59/89

SUPREME COURT OF VICTORIA

Re L (an infant)

Teague J

28 June 1989

[1990] VicRp 23; [1990] VR 243; 13 Fam LR 372 *sub nom.* Re R (an infant)

CHILDREN'S COURT – INFANT – PROTECTION APPLICATION – APPLICATION FOR BAIL IN RESPECT OF –- BAIL REFUSED BY CHILDREN'S COURT – WHETHER SUPREME COURT HAS JURISDICTION TO ENTERTAIN BAIL APPLICATION – WHETHER CHILDREN'S COURT HAS EXCLUSIVE JURISDICTION: *CHILDREN'S COURT ACT* 1973, SS16, 22.

Section 16 of the *Children's Court Act* 1973 ('Act') gives the Children's Court in its Family Division exclusive jurisdiction with respect to care and protection applications. Notwithstanding the provisions of ss22 and 17 of the Act, the Supreme Court has no jurisdiction to interfere with such applications.
***Webb v Johns* [1983] VicRp 70; [1983] 1 VR 739; (1982) 8 Fam LN N12, followed.**

TEAGUE J: [1] On 14 June 1989 an application for bail under the *Bail Act* was lodged with this court with respect to L whom I refer to hereafter as "the infant". She is aged 5. Two affidavits were filed in relation to that application, one by a solicitor representing the parents of the infant, another by an acting senior protective worker from the Department of Community Services.

When that application came on for hearing before me on Monday last, 26 June, I was informed that the application for bail under the *Bail Act* was not proceeding. An application for bail under the court's inherent jurisdiction was pressed, albeit not strongly. I was referred to differences of judicial opinion in decisions of judges of this court in *R v Blackler* [1981] VicRp 64; [1981] VR 672, *Re Lycouressis* [1983] VicRp 82; [1983] 2 VR 219, and *Re Barnett* [1987] VicRp 30; [1987] VR 367; 24 A Crim R 177. Those decisions were all concerned with appeals from the Magistrates' Court to the County Court after conviction.

I indicated that I considered there was a fundamental problem about any application for bail. The cases that I was referred to were concerned with persons who had been convicted of criminal offences. The infant has not been charged with, let alone convicted of, a criminal offence. I consider that an application for bail as such, however it is put, is inappropriate in relation to a person who has not been charged with a criminal offence. However, leave was sought to press an application under s22 of the *Children's Court Act* 1973 for the release of **[2]** the infant.

I turn to an outline of the relevant facts. The infant was taken from the custody of her parents on 19 May 1989. The protective worker from the Community Services Department, following the procedure laid down under Division 4 of Part III of the *Community Services Act* and Part IV of the *Children's Court Act*, had the infant brought before a justice of the peace on 19 May 1989. The justice of the peace made an order placing the infant with a respectable person as required by s22(4)(b) of the *Children's Court Act*. The protective worker had formed the opinion that the infant had been ill-treated and that her physical, mental and emotional development were in jeopardy. There was some evidence suggesting that the infant had been sexually abused.

On 22 May 1989, an application was made to a Mr Clifford, a magistrate for a Children's Court, seeking release of the infant to her parents. The parents of the infant were represented. Mr Clifford refused to make an order releasing the infant to her parents. On 9 June 1989, the parents made a further application for the release of the infant. That application was made to a different magistrate for a Children's Court, a Mr Walker. He refused that application. Because of constraints on the Children's Court in relation to the hearing of protection applications of any magnitude, a full-scale hearing of this application cannot take place until 24 July 1989. Until that time, as the matter now stands, the child will remain in the custody not of its parents but of the respectable person.

I turn to sub-sects (1) and (2) of s22 of the **[3]** *Children's Court Act*. It was put to me that I had jurisdiction to entertain an application under s22 based on the selection of certain words in the sub-sections. The relevant words in sub-sect. (1) are:

> "Where a child is apprehended ... as a child ... in need of care and protection ... in respect of a matter in which a children's court has jurisdiction and appears before a justice or magistrate or a children's court and the hearing of the ... application is adjourned ... the child ... may be released ... on his parent or some other person entering into a recognizance as provided in sub-section (2)."

The relevant words in sub-sect (2) are:

> "Where in the opinion of the justice ... the child has not the capacity or understanding to enter into a recognizance, the child may be released on his parent ... entering ... into a recognizance ... conditioned for the production of the child at the court to which the ... application ... is adjourned."

It was put that a judge of the Supreme Court can entertain an application under s22 by reason of s17 of the *Magistrates' Courts Act* 1971. Section 17 reads:

> "Every member of the Executive Council every judge of the Supreme of the Supreme Court or of the County Court and every magistrate shall, by virtue of his office and without any further commission or authority than this Act, be a justice."

It is submitted that a judge of the Supreme Court, by reason of his capacity to exercise the powers of a justice, can make an order for the release of the child under s22. I have not had sufficient time to research the history of s17 to better understand the reasons for its presence. In two of the cases to which I have already referred – in *R v Blackler*, Acting Chief Justice Starke and, in *Re Barnett*, Hampel J accepted that there were circumstances where it was appropriate for a Supreme Court judge to act as a justice. They were concerned with the quite different **[4]** context of s75 of the *Magistrates' Courts Act*. That section has now been amended seemingly to take account of the matters that were the subject of those court decisions.

In support of the contention that I should exercise jurisdiction as a justice, it was submitted that it would be appropriate that this court should exercise jurisdiction because the holding of persons in custody was a matter like bail which affected the liberty of the subject. It was submitted that it was appropriate that the Supreme Court, being at the top of the hierarchy of courts, should exercise the final say in relation to matters of custody of this kind, just as it does with bail applications. I concede that I initially felt a certain temptation to adopt that course, but in the end I am not satisfied that it is appropriate to do so. There is in the *Children's Court Act* what seems to me to have been intended to be a self-contained statutory scheme, that only the Children's Court would deal with protection applications, subject to a limited preliminary involvement of justices of the peace and to the right of appeal to the County Court.

The provisions of s16(1) of the *Children's Court Act* are quite strongly expressed concerning the position of that court.

> "The jurisdiction of every other court and of every justice in respect of the matters as to which a children's court has jurisdiction shall cease to be exercised by every other court or justice but no conviction order or proceeding made or given by or had before a court or justice in contravention of this section shall be invalidated or affected by reason only of that contravention."

In a limited way sub-sect (2) supports the position of **[5]** exclusivity. The side note to sub-section reads: "Jurisdiction of other courts superseded." In *Webb v Johns* [1983] VicRp 70; [1983] 1 VR 739 at p746; (1982) 8 Fam LN N12 Beach J, after scrutinizing s161 very closely, said:

> "In my opinion the legislature could not have stated more clearly that no court other than the Children's Court shall exercise jurisdiction in respect of matters as to which a Children's Court has jurisdiction."

I recognize the possibility of my deciding that Beach J had expressed that conclusion too widely, but I do not find convincing any basis for coming to that decision. I take into account that there are within the statutory scheme certain safeguards. There can be further applications made to different magistrates with respect to the release of a child. Having regard to the history of this matter, it is clear that although the initial application was made to a justice in the absence of the

parents of the infant, there were subsequently two applications made to two different magistrates on behalf of the parents when there would have been the opportunity for the merits of the preliminary custody issue to be examined. I have already briefly alluded to the role of the justice under s22. It seems to me to have been intended to be a limited role, limited to emergency situations rather than intended to be one of a continuing nature. There are also a number of practical concerns that would arise if this court were to exercise jurisdiction in matters of this kind. There would not be the opportunity of having a preliminary look at these matters, as is the situation in relation to bail **[6]** applications, to sift out unmeritorious applications. Furthermore, it seems to me that the Supreme Court would not be an appropriate forum to hear disputes of this kind. The options are to have the matter dealt with in the practice court. In matters that could involve substantial amounts of evidence, that seems inappropriate.

The alternative of having the matter referred into the causes list, with the delays in that list, would result in a substantially longer delay than would apply in the Children's Court. A further consideration is that of the relative lack of expertise in family matters of this sort of judges of this court, compared with the Children's Court which has now a family division. Beach J in *Webb v Johns* at p749, adopted comments of Barwick CJ:

> "In these more populous and complex days courts may not ... attend to the detail involved in the protection of children and in ensuring their welfare."

Since the decision of Beach J in *Webb v Johns* the *Children's Court Act* has been amended. No amendment has been made which could be seen as being designed to give the Supreme Court jurisdiction after Beach J said so positively that it had none. The amendments that have been made do provide for a family division of the Children's Court as well as a criminal division. The amendments seem to me to have been intended to cement the position that the court in its family division should exercise exclusive jurisdiction with respect to protection applications subject only to the two limitations that are expressly provided to which I have already referred. In all the circumstances I am satisfied that it **[7]** would be inappropriate for this court to exercise jurisdiction with respect to this application.

Solicitors for the applicant: Darvall McCutcheon.
Solicitor for the respondent: Solicitor for Community Services Victoria.
