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**IN THE YOUTH COURT
AT WAITAKERE**

**CRI 2016-290-000323
[2017] NZYC 172**

NEW ZEALAND POLICE
Prosecutor

v

RK
Young Person

Hearing	28 February 2017
Appearances:	Ms Bellingham for the Prosecutor N Silich for the Young Person
Judgment:	28 February 2017
Reasons:	3 March 2017

**REASONS FOR DECISION OF JUDGE A J FITZGERALD
[Delay Application]**

Introduction

[1] RK is charged with being involved in an aggravated robbery on 16 December 2015.

[2] It is alleged that at about 9.10pm that day RK and three others went to a [business type deleted] in Auckland. One of the four walked the stairs to a locked door while RK and the other two waited downstairs. The doorbell was rung and when the door opened RK and his associates ran up the stairs and all then entered the building. One of the four had a Patu which he started waving in the direction of the victim demanding money. While he did that RK and an associate searched rooms. No money was located however one of the group took two cellphones and a laptop before they all left.

[3] At the time of the alleged offending RK was just over 16 years and one month old, his date of birth being [date deleted] 1999.

[4] Although RK was identified as a suspect on 19 January 2016 he was not charged until November 2016. He has denied the charge and elected to be tried by a Judge alone in the Youth Court. It is estimated that the likely trial date would be in July 2017 at the very earliest.

[5] On 28 February 2017 I heard RK's application to have the charge dismissed on account of that delay. The application was granted and I now set out my reasons for doing so.

Background

[6] The following is an agreed chronology of relevant background events:

16 December 2015	Alleged offending occurred. RK is 16 years old.
16 December 2015 to 21 December 2015	Investigation of aggravated robbery at [business name deleted] conducted by Crimes Squad Detectives. On 16 December 2015 Police obtained a copy of the CCTV footage from the interior of the premises. This

	<p>footage shows the alleged offending.</p> <p>On 18 December 2015 a witness, ZM, is shown the CCTV footage and recognises three of the four males. Ms ZM states one of them is called "FD" and they all spend time at [address deleted], [details deleted].</p>
21 December 2015 to 6 January 2016	<p>File assigned to Constable Augusta Kennedy. Investigation by Constable Kennedy into aggravated robbery at [business name deleted] commenced.</p> <p>On 5 January 2016 still images from the CCTV footage are posted on the New Zealand Police Facebook page. An informant contacts the New Zealand Police Crimes Stoppers line and identifies one of the males as HK and gives his address.</p>
7 January 2016 to 7 February 2016	Constable Augusta Kennedy is reassigned from Avondale Police Station to assist with a homicide investigation at Auckland City Police Station.
19 January 2016	An informant contacts the New Zealand Police Crimes Stoppers line and identifies two of the males as brothers HK and RK and gives their address.
8 February 2016 to 10 March 2016	Constable Kennedy continues the investigation into aggravated robbery at [business name deleted].
10 March 2016 to 18 March 2016	Constable Kennedy is on overseas leave.
18 March 2016 to 10 April 2016	Constable Kennedy continues the investigation into aggravated robbery at [business name deleted].
10 April 2016 to 21 April 2016	Constable Kennedy is on leave.
21 April 2016 to 1 May 2016	Constable Kennedy continues the investigation into aggravated robbery at [business name deleted].
1 May 2016 to 31 July 2016	Constable Kennedy is assigned to Operation Resolve (burglary investigation).
2 August 2016	<p>Constable Kennedy is transferred from Avondale Police Station to Auckland City Police Station. The file for the aggravated robbery at [business name deleted] is returned to Detective Sergeant Hilton to await member assigned for file to be investigated.</p> <p>Detective Constable Blainey transfers from Auckland City Police Station to Avondale Police Station.</p>
8 August 2016 to 5	Detective Constable Blainey is assigned to Operation

September 2016	Resolve (burglary investigation).
5 September 2016	Detective Constable Blainey re-joins Avondale Police Station and receives the file for the aggravated robbery at [business name deleted].
5 September 2016 to 21 September 2016	Detective Constable Blainey reviews the file for the aggravated robbery at [business name deleted] and collates evidence. Detective Constable Blainey waits for a date for sufficient staff to be present for search warrants to be executed.
21 September 2016	Search warrants conducted at four locations (known addresses of FD, HK, RK and PP). FD, HK and PP were present at the addresses and spoken to by Police. FD and HK were arrested and charged. PP has not been charged in relation to this incident due to insufficient evidence.
21 September 2016 to 9 October 2016	Enquiries were conducted to try to locate RK, including home visits and phone conversations with RK and his grandmother.
10 October 2016	Enquiry made at RK's home address where he was present. RK and his grandmother come to Avondale Police Station. Detective Constable Blainey interviews RK with his grandmother present. This is recorded on DVD. RK is shown the CCTV stills and accepts he is present, and admitted being involved, but he states he cannot remember what happened that night. A youth aid file is created and sent to Waitakere Police Youth Aid section.
22 November 2016	Family Group Conference held.
22 November 2016	Youth Aid Officer Constable Shaohui Wang makes a decision to summon RK to Waitakere Youth Court on the charge of aggravated robbery.
29 November 2016	RK's first appearance in the Youth Court
20 December 2016	RK's second appearance in the Youth Court
31 January 2017	RK's third appearance in the Youth Court. A pre-trial hearing date is sought.

The Law

[7] Section 322 of the Children, Young Persons and Their Families Act 1989 (“the CYPF Act”) provides the Court with power to dismiss charges for delay. The section reads:

A Youth Court Judge may dismiss any information 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.

[8] Winkelmann J considered the particular requirements of s 322 in *Attorney-General v Youth Court* at Manukau (CIV 2006-404-2202, High Court Auckland) and said:

[48] The first point is that s 322 creates a discretion to dismiss information. The discretion is only triggered if there is an undue or unnecessary protraction of the relevant time period. That period of time is defined as the time elapsed between the commission of the alleged offence and hearing. There is no definition to assist as to what “hearing” is referred to. However in context it is plain that s 322 refers to the hearing of the charge. There are particular challenges in providing a fair trial to a child or youth offenders ... which mean that prompt disposition of charges is critical.

[49] ...If no hearing date has been fixed, the Judge will be required to undertake an assessment of when the hearing is likely to occur.

[9] In deciding whether delay is undue the following factors were identified by Winkelmann J as relevant (by reference to *Police v Turner* HC PN CRI 2005-454-62, 3 May 2006 Wild J and *Martin v Tauranga District Court* [1995] 2 NZFLR 419 (CA)):

- (i) length of the delay;
- (ii) waiver of time periods;
- (iii) the reasons for the delay including:
 - (a) inherent time requirements of the case;
 - (b) actions of the accused;
 - (c) actions of the Crown;
 - (d) limits of institutional resources;
 - (e) other reasons for delay;
 - (f) prejudice to the accused.

[10] 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.

[11] The existence of specific prejudice to the young person caused by the delay will be a factor weighing in favour of dismissal but 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.

[12] The seriousness of the offence is a factor to be taken into account 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 those who commit offences dealt with through the Justice System; the more serious the offending the greater the public interest.

[13] Section 4 of the CYPF Act sets out the general objects including s 4(f) which provides:

(4) Objects

...

(f) Ensuring that where children or young persons commit offences:

- (i) They are held accountable and encouraged to accept responsibility for their behaviour;
- (ii) They are dealt with in a way that acknowledges their needs and will give them the opportunity to develop in responsible, beneficial, and socially acceptable ways.

[14] The application of this object in the present context is to be considered in light of RK's denial of the charge and his entitlement to the presumption of innocence.

[15] Section 5 of the CYPF Act sets out the general principles including, importantly, s 5(f) which provides:

[5] Principles to be applied in exercise of powers conferred by this Act

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

[16] The Youth Justice Principles in the CYPF Act also include, at s 208(h), that the vulnerability of children and young people entitles them to special protection during any investigation relating to the possible commission of an offence. By extension it should also be that priority must be given to conducting such investigations in a timely fashion in recognition of that vulnerability and the general principle in s 5 (f) regarding the importance of timeliness.

[17] As well as that, the United Nations Convention on the Rights of the Child (“UNCROC”) includes Article 40(2) which provides:

Every child alleged or accused to have infringed the penal law has at least the following guarantees:

To have the matter determined without delay by competent, independent and impartial authority or judicial body in a fair hearing according to law.

[18] Section 25(i) of the New Zealand Bill of Rights Act (“the OR Act”) is also relevant. It provides:

Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

- (i) The right in the case of a child to be dealt with in a manner that takes into account the child’s age.

Analysis

[19] I am grateful to counsel for the helpful submissions provided: that is, Ms Mills who prepared the written submissions for the Police, Ms Bellingham who appeared for them at the hearing and Mr Silich who is RK’s youth advocate.

[20] Ms Bellingham indicated that the police took a neutral position regarding the application and accepted that the delay that occurred in this case was both unnecessary and undue.

[21] Much of the delay is the result of periods of inaction either because the officer in charge was on leave or reassigned to other work seemingly without having someone else immediately available to pick the matter up.

[22] From 19 January 2016 when RK was identified as a suspect, until 21 September 2016 when search warrants were executed on certain addresses including RK's, little appears to have happened to try and progress matters for reasons that are not explained. It was not until 10 October 2016 that RK was spoken to and a file created and sent to the Youth Aid section. The family group conference was not held until 22 November 2016. The charge was laid sometime after that and RK summonsed to appear at the Youth Court initially on 29 November 2016.

[23] For nothing to have happened to progress matters during the period between January and September 2016, without an adequate explanation, is very concerning and I find the delay firstly to have been unnecessary. There was clearly neglect on the part of the police in progressing the investigation and the delay was certainly not trivial. It might possibly be inferred from the chronology that there were some resourcing issues or limitations which accounted for some of the delay although nothing specific in that regard was provided.

[24] I also find the delay to have been undue. The period in question was substantial. There was no waiver of any time periods. There was nothing at all unusual or complex about the investigation; it appears to have been a relatively straightforward matter. There were no actions by RK that contributed to any delay; the delays were the result of police neglect and inaction. No specific institutional resource limitations have been identified.

[25] As a result of the delay there is prejudice to RK who is now aged 17 years and three months. If the charge were to be proved following a trial in July or later there are realistically no sentencing options available for him in the Youth Court given his age now. Both counsel agreed that it is most likely that RK would be transferred to the District Court for sentencing if the charge against him was proved. RK would therefore lose the benefit in sentencing of being dealt with under the provisions of the CYPF Act with its rehabilitative and restorative focus. In so finding I am mindful however of Winkelmann J's comments in *Attorney-General v Youth Court* at Manukau. In her opinion this issue is to be considered as only a neutral factor; she said;

[72] Therefore, the unavailability of these options at 17 ½ is to be regarded as a neutral factor. The loss of these options through unnecessary

or undue delay will not prejudice a young person who will continue to be treated in a manner that is appropriate to their age at the relevant time.

[26] The seriousness of the offence is of course a troubling matter in this case and was the factor weighing most heavily against dismissing the charge. Aggravated robbery is a serious charge although the allegations against RK here describe offending that is not at the high end of the range for such offending.

[27] RK is said to have made some admissions when spoken to by the police including agreeing that he is one of the people shown in the CCTV footage but also that he could not remember what had happened due to being too intoxicated. I have not seen any of the evidence against RK, including any DVD of an interview or a transcript of it, and it was not clear whether there were any issues in dispute regarding the admissibility of such alleged admissions. It was not possible therefore to form a completely clear view about the strength of the evidence on the basis of the information provided to me. I was told that others charged in relation to the incident had recently pleaded guilty in the District Court which suggests the admissible evidence against them was strong.

Conclusion

[28] Having found the delay from 16 December 2016 to probably July 2017 at the earliest to have been unnecessary and undue I exercised my discretion in favour of discharging the charging document after taking all of the above factors into account.

A J FitzGerald
Youth Court Judge