UPDATES ON CHILDREN'S CRIMINAL LAW ISSUES

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This paper will endeavour to cover some recent updates in criminal law regarding children in New South Wales.

1. **DOLI INCAPAX**:

The law in respect to doli incapax is fairly well settled and the substance of same has not changed or really been updated.

Doli incapax was recently considered in a committal context in the matter of RP v Ellis and Anorm [2011] NSWCA 442 (19 May 2011). The decision is short (7 pages) and worth the read. The decision confirms that the presumption of doli incapax needs to be rebutted by the Crown on all the evidence before the court.

RP was 13 years old. He was charged with an offence contrary to section 33 Crimes Act, the maximum penalty of which is 25 years and accordingly is a serious children's indictable offence.

At the committal hearing the DPP sought to tender the brief to establish to the requisite standard that the offence was made out.

To establish the offence, the DPP were required to establish the specific elements of the section 33 offence and that RP knew, at the time of doing the act, that the act was wrong as distinct from an act of mere naughtiness or childish mischief.

There was a deficit in the brief as to any evidence to rebut the presumption of doli incapax. Despite the deficit the Children's Court at Bidura committed RP on the erroneous understanding that doli incapax was an exclusionary objection that was impermissible at committal.

The Supreme Court in RP confirmed that doli incapax was an element of the offence that the prosecution need to rebut beyond a reasonable doubt (and is not a discretionary exclusion of evidence). The order of the Children's Court (committing the child) was quashed and the matter was remitted to the Children's Court to be dealt with according to law.

The application and significance of this case extends beyond committal proceedings and should be considered in everyday duty/ list work when matters are being dealt with in the absence of the child. For example, when a matter is listed for hearing and the issue (perhaps amongst others) is doli incapax (and there is an absence of evidence to rebut same) submissions can be made that the magistrate when dealing with the matter under section 196 Criminal Procedure Act would not be satisfied that the offence is made out. Similar submissions can be made when a child (under 14 years old) does not appear on the first return date and the Statement of Facts do not address the issue of doli incapax in a manner sufficient to rebut same.

For a detailed paper on doli incapax I refer you to a paper present at a previous Children's Legal Service Conference by Matthew Johnston (available on the CLS Bulletin, Legal Aid website).

2. **FORENSIC PROCEDURES**:

There have been two recent and important decisions in respect to forensic procedures:

R v SA, DD and ES [2011] NSWCCA 60 (28 March 2011)

Prior to this decision it was regularly argued that fingerprints and photographs taken pursuant to section 133 Law (Enforcement Powers and Responsibilities) Act 2002 could not be used for comparison of fingerprints at a crime scene or in photo identification boards in the absence of the Children's Court granting an order for forensic procedure.

In the case of SA (15 yo), DD (14 yo) and ES (15 yo) police took fingerprints and photographs pursuant to section 133. The police did not make any application under the Crimes (Forensic Procedure) Act for an order authorising the taking of fingerprints and photographs. The fingerprints taken were compared to weapons/ exhibits found at the crime scene. The photographs taken were used in identification boards with various witnesses. In the joint trial in the District Court, it was argued that the evidence regarding the fingerprints and photographs should be excluded because an order for a forensic procedure authorising the taking of fingerprints and photographs had not been sought/ granted. The young persons were successful in the District Court in excluding the relevant evidence and the Crown appealed pursuant to section 5F(3A) Criminal Appeal Act. On appeal, the CCA determined that there was no inconsistency between the powers available in the Crimes (Forensic Procedures) Act and the Law (Enforcement Powers and Responsibilities) Act and that:

> The power of the police to take fingerprints and photographs of persons in lawful custody to identify the suspect and to provide evidence of the commission of the offence had been in existence since 1951 at the time the CFPA was enacted. The Act clearly indicated in s 112 that this power should continue and there is nothing in the LEPRA to suggest any change to that policy. Indeed it is clear from that Act the power remains unchanged [para 40].

The appeal court determined that there was no illegality for improper conduct by the police and allowed the Crown appeal and set aside the District Court order that rejected the evidence.

Importantly, section 133 only enables police to taken fingerprints and photographs from persons above the age of 14. An order for a forensic procedure is still required for children under 14 years of age. The objection remains available for child clients under the age of 14.

LK v Commissioner of Police and Anor [2011] NSWSC 458 (20 May 2011)

Prior to this decision Walker v Bugden [2005] NSWSC 898 was regularly used as authority for the blanket proposition that without evidence of a DNA deposit from a crime scene that was suitable for

comparison, the test in section 24(3)(b) Crimes (Forensic Procedure) Act[1] could not be made out as a matter of law.

This issue was considered in LK where Her Honour Fullerton J was not persuaded that Walker v Bugden was authority for the blanket proposition outlined above. Her Honour noted:

- That the court in Walker v Bugden concluded that the absence of a DNA sample was fatal **in that case** because without it there was insufficient factual basis to induce a reasonable belief that a comparison DNA could be undertaken that might provide evidence of the kind required.
- Each application must be considered by reference to an assessment of *existing* facts and whether, in the particular case, they are sufficient to induce a reasonable belief in the mind of a Magistrate that the prospective outcome or result of the forensic procedure, if undertaken, might produce evidence of the relevant kind [para 32].
- Photographic or electronic evidence establishing a suspect's presence at the scene of a crime at a relevant time and/ or a suspects physical contact with an item or items in some way involved with the commission of an offence, or perhaps admissions by a suspect to a similar effect, are examples of evidence that may carry sufficient weight on an application for final orders under s24 of the Act despite the fact that crime scene DNA evidence is unavailable [para 32].

Since LK careful consideration needs to be given to whether various facts, as they exists, are sufficient to found a reasonable belief in the mind of the magistrate that the forensic procedure might producing evidence tending to confirm or disprove the suspect committed the offence. Assumptions, theoretical possibilities and speculation are insufficient to ground a reasonable belief.

3. SECTION 18 AND 19 EVIDENCE ACT:

A common children's court hearing will often involve a parent being required to give evidence against their child for damaging their property or assault.

A parent can object to giving evidence under section 18 Evidence Act:

> 18 Compellability of spouses and others in criminal proceedings generally
> (1) This section applies only in a criminal proceeding.
> (2) A person who, when required to give evidence, is the spouse, de facto partner, parent or child of a defendant may object to being required:
> (a) to give evidence, or
> (b) to give evidence of a communication between the person and the defendant,
> as a witness for the prosecution.
> (3) The objection is to be made before the person gives the evidence or as soon as practicable after the person becomes aware of the right so to object, whichever is the later.
> (4) If it appears to the court that a person may have a right to make an objection under this section, the court is to satisfy itself that the person is aware of the effect of this section as it may apply to the person.
> (5) If there is a jury, the court is to hear and determine any objection under this section in the absence of the jury.

[1] That there must be reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect committed the offence.

(6) A person who makes an objection under this section to giving evidence or giving evidence of a communication must not be required to give the evidence if the court finds that:
(a) there is a likelihood that harm would or might be caused (whether directly or indirectly) to the person, or to the relationship between the person and the defendant, if the person gives the evidence, and
(b) the nature and extent of that harm outweighs the desirability of having the evidence given.
(7) Without limiting the matters that may be taken into account by the court for the purposes of subsection (6), it must take into account the following:
(a) the nature and gravity of the offence for which the defendant is being prosecuted,
(b) the substance and importance of any evidence that the person might give and the weight that is likely to be attached to it,
(c) whether any other evidence concerning the matters to which the evidence of the person would relate is reasonably available to the prosecutor,
(d) the nature of the relationship between the defendant and the person,
(e) whether, in giving the evidence, the person would have to disclose matter that was received by the person in confidence from the defendant.
(8) If an objection under this section has been determined, the prosecutor may not comment on:
(a) the objection, or
(b) the decision of the court in relation to the objection, or
(c) the failure of the person to give evidence.

In domestic violence and other specified matters, the prosecution often argued that a parent does not have the option to object because of the operation of section 19 Evidence Act (and in particular the reference to section 279 Criminal Procedure Act) which states:

19 Compellability of spouses and others in certain criminal proceedings

Section 18 does not apply in proceedings for an offence against or referred to in the following provisions:
section 25 (Child abuse), 26 (Neglect of children), 51 (Endangering children in employment) or 52 (Certain employers of children to be authorised) of the Children (Care and Protection) Act 1987
section 279 (Compellability of spouses to give evidence in certain proceedings) of the Criminal Procedure Act 1986.

This issue was recently considered in LS v Director of Public Prosecutions (NSW) and Anor [2011] NSWSC 1016 (2 September 2011). LS was 15 years old. He lived with his mother and grandmother. LS kicked a side fence and threw and iron at a wall causing damage. He was charged with damage property. His mother made a statement and was subpoenaed by the police for the summary hearing. The mother objected to giving evidence. The prosecutor argued that section 19 applied to the effect that the objection was not available on the basis that section 279 Criminal Procedure Act applied. Importantly, it was determined (or clarified) that section 279 only applies to compel spouses to give evidence and not parents.

4. S. 281 CRIMINAL PROCEDURE ACT – TAPE RECORDING OF ADMISSIONS BY SUSPECTS

Section 281 Criminal Procedure Act provides:

281 Admissions by suspects
(1) This section applies to an admission:
(a) that was made by an accused person who, at the time when the admission was made, was or could reasonably have been suspected by an investigating official of having committed an offence, and

(b) that was made in the course of official questioning, and
(c) that relates to an indictable offence, other than an indictable offence that can be dealt with summarily without the consent of the accused person.
(2) Evidence of an admission to which this section applies is not admissible unless:
(a) there is available to the court:
(i) a tape recording made by an investigating official of the interview in the course of which the admission was made, or
(ii) if the prosecution establishes that there was a reasonable excuse as to why a tape recording referred to in subparagraph (i) could not be made, a tape recording of an interview with the person who made the admission, being an interview about the making and terms of the admission in the course of which the person states that he or she made an admission in those terms, or
(b) the prosecution establishes that there was a reasonable excuse as to why a tape recording referred to in paragraph (a) could not be made.
(3) The hearsay rule and the opinion rule (within the meaning of the *Evidence Act 1995*) do not prevent a tape recording from being admitted and used in proceedings before the court as mentioned in subsection (2).
(4) In this section:
"investigating official" means:
(a) a police officer (other than a police officer who is engaged in covert investigations under the orders of a superior), or
(b) a person appointed by or under an Act (other than a person who is engaged in covert investigations under the orders of a superior) whose functions include functions in respect of the prevention or investigation of offences prescribed by the regulations.
"official questioning" means questioning by an investigating official in connection with the investigation of the commission or possible commission of an offence.
"reasonable excuse" includes:
(a) a mechanical failure, or
(b) the refusal of a person being questioned to have the questioning electronically recorded, or
(c) the lack of availability of recording equipment within a period in which it would be reasonable to detain the person being questioned.
"tape recording" includes:
(a) audio recording, or
(b) video recording, or
(c) a video recording accompanied by a separately but contemporaneously recorded audio recording.

The issue as to whether this objection was available in the Children's Court for indictable offence being dealt with summarily was recently considered in CL v Director of Public Prosecutions (NSW) [2011] NSWSC 943. The argument largely focused on section 281(1)(c).

CL was alleged to have broken a window of a shop and stolen scooters and scooter wheels. A police officer interviewed CL at his home in the presence of his aunt. During the interview CL made admissions, which were recorded in a police notebook. The interview was not recorded by tape recording or adoption in ERISP as the tape recorder batteries were said to be flat. CL pleaded not guilty and proceeded to a summary hearing. CL's lawyer objected to the admission and relied on section 281. The magistrate in the Children's Court determined that because of section 31(1) Children (Criminal Proceedings) Act [which states proceedings are to be dealt with summarily except in certain circumstances] section 281 was not an available option. The Supreme Court in CL determined that section 281 did apply and was a valid objection to admissions made to indictable offences being dealt with summarily.

Given the fairly common police practice of recording admissions in police notebooks rather than on ERISP or tape recorder, this section will provide a useful objection for indictable offences being dealt with summarily.

5. **VICTIMS COMPENSATION LEVY**:

The Victims Compensation Levy (VCL) legislation has (somewhat) been recently amended in a manner that requires the magistrate to specifically waive the VCL regardless of age or whether or a conviction has been recorded.

Waiver of the VCL can avoid significant debt for a client. It is important to be diligent in seeking waiver of the VCL in all cases.

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