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IN THE YOUTH COURT
AT MANUKAU

CRI-2017-292-000090
[2017] NZYC 302

NEW ZEALAND POLICE
Prosecutor

v

C F
Young Person

Hearing	11 April 2017
Appearances:	Mr T Weeks as Youth Advocate Senior Constable C Clark Young Person in Person
Judgment:	27 April 2017

RESERVED DECISION OF JUDGE P RECORDON

Facts (briefly)

[1] CF has been charged with:

(a) Assault with intent to injure (x 3); and

(b) Intentional damage

[2] It is alleged that on 21 October 2016 CF was involved in an incident at a Youth Justice Residence where staff were assaulted. It is also alleged that CF damaged property at the residence.

[3] The evidence relied on is that of victims, CCTV footage, video footage of the Police helicopter and evidence of the Eagle helicopter crewman.

[4] The chronology is accepted as filed by the Police, with the addition of the Police referring the matter to Child, Youth and Family pursuant to s 247(b) for a Family Group Conference on 25 January 2017.

[5] With respect to the delay, the total time between the alleged offence and the consultation of an intention to charge Family Group Conference was fifteen weeks.

[6] The total time between the alleged offence and the date of hearing (of the delay application) has been twenty four weeks or five and a half months.

The Law

[7] The objects of the Children, Young Persons and Their Families Act 1989 ("the Act") are set out in section 4. Relevantly it includes:

> **4 Objects**
>
> The object of this Act is to promote the well-being of children, young persons, and their families and family groups by –
>
> …….
>
> (f) ensuring that where children or young persons commit offences, -
> (i) they are held accountable, and encouraged to accept responsibility for their behaviour; and

(ii) they are dealt with in a way that acknowledges their needs and that will give them the opportunity to develop in responsible, beneficial, and socially acceptable ways:

…..

[8] Section 5 of the Act sets out the principles of the Act and relevantly includes:

> 5Principles to be applied in exercise of powers conferred by this Act
>
> Subject to section 6, any court which, or person who, exercises any power conferred by or under this Act shall be guided by the following principles:
>
> …..
>
> (f) the principle that decisions affecting a child or young person should, wherever practicable, be made and implemented within a time-frame appropriate to the child's or young person's sense of time:
>
> …..

[9] Article 40(2) of the United Nations Convention on the Rights of the Child, signed by New Zealand on 1 October 1990 and ratified on 6 April 1993 contains:

> (b) Every child alleged or accused of having infringed the penal law has at least the following guarantees:
>
> …
>
> (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians..

[10] Section 322 of the Act states the law for dismissing as follows:

> **322Time 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.

[11] In *T v Youth Court at Rotorua* HC Rotorua M119/99, 15 March 2000 it was held that the section requires a two-step inquiry. The first step is to determine whether the hearing has been unnecessarily or unduly protracted. If so, the Judge has a discretion to dismiss the proceedings. In determining whether to so the Judge must

balance individual rights against the public interest, weighing the various relevant factors.

[12] In *Attorney-General v Youth Court at Manukau* [2007] DCR 243, [2007] NZFLR 103 (HC), Justice Winkelmann noted that section 322 creates a discretion to dismiss the charges. With respect to undue delay, the Court adopted the factors that had previously been articulated by Sopinka J in *R v Morin* [1992] 1 SCR 771 and had been adopted in *Martin v District Court at Tauranga* [1995] 2 NZLR 419, (1995) 12 CRNZ 509, 1 HRNZ 186 (HC & CA) as follows:

> (1) The length of the delay (from filing of charges to the end of the trial).
>
> (2) Any informed waiver of time periods by the defendant.
>
> (3) The reasons for the delay, including:
>
> (i) Inherent time requirements of the case;
>
> (ii) Actions of the defendant;
>
> (iii) Actions of the Crown;
>
> (iv) Limits on institutional resources; and
>
> (v) Other reasons for delays.
>
> (4) Prejudice to the defendant.

[13] With respect to unnecessary delay the Court held that unnecessary delay means no more than delay that could not reasonably have been avoided and will usually mean delay caused by default or neglect and must be more than trivial. With respect to prejudice, the Court held that although the existence of specific prejudice to the young person caused by the delay will certainly be a factor weighing in favour of dismissal of a charge, it is not necessary for there to be specific prejudice to the young person for the discretion to dismiss to be exercised. The Court acknowledged that unnecessary delay involving serious fault or neglect on the part of the prosecutor but not necessarily causing serious prejudice might be sufficient to warrant dismissal of the charge.

[14]

[14] It was noted that the seriousness of the offence is a matter which the Judge should consider in exercising the section 322 discretion. Justice Winkelmann commented:

> [60] There is a public interest in seeing those who commit offences dealt with through the justice system in respect of that offending. The more serious the offending, the greater the public interest. Related to this last point are the provisions of s 4(f) of the Act. One of the key purposes of the youth justice provisions of the Act is to assist in the rehabilitation of young offenders by ensuring that they are held accountable and accept responsibility for their offending. When an information is dismissed the young person ceases to be subject to the provisions of the Act designed to achieve these ends including the Family Conference regime. Complainants are also deprived of the restorative justice opportunities created by the Act. If the young person is not held accountable for his or her offending behaviour, that is ultimately to the detriment of the young person and society. When exercising the discretion under s 322, the Court is entitled to take into account the objects of the Act which include the provisions of s 4(f).

Submissions of Youth Advocate in support of application to dismiss for delay pursuant to section 322 of the Children, Young Persons and Their Families Act 1989

[15] It has been submitted that the time between the alleged offence and the consultation of an intention to charge Family Group Conference was fifteen weeks.

[16] The total time between the alleged offence and the date of the hearing of the delay application has been twenty four weeks.

[17] It has been submitted that there has been no waiver of time periods by the defence.

[18] It has been further submitted that the prosecution is a relatively simple one. Counsel for the young person accepts that the CCTV footage received by the Police on 8 November 2016 provides sufficient evidence to establish a prima facie case. It has been submitted that at this point the matter could have been referred to CYFS pursuant to section 247(b) of the Act for an intention to charge Family Group Conference to be held.

[19] Counsel notes that CF was in residence for over two weeks after the Police received the CCTV footage.

[20] Counsel has submitted that the Police may claim they needed the evidence of the Police Eagle helicopter which they received on 14 December 2016 to establish sufficient evidence to show that CF was involved in the offending. However, counsel also proceeds to say the Eagle Helicopter evidence is evidence the Police already have.

[21] Counsel has submitted that the period when CF's whereabouts is not relevant as the Police already had sufficient evidence to refer the matter to a Family Group Conference.

[22] It has been further submitted that the Police never sought to interview CF until 12 January 2017. On the same day counsel advised the Police that CF did not wish to be interviewed.

[23] It was noted that limits of institutional resources is not an issue.

[24] With respect to prejudice to the accused counsel has submitted that a significant delay offends against the principles contained in section 5(f) of the Act and may operate to defeat the object contained in section 4(f)(ii) of the Act.

[25] It has been submitted that the referral for a Family Group Conference was made on 25 January 2017 some ten weeks after the Police had sufficient evidence to establish CF's role in the offending. Counsel for the Young Person has submitted that the delay was unnecessary and unduly protracted.

[26] Counsel for the Young Person submitted that the Court should exercise their discretion to dismiss the charges, particularly bearing in mind that the delays have been the direct consequence of the Police not referring the matter to a Family Group Conference at the time when they had sufficient evidence to do so.

Respondent's submissions opposing and application for dismissal

[27] The respondent has applied the two step test from *T v Youth Court at Rotorua.*

[28] With respect to whether there has been any unnecessary or undue delay reference was made to two time frames. The first from 21st October 2016 until 13th January 2017 which was the period that it took Police to investigate the incident from the date of the alleged offending to the date that CF declined to be interviewed in relation to the allegations. The second period referred to is the period that the Police Youth Aid section took over CF's file and instituted the intention to charge Family Group Conference process. This period was from January 13th 2017 until January 25th 2017 when the matter was referred to the Youth Justice coordinator.

[29] It was submitted by the respondent that the period to be examined is therefore 15 weeks.

[30] It was submitted that the period of time CF was reported missing from his placement, from 28th November 2016 until 6th December, and the Christmas/New Year public holidays from 23rd of December until 4th January 2017 which totals three weeks should not be included in the assessable period as the Police could not advance their investigation or intention to charge processes over this period.

[31] It was therefore submitted that the assessable period is reduced from 15 to 12 weeks.

[32] The respondent has submitted that the Police conducted the investigation into CF's involvement in a timely manner. It is submitted that the investigation was complex.

[33] With respect to the actions of the young person it was noted that on 24th November 2016 CF was sentenced to a supervision order and released from [location deleted] to reside at [address deleted]. On 28th November 2016 CF did not return to the address and was reported as a missing person. On 6th December 2016 Kevin was arrested for new offending and appeared in the Manukau Youth Court. He was

remanded into the custody of Child, Youth and Family Services pursuant to s 238(1)(d) of the Act and was placed at Youth Justice [location deleted].

[34] With respect to the actions of the Prosecution, the respondent noted that the operation of the Crown Prosecution Guidelines 2010 protects CF from being charged without there being sufficient evidence to do so. The respondent submitted that an investigation was conducted to gather evidence.

[35] The respondent submitted that the evidential test for charging CF was only satisfied once the footage for the Police helicopter and statement was received on 14th December 2016.

[36] It was submitted that limits on institutional resources is not a relevant issue.

[37] The respondent has submitted that there is no prejudicial affect to CF.

[38] The respondent therefore no that the time between the completion of gathering all the evidence on the 14th December 2016 and the requests to interview CF on the 6th to the 12th January 2017 is a period of three weeks and two days. It is not accepted that this delay was unnecessarily or unduly protracted.

[39] With respect to the second step and whether the Court should exercise its discretion to dismiss the charges, it was submitted that the charges of assault with intent to injure are of a serious nature given that they occurred at a Youth Justice residence against people that were employed to help CF. It was noted that the offending has had a severe impact on the victims. It was therefore submitted that there is a strong public interest in favour of not dismissing the charges and there is a need for CF to be held accountable as reflected in s 4(f) of the Act.

Discussion

[40] Following the guidance of *T v Youth Court at Rotorua* the first step is to determine whether the hearing has been unnecessarily or unduly protracted. Counsel for the Young Person submitted that there was ten weeks between when the Police

had sufficient evidence to establish CF's role in the offending and when the matter was referred for a Family Group Conference. The respondent submitted that the period to be examined is 12 weeks.

[41] The main reason given for the delay is that the investigation was complex and involved 8 alleged offenders. It also involved interviewing 8 witnesses and obtaining CCTV footage from two sources. An extensive chronology of events has been provided to show the extensive investigation that occurred.

[42] With respect to unnecessary delay in *Attorney-General v Youth Court at Manukau* Justice Winkelmann noted that it means no more than delay that could not reasonably have been avoided and will usually mean delay caused by default or neglect and must be more than trivial.

[43] Examining the chronology it is difficult to see how there is a delay that has been caused by default or neglect and I find that counsel for the Young Person has not identified such a delay. The chronology which is not disputed by counsel for the Young Person indicates continual steps within the investigation. A number of the time periods where it may appear that there is a gap in the investigation seems to be able to be explained away as waiting for responses to requests.

[44] I find that the same applies when considering whether there has been undue delay.

[45] While the investigation may have been stagnant from 9 November 2016 until 14 December 2016, it appears that this period was due to waiting for footage and statements. Such an action cannot take the delay into the realms of being unduly or unnecessarily protracted.

[46] In *P v O* YC Otahuhu CRN7204004923, 16 December 1997 a complaint was investigated five months after it arose. One of the considerations in determining that the delay was reasonable was the fact the Christmas holiday period had intervened.

[47] In *Police v AT* YC Wellington CRN4285994915, 3 March 2004, a delay of 10 months between the alleged date of commission and the appearance of the defendant in the Youth Court was held to have been unnecessarily and unduly protracted.

[48] In *Police v P* (2004) 20 CRNZ 1005 a delay of almost one year was held to be unnecessarily and unduly protracted.

[49] In *Police v RB* YC Rotorua CRI-2011-263-53, 14 June 2011 a charge of disorderly behaviour and obstructing police were dismissed. The offences were alleged to have occurred three months earlier and disclosure was not provided until the day of the defended hearing. Judge MacKenzie found it difficult to understand why there was any delay of significance given the nature of the charges and that three months was ample time for the police to be ready for the hearing. Applying *Attorney-General v Youth Court at Manukau* [2007] DCR 243 her Honour was satisfied that to proceed further would be unreasonable.

[50] The delay in the current circumstances is not comparable to any of the above cases where the delay has been found to be unreasonable, or where to proceed further would be unreasonable. In a case such as the current where there are multiple offenders, multiple victims and a number of sources the police are reliant upon to obtain evidence from to charge, the time taken cannot be comparable to a charge of disorderly behaviour and obstructing police. This is underlined by the prosecution guidelines that CF is not to be charged until there is sufficient evidence to do so. From a practical point of view while there may have been sufficient evidence to charge CF without the footage from Eagle, it makes sense for the police to wait for the response once the request has been placed if it is thought it will contribute to having sufficient evidence to charge. While this may have delayed the case in the circumstances this was not undue or unreasonable.

[51] I find that the first step of the inquiry has not been satisfied on the basis that the hearing has not been unnecessarily or unduly protracted.

[52]

[52] Had I found that the hearing was unnecessarily or unduly protracted consideration would have turned to whether discretion should be exercised to dismiss the proceedings, I will address this for completeness.

[53] With respect to whether discretion should be exercised in *T v Youth Court at Rotorua* it was noted that the Judge must balance individual rights against the public interest.

[54] As noted by Justice Winkelmann in *Attorney-General v Youth Court at Manukau,* when exercising the discretion under section 322, the Court is entitled to take into account the objects of the Act which includes the provisions of s 4(f) – the promotion of the rehabilitation of young person by ensuring that they are held accountable.

[55] Justice Winkelmann also noted that the more serious the offending, the greater the public interest and this comes into play under s 4(f).

[56] In determining whether to exercise discretion under s 322, in the current circumstances it can be considered a balancing exercise between section 5(f) of the Act and the need for decisions to be made and implemented within a time-frame appropriate to the young person's sense of time and section 4(f) which includes the public interest and the promotion of accountability.

[57] In respect of section 5(f), if this principle has been breached, the breach is very minor. In combination with a short delay, the young person is 16 and 5 months. They are towards the upper end of falling within the definition young person. It is further noted that no prejudice has been identified beyond mere mention of this principle.

[58] In respect of section 4(f) I find there is significant public interest in holding CF accountable. I find that in line with submissions of the respondent, the seriousness of the offending is escalated due the fact the offending was against those tasked with looking after CF. Employees of Youth Justice Residence should not be in a position where they are assaulted in their line of work and where the offender is not held accountable for their acts. I find that public interest also requires one to consider the promotion of the victims' recovery. I find that under section 4(f) the balance falls strongly in favour of not dismissing the charges.

[59] When weighing up the competing interests at stake I find that the charges should not be dismissed and it is reasonable that prosecution of CF is to continue.

P Recordon
Youth Court Judge