[2017] WACC 7

JURISDICTION	**:**	CHILDREN'S COURT OF WESTERN AUSTRALIA IN CRIMINAL
LOCATION	**:**	PERTH
CITATION	**:**	THE STATE OF WESTERN AUSTRALIA -v- MB [2017] WACC 7
CORAM	**:**	JUDGE REYNOLDS
HEARD	**:**	14 SEPTEMBER 2017
DELIVERED	**:**	15 SEPTEMBER 2017
FILE NO/S	**:**	CC/KR 453 of 2016 CC/KR 517 of 2016 CC/KR 524-30 of 2016 CC/KR 561 of 2016 CC/KR 571-2 of 2016 CC/KR 585-9 of 2016 CC/KR 620 of 2016 CC/KR 681-6 of 2016 CC/KR 13-4 of 2017 CC/KR 69-71 of 2017 CC/KR 81 of 2017 CC/KR 207 of 2017
BETWEEN	**:**	THE STATE OF WESTERN AUSTRALIA Prosecution AND MB Accused

Catchwords:

Children - Criminal Law - Applications for rehearing and review pursuant to sections 28 and 40 of the Children's Court of Western Australia Act 1988 - Interpretation and operation of section 19B of that Act - Jurisdiction of Magistrates in Children's Court on indictable offences - Review application not the means of seeking a withdrawal of plea - Fitness to stand trial - 13 year old accused with severe impairments and FASD diagnosis.

Legislation:

Child Welfare Act 1947
Children's Court of Western Australia Act 1988
Criminal Code
Criminal Law (Mentally Impaired Accused) Act 1996
Criminal Procedure Act 2004
Official Prosecutions (Defendants' Costs) Act 1973
Young Offenders Act 1994

Result:

Applications successful - Conditional release order set aside - Either way indictable offences dismissed - conviction on indictable offence tried on indictment to be disregarded - No custody order.

Representation:

Counsel:

Prosecution	:	Mr S M Stocks
Accused	:	Mr C L Miocevich

Solicitors:

Prosecution	:	Director of Public Prosecutions (WA)
Accused	:	C & G Miocevich Law Offices

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

Harris v The State of Western Australia [2005] WASCA 147
Hondema v Carroll [2008] WASC 155

1 **JUDGE REYNOLDS**:

2 These matters came before me 14 September 2017. The submissions made by both the prosecution and the defence raised important issues concerning the statutory interpretation of provisions in section 19B of the Children's Court of Western Australia Act 1988 (the CC Act). Because I was going to be away on leave for four weeks from 15 September 2017 and considered it highly desirable for these matters be determined before I went on leave, I gave my decision on 15 September 2017 with oral reasons. I indicated that I would publish the decision and reasons later because of their significance. These are the published reasons.

3 Can I commence by referring to the conditional release order which was the reason for these matters coming before me.

4 On 20 January 2017, M was sentenced by Magistrate Roberts presiding in the Children's Court, at Kununurra, to a six month conditional release order for a total of 26 offences. Of all of the offences, the offence the subject of charge CCKR 529 of 2016 of aggravated burglary and committing an offence in a dwelling in a circumstance of aggravation, namely that she ought to have known that a person was in the dwelling, is the only one which, if she was an adult, must have been tried on indictment. The balance of the offences include some indictable offences which, if she was an adult, could by virtue of section 5 of the Criminal Code, be tried either on indictment or summarily.

5 In addition to all of those 26 charges, there are five new charges before the Court: 207 of 2017, 69 to 71 of 2017, and 81 of 2017. They allege various kinds of offences committed within the time period 21 January 2017 to 10 April 2017, and so after the conditional release order was made on 20 January 2017. M has not entered a plea on any of those charges.

6 On 24 July 2017, Dr Wojnarowska reported that M suffers from a mental impairment and that she is not fit to stand trial on those five new charges.

7 In a report dated 23 May 2017, Dr Fitzpatrick, paediatrician of Patches Paediatrics, set out that M satisfied the diagnostic criteria for fetal alcohol spectrum disorder. Her functional impairment is in the severe range.

8 An application has been made on behalf of M pursuant to section 28 of the CC Act for the original proceedings, which resulted in the conditional release order being made against her, to be reheard.

9 Subsections 28(1) and (2) of the CC Act provide as follows:

> (1) Subject to this section, the Court may order that any original proceedings in which an order (not being an order made following conviction on indictment) was made against a child under the *Young Offenders Act 1994* or the *Children and Community Services Act 2004* are to be reheard.
>
> (2) An order may be made under subsection (1) by the Court when constituted by the President of the Court's own motion or upon cause being shown on the application of —
>
> (a) the CEO (young offenders) or the CEO as defined in section 3 of the *Children and Community Services Act 2004*; or
>
> (b) a parent or guardian of the child against whom an order may be made in those proceedings; or
>
> (c) a child to whom the proceedings relate; or
>
> (d) the prosecutor in those proceedings.

10 An issue of statutory interpretation has arisen, namely whether the either way indictable offences in the balance of the 26 offences to which I have previously referred, can be the subject of an application pursuant to section 28 of the CC Act. The issue arises because subsection 28(1) expressly excludes the rehearing of any original proceedings in which an order was made following conviction on indictment.

11 The question then is whether an application pursuant to section 28 can be made in relation to an order made by this Court presided over by a Magistrate following a conviction for an indictable offence which could be tried either way if an adult were charged with it.

12 The answer to this question lies in deciding the proper interpretation for key parts of section 19B of the CC Act. The provisions of subsections 19B(1) to 19B(4) provide as follows:

> **19B. Jurisdiction and procedure for charges of indictable offences**
>
> (1)If a child is charged with an indictable offence and —

> (a) the offence is such that, if an adult were charged with it, it must be tried on indictment; or
>
> (b) the circumstances of the alleged offence are such that —
>
> > (i) if an adult were charged with it, it could, by virtue of section 5 of *The Criminal Code*, or another written law, be tried either on indictment or summarily; and
> >
> > (ii) the Court, having complied with section 40(2) of the *Criminal Procedure Act 2004*, decides that it is to be tried on indictment,
>
> the child may elect to be tried on indictment by the Supreme Court or the District Court (as the case requires), and the Court shall so inform the child.
>
> (2) If a child is charged with an indictable offence and the circumstances of the alleged offence are such that the child is not entitled to make an election under subsection (1), the Court shall, subject to the provisions referred to in section 19(1), hear and determine the charge summarily.
>
> (3) If the child makes an election under subsection (1) the Court shall proceed under Part 3 Division 4 of the *Criminal Procedure Act 2004* as if the charge were one that must be tried on indictment.
>
> (4) If a child does not make an election under subsection (1) —
>
> > (a) the Court, on its own motion or on the application of the child, may direct the prosecutor —
> >
> > > (i) to serve or cause to be served on the child (or the child's solicitor or counsel) and to lodge with the Court, within such time as is specified, any document that is required to be disclosed under section 95 of the *Criminal Procedure Act 2004*; and
> > >
> > > (ii) to afford the child (or the child's solicitor or counsel) reasonable opportunity to inspect any material exhibits that the prosecution proposes to tender at the hearing of the charge;
> > >
> > > and
> >
> > (b) on the making of a direction under paragraph (a), the State acting by the Attorney General or some other duly

> appointed person shall assume the conduct of the prosecution and shall be taken to be the prosecutor; and
>
> (c) the Court shall, subject to the provisions referred to in section 19(1), hear and determine the charge, and may exercise any power in Part 4 or 5 of the *Criminal Procedure Act 2004*, as if the prosecution notice were an indictment, and the hearing were a trial on indictment and the *Criminal Procedure Act 2004* shall apply with such modifications as circumstances require; but the child is not thereby entitled to have any issue tried by a jury; and
>
> (d) subject to Part 5, the child, if convicted, shall, for the purposes of punishment and orders, procedures, and proceedings consequential on conviction, be taken to have been convicted on indictment, notwithstanding that the child may have been convicted by the Court when constituted other than by a judge.

13 The learned prosecutor on behalf of the State has posed the question on the interpretation of the relevant provisions in section 19B in this case in the following terms. Do the provisions of subsection 19B(4), which is prefaced with the words "If a child does not make an election under subsection (1)", apply to (1) any charge of an indictable offence covered by the provisions of subsection 19B(1), whether or not there is any right of election which actually falls to be considered, or (2), do the provisions of subsection 19B(4) only apply to those cases where the right of election arises by operation of the provisions of subsection 19B(1) and no election is made pursuant to that right or entitlement?

14 In fairness to the learned prosecutor, he has not sought to advance one interpretation over the other.

15 Counsel for M has submitted that the second of those two interpretations is the only one open on a proper reading of section 19B.

16 Can I start by referring to section 19 of the CC Act which sets out the criminal jurisdiction of this Court for dealing with children. Subject to various provisions in section 19 of the CC Act, pursuant to subsection 19(1), this Court has exclusive jurisdiction to hear and determine a charge of an offence alleged to have been committed by a child.

17 The broad landscape of the various Courts which exercise criminal jurisdiction in this State is as follows.

18 For adults, all prosecutions start in the Magistrates Court. The Magistrates Court does not have juries. When it tries an either way indictable offence it must be constituted by a Magistrate alone. See subsection 5(11) of the Criminal Code. Indictable offences which pursuant to the Criminal Code must be dealt with on indictment cannot be tried in the Magistrates Court. The Magistrates Court deals with relatively less serious offences which can include either way indictable offences, which of themselves can be objectively serious but are not considered serious enough to warrant being tried on indictment. When an accused is dealt with summarily in the Magistrates Court for an indictable offence which may be tried either way, the conviction is regarded as being a conviction of a simple offence (see subsection 3(5) of the Criminal Code), and the summary penalty as provided in the Criminal Code applies unless the offender is committed for sentence (see subsections 5(9) and 5(10) of the Criminal Code).

19 The Magistrates Court commits accused persons charged with what are essentially the most serious kinds of offences which the Criminal Code provides must be dealt with on indictment and also those charged with either way offences which are decided by the Magistrates Court on the application of the prosecutor or the accused before the accused pleads to the charge to be tried on indictment. See sections 3 and 5 of the Criminal Code and sections 40 and 41 of the Criminal Procedure Act 2004. The committals are made to the Supreme Court or the District Court as the case requires, depending on which court has jurisdiction.

20 The overall structure of the Children's Court, in a general sense, is akin to a combination of the Magistrates Court, the Supreme Court and the District Court all in one. The Children's Court has a District Court Judge as President. A District Court Judge can sit as a Judge in the Children's Court.

21 Judges in the Children's Court can deal with any indictable offence, including offences which the Criminal Code provides must be dealt with on indictment, which in turn includes offences which carry the statutory maximum penalty of life imprisonment. The Children's Court has jurisdiction when presided over by a Judge to deal with the offence of murder. So Judges in the Children's Court can hear and determine charges for all kinds of indictable offences which, if the child was an adult, would be tried in the Supreme Court or the District Court, as the case requires.

22 Unlike Magistrates in the Magistrates Court, Magistrates in the Children's Court can hear and determine some indictable offences which the Criminal Code provides must be dealt with on indictment (not including the offence of murder). Magistrates in the Children's Court can also hear and determine either way indictable offences even if they decide pursuant to subsection 19B (i)(b)(ii) of the CC Act that such offences must be tried on indictment.

23 Whether or not Magistrates in the Children's Court do deal with such offences or send them to the President of the Children's Court depends on a consideration by the Magistrate of the circumstances of the particular offence and of the particular child accused and the Magistrate's view on whether or not he or she has adequate sentencing powers pursuant to section 21 of the CC Act and section 96 of the Young Offenders Act 1994 (the YO Act) to adequately deal with the matter.

24 Further to that, it should also be noted that pursuant to section 22 of the CC Act, the President may give a Magistrate of the Children's Court extended powers for sentencing as if the Magistrate were a Judge, but such an extension would not apply to offences of a kind which can be determined only by the Supreme Court where the person charged with the offence was not a child.

25 In addition to all of that, it is also important to note that pursuant to the combined operation of subsection 3(5) of the Criminal Code and subsections 19B(4)(c) and (d) of the CC Act, if a Magistrate of the Children's Court, ie the Court being a Court of summary jurisdiction, convicts a child of an indictable offence which must be tried on indictment or an either way indictable offence which has been decided must be tried on indictment, then the conviction is to be regarded as on indictment and the statutory maximum penalty on indictment, not the summary penalty, applies. That is relevant to the Magistrate's decision on whether or not he or she has sentencing powers to adequately deal with the matter.

26 So, generally speaking, Magistrates in the Children's Court have a more extensive criminal jurisdiction than Magistrates in the Magistrates Court.

27 Magistrates in the Children's Court send children charged with offences to the President of the Children's Court to hear and determine if the level of seriousness of the circumstances of the offence and of the child accused and applying the relevant objectives and principles in the

YO Act are such that upon any finding of guilty, the likely range of sentence considered appropriate would put the sentence beyond the sentencing powers of a Magistrate.

28 I have set out that statutory framework of the criminal jurisdiction of the Children's Court and how it compares to that of the Magistrates Court to provide a background and the statutory context within which the proper interpretation of the relevant provisions in section 19B of the CC Act fall to be considered.

29 Subsection 19B(1) of the CC Act essentially entitles a child to elect to be tried on indictment in the Supreme Court or the District Court, as the case requires, if (a) the charge is for an indictable offence which must be tried on indictment, or (b) the charge is for an either way indictable offence and having complied with section 40(2) of the Criminal Procedure Act 2004, the Court decides pursuant to subsection 19B(1)(b)(ii) that it is to be tried on indictment.

30 Subsection 19B(1) therefore provides children with the right to a trial before a Judge and jury for an indictable offence which must be tried on indictment and also for an either way indictable offence which pursuant to subsection 19B(1)(b)(ii) has been decided should be tried on indictment. If a child is or becomes entitled to make an election pursuant to subsection 19(B)(1) for a trial by Judge and jury in the Supreme Court or the District Court, as the case requires, and does not make an election, then pursuant to subsection 19B(4)(c) the child is not entitled to have a jury when tried in the Children's Court.

31 In this case, apart from charge number CCKR529 of 2016, none of the other 26 offences are indictable offences which must be tried on indictment. Further to that, the Court when presided over by Magistrate Roberts did not make any decision pursuant to subsection 19B(1)(b)(ii) that any either way indictable offence must be tried on indictment. Therefore, M had no right of election pursuant to subsection 19(B)(1) on any of the either way indictable offences in the balance of the 26 charges.

32 Section 19B(2) essentially provides that if the child, in this case M, does not have a right of election pursuant to section 19B(1) on any either way indictable offence, then, subject to section 19(1), the Court shall hear and determine the charge summarily.

33 Because no decision was made by Magistrate Roberts for any either way indictable offence in the balance of the 26 offences to be tried on indictment, M had no right of election pursuant to subsection 19B(1) on

any of them. All of the either way indictable offences in the balance of the 26 were heard and determined summarily by Magistrate Roberts. Indeed, when Magistrate Roberts dealt with M for charge CCKR 529 of 2016 for the indictable offence which must be tried on indictment he was presiding over the Children's Court as a Court of summary jurisdiction.

34 In my view, the words which preface subsection 19B(4), namely "If a child does not make an election under subsection (1)", considered in the context of the provisions of section 19B as a whole, properly interpreted, mean that the provisions in subsection 19B(4) only apply to those cases where a child has a right of election to be tried on indictment by the Supreme Court or the District Court by operation of subsection 19B(1)(a) or (b) but chooses not to exercise that right of election. Subsection 19B (1) creates a right of election which is limited to offences which fall within one or other of the two specific categories expressly provided therein. Therefore the words which preface subsection 19B(4), limit the operation of subsection 19B(4) to offences which fall within one or other of those two specific categories. Therefore, subsection 19B(4) only applies to indictable offences which must be tried on indictment and also either way indictable offences which have been decided must be tried on indictment.

35 I am very mindful that this interpretation on the combined operation of subsections 19B(1) and 19B(4) will have general application, and so it will apply to cases beyond the particular circumstances and issues in this particular case for M.

36 This interpretation will have a procedural impact on the practice of Magistrates of this Court making orders for disclosure, purportedly pursuant to subsection 19B(4)(a), on charges for indictable offences which are not indictable offences which must be tried on indictment and are also not either way indictable offences which have been decided must be tried on indictment.

37 On charges for offences which do not fall within the operation of subsection 19B(4), the relevant provisions on disclosure in Division 6 in the Criminal Procedure Act 2004 would need to be relied upon to make orders for disclosure.

38 Further, it also seems to me that this interpretation and commentary on the statutory provisions concerning the more extensive criminal jurisdiction of Magistrates in the Children's Court compared to that of Magistrates in the Magistrates Court provides support to the view that

when Magistrates in the Children's Court hear and determine indictable offences which must be tried on indictment and either way indictable offences which are decided should be tried on indictment, then they are presiding in a Summary Court and have power to award costs to a successful accused pursuant to the Official Prosecutions (Defendants' Costs) Act 1973.

39 Applying all of that to subsection 28(1) of the CC Act, the conditional release order made against M on 20 January 2017, to the extent that it relates to the balance of the 26 charges other than charge number CCKR 259 of 2016, was not an order made following conviction on indictment.

40 For all of these reasons I conclude that, first, it is not open for an application to be made on behalf of M pursuant to subsection 28(1) of the CC Act in relation to charge number CCKR 259 of 2016 because the order, to the extent that it relates to that charge, is an order made following conviction on indictment. Secondly, it is open for an application to be made on behalf of M pursuant to subsection 28(1) in relation to the balance of the 26 charges because the order, to the extent that it relates to those other charges, is an order not being an order made following conviction on indictment.

41 The learned prosecutor indicated that if I reached conclusions on the statutory interpretation of subsections 19B(1) and 19B(4), and subsection 28(1) of the CC Act as I have done, then the State accepts that it would be proper for all of the convictions on the balance of the 26 charges, ie. all of the charges the subject of the conditional release order other than charge number CCKR 259 of 2016, to be set aside and then dismissed pursuant to subsection 16(5) of the Criminal Law (Mentally Impaired Accused) Act 1996 (the CL (MIA) Act).

42 Subsections 16(1) to 16(6) inclusive of the CL (MIA) Act provide as follows:

> **16. Procedure for offences triable summarily**
>
> (1) This section applies if the accused —
>
> (a) is charged with a simple offence; or
>
> (b) is charged with an indictable offence that can be tried summarily and that is to be tried by the court of summary jurisdiction.

(2) If the court that decides that the accused is not mentally fit to stand trial —

> (a) is satisfied that the accused will not become mentally fit to stand trial within 6 months after the finding that the accused is not mentally fit, the court must make an order under subsection (5); or
>
> (b) is not so satisfied, the court must adjourn the proceedings in order to see whether the accused will become mentally fit to stand trial.

(3) Proceedings may be adjourned under subsection (2)(b) for any period or periods the court thinks fit but the proceedings must not be adjourned for longer than a total period of 6 months after the finding that the accused is not mentally fit to stand trial.

(4) If proceedings are adjourned under subsection (2)(b), the court must make an order under subsection (5) —

> (a) if at any time the court is satisfied that the accused will not become mentally fit to stand trial within 6 months after the finding that the accused is not mentally fit; or
>
> (b) if at the end of 6 months after the finding that the accused is not mentally fit to stand trial the accused has not become mentally fit.

(5) An order under this subsection is an order dismissing the charge without deciding the guilt or otherwise of the accused and either —

> (a) releasing the accused; or
>
> (b) subject to subsection (6), making a custody order in respect of the accused.

(6) A custody order must not be made in respect of an accused unless the statutory penalty for the alleged offence is or includes imprisonment and the court is satisfied that a custody order is appropriate having regard to —

> (a) the strength of the evidence against the accused;
>
> (b) the nature of the alleged offence and the alleged circumstances of its commission;
>
> (c) the accused's character, antecedents, age, health and mental condition; and
>
> (d) the public interest.

43 The charges in the balance of the 26 charges fall within one or other of the categories of offences provided in subsections 16(1)(a) and (b).

44 The concession by the prosecutor on the dismissal of the charges pursuant to subsection 16(5) is both proper and fair.

45 The basis for the dismissal is the evidence which is now before the Court in the report of Dr Wojnarowska that M has a mental impairment and that she does not satisfy all of the criteria necessary for being fit to stand trial.

46 Further to that, having regard to the various considerations set out in subsection 16(6), including M's very young age of 13 years, her significant mitigating personal antecedents, her mental condition, and it not being in the public interest, it would not be proper to make a custody order. The prosecutor properly and fairly did not seek a custody order.

47 I now turn to deal with charge number CCKR 259 of 2016. This charge is presently before me by way of an application for a review filed on behalf of M pursuant to section 40 of the CC Act.

48 Section 40(1) of the CC 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 child is proved and makes an order against or in relation to the child 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.

49 Before I move on to consider the merits of the review, I wish to make a preliminary point which relates to my earlier commentary on the jurisdiction of Magistrates in the Children's Court compared to the jurisdiction of Magistrates in the Magistrates Court when dealing with indictable offences.

50 Subsection 28(1) of the CC Act has its origins in the early child welfare legislation of this State, including the Child Welfare Act 1947

before it was repealed. As mentioned, an application to rehear proceedings cannot be made pursuant to subsection 28(1) if the order was an order made following conviction on indictment. That can be compared with the wording in subsection 40(1) on applications for review which makes no reference at all to whether an order was made on indictment.

51 Subsection 40(1) provides for a power of review by the President "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 then makes an order against or in relation to the person. It can be noted that the operation of subsection 40(1) is not limited in any way at all. In particular there is no limitation on the kind of offence which may be the subject of the charge the subject of the application for review.

52 In my view, the wording in subsection 40(1) is recognition that Magistrates in the Children's Court have jurisdiction to sentence young persons charged with indictable offences which must be tried on indictment and also either way indictable offences which are decided pursuant to subsection 19B(1)(b)(ii) of the CC Act should be tried on indictment, in addition to other kinds of offences.

53 After these matters came before me on 14 September 2017, and after they were adjourned to the next day, I caused the parties to be informed that I requested a submission from each of them on the legal effect, if any, of the conditional release order having been made on 20 January 2017 for a term of six months, and the expiry date for that order of 19 July 2017 having passed.

54 What effect, if any, does that have on the application for review pursuant to section 40? Does the basis for the application fall away, or what? I thank both counsel for their further timely and helpful submissions on that point.

55 Subsections 115(a) and (b) of the YO Act apply to a conditional release order which has been breached and they provide a limitation on the circumstances in which the court can take action in relation to the breach. In this case, the Court constituted by the President, has not been asked to consider a breach, but rather to set aside the conditional release order. If M's application for review pursuant to s40 of the CC Act to set aside the original sentence of the conditional release order on charge number CCKR 259 of 2016 is successful, then the original conditional release order will be void ab initio and no longer have any force and effect for that charge.

56 If the order is not set aside, then, unless a notice pursuant to section 113 was issued before the term of the conditional release order expired, one could not now issue. If no notice was so issued then subsection 115(b) would have no practical effect. However, if M were to be subsequently charged with an offence committed during the term of the conditional release order, and the charge was laid within six months of the expiry of the conditional release order, ie. prior to 20 January 2018, then M would remain liable to be dealt with for the breach of the conditional release order.

57 With respect, I do not agree with the defence proposition that the effect of section 115 in this case is that M is no longer liable to serve the term of detention component of the conditional release order. Whilst she is not presently liable, she is potentially liable should the conditions in section 115(a) subsequently be met. A legal consequence of setting aside the conditional release order on a review pursuant to s40 of the CC Act is to remove the liability that an accused, in this case M, may be dealt with pursuant to the breach provisions.

58 Given all of that, I will proceed and deal with M's application for review.

59 I do not propose to set out the particulars of the offences and the grounds of review in these reasons. In summary, the grounds of review include that the learned Magistrate failed to give sufficient consideration to M's youth, that M was only aged 12 and 13 years at the time of the offences, that she was with a group of other young offenders and would have been influenced by them because of her young age, that she was a first offender at the time of the sentencing, and that a sentence of detention is the sentence of last resort.

60 It must be noted that an order for detention is an integral component of a conditional release order. See subsection 101(1) of the YO Act.

61 The grounds of review also include the following. M being a first offender, she had never been afforded supervision in the community on an intensive youth supervision order by itself or a youth community based order. Further, that the decision failed to give adequate consideration on whether there was an alternative sentencing disposition to a sentence of detention, albeit in the form of a conditional release order. It is also complained that the learned Magistrate placed too much weight on the principle of general deterrence and also that insufficient weight was attached to M having spent 17 days in custody on remand prior to being

sentenced, which is said to be, and in my view is, a very significant consequence for such a young child and particularly so given that it was away from M's country and family.

62 A further ground of review is that the Magistrate failed to give sufficient weight to the relevant welfare issues personal to M which impacted on her every day and also her lack of parental supervision in the community. I repeat that M has been diagnosed with FASD and her functional impairment is in the severe range.

63 While the parties properly accept that the outcome of the review is a matter for me, the learned prosecutor has indicated that the State accepts that the six-month conditional release order was not appropriate in all of the circumstances and that a lesser order should have been imposed.

64 In my view, that concession is both proper and fair.

65 Notwithstanding the overall seriousness of the offending, in my view there is merit on each and every one of the grounds to which I have just referred. In my view the conditional release order was manifestly excessive.

66 The conditional release order imposed by Magistrate Roberts on 20 January 2017 is set aside.

67 That leads to the question, what order should be made in substitution of it. That decision should be made taking into account all of the circumstances of the offences and of M, her youth, her mental impairments as recently identified and brought to the attention of the Court, that the conditional release order has now expired, and that M has spent time in custody.

68 Counsel for M seeks a disposition pursuant to section 66 or 67 of the YO Act.

69 Taking all of that into account, in my view the proper outcome of the review is to set aside the conditional release order and substitute it with an order for no further punishment pursuant to section 67 of the YO Act given the time that M has spent in custody.

70 Counsel for M also submitted that the conviction on charge number CCKR 259 of 2016 should be set aside and that M's plea should then be allowed to be withdrawn.

71 The submission goes along these lines. Section 40 of the CC Act allows the court to discharge the six-month conditional release order and substitute it with another order. Section 40 does not, on its own, allow the court to overturn the plea of guilty or conviction. In *Hondema v Carroll* [2008] WASC 155, Hasluck J discusses the inherent jurisdiction of the Court to allow a plea of guilty to be withdrawn at any time before sentence. His Honour also discusses the difference between a plea of guilty and recording a conviction. At paragraph 44 his Honour said, and I quote:

> Toohey J observed at 522 that the court has the power to allow a plea of guilty to be withdrawn at any time before sentence. A defective plea of guilty may be withdrawn and a conviction set aside on various grounds. This is part of the inherent jurisdiction of courts to see that justice is done. Some, if not most, of the decisions mentioned are explicable on the footing that, in the view of the court, the accused lacked full understanding of the plea or there was a some other vitiating factor. To this end, the court may refuse to accept a guilty plea or direct that a not guilty plea be entered –

72 If the original order of the conditional release order was to be confirmed, then there could be no power for the Court to overturn the plea of guilty or the conviction. It is submitted that once the Court decides that a substituted sentence is appropriate, the Court has an inherent jurisdiction to allow the plea to be withdrawn before the substituted sentence is imposed. The basis for the inherent jurisdiction is as stated above, that the Court sees that justice is done.

73 It was further submitted that it appears that no plea was entered on 14 September 2016, although a plea was manually recorded on the relevant prosecution notices. It seems to me, by reference to the transcript, that there was a problem with the transcription recording. I think what likely happened is that the charges were put to M, but the audio did not pick up her response and so it was not transcribed. There is a written notation on the documentation by the Magistrate.

74 It was also submitted that the mental impairment of M shows a lack of understanding of the proceedings. It is submitted that justice is not

done by resentencing M on a charge to which the Court would not have accepted the plea had her impairments been known.

75 With respect, in my view an application pursuant to section 40 of the CC Act for review is not a vehicle to in turn seek the setting aside of a conviction and a withdrawal of plea.

76 The purpose of section 40 is provide a relatively speedy and efficient review by the President of the Court of sentences by Magistrates of the Court to avoid the delay, inconvenience and cost of appeals to the Supreme Court. It is a specific statutory provision for that purpose. In my view, any inherent jurisdiction of the Court to allow a withdrawal of a plea does not reside within the operation of section 40.

77 An application has also been made on behalf of M pursuant to subsection 189(3) of the YO Act in relation to the conviction on charge number CCKR 259 of 2016. Subsection 189(3) allows the Court to declare the conviction not to be regarded as a conviction if special circumstances exist.

78 Subsection 189(3) was discussed in *Harris v The State of Western Australia* [2005] WASCA 147 in which it was found that there was no definition of "special circumstances" and that the question of whether such circumstances exist is one reserved for the opinion of the sentencing court. It was submitted on behalf of M that the mental capacity and health of M are special circumstances to enable the Court to make a declaration under subsection 189(3).

79 The words "special circumstances" in subsection 189(3) mean something more than normal. They mean something more than ordinary. Indeed, they mean something out of the ordinary, but less than exceptional.

80 In my view, having regard to the combination of M's mental capacity, her neurological impairments, her very young age, and her other personal circumstances, including that there is nothing else on her record and that she came before the Court to be dealt with for the offence as a first offender, I find that there is merit in the application and I make a declaration pursuant to subsection 189(3) of the YO Act in relation to charge number CCKR 259 of 2016 that the conviction not be regarded as a conviction.

81 Finally, at the beginning of these reasons I referred to the group of five new charges on which no plea has yet been entered. Dr

Wojnarowska has reported that M is not fit to stand trial on them. The learned prosecutor has indicated that the State accepts that and also that the charges should be dismissed and no custody order made. Again, in my view, they are proper and fair concessions.

CONCLUSIONS

82 For all of these reasons, I have concluded as follows:

83 It is open for an application to be made on behalf of M pursuant to subsection 28(1) in relation to the balance of the 26 charges other than charge number CCKR 259 of 2016 because the conditional release order to the extent that it relates to those charges is an order not being an order made following conviction on indictment.

84 The application pursuant to subsection 28(1) is granted and the original proceedings to the extent that they relate to the balance of the 26 charges are to be reheard.

85 Further to paragraph 2, the charges are dismissed pursuant to subsection 16(5) of the CL (MIA) Act.

86 Further to paragraphs 2 and 3, no custody is made pursuant to subsection 16(6) of the CL (MIA) Act.

87 The application pursuant to section 40 of the CC Act for the review of the conditional release order to the extent that it relates to charge number CCKR 259 of 2016 is granted and the conditional release order is set aside and substituted with an order that there be no further punishment pursuant to section 67 of the YO Act.

88 The application for M to withdraw her plea of guilty on charge number CCKR 259 of 2016 is dismissed on the basis that such an application does not fall within the operation of section 40 of the CC Act.

89 The conviction on charge number CCKR 259 of 2016 is declared to not be regarded as a conviction pursuant to subsection 189(3) of the YO Act.

90 I find that M is not fit to stand trial on the five new charges, and that pursuant to the CL (MIA) Act each and every one of such charges is dismissed and that there is no custody order.