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IN THE YOUTH COURT
AT HAWERA

I TE KŌTI TAIOHI
KI HĀWERA

CRI-2020-221-000019
[2020] NZYC 434

THE QUEEN

v

[ES]

Hearing: 24 August 2020

Appearances: J Marinovich for the Crown
J Hannam for the Young Person

Judgment: 24 August 2020

ORAL JUDGMENT OF JUDGE G F HIKAKA

Introduction

[1] [ES] was born [date deleted] 2002. He has been charged that [date deleted — mid] 2018 he sexually violated the complainant by rape. It is a charge that carries a 20 year prison maximum sentence. The charge is a schedule 1 offence which would normally mean the first appearance is in the Youth Court and thereafter, appearances in the District Court.

[2] At the date of the alleged offending, the complainant had just turned 15 years old and the defendant was 16 years old.

[3] The defence application is pursuant to s 322 of the Oranga Tamariki Act 1989 which states:[1]

> A Youth Court Judge may dismiss any charge charging a young person with the commission of an offence if the Judge is satisfied that the time that has elapsed between the date of the commission of the alleged offence and the hearing has been unnecessarily or unduly protracted.

[4] The application is made on the basis of disclosure to defence to date indicated that the prosecution have had a dilatory approach. Briefly the allegation referred to offending [in mid-] 2018. In 20 August 2019, the complainant approached the police, an evidential video interview was conducted on 28 August 2019 and the defendant charged on 23 June 2020. It has been submitted that had the charge been laid earlier when the defendant was 16 years old, he would have had the benefit of the more involved and strongly rehabilitation focused Youth Court youth justice regime. Even if the charge had been laid before he turned 18, counsel submitted that the defendant may still have had greater focus on the youth justice provisions that apply. Counsel submitted that jurisdictional issues are highly relevant both pre and post-hearing, and the defendant has also been compromised in his defence, not only regarding alibi witnesses but also degradation of memory as time passes.

[5] The application is opposed. Prosecution submitted that the delay that occurred was, first, attributable to complainant delay, second, the prioritising of other urgent investigations by the officer in charge, third, the intervention of the COVID lockdown

[1] Oranga Tamariki Act 1989, s 322.

for two months earlier this year, all leading to the submission that the time between the alleged offending and hearing has been neither unnecessarily nor unduly protracted. Even if it is found there was unnecessary or undue protraction of time, prosecution submitted that nonetheless the Court should exercise its discretion and not dismiss the charge. The submission included reference to the relatively new section of the Oranga Tamariki Act (OTA) - s 4A and therein marshalling the welfare and best interest considerations under the youth justice provisions of the Act, in particular, four principles:

(a) welfare and best interests of the child or young person; and

(b) public interest (which includes public safety); and

(c) the interests of any victim; and

(d) the accountability of a child or young person for their behaviour.

[6] I have been greatly assisted by counsel's written submissions and the oral submissions and the discussion of the issues before the Court today. I noted that as the issue concerned timeliness and delay, the decision would be dictated but reserving the right to amend but without changing the outcome. That was on the basis that whatever the outcome, an appeal by defence or prosecution would be understandable and anticipated.

Issues

[7] Was the time between the alleged offending and the hearing;

(a) unnecessarily protected; or

(b) unduly protracted; and

(c) even if the Court is satisfied that the answer to either (a) or (b) is "yes", should the charge be dismissed?

Chronology

[8] It is useful to look at the chronology of events. The affidavit of the officer in charge dated 11 August 2020 has greatly assisted.

[9] To summarise from the Crown's submissions;

(a) Delay between alleged offending and complaint, 14 months;

(b) Delay between formal complaint and defendant's interview, three months;

(c) Delay from defendant's interview to charge, seven months (including two months of COVID response levels 3 and 4);

(d) Delay from charge to trial, unknown, but (almost) two months from first appearance to today's application.

[10] In more, but not all, detail from the detective's three page affidavit.

[11] [Detective Constable A] is in the Child Protection Team in [location deleted]. He investigates serious physical and sexual abuse of children and young person's under 16. At any given time he has between five and 10 active files which he is required to manage and investigate concurrently. On top of that, he is expected to respond to critical incidents or investigations deemed a priority involving young persons as they were reported.

[12] On 20 August 2019 the complainant reported that she had been sexually violated by the defendant [ES] [in mid-] 2018. [Detective Constable A] was assigned to investigate the complaint.

[13] The earliest available date the complainant could be evidentially interviewed was 28 August 2019.

[14] On 5 September 2019, the defendant's mother was spoken to by the detective. It was noted that the defendant was 17 years old. The detective wanted him to have a nominated person present when he was asked questions about the allegations. The defendant's mother told the detective that the defendant was on a course until [date deleted] 2019 and that he would not be available to be spoken to at least until October 2019.

[15] The detective applied for and was granted a search warrant on 26 September. He executed it on 3 October 2019 at the defendant's address. The defendant was present. He was spoken to about the allegations. He was willing to make a video recorded statement. He nominated his mother as the nominated person and was told by the detective that the detective would be in touch to arrange an interview at a suitable time the following week.

[16] Just before the week was up, on 9 October 2019 the detective was tasked to investigate a critical priority incident regarding two young victims of sexual violation that took several weeks of his full attention.

[17] The defendant's matter was not reassigned due to a staff shortage and operational demands because of numerous homicide investigations in Whanganui.

[18] The detective attended police training in Wellington from 11 to 15 November and on 21 November 2019 he met with the defendant. The video recorded interview was conducted with the defendant's mother acting as his nominated person. The defendant denied the allegations, referred to basis of his denial and named four individuals who would, I presume, support his narrative of the denial.

[19] The detective thought that corroboration would be important from those named people. On 29 November 2019 he obtained statements from two of them. He attempted to contact another but was unable to organise a suitable time to interview him.

[20] The detective was on sick leave for the week 11 to 18 December 2019. Between 23 December 2019 and 3 January 2020 he was on annual leave.

[21] On 9 January 2019 on his return to work, he got a statement from the third of the four people the defendant had referred to in his interview. He was unable to locate the fourth, but noted that three of the statements that he had obtained made contradictory statements to what the defendant has said in his statement.

[22] Another priority matter intervened on 14 January 2020 and the detective was tasked to investigate a critical priority incident involving a young victim of sexual violation and again that had his full attention from 14 to 21 January 2020.

[23] Between 22 January and 2 February 2020, he was on annual leave.

[24] On 18 February 2020, he tried to arrange time to take a statement from a recent complaint witness in this defendant's case. That was not easily done.

[25] Again, a priority matter came into the detective's work load, so from 3 to 25 March 2020 he had to investigate a serious non-accidental injury of a one year old.

[26] COVID-19 alert level 3 occurred on 23 March, so police investigations and in general the whole of the country's citizen to citizen involvement was curtailed. No unnecessary or non-priority physical or face-to-face enquiries were able to be completed due to the level of restrictions under alert level 3 and 4.

[27] The more recently identified recent complaint witness was interviewed by phone on 27 March 2020. Another potential prosecution witness was identified on 2 April. That person was 14 years of age and it was thought important that she be video interviewed.

[28] The complainant in this case was again interviewed on 4 April by way of a recorded phone call.

[29] On 15 May 2020, the additional prosecution witness was interviewed and that was recorded on video.

[30] On 20 June 2020, the investigation was reviewed by a detective sergeant supervisor, and in line with the Solicitor-General's Guidelines, it met the criteria for a prosecution.

[31] The complainant was notified of that, confirmed her complaint and that she wished to proceed with the prosecution. The defendant was arrested and charged on 25 June 2020.

[32] The charge was filed in the Hawera Youth Court.

Law

[33] Five aspects need close attention in these circumstances and they all arise under s 322 of the Oranga Tamariki Act:

(a) first, the alleged offence;

(b) second, the term "the hearing";

(c) third, whether the time between the alleged offence and the hearing was unnecessarily protracted;

(d) fourth, whether that same time span was unduly protracted; and

(e) fifth, even if satisfied that the time between was unnecessarily or unduly protracted, should the Court exercise its discretion and dismiss the charge.

First, the alleged offence

[34] The date of the alleged offending is clear – [mid-June] 2018. No summary of the allegation is before the Court but from what has been submitted, time, date, place, identity of the defendant, identity of the complainant, were confirmed and known when the complaint made her complaint.

Second, "the hearing"

[35] The Crown referred to the *Attorney-General v Youth Court at Manukau*.[2] Within that decision of Her Honour Winkelmann J, not only did Her Honour list criteria to consider under s 322 OTA, but also referred to the words "the hearing" and that that is to be considered, the projected date of hearing of the charges.

[36] That approach was considered in the Court of Appeal decision of *R v M* (refer *Adams on Criminal Law* CY322.04). The Court of Appeal recognised the practical sense in the approach of the High Court but said it did not sit easily with the words of the section itself and noted:[3]

> ..."the time that has elapsed between the date of the commission of the alleged offence and the hearing", which appears to contemplate a calculation looking backwards from the date of the hearing, rather than a projection forwards.

[37] I have discussed with counsel that defended hearings in the Youth Court have a high degree of flexibility locally and the justice administration accommodate hearings before a Youth Court Judge alone as soon as practicably possible and that can be within quite a short period of time.

[38] The second point on this issue is that Judge alone trials in New Plymouth at the moment are being given nominal hearing date of 11 December 2020 on the basis of the hope that an earlier date will become available sooner than 11 December 2020 or, once rostering allocations are made, a set date after 11 December 2020 would be allocated.

[39] The next point on this issue is that priority jury trials are fully allocated through to the end of 2020 and non-priority jury trials will not be given until June or July 2021. I anticipate that this defendant's case would be seen as a higher priority than some others, but that is not a guarantee.

[40] It has been submitted today, that on the basis of what is currently with defence and the Court, that it is likely the defendant will elect a trial by jury and therefore the

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[2] *Attorney-General v Youth Court at Manukau* [2007] NZFLR 103 at [49].
[3] *R v M* [2011] NZCA 673, CA689/2011 at [35].

estimate of time that elapses from the date of alleged offending will be 34 months (July 2021).

[41] Therefore, this application is under consideration in the absence of a confirmed actual hearing date. What I have referred to are the best estimates of what a projected date might be.

Third, whether the time between the alleged offence and the hearing was unnecessarily protracted

[42] Prosecution submissions referred to the Supreme Court decision of *H v R* and s 322 OTA.[4] Briefly, that case related to historical sexual offending and an appeal with respect to s 322 on charges relating to one of two victims. The offending occurred between 1955 and 1959 when the defendant was aged between 16 and a half and 20, and the victim was aged between five years and four months and eight years and 11 months of age. After a jury trial, the defendant was found guilty of those, and other charges, in 2017. At the time of conviction, he would have been aged about 62 years.

[43] Section 322 OTA came under scrutiny. It was accepted at [42] that the term "unnecessarily protracted" imports a notion of fault, usually by the Crown, and the term "unduly protracted" does not.

[44] The Court also decided that s 322 OTA took into account youth justice principles that were still relevant, even though the accused could be an adult. Also, that s 4(f)(ii) OTA was relevant, as was the principle in s 5(f) OTA referring to the timeframe appropriate to the child or young persons' sense of time. The Court noted that if a person is charged as an adult they will usually no longer have a sense of time that a child or young person may have, but the principle may still have direct application to persons charged in their late teens and early twenties for offences committed as children or young persons (refer [32]).

[45] At [33] and [34] the Court considered particular factors that relate to stage of development that may contribute to offending by children and young people and that

[4] *H v R* [2019] NZSC 69.

may be seen as reducing or explaining culpability and also rehabilitation success was more likely. The Court referred to the Court of Appeal decision in *Churchward v R* in [77]–[80] and then at [98], referred to the United Nations Convention on the Rights of the Child.[5]

[46] At [34] of *H v R* Supreme Court noted:

> Even where the alleged offending was serious, however, youth justice principles may still mean that the discretion to dismiss a charge under s 322 should be exercised. This would especially be the case where there is good reason to consider the person has been rehabilitated (for example where there has been a long period without any serious offending.)

[47] That last sentence was a reference to a decision where an offender had, in fact, gone through an extensive rehabilitation process before the Court got to consider s 322 OTA, and, I understand it, based on the rehabilitation process, the charge was dismissed under s 322.

[48] Back to the decision of Her Honour Winkelman J referred to above. The factors Her Honour considered with respect to s 322 applications were:

(a) The length of delay (from filing of the charges to the end of trial).

(b) Any informed waiver of time periods by the defendant.

(c) The reasons for the delays including:

(i) inherent time requirements of the case;

(ii) actions of the defendant;

(iii) actions of the Crown;

(iv) limits of institutional resources; and

(v) other reasons for delays.

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[5] *Churchward v R* [2011] NZCA 531.

(d) Prejudice to the defendant.

[49] Resourcing issues have been referred to in [Detective A] evidence. Her Honour Winkelman J noted that delay caused by resource limitations will not usually be unnecessary delay as the police will have to allocate resources, just as the Court has to allocate resources ([54]). But further at [55], "At a certain point however, delay caused by resourcing constraints will be undue delay."

[50] These decisions, albeit not straight-forward, do take into account that resourcing provided by the government to government agencies, and the need for those agencies to prioritise how they use the resources they have been provided with.

[51] In this case the detective's evidence showed he had a very busy work load.

[52] The reasons for passage of time from when he was tasked to investigate the complaint were;

(a) allowing the defendant to finish his course;

(b) allowing the defendant's preferred nominated person to be present at the time he was interviewed. Note that s 222(2)(b) OTA is a provision that allows an enforcement officer to organise his or her own nominated person when the enforcement officer has concerns about the nominated person, or, the nominated person is not available within a reasonable time. It is not clear from the detective's evidence but presumably he took that into account;

(c) just prior to when he said he would be in contact to arrange the interview with the mother as the nominated person, he was tasked to investigate a different priority matter or, one that presumably had a higher priority than the defendant's;

(d) the defendant's case was not reassigned because of staff shortages;

(e) the detective attended training in Wellington;

(f) on return, he interviewed the defendant;

(g) He undertook a number of related enquiries, looking more closely into the explanations given by the defendant, seeking corroboration or otherwise of the defendant's account by trying to track down the four people the defendant named as being present or likely to have been present at the time of the offending. That took some months. He was not able to locate one of the people named to speak with;

(h) 14 January, another critical priority incident took him away from the defendant's case;

(i) then annual leave;

(j) a recent complaint witness was identified, which led to another delay to look into that person's availability;

(k) another matter involving a one-year old victim (referred to above) required investigation;

(l) unusual arrangements for investigation required as a result of the COVID measures;

(m) 20 June 2020 confirmation the information and investigation met the criteria for prosecution;

(n) 25 June the arrest and charge of the defendant.

[53] Appropriately, there was no criticism of the complainant's delay in reporting (14 months).

[54] The time the formal complaint was made through to arrest was 10 months. The s 322 timeframe begins at the date of the alleged offending.

[55] In the overall scheme of things, the 10 month timeframe is not out of the ordinary for adults. Indeed, some would say there was a degree of timely progression given time, work requirements and resourcing that were available.

[56] The detective's leave requirements were noted in his evidence. I need to note that the prosecution submitted that there are times police officers are required to take leave. I have taken that was the case for [Detective A] when he referred to taking annual leave during the course of his investigation.

[57] Matching investigation timeframes, with the strict time limits for matters involving allegations against a child or young persons, means, in my view, that there needs to be an 'out of the ordinary' priority allocation of resources when it comes to observing those strict statutory timeframes for children and young people alleged to have committed offences. In my view, even more so when serious allegations of offending are made.

[58] In the context of the defendant's particular circumstances, alleged offending time, date, place and identity were clear from 28 August 2019 when the complaint made on 20 August was formalised at the evidential video interview.

[59] I have already referred to the section where the defendant does not necessarily have his preferred nominated person present when making a statement. Secondly, the perceived need of the detective to explore corroboration and the defences that were being offered by the defendant, before progressing to the point of charging him. Both aspects led to delay.

[60] In my view, with respect to the strict statutory timeframes imposed when offending by children and young persons is alleged, without any criticism of the detective himself, the process followed led to the time between the alleged offending and the hearing was, and will be, unnecessarily protracted.

Fourth, whether the time between the alleged offending and the hearing was unduly protracted

[61] There could be an argument that "unnecessarily" protracted does not necessarily mean it is "unduly" protracted but in this case, again in light of strict statutory timeframes, the time between the alleged offence and the hearing has also, in my view, been unduly protracted.

Fifth, even if satisfied that the time between the alleged offending and the hearing was unnecessarily or unduly protracted, should the Court exercise its discretion and dismiss the charge?

[62] A number of points arise. Prosecution referred to *Police v Turner,* a 2006 High Court decision of his Honour Wild J. His Honour considered s 322 and a number of cases put before him, the elapse of time referred to at [52] and the table of various cases. In summary His Honour noted: [6]

> [53] This table did not readily lend itself to statistical analysis, but I note the following points:
>
> a) Elapses of only 6–10 months were sufficient to lead to the dismissal of the informations in many of the cases, notwithstanding that the charges were serious.
>
> b) The longest elapse where the s 322 application was dismissed was one of 19 months.
>
> c) In the only two cases where the elapse exceeded two years, the s 322 application succeeded.

[63] He noted from the decisions before him that, "'a timeframe appropriate to a young person's sense of time' was quite a short period, generally measured in months rather than years". He reflected that a time period which seems very long to a young person can be quite short to an adult. An example at [54] "a year represents one-tenth of the lifetime of a 10 year old, but just one-fiftieth of the lifetime of a 50 year old."

[6] *Police v Turner* [2006] BCL 412, BC200660603.

[64] He noted from the decision *Police v BRR*, a decision of Judge Harvey, the comment:[7]

> It is something that is continually in the mind of a Youth Court Judge when scheduling defended cases that these matters not be scheduled too far out so that the significance of the case is lost.

[65] His Honour Wild J referred at [55] to memory loss occurring in a decelerating curve, and memory retention drops off rapidly immediately following an event.

[66] Reference in this case was made to that already, with respect to social media, Facebook, text messaging and some of what the defence has been provided with so far, indicates that already some of potential defence witnesses have an unclear recollection of events around the time of the alleged offending.

[67] That in turn leads to consideration of prejudice to the defendant.

[68] It is over two years from the date of the alleged offending to today.

Of Note

[69] If the charge was for evidential analysis today, or perhaps in another year's time, effluxion of time exacerbates potential memory issues and thereby prejudice to the defendant. It also impacts on the element of doubt that could arise in the determination of any charge, so memory loss could be seen as a double-edged sword in that respect.

[70] I return to what I referred to earlier, namely s 4A(2) OTA which came into force on 1 July 2019 and the submission that when it comes to prejudice, those factors need to be taken into account, not only along with other factors, but also, by statutory reference to them being primary considerations, when considering the principles in ss 5 and 208 OTA. Again, they are:

> (a) the wellbeing and interests of the child or young person;

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[7] *Police v BRR* [1993] 11 FRNZ 25 at [27].

(b) the public interest;

(c) the interest of the victim; and

(d) accountability of the young person for their behaviour.

[71] About 30 years have passed since the passing of the Act into law and there have been shifting views over that time with respect to seriousness of offending and its impact on s 322 analysis and timeframes.

[72] Primary considerations in s 4A(2) are clear and need to be taken into account. The point also needs to be made that s 322 has been in place from the beginning of the legislation back in 1989, coming into effect in 1990, right through to its most recent iteration in July 2019.

[73] Section 322 has been a provision that has been considered time and again and it seems, and I stand to be corrected, that the definition of "hearing" has yet to be defined with greater certainty. Thereafter the timeframe between date of alleged offending to "the hearing" would also have greater certainty.

[74] The impact of resourcing by agencies tasked with attending to youth justice, in particular when serious offending by children and young people is alleged, remains a troubling issue.

[75] The interplay between the primary considerations in s 4A, and, s 322. Should those principles be given greater weight when the timeframes and in particular, prejudice to a child or young person charged, as a result of what has been determined to be unnecessarily or unduly protracted time between the alleged offending and the hearing.

[76] I am of the view that having reached the conclusion I did with respect to unnecessarily or unduly protracted timeframes, that I am not prepared to exercise my discretion and dismiss the application under s 322.

[77] The issues and the reasons for and against were traversed with counsel. The issues will continue to come before the Courts. These issues are particularly significant given the law changes in July 2019, especially now that 17 year olds are within the Youth Court jurisdiction unless charged with schedule 1 serious offending. Such young people first appear before the Youth Court as the gateway for an immediate transfer to the District Court. Even in that process, s 322 goes with the alleged offender to the District Court but suppression of identity details does not. Also, with the most recent law changes, rehabilitation under Youth Court orders is available to individuals up to the age of 19 years.

[78] Part of the reason to have made those observations is, what I would not only expect but in many ways invite, an appeal to have higher authorities to consider what, in my view, are important, significant issues. Hopefully thereafter, clearer guidance for day-to-day management of youth justice, particularly in the light of serious offending by children and young persons. Given the way my discretion has been exercised today, taking the issues to another level would be in safe hands of the Crown.

Result

[79] The application is granted. The charge is dismissed.

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Judge G F Hikaka
District Court Judge

Date of authentication: 26/08/2020
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.