

**PM v THE QUEEN (S217/2007)**

Court appealed from: New South Wales Court of Criminal Appeal

Date of judgment: 13 September 2006

Date of grant of special leave: 24 April 2007

This appeal involves the interpretation of section 31 of the *Children (Criminal Proceedings) Act 1987* (NSW) and the question whether the Director of Public Prosecutions ("DPP") can present an ex officio indictment in the District Court against a child for an offence which is not a "serious children's indictable offence" and which has not been the subject of an order for committal by the Children's Court.

The prosecution alleges that on 17 September 2004 the appellant then aged 16 had non consensual intercourse with the complainant then aged 14. Initially there were two charges of aggravated sexual assault laid against the appellant in the Children's Court with two different circumstances of aggravation. The first was that the alleged victim was under the age of 16 years and the second was that at the time of the offence he "did occasion actual bodily harm" to the alleged victim which appeared to be intended to identify the circumstances in s 61J(2)(a) of the *Crimes Act 1900* (NSW). The second charge alleged a "serious children's indictable offence" under section 31 of the *Children (Criminal Proceedings) Act 1987* (NSW). The first charge was withdrawn and the appellant committed for trial on the second charge.

In the District Court a first indictment alleging "actual bodily harm" was followed by a second indictment containing three charges each of which were capable of summary disposition if he had been charged before the Children's Court. One alleged as a circumstance of aggravation that the alleged victim was under 16 years.

After the appellant was arraigned on the second indictment and the trial commenced, McGuire DCJ discharged the jury and remitted the matter to the Children's Court on the basis that the record indictment failed for want of jurisdiction.

The DPP appealed. The issue on appeal was whether the second indictment was valid in that it contained offences that were not serious children's indictable offences.

The majority of the Court of Criminal Appeal (Whealy & Latham JJ, Basten JA dissenting) allowed the appeal. Latham J gave the majority judgment. Her Honour found that the offence on which the appellant was committed had an aggravating circumstance unknown to the law (occasioning actual bodily harm). Accordingly, the notice failed to identify an essential factual ingredient of the offence and was therefore defective and insufficient to found the committal proceedings against the appellant. The committal proceedings were a nullity. This did not affect the jurisdiction of the District Court to hear and determine the charge or charges on the indictment presented at the appellant's trial. The practical consequence was that the indictments presented in the District Court were ex officio indictments. Further, the DPP had power to present an

indictment regardless of the fact that there may have been some defect in the committal proceedings, and the finding of an ex officio indictment in those circumstances would not produce an abuse of process unless it resulted in unfairness to the accused. Her Honour noted that the Court could not go behind the issue of an ex officio indictment. The District Court had jurisdiction to try the appellant on the indictment filed in that Court. Her Honour noted that the Act created a presumption in favour of summary disposition which was displaced upon the election of the child for committal to trial or upon the Court reaching a conclusion that the charge should properly be tried before a jury. Section 31 did not direct the prosecution or limit the jurisdiction of the District and Supreme Courts and did not stipulate that indictable offences may only be heard and determined by way of summary proceedings, nor did it require that indictable offences be dealt with by way of committal hearings. The ex officio indictment was procedurally valid. The DPP had power to bring an accused discharged at committal to trial, notwithstanding the protective jurisdiction of the Children's Court.

Basten JA found that all offences which were not serious children's indictable offences were required to be dealt with summarily in the Children's Court, and the exceptions to that principle only arose where proceedings had been commenced in the Children's Court under s 31. The second indictment filed in the District Court on which the appellant was arraigned was not valid.

The grounds of appeal are:

The Court of Criminal Appeal of New South Wales erred in law:

- in setting aside the order of McGuire DCJ made on 15 March 2006 remitting the matter to the Children's Court of New South Wales;
- in its interpretation of s 31 of the *Children (Criminal Proceedings) Act 1987* (NSW) in holding that there was only a *presumption* in favour of summary disposition;
- in holding that *Bartalesi and Fragassi* (1997) 93 A Crim R 274 had any relevant application to the issues to be decided in the present matter;
- in holding that the indictment actually presented at the trial of the accused was an ex officio indictment;
- in holding that the indictment presented at the [trial of the accused] was procedurally valid;
- in finding that the New South Wales DPP would have the ability to bring an ex officio indictment with respect to the prosecution of a child for an offence other than a "*serious children's indictable offence*";
- in holding that s 44 of the *Children (Criminal Proceedings) Act 1987* (NSW) was not available because the section was only available where the alleged want of jurisdiction related to the age of the defendant.