

CITATION: *Justin Antony FIRTH v DS* [2020] NTYJC018

PARTIES: Justin Antony FIRTH

V

DS

TITLE OF COURT: YOUTH JUSTICE COURT

JURISDICTION: YOUTH

FILE NO(s): 22019879

DELIVERED ON: 1 December 2020

DELIVERED AT: DARWIN

HEARING DATE(s): 03 November 2020

JUDGMENT OF: ACTING JUDGE OLIVER

CATCHWORDS:

CRIMINAL LAW: Youth Justice Court, diversion, power of the court to order diversion, meaning of s64, operation of s64A, statutory interpretation.

REPRESENTATION:

Counsel:

Informant: Mr Harold Hollingsworth

Defendant: Ms Tashi Klose

Solicitors:

Informant: DPP

Defendant: NTLAC

Judgment category classification: A

Judgment ID number: 018

Number of paragraphs: 44

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 22019879

BETWEEN

Justin Antony FIRTH

Informant

AND

DS

Defendant

REASONS FOR JUDGMENT
(Delivered 1 December 2020)

JUDGE OLIVER

1. DS is charged with four offences arising from the same incident on 20 June 2020, namely driving a vehicle causing a loss of traction, exceeding the speed limit, driving dangerously whilst being pursued by police and being a P Plater with alcohol in his blood with a reading of 0.01% (“the blood alcohol offence”), an offence contrary to section 24(1)(c)&(2) of the *Traffic Act*.
2. DS first appeared before the Youth Justice Court on 5 August 2020. Brief service orders were made, and the matter was adjourned to 9 September 2020. On that day, the Court made an order that the matter be referred for diversion pursuant to s64.
3. The primary pathway for dealing with youth offending is by way of diversion under Part 3 of the *Youth Justice Act*. Section 39 of the Act requires a police officer who believes on reasonable grounds that a youth has committed an offence, instead of charging a youth with the offence, do one or more of four things as the officer considers appropriate:
 - (a) give the youth a verbal warning;
 - (b) give the youth a written warning;

- (c) cause a Youth Justice Conference involving the youth to be convened;
 - (d) refer the youth to a diversion program.
- 4. Although section 39(2) is cast in mandatory terms,¹ section 39(6) provides that the diversion of a youth is not prevented despite he or she being charged with the offence. This allows for a youth who has been charged with an offence to be referred by a court for assessment for diversion and if the referral is accepted to proceed down that pathway with the charges being able to be withdrawn upon successful completion.
- 5. However, not all offences can be dealt with by Police Diversion. The Youth Justice Regulations identify certain “prescribed offences.” For the most part these are offences considered too serious in nature to proceed by way of diversion but also include certain traffic offences. Under regulation 3A(g) of the Youth Justice Regulations, the blood alcohol offence with which DS is charged, is a prescribed offence for the purposes of the definition in section 38A(a) of the *Youth Justice Act* which is contained in Part 3 of the Act. Section 39(3) provides that s39(2) (the requirement for a police officer to divert) does not apply if the alleged offence is a prescribed offence.
- 6. Nevertheless, police diversion is not entirely excluded for prescribed offences because section 39(4) permits the Commissioner of Police (or the Commissioner's delegate) to authorise or require a police officer to deal with a youth by a Youth Justice Conference or by referring the youth to a diversion program despite the offence being one excluded by subsection (3). No action of that kind was taken with respect to this matter.
- 7. Consequently, although in the circumstances of the offending the conduct subject of the first three charges was arguably more serious than that of the prescribed offence, and could therefore have been made the subject of a Police Diversion, the youth was charged with all four offences and appeared before the Court as described above.
- 8. The order made by the Court to refer DS for diversion was, according to the court order form, a referral to Jesuit Social Services. In accordance with that referral, Jesuit Social Services conducted what is described in their report as a “Group Conference” on 15 October 2020. The Conference included DS and his parents, a community representative, a victim support officer, officers from Catholic Care and Jesuit Social Services and the youth’s legal representative. The 12 page outcome report provided to the Court is detailed as to the participation of those present and

¹ “The officer **must**, instead of charging the youth with the offence [take one or more of the diversions options provided]” (emphasis added).

particularly that of DS and his responses to the participants. A Group Conference Outcome Plan that contains a number of actions “To repair some of harm caused” and “To prevent further offending” that must be addressed by DS was agreed. It may be noted that the conference did not involve a victim as the offences with which DS was charged were all traffic matters for which there was no direct victim. The community representative was a woman who lived in the area where some of the traffic offences occurred and she played a significant role according to the report in making DS understand how conduct like the driving he engaged in impacts on people in that area.

9. When the matter returned to Court on 21 October 2020 before me, Ms Klose for DS told that the Court that subject to DS shortly completing the Drink Driver course with Back on Track² which was one of the agreed outcomes, she would ask the Court to exercise the power under section 64A of the Act to dismiss the charges on account of his satisfactory completion of the section 64 referral. She would specifically seek that order so as to avoid the loss of licence for DS which would automatically follow from a disqualification and would result in his inability to complete his apprenticeship.

10. Section 64A provides:

“The Youth Justice Court may, at any stage of the proceedings against a youth in respect of an offence, dismiss the charge in respect of the offence, whether or not the Court finds the charge proven against the youth.”

11. The prosecution submits that the power of the Court under section 64 is not a power to convene a Youth Justice Conference because the assessment of a youth for inclusion in a Youth Justice Conference is conducted by Police and it is they who cause one to be convened. Further, relying on *Firth & Ors v JM*³ it is submitted that the youth’s participation in the “Youth Justice Conference” cannot engage the statutory stay on proceedings contained in section 41.

12. It is not clear however that the referral made by the presiding judge was for a “Youth Justice Conference”. As noted above Her Honour endorsed the file as a referral for diversion under s64 with the referral form ticking only that it was a s64 referral to Jesuit Social Services.

² A compilation of programs funded by Government through Territory Families, the Department responsible for Youth Justice and described in publicly available information sheets from the Departments website, as an “alternative sentencing and diversion program”.

³ [2015] NTSC 20 at [36]

13. In oral submissions the Prosecutor referred further to comments made by His Honour Barr J in *Firth*.⁴

“I make a further comment in relation to [s 64 Youth Justice Act](#). Although the section does not state who is to carry out the re-assessment of the youth for inclusion in a diversion program or Youth Justice Conference, it is tolerably clear that both the initial assessment and the re-assessment processes are intended to be in the hands of the police. The words “conducted for the purposes of [Part 3](#)” used in [s 64](#) in relation to a diversion program or a Youth Justice Conference are a reference to those provisions of the Act which give the relevant police officer⁵ administrative responsibility for diversion and give the Commissioner of Police (or delegate) the ultimate authority to authorise or require a police officer to divert a youth, even if the exceptions in [s 39\(2\)](#) apply. Moreover, statutory responsibility for determining whether a youth has completed diversion is entrusted to the police; the completion of diversion “to the satisfaction of a police officer” is the condition precedent to the statutory stay under [s 41\(1\) Youth Justice Act](#) coming into effect.

14. It is surprising given each of these submissions that the contention was not raised at the time the court was asked to make the referral that it had no power to do so.
15. What appears to have been overlooked in each of these submissions is that the Act has since been significantly amended since the decision in *Firth*. Section 64 previously provided as follows:

“The Court may, at any stage of proceedings (prior to a finding of guilt) in relation to a youth, with the consent of the prosecution and the youth, adjourn the proceedings and refer the youth to be re-assessed for inclusion in a diversion program, or a Youth Justice Conference, conducted for the purposes of Part 3.”

16. Section 64 was replaced by the *Youth Justice and Related Amendment Act 2019* which also added s64A. Section 64 is now in these terms:

“(1) The Youth Justice Court may, at any stage of the proceedings against a youth in respect of an offence, with the consent of the youth:

(a) adjourn the proceedings; and

⁴ *Ibid* at [28]

⁵ Northern Territory Police General Order on Youth Pre-Court Diversion, promulgated 22 February 2007.

- (b) refer the youth to be assessed for inclusion in a diversion program or a Youth Justice Conference conducted for the purposes of Part 3.
- (2) This section applies whether or not:
 - (a) the youth has entered a plea to a charge in respect of the offence; or
 - (b) there has been a finding of guilt in relation to a charge in respect of the offence; or
 - (c) the youth has previously been assessed for inclusion in a diversion program or a Youth Justice Conference.”
- 17. There are significant changes that have been made by these amendments. First, the consent of the prosecution is no longer required for an assessment for a diversion program or a Youth Justice Conference.
- 18. Secondly, section 64 no longer requires the youth to be “re-assessed for diversion”, instead the Court may “refer the youth to be **assessed** for inclusion in a diversion program or a Youth Justice Conference”.
- 19. The third aspect of the amended section 64 is that it is no longer a requirement that assessment for inclusion in a diversion program is required to take place prior to a finding of guilt. Section 64(2) makes clear that referral for assessment for a diversion program or a Youth Justice Conference can take place at any stage of the court process prior to finalisation of the charges. It seems highly unlikely that the Legislature would have intended that a youth who has pleaded guilty to an offence would be sent back to Police to undertake a diversion program or Youth Justice Conference because following the plea the Court becomes seized of the matter removing the ability for the prosecution to then withdraw the charges although it might still give effect to a stay of proceedings as explained by Barr J in *Firth* (see below).
- 20. Fourth, the inclusion in the Act of section 64A now provides the Court with the power to dismiss a charge against a youth at any stage of the proceedings. In *Firth*, the Supreme Court found that following a successful diversion the outcome is that the charges are either stayed or withdrawn by the prosecution. Section 64A however provides the Court with the power to make such orders as it considers fit, including a dismissal of the charge(s) and may do so whether or not the charge(s) have been found proven.
- 21. The only definition of “Youth Justice Conference” in the Act is provided by section 39(7)

“In this section:

Youth Justice Conference includes:

- (a) a conference with the victim or victims of the offence the youth is believed to have committed; and
- (b) a conference with members of the youth's family.”

22. It may be noted that this definition provides an inclusive not exclusive description of a Youth Justice Conference and that the definition provided is expressed to be for the purpose of section 39 which provision encompasses the Police Diversion scheme. The definition also includes the qualification that it can be with “the victim or victims of the offence the youth is believed to have committed”. In other words, section 39 conferences are at least pre charge and definitely before a plea and finding of guilt in relation to the plea.
23. There may be three ways in which conferences involving a youth and victims of a youth’s offending and/or community members can operate under the Act.
24. First, that the power of the Court to dismiss or otherwise deal with the charges that have been dealt with by a diversion program or Youth Justice Conference is one dependent on a successful completion of one of those matters pursuant to the Police Diversion scheme established by Part 3 of the Act. This is the prosecution position, that as DS has not completed a diversion program or a Youth Justice Conference conducted as part of Police Diversion (and could not do so with respect to the prescribed offence), the Court is not empowered to dismiss the charges.
25. Secondly, that the Court may refer a youth for a conference other than as conducted through Police Diversion by an agency funded for that purpose by an order made pursuant to section 84 which allows for pre-sentence conferences. Such conferences require the entry of a guilty plea and form part of a sentencing process.
 - (1) The Court may, when determining the appropriate sentence for a youth who has been found guilty of an offence, adjourn the proceedings and order the youth to participate in a pre-sentencing conference.
 - (2) A pre-sentencing conference may be with any of the victims of the offence the youth is charged with, community representatives, members of the youth's family or any other persons as the Court considers appropriate.
 - (3) The Court may:
 - (a) direct that the conference be convened at a specified time and place; and

- (b) appoint a person who is appropriately qualified as the convenor of the conference.
 - (4) The convenor must report to the Court as to the outcome of the conference.
26. Thirdly, that the amendments to section 64 have introduced a third form of diversion and Victim Offender Conferencing, one that is part of a Court ordered diversion.
27. Where there is ambiguity as to the meaning of a provision within legislation, section 62B of the *Interpretation Act* 1978 allows for the use of various forms of extrinsic material to assist in ascertaining the meaning of that provision if that material is capable of assisting the interpretation if, amongst other things, the meaning is ambiguous or obscure. In my view such obscurity and/or ambiguity exists in relation to the ordering of a “Youth Justice Conference” or “diversion” pursuant to the power given to the Court to do under section 64.
28. Relevantly section 62B(2) provides that the Court may refer to
- (e) any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of the Legislative Assembly by a Minister or other Member before the time when the provision was enacted;
 - (f) any explanatory speech or statement given by a Minister or other Member to the Legislative Assembly on introducing the Bill;
29. In the explanatory statement for clause 36 of the Youth Justice and Related Legislation Amendment Bill 2019 the following with reference to the amendment to section 64 is stated:

“This clause repeals the current section 64 and replaces it with the new section 64. Currently section 64 requires that the Court may only refer a youth for re-assessment if the prosecution and the youth both consent to referring them for re-assessment for inclusion in a diversion program or youth justice conference.

The new subsection (1) allows the Court to refer a youth for inclusion in a diversion program or youth justice conference at any stage of proceedings. This amendment removes barriers to diversion and supports the amendments made to section 39 (see Clause 30).

The new subsection (2) provides that this section applies whether or not the youth has entered a plea, been found guilty, or has been previously been assessed for inclusion in a diversion program. This amendment gives legislative effect to the decision of the Supreme Court in *Firth & Ors vs JM* [2015] NTSC 20 which clarified the difference between a youth entering a plea and a 'finding of guilt' for the purposes of court referrals to diversion. The purpose of this amendment is to ensure consistent practice and interpretation of section 64 by clarifying that the Court's power to dismiss a charge and refer a youth to diversion is not conditional upon a 'finding of guilt'."

30. Unfortunately, in my view, the explanation given for clause 36 of the Bill for the amendments to section 64 does little to clarify the question as to whether it was intended for there to only be diversion under Part 3 of the Act, in other words a diversion program operated by police or whether it shows an intention to expand diversion programs and "Youth Justice Conferences" to ones operated by other organisations funded for that purpose, such as Jesuit Social Services which has for many years held conferences pursuant to s84.

31. However, clause 36 also inserted the new s64A and the explanatory memorandum goes on to state:

"This clause inserts the new section 64A, under the heading 'Youth Justice Court may dismiss charges', to permit the Court to dismiss charges against a youth, at any stage of proceedings and whether or not the court finds the charge proven against them. The purpose of this amendment is to ensure that, upon completion of court-referred diversion under section 64, a Court has the power to dismiss the charge for the offence without having to make a determination as to whether the charge was proven or not to ensure consistency in the legal outcomes and criminal histories of young people diverted under section 64."

32. Again however, the reference to "court ordered diversion" contains some ambiguity. Is it intended to be a reference to a new stream of diversion programs or a reference to Police Diversion? If the reference is only to Police Diversion then the question arises as to whether the Court has power to override the determination by Police with respect to "prescribed offences" and require a diversion or Victim Offender Conference with respect to those offences. If the power under s64 is a limited power to refer offences other than those prescribed in Part 3, then it might be expected that the power of the Court to then dismiss all charges would contain some reference to the outcome for those offences considering that they will not have been "diverted".

33. The second reading speech likewise provides little assistance. In relation to diversion programs the Minister said:

“The amendments seek to reduce unnecessary exposure to the youth justice system by limiting the time young people spend in custodial settings. The offending behaviour is often better addressed through diversionary programs that are tailored to the individual needs of the young person and which target the underlying causes of their offending.

Diversion can help reduce the numbers of young people being dealt with by the court system, leads to improved outcomes for victims and reduces reoffending. The bill allows greater flexibility for diversion as an option to address youth offending. This will lead to young people being held more accountable in a way that is meaningful to them for their offending behaviour while also having their individual rehabilitative needs assessed.

The bill will create a simplified and clearly defined list of prescribed offences, so that there is a clear process by which young people can be diverted. The bill also provides for the recording of information on the participation of young people in diversion, documenting the assessment for diversion to assist courts with the decision to reassess young people for diversion.”

34. Consequently, it seems to me that neither the explanatory memorandum nor the second reading speech provide much assistance in determining whether it was the intention of the Legislature to introduce by the amendments to section 64 and the inclusion of the new section 64A, a new stream of court ordered diversion in addition to the existing Police Diversion. In other words, to provide a new stream of court ordered diversion to government funded or indeed any other available services or programs or whether section 64 was intended to continue to operate only as a referral back for assessment for Police Diversion.
35. If the latter were the intention it would seem that there was little purpose in changing “re-assessment” to “assessment”. The use of the term “assessment” suggests something afresh which would not be the case if the intention was for a return of a youth to the Police Diversion program rather than to other funded diversionary programs, such as the recently funded “Back on Track” initiative which as a matter of public record⁶ includes funding to Jesuit Social Services to expand their conferencing services.
36. Whatever may be the difficulty in determining the intent of the Legislature with respect to s64, it is not in my view necessary to resolve that question in this case.

⁶ See for example <https://newsroom.nt.gov.au/mediaRelease/31252>

The introduced section 64A stands alone. There is no reference within section 64A to section 64. It stands alone to provide the Court with an unfettered discretion with respect to the finalisation of charges before the Court. If it had been the intention of the Legislature to confine its operation to the diversion outcomes from the operation of section 64 it might have been expected that the provision would sit as a subsection of section 64, thus tying its operation to diversion and/or Youth Justice Conferences, not as a standalone provision. It might also have been drafted to refer back to section 64, for example by commencing with words such as “If a youth successfully completes diversion or a Youth Justice Conference” or “Subject to a successful outcome under section 64” but no such attaching reference exists.

37. The broad discretion given to the Court by section 64A can be seen to have utility outside of diversion programs or victim offender conferences or other conferences however they might be conducted. For example, the power to dismiss charges might be utilised with respect to a youth charged with drug offences who although having initially failed a police diversion has successfully undergone formal drug rehabilitation with a service provider. It might be applied to a youth whose offending has arisen from mental health issues and who has successfully undertaken or continues to undertake a mental health treatment program. It might be applied when dealing with a particularly young offender whose offending is seen to have been strongly associated with parental abuse or neglect and who has since been removed from those circumstances under a protection order.
38. The examples provided are merely representative of the diverse nature of matters and the individual circumstances of young offenders that come before the Youth Justice Court. There are many other contexts in which the discretion conferred on the Court by section 64A might be envisaged to apply.
39. I do not ignore that it is a requirement of statutory interpretation that a provision is to be considered within its context. In *Cooper Brookes (Wollongong) Pty Ltd v FCT* (1980-81) 147 CLR 297 at 304-5 Gibb CJ said

“Of course, no part of a statute can be considered in isolation from its context - the whole must be considered. If, when the section in question is read as part of the whole instrument, its meaning is clear and unambiguous, generally speaking 'nothing remains but to give effect to the unqualified, words': *Metropolitan Gas Co v Federated Gas Employees' Industrial Union* (1925) (1925) 35 CLR 449 at 455. There are cases where the result of giving words their ordinary meaning may be so irrational that the court is forced to the conclusion that the draftsman has made a mistake, and the canons of construction are not so rigid as to prevent a realistic solution in such a case: see per Lord Reid in *Connaught Fur Trimmings Ltd v Cramas Properties Ltd* [1965] 1 WLR 892 at 899;

[1965] 2 All ER 382 at 386. Examples of that sort of case may be found in Maxwell on the Interpretation of Statutes, 12th ed., (1969), at p228 et seq., and Craies on Statute Law, 7th ed., (1971), at p520 et seq. **However, if the language of a statutory provision is clear and unambiguous, and is consistent and harmonious with the other provisions of the enactment, and can be intelligibly applied to the subject matter with which it deals, it must be given its ordinary and grammatical meaning, even if it leads to a result that may seem inconvenient or unjust. To say this is not to insist on too literal an interpretation, or to deny that the court should seek the real intention of the legislature. The danger that lies in departing from the ordinary meaning of unambiguous provisions is that 'it must degrade into mere judicial criticism of the propriety of the acts of the Legislature', as Lord Moulton said in *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107 at 130; it may lead judges to put their own ideas of justice or social policy in place of the words of the statute. On the other hand, if two constructions are open, the court will obviously prefer that which will avoid what it considers to be inconvenience or injustice. Since language, read in its context, very often proves to be ambiguous, this last mentioned rule is one that not infrequently falls to be applied." (emphasis added)**

40. In *Director of Public Prosecutions v Ahwan* [2005] NTCCA 21 the Court of Criminal Appeal considered the interpretation of a provision in relation to the setting of non-parole periods for the crime of murder. At [26] Southwood J said:

*The task of courts is to interpret the words used by Parliament. It is not to divine the intent of parliament: Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG*⁷; [1975] AC 591; *In re Fish*; *Ingham v Raynor*⁸ [1894] 2 Ch 83. As Chief Justice Spigelman has stated, "In an era where a purpose approach to interpretation is emphasised, and required by statute, the distinction between interpretation and divination is not always observed: JJ Spigelman CJ, "The poet's rich resource: issues in statutory interpretation", (2001) 21 *Aust Bar Rev* 224.⁹

41. Further, at [56] Martin (BF) AJ referred to one of the fundamental approaches of statutory interpretation.

"In interpreting a provision of an Act, a construction that promotes the purpose or object underlying the Act (whether the purpose or

⁷ [1975] UKHL 2; [1975] AC 591

⁸ [1894] 2 Ch 83.

⁹ (2001) 21 *Aust Bar Rev* 224.

object is expressly stated in the Act or not) is to be preferred to a construction that does not promote the purpose or object (Interpretation Act s 62A).”

42. The *Youth Justice Act* provides for the objects of the Act (section 3) and general principles to be taken into account in the administration of the Act (section 4). They may be conveniently summarised as establishing a means for dealing with youthful offenders that is distinct from the approach to adult offending and consistent with the need to consider amongst other things, immaturity and developmental needs of a young person, when determining an outcome in relation to offending.
43. I am satisfied that section 64A is not dependent on the operation of section 64 and that it provides the Court with an unfettered discretion to determine the outcome of charges at any stage of the proceedings and in so doing can take into consideration all and any aspects of the youth and his or her circumstances including matters undertaken to address the offending. The discretion is not confined to the issue of whether or not the youth has undertaken a Youth Justice Conference (however conducted) or some other diversionary program.
44. I will hear the parties further as to the submission by the defendant that the charges should be dismissed.

Dated this first day of December 2020.

Sue Oliver
A/YOUTH JUSTICE COURT
JUDGE