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**IN THE YOUTH COURT
AT MANUKAU**

**CRI-2016-255-000086
[2016] NZYC 617**

THE QUEEN

v

[PT]

Hearing	30 September 2016
Appearances:	C Robertson for the Crown G Earley for the Young Person
Judgment:	30 September 2016

ORAL JUDGMENT OF JUDGE G F HIKAKA

[1] [PT], s 9 involvement evidence has been put before the Court today, 30 September, and earlier on 8 September. There are three discrete events under consideration. The first is that on [date deleted] December, along with [EI] and [UT], [PT] with intent to obtain any property, dishonestly and without claim of right used a document, namely [a credit] card, in the name of [AR].

[2] I have heard detailed evidence with respect to circumstances around that card being stolen from the complainant. The subsequent investigation that led to the arrest of [PT] and transactions that card was used for on [date deleted] December 2015. Those transactions were recorded by way of CCTV in two retail outlets at different times on [date deleted] December.

[3] There is also evidence with respect to circumstances surrounding [PT]'s whereabouts and activities during the times the card was used and some of that evidence was from [PT] as a result of an evidential video interview [PT] took part in with [the Detective Constable].

[4] I note from the beginning there were two issues which were raised with respect to this particular charge. The first is whether the charge itself is a nullity and the second issue is with respect to whether the threshold is met, given the charges and the charge alleges joint criminal behaviour and whether [PT]'s involvement and what [PT] can be seen to have done during the CCTV footage, would satisfy the parties to the offending test regarding the assistance provided or the encouragement to the person who seems acknowledged was the one who used the card to effect or attempt to effect the possession of property.

[5] The second series of charges relate to [date deleted] March; the alleged use by [PT] of a stolen motor vehicle, the way that vehicle was driven, the refusal to stop for police red and blue lights and siren. The third relates to an allegation that on [date deleted] February this year, [PT] assaulted the complainant Ms [LM].

[6] By way of a brief outline, [PT] was present on 8 September for the first part of evidence with respect to the fraud charge (card use charge) and [PT] had the assistance of a communication specialist. All the evidence was not heard,

30 September was reserved to hear the rest of the evidence on that charge as well as the other two sets I have referred to.

[7] The Court was advised that [PT]'s mental health was at a difficult stage. There were concerns about [PT's] involvement in this hearing. I declined an application for adjournment and dictated a discrete minute with respect to that issue. In summary, I considered [PT] was too impaired to attend the rest of the hearing and accordingly, pursuant to s 15 Criminal Procedure (Mentally Impaired Persons) Act 2003, I continued the hearing.

[8] I have considered the evidence that has been handed up by consent. I have considered the evidence I have already heard from [the Detective Constable] and [the Constable] on 8 September and these are my conclusions.

[9] First, with respect to using the document charge, I do not need to go into the requirements of s 9 Criminal Procedure (Mentally Impaired Persons) Act, suffice to say that I need to be satisfied on the balance of probabilities that the evidence against [PT] is sufficient to establish that she caused the act or omission that forms the basis of the offence with which [PT] is charged.

[10] I will deal with the evidence with respect to that charge first and then move to the submission that the charge itself is a nullity. So with respect to the sufficiency evidence. On [date deleted] December 2015 the complainant, whose card was used fraudulently, was the victim of what I would describe as a vicious aggravated robbery. Her credit card, subject of this charge against [PT], was taken during the course of that robbery.

[11] The next day, [date deleted] December 2015, the victim's father cancelled that card - thought to be between 11.30 and 12.00 noon. Now, the factual matrix as the prosecution have referred, includes the robbery, the events thereafter which [PT] was able to provide some illumination on, and the subsequent use of the card, all come into play in my view of this charge. The issue of whether [PT] helped, encouraged or assisted the use of that card was where the main focus has been. CCTV footage from

two different retail locations has been replayed for my assistance today in light of the dispute about [PT]'s assistance and/or encouragement.

[12] In the order that the evidence was adduced, it showed a group of three young [persons] entering and exiting the two retail outlets at the times alleged. Those times matched CCTV footage and there was an additional match to the times it was recorded that the card in question was used. Before concluding the identity of the three young [persons], in my view, the group's demeanour indicated that they were all in possession of guilty knowledge with respect to the use of this card and why I say that is that; they entered at the outlets at different times; they were in close proximity to the person who actually used the card at payWave or Eftpos payment points; that card was used at different times and in different ways; some by payWave, some by swipe. To my mind, it was clear that each of the individuals in that group were quite aware of what the others were doing and showed that by virtue of crowding around the various machines that were being used, indeed, an individual approaching a particular machine and others coming in to the shop and then different individuals approaching the machine with the card in question, satisfied me that they were each involved in the fraudulent use of this card.

[13] [PT]'s evidence with respect to where [PT] was on the evening of the aggravated robbery during which the card was stolen. [PT] acknowledged in [PT's] evidential video interview and included those who were involved in the robbery, what they had told [PT], the blood-stained footwear of a person [PT] referred to as [PT's] [sibling]-in-law, a young [person] who has been convicted and sentenced since the offending. In addition there was evidence from a police officer who dealt with [PT] at the address.

[14] Some of the stolen property was located in the early hours of [date deleted] December at a time when [PT] said she was in a different part of South Auckland. All that provides a causal link, in my view of the evidence, to satisfy me that she was aware of the circumstances by which the card itself was obtained and that linked to the group activity I have already referred to in the two different retail outlets.

[15] In support of that and by way of strengthening the available inference made, are enquiries from police that neither [PT] or [PT's sibling] actually have a card or any card but their mother does have a card that has a payWave facility. But that said, I was presented with confirmation of the way a payWave card works, in case my life experience did not enable me to draw a conclusion as to how such a card is used. I note that it is the back of a credit card placed on the appropriate machine or waved over that machine which activate the payWave facility. That means that the front of the card, which contains the cardholder's name, is open to display to those looking on during the use of the card and as I have indicated, the group activity around the use of that card showed that at different times during the five transactions or attempted transactions the prosecution rely on at two different retail outlets, create the inference that the name on the card was available for view. That is perhaps a weaker inference than the ones I have already referred to, regarding the overall demeanour of the group and the connection between that card and the aggravated robbery on the evening before the use of the card.

[16] A principal part of the evidence which is not in dispute is that [PT] was identified as being part of that group by a Youth Aid police officer who knows [PT] well. She identified not only [PT] but the other two young [persons] from the CCTV footage relied on by the prosecution.

[17] So as it stands, without considering the issue of the validity of the charging document, I would be satisfied that the threshold has been met and [PT]'s involvement in the unlawful use of the credit card is established.

[18] The issue underpinning this charge, is one more jurisdictional in nature and starts at s 245 Children, Young Persons, and Their Families Act 1989 where subs (1) says:

Where a young person is alleged to have committed an offence, and the offence is such that if the young person is charged he or she will be required pursuant to section 272 to be brought before a Youth Court then, unless the young person has been arrested, no charging document in respect of that offence may be filed unless—

(a) the person intending to commence the proceedings believes that the institution of criminal proceedings against the young person for that offence is required in the public interest; and

- (b) consultation in relation to the matter has taken place between—
 - (i) the person intending to commence the proceedings or another person acting on that person's behalf; and
 - (ii) a youth justice co-ordinator; and
- (c) the matter has been considered by a family group conference convened under this Part.

[19] There is no issue taken with references to Youth Court decisions, *EM v Police*¹, Her Honour Judge Malosi dismissing a serious charge of wounding - Her Honour commenting about the [FGC] gateway through which all people must pass before coming to the Youth Court, is one that must be vigilantly guarded and the note that to otherwise, would be to diminish the need and right of our young people to be protected from abuses of process.

[20] The second reference is that of His Honour Judge Walker in *Police v LM, TLD*² and Judge Walker referring to the need to ensure that the arrest process is properly done, even if that consideration of the offence is to be under the Criminal Procedure (Mentally Impaired Persons) Act.

[21] There is no issue taken with either of those decisions. The focus is more on the decision of *K v Police*³ a decision of His Honour Fisher J and the identification of s 245 and the jurisdictional barrier that poses. I do not intend to detail what was involved in that case. I refer to what His Honour held. I refer to the decision and the paragraphs under the heading, "Held":

- (1) When s 245(1) Children, Young Persons, and Their Families Act 1989 refers to a case in which the "young person has been arrested", it does not relate the arrest to any particular identified information. The arrest in question relates to the "offence" in the sense that the arrest relates to the incident with which the information is later concerned. The arrest was directly consequential upon the very incidents for which the second information was laid.

[22] Second quote, His Honour held as follows:

¹ *EM v Police* YC Manukau CRI-2008-292-000017, 25 January, 4 February 2008

² *Police v LM, TLD* YC Wellington CRI-2009-285-000023, 21 April 2009

³ *K v Police* HC Auckland AP 243-93, 14 October 1993

(2) One of the principal objects of the Act is to divert young persons away from the Court process. Section 245 discourages an overreadiness to bring prosecutions in non-arrest cases by requiring that these cases first pass through the filters of belief, consultation, and conference. The reason that those filters do not apply in arrest cases may well be because different filters relating to arrests under s 214(1) are an adequate substitute. Where the police have considered it necessary to arrest, they should be held publicly accountable for it in a Court of law to ensure that the arrest was justified, a process facilitated by prosecution.

[23] The third point held by His Honour was as follows:

(3) There had been an arrest in this case for the purpose of all the informations which followed. At the outset, the police had to consider whether the arrest was justified in line with s 214. Having done so, they discharged their responsibilities as to preconditions for a prosecution. The fact that the mechanisms of those prosecutions subsequently change is a matter of form only.

[24] On the face of it, the straight reading of s 245(1) would indicate that a person should be charged with the offence a person is arrested for and if it was as straightforward as that, then there is clear evidence that [the Detective Constable] arrested and interviewed [PT] for aggravated robbery but then subsequent to finding more information and following what [PT] told him, decided instead to charge [PT] with the use of the document which was stolen during the course of the robbery.

[25] At the time of interview, [the Detective Constable] knew that that document had been used and had, from the evidence, good cause to suspect [PT]'s involvement. I accept his evidence that as a result of search warrants and some of the victim's property being located at the address that [PT] was at, after the aggravated robbery and a few hours before the use of the card, his desire to ensure that evidence was preserved was valid grounds for the arrest.

[26] Therefore I take no issue with the fact of arrest, the grounds of arrest and it is only with respect to whether the arrest, being for aggravated robbery, the interview being in terms of aggravated robbery but the charge subsequently of use of the card taken through the course of the robbery - whether that charge can remain afoot because there was no consultation between the Youth Justice coordinator and the informant and there was no family group conference.

[27] I am satisfied that the overall picture as presented by His Honour Fisher J in *K v Police*, allows this charge to remain validly before the Court as the arrest in question relates to the incident with which the information is later concerned and the arrest was directly consequential upon the very incidents for which the charge was filed. Now that is paraphrasing part of the first matter that His Honour held from the *K v Police* case.

[28] I return to where I began and the factual matrix that the prosecution have referred to, the aggravated robbery, the card in question being an item taken in that robbery and the card in question being used unlawfully hours after that robbery. I am satisfied that charge can stand and it is validly before the Court as a result of the arrest effected by Detective Constable Patten.

[29] I now turn to the, what is termed the driving and assault charges that remain. There is very little contention with respect to these charges.

[30] On [date deleted] 2016, it is alleged that [PT] assaulted the complainant, Ms [LM]. Ms [LM]'s evidence is that she was approached by a young person, kicked and punched on the train, followed by the same person, kicked again. [LM]'s cousin's evidence is that [LM] was the person who assaulted Ms [LM]. Ms [LM]'s mother attended and where her daughter had called her to the [location deleted] Train Station and she was involved in an altercation with [PT] and others as was Mr [MH] who is the complainant's boyfriend.

[31] The operation supervisor at the train station spoke with [PT] and in the presence of that operation supervisor and the complainant's mother, [the Constable] arrested [PT] and established [PT's] identity through [PT]'s admission of [PT's] identity and photographs that were later taken. I am satisfied that [PT]'s involvement in that assault is established to the requisite standard.

[32] The next charges I have referred to as the driving charges – unlawfully using a motor vehicle, the pursuit of that vehicle and the manner in which it was driven and when it finally came to rest. The evidence of the vehicle owner is that the vehicle was left in a certain place on 30 March and on 31 March it was missing. The vehicle has

a value of \$9000. The evidence of [the Senior Constable] was that the senior constable noted the erratic driving of the complainant's vehicle, followed that vehicle, activated their red and blue flashing lights and siren.

[33] That vehicle swerved into other traffic, travelling up to 130 to 140 kilometres per hour, went straight through a red light, slid sideways onto a motorway off-ramp, nearly colliding with a police officer who was putting out spikes and [the Senior Constable] saw the car crash into a non-uniform police vehicle. That vehicle was at the time being used by [the Detective] who had heard of the pursuit through the police Eagle helicopter, went to position spikes at a particular place on the highway to see the car in question come sliding toward him and eventually smash into his car and come to a halt.

[34] [Constable A] had followed the vehicle and arrested the driver, who as it turned out, was [PT]. [the Sergeant] took photos of the scene which showed extensive damage to not only the complainant's vehicle, but also the police officer's vehicle. I am satisfied that it was [PT] who was the driver of that vehicle and that [PT] drove recklessly and failed to stop for police and that it was not [PT's] vehicle to use at that time - [PT] did not have permission to use it. The driving charges, I am satisfied that [PT] was involved to the requisite standard of proof.

G F Hikaka
Youth Court Judge