CITATION:	*Police v TW* [2024] NTYJC 2
PARTIES:	Police
	v
	TW (a youth)
TITLE OF COURT:	YOUTH JUSTICE COURT
JURISDICTION:	CRIMINAL
FILE NO(s):	22318109, 22318931, 22320441 & 22322698
DELIVERED ON:	16 February 2024
DELIVERED AT:	Darwin
HEARING DATE(s):	27 September & 2 October 2023
DECISION OF:	Judge Macdonald

CATCHWORDS:

Criminal law - Identification - Dishonestly - 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)
Evidence (National Uniform Legislation) Act 2011 (NT)
Traffic Act 1987 (NT)
Youth Justice Act 2005 (NT)

BDO v The Queen [2023] HCA 16
Chamberlain v R (No. 2) (1984) 153 CLR 521
Director of Public Prosecutions v PM [2023] VSC 560
DPP v PM [2023] VSC 560
KG v Firth [2019] NTCA 5
Knight v R (1992) 175 CLR 495
Police v TV [2024] NTYJC 1
R v Apostilides (1984) 154 CLR 563
Rigby v ND [2022] NTSC 51
Rigby v TH [2023] NTSCFC 2
"RP" v Ellis & Anor [2011] NSWSC 442
RP v The Queen [2016] HCA 53
R v Smith (2007) 179 A Crim R 453
Shepherd v The Queen (1990) 170 CLR 573
Whitehorn v The Queen (1983) 152 CLR 657

REPRESENTATION:

Counsel:

Police:	Ms K Smith
Defendant:	Ms C Newman

Solicitors:

Police:	ODPP
Defendant:	NAAJA

Decision category classification:	B
Decision ID number:	[2024] NTYJC 2
Number of paragraphs:	23

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

No. 22318109, 22318931,
22320441 & 22322698

BETWEEN:

Police

AND:

TW (a youth)

Defendant

REASONS FOR DECISION

(Delivered 16 February 2024)

JUDGE MACDONALD

Background

1. In June and July 2023 the Defendant youth (TW) allegedly commenced offending against Territory laws, approximately two months following turning 12 years of age. Between 7 June and 16 July 2023 TW allegedly committed 16 offences generating 4 Youth Justice Court (YJC) files (the Charges).[1]

2. Due to the age of TW, the Charges on all files proceeded to hearing on 27 September 2023 in order to determine, amongst other issues, a threshold issue of '*doli incapax*'.[2] Although the parties had not agreed to conduct the hearing on the basis that the issue of criminal responsibility (CR) should be determined first by preliminary or separate hearing, or that the hearings should proceed on the basis of 'agreed facts' for that purpose, counsel had been diligent and persistent in seeking to narrow the issues to those truly in dispute.[3] That included

[1] Seven of the original charges were withdrawn across the 4 files. Of the remaining Charges, other than two regulatory traffic offences and an assault, all remaining offences alleged may be described as 'property offences', namely burglary, unlawful use of a motor vehicle, theft, stealing and trespass. On the basis of the maximum sentences prescribed, all but the traffic 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] The alternative approach of a separate or preliminary hearing on the issue of CR on the basis of 'agreed facts' proposed wholly and solely for the purpose of that determination was not availed of by the parties. The authorities applied in *Police v TV* [2024] NTYJC 1 at [27] to [30] may render that option more feasible in future matters.

TW through his counsel conceding all conduct alleged on files 22318109 and 22322698, with identification and CR remaining as issues in dispute on the former and CR being the sole extant issue on the latter. Although conduct was conceded to some extents on files 22318931 and 22320441, several other legal issues remained in dispute on one or more charges across those proceedings, with CR remaining a common issue.[4] However, albeit that some issues remained in contest, facts were generally able to be agreed and tendered into evidence for all purposes across the Charges.[5]

3. On 27 September 2023 counsel also advised a further Agreed Fact to the YJC, namely; "[TW] *first came to the attention of child protection on 14 November 2011 at six months old. Between that date and 24 March 2023 there were 52 notifications of neglect and inadequate supervision*." The YJC also had the benefit of oral and written submissions of counsel for the parties.

The law on criminal responsibility

4. The state of the law in the Northern Territory in relation to CR changed, to some extent, in 2023. On 17 May 2023 the High Court decided *BDO v The Queen* [2023] HCA 16, 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, with some retrospective effect.[6] The consequences and effect of the new terms of ss 38A and 43AQ are referred to below.

5. Due to TW's age and the commencement and effect of amending Act No. 30 of 2022 in relation to the Code, as at the date of the hearing the alleged offences attracted the operation of either ss 38A or 43AQ of the Code, depending on whether Part IIAA applied to the charge.[7] 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

[4] Remaining issues, in addition to CR, were identification on file 2318109 and failure to prove various elements in relation to #1, 2, 4 and 7 on 22318931 and #6 and 7 on 22320441.
[5] Including having regard to the content of some witness statements tendered into evidence by consent.
[6] Section 472(1)(a) of the Code.
[7] 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). Section 38A applied to 5 of the 16 counts, including 2 counts contrary to the *Traffic Act 1987* (NT).

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.

6. 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.[8] It may be accepted that the knowledge required to be proven by ss 38A and 43AQ comprises a fault element of the Charges.[9] Regardless of whether characterised as 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.[10]

7. Although dealing with the common law rather than the Code, *RP v The Queen* is the highest authority of general relevance.[11] 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.[12] The authorities considering "*capacity to know*" are now of less significance to the extent that they focus on that formulation.

8. 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.*[13] *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*".[14]

9. 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

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[8] 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.

[9] 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.

[10] 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.

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

[12] *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.

[13] *RP v The Queen* [2016] HCA 53 at [9].

[14] *RP v The Queen* [2016] HCA 53 at [9].

nature and seriousness of the allegations are relevant.[15] 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.[16]

10. 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*".[17] Similarly, a defendant youths "*intellectual and moral*" development requires close consideration in determining whether the element of knowledge is proven to the requisite standard.[18]

11. 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.[19]

12. 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.[20] However, depending on subjective factors such as the youth's particular or general presentation and any diagnosed neurodevelopmental conditions, 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.[21]

The evidence and discussion

13. The Charges against TW for which the issue of CR is to be determined arose over the period 7 June to 16 July 2023, when he was 12 years of age. The evidence indicates that TW was arrested shortly following each incident (and then bailed), and that those apprehensions appeared to be his first formal interactions with the criminal justice system.[22]

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[15] *RP v The Queen* [2016] HCA 53 at [11].
[16] *Director of Public Prosecutions v PM* [2023] VSC 560 at 32.
[17] *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.
[18] *RP v The Queen* [2016] HCA 53 at [12].
[19] 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.
[20] For example, *KG v Firth* (supra) at [25].
[21] 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*.
[22] Bail documents from 7 June 2023 onwards comprised Ext P1B across all files.

14. In addition to the bail undertakings and facts which were able to be agreed,[23] other evidence adduced at hearing comprised school records produced by the Department of Education[24] (Education records), CCTV footage relevant to files ending 8109 and 0441[25], a Bail Assessment Report, a report under s51 of the *Youth Justice Act 2005* (YJ Act)[26], some photographs, and various statements by witnesses, including members of NT Police.[27]

15. The Education records comprised a Student Enrolment History from 2015 through to 2023, NAPLAN results for 2019 and 2021, a Student Behaviour Report for 2020 to 2023, a SAIS Individual Student History Report for 2016 to 2023, Primary School Individual Behaviour Reports for 2020 to 2022, an "SSP" designed 7 March 2023 and a Palmerston College Behaviour Details Report for 17 February 2023, together with a report provided under section 68 of the YJ Act on 28 August 2023. There was also a bundle of Suspension Forms from 2022, and a bundle of Care Team Records with Territory Families, Housing and Communities badging from late 2022, and an email of 28 April 2023 from TW's Primary School Principal to an investigating member of NT Police, setting out some of their experience with TW.

16. Acceptance of the Education records into evidence was significant, due to the importance of a child's education in seeking to determine whether they 'knew that their actions were seriously wrong as a matter of morality'.[28] Such records are generally relevant, but are often more nuanced and complicated than business records ordinarily tendered as an exception to hearsay under s 69 of the *Evidence (National Uniform Legislation) Act 2011* (ENULA). The Education records comprising Exhibit P1A were no exception in that regard. The Care Team Records, SAIS Individual Student Reports and the SSP all contain content, including as to impairments, which may be properly characterised as opinion evidence. In those circumstances, regardless of the possibility that such hearsay evidence might be excised and excluded from the business records, I consider it would be appropriate to produce relevant witnesses, at least for cross examination. Although the fairness of that approach is most pronounced in respect of evidence which is adverse to a defendant, it is potentially apposite to all such evidence, having regard to the prosecution obligation to call all relevant evidence towards providing a 'full picture' of the relevant case.[29] That proposition of course must be approached in the context of the YJC being a court of summary jurisdiction.[30] The Education records, including the email of 28 April 2023, were nonetheless admitted into evidence.

17. Given the starting point that each and every child under 14 is presumed to not be criminally responsible for their actions, much of the content of the Education records contained evidence which ran counter to a finding that TW knew the wrongness of his actions.[31] That evidence will be referred to briefly below. However, with the possible exception of the evidence concerning

[23] Exhibits P1B, and P1 on files ending 0441 and 2698.
[24] Exhibit P1A across all files, essentially constituting business records.
[25] Exhibit P2
[26] Exhibit P3.
[27] Those statements essentially furnished the facts alleged on files ending 8109 and 8931.
[28] *RP v The Queen* [2016] HCA 53 at [9], *KG v Firth* [2019] NTCA 5 at [27] and [29], *Rigby v ND* [2022] NTSC 51 at [17] and *BDO v The Queen* [2023] HCA 16 at [16] and [42] and *Director of Public Prosecutions v PM* [2023] VSC 560 at [93] to [97].
[29] *Whitehorn v The Queen* (1983) 152 CLR 657 at 663, *R v Apostilides* (1984) 154 CLR 563 at 575 and *R v Smith* (2007) 179 A Crim R 453 at 463
[30] Section 54 of the YJ Act. Had the prosecution been granted an adjournment of the hearing part-heard (which was refused) it is likely one or more witnesses would have been summoned to attend a resumed listing.
[31] But noting the Court of Appeals guidance in *KG v Firth* [2019] NTCA 5 at [29].

TW's antisocial behaviours at school resulting in the sanction or remedial action of suspension, the most significant evidence was contained in the email of 28 April 2023 from the Primary School Principal. In particular, "*He has grown up watching his brothers get into trouble with the law and whilst **I firmly believe that he knows right from wrong** I also believe he sees this lifestyle as a 'way of life' as that is what he has been exposed to from a very young age*" (**emphasis** added).

18. It is noted that TW's contrary behaviours at Primary School included being non-compliant, swearing, fighting with other students, stealing food from the tuckshop and, on two occasions, damaging property. Firstly, through reckless behaviour and, secondly, by deliberate and persistent throwing of a garden paver at a door.[32] Although the last two categories could fairly be described as 'criminal conduct', the vast majority of TW's documented antisocial behaviours were at a lower level. The Principal's opinion must be viewed in that light in the circumstances, despite that the Charges are of more serious behaviour. It is also noted that the concept of 'right from wrong' may also be applied to "*naughty*" behaviour, and could not unequivocally establish the requisite knowledge to the necessary standard, or having regard to the context in which Superior Courts have approached and construed the concept of "*wrong*", albeit in the moral rather than criminal sense.

19. The Education records, together with aspects of the reports provided under sections 51 and 68 of the YJ Act, all contain information highlighting that TW has had a particularly difficult and traumatic upbringing, including during the period of alleged offending.[33] The Education records also provide copious evidence that not only has TW's education been sporadic and deficient, but also that even when engaged, his performance is well below average. Various entries refer to imputed impairment on more than one level.[34] In all the circumstances, it is difficult to conclude anything other than that TW almost certainly has an impoverished, incomplete or adulterated moral code.

20. Various features of the allegations in relation to TW naturally support a conclusion that he knew at the time of his actions that they were 'seriously wrong'. For example, the frenetic and frantic conduct on entering the licensed premises on 7 June 2023, in order to steal whatever attractive items could be found, including alcohol. Clearly each of the youths in the CCTV knew they should be quick in order to avoid being caught out. The same might be said in relation to some of the offending on 25 June 2023. Similarly, the elusive, defiant and evasive behaviour of TW and his co-offender in obtaining and securing the car keys then driving the vehicle on 17 June 2023 is telling. Nonetheless, and despite the defiance often displayed, youths do not generally wish to be caught for either naughty or criminal behaviour.

21. It is also noted that TW was arrested following each incident the subject of the Charges, and remanded at an NT Police watch-house until granted bail. Certainly contact with and experience in the criminal justice system can provide good evidence that a youth has come to know that particular conduct is 'seriously wrong', despite that the complexities inherent in that proposition have been recognised by Superior Courts.[35] However, TW was relatively inexperienced in the system as at June and July 2023.

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[32] Which included breaking one or more glass panels.
[33] The s 51 report dated 6 June 2023, page 18 of the SAIS report, and various content of the Care Team Records, including case mapping.
[34] See the SSP of March 2023 and the fifth paragraph on page 2 of the section 68 report of 28 August 2023.
[35] For example, *Director of Public Prosecutions v PM* [2023] VSC 560 at 32.

22. The prosecution case relies heavily on the YJC applying inferential reasoning.[36] Despite the Principal's hearsay opinion, there is no direct evidence of any person in authority or of influence in TW's life seeking to sheet home the nature of and consequences for 'seriously wrong' behaviour.[37] Despite what might be characterised as deliberate and defiant behaviour by TW at school, that behaviour also demonstrated an inability to behave consistently in a safe, respectful or insightful fashion. I consider both his capacity and willingness to observe social mores are definitely impaired, with the former being significant. Given the adverse and countervailing factors apparent on the evidence, together with TW's inexperience in the criminal justice system at the time of the alleged offending, I find that TW has not been proven to the necessary standard to have 'known his conduct was wrong' in relation to any of the Charges.

23. In the circumstances none of the other legal issues in dispute fall to be determined. The Charges are dismissed.

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[36] *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.

[37] I have little doubt that both TW's mother and grandmother have each sought to do so. However, neither of those elders were sought to be called, and s 18 of the ENULA would provide a serious impediment unless they were willing and able.