

CITATION: Rigby v TU [2022] NTYJC 003

PARTIES: *Kerry Rigby*

v

TU (a youth)

TITLE OF COURT: YOUTH JUSTICE COURT

JURISDICTION: CRIMINAL

FILE NO(s): 22128645, 22202900, 22136489, 22135573,
22139096, 22206050, 22206614, 22208477,
22219083, 22219059 & 22219060

DELIVERED ON: 6 December 2022

DELIVERED AT: Darwin

HEARING DATE(s): 19 & 20 July 2022

DECISION OF: Macdonald J

CATCHWORDS:

Criminal Law – Criminal Liability – Capacity – *Doli incapax* – Various Offending – Defendant youth 12 years – Rebuttable Presumption – proof beyond reasonable doubt – “capacity to know that he ought not to do the act” – “at the time of doing the act” – “knows that his or her conduct is wrong” – ‘material time’ – *Criminal Code 1983* (NT) – ss 38 and 43AQ

Criminal Code Act 1983
Evidence (National Uniform Legislation) Act 2011

RP v The Queen [2016] HCA 53
KG v Firth [2019] NTCA 5
Rigby v ND [2022] NTSC 51
R v F, ex parte Attorney-General (1999) 2 Qd R 157

REPRESENTATION:

Counsel:

Police: Mr D Payne

Defendant: Mr P Crean

Solicitors:

Police: ODPP

Defendant: NAAJA

Decision category classification: B
Decision ID number: [2022] NTYJC 003
Number of paragraphs: 33

IN THE YOUTH JUSTICE COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 22139096, 22136489, 22202900, 222128645, 22206050,
22206614, 22208477, 22219083, 2219059, 22219060.

BETWEEN:

Kerry Rigby

AND:

TU (a youth)

Defendant

REASONS FOR DECISION

(Delivered 6 December 2022)

JUDGE MACDONALD

Context

1. In August 2021 the youth TU allegedly commenced offending against Territory laws. He was 12 years old at that time. Between August 2021 and June 2022 TU allegedly committed more than 25 offences generating in excess of 11 Youth Justice Court (YJC) files (the Charges).¹ Due to the age of TU, the Charges proceeded to a voir dire hearing over 19 and 20 July 2022 in order to determine the threshold *doli incapax* issue. That hearing was conducted based on 'agreed facts' without admission of liability, together with some other evidence, in order to determine whether the presumption against criminal liability was rebutted by the prosecution.
2. At the time of hearing, all charges on another file, 22205058, had been withdrawn. There were also further charges on files 22135748 and 22136192, which included aggravated robbery charges. The parties did not seek determination, in the context of the preliminary examination process, of the *doli incapax* issues in relation to those files.
3. The Charges ranged across the generic descriptions of violence, stealing, criminal damage, unlawful entry, go armed in public, unlawful use of a motor vehicle, and drive unlicensed.² The court had the benefit of comprehensive and incisive oral and written submissions of counsel, for which it is grateful.

¹ Most of the alleged offences are generally characterised as objectively serious based on the prescribed maximum sentence, including various counts of assault, stealing, criminal damage and unlawful entry. In addition to the 11 files referred to, the youth also amassed two incidents alleging 'armed robbery' in November 2021. Those matters are currently the subject of Preliminary Examination process.

² Paragraphs 51 to 107 of the Defence Submissions and pp 9 to 11 of the Prosecution Submissions.

The law

4. Due to TU's age, the offences alleged attracted the operation of either ss 38 or 43AQ of the *Criminal Code 1983* (NT) (Code), depending on whether Part IIAA applied to the charge.³ Those sections provide;

38 Immature age

- (1) *A person under the age of 10 years is excused from criminal responsibility for an act, omission or event.*
- (2) *A person under the age of 14 years is excused from criminal responsibility for an act, omission or event unless it is proved that at the time of doing the act, making the omission or causing the event he had capacity to know that he ought not to do the act, make the omission or cause the event.*

And

43AQ Children over 10 but under 14

- (1) *A child aged 10 years or more but under 14 years old can only be criminally responsible for an offence if the child knows that his or her conduct is wrong.*
 - (2) *The question whether a child knows that his or her conduct is wrong is one of fact.*
 - (3) *The burden of proving that a child knows that his or her conduct is wrong is on the prosecution.*
5. The court was referred to a number of authorities in argument on the question of whether TU was *doli incapax* in relation to the Charges. Although dealing with the common law rather than the sections, *RP v The Queen* is the highest authority of general relevance.⁴ The leading Territory authorities are *KG v Firth* in relation to s 43AQ and *Rigby v ND* in relation to s 38.⁵ There is also the long line of Queensland authorities referred to in *Rigby v ND*, concerning s 29 of that State's Code, which is in very similar terms to s 38.
 6. Section 38 requires that the court be satisfied beyond reasonable doubt that a relevantly accused youth "*had capacity to know that he ought not do the act*" for which they are charged, whereas s 43AQ requires proof that the "*child knows that his or her conduct is wrong*" (emphasis added).⁶ The former requirement is more easily satisfied than the latter, noting that the word 'seriously' is not to be interpolated into either criterion.⁷ The 43AQ formulation was relevant to only four of the Charges, concerning 'criminal damage', with the s 38 test applying to the remaining 21 charges the subject of the hearing.
 7. Irrespective of which criterion applies, some aspects of the principles laid down in the authorities bear repeating. Namely, despite one or more superior court statements that the express words of relevant *doli incapax* sections speak for themselves and need no

³ The only charges to which s 43AQ applied were 4 counts of damage to property contrary to s 241 of the Code.

⁴ *RP v The Queen* [2016] HCA 53

⁵ *KG v Firth* [2019] NTCA 5 and *Rigby v ND* [2022] NTSC 51.

⁶ Those tests applying to the physical elements of the offence; *RP v The Queen* (supra) at [9].

⁷ Despite several references to the concept of "*seriously*" in *KG v Firth* (supra), it was common ground that the ratio of *Rigby v ND* (supra) applied the Charges.

supplementation,⁸ the extent of the distinction between knowledge of (or capacity to know) the moral wrongness of an act on the one hand and, alternatively, a child's awareness that their conduct is merely naughty or mischievous, is significant.

8. Regardless of how objectively wrong or criminal a child's acts may be, the presumption of *doli incapax* cannot be rebutted solely by inference from the seriousness of the acts.⁹ Other evidence is required. Lastly, sufficiency of the evidence will vary depending on the nature of the allegation and matters subjective to the child. In particular, their age; maturity; cognitive and social development; education; personal experience and previous interactions with the justice system; their family and formative environment, and social and cultural background. Overall, the court's attention must be directed to the intellectual and moral development of the particular child, in the context of the offending alleged.¹⁰
9. It may be that the word 'wrong' is implicit in the reading of s 38, it being the objective rationale for why a child "ought not do" any particular act. Similarly, although a child need not be proven to recognise the criminality of any act, or its objective seriousness, I consider that the wrongness to be appreciated by the child must on the evidence be clear and cogent. In my view satisfaction of the standard of proof will be well beyond simple notions of "naughty" or "mischievous" (one or both of which any child may recognise as 'wrong'), and requires actual or imputed knowledge of a real moral wrongness.
10. It should also be noted that, regardless of whether s 38 or 43AQ applies, the material point in time for assessment of the child's knowledge or "capacity to know" is at the time of commission of the offence. That is express in s 38, implicit in s 43AQ, and confirmed in the authorities.¹¹ Although that must extend to any clear premeditation or preparation to commit an offence, it is apparent from the evidence in relation to the Charges that the immediate and present capacity of some neurodivergent children varies depending on the circumstances of their situation at any particular point in time.¹² A child may either 'know' or have actual 'capacity to know' an act or omission is wrong in a calm or rarefied setting, but not then when elevated or dysregulated in the context of their physiology.¹³ In some cases these differences are not the product of a conscious and intentional course by the child, albeit that elevation or dysregulation may be an inevitable result of premeditated conduct.¹⁴ What may be confidently concluded concerning this aspect of any child's actions is confounded by the propensity for young offenders to deliberately seek out stimulation and 'excitement' through engaging in anti-social and risk taking behaviour, very often in 'peer-fuelled' situations.¹⁵

⁸ *R v F, ex parte Attorney-General* (1999) 2 Qd R 157 at 160.20

⁹ The common law resort to normal, ordinary or reasonable "adult standards" is generally the point of reference, together with proof of subjective knowledge (or imputed knowledge); *RP v The Queen* (supra) at [11]. Where CCTV captures the offending, as in many cases here, additional context is available.

¹⁰ *RP v The Queen* (supra) at [12], including the premise that "[a] child will more readily understand the seriousness of an act if it concerns values of which he or she has direct personal experience".

¹¹ For example, *KG v Firth* (supra) at [25].

¹² The expert evidence provided in TU's case is an example of this possibility.

¹³ The dichotomy in analysis referred to in *Rigby v ND* (supra) at [43] is noted. In this case Dr Maxwell's oral evidence elaborated on TU's capacity and responses to situations, including as to 'self-control' and dysregulation, depending on external and other factors.

¹⁴ An imperfect analogy is the manner in which voluntary and involuntary intoxication is dealt with in the Northern Territory; for example ss 7, 43C, 43AF, 43AR and 43AV of the Code.

¹⁵ The circumstances in which children in urban areas of the NT commonly or ordinarily offend is a matter for notice under s 144 of the *Evidence (National Uniform Legislation) Act 2011*.

The Evidence & discussion

11. The offending for which TU is charged and the issue of *doli incapax* to be determined arose over the period August 2021 through to June 2022. At the commencement of offending TU was two years older than the age at which the presumption against criminal liability commences, and two years younger than the age at which that presumption gives way to a presumption of full legal capacity to commit offences. From the point of 14 years of age, any lack of capacity must be proven by the Defendant.¹⁶ With the last of the charges for which TU is charged, the differentials are close to 3 years and 1 year, he being 12 years and 11 months old at that time.
12. In addition to the 'agreed facts', other evidence adduced at hearing comprised school records produced by the Department of Education,¹⁷ expert evidence of forensic psychologist Dr Yvonne Maxwell,¹⁸ and CCTV footage of various incidents, together with some still photographs extracted from that footage.¹⁹
13. In relation to the Department of Education records comprising Exhibit P4, from May 2016 to September 2021 TU had in excess of 70 adverse behavioural incidents at Milner Primary School. As time passed the incidents generally escalated in severity or seriousness.²⁰ It may be noticed that many of those incidents involved bullying or violent behaviour, for which TU was sanctioned or had corrective action applied, in two instances through suspension from school.²¹
14. The records also show that over the period 2016 to 2019 TU's school attendance was excellent. However, that started to decline in 2020 and by 2021 was running at 41%, less than half of what TU achieved in previous years. Lastly, and perhaps of most relevance, the Prosecution submissions properly highlighted various aspects of TU's school reports over 2019 to 2020.²² Reading those reports as a whole, a fair reading is that TU displayed various positive and appropriately skilled attributes in his schooling, but also presented with some very significant challenges and limitations. Namely, in relation to inappropriate behaviour, cognition in several areas, self-regulation and control, and capacity to focus and concentrate on prescribed tasks (other than sport) for any sustained period. True it is that, following many of the adverse incidents, TU was able to recognise the 'wrongness' and inappropriateness of his behaviour, however it may be inferred that those insights existed once he was calm and collected, rather than elevated.
15. In relation to the supportive statements contained in the school reports for the relevant period, my definite impression is that the reporting teachers and Principal employed a strength-based approach towards positive reinforcement of those aspects of TU's presentation and effort which were appropriate and available. That was without seeking to varnish the difficulties and inappropriate behaviour, but was simply a matter of emphasis.

¹⁶ Section 43D of the Code, applying at least to indictable offences.

¹⁷ Documents 1 together with 10 to 19, comprising NAPLAN results, reports from Milner primary school, student enrolment records, incident summaries, behaviour reports and notices of suspension, became Exhibit P4. Documents 2 through to 9 inclusive of Exhibit P4 were not pressed to be admitted into evidence, due to that documentation relating to TU when 10 years or younger. Those documents do not comprise part of the Exhibit. Nonetheless, the NAPLAN results for 2018 reveal some difficulties

¹⁸ A SAL Consulting NT report of 29 April 2022 became Exhibit P2, an email exchange between the ODPP and Dr Maxwell of 15 July 2022 became Exhibit P3, with Dr Maxwell also giving oral evidence.

¹⁹ Exhibit P5.

²⁰ Tab 17 of Exhibit P4 refers.

²¹ Documents 16 and 17 of section D of Exhibit P4.

²² I have had regard to the content of documents B10 to B12 of Exhibit P4 and DPP submissions referable to those reports, despite the numbering used, but note that no records for 2021 or 2022 were produced.

16. The content of Dr Maxwell's evidence, comprising Exhibits P2 and P3 and supplemented by oral evidence, is perhaps of most significance.²³ The party's submissions comprehensively highlighted those aspects of the expert evidence of Dr Maxwell supporting a finding that *doli incapax* is rebutted and, conversely, why that finding was not proven. In the case of the Prosecution, that included in the context of the distinction referred to in *Rigby v ND* between capacity to know right from wrong as compared with unwillingness to exercise self-control.²⁴ I refer to the parties submissions on these aspects, such that Dr Maxwell's evidence need not be repeated in detail. However, in summary the evidence is that; TU has a diagnosis of ADHD which adversely affects and impedes his regulatory capacity; has severe impairment in some FASD domains; has cognitive deficits in a range of areas and, at best, has a "very low" IQ; and is easily influenced and encouraged by dubious peers to 'prove his worth'.²⁵
17. The composite scores obtained following assessment of TU by Dr Maxwell and her colleagues were "very low" for the Full-Scale Intelligence Quotient and "extremely low" for the General Ability Index.²⁶ Aspects of TU's performance on testing were 'normal' or better, such as in the processing speed sub-test, which results bolstered his overall ability.²⁷ However, TU's strength in the area of processing speed may be less straightforward than appears. Dr Maxwell's oral evidence was that TU is capable of making decisions very quickly, but that capacity is apt to both good and bad decisions, due to being unable to access "cortical information" when elevated or dysregulated. In such situations TU's thinking, actions and responses rely more heavily on brain stem functioning, so 'fight or flight', rather than the much more rational function of the cortex.
18. I also note that answers given by Dr Maxwell in evidence, in response to questions put by email and in oral evidence, were expressed in terms of 'capacity to *learn right from wrong*'. Dr Maxwell agreed that TU had the capacity "to learn" but did not state he had the capacity "to know". That difference may well have been the product of one or more of; the extent to which TU engaged when assessed; or did not undergo the full range of multidisciplinary assessment ideally available; or that Dr Maxwell did not have access to the full suite of education records or agreed facts comprising the Charges the subject of the hearing. Although perhaps overly semantic, I consider a material difference between the two capacities referred to exist. That is because in drafting s 38, Parliament may be said to have only intended the prosecution should be relieved of a burden to prove a child's actual knowledge of the moral wrongness of any act, rather than simply that the child had sufficient capacity to be taught the relevant moral wrongness, given an optimal environment, inputs and education. TU's situation is a signal example of how some difference may exist.
19. In considering the evidence to determine whether the presumption has been rebutted, it is appropriate to begin with the most recent offending engaged in by TU. This is not simply because that is when he was both most mature and attuned to application of the criminal justice system, due to having had significant contact with members of NT Police and the Youth Justice Court by that time. Significantly, all of the offences across files ending 6614, 9083, 9060 and 9059 were committed under the guidance, assistance, tutelage and encouragement of TU's mother and/or her partner. There is also other evidence, discussed more fully below, of behaviours by each of TU's father and stepfather in relation to TU or in his presence over the majority of his lifetime, which would have had relevant adverse effects. It may also relevant

²³ That expert evidence focussed on TU's cognitive, intellectual and adaptive functioning, relative to age-equivalent peers. Aide Memoirs 2 and 3 were prepared by counsel for the parties for the court's assistance.

²⁴ *Rigby v ND* (supra) at [43]

²⁵ The lowest being in verbal comprehension, where more than 99% of his age-equivalent peers are more advanced. See also page 45 of Exhibit P2.

²⁶ Meaning, respectively, 96% and 98% of TUs age-equivalent peers would better his results. Exhibit P2 – pp14 and 15.

²⁷ Exhibit P2 – pp 14 to 17

that, in addition to more longstanding trauma, TU experienced a significant death in his family shortly prior to the commencement of the offending the subject of the charges, and another in December 2021.²⁸

20. It is clear from the 'agreed facts' for files ending 6614, 9083, 9059 and 9060 (and from other evidence) that the moral compass instilled by those adults in TU is so disorientated as to be directionless. Any qualifying criterion, such as 'wrong by normal or ordinary adult standards', is unlikely to have held any relevance or meaning for TU in the circumstances.²⁹ Although there is no direct evidence of those standing in loco parentis having encouraged or facilitated other earlier offending, there is some evidence that parental figures had also engaged in offending in TU's presence. Regardless, the immoral and criminal context in which the offending on files 6614, 9083, 9060 and 9059 occurred has the ability to also inform offending earlier in time.
21. The issue in relation to the charges on file ending 8477 is also readily determined. In relation to the 'criminal damage' charge, the CCTV from 14 March 2022 at Casuarina shopping centre entrance shows TU casually kicking the glass panel with the heel of his foot, and then with his toe. Although s 43AQ applies to contraventions of s 241 of the Code, such that recklessness can be sufficient, I am not satisfied that TU appreciated the wrongness of even the lesser fault element constituting the charge. It is clear that not only did TU not intend the damage his foot caused, but was apparently surprised when the damage ensued. In relation to counts two and three on file 8477, the actions of TU and his co-offender in entering the Australia Post electronic delivery vehicle and riding it around Milner streets for 25 minutes is a prime example of youthful offending.³⁰ A characterisation of 'mischievous or naughty' is apposite.
22. In relation to the charges on files ending 8645, 2900 and 6050, all of the offending constitutes either property crime or had its genesis in that type of offending. It is noted that TU was in care from 2016 through to 2020, during which time he appeared to fare quite well, but then deteriorated, possibly with the assistance of peer associates.³¹ The considerations set out at [10] above are, in my conclusion, particularly relevant to the offending alleged across these files. It is noted that, when confronted with forensic evidence relevant to file ending 2900, TU sought to blame some other person. Also, that the unlawful use of the motor vehicle on file ending 6050 was quite egregious in the context of TU's age and diminutive size, and all offenders seeking to big-note themselves and their offending by uploading footage to social media. Nonetheless, having regard to the evidence as a whole, I consider a reasonable doubt remains concerning TU's capacity to properly know the wrongness of those actions, including in driving a stolen vehicle and in the manner he did.
23. The charges on files ending 6489 and 9096 are more problematic, including due to the violent, protracted and persistent nature of TU's actions at Casuarina Library on 25 September and 23 October 2021. The CCTV footage is particularly graphic and disturbing, with TU clearly being one of the prime movers in the senseless and destructive offending. However, the apparent disparity between TU's age and that of various co-offenders is also relevant in the context of Dr Maxwell's evidence concerning TUs motivations and responses in peer group situations, including on the access and use of information and in seeking approval or endorsement of older

²⁸ Exhibit P2 – pages 5 and 6. It may also be open to conclude that TU's time with his father in Tennant Creek had a deleterious effect.

²⁹ The High Court noted in *RP v The Queen* (supra) at [10] that the paradoxical result can be "*the more warped the child's moral standards, the safer he is from the correctional treatment of the criminal law*", citing Williams, "The Criminal Responsibility of Children" [1954] *Criminal Law Review* 493 at 495-496.

³⁰ Having all of the hallmarks of peer group involvement, seeking out stimulation and 'excitement', and risk-taking behaviour, including to big-note themselves.

³¹ Exhibit P2 - page 7 of Dr Maxwell's report, noting that TU also self-placed back with his mother frequently.

associates.³² Despite that features of TU's offending point firmly to a conclusion that TU must have had both the capacity to know and actually known the moral wrongness of his actions at the Casuarina Library, due to the documentary and expert evidence referred to I consider a reasonable doubt as to each of those matters remains.

24. The Prosecution has failed to rebut the presumption in relation to all charges on the above files, such that TU is *doli incapax* on those files.
25. The charges on file 22135573 remain. That incident occurred on 8 October 2021, between the incidents comprising the charges immediately above. At approximately 3pm, that day TU and at least three other youths were in the vicinity of the Sabine Road shopping centre in Milner. The relevant CCTV depicts TU walking up the driveway to the Sabine supermarket bottle-shop, which is at the rear of the store. He is clearly reconnoitring, including walking past the plastic curtained entrance twice, looking in. On the second occasion a female staff member emerges from that entrance and engages with TU, the impression being that she tells TU to go away. TU falls from view briefly, with the woman remaining. He then returns with three other youths and again peers through the plastic curtain, distracting the employee, while another older youth (who is also known to the court) examines a vending machine. The woman protests those courses, immediately following which a male staff member emerges from the plastic curtain causing TU and the three other youths to scatter, running in separate directions. All youths were, for whatever reason, clearly fearful of what the male worker might do.
26. Following their retreat, TU and the older youth then sit on a raised walkway approximately 50 metres from the bottle-shop. After a short time TU runs up behind a Linfox freight truck which is exiting the bottle-shop driveway onto the side-street, jumps onto its rear bumper, and hitches a ride out of sight. The older youth together with TU and another three youths then all reunite at the same walkway near the driveway entrance. Soon after TU breaks from the group and jogs up the far side of the driveway, approaching but keeping some distance from the entrance, again clearly reconnoitring. TU was being obviously vigilant for any staff emerging from the bottle-shop entrance and I infer that his second attendance at the bottle-shop was directed to obtaining something from that location. He was carrying a knife in his right hand, partially concealed by his forearm and, shortly prior to reaching the entrance of the bottle-shop, TU summonses the other four youths with a wave of his hand. They did not oblige or join TU and instead maintained their distance. Due to the presence of the knife, this is the first point in time at which TU could be alleged to be offending.
27. TU is then startled by two female staff emerging from the bottle-shop entrance into the driveway, and produces the knife with the blade pointed towards both women. He then advances towards the women brandishing the knife, violently kicks an empty cardboard carton in close proximity to them, then further raises the knife in a threatening manner and says something to the woman closest to him. The staff do not retreat and TU 'circles' them for a short time, forcefully kicks the cardboard carton again in their direction, then runs away.
28. TU's actions in pulling the knife and violently kicking the cardboard carton twice were standover tactics. His actions and words were belligerent, bullying and intimidatory, and were clearly and obviously intended to cause fear in the employees, presumably in the hope of achieving his unknown objective. In addition, his actions in the lead up to revealing the knife and kicking the carton were not random, haphazard or objectiveless. They were premeditated, calculated and planned to some extent. Despite that, the group of youths no doubt discussed some of what TU planned to do, probably with some urging and encouragement from them, TU was acting predominantly alone. Although clearly heightened and agitated immediately

³² I consider the evidence at page 20 of Exhibit P2 is particularly relevant in determining the issue on these files. The issues referred to at [10] above are also in my view relevant.

following the emergence of the two female employees, up until that point TU does not appear dysregulated or 'out of control'.

29. In addition to the character of the offending depicted on the CCTV, being violent, intimidatory and manipulative, I note other relevant evidence adduced at hearing. The school records contain various incidents in which TU had been found to engage in bullying or violent behaviour, and was consequently disciplined or suspended.
30. Perhaps of most significance is the evidence that TU has witnessed and been subjected to domestic violence, so has direct personal experience of that threat in the home environment.³³ It is acknowledged that children subjected or witness to domestic violence may become inured to violent behaviour, such that it is normalised and, in due course, mimicked.³⁴ In TU's case the evidence is that he is particularly attached to his mother and seeks out situations in which he feels safe. I accept that those factors are indicative of the relevant trauma referred to, but also conclude that violence in the family home from a very young age (particularly that directed towards his mother) naturally produced trepidation, anxiety and distress in him at those times, such that TU generally recognises the moral wrongness of inflicting threats and violence on others.³⁵
31. The prosecution having failed to rebut the presumption, the youth TU is *doli incapax* in relation to the Charges on files ending 8645, 2900, 6489, 9096, 6050, 6614, 8477, 9083, 9060 and 9059.
32. The presumption of *doli incapax* is rebutted on file ending 5573.
33. I will hear the parties in relation to directions on file 22135573.

³³ Exhibit P2 – pp 6 and 7.

³⁴ A clinical discussion of common effects is at pp 40 to 43 of Exhibit P2.

³⁵ Despite the incongruity of the adverse behaviours ultimately produced in many male victims of domestic violence, I consider the court can take notice that serious conflict between a child's parents (even at levels amounting to less than domestic violence) generally results in an ongoing appreciation that such behaviour is morally wrong.