

35/94

## SUPREME COURT OF VICTORIA

***DL (a child) v BARBOUR and ORS***

Vincent J

9 August 1994

**CHILD - CHARGED WITH AN INDICTABLE OFFENCE - CHILD'S ROLE AND GRAVITY OF CONDUCT CONSIDERED BY CHILDREN'S COURT - OTHER FACTORS SUCH AS CHILD'S PERSONAL CIRCUMSTANCES NOT REFERRED TO - "EXCEPTIONAL CIRCUMSTANCES" - WHETHER MAGISTRATE IN ERROR IN DECLINING TO HEAR CHARGE SUMMARILY: CHILDREN AND YOUNG PERSONS ACT 1989, S134(3).**

**1. Section 134(3) of the *Children and Young Persons Act 1989* invests the Children's Court with a substantial jurisdiction to be exercised unless there are exceptional circumstances. In deciding whether an indictable offence is unsuitable to be determined summarily by reason of exceptional circumstances, the Court is required to give attention to all of the relevant circumstances.**

**2. Where a Children's Court Magistrate declined to determine an indictable offence summarily having regard to the child's role in the commission of the offence and the gravity of conduct, the Magistrate fell into error in failing to take into account other relevant factors such as the child's personal circumstances.**

**VINCENT J:** [1] This is an application for the making of orders in the nature of mandamus, prohibition, and *certiorari*, the substantive effect of which, if granted in the form in which they have been sought, would be to require a magistrate sitting in the Children's Court to continue to hear and determine a number of charges laid against the applicant. The background against which the matter has risen may be described in brief terms. It is alleged that the applicant, on or about 5 February 1994, was implicated in the rape of a young woman. There are a number of charges which relate to activities attributed to him personally, and others arising from his alleged complicity in the actions of four other young men who, it is said, participated in the episode. It appears that all these others are older than the applicant and that proceedings against them will be conducted in the adult courts.

When the case against the applicant came before a Magistrate in the Children's Court, the prosecutor submitted that the situation was one in which the Court should decline to exercise jurisdiction. In so doing, reliance was placed upon s134(3) of the *Children and Young Persons Act 1989*, which provides:

"If a child is charged before the Court with an indictable offence, other than homicide, the Court must hear and determine the charge summarily unless—

(a) before the hearing of any evidence the child objects; or

(b) at any stage the Court considers that the charge is unsuitable by reason of exceptional circumstances to be determined summarily—

and the Court must conduct a committal proceeding into the charge and, in the circumstances mentioned in paragraph (b), must give reasons for declining [2] to determine the charge summarily."

After reading a statement, made to the police by the prosecutrix shortly after the events under consideration, and which has been produced before me, the Magistrate decided that exceptional circumstances existed which rendered unsuitable the determination of the charges in the Children's Court and, accordingly, declined to hear the matter. A Magistrate who so decides is required by the section to provide reasons for the adoption of this course. The reasons underlying this view in the present case were expressed as follows:

"In the present case it is the alleged commission by DL of the offences of rape in the presence of the

co-accused that in my view compounds the gravity of the serious offences with which he is charged, such that I am persuaded exceptional circumstances exist and that these matters should not be determined summarily in the Children's Court. To my mind the allegations of the complainant are such that, if substantiated, it might be said that DL was the instigator of the alleged multiple rapes that occurred. It is not that there are co-accused awaiting committal that leads me to exercise my discretion in the way that I have indicated, but rather the alleged criminal conduct of the defendant in the context of the co-accused allegedly being present and participating that places the gravity of the offences with which he is charged at such a level that it is inappropriate for the Children's Court to hear and determine the charges."

I should add that the Magistrate was conscious of the degree of care which must be exercised when consideration is being given to the question and reference was made to the unreported judgment of Cummins J in *A Child v A Magistrate of the Children's Court & Ors.* (24 February 1992), and the earlier judgment of Nathan J in *D. (a child) v White* [1988] VicRp 11; [1988] VR 87. These, I think represent the only occasions on which the provisions of s134(3) have been the subject of attention by members of [3] this Court. Each of the judges who have looked at this question has drawn attention to the clearly expressed legislative policy with respect to the role and responsibilities of the Children's Court. Specifically, each pointed out that the Court has been invested with a very substantial jurisdiction with the instruction that it is to be exercised unless there are exceptional circumstances which would render inappropriate the conduct of a summary hearing of the charges laid against the child accused.

Neither has attempted to do more than provide assistance of a general kind setting out factors which could be perceived as constituting such circumstances, and which can be seen as requiring, rather than justifying, in the interests of justice, the decision that the Children's Court decline to continue with the matters before it. This is understandable as it is clear enough, that the very statement that circumstances must be exceptional indicates that no comprehensive definition can be attempted of them. In broad terms, I agree with the approach which has been adopted by each of my brothers with respect to this matter. Attention must be given to all of the circumstances which could reasonably be perceived as possessing relevance to the consideration of the question whether the Children's Court is an unsuitable forum for the conduct of the proceeding.

In the present case the gravity of the conduct, and the role ascribed to the applicant in it, appear to be the central, if not the only, factors to which regard was had as these were the only considerations mentioned. They are clearly important [4] features but it is obvious that, as has been indicated, there are other matters to which attention should have been given. No reference was made, for example, of the consideration of any personal factors relative to the young accused. In circumstances where there is no indication that all of the relevant factors were taken into account in the exercise of discretion, and where, on their face, the circumstances alleged do not possess, in my opinion, any exceptional features, it is appropriate for this court to intervene.

As I remarked earlier, it must be borne in mind that a legislative scheme has been devised with respect to conduct of criminal proceedings involving young persons. There is no need in this judgement to set out its detail. It is sufficient, I think, to state that for very good reasons, our society has adopted a very different approach to both the ascertainment of and response to criminality on the part of young persons to that which is regarded as appropriate where adults are involved. It is only where very special, unusual, or exceptional, circumstances exist of a kind which render unsuitable the determination of a case in the jurisdiction specifically established with this difference in mind, that the matter should be removed from that jurisdiction to the adult courts. In the absence of such reasons in the present case, as I have indicated, I am of the view that the Magistrate fell into error.

Now, gentlemen, the question arises as to what orders ought to be made, I should also indicate that I am mindful of something that you said earlier, Mr Coghlan, [5] and that is, that this problem can arise at any point in the proceedings because it may well be that there are considerations which emerge when the matter is looked at more closely which affect the situation. You will recognise that I have said nothing more at this stage than that the Magistrate has drawn attention to two significant factors, but that they do not represent the range of considerations which had to be taken into account, nor was I prepared to assume that they had all been taken into account in a situation where the consequences to the applicant were so significant. That does not preclude a Magistrate who does embark upon the exercise that I have said has to be under

taken before the matter can be dealt with in this way from doing so in future.

**APPEARANCES:** For the plaintiff DL: Mr A McKenna, counsel. Oakley Thompson & Co, solicitors. For the third-named defendant Barbour: Mr PA Coghlan, counsel. Office of Public Prosecutions.

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