JURISDICTION	**:**	CHILDREN'S COURT OF WESTERN AUSTRALIA IN CRIMINAL
LOCATION	**:**	PERTH
CITATION	**:**	THE STATE OF WESTERN AUSTRALIA -v- SP [2012] WACC 11
CORAM	**:**	JUDGE REYNOLDS
HEARD	**:**	13 JULY 2012
DELIVERED	**:**	26 JULY 2012
FILE NO/S	**:**	CC 3011 of 2011 CC 3012 of 2011 CC 3013 of 2011
BETWEEN	**:**	THE STATE OF WESTERN AUSTRALIA Applicant AND SP Respondent

Catchwords:

Review - Juvenile Justice Team referral - Sex Offences - Jurisdiction to review - Acceptance of responsibility and plea of guilty - Interpretation of s 28(1) of Young Offenders Act 1994

Legislation:

Children's Court of Western Australia Act 1988 (WA)
Criminal Code (WA)
Young Offenders Act 1994 (WA)

Result:

Held no jurisdiction to review with comment that generally serious sex offences not suitable for Juvenile Justice Team referral.

Representation:

Counsel:

Applicant	:	Mr S M Stocks
Respondent	:	Mr M A Holgate

Solicitors:

Applicant	:	Director of Public Prosecutions (WA)
Respondent	:	Holgate Legal

Case(s) referred to in judgment(s):

AZG [2010] WACC 12
Maxwell v R (1996) 184 CLR 501

JUDGE REYNOLDS:

Introduction

1 This is an application by the State pursuant to s 40 of the *Children's Court of Western Australia Act 1988* (WA) (the Act) for the review of the decision made by a learned magistrate of the Court on 8 May 2012 to refer three charges of indecent dealing with a child under the age of 13 years against the defendant to a Juvenile Justice Team (JJT).

The alleged factual circumstances of the offences

2 The three charges are pursuant to s 320(4) of the *Criminal Code* (WA). It is alleged that, on 27 January 2011, the defendant was babysitting his cousins, AH, SH and EH. At the time, the defendant was 15 years of age and AH was 10 years of age, EH was 8 years of age and SH was 6 years of age. The allegation the subject of charge CC 3011/11 is that the defendant took EH into a bedroom of the house and grabbed him by the waist and put EH's hand down the front of his, i.e. the defendant's, pants. This was allegedly seen by AH who was watching from outside.

3 It is further alleged that later that same day, the defendant took both SH and EH into a bedroom of the house where he pulled down his pants and forced both of SH and EH to play with his penis. These allegations form the basis of charges CC 3012/11 and CC 3013/11.

History of the court proceedings

4 The defendant first appeared before the Court on 14 June 2011. The matters were adjourned to 25 July 2011 and on that date the defendant entered pleas of not guilty to each of the three charges. The matters were listed for trial on 13 and 14 October 2011.

5 On 4 October 2011, the trial dates of 13 and 14 October 2011 were vacated on the application of the State. The application was based on the Child Witness Service not having been able to prepare the two complainants, EH and SH, and the young witness, AH, to give evidence at the trial. The application for the vacation of the trial was not opposed by the defence. New trial dates of 20 and 21 February 2012 were listed.

6 On 18 November 2011, an application was made by the defence to vacate the trial dates of 20 and 21 February 2012. The matters were relisted for trial on 22 and 23 March 2012.

7 On 15 March 2012, the defence applied to vacate the trial dates of 22 and 23 March 2012. On 15 March counsel for the defendant advised the Court that,

> I can indicate that we should be in a position to advise the State of [the defendant's] position within a few weeks. All I ask is not to reset the hearing date but to put it through for another mention only.

8 The matters were adjourned for mention only on 3 April 2012. When the matters came back before the Court on that date, counsel for the defendant informed the Court that the defendant wished to accept responsibility and commented that the matters were eligible to go to a JJT. The State opposed that course and counsel for the defendant informed the Court that he would prepare detailed written submissions in support of a referral to a JJT and provide them to the State and the Court. On that basis, the matters were adjourned to 8 May 2012 for the parties to be heard on the question of whether or not the Court could and should properly refer the matters to a JJT.

9 When the matters came back before the Court on 8 May 2012, no written submissions had been prepared by the defence. Nevertheless, counsel for the defendant submitted that the matters could and should be referred to a JJT. The State took no objection to that question being decided on the day but opposed that course. It was submitted on behalf of the State that the charges were too serious, that they involved two young victims, that both victims were cousins of the accused, and that both had been left quite traumatised by what had happened.

10 In the course of submissions by both the State and the defence, mention was properly made that before the matters could be referred to a JJT, on each charge the defendant needed to accept responsibility for the act constituting the offence and agree to the matter being dealt with by a JJT rather than by the Court. Section 25(4) of the *Young Offenders Act 1994* (WA)(the YO Act) provides as follows:

> 25(4) A matter can only be referred to a juvenile justice team if the alleged offender accepts responsibility for the act or omission constituting the offence, and agrees to having the matter dealt with by a juvenile justice team rather than by a court, but if the juvenile justice team cannot agree on how to deal with the young offender or for some reason refers the young offender to the court then such acceptance is not to be construed as an admission that the offence was committed or a plea of guilty, or otherwise used in evidence against the offender.

11 After hearing submissions from both the defence and the State, the learned magistrate stated inter alia:

> **HIS HONOUR:** All right, very well. It's not usual to sort of give a quote as it were but in the event that your client accepts responsibility for this matter, which I think will probably avoid him having to go under the Offender Reporting Act, that's a matter for somebody else. However, on balance, I'm prepared to send the matter to the juvenile justice team. There is a presumption in favour of going to the team.
>
> **…**
>
> … the other cases all make it clear that there is a presumption in favour of first offenders where there's no established pattern of offending, which is the same thing, basically; they should be sent to the team and I would do so, assuming that your client accepts responsibility for these matters.

12 The learned magistrate then asked counsel for the defendant if the defendant was prepared to accept responsibility for the matters, to which counsel replied that he was. The learned magistrate then said that he would take pleas from the defendant. The following exchanges then took place:

> **HIS HONOUR:** All right. Stand up. I'll read it to you. You're charged that on 27 January 2011 at [undisclosed] you indecently dealt with [EH], a child under the age of 13, an offence under the Criminal Code section 320(4). Do you understand what you're charged with?
>
> **[DEFENDANT]:** Yes.
>
> **HIS HONOUR:** And how do you plead?
>
> **[DEFENDANT]:** Not guilty.
>
> **[COUNSEL]:** No, no.
>
> **HIS HONOUR:** [counsel] will give you some advice.
>
> **[DEFENDANT]:** Sorry, guilty.
>
> **HIS HONOUR:** Do you accept responsibility for the charge?
>
> **[COUNSEL]:** He accepts responsibility.

13 After the above exchange, the learned magistrate read each of the remaining two charges to the defendant and on each in turn asked him if he accepted responsibility for the offence. The defendant said 'yes' on both of them.

14 The learned magistrate then gave the following reasons for deciding to refer the matters to a JJT:

> My view is that notwithstanding the serious nature of the charge, this is perhaps at the lesser end of the scale, although still serious, and the offender is clearly entitled and should in my view go to the team.
>
> I am fortified in that view in the knowledge that there will be somebody from the police present at the team and that if they, after hearing all the facts and after everyone has made a contribution, come to the view that it's not appropriate for the juvenile justice team to deal with the matter, they simply withhold their consent to the plan and the matter will come back to the court, which I would expect them to do. So on that basis three matters are referred to the juvenile justice team.

15 In my view the reasons of the learned magistrate for deciding to send the matters to a JJT should be taken to include what he said before he read the charges to the defendant in addition to what he said after he did so.

Grounds for review

16 The application for review sets out the following reasons for the application:

> The sentence imposed is manifestly inadequate having regard to:
>
> 1. The seriousness of the offence;
>
> 2. The need for personal deterrence; and
>
> 3. the need for general deterrence.

17 The order referring the matter to a JJT is not a sentence. The State's position on the review was expanded in its written outline of submissions filed in support of the review on 21 June 2012.

18 A key issue in this application to review is the threshold issue of whether or not s 40(1) of the Act has been satisfied so that my jurisdiction to review is enlivened.

19 Section 40(1) of the Act provides as follows:

> **40. Review by President of certain sentences**
>
> (1) Subject to this Act, where the Court, when constituted so as not to consist of or include a judge, makes a finding that a charge against a person is proved and makes an order against or in relation to the person in consequence of that finding, the Court when constituted

> by the President may, of its own motion or upon an application made under subsection (2), reconsider the order and —
>
> (a) confirm the order; or
>
> (b) discharge the order and substitute any other order that the Court, if it had been constituted by the President, could have made in relation to the offence.

20 I adopt what I said in ***AZG [2010] WACC 12*** at p 5, namely that:

> Section 40(1) contains two preliminary requirements, both of which need to be satisfied before there can be a review of an order. They are (1), the finding that a charge against a child is proved, and (2), the making of an order against or in relation to the child in consequence of that finding.

21 I also confirm my view, as expressed in *AZG*, that a referral to a JJT is the making of an order against or in relation to a child as provided in s 40(1). The particular requirement in s 40(1) which requires consideration in this case to decide whether or not I have jurisdiction to review is the first mentioned requirement that the Court has made a finding that the charge against the defendant is proved.

22 It seems to me that the various submissions made by the State to support its contention that I have jurisdiction to review the decision of the learned magistrate to refer these matters to a JJT can be fairly put in two alternative lines of submission.

23 In no particular order of priority, the first submission is that the mechanism by which the charges against the defendant were referred to a JJT indicates that the charges against the defendant have been proved. In order to understand that submission it is necessary to set out and then comment on the provisions of s 28(1) of the YO Act. Section 28(1) provides as follows:

> **28. Referral to team by court**
>
> (1) If a young person has been charged with an offence, the court may refer the matter for consideration by a juvenile justice team —
>
> (a) before dealing with the charge;
>
> (b) after a plea of guilty has been entered but before the court records a finding that the young person is guilty of the offence;
>
> (c) after a hearing of the charge but before the court records a finding that the young person is guilty of the offence; or

> (d) after a plea of not guilty has been entered and the court has found the charge proved but before the court records a finding that the young person is guilty of the offence.

24 The State has submitted that the provisions of s 28(1)(a) do not apply because the Court by taking a plea and listing the charges for trial has commenced dealing with the charges. The State has further submitted that the provisions of s 28(1)(c) do not apply because the Court has not heard the charges. I agree with both of those submissions.

25 The State has in turn submitted that therefore the only remaining provision in s 28(1) which could have given the learned magistrate power to refer the charges to a JJT was either s 28(1)(b) or s 28(1)(d). The State has submitted that if the learned magistrate relied on s 28(1)(b) then he must have equated the acceptance of responsibility with a plea of guilty or if he relied on s 28(1)(d) he must have found each charge proved from the defendant's acceptance of responsibility. Either way, it is submitted that therefore the learned magistrate must have found each charge proved which in combination with him then ordering the referral to a JJT enlivens my jurisdiction to review pursuant to s 40(1) of the Act. The final part of this submission is that in light of all of the circumstances the matters should not have been referred to a JJT.

26 The State's second line of submission, in the alternative to the first, is that on each charge, the defendant's acceptance of responsibility of the act constituting the offence constituted a plea of guilty or a finding that the charge was proved. It is submitted that therefore the acceptance of responsibility effectively satisfies the first requirement in s 40(1). The next step in the submission is that the learned magistrate's order referring the matters to a JJT, satisfies the second requirement in s 40(1) for the purpose of considering whether I have jurisdiction to review, but was not lawfully open because the stage of the proceedings when the order was made did not fall within any of the stages as provided in s 28(1)(a)-(d) of the YO Act.

27 The final part of this submission is that if it was lawfully open for the matters to be referred to a JJT then in light of all of the circumstances they should not have been referred.

28 The State's further submission that the learned magistrate should not have ordered the referral of the matters to a JJT is particularly based on the combination of their seriousness, the need for general and personal deterrence, and the lateness of the acceptances of responsibility.

29 Finally, the State has submitted that further in the alternative if I do not accept the submissions already mentioned then at the very least the defendant has pleaded guilty to charge number 3011/11 and that the jurisdiction to review is enlivened in relation to that charge.

30 The defence has submitted that I have no jurisdiction pursuant to s 40(1) of the Act to review the order to refer the matters to a JJT because the defendant did not enter any unequivocal plea of guilty and also because none of the charges were found proved by the learned magistrate. It is further submitted that the decision of the learned magistrate to refer each of the charges to a JJT cannot of itself be a basis for me to conclude that he therefore found each of them proved and thereby give me jurisdiction to review pursuant to s 40(1) of the Act. It is also submitted that 'dealing with the charge' in s 28(1)(a) of the YO Act is a reference to the Court hearing and determining a charge or at least hearing a charge. Accordingly, it was submitted that the Court had not dealt with the charges and so it was open to refer them to a JJT under s 28(1)(a). The defence has also submitted that the order to refer the matters to a JJT was proper in light of all of the circumstances.

Analysis

31 I think that I should start my analysis by deciding whether or not the defendant entered an unequivocal plea of guilty to charge number 3011/11. It is well established that a plea of guilty must be a true admission of guilt and must be unequivocal. See ***Maxwell v R (1996) 184 CLR 501.***

32 In my view the defendant's express plea of guilty needs to be considered in the context of the submissions made by both counsel which preceded it and the circumstances in which the plea was entered. The submissions were about the defendant accepting responsibility and the matters being referred to a JJT. The transcript shows that the defendant's plea of guilty was not entered immediately after the charge was read and he was asked to plead to it by the learned magistrate. Rather, it was entered after he had initially pleaded not guilty and had then received some legal advice, which was obviously very brief. I wish to add that in my view an acceptance of responsibility is not a plea to a charge.

33 On my assessment, the plea of guilty was entered in circumstances of genuine confusion. It is also relevant to take into account the fact that the learned magistrate did not record any plea of guilty on the prosecution notice. He recorded 'accepts responsibility'. Further, on the remaining two charges, the defendant was not asked to plead, but rather he was asked if

he admitted responsibility to which he replied 'yes'. That also forms part of the overall circumstances.

34 In my view, the plea of guilty considered in the context of the circumstances as a whole, was not an unequivocal plea of guilty. Further, it seems clear that the learned magistrate disregarded the defendant's plea of guilty. While the defendant said the word 'guilty', he did not unequivocally plead guilty. The learned magistrate properly disregarded it.

35 Having made those findings I now move on to consider the first submission made by the State. Given those findings, in my view the only provision in s 28(1) of the YO Act which I need to refer to when considering this submission is s 28(1)(d). When the learned magistrate considered whether or not to refer the matters to a JJT the only pleas on the record at the time were the pleas of not guilty entered by the defendant on 25 July 2011.

36 In my view, it would be an error to reason backwards from the fact of the referral of the matters to a JJT of itself, that therefore the learned magistrate must have necessarily found each charge proved. The end result of the referral itself cannot be relied on as a basis to conclude that a requirement in the particular section for it to be made must therefore have been satisfied. That is akin to saying that because the learned magistrate made the referral he therefore must have had the jurisdiction to do so. Further to that, the learned magistrate did not say anything at all or record anything in writing at all to even suggest that he had made any such finding on any of the charges.

37 For all of those reasons I am of the view that there is no merit in this first submission by the State. I now move on to consider the State's second submission made in the alternative.

38 I think that in the context of this particular case, this second submission can be fairly distilled down to the contention that an acceptance of responsibility is a proper basis from which it can be implied that the Court has made a finding that a charge against a person is proved. With respect, I disagree.

39 For the purpose of determining this submission, I repeat and adopt what I said in AZG (supra) at p 10 and 13 inter alia:

> 32 In my opinion there is clearly a distinction between an acceptance of responsibility and a plea of guilty. That view is supported and

> recognised by the wording in s 25(4) of the YO Act which expressly provides that an acceptance, i.e. an acceptance of responsibility, is not to be construed as an admission that the offence was committed or a plea of guilty.
>
> …
>
> 43 In my opinion, an acceptance of responsibility for an act or acts which constitute an offence can never be construed as a plea of guilty even where the act or acts for which responsibility is accepted would or would seem to exclude all statutory defences.

40 Further to the second paragraph just referred to from *AZG*, I wish to add that in my view an acceptance of responsibility can never be construed as a plea of guilty even where there are no statutory defences available and even where on the face of it the circumstances do not disclose any possible defence.

41 I again refer to *AZG* (supra) and repeat and adopt what I said therein at p 13 as follows:

> 44 There are only two ways that a Court can proceed to find that a charge against a child is proved. They are (1) after the child has pleaded guilty, and (2) after the child has pleaded not guilty or is deemed to have pleaded not guilty and the hearing of the charge.

42 In my view, if the legislature did not intend any meaningful distinction between an acceptance of responsibility and a plea of guilty then it would have provided that a matter could not be referred to a JJT unless the person had pleaded guilty. That would have been easy to do and the legislature has not done it.

43 In my view, on each of these three charges it cannot be said that on the combination of the defendant accepting responsibility for the act constituting the offence and there being no statutory defence available and on the face of it no possible defence arising from the relevant circumstances, that therefore the Court has found the charge proved. The learned magistrate did not express any such finding and in my view no such finding can be implied from the combination of those things.

44 Accordingly, the first requirement in s 40(1) of the Act is not satisfied, and nor is the second requirement in s 40(1) satisfied because the order must be made as a consequence of the finding that the charge is proved.

45 That finding is enough to conclude that this second submission does not provide the basis for my jurisdiction to review being enlivened. Nevertheless, for the purpose of completeness I will now move on and deal with the balance of the submission which concerns the proper interpretation of s 28(1) of the YO Act. In my view the words 'dealing with the charge' in s 28(1)(a) should be interpreted widely. Interpreted that way, simply adjourning a matter and securing the defendant's appearance at the next listing would amount to dealing with the charge. What s 28(1)(a) is simply but importantly allowing and making clear is that a matter can be referred to a JJT on the first occasion that it comes before the Court.

46 In my view s 28(1)(a) should not be interpreted in a limiting way to mean that once the Court has started to deal with a charge that it is then no longer possible to refer the matter to a JJT. The existence of the other provisions in s 28(1), namely ss 28(1)(b)-(d) inclusive, support that view. When the provisions of s 28(1)(b)-(d) inclusive are all read, it can be seen that the common limitation in all of them is that the Court has not recorded a finding that the young person is guilty of the offence.

47 On a consideration of s 28(1) as a whole, I think that it is designed to provide and make clear that a matter can be referred to a JJT in circumstances where it might otherwise be thought that it could not, with the important proviso that a matter cannot be referred to a JJT if a finding that a young person is guilty of the offence has been recorded.

48 Section 28(1) is in my view an enabling provision which, save for the proviso, should not be interpreted in the strict way contended by the State. Further, the interpretation put on s 28(1)(a) by the defence is inconsistent with the provisions in ss 28(1)(b)-(d) inclusive.

49 For all these reasons I am also of the view that this second line of submission by the State does not provide a basis for my jurisdiction to review being enlivened.

50 This review throws up a number of issues on which I think that it would be useful for me to comment. The first, is whether or not these matters should have been referred to a JJT.

51 The three charges all allege an offence pursuant to s 320(4) of the *Criminal Code.* Such an offence is not included in the first and second Schedules to the YO Act and so is not precluded from being referred to a JJT. However, the facts on each of these three charges in a real sense involve the defendant procuring each of the two complainants to do

something of a sexual nature to him, e.g. touch his penis, and play with his penis. Procuring a child less than 13 years of age to engage in sexual behaviour is an offence pursuant to s 320(3) of the *Criminal Code* and is included in the first Schedule of the YO Act. Scheduled offences cannot be referred to a JJT. While that clearly did not determine whether or not any of these charges could be referred to a JJT, it was nevertheless, given the particular facts alleged, something to bear in mind when considering whether or not to refer these matters to a JJT.

52 Further and anyway, in my view these are not matters where the defendant should have been sent to a JJT. There are three charges of a sexual nature. The factual circumstances are both of a sexual nature and serious and there is some degree of force allegedly involved in relation to both incidents giving rise to the three charges. There are two complainants, one aged only 8 years at the time and the other aged only 6 years at the time. Both of the complainants are cousins of the defendant. The defendant was 15 years of age at the time. There is a significant age disparity between the defendant and each of the complainants.

53 I repeat what I have previously stated, namely that generally, a matter involving a sex offence committed in serious factual circumstances should not be sent to a JJT. It follows from that, that also generally, a multiple number of matters involving sexual offences committed in serious factual circumstances should not be sent to a JJT.

54 The second issue that I wish to comment on concerns the adjournment of the trial listed for 22 and 23 March 2012 when the matters were before the Court on 15 March 2012. The trial listing on 22 and 23 March was the third trial listing of the matters.

55 On 15 March 2012 the trial was vacated on the application of the defence and with defence counsel being very vague about the defendant's position. The defendant had previously pleaded not guilty on 25 July 2011 which was long before 15 March 2012. The matter should not have been adjourned and the trial vacated without requiring the defendant to have clearly stated his position. If he maintained his plea of not guilty on one or more of the charges then the hearing dates should not have been vacated unless there was some good reason. Further, if he informed the Court that he wanted to 'accept responsibility', which is not a plea, then that and whether the matters were referred to a JJT should have been sorted out before any vacation of the hearing dates.

56 It has transpired that when the defendant appeared before a JJT he denied responsibility on each charge. As a consequence the JJT has sent the matters back to the Court for determination. Everything remaining the same, the charges will now need to be given a fourth trial listing. This is clearly an undesirable situation.

57 Finally, I wish to make the point that the prospect of a defendant being placed on the 'ANCOR register' and being required to report is not a relevant consideration when deciding whether or not a defendant is referred to a JJT when charged with a sexual offence or sexual offences.

Conclusion

58 For all these reasons:

1. The application for review is dismissed, and

2. Each charge is back before the Court on the basis that the plea currently before the Court is one of not guilty.