24/11; [2011] VSCA 294

SUPREME COURT OF VICTORIA — COURT OF APPEAL

CL (a minor by his Litigation Guardian) v DPP & ORS

Warren CJ and Sifris AJA

5 August 2011

PRACTICE AND PROCEDURE – APPLICATION FOR APPEAL NOT TO BE TAKEN AS ABANDONED – FAILURE TO COMPLY WITH ORDER PROVIDING FOR ELECTRONIC FILING OF AGREED INDEX TO APPEAL BOOK: *SUPREME COURT (GENERAL CIVIL PROCEDURE) RULES* 2005, O64.16.

CHILDREN'S COURT – APPLICATION FOR LEAVE TO APPEAL FROM INTERLOCUTORY DECISION OF TRIAL JUDGE – JUDICIAL REVIEW – FITNESS TO PLEAD – WHETHER CHILDREN'S COURT HAS JURISDICTION TO DETERMINE – NO ERROR IN DECISION OF TRIAL JUDGE – LEAVE TO APPEAL REFUSED: *CHILDREN, YOUTH AND FAMILIES ACT* 2005, SS356(3), 516, 522; *CRIMES (MENTAL IMPAIRMENT AND UNFITNESS TO BE TRIED) ACT* 1997, SS5, 6, 7, 8; *CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT* 2006, S32(1).

CL appeared before the Children's Court charged with many serious offences. An issue arose as to whether CL was fit to plead to the charges. The Children's Court magistrate – in dealing with this issue – stated that that there was some doubt as to whether the Children's Court had power to determine the question of fitness to plead but decided that the charges should proceed by way of committal proceedings. Upon appeal to the Supreme Court, the trial judge held that the magistrate was in error in concluding that there was doubt over the jurisdiction of the Children's Court to hear fitness to plead issues: according to His Honour there was no doubt. In an application for leave to appeal, the solicitor failed to lodge an electronic filing of the agreed index to the appeal book within time. Upon application for leave to appeal—

HELD: Summons dismissed.

1. In relation to procedural issues, having regard to the peculiar procedural circumstances of the case, the application for the extension of time would be granted.

2. The order made by the trial judge was an interlocutory order. Orders refusing judicial review of a ruling made in criminal proceedings in the Magistrates' Court have been held to be interlocutory orders.

***Hornsby v Kaschke* [1999] VSCA 153; [1999] 3 VR 27; (1999) 31 MVR 23, and**
***Kassionis v Magistrates' Court of Victoria* [2002] VSCA 73; MC11/2002, applied.**

3. The order of the trial judge did not dispose of the principal cause, namely the pending charges or the guilt or innocence of the applicant. Although resolving an important matter, the order was ancillary to the principal cause. A matter does not cease to be interlocutory merely because it finally disposes of or resolves an important matter or issue. As long as it does not determine the rights of the parties in the principal cause, an order will usually be interlocutory.

***Dodoro v Knighting & Anor* [2004] VSCA 217; (2004) 10 VR 277; (2004) 43 MVR 231, applied.**

4. The critical question to be determined was whether the Children's Court had jurisdiction to hear and determine the question of fitness to plead.

5. In seeking to resolve this critical question, the trial judge had regard to the *Crimes (Mental Impairment and Unfitness to Be Tried) Act* 1997 ('CMI Act') and gave particular emphasis to s7 of that Act, which provides that the issue of a person's fitness to be tried is a question of fact and '… is to be determined on the balance of probabilities by a jury empanelled for that purpose.' His Honour held that the CMI Act, a comprehensive Act dealing with the very issue, did not specifically or expressly vest the Children's Court with jurisdiction to determine the issue of fitness to plead. If the intention was to include the Magistrates' Court, it would and should have been included.

6. His Honour held that although the defence of mental impairment could be raised in the Magistrates' Court and therefore the Children's Court (s5 of the CMI Act), the question of fitness to plead was a distinct anterior question from the defence of mental impairment. Fitness to plead concerned the capacity of an accused or defendant to participate in the curial process by understanding the significance of a plea and inability to give proper instructions.

7. There was no error in his Honour's decision to the effect that the CMI Act does not confer any jurisdiction on the Children's Court, whether expressly or by necessary implication.
***C L (A minor) v Tim Lee and Ors* [2010] VSC 517,**

8. Further, the *Children, Youth and Families Act* 2005 ('CYAF Act') contains no express conferral of jurisdiction and there was no warrant for implying jurisdiction in relation to such an important matter as fitness to plead.

9. The trial judge also rejected the applicant's claim that s356(3) of the CYAF Act ought to be construed so as to vest jurisdiction in the Children's Court to deal with fitness to plead issues. His Honour found that in light of his reasons, this interpretation was not a possible interpretation and accordingly, s32(1) of the *Charter of Human Rights and Responsibilities Act* 2006 was not attracted. No error had been demonstrated in relation to this issue.

WARREN CJ:
1. I invite Sifris AJA to deliver the first judgment.

SIFRIS AJA:
2. The applicant has been charged with many serious offences. On 18 June 2009, the applicant appeared before the Criminal Division of the Children's Court sitting in Broadmeadows ("the Children's Court"). An issue arose as to the fitness of the applicant to plead to the charges.

3. It is common ground that, but for the question of fitness to plead, the charges could and probably would have been heard by the Children's Court.

4. The magistrate concluded that the matters should proceed by way of committal hearing. His Honour said:

> In this matter I am of the view that there is some doubt as to whether the Children's Court does have power to determine the matter. I am satisfied that s356(3) of the *Children, Youth and Families Act* 2005 applies to this situation. I am satisfied that there are exceptional circumstances and that those exceptional circumstances are encapsulated in the written submission of the Office of Public Prosecution, the written submissions there bolstered by the oral submissions made. That being the situation I am satisfied that the matters should proceed by way of committal proceedings.

5. The applicant sought judicial review of the decision of the magistrate pursuant to O56 of the *Supreme Court (General Civil Procedure) Rules* 2005 (Vic) ("the Rules"). The applicant filed four originating motions. In each case, the first defendant was the informant in respect of each of the criminal charges laid against the applicant. The second defendant in each originating motion was the Children's Court.

6. In the originating motions the applicant sought to quash the orders of the Children's Court to the effect that the charges proceed by way of committal proceedings. The applicant sought relief in the nature of mandamus, requiring the Children's Court to hear and determine each charge in a summary manner.

7. The originating motions came on for hearing before Lasry J of this Court. The applicant asserted jurisdictional error on the part of the magistrate in relation to the jurisdiction of the Children's Court to hear fitness to plead issues.

8. The applicant submitted that, properly construed, the Children, Youth and Families Act 2005 (Vic) ("the CYAF Act") conferred jurisdiction on the Children's Court, either expressly or by necessary implication to hear and determine questions relating to fitness to plead.

9. The respondent submitted that as there was no express provision conferring jurisdiction and in light of the specific provisions of the *Crimes (Mental Impairment and Unfitness to Be Tried) Act* 1997 (Vic) ("the CMI Act"), no implication was warranted. The applicant submitted that the CMI Act was restricted to trials of indictable offences in the Supreme Court or the County Court.

10. The applicant also asserted that the magistrate failed to interpret the relevant statutory provisions in a manner compatible with the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) ("the Charter"). A further submission was made that the Children's Court had jurisdiction to decide fitness to plead issues under the common law.

11. In his reasons for decision, the trial judge stated that the primary issue for determination was whether there was any basis to conclude that the Children's Court had jurisdiction, express or implied, to hear and determine questions relating to the applicant's fitness to plead. His Honour held that it did not have such jurisdiction.

12. The critical question before us today is whether it is arguable that the Children's Court has jurisdiction to hear and determine the question of fitness to plead.

Procedural history

13. His Honour handed down his decision on 16 November 2010. The applicant commenced an appeal against his Honour's decision within the time permitted by the Rules.

14. Following the notices of appeal, the matters were listed for directions on 17 March 2011 before Lansdowne AsJ. On that day, her Honour made a number of orders in relation to the appeal. Order 3 required the filing and service of an agreed revised appeal book index by 24 March 2011.

15. Prior to 24 March 2011, the solicitor for the applicant, James Matthew Gorman, exchanged the draft orders and proposed revised appeal book index in marked up form as required with Erin Finnigan, the solicitor acting on behalf of the Office of Public Prosecutions. However, Mr Gorman failed to comply with Order 3 in that he did not file in electronic form the agreed revised appeal book index on or before 24 March 2011. The effect of non-compliance was that the appeal was taken to be abandoned.[1]

16. The explanation given by Mr Gorman for his failure to comply with Order 3 is that he is not experienced in matters of civil procedure in the Supreme Court, that he was very busy on that day and the failure was inadvertent.

17. In seeking the respondent's consent to the reinstatement of the appeals, another issue became apparent. The respondent raised the requirement of leave to appeal under s17A(4)(b) of the *Supreme Court Act* 1986 (Vic) because it took the view that the decision of the trial judge was interlocutory. This was the first time that the issue of leave to appeal was raised.

18. Despite the late stage at which it was raised, leave is a relevant issue that needs to be determined.

19. The applicant's summons filed 7 July 2011 seeks, as an alternative, leave to appeal if it is required and an extension of time within which to make the application. The first order sought, however, is that the appeal not be taken to be abandoned under r64.16(2)(a) for failure to comply with Order 3.

20. Before dealing with the orders sought in the summons, reference should be made to the notice of appeal.

21. In summary, the proposed grounds of appeal contend that his Honour ought to have found that:

> (a) The Originating Motion of the Applicant should have been granted.
> (b) The Children's Court had jurisdiction to deal with the fitness to plead issue.
> (c) The interpretation of ss516 and 522 of the *CYAF Act* proposed by the Applicant was the correct interpretation.
> (d) The *CYAF Act*, the Charter and the *CMI Act* vested the Children's Court with the jurisdiction to determine the Applicant's fitness to plead issue summarily.
> (e) The Children's Court is jurisdictionally competent to hear and determine indictable matters.
> (f) The Children's Court has implied jurisdiction to deal with the fitness to plead issue.
> (g) The absence of an express provision did not prohibit the Children's Court from dealing with the fitness to plead issue.
> (h) Section 32(1) of the Charter requires the Court to interpret a provision in a way that is compatible with Charter rights. In this case, the relevant sections of the *CYAF Act* ought to have been construed as allowing the Children's Court to hear the fitness to plead issue.
> (i) The Children's Court had jurisdiction under s356 of the *CYAF Act* to deal with the fitness to plead issue.

22. As is evident from the summary, all of the applicant's proposed grounds of appeal effectively relate to the one primary issue: is there any basis to conclude that the Children's Court has jurisdiction to deal with the issue of the applicant's fitness to plead?

23. At present, there is effectively no appeal on foot and it is convenient to deal with the issue of whether leave to appeal is required.

Leave to appeal

24. The applicant submits that the order made by the trial judge was in the nature of a final order and that leave to appeal is not necessary. However as noted above, in the alternative it is submitted that if leave to appeal is required, it should be granted, together with the necessary extension of time as any such application is required to be made within 14 days of the original order in respect of which leave is sought.

25. The respondents submit that the decision was clearly interlocutory and accordingly, leave to appeal is required. The respondents submit further in relation to each of the appeals, that the decision of the trial judge was not wrong or attended by sufficient doubt and that leave to appeal should be refused as any appeal would be futile.

26. In my opinion, the order made by the trial judge was an interlocutory order. Orders refusing judicial review of a ruling made in criminal proceedings in the Magistrates' Court have been held to be interlocutory orders.[2]

27. In *Kassionis v Magistrates' Court of Victoria*[3], the applicant sought orders in the Supreme Court in the nature of *certiorari* and prohibition in relation to orders and rulings made by a magistrate. Pagone J dismissed the originating motion. The applicant sought to appeal the decision of Pagone J as of right. In the Court of Appeal[4], Batt JA (with whom Eames JA agreed) held that the applicant required leave to appeal:

> However, it is clear, in my view, that the order of Pagone J is interlocutory and that accordingly the appellant needs leave under s17A(4)(b) of the *Supreme Court Act* 1986. This is because the order below does not, in the words of Windeyer J in *Hall v Nominal Defendant*, "finally determine the rights of the parties in a principal cause pending between them", the principal cause pending between the parties here being the charges, still undetermined, in the Magistrates' Court. The decision of the Full Court in *Farrow v La Franchi* precisely covers the present case.[5]

28. The order below does not dispose of the principal cause, namely the pending charges or the guilt or innocence of the applicant. Although resolving an important matter, the order is ancillary to the principal cause. A matter does not cease to be interlocutory merely because it finally disposes of or resolves an important matter or issue. As long as it does not determine the rights of the parties in the principal cause, an order will usually be interlocutory.[6]

29. As leave to appeal is required, the applicant must show that the decision of the trial judge is attended with sufficient doubt and that there would be a substantial injustice occasioned by failing to grant the applicant leave to appeal.

30. So far as an extension of time in order to make the application for leave to appeal is concerned, I would, in the peculiar procedural circumstances of this case, grant the application.

Is the decision of Lasry J attended with sufficient doubt?

31. In seeking to resolve the primary issue, the trial judge had regard to the CMI Act. His Honour gave particular emphasis to s7 of that Act, which provides that the issue of a person's fitness to be tried is a question of fact and '... is to be determined on the balance of probabilities by a jury empanelled for that purpose.'

32. The trial judge held that the CMI Act, a comprehensive Act dealing with the very issue, did not specifically or expressly vest the Children's Court with jurisdiction to determine the issue of fitness to plead. If the intention was to include the Magistrates' Court, it would and should have been included.

33. His Honour held that although the defence of mental impairment could be raised in the

Magistrates' Court and therefore the Children's Court (s5 of the CMI Act), the question of fitness to plead was a distinct anterior question from the defence of mental impairment. Fitness to plead concerned 'The capacity of an accused or defendant to participate in the curial process by understanding the significance of a plea and inability to give proper instructions.'[7]

34. In my opinion, there is no error in his Honour's decision to the effect that the CMI Act does not confer any jurisdiction on the Children's Court, whether expressly or by necessary implication.

35. The suggested errors are twofold. First, the applicant contends that although there is no express conferral of jurisdiction, it is not curtailed or prohibited and despite s7 of the CMI Act, the Magistrates' Court is not deprived of jurisdiction. I reject the submission.

36. The fact that the CMI Act does not include or refer to the Magistrates' Court as an applicable court save for some specific matters, does not operate positively to give it jurisdiction by silence or default in relation to a very important matter. This is particularly the case where certain matters are specifically referred to as being applicable to the Magistrates' Court, such as s5. Section 5, which renders applicable the mental impairment provisions of the CMI Act, appears immediately before the unfitness to stand trial provisions, that is ss6 and 7. If these provisions were meant to apply they would have been included in s5. After all, s5 is headed 'Application to Magistrates' Court'. Consequently, any jurisdiction must come from another source.

37. The second suggested error relates to the operation of s5. It was submitted that if a magistrate was able to rule on mental impairment issues, rulings could be given on the suggested related matter of fitness to plead. However, in my opinion the matters are not related for the reasons given by the trial judge. The ability under s5 to deal with mental impairment goes no further than that.

38. Further, his Honour observed that s8(1) of the CMI Act provides that if the question of fitness to plead arises in a committal proceeding for an indictable offence, the accused must be committed for trial and the question of fitness to plead must be reserved for consideration of the trial judge. There is no reference in s 8 to summary jurisdiction. His Honour said:

> If the intention of the Parliament was to provide the Children's Court with the power to determine the issue of fitness to plead then they would have "done well" to include specific words which had that effect.[8]

39. With respect, I agree.

40. The trial judge also held there was no basis to conclude that the CYAF Act either expressly or impliedly invested the Children's Court with jurisdiction to deal with issues relating to fitness to plead. His Honour rejected the applicant's submission to the effect that the CYAF Act was a separate and independent basis for such jurisdiction because of its breadth. It was submitted by the applicant that when properly construed, ss516 and 522 provided a basis for such a construction.

41. In my opinion, there is no error in his Honour's conclusion that when looked at as a whole, the CYAF Act, despite dealing with a number of related and important procedural matters, does not vest the Children's Court with jurisdiction to determine fitness to plead.

42. The suggested error to the effect that on a proper construction of the CYAF Act the Children's Court, a specialist jurisdiction, is given jurisdiction is not open. There is no express conferral of jurisdiction, as is conceded. Further, there is no warrant for implying jurisdiction in relation to such an important matter as fitness to plead.

43. Section 516, a provision relating to jurisdiction, says nothing about fitness to plead and s522 deals with procedural guidelines to promote a proper understanding and comprehension of proceedings by a child.

44. In written submissions and this morning, counsel for the applicant referred to s356 of the CYAF Act. In my opinion s356 assumes that a child is fit to plead. Only then is the section engaged. This follows from the content of the section as it requires, amongst other things, decisions

to be made. Even if it is engaged, it says nothing about the fitness to plead issue and this simply cannot be assumed.

45. The trial judge also rejected the applicant's claim that s356(3) of the CYAF Act ought to be construed so as to vest jurisdiction in the Children's Court to deal with fitness to plead issues. His Honour found that in light of his reasons, this interpretation was not a possible interpretation and accordingly, s32(1) of the Charter was not attracted. In my opinion, no error has been demonstrated in relation to this issue.

46. The notices of appeal raise the issue as to whether the magistrate had jurisdiction under the common law. In my opinion, and given clear authority on the point,[9] no error has been demonstrated in relation to this issue and it is not surprising that the matter was not pressed.

47. His Honour, in a lengthy and reasoned judgment, concluded that the magistrate erred in concluding that there was doubt over the jurisdiction of the Children's Court to hear fitness to plead issues. According to His Honour there was no doubt.

48. In my opinion the decision of the trial judge is not wrong or attended with sufficient doubt and leave to appeal will be refused.

49. In the circumstances, it is not necessary or desirable to deal with the issue of substantial injustice, although as submitted this morning by Mr Trapnell, any injustice is ameliorated to some extent by virtue of a number of sections of the CYAF Act to which he referred.

Appeal abandoned

50. If I am wrong about the interlocutory nature of the matter, I would not order in any event that the appeal be taken not to have been abandoned because I am clearly of the view that any appeal would be futile. As acknowledged, the Court has a broad discretion in this regard and for the reasons given, I would refuse the orders sought in paragraph 1 of the summons.

51. Before I deal with the proposed disposition of the case, I should say that for my part, I would endorse the recommendations made by the trial judge.

Disposition

52. In the circumstances and as no appeal is presently on foot, I would simply dismiss the applicant's summons.

WARREN CJ:

53. I agree.

54. The Court will order that the summons is dismissed.

55. (Discussion re costs)

56. For the reasons I indicated when the application for costs was sought by Mr Trapnell, the Court will exercise its discretion and decline to make an order for costs. Costs will lie where they fall.

57. Accordingly, the orders have already been announced otherwise.

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[1] Rule 64.16(1)(a).
[2] *Farrow v LaFranchi* (Unreported, Supreme Court of Victoria – Appeal Division, Brooking, Hampel and Smith JJ, 7 March 1995) 2; *Monash University v Berg* [1984] VicRp 30; [1984] VR 383, 386; *Hornsby v Kaschke* [1999] VSCA 153; [1999] 3 VR 27, 28-29; (1999) 31 MVR 23; *Kassionis v Magistrates' Court of Victoria* [2002] VSCA 73, [3].
[3] [2002] VSC 65.
[4] *Kassionis v Magistrates' Court of Victoria* [2002] VSCA 73.
[5] [2002] VSCA 73, [3] (citations omitted).
[6] *Dodoro v Knighting & Anor* [2004] VSCA 217; (2004) 10 VR 277, [17]-[20]; (2004) 43 MVR 231 (Callaway JA). His Honour refers to three kinds of interlocutory orders including orders '"forever staying" or dismissing, a proceeding'.
[7] *C L (A minor) v Tim Lee and Ors* [2010] VSC 517, [29].

[8] *C L (A minor) v Tim Lee and Ors* [2010] VSC 517, [53].
[9] *Pioch v Lauder* (1976) 27 FLR 79, 84-86; (1976) 13 ALR 266; 29 ALT 87 (Forster J); *Ebatarinja v Deand* [1998] HCA 62; (1998) 194 CLR 444, [31]; (1998) 157 ALR 385; (1998) 72 ALJR 1499; (1998) 103 A Crim R 535; (1998) 16 Leg Rep C8 (Gaudron, McHugh, Gummow, Hayne and Callinan JJ) and see *R v Abdulla* [2005] SASC 399; (2005) 93 SASR 208.

APPEARANCES: For the applicant CL (a minor by his Litigation Guardian): Mr David Gibson, counsel. Gorman & Hannan, solicitors. For the first-fourth respondents: Mr Douglas Trapnell SC and Mr Ben Ihle, counsel. Office of Public Prosecutions. For the fifth respondent: Ms Joanna Davidson, counsel. Victorian Government Solicitor's Office.
