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**IN THE YOUTH COURT  
AT CHRISTCHURCH**

**I TE KŌTI TAIOHI  
KI ŌTAUTAHI**

**CRI-2017-209-000328  
[2019] NZYC 4**

**REGINA**  
Prosecutor

v

**[PY]**  
Young Person

Hearing: 26, 27 November 2018, 6, 14 December 2018, 8 January 2019

Appearances: Mrs D Elsmore for the Prosecutor up to 14 December 2018  
Mr B Hawes for the Prosecutor on 8 January 2019  
Ms R Buddicom for the Young Person up to 14 December 2018  
Ms E Bulger for the Young Person on 8 January 2019

Judgment: 16 January 2019

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**RESERVED JUDGMENT OF JUDGE S J O'DRISCOLL**

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## **The background**

[1] [PY] is a young person and faces three charges of sexual violation by unlawful sexual connection. He is now aged 14 years. It is alleged that on three occasions in [date deleted] 2017 he sexually violated [VC], a five-year old complainant by sucking on the complainant's penis.

[2] [PY] denies the three charges. I understand that there have been various attempts to resolve this matter and even on the morning that the trial was due to commence on 26 November 2018, I was asked to take a brief adjournment in order to ascertain whether it might be possible to resolve this matter. That attempt at resolution, along with other attempts, was clearly not successful.

[3] Unfortunately, it has taken nearly two years from when the initial allegations were made to the police for a hearing of this matter to occur.

[4] I want to express at the beginning of my decision that it is most unfortunate that Youth Court proceedings involving a five-year old complainant are being determined nearly two years after the allegations were made to the police.

[5] A complainant who was five years of age at the time of alleged offending has now given evidence at the age of seven, and a young person who was aged 12 years at the time of the alleged offending is now before the Court at the age of 14 years.

[6] Time is a very important component and aspect in a young person's life, and the longer it takes between the alleged offending and trial the greater the impact can have on both the wellbeing of the young person and the veracity and credibility of their evidence.

[7] No application pursuant to s 322 of the Oranga Tamariki Act 1989 has been made.

[8] I make this observation without being critical to the parties. While on the one hand there is a need for a trial to be determined in a timely manner, there is also a need

for the young person to be dealt with by due process, including making all necessary and appropriate applications to defend the charges.

[9] I am not going to go into detail and refer to all the applications that have been made in this case. Various applications have been made by both the Crown and the defence at various stages leading up to this fixture which could have and should have been made at a much earlier stage. I decline to attribute any blame to any of the parties because I suspect that there was a genuine attempt by both the Crown and the defence to resolve this matter without a hearing.

### **Preliminary matters**

[10] There have been some unfortunate matters that have arisen during the course of this case. I need to mention these matters because they help explain why the defended hearing in the Youth Court was not plain sailing.

[11] I have already referred to these matters in various memoranda and minutes, however, I want to summarise them in this judgment.

[12] [PY]'s trial was due to commence in October 2018. I granted an adjournment because [PY]'s then counsel provided the Court with a medical certificate, indicating that she was unwell.

[13] The trial then commenced on 26 and 27 November 2018.

[14] [PY]'s counsel then became unwell and I adjourned the hearing until 6 December 2018 when I hoped that [PY]'s counsel would be well enough to proceed. Unfortunately, that did not occur. I then adjourned this matter until 14 December and issued a minute indicating that I would continue with the defended hearing on 8 January 2019 and requested that the Registrar appoint a new Youth advocate for [PY]. I am extremely grateful to Ms Bulger for taking on the assignment at such short notice.

[15] I did not want to declare a mistrial because that would have resulted in [VC], the complainant, having to give evidence again and consequently I made endeavours to continue with the hearing that I commenced in November 2018.

[16] It is unfortunate that [PY] has had two Youth Advocates, and because I continued the case at short notice, there have been two Crown counsel. My view however was that it was important for all parties to continue with the hearing and to attempt to avoid witnesses having to give their evidence again. Declaring a mistrial would have resulted in further delay.

[17] I heard a Judge Alone trial in the Christchurch Youth Court commencing on 26 November 2018. I concluded the hearing on 8 January 2019.

[18] At the end of the evidence I reserved my decision in order to reflect on, and consider the evidence, that I had heard at the Judge Alone Trial. I did not hear submissions from counsel at the end of the case as I indicated there did not appear to be any legal issues that might need elaboration and the determination of the case simply involved a determination of the evidence and the finding of certain facts.

[19] This is a criminal prosecution against [PY] and as such, the onus of proof is on the Crown to prove the charges beyond reasonable doubt.

[20] The prosecution must prove the essential elements of each charge beyond reasonable doubt. In this case, the elements are:

1. [PY] had unlawful sexual connection with [VC];
2. [VC] did not consent to the connection; and
3. [PY] did not believe and on reasonable grounds that [VC] consented to the connection.

[21] Sexual connection is defined as including connection between the mouth or tongue of one person, and a part of another person's genitalia.

[22] The allegation made by [VC] against [PY] is that on three occasions [PY] sucked [VC]'s penis.

[23] It is not necessary that I make findings in respect of all the issues that were in dispute in this trial. The onus is on the Crown to only establish the elements of the charge beyond reasonable doubt.

### **Information provided by a Court Security Officer**

[24] I want to raise another matter that occurred during the course of the hearing.

[25] During the afternoon of Monday 26 November 2018, I took an adjournment to give [VC] a break from giving evidence. I went to my chambers and a Court Registry Officer, along with a Court Security Officer, arrived at my chambers shortly afterwards. I was informed of certain observations made by the Court Security Officer of the young person during the course of the hearing. I asked the Court Security Officer to record those observations in writing, so that I could then provide that information to counsel.

[26] For the sake of completeness, I set out below and record the note made by [the Court Security Officer] to me. The note is recorded as follows:

During proceedings of this afternoon in court [details deleted] the defendant was observed by [the court security officer] to be adjusting and repositioning himself in his chair at the rear of the court room. It became clear that the defendant was aroused and had an erection when the witness was speaking of sexual activity and began adjusting his clothing (shirt) to cover his erection. The defendant then began to stoke [sic] his inner thigh in an attempt at 'masturbation' through his clothing (Trousers). A recess was taken a few minutes later and the matter was reported to the Court Registry officer [name deleted] and the presiding judicial officer, Judge O'DRISCOLL.

[27] I provided both counsel with a copy of the note.

[28] The purpose of providing counsel with the note was to be transparent, and to inform them of what I had been told.

[29] Ms Buddicom took instructions from her client. She said [PY] denied the allegation. She explained that he had a cellphone in one pocket that was on “vibrate” and had some keys in the other pocket.

[30] My intention was to simply advise the parties of what I had been told. I specifically record that I make no adverse inference against [PY] from what I had been informed. As I have said, my intention was to simply draw this matter to counsel’s attention and ensure that [PY] did not put himself in a position where similar allegations could be made against him. For that reason, I asked that prior to the hearing re-commencing, he emptied his pockets.

[31] I have put this matter to one side. It forms no part of my judgment but I wanted to mention this so that the parties were aware this matter did not influence my decision in any way.

### **The evidence**

[32] I intend to only briefly summarise the evidence that I heard at the Judge Alone Trial. Where there are disputes between various witnesses and significant issues that need to be determined, I will consider those later in my decision.

[33] The complainant [VC] was aged five at the time of the alleged offending. The offending is alleged to have occurred in [date deleted] 2017. The young person [PY], was aged 12 years at the time of the alleged offending.

[34] The basic allegations against [PY] are that on three occasions he sexually violated [VC] by performing oral sex on him.

[35] [VC] lived in [location 1 deleted]. The young person [PY], although aged 12 years, is the complainant’s [relative]. The complainant is therefore the [relative] of the young person.

[36] It is not disputed that the young person visited the complainant’s family in [date deleted] 2017.

[37] [VC] lived with his mother, [MY], and father [FC] in [location 1]. [VC] had a [sibling] [SE] who also lived at [location 1]. [Family details deleted].

[38] [VC]'s evidence in chief was by way of an evidential interview that was provided to the police on [early] 2017.

[39] It was agreed that [VC] did not have to be present in Court when his evidential video interview was played to the Court. I was informed that he had watched the interview, both the day before and on the day that the Judge Alone Trial commenced.

[40] [VC]'s evidence from the evidential interview was that [PY] came to live with his family. It appears that the families were happy for the children to have contact with each other.

[41] [VC] and [PY] stayed in the same room together.

[42] [VC] alleges that on three occasions [PY] performed oral sex on him.

[43] The evidence of [VC] was that on the first occasion, [PY] performed oral sex on him while they were in a bunk in their bedroom. [VC] slept on the lower bunk, while [PY] slept on the top bunk.

[44] [VC] alleges that on the first occasion [PY] asked if he could suck [VC]'s "privates". [VC] said that he said "no" to [PY], but [PY] did it anyway.

[45] It is alleged that on the following day, [VC] and [PY] made a "fort", using blankets and bedsheets to cover the upper and lower bunk. [VC] states that they were playing a game called "I dare you" when [PY] again sucked [VC]'s penis.

[46] It is alleged that on a third occasion, in another fort made on the bunks, that [PY] again sucked [VC]'s penis.

[47] [VC] was cross-examined by Ms Buddicom. Ms Buddicom raised with [VC] issues about money going missing at [date deleted] and [VC]'s attempt to blame [PY] and [SE] for taking the money, the games that the parties played, how the disclosure

of the alleged offending took place and discrepancies between what [VC] says occurred in contrast to other witnesses.

[48] The second witness was [SE]. [SE] is the [sibling] of [VC]. [SE] was [older than CE] at the time of the alleged offending, and was aged 12 years at the time that [SE] gave evidence. [SE]'s evidence in chief was given through the evidential interview [SE] made to the police on [date deleted]. [SE] was cross-examined by Ms Bulger via closed circuit television.

[49] [SE]'s evidence was that on one occasion, [VC], [PY] and [SE] played "I dare you" and [VC] dared [PY] to pull his pants down and [PY] dared [VC] to pull his pants down. [SE] said that they both pulled their pants down and [SE] said that is when [SE] left the bedroom. [SE] said that [SE] saw both [PY] and [VC] take their pants off.

[50] [MY] is the mother of [VC] and [SE], and is the [relative] of [PY].

[51] [MY] confirmed that in [date deleted], [PY] came and stayed at her house over [date deleted].

[52] [MY] said that in the late afternoon one day, [SE] said words to the effect that "[VC] is trying to pull [PY]'s pants down, or tried to pull [PY]'s pants down". [MY] said she then heard [VC] say to [PY] "can I suck your willy?".

[53] [FC] gave evidence. He is the partner of [MY] and [VC] is their son. [FC]'s evidence was to the effect that he confronted [PY] after [VC] made these comments and [PY] denied doing anything wrong.

[54] [Detective 1 name deleted] interviewed [PY]. The DVD interview was shown to the Court. [PY] denied the allegations of sexual offending against [VC]. He said that he did not know why the allegations had been made against him. He said that he did not play any "I dare you" game. He said that [MY] wanted to "ruin his life".

[55] For the sake of completeness, other witnesses gave evidence. They included the two police officers who conducted specialist child witness interviews involving



[VC] and [SE]. A statement was also produced from [Detective 2 name deleted] who has been a member of [a Child Protection Team]. He took photographs of the address where the offending is alleged to have occurred.

[56] At the end of the prosecution case, [PY] elected not to give evidence.

### **Assessment of the witnesses**

[57] I have had an opportunity to see and hear the respective witnesses in this case give evidence and be the subject of cross-examination.

[58] It is not unusual in cases such as this for there to be no forensic evidence and no independent witnesses to corroborate what a complainant alleges has occurred.

[59] Experience has shown that it is very unusual for sexual activity to occur with eye witnesses observing sexual conduct.

[60] I have also seen the initial interview made by [VC] and [SE] to the police shortly after the alleged offending is said to have occurred along with the interview that [PY] gave to [Detective 1].

[61] There is one matter that I specifically want to mention that I have taken into account in my assessment of the evidence. This relates to the timing between the alleged offending and the date of the hearing. [Around] two years has lapsed between the time of the alleged offending in [date deleted] 2017 and the Judge Alone Trial heard between November 2018 and January 2019.

[62] This aspect of the case and the fact that time can both distort memory and cause memory lapses mean that I have placed far more weight on what the respective witnesses said to the police in [early] 2017 as opposed to what they said in November 2018 and January 2019.

[63] I also take into account that witnesses can sometimes recall matters that were considered important and significant at the time an event took place but they might

not remember or recall events that were not seen as important or significant at the time that an event occurred.

[64] I have taken into account in my assessment of the witnesses, the age of the witnesses and when it is alleged the offending occurred in [date deleted] 2017.

[65] I have taken into account the relationship between the respective witnesses as at [the time of the alleged offending].

[66] I have taken into account whether any witness distorted their evidence, filled in gaps in their memory or embellished, distorted or minimised the actions or role of any of the other parties in this case.

[67] I have taken into account whether witnesses, particularly the children, may have been influenced by comments made to them by other children or adults involved in this case at any stage of the proceedings.

[68] It is important when considering the evidence and making an assessment of the witnesses that I do not speculate or guess.

[69] I am of course entitled to draw inferences that are logical and reasonable from facts I find proven.

[70] In considering the issue of the honesty, reliability and credibility of the witnesses, I take into account the following matters.

[71] The first matter is I have not heard anything in the evidence to indicate that prior to [the time of alleged offending], or at that date there was any animosity or bad blood between the parties so as to provide a motive as to why [VC] would make up allegations against [PY]. Indeed, the evidence from [MY] was that [PY] has stayed with them previously and her children [VC] and [SE] loved [PY] and “absolutely adore(d) [PY]”. There is no evidence to the contrary on this matter.

[72] [PY] was at the complainant’s address when it is alleged that the offending occurred. There is therefore an opportunity for the offending to have taken place.

[73] There was contrary evidence that [VC] liked to expose himself. [SE] said that [VC] liked to expose his “boy bits”. This was not accepted by [MY] who said that [VC] [details deleted] and [VC] was actually embarrassed about this because he felt different to other boys. Whether [VC] did expose himself to others as a five-year old boy does not explain why he would make a comment about engaging in oral sex with [PY].

[74] I heard evidence that [FC] had been [details deleted] pornography had been discovered on his computer. [FC] said the kids “never use my computer”. There is no evidence to the contrary about this and no evidence [VC] ever saw any material involving oral sex.

[75] I also heard evidence that some money [details deleted] went missing around the time that [PY] was at [MY]’s and [FC]’s home. The evidence from [SE] was that [VC] had taken the money and tried to blame [PY] and herself. My clear impression was that this was a misunderstanding and there was no attempt by [VC] to try and accuse [PY] of committing any theft of money.

[76] It was put to [FC] that he had assaulted [PY] after the issue of oral sex had been disclosed but that is a matter that arose after the disclosure and does not affect the credibility of [VC].

[77] There is nothing in the evidence to indicate that [VC] may have mistaken or misinterpreted anything that [PY] may have done, to such an extent that an allegation of oral sex could have been misinterpreted or mistaken.

[78] I accept the evidence of [MY] as to how the disclosure of oral sex occurred by [VC]. She said [VC] said he wanted to suck [PY]’s private parts. I believe it is a fair and reasonable inference that a five-year old must have said these comments because he had seen such activity in the past, had heard about such activity or had engaged in such activity in the past. When these comments are put alongside [VC]’s evidence that [PY] did suck his private parts then [VC]’s initial comments are perfectly explainable.

[79] There is certainly nothing to indicate [VC] had been coached or encouraged by anyone else to say [PY] had engaged in oral sex with him.

[80] There were aspects of [VC]'s evidence that indicated he was prepared to make concessions. This included, for example, that he had pulled off [SE]'s pants on [date deleted].

[81] There were aspects of [SE]'s evidence that corroborated and supported what [VC] said.

[82] [SE] said [VC] and [PY] had played a game of "I Dare You". [PY] was adamant when he spoke to [Detective 1] that this had not occurred. This is important because this sets the foundation of the winner of the game daring the loser to pull down their pants or to take off their clothing. I accept the parties did play this game and I think [PY] realised the significance of this, so denied playing the game at all when spoken to the police.

[83] I was impressed with [VC] when he was confronted head on by defence counsel who suggested that the allegations that he had made about [PY] did not occur. [VC] clearly refuted the suggestion. When Ms Buddicom put to [VC] that [PY] told the police he didn't suck [VC]'s privates or penis at any time [VC] responded by saying "(b)ut he did".

[84] There was also a telling comment made by [VC] in his evidence when he was asked by the police interviewer to tell her everything "your private could feel on [sic] that time in the fort?" when [PY] sucked his penis. [VC] responded by commenting "(s)lobbery, yuck and disgusting". In my view, this response enhances the credibility of [VC] as to what occurred with [PY]. [VC] is unlikely to have made up this response.

[85] I was not impressed with the way [PY] responded to [Detective 1]'s questions at the police interview. He attributed the allegations made against him to the actions of [MY] and commenting that she "wants to ruin my life...". I do not know the relationship between the parties pending the outcome of this court case but there is certainly no evidence to support [PY]'s claim against [MY] as at [date deleted] 2017.

[86] I see this comment made by [PY] as an attempt to explain the difficult predicament he now finds himself in and to justify why he says false allegations have been made against him.

[87] I place little weight on [PY]'s denials to [FC] that he did anything wrong and his denials of any wrong doing to [Detective 1].

[88] There were of course, matters that [VC] could not remember or that he could not explain. This is not unusual in cases such as this but, again, experience shows that witnesses can remember the detail of certain events, but cannot remember other minor details because they were either not seen as being important or significant at the time, or because of the passage of time.

[89] I find that the Crown have proved the three charges against [PY] beyond reasonable doubt.

[90] I find that on each occasion [PY] engaged in oral sex with [VC].

[91] I find that an unlawful sexual connection occurred between the mouth of [PY] and the penis of [VC]. I find that [VC] did not consent to the activity; he was aged five at the time. I find that [PY] knew [VC] did not in fact consent. [VC] had said to [PY] "no" to the oral sex and I accept [VC]'s evidence when he said "no" [PY] still did it. I also find that no person in [PY]'s shoes as a 12-year old would have thought [VC] was consenting to the oral sex.

[92] I will release this decision before [PY] is next due to appear in the Youth Court on [date deleted] 2019 and then order a Family Group Conference to suggest how this matter should be dealt with.

S J O'Driscoll  
Youth Court Judge