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**IN THE YOUTH COURT
AT WHANGAREI**

**I TE KŌTI TAIOHI
KI WHANGĀREI-TERENGA-PARĀOA**

CRI-2019-288-000036

CRI-2019-288-000004

[2019] NZYC 452

**NEW ZEALAND POLICE
Prosecutor**

v

**[SH]
Young Person**

Hearing: 9 and 22 August 2019

Appearances: D Buckley for the Prosecutor
D Whitehead for the Young Person

Judgment: 24 September 2019

DECISION OF JUDGE K B de RIDDER

Introduction

[1] [SH] faced charges of assaulting a child, being a male assaulting a female, and assault.

[2] [SH] is the father of a child [BH] born on [date deleted].

[3] It is alleged that on [date deleted] 2018 [SH] was at home in [location A] with his partner and mother of [BH] and [BH]. They were all in the bedroom and the baby was crying. It is alleged that [SH] shook [BH] up and down in a forceful manner while swearing at her. At the time [SH]'s mother in law, [MI], and her partner, [PI], were also at the address. Apparently [MI] intervened in this incident, and took the baby off [SH].

[4] Three days later [SH], his partner and the baby were preparing to leave [location A] together with [a close family member] from [location B] who had driven down to take them back to [location B]. [PI] attempted to persuade his daughter to get out of the vehicle but she refused to speak with him. It is alleged that [SH] lent across and punched [PI] in the face two or three times with a closed fist. It is also alleged he grabbed the victim by his arms and dug his fingernails into his arms.

[5] It is alleged that [SH] then got out of the vehicle and [MI] confronted him asking what he was doing, at which point [SH] then punched her with a closed fist in the jaw.

[6] Although police were called to the incident neither of the alleged victims reported assaults to the police. [SH], his partner and [BH] then left and went to [location B].

[7] On 23 October 2018 a report of concern was made in regards to [BH] to Oranga Tamariki.

[8] On 2 November 2018 [BH] was taken to [location B] Hospital for a check up and was found to have a bleed to the brain, but it was not medically possible to determine how it had occurred.

[9] [SH] denied shaking his daughter. He says he punched [PI] only after he had punched him, and that he punched [MI] when she walked up to him because she was “coming down”.

[10] Charging documents were filed in the Youth Court at [location A] on 17 May 2019 in respect of these incidents. Initially [SH] was charged with assault with intent to injure [BH] but that was later amended to assault on a child. At his first appearance in the [location B] Youth Court on 30 May 2019 [SH] denied the charges.

[11] [SH] applied pursuant to s 322 of the Oranga Tamariki Act 1989 for the charges to be dismissed on the grounds that the time that has lapsed between the date of the alleged offences and the hearing has been unnecessarily or unduly protracted. The prosecution opposed the application.

[12] On 6 September 2019 I granted the application and dismissed the charges, indicating that my reasons would follow. These are now my reasons.

Background

[13] [SH] was the subject of an interim custody order made pursuant to s 102 of the Oranga Tamariki Act in [month deleted] 2006, and a s 101 custody order made on [date deleted] 2008, that order being subsequently discharged.

[14] On 24 March 2016 the New Zealand Police filed an application for a declaration that [SH] was a person in need of care and protection and that declaration and a s 101 custody order were made on [date deleted] 2016. [SH] has been subject to the s 101 custody order since that time and remains so. Subsequent psychological and medical reports established that his cognitive abilities are mostly in the low average range, that he meets the diagnosis of conduct disorder, and that he fulfils the

diagnostic criteria for foetal alcohol spectrum disorder (FASD). However, although he is of low average intellectual ability, he does not have an intellectual disability.

[15] From January to June 2019 [SH] faced three other charges in the [location B] Youth Court involving multiple appearances including on 17 April 2019 when a family group conference plan was approved, and a further appearance on 14 June 2019 when he was discharged pursuant to s 282 of the Act on these three matters.

Timeline

[16] In order to better understand the application it is necessary to set out a timeline. This timeline has been prepared from the chronologies set out by Counsel in their respective memoranda, and supplemented by the evidence of Detective Westlake. I understand that Oranga Tamariki confirmed the chronologies prepared by counsel.

<u>Date</u>	<u>Commentary</u>
[dates deleted] 2018	Alleged offending – [SH] aged 16 years at the time of the alleged offending
2 November 2018	[BH] admitted to [location B] Hospital
3 November 2018	Investigation commenced by Police
5 November 2018	Investigation referred to [location B] Child Protection Team. O/C assigned to case.
5 November 2018	Statement taken from [PI] regarding the alleged assault.
6 November 2018	Statement taken from [MI] regarding the alleged assault.
8 November 2018	[BH] discharged from [location B] Hospital. OT obtained interim custody order.
8 November 2018	O/C attends whanau hui convened by Oranga Tamariki regarding [BH] and her family.

13 November 2018	O/C collects medical records relating to baby T.
10 December 2018	Medical report released from Dr Andre Schultz.
10 December 2018	O/C starts preparing prosecution file for [SH].
19 December 2018	O/C listens to 111 call from female victim on the day [SH] and his partner left for [location B].
19 December 2018	O/C attempts to contact [SH] and leaves message on cellphone for him to contact her.
24-26 December 2018	O/C on leave over Christmas.
4-8 January 2019	O/C on annual leave.
25 January to 11 February 2019	O/C on annual leave.
15 February 2019	Statement taken from [name deleted].
15 February 2019	Statement taken from [name deleted].
19 February 2019	Interview with [SH]'s partner, [LI]
19 February 2019	[SH] interviewed.
19 February 2019	After interview, [SH] informs O/C he has an exculpatory video.
5 March 2019	O/C receives an undated video from [SH]'s social worker. O/C contacts [SH] who advises he will provide the original video on 11 March 2019.
11 March 2019	O/C has not received original video.
20 March 2019	O/C completes investigation and refers file to Detective Sergeant in charge.
26 March 2019	Detective Sergeant submits file to Youth Aid Services.
1 April 2019	Case assigned to a Youth Aid Constable.

16 April 2019	Youth Justice matters consulted and accepted by Youth Justice coordinator.
7 May 2019	Invitations distributed to participants for Family Group Conference.
14 May 2019	247B Family Group Conference held.
17 May 2019	Charging documents filed in [location A] Youth Court.
30 May 2019	First call of charges in [location B] Youth Court. Charges denied.
9 August 2019	No date for trial set.

[17] The officer in charge of the case, [Detective A] filed an affidavit outlining her involvement in the case, and was cross-examined on that. I will deal with the relevant portions of her evidence later in this judgment.

Applicable law

[18] Section 322 of the Act provides:

A Youth Court Judge may dismiss any charge 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.

[19] It is accepted that the leading authority on the application of s 322 is *Attorney-General v Youth Court at Manukau*¹. That case in turn adopted the test set out by the Court of Appeal in *Martin v District Court at Tauranga*².

Submissions for [SH]

[20] Mr Whitehead points to the relevant provisions of the Act, in particular s 5(1)(b)(v) – (viii) and s 208, which set out the principles to be applied in the exercise of powers relating to a young person, and set out the principles applying to youth

¹ [2007] NZFLR 103

² [1995] 2 NZLR 419

justice. He also points to Article 40(2) of the United Nations Convention on the Rights of the Child.

[21] He notes that [SH] has been diagnosed with FASD, has an intellectual disability, and has been subject to care and protection status since 2008. In that regard he points to the effect of delay on vulnerable young persons with such disabilities. He also pointed out the assessment of Dr McGinn that at the age of [14]he has the reading/spelling level of a 10 year old.

[22] Mr Whitehead submits that it is unclear why there is delay between November 2018 to February 2019, and why there was delay until 16 April 2019 when the Youth Justice matters were consulted. He points out that [BH] was uplifted in November 2018, and at that point, the police had a prima facie case at least to proceed to an intention to charge family group conference pursuant to s 247(b), noting that the two alleged victims and witnesses to the alleged assault on [BH] provided statements on 5 and 6 November 2018.

[23] Mr Whitehead pointed to the presumption that decisions should be made and implemented promptly in a timeframe appropriate to the age and development of the young person, and that the delay in this case has resulted in a time frame that is not appropriate to the development of [SH]. He also relied upon the observations of the High Court in *Police v T*³.

Prosecution submissions

[24] Mr Buckley likewise referred to the relevant provisions of the Act, in particular s 4, 4A, 5, and 208.

[25] Mr Buckley focused on the issue of whether or not there had been undue delay, and focused on three periods of time, namely:

- (a) From 3 November until [SH] was interviewed on 19 February 2019, a period of over three months;

³ High Court Palmerston North CRI-2005-454-62 Wilde J

- (b) The time between the interview on 19 February and consultation with a Youth Justice coordinator on 16 April 2019 being less than two months;
- (c) The unknown amount of time that will lapse from [SH]'s first appearance on 30 May 2019 until the eventual hearing of the charges for which a conservative estimate of time would be four months.

[26] In response to the suggestion that the matter could have been referred to an intention to charge FGC in November 2018 it is submitted that, "That course of action would have been negligent, inappropriate and inevitably subject to criticism from all parties involved."

[27] It is submitted for the prosecutor that some of the delay can be attributed to institutional resource limitations, and that [SH] has contributed in part to the time that elapsed between his interview and the consultation with the Youth Justice coordinator.

[28] The primary submission for the prosecutor is that there was no undue or unnecessary protraction of the relevant time period, and that the periods of delay that have been identified are explicable and were not caused by default or neglect.

[29] The investigation began in earnest on 5 November 2018 when the officer in charge became involved and concluded on 20 March 2019 when the file was referred to a detective sergeant. The prosecutor points to the number of people spoken to in that time and the fact that the OC had difficulties locating and speaking to the young person. This also occurred over the New Year period when any delay was expected and entirely ordinary. Further delay was caused by the officer being on annual leave.

[30] It is submitted that there is nothing untoward or undue in the delay between 16 April 2019 when Youth Justice matters were consulted on and accepted, and 14 May when the FGC was held.

[31] It is submitted that the delay in the period between 19 February 2019 and 11 March 2019 is delay that can be attributed to [SH], in particular the delay in providing

the original video which he indicated was exculpatory. In the event he did not provide it and the officer in charge concluded her investigations.

[32] It is submitted that there is no prejudice involved as a full range of sentencing options under the Act are still available and the delay has not prejudiced his defences. In his interview he has denied shaking [BH] but acknowledged punching both [PI] and [MI] but claims self defence.

[33] On balance it is submitted that any delay has not reached the stage where the Court should exercise its discretion under s 322, and the prosecution should continue.

Discussion

[34] In order to determine whether or not there has been unnecessary or undue delay it is first necessary to identify any period or periods of delay between the alleged commission of the offences and the date of hearing. If any such delay is identified then the issue is whether, in all the circumstances, the delay has been unnecessary or undue. Finally, in the event that unnecessary or undue delay has occurred I then have a discretion as to whether or not the charges should be dismissed. In relation to that issue, consideration must be given to any prejudice that has occurred as a result of the delay.

[35] There are three discrete periods where there is a significant time lapse. They are:

- (a) 8 November 2018 to 10 December 2018;
- (b) 19 December 2018 to 11 February 2019;
- (c) 19 February 2019 to 16 April 2019.

[36] On 8 November 2018, [Detective A] went to a whānau hui convened by Oranga Tamariki regarding [BH] and her family. On 13 November she collected medical

records relating to [BH], and received a medical report on 10 December 2018 at which point she started preparing the prosecution files.

[37] However, on 5 and 6 November statements were taken from the two victims of the alleged assaults, and one of those also witnessed the alleged assault on [BH]. It appears that at that point, there was sufficient information to enable charges to be laid. I note that there are no other witnesses in relation to the alleged assaults.

[38] Between 8 November and 10 December, [Detective A] was clearly busy with other work as set out in her affidavit. However, despite involvement in what are clearly significant other cases, there is no assertion that those matters had to be prioritised to such an extent that no action was taken on the file for [SH] for a month.

[39] Having regard to the principle that matters involving young persons it must be dealt with in a timely fashion, and in the absence of any evidence of clear resourcing issues or other limitations it appears that this delay could be fairly categorised as undue.

[40] I note the comments of the High Court in the *Attorney General v Youth Court at Manakau* at [54] regarding resource limitations and allocating priorities. However, in this case there is no clear evidence of what resource limitations there may have been.

[41] The second period of delay identified is from 19 December 2018 to 11 February 2019. That is easily explained by resource limitations and the availability of the officer in charge. For a significant period of this time the officer in charge was on leave, and the timeline reveals that on her return from leave she promptly engaged with the file again. This delay could not be described as either undue or unnecessary.

[42] The final period of delay is from 19 February 2019 when the officer in charge interviewed [SH] to 16 April 2019 when the Youth Justice matters were consulted and accepted by the Youth Justice coordinator.

[43] There is no evidence as to why there was a delay from 19 February 2019 when [Detective A] took a statement from [SH], and 20 March 2019 when [Detective A] concluded her investigation and referred the file to the Detective Sergeant in charge. Likewise, there is no evidence as to why it took until 16 April before matters were accepted by the Youth Justice coordinator.

[44] In all the circumstances, I am satisfied that the delay from 19 February 2019 to 16 April 2019 was undue. In the absence of evidence as to what caused this undue delay, it is not possible to say whether or not it was also unnecessary. However, that does not bear on the ultimate conclusion, which is that there were two significant periods of undue delay in the handling of these charges.

[45] The final issue, is whether or not, in all the circumstances, it is appropriate that I exercise my discretion to dismiss the charges. In that regard, I note the charges were relatively straightforward with limited investigation required and a very limited number of witnesses involved. Also, [SH] was before the Youth Court in early 2019, and a prompt handling of these charges could have resulted in them being considered at the same time. It is not clear why the prosecution assert that it would have been negligent or inappropriate to lay charges in November 2018.

[46] [SH]'s psycho neuro disability and his cognitive impairment mean that the effects of the delay are exacerbated, particularly noting that as at the date of this hearing, there was still no firm date for a defended hearing and it appears likely that it will be something approaching a year between the date of the alleged offending and the date of any hearing.

[47] Finally, I also note that although one of the charges was relatively serious, it appears to have been accepted from an early stage that that charge would be amended to a lesser charge.

[48] In all the circumstances, I am satisfied that this is a case where it is appropriate to exercise my discretion to dismiss the charges.

Result

[49] The charges against [SH] are dismissed pursuant to s 322 of the Act.

K B de Ridder
Youth Court Judge