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**IN THE YOUTH COURT
AT MANUKAU**

**I TE KŌTI TAIOHI
KI MANUKAU**

**CRI-2018-292-000433
[2019] NZYC 205**

**NEW ZEALAND POLICE
Prosecutor**

v

**[MI]
Young Person**

Hearing: 26 April 2019

Appearances: Ms Norrie for the Prosecutor
Mr Early for the Young Person

Judgment: 8 May 2019

DECISION OF JUDGE J H LOVELL-SMITH

[1] This is an application pursuant to s 322 of the Oranga Tamariki Act 1989 (“the Act”) for an order that a charge of aggravated robbery (CRN 1829200026) be dismissed on the ground that the time that has elapsed between the date of the alleged offending and the date of the hearing has been unnecessarily or unduly protracted.

[2] The application is opposed by the Prosecutor who submits that any delay is not such that the Court should exercise its discretion to dismiss the charge.

[3] The young person’s advocate submits that there are four areas of delay in her case, which are such that the charge should be dismissed pursuant to s 322 of the Act:

- (a) Delay from the alleged offending to the date the charges were laid in the Youth Court;
- (b) Delay resulting from the Court’s inability to accommodate a hearing on 22 and 23 November 2018;
- (c) Delay caused by the unavailability of the Communication Assistant on 5 and 6 March 2019; and
- (d) Delay resulting from inadequacies in the provision of the disclosure.

Background

[4] The young person, [MI], was born on [date deleted] 2001 and is now aged [over 17 years]. At the time of the alleged offending she was aged [over 16 years]. On 31 January 2018 it is alleged that the young person was involved together with other young persons, in an aggravated robbery of [VV] while she was on her own waiting for a bus.

[5] The young person originally faced four charges arising from this alleged incident on 31 January 2018, when a woman at the [location 1 deleted] was surrounded by a number of young people and punched in the face before being robbed of her iPhone and credit cards. One of the credit cards was used a short time later at

McDonald's at [location 1]. Two of the young people [SI] and [QQ] admitted the aggravated robbery. [SI] also admitted to being the one who punched the complainant and took her phone.

[6] The young person admitted three charges of using the stolen credit card but has denied being part of the initial aggravated robbery. She has since successfully completed a plan monitored by the Youth Court in respect of the charges of using a document as well as other unrelated matters and has been discharged pursuant to s 282 of the Act.

The Law

[7] Section 322 of the Act provides:

A Youth Court Judge may dismiss any information 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.

[8] Section 4(f) of the Act provides:

- (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 will give them the opportunity to develop in responsible, beneficial and socially acceptable ways.

[9] Section 5(f) of the Act provides:

The principle that decision affecting a child or young person should, wherever practicable, be made and implemented within a timeframe appropriate to the child or young person's sense of time.

[10] Winkelmann J in *Attorney General v Youth Court at Manukau & Ors* [2007] NZFLR 103 set out the test to be adopted when determining an application under s 322 of the Act. The initial enquiry into delay is a two part process:

- (a) First, whether the time period referred to has been unnecessarily or unduly protracted where the time period is defined as the time elapsed between the commission of the alleged offending and hearing.
- (b) Second, if there has been delay, there is a discretion as to whether to dismiss the charging document.

[11] When determining whether the delay has been unnecessarily or unduly protracted, the Court is required to take into account the following factors:

- (a) The length of the delay;
- (b) Waiver of time periods;
- (c) The reasons for the delay, including:
 - (i) Inherent time requirements of the case;
 - (ii) Actions of the accused;
 - (iii) Actions of the prosecution;
 - (iv) Limits of institutional resources; and
- (d) Other reasons for delays; and
- (e) Prejudice to the accused.

[12] In *Police v ET* [2015] NZYC 412 over three years had elapsed between the commission of the offence and the date of the hearing. Judge Fitzgerald dismissed the charges on account of delay and held:

- (a) The discretion is only triggered if there is an undue or unnecessary protraction of the relevant period of time. It is necessary to consider whether the relevant period has been protracted, in the sense that it is likely to be longer than would reasonably be expected in a case of that nature. Not every delay at a discrete stage of the proceeding will result

in a protraction of the relevant period. Time lost during one phase may be made up in another.

- (b) Unnecessary delay means no more than delay that could reasonably have been avoided. It will usually mean delay caused by default or neglect. The delay must be more than trivial. It is not appropriate to impose upon 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.
- (c) A delay caused by resource limitations will not usually be unnecessary delay. Police will inevitably have to allocate priorities between different investigations. The Court will not normally involve itself in second guessing the allocation of police resources, if satisfied that the need to investigate suspected youth offending very promptly is taken into account in allocating priorities for those resources. At a certain point however, delay caused by resourcing constraints will be undue delay. If the Court is satisfied that the relevant time period has been unduly or unnecessarily protracted the Court then has a discretion as to whether to dismiss the charge.
- (d) The existence of specific prejudice to a young person caused by delay will be a factor weighed in favour of dismissal, but the existence of specific prejudice is not a precondition to the exercise of the discretion. There will be a presumption that at a certain point in time general prejudice to the young person has been caused by the delay.
- (e) Seriousness of the offence is a factor to be taken into account in the exercise of the discretion although the weight attached to that factor will depend on the particular circumstances of the case. There is a public interest in seeing those who commit offences dealt with through the justice system. The more serious the offending the greater the public interest.

[13] In *Police v RK* [2017] NZYC 172 the offence was committed in December 2015, but *R* was not charged until November 2016.

[14] Much of the 11 month delay between the commission of the offence and the charge being filed in Court was due to police inaction, either because the officer in charge was on leave or reassigned to other work.

[15] The Judge dismissed the charge on account of delay and took into account the following factors:

- (a) There was clear neglect on the part of police in failing to progress the investigation and the delay was not trivial.
- (b) There was nothing unusual or complex about the investigation.

- (c) There were no actions by R that contributed to any delay.
- (d) No specific institutional resource limitations were identified.
- (e) There was prejudice to R as a result of the delay, insofar that given his age at the time the charge would likely be determined, there would realistically not be disposition options in the Youth Court available to him. This factor was tempered, however, by the Court's comments in *Attorney-General v Youth Court at Manukau* that the loss of Youth Court disposition options as a result of delay should be treated neutrally.
- (f) The seriousness of the offence was a factor that weighed against dismissing the charge.

[16] In *Police v VT*, V faced seven charges including two aggravated robberies and two unlawfully takes motor vehicle. There was a period of 11 months between first appearance and the s 322 application. At that stage the s 9 hearing had not yet taken place. When exercising his discretion to dismiss the charges, Judge Fitzgerald considered the following factors:

- (a) Some of the delay was caused by poor case management decisions and resourcing issues within the Court;
- (b) Some of the delay was due to police being unable to proceed with a two day fixture that had previously been accepted;
- (c) V's particular vulnerability caused by his low intellectual functioning, particularly with respect to memory function; and
- (d) The seriousness of the charges and the public interest.

Chronology of proceedings in relation to the aggravated robbery

[17] The following chronology was prepared by the Youth Advocate:

31 January 2018	Date of alleged offending
7 March 2018	The police notify a youth justice coordinator of the charges.
27 March 2018	A family group conference is convened.
3 April 2018	A family group conference is held.
19 April 2018	[MI] makes her first appearance in respect of the three charges of using a document and one of aggravated robbery. All matters are remanded without plea for disclosure and instructions.

	Counsel makes a written application for full disclosure.
2 May 2018	[MI] is arrested for a bail breach and remanded in custody.
11 May 2018	Due to concerns regarding [MI]'s presentation at Court a psychological report pursuant to section 333 OTA is directed, [MI] is further remanded in custody until 28 May 2018.
24 May 2018	Following a custody family group conference, the matter is brought on and [MI] is bailed to 27 June 2018.
29 June 2018	A section 333 report is prepared stressing the need for a communication assistant to be appointed pursuant to section 80 of the Evidence Act 2006.
11 July 2018	[MI] admits the three charges of using a document and denies the charge of aggravated robbery. Identification is a key issue. Matters are further remanded to 1 August 2018.
30 July 2018	A family group conference proposed a plan to deal with the three charges of using a document together with other matters.
1 August 2018	The Court approves [MI]'s plan. Denied matters including the charge of aggravated robbery are remanded further to 17 August 2018 for a case review hearing.
17 August 2018	A Judge Alone trial date of 5 October is set with a call over of 5 September, the call over being to confirm the availability of a communication assistant.
5 September 2018	After consultation with the communication assistant, it becomes clear that a day will be insufficient for the Judge Alone trial, particularly if [MI] elects to give evidence. 22-23 November are set for the Judge Along trial dates. The matter is further remanded to 19 September 2018 for call over and a ground rules hearing.
19 September 2018	Counsel is advised that 22 and 23 November are no longer available, apparently as a result of lack of Court resources, the matter would have been unable to proceed as substantial and important disclosure was still outstanding as at the end of November.
	Counsel receives a disclosure pack including formal statements from [six witnesses] together with related documentation.

29 October 2018	Counsel is advised by the Court that the earliest available dates for a Judge Alone trial are 9-10 April 2019.
29 November 2018	Counsel is advised by the Court that an earlier date is available; March 5 and 6.
6 December 2018	[MI] appears in Court. The Judge Alone trial date of 5-6 March 2019 is confirmed. [MI] has completed a plan in respect of all other matters and is discharged pursuant to section 282 of the OTA. A call over date of 18 January 2019 is set.
11 January 2019	Counsel receives further disclosure including a statement from [AA] dated 15 January 2018, a statement from [BB] dated 1 February 2018 and a statement from [Constable 1] dated 16 April 2018. Counsel is advised that the police intend to rely upon these witnesses at trial.
17 January 2019	Counsel receives copy of the CCTV footage from outside McDonalds; [location 1] relied upon by the police. This footage is from 31 January 2018.
19 January 2019	The matter is before the Court for a pre-trial call over. It is further adjourned to allow counsel time to discuss new disclosure with discreetly.
1 February 2019	The matter has a further call over and the Judge Alone trial is confirmed for 5-6 March 2019.
18 February 2019	The police further forward disclosure including two emails sent by the complainant to an investigating constable on 6 and 8 February 2018, regarding a photograph of discreetly taken after the robbery and viewed by the complainant. There is also a copy of [Constable 2]'s notebook regarding her enquiries with the complainant on 27 February 2018.
27 February 2019	Counsel receives a s 9 memorandum from the prosecutor referring to a 111 call. Neither a recording of the call nor a transcript have been disclosed.
4 March 2019	Counsel receives disclosure of an event chronology. Counsel receives disclosure of two 111 calls made on behalf of the complainant on 31 January 2018. Counsel is told by the police that there are two sound files, both being disclosed. Counsel receives an updated brief from the witness [CC]. This brief confirms that the complainant was shown a picture of discreetly (taken some time after the robbery) before the complainant provides

identification particulars of the offenders to the police.

5 March 2019

The matter is supposed to proceed to Judge Alone trial. Due to the unavailability of judicial resources, the matter has been placed in the list Court. The matter cannot proceed as the communication assistant, Mr Stephenson has not been advised of the change of dates and is in Tonga. Mr Stephenson, despite his best efforts, cannot find a replacement. The prosecution also advise that they wish to make a mode of evidence application for the complainant.

The matter is adjourned to a further Judge Alone trial date of 5 and 6 June 2019 with the mode of evidence application to be heard on 31 May 2019.

Even if the matter had been able to proceed on March 5, counsel would have sought an adjournment when it became apparent that there was an undisclosed 111 call from the complainant in which she is asked to describe the culprits.

11 March 2019

Counsel receives a copy of the 111-call made by the complainant and her partner on 31 January 2018. This is critical as the despatcher asks the complainant to describe the people who robbed her. She is unable to do so either directly or through her partner.

[18] The prosecution’s chronology complied with reference to police records and disclosure index is as follows:

31 January 2018	[MI] was allegedly involved in the aggravated robbery, as well as a number of other offences set out in the table above.
5 February 2018	[MI] was arrested and appeared in the Manukau Youth Court (in relation to different charges). Bail was declined but subsequently granted on 19 February 2018.
12 March 2018	Police referred the matter to Oranga Tamariki to convene a s 247(b) FGC.
26 March 2018	The s 247(b) FGC was held. [MI] walked during the FGC. The FGC was adjourned.
3 April 2018	The section 247(b) FGC was held.
Charge brought before the Court	
19 April 2018	[MI] first appeared in respect of the aggravated robbery charge. First appearance also occurred in respect of a number of other charges detailed

	above. [MI] was bailed in respect of all charges with a 7pm to 7am curfew.
2 May 2018	[MI] was arrested for a breach of bail. A bail application was not advanced. According to the prosecution's record of that hearing, although [MI]'s mother was present at Court, she was not prepared to have [MI] return home. [MI] was remanded in custody. A custody FGC was directed.
11 May 2018	A section 333 report was directed to consider the issue of fitness to stand trial. All charges remained without plea pending the receipt of that report.
15 May 2018	The custody FGC was held.
24 May 2018	An application for electronically monitored bail was made and granted without opposition from the prosecution. There was an exception to enable [MI] to attend [a mentoring] programme between 8.30 am and 3.30 pm Monday to Friday. The charges were further remanded without plea pending receipt of the s 333 report.
27 June 2018	A hearing was scheduled for receipt of the s 333 report. That report had not been completed and the matter was adjourned for a further two weeks.
2 July 2018	The s 333 report was completed and released. The report writer's opinion was that [MI] was fit to stand trial.
Pleas entered to the charges	
11 July 2018	[MI] entered pleas to all charges before the Court. [MI] denied the current charge.
1 August 2018	The case review hearing in respect of the "denied" matters was adjourned to enable further discussions between the prosecution and [MI]'s Youth Advocate. In relation to the other matters [MI] had "not denied" on 11 July 2018, the Court adopted a plan which had been agreed at the FGC. As agreed at the FGC, [MI] was readmitted to bail with a 7am to 7pm curfew (no longer electronically monitored).
16 August 2018	A case management memorandum was filed. In that memorandum, the prosecution estimated that the prosecution evidence could be completed within one day.
17 August 2018	[MI] 'not denied' all outstanding charges, except the aggravated robbery (CRN 026). The Court set down a tentative Judge-alone trial date of 5 October 2018 at 10am. It was a tentative date as a report from a communication assistant was

	<p>pending. A callover on 5 September 2018 was allocated to confirm receipt of the communication assistant's report and assessment, and his availability on the trial date.</p>
5 September 2018	<p>In respect of [MI]'s other "not denied" charges a further plan agreed at a FGC was adopted by the Court. The report from the Communication Assistant was not available.</p> <p>[MI]'s Youth Advocate advised that consideration was being given to calling the co-defendants. [SI] and [QQ] as defence witnesses at trial, however one, [QQ], was yet to enter a plea (the prosecution understands this witness is not being called by the defence). As a result, [MI]'s Youth Advocate sought an adjournment of the trial to a date in November. The prosecution opposed the adjournment application. The adjournment application was declined. The Court set down the following dates:</p> <ul style="list-style-type: none"> • A further trial callover (and possible ground-rules hearing if the Communication Assistant's report was available) on 19 September 2018; • A tentative Judge alone trial date on 5 October 2018; and • A further tentative Judge alone trial date of 30 November 2018. <p>The conditions of [MI]'s bail were amended, as agreed at a FGC, to remove the curfew condition.</p>
12 September 2018	<p>The report from the Communication Assistant was provided to counsel.</p>
18 September	<p>The hearing on 19 September 2018 was administratively adjourned to 20 September 2018.</p>
20 September 2018	<p>[MI]'s Youth Advocate advised the Court that the trial would now take two days rather than the one day currently set down, noting the likelihood of defence evidence. A trial date of 22 and 23 November 2018 was set down. The other trial dates were vacated.</p>
15 October 2018	<p>The Court advised via email that resources would not be available for the trial to go ahead in November as scheduled. The matter was listed for 29 October for a new trial date to be set.</p>
29 October 2018	<p>The Court did not have any capacity to accommodate a two day Judge-alone trial in the Youth Court until 9 and 10 April 2019 at the earliest, which was the date set down. A callover was also scheduled for 7 December 2018.</p>

26 November	The Court advised via email that an earlier trial date of 5 and 6 March 2019 was available.
29 November 2018	The earlier trial date of 5 and 6 March 2019 was confirmed by the Court administratively.
7 December 2018	The trial date on 5 and 6 March was confirmed. [MI]'s Youth Advocate was directed to confirm by 16 January 2019 the defence position in terms of the proposed prosecution witnesses to be read, and which witnesses would be required for trial. A callover on 18 January 2019 was set down.
20 December 2018	[MI]'s Youth Advocate filed an application for the co-defendant [SI], a child, to give evidence in the ordinary way at trial.
11 January 2019	The Officer in Charge provided disclosure of the following formal written statements: <ul style="list-style-type: none"> • [AA] • [BB] • [Constable 1]
17 January	The prosecution provided an updated witness and exhibit list including it would call [Constable 1] to give evidence in person.
18 January 2019	At callover the matter was adjourned to a further callover on 1 February 2019 to enable [MI]'s Youth Advocate to consider the disclosure provided on 11 January 2019. [MI]'s Youth Advocate indicated an intention to file an application for dismissal of the charge pursuant to s 322 of the Act.
31 January 2019	An application for dismissal of the charge pursuant to s 322 of the Act was filed. [MI]'s Youth Advocate also confirmed that the evidence of [AA] and [DD] could be read.
1 February 2019	At callover, the hearing of the application for dismissal was set down for the morning of trial (5 March 2019) and submissions were timetabled.
18 February 2019	[MI]'s Youth Advocate filed a memorandum seeking to withdraw the s 322 application for dismissal of the charge having reviewed the file and [MI]'s CYRAS notes.
18 February 2019	The Officer in Charge disclosed the following: <ul style="list-style-type: none"> • The formal written statement and notebook entries of [Constable 2]; and • Two emails sent by the complainant to [Constable 3].

27 February 2019	<p>The proposed s 9 statement of agreed facts was sent to [MI]'s Youth Advocate.</p> <p>The statement of [EE] is disclosed. [EE] provided still CCTV images from [location 1].</p>
27 February 2019	[MI]'s Youth Advocate confirmed the evidence of [BB] can be read.
4 March 2019	<p>[MI]'s Youth Advocate requested the event chronology and 111 call audio and transcript. The Officer in Charge advised that Northern Communications had provided two audio files relating to two 111 calls made by [FF] (a friend of the complainant [VV]). The Officer in Charge disclosed the audio files for both 111 calls via email.</p> <p>An updated statement from the witness [CC] (recent complaint witness) was also disclosed. She was further spoken to by police in the lead up to trial (for the purposes securing her attendance at trial) and provided additional detail which was recorded in a further formal statement.</p>
4 March 2019	The prosecution received a copy of a notice of alibi from [MI]'s Youth Advocate. The prosecution requested further particulars of where [MI] was said to have been at the time of the alleged offending and indicated that depending on the information provided the prosecution might need to reconsider its decision not to call J B and F P.
5 March 2019	The formal written statement of [GG] (recent complaint witness) was disclosed, it was signed a few hours after the additional statement from [GG]'s wife, [CC], was signed.
5 March 2019	<p>The Communication Assistant was not present and therefore the trial was unable to proceed. The prosecution suggested that attempts be made to locate an alternative communication assistant. [MI]'s Youth Advocate was not amenable to this course of action given the pre-existing relationship between [MI] and the Communication Assistant. The trial was ultimately adjourned to 5 and 6 June 2019.</p> <p>The complainant was present at Court and completed a Court familiarisation process with the Victim Adviser. As memorandum for the Court was then prepared indicating that the complainant wished to give evidence from behind a screen. The prosecution indicated its intention to make that application. When the trial was adjourned, the mode of evidence application was set down for 29 May 2019 with submissions timetabled.</p>

11 March 2019	The Officer in Charges disclosed a third 111 call received from Northern Communications. Both [FF] (the complainant's friend) and the complainant [VV] speak to the call taker.
15 March 2019	The application for dismissal of the charge pursuant to s 322 of the Act was filed.
20 March 2019	A hearing date for the s 322 application was allocated and submissions were timetabled.
22 March 2019	The prosecution filed a memorandum proposing the trial date for this matter be swapped with the trial date of another matter in order for this matter to proceed to trial at the earlier date of 8 and 9 April 2019. That memorandum was mistakenly not filed with the Court (and only sent to the Youth Advocate). It was filed with the Court on 25 March 2019.
25 March 2019	[MI]'s Youth Advocate opposed the exchange of trial dates, on the basis that there may be insufficient time for the mode of evidence application, the delay application and the trial to all be heard in the time available on those two days noting there were also list matters scheduled to be heard before the trial Judge on 8 and 9 April 2019. The prosecution application was declined and the trial date of 5 and 6 June 2019 remained.

Delay prior to the laying of the charge in the Youth Court

[19] This is a period of about two months and three weeks.

[20] Counsel for the prosecutor submitted that the period between the commission of the offence on 31 January 2018 and when the police first referred the matter to Oranga Tamariki to convene a s 47(b) FGC on 12 March 2018, was a period of five weeks. The s 247(b) FGC was held on 3 April 2018 less than three weeks later.

[21] Further, any delay between the commission of the offence and the s 247(b) referral was neither unnecessary nor undue when regard has to be had to the requirements for police to investigate a number of offences committed in the same area over a short period of time by multiple young people and rely on Judge Fitzgerald's comments in *Police v ET* that police will inevitably have to allocate priorities between different investigations. Normally, the Court will not involve itself in second guessing the allocation of police resources if satisfied that the need to

investigate suspected youth offending very promptly is taken into account in the allocation of priorities for those resources.

[22] This alleged offending occurred on the evening of 31 January 2018 but between 25 and 31 January 2018 the young person was involved in the commission of nine other offences, seven of which also occurred on 31 January 2018 (three of those relate to the use of the complainant's bank card). The offending was committed by multiple young people at various locations in the [location 1] area.

[23] A statement was taken from the complainant on the night of the alleged offending, but she was unable to identify the offenders and provided a description of the clothing worn by those allegedly involved.

[24] The CCTV footage from [location 1] was obtained on 1 February 2018 and the CCTV footage from McDonald's at [location 1] was obtained on 19 and 21 February 2018. The McDonald's CCTV which was taken later shows the use of the complainant's bank card shortly after the aggravated robbery in which it is alleged the young person was involved. The [location 1] CCTV shows the offending at [a clothing retail store] for which the young person was arrested on 5 February 2018.

[25] When the stills from the McDonald's CCTV were shown to the young person's mother on 27 February 2018 she identified the young person as one of the people inside the McDonald's. The same day the complainant was shown still CCTV images from inside McDonald's depicting a young person holding a mobile phone which the complainant identified as her own mobile phone.

[26] Counsel for the prosecutor therefore submitted that the investigation of this case and associated charges such as the use of the complainant's bank card was ongoing in February and early March 2018. There are other statements from relevant witnesses dated 26 February 2018 and 2 March 2018 respectively. The bank records from ANZ showed the complainant's bank card being used at the [location 1] McDonald's on 31 January 2018 which are dated 8 March 2018.

[27] Further, the young person refused to engage and left the first s 247(b) FGC on 26 March 2018 which necessitated another FGC to be convened eight days later in early April 2018.

[28] Within two weeks a referral was made to Oranga Tamariki for a FGC to be held. In the prosecutor's submission there was no police inaction or delay in progressing the investigation.

[29] However, in the Youth Advocate's submission the Police should have reached a decision whether to charge the young person or not "in short order". The police were aware that the stolen credit card was being used in McDonald's within an hour of the alleged offending. CCTV footage from the McDonald's premises would have been immediately available. When explaining the lack of a formal identification process, the officer in charge commented that: "[MI] was well-known to police staff." Taking these matters into account, in my view, there was delay prior to the laying of the charges.

Delay since laying the charge in the Youth Court

[30] There is no issue that a period of approximately 16 months and 5 days will have lapsed between the date of the alleged offending and the hearing on 5 June 2019. This is a significant period of time in the context of the Youth Court proceedings.

[31] There is no issue about delay caused by the Court being unable to accommodate a hearing on 22 and 23 November 2018. Judicial resourcing problems are not uncommon, but are not acceptable grounds for delay. See *Police v VT* [2015] NZYC 819 para 20.

[32] There is no issue about the further delay due to the unavailability of the Communication Assistant.

[33] The Youth Advocate also relies on what he calls the tardy and piecemeal nature of disclosure which meant that the trial would not have been able to proceed on 22 and 23 November in any event.

[34] For the hearing on 5 March 2019 the Youth Advocate specifically notes the following:

- (a) The event chronology prepared by the prosecutor is a document that would have been in existence for months but was not disclosed to counsel until 4 March 2019. Had it been disclosed earlier, counsel would have been alerted to the fact that there were 111 calls in existence.
- (b) The 111 calls were disclosed in a piecemeal fashion and the most important call was not disclosed until after the scheduled trial date of 5 and 6 March.

[35] There is a positive obligation on the prosecution to disclose such information both in terms of the Criminal Disclosure Act 2008 and at common law. Section 13(3)(a) of the Criminal Disclosure Act requires disclosure of a copy of any statement made by a prosecution witness.

[36] In counsel for the young person's submission this disclosure should have been made as soon as is reasonably practicable after the young person had denied the charge on 11 July 2018, if not sooner. There was also a duty upon the police to disclose to defence counsel any significant material which could affect the reliability of a prosecution witness *R v Marshall* [2004] 1 NZLR 793.

[37] Although the prosecution disclosure index records that the statements of [VV], [DD], F P, J B and [the Detective Sergeant] were disclosed electronically on 6 May 2018. Counsel for the young person contends they were not received until 19 September 2018.

[38] In response, counsel for the prosecutor relies on the following chronology:

- (a) On 11 January 2019, statements from the following witnesses were provided:
 - (i) [AA]
 - (ii) [BB]

(iii) [Constable 1]

The statements of [AA] and [BB] relate to the provision of CCTV footage to police (the CCTV stills had earlier been disclosed to counsel). [MI]'s Youth advocate has confirmed that the evidence of these witnesses can be read.

The prosecution notes that [the Detective Constable] refers in her statement to obtaining the footage from [AA] (that statement had been disclosed previously).

Although the prosecution acknowledges that the statements of [BB] and [Constable 1] were not disclosed in relation to this particular charge, it appears the same formal statements were disclosed on 27 April 2018 in relation to the offending at [the clothing retail store] (CRN 18292000051 was withdrawn by leave and [MI] "not denied" the amended charge 18292000288) also committed on 31 January 2018.

In terms of [Constable 1]'s evidence, on 1 February 2018, [Constable 1] received CCTV footage from [location 1]. This was provided to [Constable 1] by [BB].

On 24 April 2018 [Constable 1] received CCTV stills from [location 1]. These stills were provided to [Constable 1] by [EE]. It is this aspect of evidence that the prosecution intends to lead from [Constable 1].

Finally, the prosecution notes [Constable 1]'s evidence in relation to the arrest of [MI]. The present charge proceeded through a s 247(b) process.

- (b) On 17 January 2019, CCTV footage from the McDonald's was disclosed. Counsel had previously been provided with a 15 page booklet of still images from that CCTV. The footage does not depict the alleged aggravated robbery, but instead the immediate aftermath of the offending and the use of the complainant's bank card (which [MI] had already admitted).
- (c) On 18 January 2019 the following was disclosed:
 - (i) The formal written statement and notebook entries of [Constable 2]; and
 - (ii) Two emails sent by the complainant to [Constable 3] on 6 and 8 February 2018 respectively.

The prosecution notes that [Constable 2] is not a witness at trial. [Constable 2] took a statement from the complainant on 27 February 2018 (which was disclosed previously).

The email sent to [Constable 3] on 6 February 2018 contains a still image from CCTV footage in a gas station. The witness [CC] is said to have forwarded this image to the complainant (this is referred to by

[CC] in her formal written statement). The CCTV screen shot had been disclosed previously.

The email the complainant sent to [Constable 3] on 8 February 2018 relates to the bank records of the complainant showing the purchases at McDonald's (the prosecution notes [MI] had previously admitted this offending and documents from ANZ bank had been disclosed earlier, as had a receipt from the McDonald's).

- (d) On 27 February 2019 the statement of [EE] was disclosed. It relates to the provision of some CCTV stills from the [location 1] to police on 24 April 2018.
- (e) On 1 March 2019, [the Detective Sergeant], the officer in charge, completed and disclosed a statement regarding the time stamp on the CCTV footage at [location 1]. It related to enquiries regarding the accuracy of the time stamp which were made on 1 March 2019 and therefore could not have been disclosed any earlier.
- (f) On 4 March 2019, the Officer in Charge disclosed the event chronology and two sound files (relating to 111 calls). Those calls were made by an associate of the complainant who was not present at the time of the alleged offending.

Also disclosed was an updated statement from the witnesses [CC]. The statement was signed on the afternoon of 4 March 2018. [CC] was spoken to by police in advance of the trial (police visited her in order to secure her attendance at the trial) and she provided additional detail that was recorded by way of an additional statement. [CC]'s evidence relates to receiving a call from the complainant after the alleged offending. She was then involved in reviewing CCTV footage from [store deleted]. A still image from that CCTV footage was sent to the complainant.

- (g) On 5 March 2019, the formal written statement of [GG] was disclosed, it was signed a few hours after the additional statement from [FF]'s wife, [CC], was signed. The prosecution indicated it would not call [FF] given the content of [CC]'s statement unless the defence wished to cross-examine him. [FF] was also involved in the reviewing of the [store] CCTV footage and the sending of the still image from that CCTV to the complainant.
- (h) On 11 March 2019 a further audio file of a 111 call was disclosed.

The call involves the complainant, as well as her associate, speaking to police. A copy of the transcript has recently been completed and is attached at Tab 2.

[39] The prosecution accepts that there has been delay in the provision of some items of disclosure but that this has not prejudiced the defence of the charge at a subsequent trial date.

[40] Counsel for the prosecutor has also raised issues over the failure by the Youth Advocate to provide an alibi notice. However, this has not directly resulted in delay to the proceedings given the other matters which impeded the progress of the proceeding.

Exercise of discretion

[41] Counsel for the young person submits that the seriousness of the alleged offending is relevant but not determinative; it is simply one of many factors to be considered. The charge of aggravated robbery is serious, but the allegations are not of the most serious kind. In this case the young person is not alleged to be physically violent towards the complainant.

[42] In *Police v T Wild* J commented that a significant consideration was the behaviour of the young person since the offending alleged. The young person has now completed her plan in respect of all outstanding matters save this charge and there are no other charges pending.

[43] The young person has been before the Court on this charges for well over a year subject to restrictive bail conditions. She has been remanded in custody as a result of breaching those conditions. She has successfully completed a plan before the Youth Court, been discharged and should be allowed to continue with her life.

[44] Further, any disposition is now so far removed from the date of the alleged offending that it would be difficult for the young person to relate the procedure and disposition to the actual offence. She is currently attending the Limited Services Volunteer course and is doing well.

[45] At the date of hearing of this matter the young person is aged [over 17 years] which limits possible Youth Court outcomes. Counsel for the prosecutor submits there has not been unnecessary prosecutorial delay in this case such as the Court should exercise its discretion to dismiss the charge on that ground.

[46] The protraction of proceedings during that period is principally a result of Court resourcing constraints. Unfortunately, the 5 March 2019 trial date was

adjourned given the non-attendance of the Communication Assistance. Although the prosecution's subsequent application to bring forward the trial date to 8 April 2019 was opposed.

[47] In the prosecutor's submission there is significant public interest in holding the young person to account and the circumstances surrounding the delay in this charge are not such that the charge should be dismissed.

Conclusion

[48] I find that there has been significant undue delay from the laying of the charges. The principal delay is due to the resourcing problems in relation to the Manukau Youth Court and the unavailability of the Communication Assistant. Further, because of the nature of the allegations, there was delay caused by late disclosure.

[49] I find that the young person has been prejudiced by the delay in this case. The delay in hearing of the criminal charges does directly affect the quality of the evidence. The young person has been subject to restrictive Court bail conditions throughout and she has been remanded in custody for breaching those bail conditions. She is now aged [over 17 years]. There is very limited time remaining for her to continue in the Youth Court. All the other charges have now been disposed of and she has not reoffended. She is currently a member of and attending Limited Service Volunteers.

[50] This is a serious charge and there is the public interest in holding the young person to account which I take into consideration, but the delay is unacceptable and has prejudiced the young person. I accept counsel for the young person's submission that this prosecution has reached the stage where any disposition is so far removed from the date of the alleged offending it will be difficult for the young person to relate the procedure and disposition to the actual offence.

[51] For these reasons, the charge is dismissed on account of delay.

J H Lovell-Smith
Youth Court Judge