04/87

SUPREME COURT OF VICTORIA

R v McGRANE; ex parte WALKER

Nathan J

1 December 1986

CHILDREN'S COURT – HEARING ADJOURNED FOR PRE-SENTENCE REPORT – CHILD PLACED IN REMAND CENTRE PENDING PREPARATION OF REPORT – HEARING ADJOURNED FOR SIX WEEKS – WHETHER STATUTORY LIMIT ON PERIOD OF REMAND: *CHILDREN'S COURT ACT* 1973, SS21, 22, 23, 25.

Having regard to the provisions of Sections 21, 22 and 25 of the *Children's Court Act* 1973, where a Children's Court adjourns the further hearing of a charge for a pre-sentence report and decides to place the offender in a remand centre in the meantime, the Court has no power to adjourn the hearing for more than 21 days.

NATHAN J: [1] I grant leave to the applicant to bring this action by his next friend, and I appoint Julian Gardner to be the applicant's next friend. This matter is the return of an order nisi for *certiorari* granted by Tadgell J on 27th November 1986. His Honour ordered that the Magistrate constituting the Children's Court at Tallangatta show cause why his order, made on 5th November 1986 wherein the Certificate of summary conviction or order which records that the applicant, Scott Walker, on an information laid pursuant to the provisions of Act No. 6231 did inflict criminal damage **[2]** was proved and be adjourned until further hearing of the matter by the Children's Court at Corryong on 17th December 1986 pending the receipt of a pre-sentence medical and psychiatric report. In the meantime that the applicant, Scott Walker, be placed in a remand centre.

The certificate of summary conviction also refers to a protection application, but other than the endorsement of those words on the certificate, I am innocent as to what may have happened or what orders, if any, were pronounced on any, and if so what, protection application. His Honour then went on to recite as a ground that the adjournment of the hearing was in contravention of s21(4) of the *Children's Court Act* inasmuch as the period of the said adjournment exceeded a period of 21 days.

The Magistrate has filed an affidavit before this Court, which recites in part that Scott Walker the applicant pleaded guilty. Further, the Magistrate recites:

> "I found the charge proved, and pursuant to s25 of the *Children's Court Act* adjourned the further hearing to the Children's Court at Corryong on the 17th December 1986 for the purpose of obtaining a pre-sentence medical and psychiatric report. I further ordered that the applicant be placed in a remand centre for the duration of the adjournment."

The mere recitation of the Magistrate's findings as supported by the certificate brings one to an examination of s25 of the *Children's Court Act.* However, before doing so, I observe that, in my view, I am invested with power to deal with applications of this kind. With prerogative writs, the purview of this Court, cannot be excluded unless **[3]** there is clear and specific legislative words to that effect, and although there are some privative words used in s16 of the *Magistrates' Courts Act*, they do not relate to the run of the prerogative writs. I refer to *R v Atterby* [1959] VicRp 101; [1959] VR 800; [1959] ALR 1449, and further observe that the decision of *LeGuier v Simpson* [1980] VicRp 65; (1980) VR 782 does not affect these general observations. The latter decision was restricted to the procedures relevant to orders to review and is not pertinent to prerogative writ proceedings.

That having been said, I return to the provisions of s25(3) which read:

> "The Court may adjourn the hearing of any case for the purposes of having such an investigation

> made [I interpolate a psychiatric investigation] and a report submitted and the child during the adjournment may be permitted to go at large or placed as provided by Section 22."

It is immediate and obvious to remark that the power of adjournment granted by s25 is not uninhibited as is the case in most proceedings. It is a power which is constrained by the provisions of s22, and I reiterate the words, "and the child during the adjournment may be permitted to go at large or placed as provided by s22." Therefore, the power of adjournment can be exercised in two ways: uninhibitedly, if the child is at large, or constrained, as provided by s22.

One turns to s22(4), which reads:

> "If the child is not released as provided in the foregoing provisions of this section or allowed to go at large as provided by sub-s3 of s21, he shall be placed in one of the following ways:
> when practicable expedient and convenient the child may be placed in a remand centre."

[4] Section 22 also uses the word "placement" and accordingly when a child is to be placed under the provisions of s22(1) some assistance from the Act must be had as to what is regarded as being placed. This brings into operation the provisions of s23(3) and (4) and it becomes necessary to examine the legislative framework of Part 4 of the *Children's Court Act* in which both ss21 and 22 appear.

The scheme of s21 is to provide that upon the apprehension of a child in respect of a criminal offence he shall be brought before a Magistrate or a Justice within very narrow time limits, namely, 24 hours. Sub-section 3 recites that in the event of being brought before a court, as defined in sub-s1, the court before whom the child appears, subject to this Act, shall hear and determine the charge, application or other proceedings, or adjourn the hearing or further hearing thereof to another sittings, or that the child, and I am now paraphrasing, may be placed in a manner as provided by s22. When dealing with the placement under s22, s21(4) says:

> "Where a Justice or a Magistrate or Children's Court adjourns the hearing or further hearing of a charge application or other proceeding pursuant to the foregoing provisions of this section and the child is disposed of in a manner provided by paragraph (a) or (b) of sub-s4 of s22, the period of the adjournment shall not exceed 21 days..."

So that accordingly when the child is placed under s22(4)(a)(ii) the placement of the child is governed by the provisions of s21(4) and that is that the adjournment which gives rise to the placement shall not be for a period exceeding 21 days.

[5] A further close examination of s21(4) supports this view; it relates to the words in "the hearing or further hearing." The words are not surplusage and, accordingly, the contention advanced by the Crown that there is a dividing line between adjournments relating to periods prior to conviction, and adjournments relating to periods after conviction. It is contended that this case relates to an adjournment after conviction thus the provisions of s25 apply uninhibited by any constraints; it is accordingly, not subject to the 21 day rule. But, s21(4) does in its terms relate to hearings or further hearings.

A further hearing itself must relate to a proceeding already underway and accordingly is predicated upon the assumption that a hearing itself may be adjourned, as in fact happened in the instant case. Section 21 goes on to provide:

> "that where the child is disposed of in a manner provided by s22."

As it is simply impossible to deny this child was dealt with under this section then indeed the period of the adjournment must be constrained. It can be seen then that s22(4), resulting as it does in the placement of a child in a remand centre is itself constrained by the provisions of s21 and, accordingly, the proper legislative format is that s25 itself refers to s22 and that section itself is governed by the provisions of s21. The adjournment period in this case, which was for a period of six weeks, was for a period in excess of the Magistrate's powers and, accordingly, his order must be quashed.

[6] I add this further observation: my ruling is consonant with commonsense; to rule

otherwise would work a manifest injustice. If the Crown's contentions were correct a child could be remanded indefinitely if his case was adjourned after conviction; but for a child placed on remand prior to conviction the deprivation of liberty would be limited to 21 days.

Obviously the structure of the Act is to safeguard the interests of children and indeed the various provisions relate to a range of options available to Magistrates, so as to use the deprivation of liberty as a last rather than a first resort. That being so, were I to adopt a purposive view to interpreting this legislation, I would be minded to come to the same conclusion as I have by adopting a strict literalist view. In any matter of construction of a penal statute, I am enjoined by bountiful authority to interpret restrictively the words of such a statute and to adopt an interpretation which is beneficial to the person deprived of liberty. Consonant with this principle, I am entrenched in the views already arrived at.

That being so, there is no other conclusion but to quash the Magistrate's order, making the order absolute.
