

37/87

SUPREME COURT OF VICTORIA

Re D (a child) v WHITE

Nathan J

27, 31 July, 12 August 1987 — [1988] VicRp 11; [1988] VR 87

CHILD – CHARGED WITH INDICTABLE OFFENCES – ADULT CO-OFFENDER CHARGED – DISPARITY IN SENTENCES IF CHARGES FOUND PROVEN – CHILD SIGNIFICANTLY INVOLVED IN COMMISSION OF OFFENCE – WHETHER CHARGES SUITABLE FOR SUMMARY DETERMINATION – "SPECIAL REASONS": CHILDREN'S COURT ACT 1973, SS14, 15, 26.

Where a child was charged with armed robbery and conspiracy with an adult to commit armed robbery, and the evidence disclosed that the child was significantly involved in the commission of one offence and that the course of justice would be better served by having a joint trial of the co-conspirators, the Children's Court Magistrate was entitled to find that these factors provided special reasons for not determining the charges summarily.

NATHAN J: *[After setting out the relevant provisions of the Children's Court Act 1973, the Crimes Act 1958 (as amended) and referring to the facts and reasons given by the learned Magistrate, His Honour continued]:* ... [9] At the hearing before the Court, D's counsel outlined the fact situation prior to the informant calling evidence. It was then submitted that the Magistrate should hear the case summarily. The Magistrate declined to do so, reciting as his special reason that due to the disparity of penalties, should the court make a finding of fact that at the time of the second incident D was aware of the use of a firearm by Militano during the first [10] incident, the case was unsuitable for summary determination.

The submission to cease hearing the matter would have been persuasive had the Magistrate ruled in a blanket fashion that armed robberies by children were unsuitable cases for summary determination. If the Magistrate had done so it would have amounted to legislating by way of judicial ruling. Because, as I now reiterate, the scheme of the Act is to establish a jurisdiction to deal with all offences committed by children subject only to their or their parents consent, the exception being homicides and those cases where the Court finds special reasons for not doing so. And even so, the Court proceeds as if it were a committal proceeding. (sub-section 4.).

However, on the first occasion, the Magistrate did not limit himself to finding that special reason for divesting himself was constituted by the disparity of sentences. He based his conclusions of "unsuitability" upon the possibility that a Court, after hearing all evidence, might find that at the time of the second incident, D was aware that a firearm had actually been used during the first incident. Therefore, the culpability attaching to the second incident could be of a significantly higher order than that which attached to the first, or alternatively, the use rather than the mere possession of the firearm at the first incident may have made that more culpable than the second. On any view of his reasons, the Magistrate was plainly advertent to the fact situation and the degree of the potential culpability of the child before him.

The offences one would have expected the child to have been charged with, i.e. theft of a motor car, illegal use of a motor car, were not before [11] the Court. It is these types of charges which are of a usual kind before the Children's Court. In this case the Magistrate had plainly put his mind to a potential issue of disparity in the event of different fact situations being established. It was these considerations which led him to the view that the case was unsuitable for summary determination. In my view, he was entitled to find that those reasons constituted special reasons and his decision should not be disturbed.

On the second occasion the submission was made, the Magistrate had additional testimony and D's record of interview available. I have already said he was entitled to elaborate and find additional special reasons for declining to hear the matter summarily. From the reasons pronounced

by him on this occasion, it is plain that he had come to the view that D was likely to have known of the use of a gun on the first occasion, that D himself was prepared to become engaged in ongoing criminal activity. He added a further reason (Part (e)) and that is that it would be appropriate for the co-conspirators to be tried together by the one Court at the same time and place, (although he knew that Militano was dead.) However, Sims is an adult and has apparently been charged. In my view, the Magistrate was entitled to find, additionally as he did, that the course of justice would be better served by having a joint trial of co-conspirators. That of itself provided a special reason for not proceeding summarily before him. Likewise, the Magistrate was entitled to elaborate upon the special reasons already arrived at or to separately conclude that there were at that stage special reasons to cease determining the matter.

[12] What are "special reasons" and when they arise to cause a Court to divest itself of jurisdiction must be matters of discretion, but the following considerations should apply. As the Act invests the Court with embrative jurisdiction in respect of children it should only be relinquished reluctantly. The reason to do so must be special; not matters of convenience or to avoid difficulties. As the power to divest the Court of jurisdiction may be invoked by the Magistrate personally at any stage, before doing so, the Magistrate should ask for, consider and adjudicate upon submissions made by the informant, counsel or the children or parents. The power should be exercised sparingly and reasons for doing so given. The overall administration of justice is the most important criterion. That is justice as it affects the community as well as the individual. In this case a possible joint trial of co-conspirators rather than individual hearings is a significant matter involving the administration of justice. The special reason must satisfy its object, that is it would be unsuitable to determine the matter summarily. Circumstances which might give rise to unsuitability can never be categorized. The following facts are merely a guide:

1. The particular features of the offence, the degree of planning, complexity and maturity of the offender.
2. The antecedents of the offender or particular features peculiar to him/her.
3. The nature of the evidence to be called by either party may render a case unsuitable for summary determination. Forensic or scientific evidence, even evidence about political motivation may be so complicated or contentious as to fall within this class.
4. Whether there are adult co-accused or accessories, and if so in what jurisdiction should the majority of charges proceed.

It follows the Magistrate in this case was entitled to find initially and again at the end of the informant's case that special reasons had arisen to proceed in the manner he did. I dismiss these motions.
