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| CITATION: | *Police v TV* [2024] NTYJC 1 |
| PARTIES: | Police |
| | v |
| | TV (a youth) |
| TITLE OF COURT: | YOUTH JUSTICE COURT |
| JURISDICTION: | CRIMINAL |
| FILE NO(s): | 22318107, 22318435 & 22321812 |
| DELIVERED ON: | 9 February 2024 |
| DELIVERED AT: | Darwin |
| HEARING DATE(s): | 19 September 2023 |
| DECISION OF: | Judge Macdonald |

**CATCHWORDS:**

Criminal law – Criminal responsibility – *Doli incapax* – Knowledge - Rebuttable presumption – Proof beyond reasonable doubt - Inference – "*at the time of doing the act*" – "*knows that his or her conduct is wrong*" – 'material time' – *Criminal Code 1983* (NT) – ss 38A and 43AQ

*Criminal Code 1983* (NT) ss 38, 38A, 43AP, 43AQ, 295
*Director of Public Prosecutions Act 1990* (NT) ss 12, 13, 22
*Evidence (National Uniform Legislation) Act 2011* (NT) ss 144, 184, 191, 192, 192A
*Interpretation Act 1978* (NT) s 24
*Local Court Act 2015* (NT) s 49
*Local Court (Criminal Procedure) Act 1928* (NT) s 69
*Youth Justice Act 2005* (NT) ss 4(m), 52, 120, 1221A

*Atwells v Jackson Lalic Lawyers Pty Ltd [2016] HCA 16*
*Australian Energy Regulator v Snowy Hydro Ltd [2014] FCA 1013*
*AWB Ltd v Cole (No 2) (2006) 253 FCR 288*
*AWB Ltd v Cole [2006] FCA 913*
*Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334
*BDO v The Queen* [2023] HCA 16
*BP v Regina, SW v Regina* [2006] NSWCCA 172
*Chamberlain v R (No. 2)* (1984) 153 CLR 521
*Consolidated Press Holdings Limited v Wheeler* (1992) 84 NTR 42
*Director of Public Prosecutions v PM* [2023] VSC 560
*DPP (Cth) v JM* [2013] HCA 30
*DPP v PM* [2023] VSC 560
*FKP Commercial Developments v Zürich Australian Insurance Ltd* [2022) FCA 862
*Grassby v R* [1989] HCA 45
*Harts Australia Ltd v Commissioner of Taxation* [2001] FCA 761

*Harts Australia Pty Ltd v Commissioner of Taxation* [2000] FCA 1131
*KG v Firth* [2019] NTCA 5
*Knight v R* (1992) 175 CLR 495
*O'Neill v Rankine* [2015] NTCA 3
*Parsons v Martin* (1984) 5 FCR 235
*Reading Australia Pty Ltd v Australian Mutual Provident Society* [1999] FCA 718
*Rigby v TH* [2023] NTSCFC 2
*"RP" v Ellis & Anor* [2011] NSWSC 442
*RP v The Queen* [2016] HCA 53
*Shepherd v The Queen* (1990) 170 CLR 573
*SPI Spirits (Cyprus) Ltd v Diageo Australia Ltd* [2006] FCA 14
*Tepko Pty Ltd v Water Board* (2001) 206 CLR 1
*Zürich Australian Insurance Ltd v FKP Commercial Developments Pty Ltd* [2023] FCA in 188

**REPRESENTATION:**

*Counsel:*

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| Police: | Ms K Smith |
| Defendant: | Ms Armstrong |

*Solicitors:*

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| Police: | ODPP |
| Defendant: | NAAJA |

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| Decision category classification: | B |
| Decision ID number: | [2024] NTYJC 1 |
| Number of paragraphs: | 46 |

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

No. 22318107, 22318435
& 22321812

BETWEEN:

Police

AND:

TV (a youth)

Defendant

REASONS FOR DECISION

(Delivered 9 February 2024)

JUDGE MACDONALD

**Background**

1. In June and July 2023 the Defendant youth (TV) allegedly commenced offending against Territory laws. He was 12 years old at that time. Between 7 June and 8 July 2023 TV allegedly committed 12 offences generating 3 Youth Justice Court (YJC) files (the Charges).[1] As at 19 September 2023 TV had a further 13 extant files comprising a large number of charges, being listed for hearing in December 2023 and January 2024, with others being strictly indictable, so subject to the preliminary examination process.

2. Due to the age of TV, on 19 September 2023 the Charges proceeded on a preliminary or separate hearing, in order to determine a threshold issue of '*doli incapax*'.[2] That hearing had been case-managed at directions hearings before the YJC in relation to 5 files on the basis that 'agreed facts' without admission of broader liability in respect of conduct and other elements of the offence, were to be relied on by the parties.[3] That is, facts would be agreed for the purpose of determination of the issue of rebuttal of the presumption against criminal

[1] Other than two regulatory traffic offences of 'drive unlicensed', all offences alleged may be described as 'property offences', namely burglary, unlawful use of a motor vehicle, theft, and trespass. On the basis of the maximum sentences prescribed, those offences are generally characterised as objectively serious.
[2] It is noted that the phrase *doli incapax* describes a common law presumption which is not expressed in the Code. However, ss 38 and 43AP, and then 38A and 43AQ, of the Code respectively prescribe irrebuttable and rebuttable presumptions against criminal responsibility in relation to children under 12, and those of 12 or 13 years of age.
[3] Other issues which, depending on whether the prosecution rebutted the presumption in relation to 1 or more of the Charges, were not the subject of the 'agreed facts' and would fall to be determined at any subsequently listed hearing.

responsibility, but not for any other purpose.[4] Agreed facts in relation to three of the five files were filed by the parties at the YJC on 1 August 2023, for the purpose of the hearing listed 19 September 2023.

**Jurisdiction to and appropriateness of proceeding**

3. Despite the pre-trial procedure applied with the consent and support of the parties, a day or so prior to hearing the prosecution advised that the concluded view of the Office of the DPP was that facts could only be agreed for all purposes of any contested hearing. That is, it was impermissible at law to agree facts for the purpose of final determination of an issue in dispute, as opposed to agreeing facts for the purpose of final determination of all issues in dispute. The concluded position of the prosecution may be characterised as a jurisdictional issue, in that the YJC either has or has no power to conduct a separate or preliminary hearing on the basis of facts agreed solely for the purpose of finally determining what may be described as threshold elemental issues such as legal capacity or criminal responsibility.[5]

4. The crux of the prosecutions objection to the hearing was that agreed facts could not be used for a particular and limited purpose in the context of determination of the whole of the proceeding. However, a broader issue, being whether the YJC has jurisdiction to conduct a preliminary or separate hearing on any basis apparently arises. If jurisdiction exists, there remains the question of whether that course is appropriate in the circumstances.

5. The YJC is not critical of the change in the ODPP's position and, although inconvenient, considers the prosecution's late advice to the YJC was necessary and appropriate.[6] However, that change required a hurried consideration of the respective positions, in order to then decide whether the hearing should proceed. That included in the context of the imperative of expedition prescribed by s 4(m) of the *Youth Justice Act 2005* (YJ Act). For reasons set out below, the hearings proceeded, despite the option of vacation of the hearing dates and re-listing in 2024 for a hearing across all issues in dispute.

6. In the circumstances of the pre-trial procedure applied; the agreement as between counsel reached; that the Agreed Facts had been filed 6 weeks prior in preparation for the hearings; the sanctity of hearing dates in the administration of justice; and general hearing procedure which had previously been applied in the jurisdiction, I determined that the listed hearings of the Charges should proceed.[7] Although on 7 December 2023 I found, by brief *ex tempore* reasons, that the prosecution had not proven knowledge to the necessary standard on any of the

[4] Such as identification, conduct, and any other 'authorisation, justification or excuse' provided by Part II of the Code; *Criminal responsibility* (noting that s 38A also obtains some character as a defence, but where the evidentiary threshold borne by a defendant is assumed). The structure of Part IIAA is different, however the analogy remains.

[5] It follows that the parties were in apparent agreement that a full hearing on all issues in dispute could properly occur on the basis of agreed facts, which is hardly surprising given the procedure provided by s 191 and, perhaps, s 184 of the *Evidence (National Uniform Legislation) Act 2011* (ENULA).

[6] Including due to the statutory functions and discretions provided by ss 12, 13 and 22 of the *Director of Public Prosecutions Act 1990* (noting that the Charge procedure under the YJ Act is adaptable) and rules 10A.5 and 17.46 of the Law Society NT *Rules of Professional Conduct and Practice*.

[7] Noting that a number of provisions from a range of legislation were potentially relevant, and that the authorities relied upon had not yet been cited, and the contents of paragraphs 26.36 - 26.37 and Appendix E of Practice Direction 26 (PD26). Whether facts are agreed is a matter for the parties and entails no YJC involvement, however the issue at bar was whether facts may be agreed for the purpose of a discrete or preliminary dispute, so as part but not all of a contested hearing.

Charges (such that what has been referred to as 'the presumption' had not been rebutted), written consideration and explanation of the issues is warranted.[8]

7. Despite the prosecutions apparent position being that a separate or preliminary hearing on the issue of criminal responsibility could properly proceed provided facts were agreed for all purposes of the proceeding, the question of whether the YJC has jurisdiction to conduct a separate or preliminary hearing (even if facts are agreed for all purposes in the proceeding) must arise. Unlike in some other jurisdictions, there is no express provision specifically empowering the YJC to adopt such a course.

8. Due to its concern at the procedure under which the proceedings were heard (on the basis of 'agreed facts'), following the hearing the prosecution also provided some authorities submitted in support of its altered position.[9]

9. The YJC is a statutory court of limited jurisdiction, so may only exercise jurisdiction through legislated powers. Possible sources of law for the course ultimately adopted in the conduct of the hearing may be express legislated power or implied jurisdiction. Associated with this are any relevant authorities concerning practice and procedure in the administration of justice in the context of exercise of jurisdiction.

10. As an inferior court, the YJC has no inherent powers, however the nature and degree of implied power has been discussed in many authorities. The Full Federal Court has described the jurisdiction as comprising "*such powers as are* ***incidental and necessary to the exercise of the jurisdiction*** *or powers so* [expressly or by implication] *conferred*".[10] The High Court then observed that the basis for the jurisdiction is "*the principle that a grant of power carries with it* ***everything necessary for its exercise***" and noted that; "*Recognition of the existence of such powers will be called for whenever they are* ***required for the effective exercise of a jurisdiction*** *which is expressly conferred but will be confined to so much as can be derived by implication from statutory provisions conferring particular jurisdiction*".[11] (**emphasis** added).

11. The existence of implied jurisdiction has been subsequently discussed by various superior courts of the Territory. I consider that the question involved in deciding whether a separate or preliminary hearing should occur is a matter of practice and procedure.[12]

12. It may be accepted that the vast majority of decisions concerning hearings on a separate or preliminary issue have their genesis in legislated provisions which facilitate that process, to a greater or lesser extent.[13] No specific provision exists in the YJ Act, or those provisions of the

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[8] The primary issue of whether the prosecution had rebutted the presumption established by ss 38A and 43AQ was finally determined on 7 December 2023 by brief *ex tempore* reasons. The findings were that the presumption had not been rebutted in respect of any of the charges on the 3 hearing files, and the Charges were withdrawn at that time.

[9] On 22 September 2023, being *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at [45] – [56], *Harts Australia Ltd v Commissioner of Taxation* [2001] FCA 761 at [23] to [26], *AWB Ltd v Cole* (No 2) (2006) 253 FCR 288 at [26] to [39] and *Australian Energy Regulator v Snowy Hydro Ltd* [2014] FCA 1013 at [40] to [47].

[10] Full Federal Court in *Parsons v Martin* (1984) 5 FCR 235 at 241, recently cited with approval by the Full Court in *Rigby v TH* [2023] NTSCFC 2 at [13], and referring to *Consolidated Press Holdings Limited v Wheeler* (1992) 84 NTR 42.

[11] *Grassby v R* [1989] HCA 45 at [22] and [23].

[12] *Consolidated Press Holdings Limited v Wheeler* (1992) 84 NTR 42, *O'Neill v Rankine* [2015] NTCA 3 at [15] and *Rigby v TH* [2023] NTSCFC 2 at [13].

[13] See *AWB Ltd v Cole* [2006] FCA 913 at [27], *Harts Australia Pty Ltd v Commissioner of Taxation* [2000] FCA 1131, *DPP (Cth) v JM* [2013] HCA 30 and *Australian Energy Regulator v Snowy Hydro Ltd* [2014] FCA 1013, with *FKP Commercial Developments v Zürich Australian Insurance Ltd* [2022) FCA 862 being a possible exception.

*Local Court Act 2015* (LC Act) or *Local Court (Criminal Procedure) Act 1928* (LCCP Act) which apply to the YJC.[14] Noting the discussion concerning implied jurisdiction above, the YJC jurisdiction is provided for by s 52 of the YJA, relevantly as follows;

> ***52 Jurisdiction of Youth Justice Court***
>
> *(1) The following* ***must be dealt with*** *in accordance with this Act by the Youth Justice Court:*
>
> *(a)* ***All charges in respect of summary offences or indictable offences allegedly committed*** *by a youth;*
>
> *(b) All applications in the Territory relating to unlawful activity, or alleged unlawful activity, of youths, whether or not that activity took place, or is alleged to have taken place, in the Territory.* (**emphasis** added)

13. The legislated function of the YJC is therefore to 'deal with' all charges alleged against each youth, provided they otherwise fall within the jurisdiction provided by the YJA.[15] That is against the background of the direction of s 54 of the YJA that all charges before the YJC "*are to be heard and determined summarily*". It is also my conclusion that, despite no reference to 'other laws', the YJC may accrue powers or authority through other legislation, such as the Code and the *Evidence (National Uniform Legislation) Act 2011* (ENULA).

14. Section 49 of the LC Act also confers power on the Chief Judge to make Practice Directions in respect of "*practice and procedure of the* [YJC] *in the exercise of any of its jurisdiction, whether conferred by this or another Act*". A revised Practice Direction 26 (Direction) was issued by the Chief Judge in July 2023 in respect of YJC proceedings. Paragraph 26.36 of the Direction requires counsel for the parties to provide a duly completed information form, being Appendix E, prior to or at the time of the "*case management inquiry*" listing (CMI) before the YJC.[16] Paragraph 26.37 also directs the prosecutor and defence counsel in relation to oral advice which should be provided to the YJC at the CMI, including "*whether the statement of alleged facts is agreed for the purposes of determination of doli incapax*".[17] Appendix E to the Direction also requires a definite response to; "*Is the statement of alleged facts agreed for the purpose of determination of Doli incapax*?". In circumstances where facts are not agreed for the purpose of a hearing on the issue of criminal responsibility, the proceeding must be listed for a contested hearing on all issues in dispute.[18]

15. The record does not make clear the extent to which the parties strictly complied with the Direction in preparation for the hearing. What is clear is that the parties agreed in writing the facts on which the separate or preliminary hearing was to occur. That was by email exchange, advice to the YJC on CMI, and by the filing of agreed facts with the Registry. The agreed facts

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[14] Section 53 of the YJA provides that all but Part IV, Division 2A of the LCCP Act and some provisions of the *Local Court Act 2015* apply to the YJC. It would appear that s 295 of the Code adds nothing to this body of power.

[15] Sections 55, 120 and 121A of the YJA prescribe the ambit of the charges which the YJC has jurisdiction to deal with.

[16] Which process is well known to practitioners practising in the lower courts (including as CMI), being in the nature of a directions hearing preparatory to substantive hearing.

[17] Noting that use of the term doli incapax is a generic reference to the element of criminal responsibility prescribed by ss 38A and 43AQ of the Code.

[18] Entailing the calling of all relevant evidence in the form of police, civilian and expert witnesses, together with all documentary evidence, on usual issues of identification, conduct, Part II Code issues, and other factual and legal issues in dispute.

for each of the three matters heard on 19 September 2023 became Exhibit P1 in each proceeding. It is trite to observe that whether facts can be agreed, for whatever purpose, is a matter *inter partes*.[19] The most the YJC can properly do to facilitate that course is to encourage the parties, including in the context of their lawyers' ethical obligations to the YJC.[20] It may also be accepted that, where facts are agreed for the preliminary purpose of determining the question of criminal responsibility, those 'facts' will generally comprise the prosecution case at its highest.

16. The Prosecution position in relation to the Direction was that the provisions facilitating the hearing and determination of issues of criminal responsibility on the basis of facts agreed wholly and solely for that purpose were beyond the power expressly conferred on the YJC by legislation, or by implication. Obviously no Practice Direction (or Rule of Court) is capable of broadening or creating jurisdiction where none previously existed.[21]

17. Immediately prior to embarking on the separate or preliminary hearing, various general provisions were put to the court on the procedural question in issue, particularly s 69 of the LCCP Act and s191 of the ENULA. The prosecution contended that the operation and effect of those provisions, and the absence of any express power, precluded any possibility of a separate or preliminary hearing on the basis of agreed facts for the purpose of finally determining the issue of criminal responsibility.

18. Section 69 of the LCCP Act relevantly provides;

> ***69 After hearing the parties Court to find guilty or dismiss***
>
> *When the parties and their evidence have been heard,* ***the Court shall consider and determine the whole matter****, and shall find the defendant guilty or make an order against the defendant or dismiss the complaint, as the case may require* (**emphasis** added).

19. It was contended that the phrase "*the whole matter*" should be interpreted and applied such that (in the absence of any countervailing provision), the YJC had no jurisdiction to hear and determine one or more issues separately or by preliminary hearing, prior to then proceeding to others which may then be extant. An example was given of legislation which expressly permitted hearing and determining a discrete issue prior to hearing and determining others, being s590AA of the *Criminal Code 1899 (Qld)*.

20. In addition, the prosecution relied on s 191 of the ENULA, which relevantly provides;

> ***191 Agreements as to facts***
>
> *(1) In this section:*

***Agreed fact*** *means a fact that the parties to a proceeding have agreed is not,* ***for the purposes of the proceeding****, to be disputed.*

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[19] For example, in respect of a guilty plea, or for a voir dire hearing, cases stated to superior courts, or even demurer, or in the context of any contested hearing on other issues. See *GAS v The Queen* [2004] HCA 22 at [27] to [31] and [42] to [44].
[20] Rules 10A.5 and 17.46 of the Law Society NT *Rules of Professional Conduct and Practice* and Rules 42 and 62 of the *Barristers' Conduct Rules (NT).*
[21] See s 61 of the *Interpretation Act 1978*.

*(2) In a proceeding:*

*(a) evidence is not required to prove the existence of an agreed fact; and*

*(b) evidence may not be adduced* ***to contradict or qualify an agreed fact****;*

***unless the court gives leave*** (**emphasis** added).

21. The prosecution contended that the phrase "*for the purposes of the proceeding*" intended 'for all purposes', such that a hearing was indivisible. That is, akin to the approach advanced in respect of s 69 above.

22. Despite the general rule in litigation, I consider the intention of s 69 is not to restrict the YJC to a sole and indivisible hearing, and simply reflects the court's fundamental function and obligation to finally determine all issues in dispute. In my view the section does not seek to prevent the YJC from approaching the determination required by application of practice or procedure generally recognised in the administration of justice.[22] Similarly, in my opinion s 191 does not have the restrictive operation contended for. The term "*purposes*" may be read as singular; 'a purpose'[23], and the provision is facilitative.[24] In any event, the immutability of any agreed fact is subject to leave being granted by the YJC to the contrary. A strong thread running through the ENULA, including Chapter 5, is the courts' power to grant leave to various courses.[25]

23. However, in the absence of express legislated provision for the conduct of separate or preliminary hearings on discrete issues, it would still be necessary for such a procedure to form part of the YJC's implied jurisdiction. That is, a conclusion that the relevant procedure was "*incidental and necessary to the exercise of the jurisdiction*" or "*required for the effective exercise of a jurisdiction*".[26] Those considerations must be approached in the context of the starting point and general rule being that all issues of fact and law should be determined at the one time.[27] Associated with that is the fundamental obligation on the YJC to hear and finally determine issues in dispute, otherwise described as the 'quelling of controversy' or final determination of right.

24. Criminal responsibility in respect of a 12-year-old is an element of each of the Charges, and may be characterised as a threshold issue.[28] Although the issue of criminal responsibility must be considered separately and discretely in relation to each and every charge, a degree of commonality often exists in relation to the relevant evidence across all charges on any particular

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[22] Although the separate or preliminary hearing was not commenced and conducted by way of Application, that procedure has some analogy.

[23] In the absence of any contrary intention apparent in s 191, s 24 of the *Interpretation Act 1978* may apply.

[24] Sections 184 and 192A of the ENULA are directed to similar effect. The ENULA regulates the admission and exclusion of evidence, but intends a flexibility to enable the nuances required in the proper and efficient administration of justice.

[25] For example, ss 32, 37-39, 46, 64, 66, 104, 106, 108, 108B, 108C, 112, 168 and, most relevantly, ss 191, 192 and 192A of the ENULA.

[26] *Rigby v TH* [2023] NTSCFC 2 at [13] and *Grassby v R* [1989] HCA 45 at [22].

[27] *Reading Australia Pty Ltd v Australian Mutual Provident Society* [1999] FCA 718 at [7] and *SPI Spirits (Cyprus) Ltd v Diageo Australia Ltd* [2006] FCA 14 at [23].

[28] Examples of superior courts approaching the issue of doli incapax as the final hurdle which the prosecution must clear to succeed in a prosecution, such as *BP v Regina, SW v Regina* [2006] NSWCCA 172 at [20], exist. However, converse examples, where the court has considered the question or element of doli incapax as a threshold issue, such as *DPP v PM* [2023] VSC 560 at [11], also exist.

prosecution. Despite the complexities arising from relative moral culpability associated with more serious charges and the effect which a child's increased and cumulative experience in the criminal justice system can have, it will often be the case that the element is uniformly heard and determined one way or the other in respect of the entirety of a prosecution. The element is liminal, in that without satisfaction beyond reasonable doubt, proof of other elements cannot ensue.[29]

25. Due to its character, final determination of the element of criminal responsibility can be said to save time and expense by, where not proven, disposing of the charge. Facts agreed for that purpose are generally the 'Crown case at its highest', and evidence led on the issue is largely different to potential evidence on other issues and elements to be subsequently proven in the event the presumption is rebutted. No significant overlap exists between evidence led at a separate or preliminary hearing and subsequent hearing on the remanent issues, including because agreed or assumed facts obviate the necessity for evidence on their asserted veracity at the first hearing.[30] Clear efficiencies in the administration of justice exist in the conduct of a separate or preliminary hearing on the issue of criminal responsibility, particularly if it proceeds on the basis of facts agreed by the parties. In addition, the express jurisdiction of the YJC provided by s 52, to 'deal with' charges, is promoted and advanced in as timely a fashion as possible.[31]

26. Having regard to the provisions of the YJ Act referred to, the relevant features of respective courses, and the issues presented by of s 38A and 43AQ of the Code, I consider that conducting a separate or preliminary hearing to finally determine the issue of criminal responsibility in relevant proceedings is both "*necessary*" and "*required*" in the proper and efficient exercise of the YJC's jurisdiction. That is regardless of whether facts are agreed, due to the nature of the issue for determination and the evidence ordinarily lead. The process significantly advances the "*effective*" exercise of the jurisdiction.[32] Consequently, the YJC has implied jurisdiction to hear and determine the issue of criminal responsibility on a preliminary or separate basis.[33]

27. There remains an issue as to whether a preliminary or separate hearing may be properly conducted on the basis of agreed facts. That is, facts agreed wholly and solely for that hearing, and not for the purpose of any subsequent or substantive hearing on other issues. On

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[29] On one analysis, the issue of criminal responsibility is in the nature of a defence, except that the evidentiary threshold borne by a defendant has already been furnished by the presumption, such that the starting point is for the Crown to disprove or rebut beyond reasonable doubt. Analogous, lack of "consent" is an element of the charge of assault, but regardless of any defendant raising consent at hearing, a lack of consent must always be proven beyond reasonable doubt by the Crown in order to establish criminal responsibility. The scheme of Parts II and IIAA of the Code are also supportive of that approach.

[30] The practical result is that, at that stage, very significant savings present in court time and the time police and civilian witnesses would otherwise be occupied in attending to give oral and other evidence towards proof of the factual allegations comprising a charge or charges in a proceeding. That the question of criminal responsibility, particularly where facts are agreed for that purpose, can be determined for a range of charges across a number of files at the one time (regardless that it may be proven on some but not on others), ensures that charges are 'dealt with' much more quickly and efficiently than otherwise would be the case.

[31] The true issues for determination are narrowed and all oral and documentary evidence on issues other than criminal responsibility may be left until obviously required. The importance of expedition in the YJC in the final determination of charges is reflected in ss 4(m) and 54 the YJ Act.

[32] See for example, *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1 at [168] to [170].

[33] Regardless of being unable to say what other real issues in dispute existed, or how many police, civilian and expert witnesses, together with other evidence, would have been required for a full hearing on all issues in dispute.

22 September 2023 the prosecution also referred the YJC to a number of authorities, advanced in support of the proposition that facts could only be agreed for all purposes of a hearing.[34] On my reading, the closest any of the authorities provided come to prohibiting a preliminary or separate hearing on facts agreed solely for that purpose is the statement of the Full Federal Court in 2001; "*The utility of questions being answered as a preliminary issue is lost if the facts upon which those questions are to be answered might ultimately be found to be different at trial*." [35]

28. Although a large number authorities have subsequently considered issues arising from the conduct and determination of separate and preliminary hearings, it is relevant to particularly note the decisions of the High Court and Full Federal Court in *Director of Public Prosecutions (Cth) v JM* [2013] HCA 30 at [29 to [34], *Atwells v Jackson Lalic Lawyers Pty Ltd* [2016] HCA 16 at [21] to [26] and *Zürich Australian Insurance Ltd v FKP Commercial Developments Pty Ltd* [2023] FCA in 188 at [19] to [23].

29. In *Director of Public Prosecutions (Cth) v JM*, in relation to an issue finally determined prior to substantive trial on the basis of the facts which the prosecution would seek to establish at trial, the plurality noted; "*Those facts, or at least some of them, may be disputed* [at substantive trial], *but they are confined by the way in which the prosecution has said it will open its case*".[36] In *Atwells v Jackson Lalic Lawyers Pty Ltd* the majority considered a determination made on facts which were 'agreed' "*…in the sense that the separate question was to be determined on the assumption, made only for the purposes of that determination, that they were established*". The High Court went on to note; "*If the procedure for determination of a separate question is to be useful, it is necessary for those managing the case at the stage when a question is posed for separate determination to ensure that the facts on which the question is to proceed are the facts which the* [complainant/plaintiff] *will seek to establish a trial*".[37] The Full Federal Court has also considered and applied aspects of *DPP (Cth) v JM* in stating "*… it is possible before the trial to decide an issue between the parties about how the law applies to the facts on which one party intends to rely; even though the question may be said to be contingent on those facts being proved in due course*".[38]

30. I consider that provided the 'agreed facts' are precise and clear (as they were here), a preliminary or separate hearing will not be chimerical and the determination which ensues will be final rather than hypothetical. In my conclusion, having regard to questions of jurisdiction and appropriateness to the circumstances of the Defendant and issue(s) in dispute, the hearing and determination of the issue of criminal responsibility in these proceedings on a separate and preliminary basis was available, appropriate, and in the interests of the administration of justice.

**The law on criminal responsibility**

31. The state of the law in the Northern Territory in relation to criminal responsibility changed, to some extent, in 2023. On 17 May 2023 the High Court decided *BDO v The Queen*

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[34] *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at [45] – [56], *Harts Australia Ltd v Commissioner of Taxation* [2001] FCA 761 at [23] to [26], *AWB Ltd v Cole* (No 2) (2006) 253 FCR 288 at [26] to [39] and *Australian Energy Regulator v Snowy Hydro Ltd* [2014] FCA 1013 at [40] to [47].
[35] *Harts Australia Ltd v Commissioner of Taxation* [2001] FCA 761 at [24].
[36] (supra) at [34]. The agreed facts in the subject proceedings may be taken as the prosecution case at its highest. It was not the prosecution's position that it would seek to prove other or, more relevantly, different and conflicting facts at substantive hearing in the event that the presumption was rebutted.
[37] (supra) at [21].
[38] *Zürich Australian Insurance Ltd v FKP Commercial Developments Pty Ltd* [2023] FCA in 188 at [21]. See also *HP Mercantile Pty Ltd v Harnett* [2016] NSWCA 342 at [80] to [82].

[2023] HCA16, albeit generally reiterating its decision in *RP v The Queen* [2016] HCA 53. Most relevantly, on 1 August 2023 sections 38A and 43AQ of the *Criminal Code 1983* (NT) (Code) came into force. The consequences and effect of the new terms of ss 38A and 43AQ are referred to below.

32. Due to TV's age and the retrospectivity of the amendments to ss 38A and 43AQ of the Code, as at the date of the hearing the offences alleged attracted the operation of either ss 38A or 43AQ of the *Criminal Code 1983* (NT) (Code), depending on whether Part IIAA applied to the charge.[39] Those sections provide;

> ***38A Child 12 or 13 years of age***
>
> *(1) A child aged 12 or 13 years can only be criminally responsible for an offence if the child knows that the child's conduct is wrong.*
>
> *(2) The question whether a child knows that the child's conduct is wrong is one of fact.*
>
> *(3) The burden of proving that a child knows that the child's conduct is wrong is on the prosecution.*
>
> and
>
> ***43AQ Child 12 or 13 years of age***
>
> *(1) A child aged 12 or 13 years can only be criminally responsible for an offence if the child knows that the child's conduct is wrong.*
>
> *(2) The question whether a child knows that the child's conduct is wrong is one of fact.*
>
> *(3) The burden of proving that a child knows that the child's conduct is wrong is on the prosecution.*

33. Sections 38A and 43AQ must be applied in context, some of which is apparent from their express terms, with other considerations being recognised in the authorities. Subsection (2) of each section provides that the issue of whether a child knows that their conduct is wrong is a question of fact.[40] It may be accepted that the knowledge required to be proven by ss 38A and 43AQ comprises a fault element of the Charges.[41] Regardless of whether characterised as

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[39] The Code was amended effective 1 August 2023, such that the test to be applied to all charges, regardless of whether within or without Schedule 1, is in identical terms. See *Rigby v TH* [2023] NTSCFC 2 at [2] for some history of the amendments. It is noted that an alternative fault element of recklessness may through s 43AK apply to some Schedule 1 offences, however that possibility does not sit comfortably with the express threshold requirement of s 43AQ that the child be proven to 'know that the conduct is wrong'. See s 221(1)(c) (which is not mentioned in ss(2)) and s 222(1). The only charges to which s 38A applied were 2 counts of 'drive unlicensed' contrary to s 32 of the *Traffic Act 1987* (NT), which is a regulatory offence.

[40] It is noted that many superior court decisions on the issue of capacity involve extensive expert evidence, with determination being by a 'judge alone'. For example, see *Director of Public Prosecutions v PM* [2023] VSC 560. On questions of fact and law, see 'What is a question of law?' S. Gageler (2014) 43 AT Rev 68.

[41] See *"RP" v Ellis & Anor* [2011] NSWSC 442 at [18], but noting that in *RP v The Queen* [2016] HCA 53 at [9] and [38] and *BDO v The Queen* [2023] HCA 16 at [6] the focus of the High Court is application to physical elements.

rebuttal of a presumption, or an element of the offence, the prosecution must prove the Defendant's knowledge to the standard of beyond reasonable doubt.[42]

34. Although dealing with the common law rather than the Code, *RP v The Queen* is the highest authority of general relevance.[43] The leading Territory authorities are *KG v Firth* in relation to s 43AQ and *Rigby v ND* in relation to the now repealed s 38.[44] The authorities considering "*capacity to know*" are now of less significance to the extent that they focus on that formulation.

35. Context in determining a Defendant's knowledge was explained by the High Court in *RP v The Queen*; "*Knowledge of the moral wrongness of an act or omission is to be distinguished from the child's awareness that his or her conduct is merely naughty or mischievous.*[45] *This distinction may be captured by stating the requirement in terms of proof that the child knew the conduct was "seriously wrong" or "gravely wrong*".[46]

36. It is important to note that, regardless of how objectively serious or wrong a defendant's proven conduct may be, the requisite knowledge cannot be simply inferred from the facts and circumstances of the alleged offence *per se*. Other evidence is also required. However, the nature and seriousness of the allegations are relevant.[47] Likewise, the extent of a youth's contact with and experience in the criminal justice system can also be relevant, including having regard to interactions with law enforcement officers, episodes of apprehension or arrest, and remand and bail.

37. In the final analysis, "*The prosecution must point to evidence from which an inference can be drawn beyond reasonable doubt that the child's development is such that he or she knew that it was morally wrong to engage in the conduct. This directs attention to the child's education and the environment in which the child was raised*".[48] Similarly, a defendant youths "*intellectual and moral*" development requires close consideration in determining whether the element of knowledge is proven to the requisite standard.[49]

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[42] Regardless of the statement of Incerti J in *DPP v PM* [2023] VSC 560 at [67], another available characterisation is that of a defence, albeit that the evidentiary threshold borne by a defendant has already been furnished by the presumption, such that the starting point is for the Crown to disprove or rebut beyond reasonable doubt. By analogy, lack of "consent" is an element of the charge of assault, but regardless of any defendant raising consent at hearing, a lack of consent must always be proven beyond reasonable doubt by the Crown in order to establish criminal responsibility. The scheme of Parts II and IIAA of the Code are also supportive of such an approach.

[43] *RP v The Queen* [2016] HCA 53.

[44] *KG v Firth* [2019] NTCA 5; although not apparently the subject of any debate on appeal, the Court of Appeal accepted that the test provided by section 43AQ is the same as, or at least very similar to, the common law test in relation to Doli incapax. Section 43AQ has been amended since 2019, however the current and applicable provision is in no material way different to the provision as it then stood. *Rigby v ND* [2022] NTSC 51; now being of lesser relevance due to repeal of s 38.

[45] *RP v The Queen* [2016] HCA 53 at [9], approving *C (A Minor) v Director of Public Prosecutions* [1996] AC 1 at 38; *BP v The Queen* [2006] NSWCCA 172 at [27]-[28].

[46] *RP v The Queen* [2016] HCA 53 at [9], approving *R v Gorrie* (1918) 83 JP 136; *C (A Minor) v Director of Public Prosecutions* [1996] AC 1 at 38; *Archbold: Criminal Pleading, Evidence & Practice*, (1993), vol 1 at 52 [1-96].

[47] *RP v The Queen* [2016] HCA 53 at [11].

[48] *RP v The Queen* [2016] HCA 53 at [9]. The accepted principles regulating inferential reasoning generally apply; *Chamberlain v R (No. 2)* (1984) 153 CLR 521, *Shepherd v The Queen* (1990) 170 CLR 573 and *Knight v R* (1992) 175 CLR 495.

[49] *RP v The Queen* [2016] HCA 53 at [12].

38. The 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 contexts of the offending alleged and that cogent evidence of the requisite knowledge is required.[50]

39. It should also be noted that the material point in time for assessment of the child's knowledge is at the time of commission of the offence, which may extend to any clear premeditation or preparation to commit an offence.[51] However, depending on subjective factors such as the youth's particular or general presentation, some circumspection may be warranted. This includes due to the propensity for young offenders to blithely seek out stimulation and 'excitement' through engaging in anti-social and risk taking behaviour, very often in 'peer-fuelled' situations.[52]

**The evidence and discussion**

40. The Charges against TV for which the issue of criminal responsibility is to be determined arose over the period 7 June to 8 July 2023, when he was 12 years of age. He was arrested shortly following each incident (and then bailed), those apprehensions being his first formal interactions with the criminal justice system.

41. In addition to the 'agreed facts', other evidence adduced at hearing comprised school records produced by the Department of Education[53] and CCTV footage of the incident of 8 July 2023 giving rise to file 22321812.[54] No custody records, bail agreements nor remand warrants comprised any of the evidence adduced and admitted at hearing.

42. Tender of the Department of Education records into evidence was objected to, including on the basis of relevance. Several of those documents were also sought to be excluded on the basis of asserted unfairly prejudicial content, or that they contained second hand hearsay. That evidence was ultimately admitted, including due to the relevance and general importance of a child's education in considering the issue of criminal responsibility. However, it should be noted that none of the authors, or even an employee of the Department of Education, was made available for cross examination on 19 September 2023. Despite the general procedure applied to business records, that absence could have readily resulted in the exclusion of various records

[50] The nature and extent of necessary lay and expert evidence will vary depending upon subjective and objective considerations. Some proceedings involving the issue are hard-fought and conducted and determined to the standards of counsel of perfection; see *Director of Public Prosecutions v PM* [2023] VSC 560 for example.
[51] For example, *KG v Firth* (supra) at [25].
[52] 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*.
[53] Those records included a Learner Profile, Modified Timetable for 2023, a psychologist report together with Behaviour Support Plan compiled in mid-2021, a Student Chronicle of 14 pages, School Reports on TV, and Student Enrolment History, together with emails between teachers (which on one view, may have included unfairly prejudicial material). The Exhibit also included some RDH records, including noting a diagnosis of ADHD from 2020.
[54] Exhibit P3.

in the exercise of one or more discretions available under the ENULA. Regardless, issues of cogency and weight must arise.

43. The records show that until August 2019 TV's school attendance was at a reasonable level, between 60 per cent and 70 per cent. However, from August 2019 engagement plummeted, reducing to 15 per cent at the beginning of 2023. It may be inferred from a fair reading of various of the school records that at times TV displayed various positive and appropriately skilled attributes in his schooling, but also presented with some very significant challenges and limitations, particularly in areas of self-regulation and control, and an incapacity to focus and concentrate (except in relation to Clontarf and cooking). No doubt some of that was contributed to by his ADHD condition, however it is not my conclusion that amounted to a cognitive disability.[55] Nonetheless, TV's academic achievement was well below his expected age level and he clearly demonstrated an inability to behave consistently in a safe, respectful and insightful fashion. Following adverse incidents in the school environment, TV could often 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 or distressed.

44. The offending alleged on each of the three files has some similarity, albeit that the offending in the first file in time was objectively the most spontaneous and opportunistic, and least serious of the three files. That offending essentially involved entering licensed premises after closing hours (without the use of force or damaging property) and stealing alcohol. The second episode was the most serious, being a concerted and protracted unlawful entry culminating in the theft of two motor vehicles. The persistence and insight apparent on the part of TV in order to achieve his objectives was clear, with those actions culminating in Instagram postings of TV driving one of the stolen vehicles. The last episode, on 7 July 2023, was also calculated to some extent, although it is not my finding that TV and his alleged co-offender were calculating or sophisticated preparatory to the incident.

45. As is usual in these matters, the prosecution case relies heavily on the court drawing inferences from the documentary evidence. There was no direct evidence of any discussions by a person in authority or influence with TV, concerning the moral wrongfulness (or criminal nature) of his offending behaviour. It is noted that, in order to properly draw an inference, the court must be satisfied it is not only reasonable, but is the only reasonable inference which can be drawn from the evidence.[56] Various aspects of the evidence also point to, for whatever reason, an impaired insight into the impacts of and consequences for antisocial and immoral behaviours.

46. Having regard to the evidence as a whole, the prosecution failed to prove beyond reasonable doubt that on the relevant dates TV 'knew his conduct was wrong' in the manner and context required.

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[55] An inference from the evidence that TV has experienced a particularly difficult, tumultuous and traumatic upbringing is also open, and those factors very likely have a definite role to play.
[56] *Chamberlain v R (No. 2)* (1984) 153 CLR 521, *Shepherd v The Queen* (1990) 170 CLR 573 and *Knight v R* (1992) 175 CLR 495.