CITATION:	*Rigby v TH* [2023] NTSCFC 2
PARTIES:	RIGBY, Kerry Leanne v TH
TITLE OF COURT:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	ON REFERENCE from the Youth Justice Court exercising Territory jurisdiction
FILE NO:	3 of 2023 (22315957) and 4 of 2023 (22315959)
DELIVERED:	27 July 2023
HEARING DATES:	29 June 2023
JUDGMENT OF:	Kelly J, Barr J and Hiley AJ

CATCHWORDS:

PRACTICE AND PROCEDURE – whether Youth Justice Court has an implied statutory power to stay preliminary examination proceedings being conducted in accordance with Part V, Division 1 of the *Local Court (Criminal Procedure) Act 1928* (NT) pursuant to s 54A(2) of the *Youth Justice Act 2005* (NT), before the examination is completed, as an abuse of process, as oppressive or for unfairness – held no such implied power

Criminal Code Act 1983 (NT) s 211(2), s 297A, s 298, s 300, s 302, s 336(1), s 336(2)

Criminal Code Amendment (Age of Criminal Responsibility) Act 2022 (NT) s 469(1)

Justices Act 1902 (NSW) s 41, s 41(6), s 41(6)(b)

Local Court (Criminal Procedure) Act 1928 (NT) s 105C, s 105D, s 105E, s 105F, s 105G, s 105H, s 105I, s 105J, s 105K, s 105L, s 109, s 109(1), s 109(2), s 109(3)(c), s 110, s 112, s 112(1), s 112A(2)(a), s 112A(2)(c), s 113, s 114, Part V, Division 1

Youth Justice Act 2005 (NT) s 54A(2), s 60, s 62, s 112A(2)(a), s 138(1)(a)

Grassby v The Queen (1989) 168 CLR 1, applied

Atkinson v Government of the United States of America [1971] A.C. 197, *Connelly v Director of Public Prosecutions* [1964] A.C. 1254, *Consolidated Press Holdings Limited v Wheeler* (1992) 84 NTR 42, *Higgins v Comans* (2005) 153 A Crim R 565, *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, *Migration Agents Registration Authority v Frugniet* (2018) 259 FCR 219, *Miller v Ryan* (1980) 1 NSWLR 93, *Parsons v Martin* (1984) 5 FCR 235, *R v Hush; Ex parte Devanny* (1932) 48 CLR 487, *R v O'Meara* [2001] NSWCCA 201, *Rolfe v The Territory Coroner & Ors* [2023] NTCA 8, referred to

REPRESENTATION:

Counsel:

Applicant:	L Babb SC with L Auld
Respondent:	J Murphy with R Barwick

Solicitors:

Applicant:	Director of Public Prosecutions
Respondent:	North Australian Aboriginal Justice Agency

Judgment category classification:	B
Number of pages:	15

IN THE FULL COURT OF THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Rigby v TH [2023] NTSCFC 2
No. 3 of 2023 (22315957) and 4 of 2023 (22315959)

BETWEEN:

KERRY LEANNE RIGBY
Applicant

AND:

TH
Respondent

CORAM: KELLY ACJ, BARR J AND HILEY JJ

REASONS FOR JUDGMENT

(Delivered 27 July 2023)

THE COURT:

[1] The respondent is a youth (the "youth") being prosecuted for serious criminal offences allegedly committed on 3 July 2022 and 19 August 2022 at which time he was 11 years of age. As a "youth", the matters are currently before the Youth Justice Court. Given the serious nature of the alleged offences, including aggravated robbery contrary to s 211(2) of Schedule 1 of the *Criminal Code Act 1983* (NT), ("the *Criminal Code*") which carries a maximum penalty of life imprisonment, the Youth Justice Court must deal with the charges by way of "preliminary examination" in accordance with the procedure

under Part V ("Indictable offences"), Division 1 ("Procedure on committal") of the *Local Court (Criminal Procedure) Act 1928* (NT).[1]

[2] On 9 November 2022 the Northern Territory Legislative Assembly enacted the *Criminal Code Amendment (Age of Criminal Responsibility) Act 2022* (NT) ("the Amending Act") which will have the effect of raising the age of criminal responsibility to 12 years. The Amending Act also introduces a new s 469(1) into the *Criminal Code* which reads: "Any charge or conviction against a person for an offence committed or alleged to have been committed when the person was under 12 years of age is expunged." Although the Amending Act has not yet commenced, it contains a self-executing provision such that it will commence (at the latest) on 7 October 2024.[2]

[3] On 16 February and again on 3 March 2023, the youth indicated an intention to apply to the Youth Justice Court for:

(a) an adjournment of proceedings until 7 October 2024; or

(b) a stay of proceedings in light of the legislated commencement of the Amending Act no later than 7 October 2024.

[4] The second of those applications raises the question as to whether the Youth Justice Court has the power to stay the proceedings.

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1 *Youth Justice Act* 2005 (NT), ss 54A(1)-(2), 5(1).

2 Amending Act s 2(2)

[5] The Youth Justice Court reserved that question of law and stated a special case for the consideration of the Supreme Court, pursuant to s 60 of the *Youth Justice Act 2005* (NT). The question stated was:

> [W]hether, upon a proper construction of the Act, the Youth Justice Court has an implied power to stay proceedings in circumstances not specified in sections 62 and 137 of the Act.

[6] Following discussions with counsel at the hearing we have re-formulated the question as follows:

> Does the Youth Justice Court have an implied statutory power to stay preliminary examination proceedings being conducted in accordance with Part V, Division 1 of the *Local Court (Criminal Procedure) Act 1928* (NT) pursuant to s 54A(2) of the *Youth Justice Act 2005* (NT), before the examination is completed, as an abuse of process, as oppressive or for unfairness?

Preliminary examination proceedings

[7] Part V, Division 1 of the *Local Court (Criminal Procedure) Act 1928* (NT) provides for the conduct of preliminary examinations (previously known as committal proceedings).

[8] The Court is given various powers including power to give leave for a defendant to cross examine a witness (s 105H), power to remand the defendant or grant the defendant bail (ss 113 & 114), power to adjourn the preliminary examination from time to time (s 112A(2)(a)), and powers to order the prosecutor or defendant to do anything the Court considers will or may facilitate the preliminary examination being

conducted fairly, efficiently, and economically and expeditiously (s 112A(2)(c)).

[9] In exercising the committal function under the *Local Court (Criminal Procedure) Act*, the Court receives evidence offered by the prosecution in the manner broadly regulated by ss 105C to 105L. It then forms an opinion as to whether the evidence is sufficient to "put the defendant on trial".[3] If the Court is of the opinion that there is not sufficient evidence, it must dismiss the prosecution.[4] If it is of the opinion that there is sufficient evidence, the Court must (given the nature of the charges in this case) "proceed with the examination",[5] by giving the defendant an opportunity to give or call evidence.[6] The Court must then consider whether the evidence is sufficient "to put the defendant upon his trial for any indicatable offence".[7]

[10] Section 109 provides for the procedure on completion of the evidence for the prosecution:

> (1) When all the evidence offered upon the part of the prosecution has been taken, the Court must consider whether it is sufficient to put the defendant on trial for any indictable offence.
>
> (2) If the Court is of the opinion that the evidence is not so sufficient, it shall forthwith order the defendant, if in

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3 *Local Court (Criminal Procedure) Act 1928* (NT), s 109(1).

4 *Local Court (Criminal Procedure) Act 1928* (NT), s 109(2).

5 *Local Court (Criminal Procedure) Act 1928* (NT), s 109(3)(c).

6 *Local Court (Criminal Procedure) Act 1928* (NT), s 110.

7 *Local Court (Criminal Procedure) Act 1928* (NT), s 112(1).

custody, to be discharged as to the information then under inquiry.

(3) If the Court is of opinion that the evidence is so sufficient, the Court may:[8]

(a) if the charge is one that may be heard and determined summarily under Division 2 – proceed in the manner directed and under the provisions in that behalf contained in Division 2; or

(b) unless the defendant is charged with an offence punishable by imprisonment for life, ask the defendant whether the defendant wishes to plead to the charge as provided in Division 3, and proceed as thereby directed; or

(c) proceed with the examination as provided in the next succeeding sections.

[11] Section 112 provides for the procedure on completion of the preliminary examination:

(1) When the examination is completed the Court must consider whether the evidence is sufficient to put the defendant upon his trial for any indictable offence.

(2) If, in the opinion of the Court, it is not so sufficient, the Court must forthwith order the defendant, if in custody, to be discharged as to the information then under inquiry.

(3) If, in the opinion of the Court, the evidence is sufficient, the Court must:

(a) direct the defendant to be tried at the first sitting of the Supreme Court exercising its criminal jurisdiction next held after a period of 14 days after a date and at a place specified by the Court; and

(b) either commit the defendant by warrant into the custody of the Commissioner of Correctional Services until the trial or grant the defendant bail under the Bail Act 1982; and

(c) cause a record of the direction and the committal or admission to bail to be made in writing.

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8 Here "may" means "must". It does not appear that the Court has any choice but to do one of the three things listed in (a), (b) and (c) depending on which of the pre-conditions in the three paragraphs are present.

(4) Where the defendant is so directed, he shall, subject to any order made by the Supreme Court, be tried accordingly.

[12] If the defendant is discharged the Crown may still charge the offender by signing an *ex officio* indictment.[9] If a defendant is committed, the Crown then must determine whether to indict the defendant and put him/her to trial,[10] or determine not to do so and issue and serve a certificate following which the defendant is discharged.[11] The Crown can subsequently decide not to further proceed by filing a *Nolle Prosequi*.[12]

Statutory courts and implied powers

[13] Although the Youth Justice Court, as an inferior court, does not have the inherent powers possessed by a superior court, in *Parsons v Martin*[13] the Full Court of the Federal Court said:

> In our opinion a court exercising jurisdiction conferred by statute has powers expressly or by implication conferred by the legislation which governs it. This is a matter of statutory construction. We are of the opinion also that it has in addition such powers as are incidental and necessary to the exercise of the jurisdiction or powers so conferred.
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> (underlining ours)[14]

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9 *Criminal Code*, s 300.

10 *Criminal Code*, ss 298, 336(1)-(2).

11 *Criminal Code*, ss 297A.

12 *Criminal Code*, s 302.

13 (1984) 5 FCR 235, 241. This passage was quoted with approval by Toohey J in *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, 630.

14 The relevant principles were discussed and the authorities reviewed by Mildren J in *Consolidated Press Holdings Limited* v *Wheeler* (1992) 84 NTR 42.

[14] The question as to whether a magistrate exercising powers in committal proceedings in New South Wales had an implied power to stay such a proceeding was the subject of the High Court's consideration in *Grassby v The Queen*[15] ("*Grassby*"). The relevant parts of the judgment are those of Dawson J, with Mason CJ, Brennan and Toohey JJ agreeing, and Deane J agreeing subject to a qualification.

[15] After referring to the inherent jurisdiction of superior courts, Dawson J said at pp 16-17:

> On the other hand, a magistrate's court is an inferior court with a limited jurisdiction which does not involve any general responsibility for the administration of justice beyond the confines of its constitution. … However, notwithstanding that its powers may be defined, every court undoubtedly possesses jurisdiction arising by implication upon the principle that a grant of power carries with it <u>everything necessary for its exercise</u> … Those implied powers may in many instances serve a function similar to that served by the inherent powers exercised by a superior court but they are derived from a different source and are limited in their extent.
>
> (underlining ours)

[16] Dawson J later said, at p 17:

> It would be unprofitable to attempt to generalize in speaking of the powers which an inferior court must possess by way of necessary implication. Recognition of the existence of such powers will be called for whenever they are required for the effective exercise of a jurisdiction which is expressly conferred but will be confined to so much as can be "derived by implication from statutory provisions conferring particular jurisdiction". There is in my view no reason why, where appropriate, they may not

15 (1989) 168 CLR 1.

extend to ordering a stay of proceedings: cf. *R. v. Hush; Ex parte Devanny*.[16]

Power to stay committal proceedings

[17] Dawson J then turned to the question at hand and said, at p 17:

> The fact that in the conduct of committal proceedings a magistrate is performing a ministerial or administrative function is, of course, no bar to the existence of implied powers, if such are necessary for the effective exercise of the powers which are expressly conferred upon him. The latter are now to be found in s 41 of the *Justices Act*. But the scheme of that section, far from requiring the implication of a general power to stay proceedings, is such as to impose an obligation upon the magistrate to dispose of the information which brings the defendant before him by discharging the defendant as to it or by committing him for trial. If the defendant is committed for trial and subsequently indicted, the charge contained in the indictment will take the place of the charge upon the information.

[18] Dawson J then referred to s 41 of the *Justices Act 1902* (NSW), and in particular to s 41(6) which required the magistrate to do one of two things after taking and considering all the evidence adduced during the committal proceeding: (i) order the defendant to be discharged; or (ii) commit the defendant for trial.

[19] His Honour then said, at pp 18-19:

> There is no room in the face of these statutory obligations, couched as they are in mandatory terms, for the implication of a discretionary power to terminate the proceedings in a manner other than that provided. Nor is this surprising. True it is that a person committed for trial is exposed to trial in a way in which he would otherwise not be, but the ultimate determination whether he does in fact stand trial does not rest with the magistrate. The

16 (1932) 48 CLR 487 at 515.

> power to order a stay where there is an abuse of the process of the trial court is not to be found in the committing magistrate and the considerations which would guide the exercise of that power have little relevance to the function which the magistrate is required to perform.

[20] Dawson J concluded this discussion by saying, at p 19:

> … The fact remains that in committal proceedings a magistrate is performing an administrative or ministerial function which is governed by statute and the terms of the statute afford no basis for the implication of any power to dispose of those proceedings by the imposition of a permanent stay.

[21] We see no material difference between the statutory provisions in s 41(6)(b) of the *Justices Act 1902* (NSW) in force as at 1989 (as considered in *Grassby*) and s 112 of the *Local Court (Criminal Procedure) Act 1928* (NT). *Grassby* is therefore binding authority that the Youth Justice Court conducting preliminary examination proceedings in accordance with Part 5, Division 1 of the *Local Court (Criminal Procedure) Act 1928* (NT), pursuant to s 54A(2) of the *Youth Justice Act 2005* (NT) does not have implied power to order a permanent stay of such preliminary examination proceedings.[17]

Is *Grassby* distinguishable?

[22] Counsel for the youth contended that *Grassby* is distinguishable because it only applied after completion of the examination and it did not apply to temporary or conditional stays.

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17 We note that the Queensland Court of Appeal reached the same conclusion, also applying *Grassby*, in relation to committal proceedings in Queensland, in *Higgins v Comans* (2005) 153 A Crim R 565.

[23] As to the first point, counsel for the youth relied upon the (pre *Grassby*) decision in *Miller v Ryan*[18] where Rath J said that a stay power might be available at an earlier stage of committal proceedings. Counsel contended that the High Court's criticism of that reasoning in *Grassby* was not essential to the decision and thus must be considered *obiter dicta.*

[24] We disagree. This Court cannot distinguish *Grassby* for the purpose of the present question on the basis that the ratio in *Grassby* is only referable to the power to grant a stay "when all the evidence for the prosecution and any evidence for the defence have been taken".[19]

[25] In relation to this point, Dawson J referred to some United Kingdom decisions, including *Connelly v Director of Public Prosecutions*,[20] to the effect that every court has a right to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the court. However his Honour added that "it is clear that [those decisions] do not extend to a magistrate hearing committal proceedings."[21] His Honour then quoted from comments about *Connelly's* case made by Lord Reid in *Atkinson v Government of the United States of America*[22] where his Lordship said that he could "not regard [*Connelly's*] case as

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18 (1980) 1 NSWLR 93.

19 Section 41(6) of the *Justices Act 1902 (*NSW*).*

20 [1964] A.C. 1254.

21 *Grassby* p 9.

22 [1971] A.C. 197 at pp 231-232.

any authority for the proposition that magistrates have power to refuse to commit an accused for trial on the ground that it would be unjust or oppressive to require him to be tried."

[26] Dawson J then said, at pp 10-11:

> In *Miller v. Ryan* (1980) 1 NSWLR 93, at p 107, Rath J. read these passages as referring only to the case where the magistrate has heard all the evidence and not as denying generally the power of a magistrate to stay committal proceedings as an abuse of process. Rath J. went on to hold (at p 109) that a magistrate otherwise does have power to stay committal proceedings upon the ground that they are oppressive and vexatious. The present case is, of course, one in which the magistrate had heard all the evidence before he purported to stay proceedings, but I am unable to read Lord Reid's remarks as confined to that situation. Nor is there any logical reason for doing so. If committal proceedings are an abuse of process justifying a stay, they do not cease to be so merely because the evidence is closed and there is no reason why a power otherwise existing to order a stay should cease at that point. The question is more fundamental than that and the answer lies in the nature of committal proceedings and of the function of the magistrate in hearing them.
>
> (underlining ours)

[27] This Court should follow considered dicta of the High Court.[23]

[28] As to the second point, counsel for the youth referred to *R v O'Meara*[24] where the New South Wales Court of Criminal Appeal said that a conditional stay "may be granted until such time as the prejudice to which the defendant would otherwise be subjected if the proceeding were to continue has been removed". Counsel submitted that "given a

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23 *Migration Agents Registration Authority v Frugtniet* (2018) 259 FCR 219 recently acknowledged by the Northern Territory Court of Appeal in *Rolfe v The Territory Coroner & Ors* [2023] NTCA 8 at [35]-[36].

24 [2001] NSWCCA 201 at [38].

conditional stay does not necessarily finally terminate the proceedings, different considerations apply in determining whether such a lesser power ought be implied (noting that the youth in this case only requires the implication of such a lesser power, allowing for a stay until 7 October 2024)."[25]

[29] Although *Grassby* related to permanent stays, the principles concerning the implication of powers discussed by Dawson J at pages 16 to 19 and extracted above are applicable in relation to the power of the Youth Justice Court to order a temporary or conditional stay of proceedings when conducting a preliminary examination.

[30] The question is whether the implication of such a power is "necessary for the effective exercise of the powers which are expressly conferred" by the statute on the Youth Justice Court conducting a preliminary examination.[26]

[31] In our view it is not necessary for the effective exercise of the power to conduct a preliminary examination that the Youth Justice Court should have the power to grant a temporary or conditional stay of those proceedings.

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25 Youth's Outline of Submissions on Question Reserved dated 14 June 2023 [48].

26 See [13] to [16] above.

[32] As we have noted, the Youth Justice Court conducting a preliminary examination has the power to adjourn proceedings from time to time.[27] The use and exercise of this power would seem to provide a remedy no different in effect than that which might be available if there were a power to grant a temporary stay of the preliminary examination. Further, the circumstances which might exist in order to persuade the Youth Justice Court to exercise a discretionary power to order a temporary stay, particularly in a matter such as this, would be similar if not the same as those that would support an application for the preliminary examination to be adjourned. This remark should not be taken as any indication that we are of the view that an adjournment should be granted in the present circumstances; we are merely stating that the power undoubtedly exists and express no opinion as to how it should be exercised in the present case.

[33] A power to grant a temporary stay would not be necessary for the effective exercise of the Youth Justice Court's power to conduct a preliminary examination.

[34] Further, even if a temporary stay did have a different purpose from an adjournment, the fact that there is no implied power to grant a permanent stay would seem to argue against the necessity of there

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27 *Youth Justice Act 2005* (NT) s 112A(2)(a).

being an implied power to grant a temporary stay instead of an adjournment.

[35] Counsel for the youth also referred to two provisions in the *Youth Justice Act* which expressly confer a power on the Youth Justice Court to stay a proceeding: s 62 empowering the Youth Justice Court to "stay the proceedings until satisfactory arrangements are made for the representation of the youth"; and s 138(1)(a) empowering the Youth Justice Court to order a stay of the proceedings if it becomes apparent that proceedings should have been commenced in the Local Court because the accused was an adult. Whilst acknowledging that neither provision is applicable in the present case counsel referred to them in order to answer a possible contention by the Crown to the effect that by expressly including those powers Parliament intended to exclude any general power: *expressio unius est exclusio alterius*. Counsel submitted, correctly, that that principle would not operate to prevent the implication of any other powers, for example the power of the Youth Justice Court to permanently stay a trial for abuse of process, unfairness or oppression.[28]

[36] That contention, however, does not assist in circumstances such as the present where the implication of such a power is not necessary.

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28 Youth's Outline of Submissions on Question Reserved dated 14 June 2023 [60] – [63].

[37] We answer the question: No.
