appellate jurisdiction is exercised in respect of decisions involving discretionary judgment is that there is a strong presumption in favour of the correctness of the decision appealed from, and that that decision should therefore be affirmed unless the court of appeal is satisfied that it is clearly wrong. A degree of satisfaction sufficient to overcome the strength of the presumption may exist where there has been an error which consists in acting upon a wrong principle, or giving weight to extraneous or irrelevant matters, or failing to give weight or sufficient weight to relevant considerations, or making a mistake as to the facts. Again, the nature of the error may not be discoverable, but even so it is sufficient that the result is so unreasonable or plainly unjust that the appellate court may infer that there has been a failure properly to exercise the discretion which the law reposes in the court of first instance."

Those then are the principles that are to be applied in consideration of the present case.

For the informants, Mr Graham submitted that the orders made by the Magistrate were, having regard to the nature of the offences and the circumstances in which they were committed, manifestly insufficient and inadequate, and accordingly that the exercise of discretion by the Magistrate failed. Mr Graham did not contend that the nature of the error in these cases was detectable, and he relied upon the latter portion of the judgment which I have read from the decision of Kitto J, and contended that in these cases the result was so out of proportion to the nature of the crimes committed and to the circumstances surrounding them that there must have been some failure by the Magistrate properly to exercise the discretion reposed in him under the statute.

It was submitted by Mr Graham that an order releasing a defendant on a recognizance under s28(1)(d) is akin to the release of a convicted person on a common law bond to be of good behaviour and to come up for sentence if called upon, the effect of which was shown by the decision of this court in *R v Nicholson* [1951] VicLawRp 36; [1951] VLR 273; [1951] ALR 574 to be that the trial was adjourned without sentence or judgment having been passed. Mr Graham contended, therefore, that in the present cases, in the result, the magistrate having convicted these defendants, had imposed no punishment upon them. He submitted that regard being had to the powers available to the Magistrate under the *Children's Court Act*, the nature of the crimes

charged and the circumstances in which they were committed imperatively demanded in the proper exercise of a discretion an order for detention in a youth training centre under s28(1)(f) of the Act, and he further contended that any order under any of the other paragraphs would be so manifestly inadequate and unreasonable as to involve a miscarriage in the exercise of the Magistrate's discretion. These submissions raise difficult problems for the Court to weigh and determine.

For the defendants, on the other hand, it was submitted that the exercise of the Magistrate's discretion in these cases could not be characterised as so manifestly inadequate or unjust or unreasonable as to justify the court inferring that the discretion was vitiated by error of some kind on the part of the Magistrate. It was submitted that the orders made by the Magistrate must be regarded within the framework of the Act under which the cases were being determined, namely the *Children's Court Act*. It was said that it would be quite wrong to disregard that framework and judge the validity of the orders made on the analogy of what punishment would be appropriate for an adult, or even for a child within the meaning of the *Children's Court Act*, if convicted on indictment. It was further contended that it was most relevant to the exercise of the Magistrate's discretion to have regard to the fact that the degrees of punishment provided by the Children's Court legislation were very limited. Attention was also directed to s27(3) of the *Children's Court Act*, which provides:

> "In making any order in any case the Court shall firstly have regard to the welfare of the child but shall also, where dealing with the child for an offence, have regard to the nature and circumstances of the offence and to the child's character history and previous convictions (if any)".

It was submitted that that provision demonstrates that the approach to be made to punishment under the *Children's Court Act* is very different from that which would be adopted for conviction on indictment. Stress was laid upon the provision that under s27(3) the court is required firstly to have regard to the welfare of the child. It was said it is true that the other considerations must be taken into account — the other considerations being those referred to in the sub-section — but that nonetheless applying the subsection as a whole, the Magistrate was required to have regard to the welfare of the child.

For the defendants it was further submitted that the true effect of the orders made by the Magistrate was that judgment had been deferred, not that the Magistrate had refused to impose any punishment at all. It was further contended that his discretion had not miscarried because he had declined instantly to impose a particular punishment open to him under s26(1)(f), namely an order for detention in a youth training centre.

Counsel for the defendants referred in some detail to the aspects of the evidence before the Magistrate. They submitted that it was open, on the whole of the material before him, for the Magistrate to find that the defendants had not taken part in the threats to and the violence actually used upon the prosecutrix and that their real culpability lay in taking advantage of the opportunity presented to them by the actions of others who were involved in the assaults upon the girl. It was contended that having regard to the ages of the defendants and to their antecedents and to the family and other background as disclosed by the antecedent reports tendered to the Magistrate pursuant to s27(1) of the Act it could not be said that the orders made by the Magistrate, viewed within the framework of the *Children's Court Act*, were so manifestly inadequate or insufficient as to justify this court, acting upon the principles to which I have referred and by which we are bound, in saying that there was error in some way in the exercise of the Magistrate's discretion.

It is important to observe that these proceedings are not appeals against sentence, and they cannot be treated as such, Moreover, they are in no sense re-hearings of the proceedings which were conducted before the Magistrate. In the exercise of the jurisdiction which is appealed to in these cases, it is, of course, not for this court to sentence the defendants or indeed to determine what punishment it would impose if it were dealing with these matters as cases of first instance.

It is also important to recall that this court is not at liberty to set aside the orders made by a Magistrate because it would have taken a different course had it exercised the discretion in the first place. In these proceedings the court is concerned only with the way in which the Magistrate exercised his discretion, and, as appears from the statement of the principles to which I have

already referred, the court cannot interfere with the orders made unless it is satisfied that they are clearly wrong.

In applying the relevant principles, I am of opinion that the proper approach is to examine what the Magistrate did within the framework of the *Children's Court Act*. Regard must, I think, be had to the factors set out in s27(3), to the fact that the charges were being dealt with summarily under the Act by the Magistrate in the exercise of the discretion given to him, and also to the alternative courses of action which were open to the Magistrate. Regard must also, I think, be had to the view that it was open on the whole of the material before him for the Magistrate to take of the nature of the culpability of the defendants in question.

Having regard to the argument put on behalf of the Informant, it seems to me that the real question for this court is whether the proper conclusion is that the nature of the offences charged and the circumstances of the offences were such as to demand an immediate order for detention in a youth training centre under s28(1)(f) to the exclusion of the other powers conferred on the Magistrate by s28 of the Act. It was put by Mr Graham that that was the only course reasonably open to the Magistrate, and that in the circumstances of these cases the exercise of any of the other powers conferred by the section would necessarily have involved an improper exercise of his discretion.

For my part, I am not prepared to say that the discretion of the Magistrate was so circumscribed. What he did was to exercise the power undoubtedly conferred upon him by s28(1)(d) of the Act. I think the effect of that was to defer the imposition of sentence on the defendants on the terms and conditions prescribed therein, and to hold the defendants in bondage, as it were, for the prescribed period. The Magistrate had to act within the framework of the Act he was administering; and having regard to the view I think he was entitled to take of the evidence, including the whole background of the defendants as disclosed by the reports before him, I am unable to say that I am satisfied that in exercising the statutory power conferred upon him by s28(1)(d) he took a course that was so plainly unjust or unreasonable, or so plainly and manifestly out of proportion to the circumstances of the case, as to require an inference to be drawn that he failed properly to exercise the discretion conferred upon him by law. In my view it would be wrong to say that the Magistrate had no discretion except to act under s26(1)(f) of the Act, and if he acted otherwise he would be acting in an improper exercise of his discretion. That is what the informants' argument amounts to.

In my view if the Magistrate thought that the interests of the defendants themselves and the community at large would be best served by deferring sentence and placing the defendants under bondage, then s28(1)(d) of the Act empowered him, I think, to take that course. It should, I think, be said that the Act entrusted the discretion to the Magistrate, and I am unable to say that it was not open to him to consider that matter and act upon it. It is plain enough from what the Magistrate said in the reasons given for the course he took that he was fully aware of the gravity of the crimes in question. If one accepted the argument for the informant, the most he could have done would have been to make an immediate order for detention in a youth training centre up to a period of two years. That would have involved, of course, in the exercise of the Youth Parole Board's discretion, release at any time that the Board saw fit thereafter. It would appear that in this case the Magistrate considered that it would be better in the interests of all concerned, both the defendants and the community in general, to place them under bondage for a period of three years, and to require them to be of good behaviour and to come up for sentence if and when called upon.

For the reasons I have given, I am of opinion that the order nisi in each case should be discharged.

It remains, however, for me to say two things. I want to make it as plain as I can that my conclusion cannot be taken as having any bearing whatsoever as to what would be appropriate punishment to be awarded to these defendants if they had been convicted on indictment for such a serious offence as rape. As has been said on many occasions, the crime of rape is one of the most serious crimes in the criminal calendar. Normally it calls for exemplary and salutary punishment where conviction is upon indictment, and it may well call for the severest punishment available if and when occasion is seen fit to proceed with the charges summarily in a Children's Court.

I desire to add that when cases of such a serious kind come before a Children's Court, the most serious consideration should be given by the Magistrate at the outset, and having regard particularly to the limited powers available to him, as to whether he should proceed to hear the charges summarily, or whether the nature of the charges and the circumstances in which the offences were committed are such as to require they be dealt with in the ordinary way on indictment where, if conviction resulted, undoubtedly very heavy punishments would normally follow. In the present cases, the Magistrate saw fit to proceed with the charges summarily, and no challenge, of course, was made or could be made in these proceedings to that exercise of the discretion of the Magistrate; and we are not in possession of the factors which induced him to take that course in the present cases.

The second matter I desire to add is that we have had the benefit of an attractive argument by Mr Winneke for the defendant Moran, that the Magistrate had no power on the information charging the defendant with rape to convict him of the offence of attempted rape. He submitted that no such power to convict of the alternative offence existed at common law, and he submitted that none was conferred by Statute. However, the conviction of Moran has not been challenged in appropriate proceedings, and is certainly not open to challenge in this order nisi; and having regard to the general conclusion I have reached and expressed, I think it is undesirable to pronounce upon this argument when it is not directly in issue, and when it was advanced only as an aid to the general submission that the order nisi should be discharged.

ADAM J: I agree with the conclusions expressed by the presiding Judge, and, for the reasons which he has given but I would not like it to be thought that I, in any way, personally approve of the ultimate result, which is that two young men convicted of rape and one young man of attempted rape, under conditions which the Special Magistrate described as being "the worst example of pack rape" that he had encountered in all his time as a Magistrate, should have been released on a bond to be of good behaviour.

I must confess I was quite shocked at first on reading the evidence to find that this was the end result; but we have to consider the limits on our own jurisdiction and act according to principle, and it is not, as the Chief Justice has mentioned, our function to do what we personally might have done had we been in the position of the primary Magistrate. But we are here to consider whether he erred in a legal sense in what he did, and, that means whether in law it was permissible for him to have adopted the course that he did, which resulted in the sentence which he imposed.

I agree with what has been said as to that. While not saying I would have acted in the same way, I am quite unable, having regard to the provisions of the *Children's Court Act*, to reach the conclusion that the Magistrate acted so unreasonably in exercising his powers that his discretion has miscarried.

I think the difficulty facing the informant is the greater in his submission that in releasing on a bond the Magistrate erred because he was in any case so limited in the choice of courses that he might take in proceeding to hear this matter summarily. It has been pointed out that in effect the choices open appear to be the course he did eventually take under s28(1)(d) of discharging the accused on entering into recognizances, or of sentencing them to a period of detention in a youth training centre. There was no alternative which for young men of mature mind might well have commended itself as the reasonable one of sentencing to a long period of imprisonment. That was not open to the Magistrate. He had to choose in practice one or other of the two courses which I have mentioned. There are reasons which readily come to one's mind in electing between these two relatively lenient modes of dealing with such a serious offence. I need not go into these reasons as they have been gone into in argument, but they satisfy me that in choosing what might be considered the more lenient alternative under s28(1)(d), the Magistrate could not be said not to have exercised a discretion at all.

If one looks to the purpose of sentencing under this *Children's Court Act* there are various purposes to be served, looking to the welfare of the child – leaving the child or the youth under such home influence as he has bonded to the Crown to be of good behaviour over a period, rather than sentencing him to be detained in a youth training centre where other influences come to bear which notoriously are not always advantageous to the welfare of the young malefactor. It

is a matter for an experienced Magistrate to decide after considering all the factors in the case. Having decided on that course, I do not think it is for us to say that he acted so unreasonably that we cannot allow his decision to stand.

I do feel, as the presiding Judge has said, that when one gets to such grave cases as these – a pack rape in such nauseating circumstances – that the real remedy is for the informations not to be heard summarily but to proceed in the normal way as against an adult, on indictment before a judge and jury where much more freedom is allowed in awarding an appropriate punishment.

That is not before us, but I think it is for Magistrates, when they come to deal with cases of this sort, recognized at one stage to be offences punishable by death, where there are no real mitigating circumstances, to consider very seriously whether in view of their limited powers they should proceed summarily rather than allow the matter to go forward in the ordinary way, particularly when the accused are not infants or very young children but young men of mind who are fully responsible for their actions.

However, that is more or less by the way, and I agree with what the Chief Justice has said, particularly his latter comments, not only on what would be an appropriate penalty if they had been convicted on indictment, but also what he said about Mr Winneke's alternative argument, which I found very interesting, and certainly consider it to be one which raises problems well worthy of consideration. But I think it is not desirable to express any final conclusion upon it, as it is not necessary for the purposes of the proceedings before us.

ANDERSON J: I am at a loss to appreciate the basis on which the special stipendiary magistrate dealt with these matters, and I share the misgivings expressed by the learned Chief Justice and my brother Adam that crimes of such a serious nature as these are dealt with in a Children's Court much as one would deal with a petty larceny.

However, the challenge made by the informants in these orders to review is in respect to the exercise of the Magistrate's discretion, and it has to be remembered that the test is not what one would oneself have done. In this regard the remarks of the Full Court in *Atkinson v Atkinson* [1969] VicRp 34; [1969] VR 278; [1969] ALR 269; (1968) 13 FLR 322 especially those of Barry J are apposite.

The highest that it can be put for the respondents to these orders to review is that the informants have failed to satisfy this Court that the Magistrate erred in the exercise of the particular and peculiar discretion given him by the *Children's Court Act*. Accordingly, with extreme reluctance I am constrained to agree that the orders nisi should be discharged.

As indicated by the learned Chief Justice, this conclusion relieves the Court of reaching a decision as to the further argument advanced by Mr Winneke that in any event the order relating to his client, Moran, should be discharged because, as he put it, of the invalidity of the conviction of his client of attempted rape. I would add, however, that I found the argument cogent.

WINNEKE CJ: The order of the Court is in each case that the order nisi will be discharged. (Discussion re costs). Order nisi discharged without costs in the cases of Bowen and Ryan, and with $200 costs in the case of Moran.
