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IN THE YOUTH COURT
AT AUCKLAND

I TE KŌTI TAIOHI
KI TĀMAKI MAKAURAU

CRI-2018-204-000267
[2019] NZYC 10

NEW ZEALAND POLICE
Prosecutor

v

[VF]
Young Person

Hearing: 6 December 2019

Appearances: J Bergseng for the Police
M Winterstein for the Young Person

Judgment: 10 January 2020

DECISION OF JUDGE J H LOVELL-SMITH
In Respect of Application for Dismissal by Young Person

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[1] [VF], "the young person" is charged that on [date deleted] 2018 at Auckland, with intent to injure [SL] assaulted the said [SL], a charge laid under s 193 of the Crimes Act 1961.

[2] This is an application by the young person to have the charge dismissed on the grounds that proceedings had not complied with the requirements of s 245(1)(c) of the Oranga Tamariki Act. The charge was laid in Court pursuant to the provisions of s 247(b) of the Act and not as a result of an arrest.

[3] The young person first appeared in Court when he was remanded without plea on 14 March 2019. On 18 July 2019 he denied the charge and was remanded to 19 August 2019 for a Case Review Hearing. It was noted then there was a challenge to the Family Group Conference process. On 19 August 2019 the Youth Advocate indicated that there would be an application made to dismiss the charge which was opposed by the police and sought a two hour pre-trial date. On 29 August 2019, the young person was remanded to 6 November 2019 for a two hour pre-trial hearing, but on 31 August this pre-trial hearing date was vacated as counsel needed more time to prepare. There was also discussion about witnesses. The matter was further adjourned to 14 November 2019 when a half day fixture was allocated for 6 December 2019. The opposed application was heard that day and I reserved my decision.

[4] The s 247(b) Family Group Conference was convened and held on 6 March 2019 at 7:00 pm at the [location deleted] office of Oranga Tamariki.

[5] The Decisions Recommendations made and Plan formulated by the Family Group Conference under Part 4 of the Act are recorded as follows:

(a) Persons present (in relation to the child or young person) were:

The young person, [VF], his mother, [MF] and his father [FF]. [CA] from Community Approach was present together with [Constable 1], Youth Aid, [YC], ACES, [GU], Caregiver/Victim Support, [IJ],

Youthline [AL], mother of victim, [DZ] Youth Justice Coordinator and [Constable 2], Youth Engagement Officer.

(b) Two charges of assault with intent to injure on [date deleted] 2018 and the assault with intent to injure [four days earlier] were admitted.

(c) The outcome was recorded as non-agreement. Under the heading Decisions and Recommendations made, and plans formulated by the Family Group Conference, the Youth Justice Coordinator stated:

> The conference could not make a plan or any recommendation for a plan as the conference had to be adjourned. [VF] took offence to a comment made by the mother of the victim about [VF]'s reaction to when the Summary of Facts was read out. [VF] went into a rage, verbally abusing and threatening the victim. The victim was shaken by the ordeal and sought support from the police fearing retribution, especially from [VF]'s friends at [school deleted] where the victim attends school.

[6] The Youth Justice Coordinator advised [Constable 1] that the conference outcome was a non-agreement and returned the matter to the police to decide whether or not to lay charges.

[7] On 14 March 2019, the charge of injuring with intent to injure was filed in the Auckland Youth Court.

[8] Section 245 of the Act sets out three requirements before proceedings can be laid against a young person.

> **245 Proceedings not to be instituted against young person unless Youth Justice Co-ordinator consulted and family group conference held**
>
> (1) Where a young person is alleged to have committed an offence, and the offence is such that if the young person is charged the young person will be required pursuant to section 272 of this Act to be brought before, the Youth Court then, unless the young person has been arrested, no charging document in respect of that offence may be filed unless—
>
> (a) the person intending to commence the proceedings believes that the institution of criminal proceedings against the young person for that offence is required in the public interest; and

(b) consultation in relation to the matter has taken place between—

[(i) the person intending to commence the proceedings or another person acting on that person's behalf; and

(ii) a Youth Justice Co-ordinator; and

(c) the matter has been considered by a family group conference convened under this Part of this Act.

(2) Notwithstanding anything in subparagraph (i) of paragraph (b) of subsection (1) of this section, where the person intending to commence the proceedings is not an enforcement officer, the consultation required by that paragraph shall be consultation between a Youth Justice Co-ordinator and an enforcement officer authorised in that behalf by the person intending to commence the proceedings.

264 Procedure where no agreement possible

(1) Where—

(a) The members of a family group conference are unable to agree on what decisions, recommendations, or plans should be made in relation to the child or young person in respect of whom the conference was convened; or

(b) A Youth Justice Co-ordinator is unable to secure agreement under section 263 of this Act to the decisions, recommendations, and plans made or formulated by a family group conference,—

the Youth Justice Co-ordinator who convened the conference shall—

(c) Adjourn the proceedings of the family group conference; and

(d) Where the conference was convened under section 247(a) or (b) of this Act, report the matter to the appropriate enforcement agency; and

(e) Where the conference was convened under section 247(d) or (e) of this Act, report the matter to the Court.

(2) Where a Youth Justice Co-ordinator makes a report under subsection (1)(d) of this section to an enforcement agency, any enforcement officer may take such action under this Act as that officer considers appropriate.

[9] Counsel for the young person submits that the matter was not considered by the Family Group Conference as required by ss 245(1)(c) and 258(b) prior to the police filing the charge. The Family Group Conference did not reach the stage of discussing the means of dealing with the offending and the decision to deal with it by way of

prosecution alone was made without reference to any of the provisions in the Oranga Tamariki Act. The Family Group Conference was adjourned without any alternatives being discussed.

[10] Counsel submitted that although the requirements of s 245(1)(a) and (b) were complied with s 245(1)(c) of the Act was not, in particular:

> (a) the police or enforcement officer believes that the criminal proceedings are required in the public interest (s 245(1)(a)); and
>
> (b) the police or enforcement officer has consulted with a Youth Justice Coordinator (s 245(1)(b));
>
> (c) the matter has been considered by a Family Group Conference (s 245(1)(c)).

[11] The failure was in respect of s 245(1)(c) because the matter was not considered by the Family Group Conference when the police proceeded to file the charge in Court prior to returning to a reconvened Family Group Conference. Compliance with these steps was found to be as a pre-requisite for the filing of a lawful document in *Pomare v Police*.

[12] The purpose of s 245 is to require the police to consider means of dealing with the offending other than by way of prosecution and other alternatives may be put forward by the Youth Justice Coordinator, family members attending the intention to charge conference or by the Youth Advocate representing the young person.

[13] This approach accords with the principles set out in s 5(a) of the Act which requires that, where possible, a young person's family, whanau, hapu, iwi and family group should participate in the making of decisions affecting the young person, and regard should be had to their views and enables consideration to be given to the young person's age, identity, cultural connections, education and health.

[14] Counsel referred to *N v P*[1] a charge was laid against *N* for wounding with intent to cause grievous bodily harm in which the police had not complied with s 245(1)(b) and (c) having failed to consult with the Youth Justice Coordinator and have the

[1] *N v P* (2008) 26 FRNZ 982, [2008] DCR 399 YC.

offending considered by the Family Group Conference prior to the laying of the information. The charge was dismissed and the police were refused leave to re-lay the charge. The police had argued that despite the consented lack of compliance with s 245(1) such a serious charge should not result in a dismissal. In *P v V*[2] Justice Rodney Hansen considered the times for convening and holding Family group Conference, and held that:

> It is no longer helpful to categorise statutory obligations as mandatory or directory. The modern approach is to focus on the cause, nature and consequences of non-compliance for determining where non-compliance lies on the spectrum of possibilities. The implication of non-compliance can then be addressed on the facts of each case, and the charge is dismissed only if warranted by the circumstances.

[15] Further the charge should be dismissed as the delays are such that the young person is prejudiced in terms of timely resolution and the opportunity has been lost of having this matter resolved outside the Court. He is now 17 years of age and has not further offended. He has no other matters or notations in the Youth Court. Had the charge been properly considered at the Family Group Conference any plan would have been completed by now.

[16] The police oppose the application and contend that there are three main issues:

(a) Whether or not the charge was considered by the Family Group Conference held on 6 March 2019 for the purposes of s 245(1)(c) of the Act.

(b) Whether or not the police followed the correct procedure entering the charging document now before the Court.

(c) Whether the charging document should be dismissed if the Court finds there has been non-compliance with the requirement of s 245(1)(c) of the Act.

[2] *P v V* (2006) 25 FRNZ 853; [2006] NZFLR 1057.

[17] Although the Act is silent on the definition of "considered," where there has been a non-agreement there is no issue that matters are routinely returned to the police to determine whether or not to enter a charging document in the Court.

[18] As s 245(1)(a) and (b) of the Act are not in dispute, the police submit that s 241(c) of the Act has been satisfied for the following reasons:

(a) A Family Group Conference was held on 26 August 2019 to consider the matter before the Court and the attendees.

(b) There was a non-agreement.

[19] I accept the police submission that this case is not one where there has been any evidence of negligence or gross inefficiency on the Youth Justice Co-ordinator. The charge is a serious one. The police allege that the young person kicked the victim in the head and posted the incident on social media.

[20] The Family Group Conference was held pursuant to s 247(c) of the Act and the list of attendees recorded, which included the young person and his parents and the victim's mother. There was a non-agreement recorded by the Youth Justice Coordinator and the Family Group Conference adjourned and reported the matter to the police.

[21] I am satisfied that the procedure in ss 247(c) and 264 of the Act have been complied with in that:

(a) The Family Group Conference was held pursuant to s 247(b) of the Act;

(b) The Youth Justice Coordinator recorded a non-agreement, adjourned the proceedings of the Family Group Conference and reported the matter to the police.

(c) As a result, the police charged the young person.

[22] For these reasons, the application by the young person to have this charge dismissed for non-compliance with s 245(1)(c) of the Act is declined as is the application to dismiss for delay.

J H Lovell-Smith
Youth Court Judge