Recent cases relating to juvenile justice

R v D [2011] NSWDC 73

The issue in this case related to admissions made by a juvenile to his school teacher and whether they should be excluded under the unfairness discretion contained in section 90 of the *Evidence Act* 1995.

Whilst her Honour Judge Murrell SC found that the admissions appeared to be reliable, her Honour excluded the admissions under section 90. The admissions were held to be unfair on the basis that the accused was fourteen years of age at the time of the admissions; that he was a "vulnerable person" under the *LEPRA*; that six months before the admissions when the young person was charged he exercised his right to silence and that the admissions were made to an adult in a position of authority.

V (a child) v Constable Joshua Hedges [2011] NSWSC 232

The case concerned a summary hearing in the Children's Court relating to six charges. On the third day of the hearing, immediately prior to the making of a no case submission, all six charges were withdrawn by the prosecutor and were dismissed. The Magistrate refused the defendant's costs application.

It was accepted in submissions on the costs application that there was no prima case with respect to one of the charges. The Magistrate held there was a prima facie case with repect to the remaining five charges. However, the Magistrate held that he had no jurisdiction to award costs only in relation to the charge for which no prima facie case was found.

In the Supreme Court, the defendant conceded that the Magistrate erred in concluding that he had no jurisdiction to award costs in relation to one of the six charges. It was implicit in the Magistrate's decision that he regarded the six charges as collectively constituting the "proceedings" within the meaning of section 214 (1) (b) of the *Criminal Procedure Act* 1986. The Supreme Court held that each separate charge gives rise to separate criminal proceedings and that the Magistrate should have proceeded to consider the exercise of his discretion to award costs in relation to the charge for which there was no prima facie case.

On the issue of the remaining five charges, the Court held that a prosecutor's decision to discontinue a proceeding is not determinative of the assessment as to whether there is a prima facie case.

R v SA, DD and ES[2011] NSWCCA 60

This was an appeal by the Crown against a ruling by the trial judge who held that photographs and fingerprints taken of three juveniles (one aged 14 years and two aged 15 years) following their arrest were illegally obatined and should be excluded. The trial judge

held that the provisions of the *Crimes (Forensic Procedures) Act* 2000 (CFPA) have the effect of modifying section 133 of the LEPRA so that the consent of a Magistrate must be obtained before taking photographs or fingerprints of a juvenile in lawful custody for the purpose of identification.

The Court of Criminal Appeal held there was no illegal or improper conduct by the police. The Court held that section 133 of the LEPRA preserves the broad powers of police to take identification details as were previously contained in section 353A (3) of the *Crimes Act* 1900 and that there is nothing in the CFPA to suggest that the power of the police to take photographs and fingerprints of persons in lawful custody to identify the suspect and to provide evidence of the commission of the offence should not continue. The Court also held that section 112 of the CFPA clearly excludes from the operation of the Act the taking of photographs and fingerprints from a suspect in lawful custody as mentioned in section 133 of the LEPRA.

CL v Director of Public Prosecutions (NSW) [2011] NSWSC 943

The issue on appeal was whether admissions made by a juvenile that were not tape-recorded were required to be recorded under section 281 of the C*riminal Procedure Act 1986.* Section 281 (1) (c) provides that the section does not apply to an indictable offence that can be dealt with summarily without the consent of the accused person.

Sitting in the Children's Court, the Chief Magistrate held that section 281 (1) (c) did not apply to the admissions because of the operation of section 31 (1) of the *Children (Criminal Proceedings) Act* 1987 (CCPA). His Honour held that an offence of break, enter and steal under section 112 (2) of the *Crimes Act 1900* (which is a strictly indictable offence) is an indictable offence that can be dealt with summarily without the consent of the accused person because the proceedings in the Children's Court were conducted in accordance with sections 26-31 of the CCPA. Section 31 (1) of the CCPA provides that all offences in the Children's Court (other than a serious children's indictable offence) are to be dealt with summarily. (Certain exceptions are provided for in sub-sections 31 (2) and (3)).

The Supreme Court held that consistent with the analysis given to the equivalent provision in section 424A of the *Crimes Act* by Smart AJ in *R v Rowe* [2001] NSWCCA 1 the qualification in section 281(1)(c) is to the type of offence to which the admission relates not the nature of the proceedings where the admission is sought to be led. Therefore objection was properly taken to the tender of admissions under section 281.

LS v Director of Public Prosecutions and Anor [2011] NSWSC 1016

The mother of the applicant objected under section 18 of the *Evidence Act* 1995 to being called by the prosecution to give evidence against her son. Section 19 of the *Evidence Act* provides, inter alia, that section 18 does not apply in proceedings for an offence referred to in section 279 of the of the *Criminal Procedure Act* 1986 ('Compellability of spouses to give evidence in certain proceedings'). Section 279 (1) (b) refers to a 'domestic violence offence'. The applicant was charged with such an offence. The Magistrate therefore found that section 19 removed the mother's right to object to giving evidence against her son.

In the Supreme Court, Johnson J held that the reference to a domestic violence offence in section 279 (1) (b) of the CPA is a reference to such an offence committed by a spouse not to a domestic violence offence generally and that it was not Parliament's intention to remove the section 18 right to object in all 'domestic violence offences'. Therefore the mother should have been allowed to rely on section 18. Johnson J recommended that consideration be given by the Attorney General to amending section 19 to make its purpose clear. His Honour quashed the decision of the Magistrate and made an order remitting the proceedings to the Children's Court to be dealt with according to law.

SJ v Regina [2011] NSWCCA 160

The applicant sought leave to appeal against a sentence imposed in the District Court following a plea of guilty to an offence of robbery in circumstances of aggravation. The first ground of appeal was that her Honour erred by finding that there was a total lack of remorse and contrition shown by the offender. The Court of Criminal Appeal held that in the circumstances her Honour was perfectly entitled to discard the applicant's expression of regret in the witness box and the material that was contained in the juvenile justice reports (*Alvares v R* [2011] NSWCCA 33). The second ground of appeal was that her Honour erred in failing to have regard to the principles in section 6 of the *Children (Criminal Proceedings) Act 1987* and the principles governing the sentencing of juvenile offences. The Court accepted that her Honour did not refer, in terms, to the principles enunciated in section 6 and said that it would have been preferable had she done so. However, the Court was not persuaded that her Honour had overlooked the sentencing principles governing juvenile offenders. Her Honour had referred to the applicant as a 'young person' and had determined that he would be detained in a juvenile detention centre until he turned 21. Those circumstances indicated that her Honour was aware of the relevant principles to be applied.

Judge Mark Marien SC
24 September 2011