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**IN THE YOUTH COURT
AT PUKEKOHE**

**I TE KŌTI TAIOHI
KI PUKEKOHE**

**CRI-2021-255-000003
[2021] NZYC 456**

**NEW ZEALAND POLICE
Prosecutor**

v

**[MS]
Young Person**

Hearing: 15 October 2021
Appearances: Sergeant Lyle for the Prosecutor
K Leys for the Young Person
Judgment: 8 November 2021

RESERVED DECISION OF JUDGE F J EIVERS

Introduction

[1] [MS] is facing one charge of assault in a family relationship. The offending is alleged to have occurred on 5 November 2020. The maximum penalty is a term of imprisonment of two years. [MS] was aged 16 at the time of the alleged offending. He turned 17 on [date deleted] 2021.

[2] The charge was denied by [MS] when he first appeared before the Court on 16 April 2021. The matter is before me to determine a delay application filed on [MS]'s behalf. Ms Leys appears for him. I spoke to [MS] by telephone and he confirmed that he was aware of the proceedings. He is working so I excused his attendance.

[3] I set out the chronology which is a combination of the chronologies separately filed by Ms Leys and by the Police:

- (a) 5 November 2020, alleged assault occurs.
- (b) 5 November 2020, the complainant is interviewed.
- (c) 10 November 2020, police are trying to locate [MS], having had two visits to his address.
- (d) 26 November 2020, [MS] is interviewed. He denies the assault took place.
- (e) 7 December 2020, the file is assigned to Youth Aid Officer [Constable A].
- (f) 10 December 2020, [Constable A] tries unsuccessfully to contact the victim.
- (g) 22 December 2020, the victim is encouraged to make an evidential statement by way of video but she declines that request.
- (h) 7 January 2021, [Constable A] visits [MS] who confirms that the charge is denied.
- (i) 18 January 2021, the mother of the victim is contacted.

- (j) 20 January 2021 attempt to contact victim but she is away in [location deleted].
- (k) 22 January 2021, [MS] confirms that he is denying the charge.
- (l) 4 February 2021, [Constable A] tries to contact the victim, but she is away at a tangi in [location deleted].
- (m) 10 February 2021, the complainant confirms she wishes to proceed with the matter.
- (n) 11 February 2021, the referral is made to the youth justice co-ordinator.
- (o) 18 February 2021, the consultation with the youth justice co-ordinator occurs for an intention to charge FGC.
- (p) 12 March 2021, the family group conference takes place and the charge is denied by [MS].
- (q) 24, 25 and 26 March 2021, there are unsuccessful enquiries to locate [MS] to serve the summons.
- (r) 14 April 2021, [MS] is served with the summons to appear on 16 April 2021.
- (s) 16 April 2021, [MS]'s first appearance in Youth Court. The charge is denied by [MS] formally in court.
- (t) 30 April 2021, the case review hearing is held, and the denial is maintained. The judge alone trial is set for 23 July 2021.
- (u) 28 May 2021 judge alone trial date confirmed as 23 July 2021.
- (v) 18 July 2021, the youth advocate advised that the officer in charge is not available.
- (w) 21 July 2021, the police file a memorandum advising that the officer in charge is on leave and seeks an adjournment of the hearing.
- (x) 21 July 2021, the youth advocate files a memorandum in opposition to the adjournment application.
- (y) 21 July 2021, the application is granted. The new date of hearing is allocated at the Manukau Youth Court.

- (z) 3 August 2021, the judge alone trial is scheduled but there is no attendance by the complainant or [MS]. By consent a new judge alone trial date is allocated for 15 October 2021 at Pukekohe Youth Court.
- (aa) 17 August 2021, COVID-19 level 4 restrictions commence at midnight.
- (bb) 1 October 2021, there is a callover/mention via VMR. The judge alone trial is not able to proceed on 15 October 2021, due to COVID-19 restrictions but the delay application is signalled and set down for that date.

Law

[4] In terms of the law I am guided by s 322 of the Oranga Tamariki Act 1989 in relation to time for instituting proceedings:

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.

[5] In terms of purposes of the Act, s 4(f), provides:

... to promote the wellbeing ... of young persons by responding to alleged offending and offending by children and young persons in a way that:

- (i) Promotes their rights and best interests and acknowledges their needs and;
- (ii) Prevents or reduces offending or future offending;
- (iii) Recognises the rights and interests of victims.
- (iv) Holds the children and young persons accountable and encourages them to accept responsibility for their behaviour.

[6] Section 4A (2) provides:

In all matters relating to the administration or application of parts 4 and 5 in ss 351 to 360, the four primary considerations, having regard to the principles set out in ss 5 and 208, are:

- (i) The wellbeing and best interests of the children or young person.
- (ii) The public interest (which includes public safety).
- (iii) The interests of any victim.
- (iv) The accountability of the child or young person for their behaviour.

[7] Section 5 (f) of the Act provides:

The principle decisions affecting a child or young person should wherever practicable be made and implemented within a timeframe appropriate to the child or young person's sense of time.

[8] Ms Leys refers me to the case law, in particular the decision of Winkelmann J, *Attorney-General v Youth Court Manukau and Ors*.¹

[9] Justice Winkelmann set out the test to be adopted when determining an application under s 322 of the Act. The initial enquiry into delay is a two-part process:

- (a) First, whether the time period referred to has been unnecessarily or unduly protracted where the time period is defined as the time elapsed between the commission of the alleged offending and hearing.
- (b) Second, if there has been delay there is discretion as to whether to dismiss the charging document.

¹ *Attorney-General v Youth Court at Manukau* [2007] NZFLR 103.

[10] When determining where the delay has been unnecessarily or unduly protracted, the Court is required to consider the following factors:

- (a) The length of delay.
- (b) Waiver of time periods.
- (c) The reasons for the delay including:
 - (i) Inherent time requirements of the case.
 - (ii) Actions of the accused.
 - (iii) Actions of the prosecution.
 - (iv) Limits of institutional resources.
- (d) Other reasons for delays.
- (e) Prejudice to the accused.

[11] Winkelmann J commented that unnecessary delay means no more than delay that could have reasonably been avoided. It will usually mean delay caused by default or neglect. The delay must be more than trivial.

[12] The existence of specific prejudice to the young person caused by the delay will be a factor weighing in favour of dismissal, but it is not a precondition to the exercise of the discretion to dismiss. There is a presumption that at a certain point in time general prejudice to the young person has been caused by the delay.

[13] The seriousness of the offence is a factor to be considered in the exercise of the discretion although the weight attached to that factor will depend on the particular circumstances of the case. There is a public interest in seeing that those who commit offences dealt with through the justice system, the more serious the offending, the greater the public interest.

[14] The issue of delay was addressed by Judge Hikaka in *R v ES*² where he briefly summarised the issues relating to the time between the alleged offending and the hearing as:

- (a) Unnecessarily protracted, or
- (b) Unduly protracted.
- (c) Even if the Court is satisfied that the answer to (a) or (b) is “yes” should the charge be dismissed.

Submissions

[15] Ms Leys’ application is premised on two sets of delay. Firstly, there is the length of time from the alleged offending through to the holding of the Family Group conference (“FGC”). Her view is that when it was initially denied by [MS], which was on November 2020, then an intention to charge conference should have taken place at a much earlier date.

[16] The next set of delay is in relation to the court hearing being set down. It was set for 21 July. On 18 July notice was received that the officer in charge was not available and therefore, the hearing was adjourned. At the new date on 3 August 2021, there was no attendance by the complainant or the young person, so it was further adjourned. Of course, since then COVID-19 has stepped in to occasion further delay.

[17] In total there is a delay of over 11 months.

[18] In relation to the legal principles Ms Leys submits the following:

- (a) The delay is over 11 months. There is a delay of over five months from when the alleged offending occurred to when [MS] had his first scheduled court appearance, and then a further delay of over six months from the first appearance to the date set for the pre-trial hearing

² *R v ES* [2020] NZYC 434

- (b) There has been no waiver of time periods by the young person.
- (c) The first period of delay occurs pre-charge. [MS] was spoken to three weeks after the alleged offending and denied the charge. It was referred to Youth Aid less than two weeks later. Then there is a delay from 7 December 2020 to 11 February 2021, over two months. This delay was unnecessary. He had denied the charge and the matter should have been progressed accordingly.
- (d) The referral to the youth justice co-ordinator for consultation and the convening and holding of the family group conference met the statutory timeframes, but then there is a delay of over a month before [MS] is required to appear in Court.
- (e) There is nothing to suggest that any of these delays are caused by [MS].
- (f) The judge alone trial has not been able to proceed on three occasions. The first hearing was vacated at the request of the police with opposition on behalf of [MS]. The second date was adjourned when both the complainant and [MS] failed to attend Court. COVID-19 lockdown restrictions mean the judge alone trial date is not able to proceed.
- (g) That the time that has elapsed between the commission of the alleged offence and the hearing has been both unnecessarily and unduly protracted.
- (h) The prejudice to [MS] is two-fold.
 - (i) It is likely to have a negative impact on his recollection of events.
 - (ii) He is entitled to have the matter dealt with in a matter consistent with his timeframes.

[19] Ms Leys refers to s 4A(2) of the Act. She submits that all the primary considerations are best met when matters are dealt with in a timely fashion consistent with the young person's perception of time, particularly when the victim is also a young person. Given that [MS] denied any wrongdoing he is not able to be accountable

unless the Court finds the charge proven. The longer the delay the more difficult it is for accountability to be meaningful should be charge be proven. In these circumstances, the issue of public safety, must be weighed against the issue of public interest for matters to be determined in a timely fashion.

[20] She submits that the charge faced by [MS] is at the lower end of the scale and he has no history of previous court appearances and is before the Court on this one charge.

[21] The police oppose the application. The police do not agree that the time that has elapsed between the commission of the alleged offence and the hearing has been unnecessarily protracted. The police acknowledge the general principles set out in the Act, particularly those in ss 4(f), 5(f) and s 208. The police refer me to the decision of *BGTD v Youth Court at Rotorua*,³ where Robertson J referred to the two-step enquiry required.

[22] The police also refer me to the principles set out in decision of *AG v Youth Court at Manukau*, of Winkelmann J.⁴

[23] The period from the time when Police Youth Aid section obtained [MS]'s file and instituted the intention to charge family group conference process (7 December 2020, until 11 February 2021), is a period of 66 days and well within the accepted timeframes. This time frame includes the Christmas/New Year period.

[24] The police submit that the delay is not unduly or unnecessarily protracted. They agree that it has been 11 months between the alleged commission of the offence, the investigation, the consultation of an intention to charge family group conference, the filing of the charging document and subsequent youth appearances. COVID-19 has clearly impacted on progressing it at this stage.

³ *BGTD v Youth Court Rotorua* 15/3/00, High Court Rotorua 119/999.

⁴ *Ibid.*

[25] The police highlight the following facts:

- (a) They conducted the investigation into [MS]'s involvement in a timely manner.
- (b) It involved a victim who travelled frequently and was difficult to contact.
- (c) They were aiming to support the victim as much as possible. It was evident that she had been traumatised by what had occurred, and the police wanted to keep her fully informed.
- (d) Upon completion of the investigation by [Constable B] the file was then forwarded to the Pukekohe youth aid officer.
- (e) On 7 December the file was assigned to [Constable A].
- (f) On 11 February [Constable A] referred it to Oranga Tamariki for the purpose of an intention to charge FGC.
- (g) An FGC was held 12 March well within the timeframes stipulated within s 249 of the Oranga Tamariki Act 1989.
- (h) On 16 April 2021, he made his first appearance in the Youth Court.

[26] In terms of actions of the young person the police submit:

- (a) [MS] has always denied the offending.
- (b) He was at times difficult to locate after the alleged offending moving between his father's address, his mother's address and his sister's address.
- (c) During the period 25 March to 26 March 2021, he actively avoided police in an attempt to avoid the summons.
- (d) [MS] failed to appear in the Court on 3 August.

[27] In terms of actions of the prosecution:

- (a) The police acknowledge that on 28 May 2021, the first judge alone trial was set down for 23 July 2021.

- (b) [Senior Constable C] did not have access to the [Constable B]’s duty roster at that time and therefore, did not realise that the date was unsuitable as [Constable B] had been granted leave.
- (c) This unfortunate set of circumstances led to the request for the adjournment.

[28] In terms of limits on institutional resources, the police submit that the Pukekohe Youth Court has a restricted number of days where judges are available and that the holiday period, Christmas/New Year 2020/2021, are also impacting on the delay.

[29] The police submit there is no prejudice to [MS] in terms of the delay.

[30] In terms of whether the proceedings were unnecessarily or unduly protracted the police submit that the time in the Youth Court from the first appearance is seven months. There are three significant events that influence this time period:

- (a) Firstly, the adjournment sought and granted on 23 July 2021.
- (b) Secondly, the failure of [MS] and the complainant to appear on 3 August.
- (c) Thirdly, COVID-19 level 4 restrictions.

[31] In terms of whether the Court should exercise its discretion to dismiss the charges the police rely on comments at para 60, in Winkelmann J decision that:

There is a public interest in seeing those who commit offences dealt with through the justice system in respect of their offending. The more serious the offending the greater the public interest.

[32] The police submit that a charge of assault in a family relationship is serious in nature, therefore, there is public interest in holding [MS] to account for his actions and addressing his behaviour and attitude towards women. The rights of the victim need to be addressed.

[33] The incident has had an ongoing traumatic impact on the young victim. She remains fearful of seeing [MS] at the trial and Police will likely apply to allow her to give her evidence from behind a screen.

[34] The police submit there is a strong public interest in favour of not dismissing the charges reflected in s 4(f) of the Act which states:

That the objects of this Act is to promote the wellbeing of the children and young persons and their families in groups by...

(f) ensuring that where children or young persons commit offences they are held accountable and encouraged to accept responsibility for their behaviour.

[35] In conclusion, the police accept that time has elapsed, however, the Court should not exercise its discretion on the following grounds:

- (a) The nature of the offence.
- (b) The severe impact this has had on the victim.
- (c) The public interest in this case and the need to hold [MS] responsible for his behaviour.

Decision

[36] It is clear there has been delay when considering the length of the delay in terms of a young person's timeframe, - 11 months from the time of offending and six months, and continuing, from the time he entered his plea. And we still do not have a hearing date because of COVID-19 restrictions which are likely to go beyond the end of this year, on recent information.

[37] The question is, has the delay been unnecessarily or unduly protracted?

[38] I note the following:

- (a) it is accepted that the timeframe for deciding that there should be an intention to charge FGC, notifying Oranga Tamariki and holding that conference is not an issue and is within the statutory requirements;

- (b) In terms of the wellbeing of the young person, there is a concern in this case that the rights and best interests of [MS] have not been fostered by the delay, and indeed nor have the rights or interests of the victim because this matter is protracted and ongoing.
- (c) A key principle is that future offending is prevented or reduced. There is no evidence before the Court that since that alleged offending in November 2020 there has been any further offending. Indeed, [MS] is in fulltime employment.
- (d) The ability to hold him accountable and to accept responsibility for his behaviour is difficult when matters do not proceed in a timely way.
- (e) There is some merit in the argument put forward by Ms Leys, that the longer this goes on the less likely any rehabilitation is likely to be meaningful for the young person.
- (f) There is the principle that a decision affecting a young person wherever practical be made and implemented within a timeframe appropriate to the young person's sense of time is an important consideration.

[39] I am of the view that the delay has been unduly protracted. There are several key facts which bring me to this decision. They are:

- (a) The length of time taken from the file being received by the youth aid officer and then determining that an intention to charge conference should be held. When first spoken to by police on 26 November 2020 he denied the offending. The complainant was spoken to on 10 December 2020 and she confirmed that she was prepared to go to court. Christmas was looming and it is known that three or four weeks is lost over that national holiday period. There is no explanation as to why it was not immediately referred to Oranga Tamariki in mid-December and an intention to an FGC process instituted. That did not occur until almost two and a half months later.

- (b) That delay occasioned by the police when the matter was first set down for hearing. While it is appreciated by the Court that the police officer present did not realise that the officer in charge would be on leave on that date and accepted it, that fact was not notified to the Court or counsel until shortly before the hearing date, some one and a half months later. Given the nature of the offending, and given that proceedings in Youth Court need to be heard within the timeframes of a young person, and given that the Pukekohe Youth Court sits on limited dates, the delay by the police in attending to this was unacceptable.
- (c) Further when it was set down for the subsequent date on 5 August while the young person, [MS], did not appear nor did the complainant. The charging document record for 3 August 2021, is noted by Judge Recordon to say, "*Complainant won't come to court today.*" This indicates some reluctance on her part.
- (d) In terms of public interest, it is important to make someone accountable for any harm that they have done to another person. Any family harm offending is not condoned at all. However if the opportunity is not taken by the complainant to appear at court on the assigned date of the hearing, then there will be delay as a consequence.
- (e) [MS] has not appeared in the courts before. He has not reoffended.

[40] For the record, I note that the police allege that [MS] was avoiding service of the summons in March 2021, however, there is no evidence of that before me. Indeed, in the context of his living between different family members I can see that that created some difficulty, but it is not evidence that [MS] was wilfully and knowingly avoiding the police. In March he appeared at the police station and was interviewed. I therefore place no weight on that submission, which is unreasonable and prejudicial in the circumstances.

[41] Having determined that there is delay which is unduly protracted, it is a matter of whether I exercise my discretion to dismiss the charge.

[42] The youth court process must run as best it can to strict times frames because we are working with young people who need special care and attention to ensure their wellbeing in the criminal justice process, both offender and complainant, and to ensure the public interest. This is well set out in the principles of the Act, and the decisions of the higher courts which have interpreted these principles, referred to herein at pages 4-7. In this case there have been several factors which have contributed to the unduly protracted delay, and which with reference to the various principles leads me to the conclusion that I should exercise my discretion and dismiss the charge for delay. The relevant factors are:

- (a) The principle (5(f)) that decisions affecting a child or young person should wherever practicable be made and implemented within a timeframe appropriate to the child or young person's sense of time.
- (b) This is not only for the benefit of the young person but also the complainant young person. That is clearly apparent in this case.
- (c) The fact of the officer in charge being unavailable for the first date set for hearing is relevant and an issue that affects this decision. While I appreciate leave is an ordinary part of the process, it is important that those matters are determined at the time of call over when a hearing date is proposed and set. An officer in charge should provide the Prosecutor with dates of unavailability in advance of call over.
- (d) This issue was then exacerbated by a delay of one and a half months as the fact of the officer's unavailability was not notified to counsel or the court until close to the hearing date.
- (e) The fact that neither the complainant nor the young person appeared on 3 August, led to further delay, now compounded by the COVID 19

pandemic restrictions. No blame can be apportioned to Police or the young person for this, but it is a relevant fact.

- (f) The allegations are serious– approximately 20 punches to the head and chest area. However, there are no photographs, the victim did not receive injuries (the summary states there was no visible bruising) nor require medical attention. There is a question mark as to the standard of proof.
- (g) The COVID 19 pandemic means that the ongoing delay is uncertain.
- (h) This was the first time the young person had appeared in youth court. He has not reoffended, and it is now a year since the alleged offending. He is in full time employment. While it is in the public interest to make him accountable for his offending should the charge be proved, the longer the matter is delayed, the more difficult it will be to ensure that any intervention is meaningful or instructive. The fact he has not reoffended is a positive sign in terms of future behaviour.
- (i) The delay has as much, if not more, impacted on the complainant in this case as it remains unresolved for her. However, the complainant had an opportunity to have the case heard on 5 August but did not appear.

[43] I therefore dismiss the charge for delay.

Judge F Eivers

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 07/11/2021