CITATION: *Police v LH and SB* [2012] NTMC 026

PARTIES:	POLICE
	v
	LH & SB
TITLE OF COURT:	COURT OF SUMMARY JURISDICTION
JURISDICTION:	CRIMINAL
FILE NO(s):	21220248, 21206330 & 21204515
DELIVERED ON:	23 July 2012
DELIVERED AT:	Katherine
HEARING DATE(s):	27 June and 28 June 2012
JUDGMENT OF:	Ms Sue Oliver SM

CATCHWORDS:

CRIMINAL LAW -- YOUTH JUSTICE -- DOLI INCAPAX

Criminal Code section 38 and 43AQ

REPRESENTATION:

Counsel:

Complainant:	Mr Smith
Defendant:	Mr Moore for SB Mr Schofield for LH

Solicitors:

Complainant:	ODPP
Defendant:	NAAJA

Judgment category classification:	B
Judgment ID number:	[2012] NTMC 026
Number of paragraphs:	38

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21220248, 21206330 and 21204515

BETWEEN:

POLICE
Complainant/Informant

AND:

LH & SB
Defendant

REASONS FOR DECISION

(Delivered 23 July 2012)

Sue Oliver SM:

1. LH and SB are charged with a number of dishonesty offences relating to entry into dwelling houses and stealing property from them and being involved in the unlawful use of motor vehicles. The earliest of these offences is from 23 September 2011 to dates towards the end of January 2012. Some of these charges are in common with each other. In addition, LH has two charges (trespass and stealing) from 10 February 2012. LH also has two charges of breach of bail both on 19 April 2012.

2. The issue that has been raised with respect to each of the youths is whether because of their respective ages at the time of the alleged offending they are not to be held criminally responsible for their conduct. SB was born on 20 May 1998 and was therefore 13 years and four months of age at the time of the earliest offences and 13 years and eight months at the offences in late January. LH was born on 25 May 1999 and was therefore 12 years and four months of age at the date of the earliest alleged offences and around 12 years and eight months in January/February 2012.

Onus of Proof

3. Consistent with the common law doctrine of *doli incapax*, the Criminal Code provides for a presumption that a youth under the age of 14 years is excused from criminal responsibility.

4. However, the Criminal Code carries a complexity in that it presently sets two different tests for determining the rebuttal of the presumption depending on the nature of the charge. Section 38 of the Criminal Code, which was the original provision dealing with criminal responsibility by a child under the age of 14 years provides for a test based on capacity.

> **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.

5. Section 38 applies to all offences other than those covered by section 43AQ.

6. Section 43AQ applies to Schedule 1 or Declared Offences and provides a test aligned to the common law doctrine of *doli incapax*, that is, the prosecution must establish beyond a reasonable doubt that the child knew that the conduct was wrong.

> **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.

7. In the case of LH there are two charges of unlawfully damage property pursuant to Section 241 of the Criminal Code. Section 241 is a Schedule 1 offence. Consequently, whether LH can be found criminally responsible for the alleged offences will depend on the rebuttal of the presumption based both on section 38 in its application to the majority of the charges and on section 43AQ on the unlawful property damage charges.

8. In terms of section 38, the prosecution must only prove that LH and SB had the *capacity* to know that the act or acts were wrong ("to know that he ought not to do the act, make the omission or cause the event") as opposed to section 43AQ which requires that the prosecution prove actual knowledge that his or her conduct was wrong.

9. In neither case must the prosecution prove that the youth had capacity to know or knowledge that the act or conduct constituted a criminal offence. What must be shown is that respectively the youth had capacity to know or actual knowledge that the act or conduct was seriously wrong according to the principles of ordinary people or the ordinary principles of reasonable people[1].

10. It was submitted that what is required for the discharge of the presumption is "strong and pregnant evidence" that the youths understood that what they did was seriously wrong and not merely naughty or mischievous. That direction was under consideration in *R v F ex parte Attorney General* [1999] 2 Qd R 157. That somewhat curious phrase is of long standing[2] and had been used in a jury direction that was, *inter alia*, under appeal. Davies JA (with whom McPherson JA and Sheperdson J agreed) said that expressing the test that way was wrong for two reasons. First, the section[3] is concerned with

[1] *M (A minor)*(1977) 16 SASR 589 at 590 per Bray CJ; *Field and South Australia v Gent* (1996) 87 A Crim R 225 at 230 per Mulligan J
[2] *B v R* (1958) 44 Cr App R 1 at 3 per Lord Parker LCJ
[3] S29(2) Queensland Criminal Code which is in identical terms to section 38 of the NT Criminal Code

capacity to know rather than as the common law appears to be, with actual knowledge. Secondly, it tended to obscure the fact that what the provision required and no more is that the Crown prove the relevant capacity beyond a reasonable doubt. His Honour said

> "It is preferable in my view, if the phrase "that the person ought not to do the act" needs to be paraphrased, and I doubt if it does, to use the phrase "that the act was wrong according to the ordinary principles of a reasonable man"

11. Likewise in R v ALH [2003] VSCA 129 at [20] Callaway JA said

> "To speak of a "presumption" that a child under 14 is *doli incapax* accords with long usage, but it obscures the simplicity of the common law rule properly understood. In the case of an accused person of or over the age of 14, the Crown does not have to prove that he or she knew that his or her conduct was seriously wrong. The question does not arise. In the case of an accused person under that age, but not under the age of 10, the Crown does have to prove such knowledge. That is all that is meant by the presumption. It is like other rebuttable presumptions that do no more than indicate on whom the burden of proof of a particular fact lies. When it is understood in that way, there is no circularity or inconsistency in saying that the act or acts constituting the offence, in conjunction with the child's age, may be sufficient on their own to discharge the onus. The authorities to the contrary are wrong in principle and should not be followed. The absurdities to which they lead are illustrated by the English cases after *C v. Director of Public Prosecutions.*

12. The courts have consistently held that the older the child the easier it is to rebut the presumption. It has also been said that the more heinous or serious the offence the easier it is to rebut the presumption particularly in combination with an older rather than younger child. However the learned authors of *Criminal Defences in Australia*[4] make a considered argument that the proper focus should be on the *type* of offence. They say

> 'For example, crimes such as fraud, forgery or receiving stolen property may be serious offences but their sophisticated content would work in favour of rebutting the presumption of *doli incapax."*

13. Conversely, it seems to me that the nature of some offences are quite simple in terms of what a reasonable person would understand to be right or wrong

[4] Fairall and Yeo *Criminal Defences in Australia* 2005 (4th Edition) at 332

according to the ordinary principles of man. In terms of the conduct in question here, the conduct involves what might be regarded as simple principles of conduct in society; not entering other people's homes and taking their property, not taking other peoples vehicles and not damaging other people's property. They are not complex principles of conduct, indeed a child from an early age will rile against the use of a toy without permission or another child damaging it.

The Prosecution Evidence

14. The evidence presented by the prosecution in this matter and on which the prosecution relies in order to rebut the presumption was that of two youth workers, one of whom has worked with both of the youths at programs with the YMCA and another who has worked with the young persons as part of the Clontarf Academy program. They have each worked with these boys for at least two years. The Police Constable with the Youth Diversion Unit in Katherine also gave evidence with respect to an antecedent report which was said to be that of SB. There is some dispute as to whether the record is accurate given a discrepancy in the date of birth on the report. Interviews were conducted by police with both boys. In the case of SB on both 3 and 17 February 2012 and in the case of LH on 17 February 2012. The electronic record of interview (EROI) with each of the youths was played.

15. Ms Tammy Freeon's evidence was that she knew both boys through her position as a youth worker with the YMCA. She has had more to do with LH than with SB. In summary her evidence was that the boys are required to comply with rules as part of the program and that there are consequences for a failure to do so. It has taken time and repetition over the two years of engagement to develop compliance but now they are "pretty good". She has never had an issue with them with honesty. The boys had been involved in a project of developing rules for the program and deciding the consequences.

16. Mr Mathew Hahndorf has worked with the boys in the Clontarf Academy program. An aim of the program is to keep youth at school and as part of the program they are required to sign a contract with guidelines and rules. There are consequences, though appropriately not exclusion, for breaking the rules. He has known LH for three years and SB for two years.

17. In essence, the evidence of each of these witnesses would support a view that each of the boys has been for at least two years involved in structured programs in which they must comply with rules and have consequences attached for non compliance. With respect to the YMCA, and consistent with normal development of children, they appear from time to time to have broken rules and learnt of the consequences. Their compliance has improved over time.

18. I do not accept that the evidence of Ms Freeon that it has taken time to develop compliance with the rules of attendance at the YMCA means that I could not be satisfied that at the earliest date each boy had not matured to the extent of the capacity required for criminal responsibility. Respecting and complying with rules are about behaviour, not about capacity. It is entirely possible, indeed a constant feature of the youth justice system, that youths before the court understand the wrongfulness of their behaviour but choose nevertheless to commit offences.

19. Constable Whitfield Jones evidence was confined to SB. He said that in January he had given him a written warning but there was no evidence of what the warning was in regard to. The antecedent report has been mentioned above and I do not place reliance on it because of discrepancy in the record.

EROI of SB on 3 February 2012

20. SB gave his name and that he was 13 nearly 14 years old. He is in year nine at High School. He was given a proper caution with respect to not being

required to answer questions and he was able to explain his right to silence saying “I don’t have to talk” and could say “I don’t want to talk about it”. When asked what can happen with the recorded interview he said it can be “shown to the judge” and that the judge can “send me to Don Dale” or “juvenile diversion”.

21. He was very open about the conduct involved in entering houses and searching for and taking property and vehicles. He spoke at length and in detail about his involvement. In my view key elements in terms of the capacity issue that emerge from this EROI are:

- That they were all planning at [LH’s] and knew the house
- A stick was used to poke a hole in the flyscreen to open the door
- That LH stole a packet of smokes and a bottle of Smirnoff and Samuel stole a phone and $40 and that he thought that Radney had an iPod too
- In relation to the taking of a vehicle on a different date from the same house he said that he didn’t know it was stolen until they woke him up and he asked Samuel who said they stole it. He then proceeded to give a very detailed account of what occurred with the use of that motor vehicle and that he knew it was stolen when they went driving. He told LH that “Fire stole that car from the blue house”. He also said he told [WO] at [LH’s] that it was stolen.
- With respect to another address on 30 January 2012 he said that [LH] came back with jewellery, gold and necklaces and Fire had an iPad and $500 and keys to a car.

- He referred to an incident of them coming back and said “they stole whole heap of grog” and gave him money to buy drinks. “They were smoking gunja”.

- He was asked about other house properties and identified that these were not ones that did not involve him.

- When asked whether there was anything else he wanted to tell them about he said that he stole two bikes from flats.

EROI of SB on 17 February 2012

22. SB was interviewed further on 17 February 2012. Similarly to the previous interview he was articulate and forthcoming in his account of involvement in an incident with other young people that involved damage to the school gym in 2010. This relates to a further charge in which I gave an immediate decision following this hearing that the prosecution had, with respect to that offence, failed to discharge the onus. In my view, there was considerable difficulty in relying on evidence so long after the event to prove capacity at the time of the conduct in 2010.

23. After being questioned about that matter he was asked to comment on a break and enter at 7 Ronan Court on 14 February. Although he said he knew about it he declined to tell what happened.

Capacity of SB

24. SB was 13 years and four months of age at the time of the earliest of the charged offences and 13 years and eight months at the offences in late January. He is in year nine at High School which is an age appropriate school level.

25. As was said in *R v ALH* the acts themselves combined with the age of the youth may be sufficient to rebut the presumption. As I have said, in my view this is not necessarily confined to those offences that by their nature are so

heinous that a child of young years would understand that they are seriously wrong. In my view, offences that involve basic elements of dishonesty **of the level involved here** committed by a youth in his 14th year might well be sufficient to rebut the presumption, provided that there is no evidence suggesting any delayed development or cognitive difficulties in the youth. However there is more than these two factors to be considered on the evidence before me.

26. SB's demeanour both as seen in the EROI's and in court is of an alert and articulate young man. He gave detailed unprompted accounts of his conduct in relation to the offences with which he was subsequently charged and of the involvement of others. He clearly understood the caution with respect to his right to silence. He knew not only that punishment might result from what he might disclose in the EROI but also knew the name of the youth detention centre and that police diversion is an option for young offenders. It might be true that little can be gleaned from a young person identifying conduct as being "wrong" in an interview with police (because the context itself informs them that something wrong has been done), however SB was able to not only specify what punishment that might result from a court hearing the matters but was able to identify both the place of detention and police diversion. It illustrates knowledge of these features of the criminal justice system in advance of the interview and the connection of them to the conduct that he is about to disclose.

27. SB consistently used the term "stolen" in his interview rather than talking about "taking" or "using" property. He spoke of other features of the conduct that were detailed and coherent accounts of what happened and his and others levels of involvement. He had no difficulty in remembering the detail and sequence of what had happened some four months earlier. In my view his accounts, the words he used to describe the conduct all point to his being able to evaluate the conduct as "wrong according to the ordinary

principles of a reasonable man". I am satisfied beyond a reasonable doubt that he had the capacity to know that he ought not do the acts charged.

EROI of LH

28. LH was also interviewed on 17 February 2012. He identified that he is in year eight at High School and was 12 years old at that time.

29. He understood the caution "don't have to talk when you give me a question". When asked about what might happen with the magistrate he said he might "tell me I'm going to jail or getting community work."

30. Particular features of his record of interview relevant to capacity are:

- That at one of the house he entered he told a child who had woken to go back to bed and had shut the dog in another room

- He used expressions consistent with understanding wrongfulness. In relation to a house entered on 27 January he identified it as the same house previously entered saying "because we **broke into** there before" Fire came up with the idea of "breaking in". Sam and I were keeping a "lookout" and "I was keeping a watchout". In relation to a silver car that they pushed the car and "**stole** the keys."

- He displayed discomfort with his mother discovering in the interview that he had been involved with his older brother "Fire" in the offending in question. It was readily apparent that he had been told not to be involved with Fire and his criminal activities.

- When asked if anyone had forced him to be involved in the offending his mother who was present intervened to try to get him to agree that it was Fire who forced him but he rejected the idea.

31. LH was 12 years and four months of age at the date of the earliest alleged offences and around 12 years and eight months at the latter offences. Although younger than SB he is still towards the upper range of the ages for which there is a rebuttable presumption (over 10 years to under 14 years).

32. He is also in an age appropriate class at school suggesting no learning disabilities and though perhaps not quite as forthcoming and articulate as SB in interview, was well able to give a detailed account of what happened and who was involved. In my view he displayed a confidence in the interview with police that was at least consistent with his age and more confident in his answers (and refusals to answer) than in many interviews that I have seen with youths older than him.

33. The telling of the small child to go back to bed and putting the dog out of the way in another room are both acts consistent with not wanting to be detected in the house. They therefore indicate a consciousness that the activities in the house were wrong as does the role of keeping a "lookout".

34. As I have said the expressions used to describe the conduct are consistent with knowing not just that the conduct was wrong by ordinary principles but the criminality involved. The houses were "broken into" rather than entered and things "stolen" rather than taken. Although proof that the conduct amounts to a criminal act is not required, describing acts in terms that are familiar to criminal charges or conduct clearly points to both capacity and knowledge of the wrongfulness of the acts.

35. Like SB he was able to identify forms of orders that a court might make having heard the evidence from the EROI. Identifying "community work" as a disposition that a court might give displays an understanding of court outcomes that not many 12 year olds would be familiar with. It is a reasonable inference that some personal or family contact has resulted in him knowing of the disposition available to courts and that it might apply to the conduct he was about to disclose.

36. Having considered each of the matters to which I have referred they all point to his being able to evaluate the conduct as “wrong according to the ordinary principles of a reasonable man”. I am satisfied beyond a reasonable doubt that he had the capacity to know that he ought not do the acts charged.

37. With respect to the charge of unlawfully damage property I am satisfied for the same reasons that he knew that the conduct was wrong as required by section 43AQ. The terms used to describe what occurred at that residence and his involvement taken from the record of interview show beyond a reasonable doubt that he knew the conduct to be wrong.

38. I find both SB and LH to be capable of criminal responsibility for the conduct alleged.

Dated this day of .

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Sue Oliver
STIPENDIARY MAGISTRATE