Magistrate's verdict overturned

11-year-old child to stand trial for manslaughter in Australia

Cheryl McDermid
17 May 1999

In an unprecedented decision, the New South Wales Director of Public Prosecutions has overturned the verdict of the state's Senior Childrens Court Magistrate and indicted an 11-year-old child to stand trial for manslaughter. The little boy will be the youngest person to ever face the state's Supreme Court.

The DPP, Nicholas Cowdery QC, announced his ex officio indictment one week after Magistrate Stephen Scarlett had concluded a lengthy and much-publicised committal hearing into the drowning death of 6-year-old Corey Davis in the Sydney working class suburb of Macquarie Fields last year. Four children aged between 6 and 10 were playing alone on the banks of the Georges River when the older boy allegedly threw Davis into the river.

Scarlett dismissed the charges because he feared a jury would object to the spectacle of a young child standing trial in the Supreme Court. As soon as he heard of Scarlett's decision, the NSW Labor government's Attorney General Jeff Shaw publicly foreshadowed the possibility of the DPP overruling the decision, saying it “would be a very rare and indeed extraordinary thing to do but the Director of Public Prosecutions does have the power to do that”.

One lawyer, Michael Antrum of the Children's Legal Issues Committee, described the DPP's decision as extraordinary and unsettling. “In the adult system it is a very rare thing to utilise ex officio indictment when a committal has been run,” he said. “In the juvenile court it is even rarer.”

At the committal hearing, Scarlett legally laid the basis for the DPP's intervention by deciding that the prosecution had rebutted the presumption of *doli incapax*. This rule states that a youngster aged 10 to 14 is deemed incapable of forming criminal intent unless the prosecution proves that the child knew that what he was doing was seriously wrong, and not just naughty. Children younger than 10 cannot be placed on trial at all.

Scarlett made his finding despite the little boy being only 98 days over the minimum age of 10 years at the time of the tragedy, and despite the case hinging on the evidence of two six-year-old children.

However, he could not guarantee that a jury would agree with him and convict the boy of an offence that carries a maximum sentence of 25 years. He stated: “I consider that any jury would be less than comfortable at the whole concept of trying an 11-year-old child for the serious indictable offence of manslaughter in the Supreme Court. With the very best will in the world, the Supreme Court is a court for adults, and many members of the community would find a child defendant to be quite out of place in that environment. The circumstances of the case are such that a jury would be more than likely to interpret the incident as an act of bullying that went horribly wrong.”

Scarlett also remarked that at least one of the child witnesses was a reluctant participant who could not be relied upon at a public trial. The boy's evidence had been presented to the committal hearing via a video link. Scarlett, with a degree of vehemence, described the boy as “not a good witness”. “He was fidgety and argumentative, reluctant to give evidence, lacking in patience and keen to leave. Obtaining his evidence was a struggle, to say the least, and I doubt that he would be at all willing to go through the experience again.”

The magistrate urged the prosecution to charge the accused boy with assault, a charge that could be heard

in the Childrens Court without a jury.

In a highly political judgment, Scarlett spent a considerable portion of his 18-page document attacking the doctrine of *doli incapax*. “The presumption has been described by judges in recent times as ‘illogical' and ‘capricious': it is certainly arbitrary,” he said. “It is a presumption that predates the establishment of specialist Childrens Courts by well over a century....”

Although he was dealing with the conduct of a 10-year-old, Scarlett declared the cut-off point for *doli incapax* to be “unrealistically high” at 14. He said he would recommend a reduction to 12, effectively deeming children to be adults in the eyes of the criminal law from that age.

According to academic research, the principle of partially protecting children from conviction is so established that *doli incapax* dates back to 14th century England. Scarlett attributed the doctrine to an 18th century reluctance to impose the draconian punishments of hanging and transportation on children for minor offences. If so, his proposal demonstrates that principles which safeguarded children even during the harsh times of the Industrial Revolution are now being repudiated.

Scarlett's decision favoured the prosecution on all the substantive legal issues, differing only on whether the political climate was such that a jury would convict. The government and the mass media then set about creating just such a climate. The *Sydney Morning Herald* reported Scarlett's decision under the headline: “Too young to die...and his killer's too young to be tried.”

Three days later it published an article entitled “Age of Reason”, drawing a comparison with the James Bulger trial in Britain where two 10-year-old boys, Jon Venables and Robert Thompson, were tried and convicted as adults for murder. “Etched into the memory of the world—because the abduction was filmed by security cameras and shown on television news bulletins—the Bulger case shattered notions about the innocence of children,” the article claimed.

In the British case, the boys were tried in an atmosphere of media- and government-generated hysteria. Their deprived and troubled backgrounds were not admitted into evidence or discussed in the media. The boys were depicted as evil and despicable. Following their conviction, Murdoch's the *Sun* featured a headline screaming: “How do you feel now, you little bastards!”

The media's role in today's case has been similar. Attention has been focused solely on the alleged actions and statements of a little boy, to the complete exclusion of the social context in which the tragedy occurred. As we have discussed elsewhere, ("Criminally wrong" or "naughty"?--little boy could face trial for manslaughter), Macquarie Fields, where Corey Davis died, is marked by a high unemployment rate, low incomes, poor housing and community services and unaffordable child care centres. People are increasingly hounded off welfare and deprived of assistance with their children's development and entertainment.

Similar conditions exist throughout working class suburbs and rural towns across Australia. With children and their families starved of decent education, recreation and social assistance, there are bound to be further tragic incidents such as that in Macquarie Fields. Through the vilification of this young boy, public opinion is being conditioned to blame individuals, whether they be little children or adults, for the ever-more apparent failure of the present social order.