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SUPREME COURT OF VICTORIA

R (a child) v WHITTY

Harper J

18, 19 January 1993 — (1993) 66 A Crim R 462

CHILDREN – AGED BETWEEN 10 AND 14 YEARS – PRESUMPTION AS TO CAPACITY TO COMMIT CRIME – MAY BE REBUTTED – ONUS ON PROSECUTION – CHILD AGED 12 YEARS 10 MONTHS – SHOPSTEALING – ADMITTED SHE "STOLE" PROPERTY – WHETHER PRESUMPTION REBUTTED.

R., a child aged 12 years 10 months was charged with theft of tracksuit pants from a shop. Evidence was given that R. hid the pants under her dress then left the shop without paying. R. later said she "stole" the pants. On the hearing of the charge it was submitted that R. was not guilty of the offence because (i) she was being no more than deliberately mischievous; and (ii) the prosecution had not proved that R. knew that what she was doing was wrong. The magistrate found the charge proved. On appeal—

HELD: Appeal dismissed.
1. Where a child of 10 years or more but less than 14 is charged with an offence, a presumption arises that the child is incapable of committing a crime. However, the presumption may be rebutted if it is proved that the child knew that any well-ordered society would punish an offender for the act committed.
***Stapleton v R* [1952] HCA 56; (1952) 86 CLR 358; [1952] ALR 929, applied.**

2. Given the age of the child, the circumstances of the offence and the child's use of the word "stole", it was open to the magistrate to conclude the presumption had been rebutted and find the charge proved.

HARPER J: [1] "No civilised society", says Professor Colin Howard in his book entitled "Criminal Law", Law Book Company, 4th Ed., 1982, p343, "regards children as accountable for their actions to the same extent as adults". In this respect, at least, the State of Victoria must be accounted civilised. By s127 of the *Children and Young Persons Act* 1989, it is conclusively presumed that a child under the age of 10 years cannot commit an offence.

The wisdom of protecting young children against the full rigour of the criminal law is beyond argument. The difficulty lies in determining when and under what circumstances that protection should be removed. Under the common law, it could not be called in aid of an accused person aged 14 years or over, but a child under that age is presumed not to have reached what the lawyers call 'the age of discretion'. By a combination of the statutory provision and the common law, the present position in Victoria is that a child of 10 or more but under 14 "is presumed not to know the difference between right and wrong and therefore to be incapable of committing a crime because of lack of *mens rea*". (See Archbold, *Criminal Pleading Evidence and Practice*, 42nd Ed., 1985, par.1.37.)

Although the presumption is rebuttable, the burden of rebutting it is of course on the prosecution. (*J M v Runeckles* (1984) 79 Cr App R 255 at 258, per Mann J). In order to discharge that burden, the prosecution must show that when the child committed the act in question, he or she knew that what was being done was not merely wrong but seriously wrong. (*R v Gorrie* (1919) 83 JP 136, per **[2]** Salter J; *Runeckles* at p259, per Mann J). In the last-mentioned case, again at p259, Mann J added the comment that a court "has to look for something beyond mere naughtiness or childish mischief" and the other judge who heard the case, Robert Goff LJ, said the same thing at p260,

> "The point is that it is not enough that the child realised that what he or she was doing was naughty or mischievous. It must go beyond childish things of that kind. That, as I understand it, is the real point underlying the presumption that a child under the age of 14 has not yet reached the age of discretion, because children under that age may think what they are doing is nothing more than mischievous. it would not be right for a child under that age to be convicted of a crime, even if

> they had committed the relevant *actus reus* and had the relevant *mens rea* specified in the statute, unless they appreciated that what they were doing was seriously wrong and so went beyond childish activity of that kind."

Other courts have framed the test in slightly different terms. In a passage which was subsequently quoted with approval by WB Campbell J in *R v B* (1979) Qd R 417 at p425, Lord parker LCJ said in *B v R* (1958) 44 Cr App R 1 at 3,

> "It has often been put in this way, that in order to rebut the presumption, guilty knowledge must be proved and the evidence to that effect must be clear and beyond all possibility of doubt or, as it has also been put, there must be strong and pregnant evidence that he understood what he did."

One of the leading Australian cases on this point is *R v M* (1977) 16 SASR 589. In that case, a child of 12 was charged with murder, the victim having been hit several times over the head with a brick. In her charge to the jury, the trial judge included the following passage:

> "Ladies and gentlemen, before we adjourned at lunch I had pointed out to you that if you are not satisfied beyond reasonable doubt when John hit Chris over the head with a brick and caused his death he knew what he was doing was wrong in the sense of what ordinary people would disapprove, then he is entitled to be acquitted of any offence."

[3] The accused in that case was convicted: he appealed. In giving his reasons for dismissing the appeal, Bray CJ depreciated the use of the word 'disapprove' in the passage which I have quoted from the charge. It was, he thought, too weak. He added, however, at pp591-2,

> "that the jury would not have been misled into thinking that it was sufficient if the appellant knew that ordinary people would regard hitting the victim several times on the head with a brick as something in the same category as failing to wash his hands before meals, put his clothes away or thank his host after being entertained."

The test, the Chief Justice said, was that laid down by the High Court in *Stapleton v R* [1952] HCA 56; (1952) 86 CLR 358; [1952] ALR 929, that is, whether the accused knew that what he was doing was wrong according to the ordinary principles of reasonable people. The High Court in *Stapleton's* case consisted of Sir Owen Dixon CJ and Webb and Kitto JJ. In a joint judgment, they adopted, at p375, a passage from Pope's *Treatise on the Law and Practice of Lunacy* as admirably setting out the true view.

> " 'Accordingly, in a reasonable system of law, that person only will be criminally responsible who, at the moment of committing a criminal act, is capable of remembering that the act is wrong, contrary to duty, and such as in any well-ordered society would subject the offender to punishment. It is by a reference, such as this, to principles of general morality rather than to the enactments of positive law that the courts of this country have been content to test criminal responsibility in individual cases. That ignorance of the positive law cannot be pleaded as an excuse for crime, is a maxim necessary to the safety of society, and sufficiently near the truth for practical purposes.' It would, therefore, be misleading to raise the issue of capacity or incapacity to know that a particular act is contrary to the law of the land. But a judge may, without fear of misleading, direct the jury that the accused is not responsible for his criminal acts if he has not the mental capacity to know that the particular act is wrong, or, in other words, if he cannot distinguish between right and wrong in regard to the particular act; and this is accordingly the form commonly adopted in practice."

[4] It seems to me that this test is helpful in deciding whether a child between the ages of 10 and 14 knew that what she was doing was wrong. If a child is capable of understanding that the act in question is such as in any well ordered society would subject the offender to punishment, then in my opinion the child has the requisite degree of understanding.

In the case before me, the appellant was charged that "at Sunshine on 20 March 1991 [she] did steal a pair of track suit pants valued at $35.00 being property belonging to Target Australia." She was then nine weeks short of her 13th birthday. The evidence against her was principally contained in a record of interview conducted by the Sunshine Police on the day of the alleged offence. A store detective also gave evidence which in material respects was consistent with the appellant's answers given during the course of the interview. The detective, described in her statement as a "loss prevention officer", recounted how at about 3 pm on 20 March 1991, she observed the appellant attempt to stuff the pants into the jacket which the appellant was then

wearing. Apparently (and I extrapolate this portion of the narrative from the appellant's record of interview) this made the appellant look so odd that any observant loss prevention officer would be put on inquiry. What the appellant said in the record of interview was, "I tried to put it down my jacket but it looked too obvious". Instead, the appellant moved to another part of the store, put the pants up her dress and walked out without paying. Before leaving, she noticed the store detective and pointed her out to her brother who was with the appellant at the time. He told **[5]** her not to worry.

All this points unequivocally to the conclusion that the appellant knew that what she was doing was wrong. Her counsel, Mr Ian Freckleton, submitted however that it was evidence merely of the fact that the appellant was being no more than deliberately mischievous, without appreciating the true nature and quality of her act. At the very worst, he submitted in effect, it was evidence consistent with a merely mischievous intent and was quite insufficient to defeat the presumption.

The appellant herself removes from these submissions the force which they might otherwise have. Relatively early in her record of interview, after recounting how she travelled from Footscray Girls' High School (where she was and may still be a pupil) to Sunshine, the appellant said that she went to an area apparently in the vicinity of the Target store. She referred to this area as "the plaza". To this point, the record of interview contained no reference, either by the police or by the appellant, to any wrongdoing. The appellant was then asked what she did when she was at the plaza last time. She replied, "Went into the shop, Target, and stole those jeans".

The use by the appellant of the word 'stole' is I think conclusive. Nobody had used that word before, at least not in the record of interview. In the context, no other conclusion is reasonably open but that the appellant used it deliberately and appropriately and knew what it meant. Certainly, nothing elsewhere in the record of interview or in the other evidence is inconsistent with that conclusion; and there is much that is entirely consistent with it.

[6] Nor could it be said that the generality of young persons of the age of 12 years and 10 months or thereabouts do not know that the word "steal" means at least a misappropriation that is seriously wrong. The authorities are clear that the nearer the child in question is to the age of 14, the less strong need the evidence be if the presumption is to be rebutted. Nothing is this case suggests that the appellant was outside the generality of young persons in this regard.

The Magistrate found the charge proved but then placed the appellant on an unaccountable undertaking to be of good behaviour for a period of 3 months. In my opinion, no complaint can properly be made about his finding; and no appeal is taken against any other aspect of the case. The appeal against conviction is therefore dismissed.

APPEARANCES: For the appellant R: Mr I Freckleton, counsel. Legal Aid Commission of Victoria. For the respondent Whitty: Mr SP Gebhardt and Mr Devlin, counsel. Director of Public Prosecutions.
