EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].



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**IN THE YOUTH COURT**
**AT MANUKAU**

**CRI-2017-292-000366**
**[2018] NZYC 2**

**NEW ZEALAND POLICE**
Prosecutor

v

**[IH]**
Young Person

| | |
|---|---|
| Hearing | 8 December 2017 |
| Appearances: | C Holdaway for the Prosecutor<br>T Coburn for MVCOT<br>C Bennett for the Defendant |
| Judgment: | 17 January 2018 |

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**RESERVED DECISION OF JUDGE J H LOVELL-SMITH**

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[1] [IH] (the Young Person) was born on [date deleted] 2003.

[2] The application relates to non-compliance of statutory requirements in relation to the convening of two s 247(b) Family Group Conferences.

[3] The first Family Group Conference was purportedly convened on 22 June 2017 and held on 29 June 2017 in respect of the following intention to charge matters:

(a) Theft;

(b) Possession of an offensive weapon;

(c) Aggravated assault;

(d) Unlawfully gets into motor vehicle.

[4] The second Family Group Conference held on 31 July 2017 was in relation to the following intention to charge matters:

(a) Burglary;

(b) Unlawfully takes motor vehicle;

(c) Careless driving.

**The 29 June 2017 FGC**

[5] There is no issue about the background to the holding of this Family Group Conference. The Youth Justice Coordinator, [the YJC] purports to have consulted with the parties, then convened the conference on 22 June 2017. The summary of facts discloses three victims: [victim 1] (aggravated assault), [victim 2] (theft) and [victim 3] (unlawfully gets into motor vehicle).

[6] On 20 June 2017 [the YJC] was allocated this case in his capacity as Youth Justice Coordinator. He telephoned the young person's mother on 21 June which went to answerphone. He made a home visit the following day but no one was home. On

that day he also consulted with other participants and purportedly convened the conference, even though he had no direct contact with either the whanau or the young person. [The YJC] left invitations in the letter boxes of the addresses of the mother and father of the young person on the same day.

[7] On 26 June 2017, [the YJC] telephoned the young person's mother but the call was again diverted to the answerphone. A home visit was made the same day but no one answered the door. There is no evidence that any message was left for the occupants.

[8] On 28 June 2017, the Ministry were aware that the young person was missing. The CYRAS confirms this and the document appears to be an internal communication between [name removed], C&P Social Worker and [the YJC] as the YJC.

[9] The FGC proceeded on 29 June 2017 in the absence of the young person and any whanau. One of the victims was invited but it is unclear whether the others were or not.

[10] Mr Holdaway conceded that all it appears to have occurred was that [the YJC] made a phone call to the mother which was unanswered and one home visit and then went ahead and convened the Family Group Conference. [The YJC] did give some reasons in his affidavit namely that he worked with the family before and he expected that it would be sufficient notice from his previous work with the family. It was Mr Holdaway's understanding that there is also some sense of urgency that the FGC should be called together as quickly as possible, not so much around the offences, but around the overall care and protection situation for this young person. Mr Holdaway conceded that the initial consultation process certainly did not meet the Ministry's best practice standards in relation to the first Family Group Conference.

[11] The High Court Judge in *H v Police* 18 FRNZ 593 was concerned to emphasise that:

> It was not the intention of Parliament that the young person and his family could avoid the laying of an information in respect of alleged offending simply by staying away from a conference and then arguing that because of their absence no conference had taken place (at page 602).

[12] It is not mandatory that a young person or their whanau attend; they are simply "entitled to attend" (see s 251). This case can be distinguished from the High Court's decision in *H v Police* on the basis that in that case the YJC had made "all reasonable endeavours" to contact the young person and family. In that case, significantly more time was allowed for the family to respond, and numerous attempts were made to contact the family and young person which included endeavouring to consult with the young person and his mother over the next three weeks after sending letters to the alleged victims and the appellant's mother advising them of the referral and requesting that contact be made. The Youth Justice Coordinator received various responses to telephone calls, but was unable to set a time, date and place for the conference without either the young person or his mother. Finally, after three weeks the YJC wrote to the young person's mother stating that as she had been unsuccessful making contact, that unless she heard from the young person's mother by Friday, 9 October, she proposed then to set a time, date and place for the conference.

[13] Unlike this case, significantly more time was allowed for the family to respond and numerous attempts were made to contact the family and the young person.

[14] The Youth Justice Coordinator's ability to fix a conference date and time is subject to ss 248 to 250 (see s 247(e)).

[15] Section 250 provides that:

> The YJC shall, before convening a family group conference . . . make all reasonable endeavours to consult with the child's or young person's family, whanau [etc.] in relation to the date, time, attendees and conference procedure.

[16] The use of "shall" in s 250 means that making "all reasonable endeavours" to consult with the family is a mandatory pre-requisite to convening a Family Group Conference and in this case the YJC failed to make "all reasonable endeavours" to contact the family prior to convening the conference.

[17] Section 250(2) also requires the YJC to make "all reasonable endeavours to consult with . . . any victim of the offence or alleged offence to which the conference relates." The defendant submits that "it appears one of the victims was invited but it is unclear whether the others were not". It is not able to be challenged by the Ministry.

In my view, it cannot be said that the YJC made "all reasonable endeavours" to consult with the three victims prior to convening the conference.

[18] In relation to the first Family Group Conference having been invalidly convened, I am satisfied there was no legal basis for summonsing the young person to Court on 18 July 2017. On that basis, the charges are dismissed pursuant to s 147 of the Criminal Procedure Act.

**Second Family Group Conference 31 July 2017**

[19] The young person was summonsed to Court for the matters considered at the first FGC on 18 July 2017. At that time issues relating to the convening and holding the first FGC were raised. Ms Bennett was appointed as the Youth Advocate and the matter further remanded to 3 August 2017 for the Youth Justice Coordinator to provide a response relating to the issues raised. The Youth Justice Coordinator provided a letter to the Court dated 27 July 2017, setting out a timeline. The Ministry was aware of the appointment of Ms Bennett as Youth Advocate at that time.

[20] Ms Bennett submits that notwithstanding the fact that the young person now had a lawyer acting for her, there was no consultation or notice of that FGC to the Youth Advocate. This was at a stage in the proceedings when the Youth Justice Coordinator should have known that there were concerns about the earlier Family Group Conference.

[21] Section 251 of the Orangi Tamariki Act 1989 provides as follows:

> **251 Persons entitled to attend family group conference**
>
> (1) Subject to subsection (2) of this section, the following persons are entitled to attend a family group conference convened under this Part of this Act:
>
> (a) the child or young person in respect of whom the conference is held:
>
> (b) every person who is—
>
> (i) a parent or guardian of, or a person having the care of, that child or young person; or

(ii) a member of the family, whanau, or family group of that child or young person:

(c) the Youth Justice Co-ordinator who is convening the conference, or any Youth Justice Co-ordinator who is acting for that person:

(d) the **[**prosecutor of, or the person intending to commence**]** the proceedings for the offence or alleged offence to which the conference relates, or a representative of that person:

(e) if the **[**prosecutor of, or the person intending to commence**]** those proceedings is not an enforcement officer acting in that capacity, a representative of the appropriate enforcement agency:

(f) any victim of the offence or alleged offence to which the conference relates, or a representative of that victim:

(g) any barrister or solicitor or Youth Advocate or lay advocate representing the child or young person:

(h) **[**the chief executive**]**, in any case where—

(i) the **[**chief executive**]** is a guardian of the child or young person; or

**[**(ii) the chief executive has the role of providing day-to-day care for the child or young person under the Care of Children Act 2004, or is entitled to custody of the child or young person under an order or agreement made under Part 2 of this Act; or**]**

(iii) the **[**chief executive**]** is required, pursuant to an order made under section 91 of this Act, to provide support to the child or young person; or

(iv) the young person is under the supervision of the **[**chief executive**]** pursuant to an order made under section 283(k) or section 307 or section 311 of this Act:

**[**(i) a representative of an Iwi Social Service, of a Cultural Social Service, or of the Director of a Child and Family Support Service, if that Service or that Director—

(i) is a guardian of the child or young person; or

(ii) has the role of providing day-to-day care for the child or young person under the Care of Children Act 2004, or is entitled to custody of the child or young person under an order or agreement made under Part 2 of this Act.**]**

**[**(j) if the young person is subject to a community-based sentence (as that term is defined in section 4(1) of the Sentencing Act

2002) or a sentence of home detention imposed under section 80A of the Sentencing Act 2002,—

(i) a probation officer:

(ii) in the case of a young person who is subject to a sentence of community work (within the meaning of that Act), a representative of the agency on whose behalf the young person is required to perform any work for the purposes of the sentence:

(iii) in the case of a young person who is subject to a sentence of supervision, intensive supervision, or a sentence of home detention (within the meaning of that Act), any person or agency, or a representative of any person or agency, that provides any course or conducts any programme that the young person is required to undertake as a condition of the sentence or to undergo under the sentence:**]**

**[**(k) if the child or young person is under the guardianship of the Court under the [[Care of Children Act 2004]], any person appointed as agent for the Court under that Act, or any representative of that person:**]**

(l) where the child or young person is subject to an order made under section 91 of this Act, a representative of the person or organisation required, pursuant to that order to provide support to that child or young person:

(m) where the young person is under the supervision of any person (not being the **[**chief executive**]**), or any organisation, pursuant to an order made under section 283(k) or section 307 of this Act, that person or a representative of that organisation:

(n) where a community work order made under section 283(1) of this Act is in force with respect to the young person, the **[**chief executive**]** or person or a representative of the organisation supervising the order:

(o) any other person whose attendance at that conference is in accordance with the wishes of the family, whanau, or family group of the child or young person as expressed under section 250 of this Act.

. . .

[22] In Ms Bennett's submission Youth Advocates often attend intention to charge FGC's despite the fact that there is no legislative basis for remuneration for those attendances. She referred particularly to a decision of the Principal Youth Court Judge in *NZP v JB* [2015] NZYC 488 at paras [113] – [117]. Judge Becroft commented that the attendance of counsel at an intention to charge FGC is important, particularly when

the young person is especially vulnerable. Due to both [the young person's] age (attained 14 years on [birthdate deleted] 2017) and by fact of [the young person's] care and protection status. Ms Bennett submitted that it was particularly important the Youth Advocate be invited given the young person had current Youth Court matters.

[23] Mr Holdaway for the Ministry submitted that the Youth Advocate is not an entitled member, but conceded that it would have been preferable if she had been invited. However, the failure to invite Ms Bennett does not invalidate the process because there is no provision for appointing Youth Advocate in that situation and the provisions however desirable it might be. He accepts that Judge Becroft's comments are a criticism of the laws as it stands and it is his belief that the law was to be changed. However, in his submission, one cannot correct or try to correct that law by invalidating charges where a decision has been made by a coordinator not to invite a lawyer in a specific case unless they are appointed for those charges or instructed by the young person.

[24] There was a lawyer already present at the FGC who was appointed for the young person and who [the YJC] had worked for in relation to the previous s 14(1)(e) processes. Although all of those were care and protection processes, they are nonetheless s 14(1)(e) processes, and it was his submission that the failure to invite Ms Bennett did not leave this young person devoid of any kind of legal representation or assistance.

[25] In my view, there is no basis for arguing that the second FGC was invalidly convened. The young person's Youth Advocate was "entitled to attend" the second Family Group Conference but was not notified by the Ministry that it was occurring. However, there is no specific requirement that the Youth Advocate be consulted with prior to the FGC being convened.

[26] The application in relation to the second FGC is dismissed for these reasons.

J H Lovell-Smith
Youth Court Judge