Firth & Ors v JM [2015] NTSC 20

PARTIES:	FIRTH, Justin & Ors v JM
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NOS:	21342651, 21415572, 21417314, 21413986, 21416451
DELIVERED:	8 April 2015
HEARING DATES:	26 November 2014
JUDGMENT OF:	BARR J
APPEAL FROM:	YOUTH JUSTICE COURT (SPECIAL CASE STATED)

CATCHWORDS:

CRIMINAL LAW – Practice and Procedure – Special Case Stated – youth offender – diversion mandatory, subject to statutory exceptions – 'consent' of police officer not required for youth's inclusion in diversion program following referral by Youth Justice Court for re-assessment – re-assessment criteria same as for initial assessment – *Youth Justice Act* (NT) s 64.

CRIMINAL LAW – Practice and Procedure – Special Case Stated – youth offender – criminal legal proceedings stayed by operation of statute upon completion of diversion to satisfaction of police officer – Youth Justice

Court has implied jurisdiction to then dismiss charges – does not constitute dismissal of charges under s 83 *Youth Justice Act*.

Youth Justice Act (NT) s 3(a), s 4(a), (b), (e), (f), (k), (o), (q), s 21(1), s 37, s 39, s 39(2), s 39(3), s 39(4), s 39(7), s 40(3), s 64, s 41, s 41(1), s 41(2), s 42(1), s 42(2), s 83, s 83(1).

Youth Justice Regulations (NT), reg 3

Meissner v The Queen (1995) 184 CLR 132; *Maxwell v The Queen* (1995) 184 CLR 501, followed.

House v The King (1936) 55 CLR 499; *R v Tonks* [1963] VR 121; *Bynder v Gokel* (1998) 8 NTLR 91; *S v Recorder of Manchester* [1971] AC 481, referred to.

Northern Territory Police General Order; Youth Pre-Court Diversion. Promulgated 22 February 2007, par 15, par 62 to par 66.

REPRESENTATION:

Counsel:

Informants:	S Lau
Defendant:	N MacCarron

Solicitors:

Informants:	Office of the Director of Public Prosecutions
Defendant:	Northern Territory Legal Aid Commission

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

Firth & Ors v JM [2015] NTSC 20
Nos. 21342651, 21415572, 21417314, 21413986, 21416451

BETWEEN:

JUSTIN FIRTH & ORS
Informants

AND:

JM
Defendant

CORAM: BARR J

REASONS FOR DECISION

(Delivered 8 April 2015)

Special case stated

[1] On 8 July 2014 Susan Oliver SM, a Youth Magistrate for the Northern Territory of Australia, stated a Special Case reserving questions of law for the consideration of the Supreme Court pursuant to s 60 *Youth Justice Act*.

[2] I now reproduce the Special Case stated by the learned magistrate.

> I. There are two issues of law that arise with respect to this case. First, it concerns the question of what constitutes a "referral for re-assessment for diversion" upon an order by the Youth Justice Court pursuant to section 64 of the *Youth Justice Act*. Secondly, there is a question of the procedure to be followed by the Court with respect to section 64 orders following a difference of view of presiding magistrates as to that procedure and consequent differing orders on completion of diversion.

II. This case concerns a youth, JM, who was born on 4 November 2000 (13 years old at the date of all of the alleged offences). JM is charged across five files with eleven charges across dates from 1 September 2013. These are:

File 21342651 – Aggravated Unlawful Entry, Stealing, Damage to Property (1 September 2013)
File 21415572 – Aggravated Unlawful Entry, Stealing, Unlawful Use of a Motor Vehicle (30 December 2013)
File 21417314 – Aggravated Unlawful Use of a Motor Vehicle, Drive Unlicensed, Stealing (8 March 2014)
File 21413986 – Aggravated Unlawful Entry, Stealing (14 March 2014)
File 21416451 – Breach of Bail (2 April 2014)

III. JM first appeared before the Court on 25 February 2014 on the file earliest in time (21342651). A re-assessment for diversion pursuant to s 64 of the Act was ordered and the proceedings adjourned to 18 March 2014. On that date the Court was told that diversion was still being considered but it was likely he would be accepted and there was a further adjournment to 17 June 2014 with JM excused if diversion was complete.

IV. However, on 28 March 2014 two files were listed before the court (the existing file 21342651 and a new file 21413986). It is not obvious from the file records why the two files were listed on 28 March. The endorsement indicates JM was not present and not required. The June date was vacated and both files adjourned to 8 April for a mention. It may be noted that while the second file concerns offences later in time than the subsequent files 21417314 and 21415572 these charges were not laid until 11 April (21417314) and 23 April (21415572).

V. On 8 April JM appeared in custody. He had been charged on 7 April with the breach of bail (21416451) alleged to have been committed on 2 April. He was remanded in detention on this charge and on the charges on the existing two files that had been adjourned to that date (21342651) and (21413986). The three files were then adjourned to 11 April for a bail application.

VI. On 11 April 2014 the file 21417314 was listed for the first time, the charges having been laid that day. The court was

advised that the Volatile Substance Abuse team were doing an assessment of JM with a view to sending him to a residential rehabilitation program at Bush Mob in Alice Springs. As a result of what the court was told in relation to his intellectual function and volatile substance misuse (see Transcript 11 April 2014 at Appendix A[1]) a report was ordered from the Department of Education and the matter adjourned to 28 April 2014.

VII. On 28 April all five files were before the Court. The charges on the fifth file (21415572) were not subsequent to the appearance on 11 April but were from 30 December 2013 laid on 23 April 2014. The Education Report had been received (Appendix B) and the court was informed that JM was assessed as suitable to go to Bush Mob but that no place was available until 5 May. An order was made pursuant to s 64 that with the consent of the prosecution and defendant JM be referred for reassessment for inclusion in a diversion program and the matters adjourned to determine the outcome of the reassessment.

Operation of section 64

VIII. Section 64 is in these terms:

> **64 Court may refer youth to diversion**
>
> The Court may, at any stage of proceedings (prior to a finding of guilt) in relation to a youth, *with the consent of the prosecution* and the youth, adjourn the proceedings and refer the youth to be *re-assessed for inclusion in a diversion program*, or a Youth Justice Conference, conducted for the purposes of Part 3. [emphasis added by the magistrate]

The purpose of Part 3 is set out in section 37:

[1] Appendix A has not been reproduced in these Reasons. However, in relation to the intellectual function of JM, the Court was informed that JM had a very low IQ (68). There was no specific information given to the Court about JM's volatile substance misuse; rather, substance misuse was implied in defence counsel's address, in which she said that JM was willing to engage with Bush Mob if referred to that organization by the Volatile Substances Unit.

(1) The purpose of this Part is to provide a means of diverting youths who are believed on reasonable grounds to have committed offences.

Part 3 establishes [or] appears to establish diversion as the primary means for dealing with youth offending (subject to some statutory exceptions) consistent with the Principles of the *Youth Justice Act* which must be taken into account in the administration of the Act. In particular, section 4(q) provides "unless the public interest requires otherwise, criminal proceedings should not be instituted or continued against a youth if there are alternative means of dealing with the matter".

The diversion scheme is set out in section 39 of the Act. Section 39(2) provides that if a police officer believes on reasonable grounds that a person who was a youth at the time has committed an offence, that officer must, instead of charging the youth with the offence, do one or more of the following as the officer considers appropriate:

(a) give the youth a verbal warning;
(b) give the youth a written warning;
(c) cause a Youth Justice Conference involving the youth to be convened;
(d) refer the youth to a diversion program

Each of these actions therefore appears to be "diversion" within the meaning of the Act with a "diversion program" or a Youth Justice Conference being a particular form of diversion.

There are some exceptions to this requirement as set out in s 39(3), including that the alleged offence is a serious offence (as defined in the regulations) or that the youth has, on two previous occasions, been dealt with by Youth Justice Conference or diversion program (or on one of the occasions by Youth Justice conference and on the other by diversion program) or the youth has some other history that makes diversion an unsuitable option (including a history of previous diversion or previous convictions).

Where an officer decides not to proceed with diversion for one of the reasons set out in section 39(3), charges may only be laid with the consent of an authorised officer as defined in section 36. Failure to adhere to this requirement results in the charges that have been laid being null and void (*Moore v Haynes* [2008] NTCA 9 at [26] to [38]).

In the case of JM none of the charges are "serious offences" and therefore excluded from diversion. A single charge of drive unlicensed is excluded because it is one of the traffic offences that are excluded from diversion in the Act (section 38(b)).

IX. On 10 June 2014 the matters were before the Court for further mention to determine the outcome of the re-assessment. The Court was informed that the current OIC of Diversion was of the view that what was required by section 64 was a decision by him as to whether diversion should be allowed. It is understood that previously the process had been for the re-assessment to be undertaken by the diversion provider as to the suitability of the youth to undertake a diversion program in the same way as when an initial decision is made for diversion under section 37. However it may be noted that section 64 does not refer to a re-assessment for diversion but specifically to a re-assessment for inclusion in a diversion program or a Youth Justice Conference, that is re-assessment for two of the forms of diversion for which the Act provides.

The questions of law with respect to the first aspect of the case stated are:

1. *Is the further consent of a police officer for diversion required following an order of the court made pursuant to section 64 for re-assessment for inclusion in a diversion program required noting that a pre-requisite for an order pursuant to that section is the consent of the prosecution.*

2. *If the answer to Question 1 is "Yes", is the officer tasked to make that decision required to be an "authorised officer" as defined in section 36 given that the effect of the refusal is to continue with criminal charges?*

3. *If the answer to Question 1 is "No", what is required in order to comply with an order for re-assessment for inclusion in a diversion program or a Youth Justice Conference? Does "re-assessment" require meeting with the youth and family to consider any change in circumstances or attitude or is a review of the existing files and decision not to divert or to cancel diversion sufficient?*

Procedure with respect to a section 64 re-assessment for diversion

X. Further, a question has arisen as to the procedure required by section 64 (which will determine the consequent legal outcome) as a result of a divergence of practice been the Youth Justice Court sitting in Darwin and the Youth Justice Court sitting in Alice Springs.

XI. Practice Direction No. 6 of 2012 provides for the procedure to be adopted on section 64 applications and is reflective of the procedure that has been in practice in the Youth Justice Court prior to that Direction coming into existence. In summary, once an order under section 64 has been made the proceedings are adjourned initially for about three weeks to determine if the re-assessment has been successful and then, if so, adjourned for around three months to allow for completion of the diversion program. On successful completion, the prosecution withdraw all charges and the youth is discharged from any undertakings.

XII. This practice had been considered to be consistent with what was thought to be the object of the legislation, that is, to provide for diversion as the primary means of dealing with youth offending consistent with the principle in section 4(q) "unless the public interest requires otherwise, criminal proceedings should not be instituted or continued against a youth if there are alternative means of dealing with the matter."

XIII. It also appeared to be consistent with section 41 which provides that where a youth is diverted in relation to an offence and the diversion is completed to the satisfaction of a police officer, no criminal investigation or criminal legal proceedings can be commenced or continued against the youth in respect of the offence and that any admission made or information given by a youth during the course of diversion in

relation to an offence is not admissible in any subsequent criminal or civil proceedings in relation to the offence.

XIV. However it is understood that recently the practice in the Alice Springs Youth Justice Court has been to require a plea of guilty to be entered to the charges before the Court before a referral pursuant to section 64 is granted and that once diversion is completed the charges are then dismissed by the court as opposed to being withdrawn by the prosecution.

XV. As the Youth Justice Court is a legislative creation, the powers of the Court can only be those derived from the Act; the Court has no inherent powers. The power in relation to dispositions that the court may make is contained in section 83, which includes the power to dismiss a charge with or without recording a conviction. However that power is conditioned on finding a charge proven against a youth. Although the Act provides that diversion is not precluded at any stage of the proceedings prior to a finding of guilt, the power to dismiss charges under s 83 for which a plea of guilty has been entered requires a finding that the charges are proven and that would seem inconsistent with section 64.

XVI. While a court is generally at liberty to direct its own procedures provided that the procedure is not inconsistent with legislation, this divergence in practice leads to a different legal outcome and a different criminal history such that it is necessary to determine as a matter of law the interpretation of the Act. Where diversion has been undertaken an antecedent report will show diversion as the result and charges withdrawn. However if the charges are dismissed (with or without conviction) pursuant to s 83 of the Act that result will appear on a criminal history report.

XVII. It may also be noted that Diversion does not operate to require a youth to admit to particular criminal charges for inclusion in a program but only to take responsibility for their conduct. There may be cases where a young person may be charged with a range of offences, some of which might be contested on legal or other grounds, but who is nevertheless willing to undertake diversion taking responsibility for his or her overall conduct. This might for example include cases where capacity for criminal responsibility is at issue, including JM who is 13 years old and for whom capacity must therefore be proven

and in respect of whom there is a further issue related to his intellectual capacity.

The questions of law with respect to this aspect of section 64 are these:

1. *If the Court requires a plea of guilty to be entered prior to considering or ordering referral for re-assessment for a diversion program or Youth Justice Conference, what power does the Court then have to dismiss the charge/s on successful completion of Diversion?*

2. *If the power to dismiss is only that contained in section 83 which requires a finding that the charges are proven, is that outcome inconsistent with section 41 of the Act which provides that where a youth is diverted in relation to an offence and the diversion is completed to the satisfaction of a police officer, no criminal investigation or criminal legal proceedings can be commenced or continued against the youth in respect of the offence?*

3. *If the answer to question 2 is Yes, does that mean that adopting a procedure to require a plea of guilty to be entered is not permissible as it is inconsistent with the intent of the Act with respect to diversion?*

First aspect of case stated

[3] I will refer to question 1 in the first aspect of the case stated as "question 1 (first aspect)".

[4] Counsel for both the informant and the youth understood question 1 (first aspect) to be whether the consent of a police officer is required before the Court may exercise its power to refer a youth for re-assessment for inclusion

in a diversion program or a Youth Justice Conference.[2] The hearing proceeded on the basis of that understanding. For the reasons explained in [5] below, such consent is not required.

[5] Although s 64 *Youth Justice Act* is headed "Court may refer youth to diversion", the section heading is not part of the Act.[3] To the extent that the section heading suggests a power to refer to diversion, it is misleading. The words of the section are unambiguous and make clear that the Court's power is to "refer the youth to be re-assessed for inclusion in a diversion program, or a Youth Justice Conference, conducted for the purposes of Part 3."[4] The conditions precedent to such referral are that: (1) the proceedings must not have reached the stage where a finding of guilt has been made, and (2) both prosecution and the youth consent. There is no requirement in s 64 or elsewhere, express or implied, that a police officer consent to the Court exercising its power under s 64 to refer a youth to be re-assessed for inclusion in a diversion program. The answer to question 1 (first aspect), as it was argued, should be "No".

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[2] Submissions of the Informant dated 15 August 2014, par 5; Defence Outline of Submissions dated 1 September 2014, par 20.
[3] See s 55(2) *Interpretation Act* (NT). The *Youth Justice Act* (No. 32/2005) received assent on 22 September 2005. It was therefore "enacted" prior to 1 July 2006. The section heading to s 64 was not amended or inserted after that date.
[4] *Youth Justice Act*, Part 3, Diversion of Youth, s 39(2) provides four kinds of diversion, referred to by the magistrate in Paragraph VIII of the Case Stated: (1) giving the youth a verbal warning, (2) giving the youth a written warning, (3) causing a Youth Justice Conference to be convened, and (4) referring the youth to a diversion program.

[6] However, question 1 (first aspect) probably raises a different issue to that understood and argued by counsel. This is apparent from a careful consideration of the facts in the case stated. In paragraph VII, the magistrate stated that on 28 April 2014 an order was made pursuant to s 64, with the consent of the prosecution and the youth, that the youth be referred for re-assessment for inclusion in a diversion program, and that the matters were adjourned for that purpose. In paragraph IX, her Honour explained that the Court was informed on 10 June 2014 that the "current OIC of Diversion" was of the view that s 64 required a decision by him as to whether diversion should be allowed. In this context, question 1 (first aspect) is directed not at whether a police officer is required to consent to the Court ordering re-assessment under s 64 but rather whether, after the Court has ordered re-assessment under s 64, a police officer has to then consent to the youth being included in a diversion program.

[7] In my opinion the answer to question 1 (first aspect), as that question is clarified in [6], is "No". Under the *Youth Justice Act*, diversion of a youth is mandatory, subject to the outcome of the assessment of certain matters which must be considered, and to which I refer in [12], [13] and [16] below. Although there would need to be a subjective assessment favourable to the youth on one of those matters (that the youth's history does not make

diversion an unsuitable option[5]), the 'consent' of a police officer is not a requirement.

[8] It is not necessary to answer question 2 (first aspect), because it is predicated on an affirmative answer to question 1.

[9] I turn to consider question 3 in the first aspect of the case stated, namely: "What is required in order to comply with an order for re-assessment for inclusion in a diversion program or a Youth Justice Conference?" I shall refer to the question as "question 3 (first aspect)".[6]

[10] Diversion is offence-specific.[7] Each offence committed by a youth is potentially subject to the diversion regime. Pursuant to s 39(2) *Youth Justice Act*, diversion is mandatory, subject to the exceptions contained in s 39(3), if a police officer believes on reasonable grounds that a person (who is a youth or who was at the relevant time a youth) has committed an offence. I agree with the magistrate that Part 3 of the Act establishes diversion as the primary means for dealing with youth offending, subject to the exceptions in s 39(3). That is consistent with the general principles specified in s 4 of the Act; specifically s 4(q) which provides that, unless the public interest requires otherwise, criminal proceedings should not be instituted or continued against a youth if there are alternative means of dealing with the

[5] See s 39(3)(d) *Youth Justice Act*.
[6] The second, ancillary, question is "Does 're-assessment' require meeting with the youth and family to consider any change in circumstances or attitude or is a review of the existing files and decision not to divert or to cancel diversion sufficient?
[7] See the references to "an offence", "the offence" and "the alleged offence" in *Youth Justice Act*, s 39(1)(a) and (b), s 39(2), s 39(3)(b), s 39(6), s 40(3), s 41(1) and (2), s 42(1) and (2).

matter. That provision is reinforced by s 41(1) of the Act which provides that, if a youth's diversion is completed to the satisfaction of a police officer, no criminal investigation or criminal legal proceedings can be commenced or continued against the youth in respect of the offence.

[11] The use of the word "re-assessed" in s 64 suggests that the youth must have already been assessed for inclusion in a diversion program or a Youth Justice Conference, or at least assessed for one of the forms of diversion in s 39(2) of the Act. A previous assessment is required. Part 3 of the Act, which relates to (the initial) diversion of youth, does not use the term "assessment". However, the requirement for assessment is implied by s 39 *Youth Justice Act*, relevant parts[8] of which are set out below:-

> 39 Diversion of youth
>
> (1) This section applies if a police officer believes on reasonable grounds that:
>
> (a) a person has committed an offence; and
>
> (b) the person is a youth or was a youth when the offence was committed.
>
> (2) The officer must, instead of charging the youth with the offence, do one or more of the following as the officer considers appropriate:
>
> (a) give the youth a verbal warning;
>
> (b) give the youth a written warning;

[8] *Youth Justice Act*, s 39(7) has not been included.

(c) cause a Youth Justice Conference involving the youth to be convened;

(d) refer the youth to a diversion program.

(3) Subsection (2) does not apply if:

(a) the youth has left the Territory or the youth's whereabouts is unknown; or

(b) the alleged offence is a serious offence; or

(c) the youth has, on 2 previous occasions, been dealt with by Youth Justice Conference or diversion program (or on one of the occasions by Youth Justice Conference and on the other by diversion program); or

(d) the youth has some other history that makes diversion an unsuitable option (including a history of previous diversion or previous convictions).

(4) However, the Commissioner of Police (or the Commissioner's delegate) may authorise or require a police officer to deal with a youth by Youth Justice Conference or by referring the youth to a diversion program despite the fact that the case is covered by subsection (3).

(6) This section does not prevent the diversion of a youth in relation to an offence despite that he or she has been charged with the offence.

[12] Although s 39(1)(b) of the Act does not expressly require a police officer to assess and decide whether a suspect is a youth or was a youth when the relevant offence was committed (rather it is drafted in conditional terms, so as to apply if a police officer has that belief on reasonable grounds), there is nonetheless an implied obligation that a police officer will consider in every case whether s 39(1)(b) applies. The obligation is implied as a matter of logic and common sense: if the police officer did not consider s 39(1)(b), he

or she could overlook a matter which, if considered, would lead to mandatory diversion of a youth, subject to the exceptions contained in s 39(3). Belief on reasonable grounds for the purposes of s 39(1)(b) is therefore belief after consideration as to whether the person who has committed an offence is a youth or was a youth at the relevant time.

[13] Further to the preliminary assessment required by s 39(1), additional assessments are required by s 39(3), which sets out various circumstances in which mandatory diversion does not apply. One of the exceptions in s 39(3) is that the alleged offence is a "serious offence", namely an offence prescribed by regulation or by a corresponding law or repealed law of the Territory or another jurisdiction.[9] Another of the exceptions in s 39(3) is that the youth has, on two previous occasions, been dealt with by Youth Justice Conference or diversion program. A further exception is that the youth has "some other history that makes diversion an unsuitable option (including a history of previous diversion or previous convictions)."[10] These statutory exceptions require consideration of the alleged offence, the youth's history of prior offending and diversion, and other subjective factors which may make diversion unsuitable. For similar reasons to those expressed in [12], I consider that the relevant police officer has an implied obligation, in every case involving a youth, to consider whether any of the exceptions in

[9] See definition of "serious offence" in s 39(7) *Youth Justice Act*. Regulation 3 *Youth Justice Regulations* prescribes a significant number of offences against the Criminal Code and the *Misuse of Drugs Act*.
[10] *Youth Justice Act*, s 39(3)(d).

s 39(3) apply to exclude mandatory diversion. Such consideration is clearly part of the assessment required under s 39 of the Act.

[14] Section 39(1) does not state which police officer has the implied obligations referred to in [12] and [13]. It is not necessary that I determine that point for the purpose of answering the questions in the special case stated, but my preliminary view is that the obligation attaches to those police officers involved in the investigation of the youth and/or those police officers who, but for s 39, would be responsible for charging and prosecuting the youth for any offences committed. Counsel have informed me that there is a specialist unit within the Northern Territory Police which is responsible for the diversion of youth.[11]

[15] None of the exceptions in s 39(3) is an absolute bar to the diversion of a youth because, even where the exceptions apply, the Commissioner of Police or the Commissioner's delegate may authorise or require a police officer to deal with a youth by Youth Justice Conference or by referring the youth to a diversion program.[12]

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[11] Counsel for the informant refers to the Youth Diversion Unit in Submissions dated 15 August 2014, at par 5. Counsel for JM also refers to the Youth Diversion Unit in Submissions dated 1 September 2014, at par 11. The NT Police General Order promulgated 22 February 2007 refers to the "Northern Territory Police Juvenile Diversion Division" (at par 15); also (at par 66) the "Juvenile Diversion Unit" or "JDU".

[12] *Youth Justice Act*, s 39(4). It is not necessary to further consider this power on the part of the Commissioner in order to answer the questions in the case stated. However, the sub-section would permit a police officer, who considered that diversion under s 39(2)(c) or (d) should be undertaken, to approach the Commissioner for an authorization or direction under s 39(4) to circumvent the exceptions in s 39(3) and divert the youth. The Commissioner of Police or the Commissioner's delegate may not authorize or require a police officer to give a youth a verbal warning or a written warning.

[16] In summary to this point, s 39 *Youth Justice Act* requires assessments to be made by a police officer as to (1) whether the offender is a youth, (2) whether any one or more of the s 39(3) exceptions apply and, if diversion is mandated, (3) what form or forms of diversion under s 39(2) should take place.

[17] Within s 39(2) of the Act, there are options which need to be considered and assessed to determine which would be the most appropriate. If the police officer decides to cause a Youth Justice Conference to be convened pursuant to s 39(2)(c) of the Act, a decision has to be made as to whether the Youth Justice Conference would be a conference between the police, the youth and members of the youth's family and/or respected community members; or whether it would be a victim/offender conference, that is, a conference with the youth and the victim or victims of the offence the youth is believed to have committed.[13] There are several possible combinations of participants in a s 39(2)(c) conference.

[18] If a police officer decides to refer the youth to a diversion program pursuant to s 39(2)(d) of the Act, there are many possibilities. Although the *Youth Justice Act* is silent as to the meaning of the term "diversion program", and gives no specific guidance as to the content of such programs, the relevant Police General Order[14] gives helpful practical insight

[13] There is an interpretation or explanation of the term "Youth Justice Conference" in s 39(7) *Youth Justice Act*, but it is not a definition as such, and does not purport to be exhaustive.
[14] Northern Territory Police General Order on Youth Pre-Court Diversion, promulgated 22 February 2007.

into different kinds of diversion programs. The General Order divides programs into three broad categories: personal programs, informal programs and registered programs.[15] Personal programs are personal plans where the youth may have to agree to certain "minor personal conditions" over a period of time, for example, school attendance, good behaviour, or non-association with certain individuals.[16] Informal programs involve tailored activities over a period of time that may be focused on the needs of the victim and the community. For example, a youth may have to provide assistance to an elderly relative, work for the victim, attend a sporting program or perform a community service.[17] Registered programs are formally registered with the youth diversion division (however named[18]) and are intended to provide specialized services or intensive supervision. Registered programs attempt to change behaviours which led to offending and may include counselling, employment, special education or substance abuse prevention programs.[19]

[19] In this context, a decision by a police officer not to divert a youth or not to utilize any one or more of the particular forms of diversion referred to in s 39(2) could in one case be based on objective facts (for example, where the offence committed is a "serious offence", as defined), or in another case on the basis of a subjective assessment as to whether the youth has "some

[15] Police General Order, par 61.
[16] Police General Order, par 62.
[17] Police General Order, par 63.
[18] See footnote 11 above.
[19] Police General Order, par 64.

other history that makes diversion an unsuitable option". There are many possible circumstances in which a youth may not be diverted under s 39 of the Act.

[20] If I am correct that the use of the word "re-assessed" in s 64 means that the youth must have already been assessed for referral to a diversion program or for participation in a Youth Justice Conference (or for some other form of diversion) before a magistrate may order that the youth be *re-assessed* for inclusion in a program or conference, then it would follow that a magistrate does not have the power under s 64 to refer a youth who has been overlooked for diversion, and therefore not previously assessed. By way of example, a police officer may not realize that a person believed to have committed an offence was a youth when the offence was committed. An investigation into an offence of indecent dealing with a child under the age of 16 years[20] committed some years in the past may not reveal the specific date or dates on which the alleged offences were committed, and so investigating police may not know whether the person believed to have committed the offence or offences was a youth when the offences were committed and hence a candidate for mandatory diversion; alternatively investigating police may not appreciate the need to consider whether the suspect was a youth at the time. If s 64 only applies to a youth who has

[20] The offence of indecent dealing with a child under the age of 16 years, contrary to s 132 of the *Criminal Code*, is not a "serious offence" prescribed by Regulation 3, *Youth Justice Regulations* for the purposes of s 39(7) of the *Youth Justice Act*, and hence is subject to the mandatory diversion regime.

previously been assessed for inclusion in a diversion program or a Youth Justice Conference, then the Court could not under s 64 refer such an offender for re-assessment.

[21] The examples given in the previous paragraph may be considered unusual cases. In the usual case, given the clear statutory emphasis on diversion, a 'youth offender' will be appropriately identified for assessment for diversion. Nonetheless, there are circumstances in which a youth who has been assessed for diversion may still be prosecuted before the Youth Justice Court. A youth may have been assessed for diversion, but refused under s 39(3)(d) of the Act because of a "history which makes diversion an unsuitable option". A youth, otherwise assessed as suitable for diversion, may wish to plead not guilty and therefore neither the youth nor the "responsible adult" for that youth has consented to the youth being diverted.[21] In such cases, the youth may be charged and prosecuted for any offence which a police officer believes on reasonable grounds the youth has committed.[22] Another situation may be where a youth has been diverted by the convening of a Youth Justice Conference or by referral to a diversion program but has failed to satisfactorily complete the particular form of diversion,[23] possibly because of further offending while on diversion. The consequence would be that the prosecution of the youth goes ahead.

[21] *Youth Justice Act*, s 40(1).

[22] However, even where negative factors have resulted in the youth not being diverted or not satisfactorily completing diversion, circumstances may change between the date of (initial) assessment and the date of proceedings in court. Despite a history assessed as 'making diversion an unsuitable option', or a youth's unsatisfactory engagement in diversion, the youth's history might be seen in a more positive light after a reasonable period of good behaviour or where there is some other evidence of a changed attitude. In such cases, the Youth Justice Court might decide to adjourn the proceedings under s 64 and refer a youth to be re-assessed for inclusion in a diversion program or a Youth Justice Conference.

[23] There are other, arguably less likely, possibilities. An error may have been made in the initial assessment, resulting in the youth's exclusion from diversion. A police officer may have wrongly concluded that the offence committed by the youth was a "serious offence", when it was not.[24] There might have been an error or misunderstanding on the part of the police officer as to the number of previous occasions on which the youth had been dealt with by Youth Justice Conference or diversion program.[25]

[24] It is difficult to comprehensively state the many situations in which the Youth Justice Court could decide to refer a youth to be re-assessed for inclusion in a diversion program or a Youth Justice Conference. Some of the

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[22] *Youth Justice Act*, s 40(3). Note that the consent of an authorized officer is required before a youth can be charged with an offence – see *Youth Justice Act*, s 21(1).
[23] *Youth Justice Act*, s 39(2)(c) and (d); s 41(1); s 42(1).
[24] *Youth Justice Act*, s 39(3)(b).
[25] *Youth Justice Act*, s 39(3)(c).

situations are seen in the examples given in [22] and [23]. Despite this difficulty, it is clear that the matters required to be considered in a re-assessment are the same as those in the initial assessment, explained in [12], [13], [16], [17], [18] and [19], save that consideration need not be given to forms of diversion other than those referred to in s 64: a diversion program or a Youth Justice Conference.[26] There is nothing in the Act to suggest that the statutory exceptions in s 39(3) *Youth Justice Act* do not apply in a re-assessment.

[25] In practice, the Youth Justice Court should state its reasons for referring a youth to be re-assessed pursuant to s 64 *Youth Justice Act*. The reasons would then be communicated to the police by the prosecutor. The response on the part of a police officer to a referral by the Court for re-assessment would no doubt depend in part on the Court's reasons, and in part on the reason(s) why the relevant police officer did not (initially) divert the youth under s 39(2)(c) or (d) instead of charging him or her; or, if the relevant police officer did divert the youth, the circumstances in which the youth failed to satisfactorily complete his or her diversion.

[26] Although the matters required to be considered in a re-assessment are as stated in [24], this Court cannot prescribe precisely "what is required in order to comply with an order for re-assessment for inclusion in a diversion program or a Youth Justice Conference". It is trite to say that a genuine re-

[26] Options referred to in s 39(2)(c) and (d) *Youth Justice Act*.

assessment should take place. In my view, however, there is no express or implied legal obligation on the part of any police officer to meet with the youth and the youth's family, as postulated by the magistrate in the ancillary question to question 3 (first aspect).

[27] I would answer question 3 (first aspect) in terms of the explanation in [24]. With respect, however, I refrain from prescribing the method of re-assessment or any specific steps in the process of re-assessment.

[28] I make a further comment in relation to s 64 *Youth Justice Act*. Although the section does not state who is to carry out the re-assessment of the youth for inclusion in a diversion program or Youth Justice Conference, it is tolerably clear that both the initial assessment and the re-assessment processes are intended to be in the hands of the police. The words "conducted for the purposes of Part 3" used in s 64 in relation to a diversion program or a Youth Justice Conference are a reference to those provisions of the Act which give the relevant police officer[27] administrative responsibility for diversion[28] and give the Commissioner of Police (or delegate) the ultimate authority to authorise or require a police officer to divert a youth, even if the exceptions in s 39(2) apply. Moreover, statutory responsibility for determining whether a youth has completed diversion is entrusted to the police; the completion of diversion "to the satisfaction of a police officer" is

[27] See the discussion in [14] above.
[28] See, in particular, s 39(2) *Youth Justice Act*.

the condition precedent to the statutory stay under s 41(1) *Youth Justice Act* coming into effect.

Second aspect of case stated

[29] Before I proceed to answer the specific questions in the second aspect of the case stated, it is important to consider the legal implications of a plea of guilty, whether in the Youth Justice Court or generally.

[30] A plea of guilty to a criminal charge constitutes an admission of all the elements of the offence charged.[29] It has been described as "a solemn confession of the ingredients of a crime charged".[30] A plea of guilty in open court is such that no further proof is required of a person's guilt.[31] However, a plea of guilty is a formal admission which neither the prosecution nor the court is obliged to accept. A court is not obliged to make a determination of a person's guilt upon that person entering a plea of guilty. A court may permit a person who has pleaded guilty to change the plea to not guilty at any time before the case is finally disposed of by sentence or otherwise.[32] It is not until the disposal of the court case (usually by sentence) that there is a judgment of the court determining guilt.[33] Consistent with the authorities, a formal finding of guilt prior to the actual sentence would constitute a judgment of the court determining guilt. However, it has been held that "an

[29] *Meissner v The Queen* (1995) 184 CLR 132 at 157.5, per Dawson J.
[30] *R v Tonks* [1963] VR 121 at 127-8 (Full Court).
[31] See the observation of Lawton LJ in *R v Inns* (1974) 60 Cr App R 231 at 233, cited with approval in *Meissner v The Queen* (1995) 184 CLR 132 at 141, per Brennan, Toohey and McHugh JJ.
[32] *S v Recorder of Manchester* [1971] AC 481 at 488, per Lord Reid, cited with approval in *Maxwell v The Queen* (1995) 184 CLR 501 at 509, per Dawson and McHugh, JJ.
[33] *Maxwell v The Queen* (1995) 184 CLR 501 at 509.5, per Dawson and McHugh, JJ.

adjournment of proceedings or the remand of a prisoner for sentence does not ordinarily amount to the disposal of the matter."[34] An adjournment for such purposes would not constitute a judgment of the court determining guilt or a finding of guilt. For the same reason, an adjournment of proceedings for the purposes specified in s 64 *Youth Justice Act* would not constitute a judgment of the court determining guilt, or amount to a finding of guilt.

[31] The negative condition precedent to the Youth Justice Court exercising its discretion under s 64 to adjourn the proceedings and refer the youth for re-assessment is that there must not have been a finding of guilt by the Court. The authorities satisfy me that the entry of a plea of guilty would not, on its own, prevent the Court exercising its discretion.

[32] The *Youth Justice Act* does not state in s 64 the matters which the Court is to take into account in exercising its discretion under that section to adjourn the proceedings and refer the youth for re-assessment. Nonetheless, the Act specifies the general principles of youth justice; more particularly, the general principles "that must be taken into account in the administration of [the] Act".[35] The first-stated general principle is the need to hold the youth accountable and to encourage the youth to accept responsibility for his or her offending behaviour.[36] A youth should be made aware of his or her

[34] *Maxwell v The Queen* (1995) 184 CLR 501 at 509.8, per Dawson and McHugh, JJ.
[35] *Youth Justice Act*, s 3(a), s 4.
[36] *Youth Justice Act*, s 4(a).

obligations under the law and of the consequences of contravening the law.[37] The second-stated general principle is that the youth should be dealt with in a way that acknowledges the youth's needs and which will provide the youth with the opportunity to develop in socially responsible ways.[38] Another general principle is that a youth who commits an offence should be dealt with in a way that allows the youth to be re-integrated into the community.[39] An Aboriginal youth should (if practicable) be dealt with in a way that involves the youth's community.[40] A balanced approach must be taken between the needs of the youth, the rights of any victim of the youth's offence and the interests of the community.[41] A victim of an offence committed by a youth should be given the opportunity to participate in the process of dealing with the youth for the offence.[42] Unless the public interest requires otherwise, criminal proceedings should not be instituted or continued against a youth if there are alternative means of dealing with the matter.[43] Finally, in reference to 'alternative means', I repeat my observation in [10] above that Part 3 of the *Youth Justice Act* appears to establish diversion as the primary means for dealing with youth offending, subject to the exceptions in s 39(3) of the Act.

[37] *Youth Justice Act*, s 4(e).
[38] *Youth Justice Act*, s 4(b).
[39] *Youth Justice Act*, s 4(f).
[40] *Youth Justice Act*, s 4(f).
[41] *Youth Justice Act*, s 4(o).
[42] *Youth Justice Act*, s 4(k).
[43] *Youth Justice Act*, s 4(q).

[33] The Court's discretion under s 64 to adjourn the proceedings and refer a youth for re-assessment must be exercised judicially and, given the statutory context, the Court should be guided in the exercise of its discretion by the general principles of youth justice, or by such of those principles as it considers relevant to the facts of the case. Although in a particular case it may be appropriate for the Youth Justice Court to require a youth to plead guilty to the offence for which re-assessment for diversion is being considered (for example, in order to encourage the youth to accept responsibility for his or her offending behaviour[44]), it should not be the invariable practice of the Youth Justice Court to require a youth to plead guilty before the Court makes orders under s 64. To adhere to such a practice would fetter the Court's own discretion in individual cases and could lead to the Court acting on wrong principle, taking into account irrelevant or extraneous considerations and/or failing to take into account relevant considerations.[45] Diversion is not a reward for the fully repentant. Diversion has a clear corrective objective. A youth may not accept responsibility for his or her offending behaviour until after diversion has taken place, for example, after having participated in a Youth Justice Conference involving a victim, convened under s 39(2)(c) of the Act.

[34] I next turn to consider how the court record should reflect the satisfactory completion of diversion by a youth, that is, the situation where the youth has

[44] For the purposes of the principle of youth justice set out in s 4(a) *Youth Justice Act*.
[45] *House v The King* (1936) 55 CLR 499 at 505, per Dixon, Evatt and McTiernan JJ.

been referred under s 64 of the Act to be re-assessed for inclusion in a diversion program or Youth Justice Conference; has been favourably assessed for inclusion; and has then satisfactorily completed the particular form of diversion. Pursuant to s 41(1) of the Act, if diversion is "completed to the satisfaction of a police officer", no criminal legal proceedings can be continued against the youth in respect of the offence for which the youth was diverted. The effect of the statutory provision is that, in the circumstances referred to, criminal legal proceedings against the youth are permanently stayed. The stay is not the result of court order but arises under statute. Any continuation of the proceedings would be in breach of statute, but also unjust and hence an abuse of process.

[35] To reflect the statutory stay referred to in the previous paragraph, the Court could simply note, in relation to an offence, that diversion had been completed to the satisfaction of a police officer and hence that proceedings against the youth in respect of the offence were stayed pursuant to s 41(1) of the Act. However, consistently with s 41(1) of the Act and with the youth justice principles, which must be taken into account in the administration of the Act,[46] the Court could permit the prosecutor to withdraw the charge(s) the subject of the statutory stay; alternatively dismiss the charge(s). This power of dismissal is an exercise of jurisdiction by implication, not inherent

[46] In particular, that in s 4(q) of the Act, that criminal proceedings should not be instituted *or continued* against a youth if there are alternative means of dealing with the matter. [Italic emphasis added]

jurisdiction.[47] With respect to the concerns of the magistrate set out in par XV of the case stated, such dismissal would not be a dismissal pursuant to s 83 *Youth Justice Act*. That section is contained within Pt 6 Div 2, which has the division heading "Sentencing options", and clearly relates to sentencing. The various sentencing options contained in s 83(1) are conditional upon the Court finding a charge against a youth to have been proven. In my opinion, s 83 *Youth Justice Act* would have no application in the situation where diversion is satisfactorily completed such that criminal legal proceedings cannot be continued against the youth.

[36] It follows from the discussion in the previous paragraph that the answer to question 1 (second aspect) is that the Court has implied jurisdiction to dismiss the charge or charges the subject of the statutory stay. I would add that the answer is the same whether or not the Court requires a plea of guilty to be entered before exercising its jurisdiction under s 64 to adjourn the proceedings and refer the youth to be re-assessed for inclusion in a diversion program or a Youth Justice Conference. The Court's implied jurisdiction to dismiss the charge or charges the subject of the statutory stay derives from s 41(1) of the Act, and is conditional upon the youth having completed diversion to the satisfaction of a police officer, irrespective of the stage

[47] For a discussion of the difference, see *Bynder v Gokel* (1998) 8 NTLR 91 at 97-98, per Bailey J.

which the investigation of the offence or criminal legal proceedings in relation to the offence had reached at the time the youth was diverted.[48]

[37] It is not necessary to answer question 2 (second aspect) of the case stated. As explained in [35], the power to dismiss where diversion has been satisfactorily completed and criminal legal proceedings cannot be continued against the youth is quite different to the power to dismiss contained in s 83 *Youth Justice Act*.

[38] It is not necessary to answer question 3 (second aspect) of the case stated. That question is predicated on an affirmative answer to question 2, which I have not been required to answer. To the extent that the question raises the issue as to whether it is permissible to require that a plea of guilty be entered before the Court will adjourn the proceedings and refer the youth to be re-assessed under s 64, I refer to my discussion of the issue in [32] and [33] above.

Conclusion - summary of questions and answers

[39] I restate below the questions of law with respect to the first and second aspects of the case stated and the answers thereto.

Questions of law with respect to the first aspect of the case stated:

1. *Is the further consent of a police officer for diversion required following an order of the court made pursuant to section 64 for re-assessment for inclusion in a diversion program required noting that a*

[48] Subject to the statutory limitation in s 64 that the criminal legal proceedings must not have reached the stage where a finding of guilt has been made.

pre-requisite for an order pursuant to that section is the consent of the prosecution.

Answer

No, for the reasons explained in [7].

2. *If the answer to Question 1 is "Yes" is the officer tasked to make that decision required to be an "authorised officer" as defined in section 36 given that the effect of the refusal is to continue with criminal charges?*

Answer

No answer is required to this question.

3. *If the answer to Question 1 is "No", what is required in order to comply with an order for re-assessment for inclusion in a diversion program or a Youth Justice Conference? Does "re-assessment" require meeting with the youth and family to consider any change in circumstances or attitude or is a review of the existing files and decision not to divert or to cancel diversion sufficient?*

Answer

The matters required to be considered in a re-assessment are the same as those in the initial assessment, explained in [12], [13], [16], [17], [18], [19] and [24]. The Court declines to answer the second part of the question.

Questions of law with respect to the second aspect of the case stated:

1. *If the Court requires a plea of guilty to be entered prior to considering or ordering referral for re-assessment for a diversion program or Youth Justice Conference, what power does the Court then have to dismiss the charge/s on successful completion of Diversion?*

Answer

The Court has implied jurisdiction to dismiss the charges, for reasons explained in [35].

2. *If the power to dismiss is only that contained in section 83 which requires a finding that the charges are proven, is that outcome inconsistent with section 41 of the Act which provides that where a youth is diverted in relation to an offence and the diversion is completed to the satisfaction of a police officer, no criminal investigation or criminal legal proceedings can be commenced or continued against the youth in respect of the offence?*

Answer

The power to dismiss after satisfactory completion of diversion is not contained in s 83. No answer is required to this question.

3. *If the answer to question 2 is 'Yes', does that mean that adopting a procedure to require a plea of guilty to be entered is not permissible as it is inconsistent with the intent of the Act with respect to diversion?*

Answer

No answer is required to this question.
