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<http://www.legislation.govt.nz/act/public/1989/0024/latest/DLM155054.html>

**IN THE YOUTH COURT
AT AUCKLAND**

**I TE KŌTI TAIOHI
KI TĀMAKI MAKĀURAU**

**CRI-2018-204-000200
[2019] NZYC 121**

THE QUEEN

v

[FG]

Hearing: 18 March 2019
Appearances: H Clark for the Crown
M Winterstein for the Young Person
Judgment: 18 March 2019

ORAL JUDGMENT OF JUDGE A J FITZGERALD

[1] [FG] faces these four charges which he denies;

(a) Aggravated robbery of [store 1 deleted] on 16 September 2017,

(b) Aggravated robbery of [store 2 deleted] on 3 January 2018,

(c) Aggravated robbery of [store 3 deleted] on 24 March 2018 and unlawfully getting into a motor vehicle that day.

[2] [FG] has admitted a charge of burglary committed on 25 September 2018 and is now on a family group conference plan for that charge.

[3] Today's hearing was, firstly, to deal with a challenge to the validity of the denied charges on the grounds that a properly convened family group conference had not been held in relation to them before the charges were laid in Court. However, all the necessary evidence is not yet here, and some further directions are required. I will return to those later.

[4] The second purpose of today's hearing was to deal with the application to dismiss the denied charges because of delay.

[5] Section 322 of the Oranga Tamariki 1989 gives me power to dismiss a charge if I am satisfied that the delay that has elapsed between the date of the commission of the alleged offence and the hearing has been unnecessarily or unduly protracted.

[6] The enquiry into delay involves a two-part process; firstly, I must decide whether the timeframe referred to, that is from the commission of the alleged offending to the hearing, has been unnecessarily or unduly protracted. If so, I have a discretion to dismiss the charge.

[7] The discretion is only triggered if there is an undue or unnecessary protraction of the time period. I need to consider whether the relevant period has been longer than would reasonably be expected in a case of this nature. Not every delay at a discrete stage will result in a protraction of the relevant period. Time lost in one phase might be made up in another.

[8] “Unnecessarily protracted” means no more than delay that could reasonably have been avoided. It will usually mean delay caused by the default or neglect and must be more than a trivial delay. It is not appropriate to impose on the police or the Court system a standard of perfection, so that every delay no matter how minor will trigger the exercise of the discretion.

[9] “Unduly protracted” has essentially the same meaning as the words “undue delay” do in the New Zealand Bill of Rights Act 1990 and so cases such as *Martin v Tauranga District Court* are useful in interpreting and applying section 322.

[10] The delay issue should be considered against the principle in s 5(f) of the Oranga Tamariki Act; namely that decisions affecting a young person should, wherever practicable, be made and implemented within a timeframe appropriate to a young person’s sense of time.

[11] There has not been unnecessary delay here, nor has there been undue delay. The bulk of the time delay that there has been is because [FG]’s alleged involvement was not detected until a DNA sample was taken from him after the burglary on 25 September 2018. There has been criticism of the police here for not analysing fingerprint evidence until October 2018 despite fingerprints being uplifted from the scene of [store 1] in September 2017. However, it has been clarified today that [FG]’s fingerprints were not taken until 25 September 2018, the same day as the DNA sample was taken, and so the explanation for the delay is the same.

[12] Once the charges were laid in Court things have progressed at a reasonable and steady pace. [FG] first appeared on 18 October 2018. Amongst other things, questions were raised that day about his fitness to stand trial for the charges and an assessment of that issue was ordered from the Regional Youth Forensic Service (“RYFS”). Although [FG] was assessed as having cognitive functioning in the low-average range, and meeting the diagnostic criteria of conduct disorder and substance use disorder, he was considered fit to stand trial but requires the help of a communication assistant.

[13] The RYFS report was provided on 26 November 2018. Three days later [FG] came to Court and denied the charges that I have mentioned earlier.

[14] On 15 January, the issue about delay was raised. There was a further pre-trial conference in relation to that issue on 24 January and a hearing date set for 4 March 2019.

[15] The hearing on 4 March 2019 was adjourned until today, partly because the issue I mentioned earlier, about the convening and holding of an FGC, was raised and further time needed to obtain more information on that issue.

[16] In relation to the issues that need to be taken into account when considering undue delay, there is firstly the length of the delay here which I have already mentioned. It was not possible nor practicable for the police to bring the charges any earlier than they did, because [FG]'s alleged involvement was not identified until October last year. In terms of the inherent time requirements of the case, those have been accommodated since the charges have been laid and matters moved at a steady pace.

[17] There have been no actions on the part of [FG] nor the prosecution that have contributed to any sort of delay. No issues arise here regarding limits to institutional resources.

[18] The only prejudice to [FG] in terms of time factors, is that his alleged involvement was not identified until October last year and any delay has the potential to be prejudicial to fair trial processes and issues such as recalling events accurately or getting or testing evidence that might have existed at the time but does not now.

[19] [FG] has very recently turned [age deleted]. Therefore, there is plenty of time still to run under the Oranga Tamariki Act. I note however the comments of Winklemann J in *Attorney General v The Youth Court at Manukau* [2007] NZFLR 103, that such prejudice should be considered a neutral factor.

[20] There having been no unnecessary nor undue delay the application to dismiss the charges on account of delay must fail.

[21] Even if I had reached a different conclusion on those issues, I would not have exercised my discretion in favour of dismissing the charges. Relevant considerations include the seriousness of the alleged offending. They also include the objects and principles of the Act including the need to hold young people who offend accountable, encourage them to accept responsibility but also to acknowledge their needs and give them the opportunity to develop in responsible, beneficial and socially acceptable ways. However, given that the charges are denied this consideration cannot be given significant weight at this time. [FG]'s young age and his particular needs including the low-average cognitive functioning is an important consideration. There is a need to be cautious about dismissing charges for delay in a situation like this where the delay that is complained about is due to [FG] not being known about as a suspect until DNA and finger-print matches became possible.

[22] For the reasons given therefore, the application to dismiss the charges due to delay is declined.

[23] There remain three further pre-trial applications to be determined.

(a) One of those is the challenge to the validity of the charges because it is alleged that there was not a properly convened or held FGC. In relation to that issue, evidence is required from the FGC coordinator in relation to the steps that she took to convene and hold the FGC and provide [FG] and his mother a reasonable opportunity to attend. It is hoped that the coordinator's evidence can be filed and served within the next two weeks. Counsel to assist the Court is appointed to obtain affidavit evidence from [FG]'s mother in relation to that issue of being afforded an adequate opportunity to attend the section 247(b) FGC held on 1 November 2018. That affidavit evidence also to be filed and served within two weeks.

(b) There is also a challenge to the admissibility of a statement taken from [FG] by [Detective 1]. That interview was not recorded on DVD but in writing. [FG]'s mother was present during the interview as nominated person. Counsel to assist is also to obtain affidavit evidence from

[FG]'s mother in relation to her understanding of her role as nominated person and her impression of [FG]'s understanding and comprehension of his rights during the interview.

- (c) There is also a challenge to the admissibility of the DNA sample that was taken from [FG] on 25 September 2018. No timetable directions are made regarding that now, but I leave it for counsel to confer in relation to all of these issues and provide a memorandum for the next Court date setting out the directions sought to advance matters to hearing.

[24] That next Court date is 1 April 2019 at 2.15 pm. [FG]'s attendance that day is excused. His bail continues of the current terms.

A J FitzGerald
Youth Court Judge