IN THE SUPREME COURT OF NSW, COURT OF APPEAL

No. 2025/0085681

THE DIRECTOR OF PUBLIC PROSECUTIONS (NSW)

Applicant

-v-

PD[1]

Respondent

APPLICANT'S SUMMARY OF ARGUMENT

1. The Director brings an application for leave to appeal from the whole of the decision of his Honour Basten AJ in *PD v Director of Public Prosecutions (NSW)* [2025] NSWSC 16 (**"J**").

The nature of the applicant's case (rule 51.12(4)(a))

2. On 18 March 2024, the respondent was sentenced in the Children's Court for 19 offences. The offences primarily involved the theft and misuse of motor vehicles, extending to reckless driving and intimidation of other drivers, and engaging in police pursuits: J [24]-[28]. The respondent was 16-17 years old at the time of the offending and 18 at the time of sentencing. The President of the Children's Court imposed an aggregate control order for a period of three years, with a non-parole period of 18 months. The sentence was backdated, so that it commenced on 2 October 2023 with the non-parole period portion of the sentence expiring on 1 April 2025.
3. The respondent lodged an appeal to the District Court, in accordance with Part 3 of the *Crimes (Appeal and Review) Act 2001* (NSW), alleging that the sentence imposed in the Children's Court was excessive. Section 22A of the *Children's Court Act 1987* (NSW), provides that an appeal to the District Court from a decision of a Presidential Children's Court is taken to be an appeal to the Supreme Court.[2]
4. On 4 February 2025, the respondent's severity appeal was heard by Basten AJ ("**the primary judge**"), sitting as a single judge in the Common Law Division of the Supreme Court of NSW. The primary judge made orders immediately following the hearing.
5. The primary judge concluded that the Children's Court had no power to impose an aggregate control order for three years: J [45]. On that basis, his Honour allowed the

[1] *Children (Criminal Proceedings) Act* 1987 (NSW) s 15A prevents the publication of the name of the respondent.
[2] J at [11]-[12]; see also [16]-[20].

appeal and set aside the aggregate sentence imposed by the President of the Children's Court. A challenge to the correctness of that legal conclusion is the substance of this application for leave to appeal. The applicant contends that the primary judge erred in his construction of the *Children (Criminal Proceedings) Act 1987* (NSW) ("**CCPA**").

6. The primary judge re-sentenced the respondent to two separate aggregate control orders. The primary judge agreed with the conclusion of the Children's Court President that the objective seriousness of the totality of the respondent's offending could not be adequately addressed by a sentence of less than 3 years: J [53]. The primary judge found, however, that the imposition of two consecutive aggregate control orders would allow "on the proper construction of s 33A(4) the combined continuous period to extend to three years.": J [52].
7. The first aggregate control order was imposed for a fixed term of 12 months, commencing 7 August 2023, in respect of the ten offences which had been prosecuted summarily by police prosecutors ("**the first group of offences"**): see J [54]. The second control order was imposed in respect of the nine offences that took place over four days between 30 September 2023 and 3 October 2023, and which were prosecuted by the Director in the Children's Court (**"the second group of offences**"): see J [55]. The second aggregate control order commenced on 7 August 2024, with a non-parole period of 6 months, expiring on 6 February 2025. [3]

The questions involved (rule 51.12(4)(b))

8. The proposed ground of appeal is as follows:

    a. The primary judge erred in concluding that the Children's Court had no power to impose an aggregate control order of three years.

9. The appeal gives rise to the following question:

    a. Whether the proper construction of s 33A of the *Children (Criminal Proceedings) Act 1987* (NSW) permits the imposition of an aggregate control order of up to 3 years, or whether the jurisdiction of the Children's Court to impose an aggregate control order is limited to an individual control order "not exceeding 2 years" as is provided for by s33(1)(g) of the same Act.

[3] When resentencing, the primary judge permitted additional backdating to take account of some pre-sentence custody (see J [2]; [62]).

Reasons why leave should be granted

10. Leave to appeal to the Court of Appeal from the decision of the primary judge is required, in accordance with s101(2)(r) of the *Supreme Court Act 1970* (NSW).
11. It has been made clear by authorities of this Court that a grant of leave requires the identification of an issue of principle, a question of public importance or identifiable injustice in the individual case: *Cheng v Motor Boat Yacht Sales Australia Pty Ltd* (2022) 108 NSWLR 342 at [15]. An applicant must establish something more than that the primary judge was arguably wrong in the conclusion arrived at: *Director of Public Prosecutions v Priestley* [2014] NSWCA 25 at [15].
12. This application identifies a clear issue of principle, which is also a question of public importance. Whether a Children's Court has the power to impose an aggregate control order that extends to three years, or whether the power is limited to two years is an important matter with a broad impact beyond the facts of this individual case.
13. The construction by the primary judge has the effect that the Children's Court has no power to impose an aggregate control order any longer than two years, which is the same as the jurisdictional limit for a single control order, imposed for a single offence. However, the Children's Court may still impose multiple control orders which lead to an effective total term of three years. Therefore, despite how it may first appear, the construction reached by the primary judge does not benefit a young person appearing for sentence before the Children's Court. Without the power to impose an aggregate sentence for more serious multiple offending, the Children's Court is far more likely to be required to engage in a more difficult and complex "traditional" sentencing task in the very cases for which aggregate sentencing provides the greatest benefit. These potential consequences are reflected in the observations made by the primary judge when he turned to the resentencing task (J [51]-[53]).
14. The appeal raises questions of statutory construction with broad application in respect of the power of the Children's Court to impose control orders. By reference to the argument below, it is respectfully contended that in this important context, sufficient doubt attends the decision of the primary judge to warrant leave being granted to appeal.
15. It is appropriate that the application for leave and the appeal be heard concurrently. The argument in respect of the application for leave concerns the merits of the appeal itself. The submissions and material relevant to consideration of the question of leave are likely to be substantially the same as those relevant to the appeal and thus a separate

leave hearing will potentially require the merits of the case to be ventilated twice and delay finalisation of the proceedings.

16. The respondent to these proceedings is a young person who has completed the non-parole portion of his sentence. Should leave be granted and the appeal upheld, the applicant contends that the sentencing orders made by the President of the Children's Court should be confirmed, subject to the variation of commencement date ordered by the primary judge. Such an outcome for the respondent would not disturb his release to parole which has already occurred.
17. Finally, it is understood that the respondent is presently represented by the NSW Legal Aid Commission. The Director does not seek costs against the respondent if the appeal is successful. Nor would the Director oppose an order for costs against the Director even where the appeal was successful, should this Court deem it appropriate in all the circumstances that the costs of the appeal be borne by the Director.

The applicant's argument (rule 51.12(4)(c))

Relevant legislative provisions applying to penalties in the Children's Court

18. The Children's Court is empowered to impose penalties in accordance with s 33(1) of the CCPA. Relevantly, s 33(1)(g) provides (emphasis added):

> **33 Penalties**
> (1) If the Children's Court finds a person guilty of an offence to which this Division applies, it shall do one of the following things—
> …
>
> (g) it may, subject to the provisions of the *Crimes (Sentencing Procedure) Act 1999*, make an order committing the person for such period of time (not exceeding 2 years) as it thinks fit—
> (i) in the case of a person who is under the age of 21 years, to the control of the Minister administering the *Children (Detention Centres) Act 1987*, or
> (ii) in the case of a person who is of or above the age of 21 years, to the control of the Minister administering the *Crimes (Administration of Sentences) Act 1999*.

19. It is observed that the power to sentence a child pursuant to s 33(1)(g) is expressed as a power to impose a control order in respect of an individual offence (i.e. "an offence") to which the Division applies and in respect of which the Children's Court has found the child guilty. Section 33 does not include any express power to impose a single control order in respect of multiple offences (i.e. an aggregate control order) and was not amended when aggregate sentences were introduced in 2011. The primary judge

was nevertheless satisfied that the language of the provision is apt to apply to an aggregate control order: J [41].

20. Section 33A of the CCPA provides:

> **33A Cumulative or concurrent orders etc**
> (1) In this section, ***control order*** means an order referred to in section 33 (1) (g).
> (2) Unless a direction is given under this section, the period for which a person is required to be detained under a control order commences when the order takes effect.
> (3) If the Children's Court so directs, the period for which a person is required to be detained under a control order commences when the period for which the person is required to be detained under another control order or other control orders expires.
> (4) The Children's Court must not make a new control order, or give a direction under this section, if the order or direction would have the effect of requiring a person to be detained for a continuous period of more than 3 years (taking into account any other control orders relating to the person).
> (5) Subsections (2) and (3) are subject to section 57 of the *Crimes (Sentencing Procedure) Act 1999*, as applied by section 33C.
> (6) This section does not apply to a control order to which section 33AA applies.

21. This provision was enacted in a predecessor form in 1989.[4] The Second Reading speech in the Legislative Assembly (5 April 1989) provided (at p 5904):

> …Currently, the maximum term of committal that may be imposed on a juvenile is two years. This is clearly insufficient for the range of serious offences with which the Children's Court may deal. It is also not clear from the present wording of the section whether a judicial officer can direct that committal orders be served cumulatively. It is highly desirable that judicial officers have legislative authority to impose cumulative sentences where an offender has committed offences that are unrelated. After consultation with the Senior Children's Court Magistrate I have decided that it is appropriate to specifically provide that a Children's Court Magistrate may impose a maximum term of committal of two years for an individual offence, with a maximum total cumulative order of three years. Thus the total maximum term of committal which will now be able to be ordered is three years.

22. The most recent substantive amendment to s 33A was in 2008.[5]

23. Aggregate sentencing provisions were introduced into the *Crimes (Sentencing Procedure) Act 1999* ("**the Sentencing Act**") commencing 14 March 2011. Section 53A(1) provided (and still provides) that "[a] court may, in sentencing an offender for more than one offence, impose an aggregate sentence of imprisonment with respect to all or any 2 or more of those offences instead of imposing a separate sentence of imprisonment for each". The section was introduced to ameliorate the difficulties that

[4] By the *Children (Criminal Proceedings) Amendment Act 1989* (No 75) Schedule 1 (13).
[5] By the *Children (Criminal Proceedings) Amendment Act 2008* (No 54) Schedule 1 [32]. The amendment replaced an earlier form of s 33(4) to amend the limitation upon the number of control orders that may be made partly or wholly consecutive from two to any number, whilst retaining the overall jurisdictional limit on the total period of detention as 3 years.

arose when sentencing for multiple offences, including obviating the need to specify staggered start and end dates for multiple individual sentences when accumulating the terms of such sentences and applying the totality principle: *Pearson v Commonwealth & Ors* [2024] HCA 46; (2024) 99 ALJR 110 at [46].

24. The jurisdiction of the Children's Court to impose an aggregate control order arises by virtue of s 33C, "picking up" the relevant provisions of the Sentencing Act. That provision relevantly provides as follows (emphasis added):

> **33C Application of Crimes (Sentencing Procedure) Act 1999 to children**
>
> (1) Subject to this Act and section 27(4A) of the *Crimes (Sentencing Procedure) Act 1999*, the provisions of Parts 3 and 4 of the *Crimes (Sentencing Procedure) Act 1999* apply to the Children's Court in the same way as they apply to the Local Court, and so apply as if—
>
> (a) a reference in those provisions to the sentencing of an offender to imprisonment were a reference to the making of a control order, and
>
> ….

25. Part 4 of the Sentencing Act includes s 53A, which provides the power to impose an aggregate sentence. At the time that s 53A of the Sentencing Act was introduced, s 33A was in the form set out above. Also at that time, s 58(1) of the Sentencing Act imposed a jurisdictional limit of 5 years upon cumulative or consecutive sentences imposed by the Local Court. Neither s 33A(4) or s 58(1) was amended to refer to aggregate sentences at the time of their introduction. Part 4 of the Sentencing Act also now includes s 53B which provides:

> **53B Limitation on aggregate sentences imposed by Local Court**
>
> For the avoidance of doubt, the Local Court may impose an aggregate sentence of imprisonment that does not exceed 5 years.

26. Importantly for present purposes, s 53B was not inserted into the Sentencing Act at the time of the introduction of aggregate sentencing: cf J [44]. It was enacted in 2016.[6] The Second Reading speech in the Legislative Council for the introduction of the relevant bill stated (emphasis added):

> The *Crimes (Sentencing Procedure) Act 1999* already states that the Local Court may impose multiple sentences of imprisonment up to a total of five years. [Section 53B] makes it clear that the Local Court may also impose an aggregate sentence of imprisonment of up to five years. This amendment aims to avoid doubt, so it is clear that when the Local Court imposes an aggregate sentence its jurisdiction is the same as

[6] *Justice Portfolio Legislation (Miscellaneous Amendments) Act* 2016, Sch 1.6[4].

> accumulating sentences. This will implement a recommendation of the NSW Law Reform Commission in its 2013 sentencing report.[7]

27. The NSW Law Reform Commission Report on Sentencing (No 139) had relevantly made reference to 'doubt' expressed in consultations with the Local Court on the question, and made a recommendation to 'clarify' the application of s 53A in the Local Court: [6.90]-[6.92]. This legislative history indicates that s 53B is in the nature of a "declaratory" provision.[8]

Aggregate Sentencing

28. The introduction of aggregate sentencing was a significant reform. As explained by R A Hulme J in *JM v R* [2014] NSWCCA 297; (2014) 246 A Crim R 528 at [39] (citations omitted):

> Section 53A was introduced in order to ameliorate the difficulties of applying the decision in *Pearce v The Queen* … in sentencing for multiple offences… It offers the benefit when sentencing for multiple offences of obviating the need to engage in the laborious and sometimes complicated task of creating a "cascading or 'stairway' sentencing structure" when the principle of totality requires some accumulation of sentences…
>
> When imposing an aggregate sentence a court is required to indicate to the offender and make a written record of the fact that an aggregate sentence is being imposed and also indicate the sentences that would have been imposed if separate sentences had been imposed instead (the indicative sentences): s 53A(2). The indicative sentences themselves should not be expressed as a separate sentencing order.

29. Aggregate sentences provide an alternative method for sentencing an offender for multiple offences, permitting a court to impose an aggregate sentence of imprisonment instead of a separate sentence of imprisonment for each count: *R v Nykolyn* [2012] NSWCCA 219 at [32]; *Cullen v R* [2014] NSWCCA 162 at [25]. The purpose is not to achieve a lesser effective sentence than would have been imposed by a traditional sentence structure, but rather to ameliorate the difficulties described above: *Taitoko v R* [2020] NSWCCA 43 at [130].[9] As observed by the High Court in *Park v The Queen* [2021] HCA 37; (2021) 273 CLR 303 at [27]:

> Section 53A applies once the sentencing judge has determined appropriate sentences for each of multiple offences, and the section permits a single sentence to be imposed for multiple offences, such that the overall impact of the sentence is clear, as is the court's assessment of the offender's criminality with respect to each offence.

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[7] 12 October 2016.
[8] See *DC Pearce* Statutory Interpretation in Australia (10th Edition) 2024 *Lexis Nexis* Australia at [12.30].
[9] For one example of the complexities, see *Gray v R* [2013] NSWCCA 169 at [39]-[45]; [75]; [77].

Argument

30. The legislative history and context above evinces a legislative intention that the option to impose an aggregate sentence be available to both the Local Court and the Children's Court *and* that it be available as a true alternative to multiple sentences for multiple offending to the full extent of the jurisdictional limit applicable in each case: cf J [44]. The construction of s33A(4) reached by the primary judge placed too great an emphasis upon the textual language of s 33A removed from its broader statutory context and purpose: *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 262 CLR 362 at [40] (per Gageler J); cf J [31]-[42].

31. It may be observed that it was accepted by the primary judge that the power to impose a single aggregate control order for multiple offences has been conferred upon the Children's Court without any amendment to the statutory language of s 33(1)(g) (which provides that *an order* may be made in respect of *an offence*): J [41]). It has been (uncontroversially) accepted that the legislative intention of providing the power to impose an aggregate control order to the Children's Court was nevertheless achieved.

32. It is contended, contrary to J [40], that the 'subject matter' of s 33A(4) is sentencing for multiple offences. The clear purpose of s 33A was to extend the jurisdictional limit from 2 years to 3 years when sentencing an offender for multiple offences. At the time of enactment of s 33A, the only method for sentencing an offender (to imprisonment) for multiple offences was by the imposition of multiple individual control orders. In 1989, when 33A was introduced, the proposition that one might impose what is now an aggregate sentence was contrary to principle, and necessarily not reflected in the statutory language. What *was* intended by the provision, however, was that a Children's Court magistrate have the power to impose a longer total period of imprisonment for multiple offences than was available for a single offence.

33. No amendment to s 33A was necessary in order to "extend" the jurisdictional limit upon a control order where it was an aggregate control order (cf J [43]-[44]). The language of the provision is capable of adaptation (as with the language of s 33(1)(g)) to apply whether the traditional or aggregate sentencing method is adopted. That this is consistent with the intention of Parliament is underscored by the observation that the advantages of aggregate sentencing are especially beneficial in cases where an offender is to be dealt with for a large number of offences (which will commonly be the case in the Children's Court in circumstances where a young offender is likely to be sentenced to a control order, and is amply illustrated by the circumstances of the present case). It

is also an interpretation which is consistent with the operation of the analogous provisions applicable in the Local Court (see J [37]; cf J [44]). Similar provisions within an overall legislative scheme should be interpreted consistently where possible: *Harrison v Melhem* [2008] NSWCA 67; (2008) 72 NSWLR 380 at [131].

34. A harmonious construction of ss 33, 33A, and ss 53A and 53B of the Sentencing Act as applied to the Children's Court by s 33C, is one in which the beneficial aggregate sentencing procedure remains available to the Children's Court to the maximum jurisdictional limit available to that Court when sentencing for multiple offences. This interpretation should be preferred.

Application to the respondent's case

35. The primary judge did not disturb the findings of the Children's Court President as to the objective seriousness of the individual offences, the indicative sentences pronounced by her Honour, nor the overall effect of the aggregate control order. The primary judge held that her Honour's finding that the objective seriousness of the offending conduct required a minimum level of detention was "clearly correct": J [49]. His Honour also recorded his observation at [51] that "the President was of the view that, unless a control order of three years could be imposed, the offences, or at least some of them, should not be dealt with under the special powers available in the Children's Court". The primary judge agreed with this view about the seriousness of the offending, the minimum appropriate sentence and the alternative course that would have to be taken were a 3-year total term not available: J [53].

36. The determination of the primary judge to substitute for the 3-year aggregate control order, two separate aggregate orders to be served consecutively was made "not without some misgivings" (J [52]). Notably, his Honour stated that it "would not generally be appropriate to divide an aggregate sentence into two parts so as to extend its effect". It was only available in the respondent's case because the offending was, as it happened, was able to be logically separated into two periods of time and two groups of offending: J [53]. Had this not been the case, the structure that his Honour adopted would have involved an inappropriately contrived sentencing outcome. The alternative, which may be the only alternative in many cases, is to engage in a *Pearce* exercise involving the imposition of multiple control orders, with its attendant difficulties and complexities.

37. There was an additional element of complexity introduced by the imposition of two consecutive sentences; being that the second group of offences, which contained the

more serious offending, was subject to an aggregate control order of 2 years, with a non-parole period of only 6 months. On its face, this non-parole period was inadequate to reflect the criminality of the offending conduct. The primary judge explained that such a variation of the statutory ratio was available by means of a finding of special circumstances and the application of principles of totality (J [65]), noting that a sentence structured in such a way was far more common prior to the introduction of aggregate sentencing. The necessity for the primary judge to structure the consecutive sentences in such a way in order to achieve the same result as the original sentence, illustrates but one aspect of the benefits of aggregate sentencing precluded by the construction adopted by the primary judge.

38. The primary judge expressly held that the objective seriousness of the respondent's offending could not be addressed adequately by a lesser sentence than three years. If the appeal is upheld, the order of the Children's Court sentencing the respondent to a 3 year aggregate control order with an 18 month non-parole period should be confirmed, subject to the variation of the commencement date as ordered by the primary judge.

A list of relevant authorities and legislation

Children (Criminal Proceedings) Act 1987 s 27, s 31, s 31H, s 33, s 33A, s 33C

Crimes (Sentencing Procedure) Act 1999 s 53A, s 53B, s 58

Park v The Queen [2021] HCA 37; (2021) 273 CLR 303

Conclusion

39. For the reasons set out above, the primary judge erred in finding that the President did not have the power to impose the aggregate control order of three years. Leave should be granted and the appeal upheld.

40. These submissions are in a form suitable for publication on the internet.

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Amended 5 September 2025

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