IN THE YOUTH COURT
AT WAITAKERE

I TE KŌTI TAIOHI
KI WAITĀKERE

CRI-2020-292-000207
[2020] NZYC 660

THE QUEEN
Prosecutor

v

[LF]
[EB]
Young Person

Hearing: 20 November 2020

Appearances: C Piho for the Crown
S Mandeno for the Young Person [LF]
V Letele for the Young Person [EB]

Judgment: 23 December 2020

RESERVED JUDGMENT OF JUDGE L TREMEWAN
(Reasons)

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[1] On 20 November 2020 I presided over a severance application pursuant to s 138(4) of the Criminal Procedure Act 2011 in these proceedings.

[2] I gave a decision severing the forthcoming trials of [EB] and [LF] (which would therefore be retained in the Youth Court jurisdiction) from that which is to be held in the adult Court for [WC]. That decision was made pursuant to s 277 of the Oranga Tamariki Act 1989, and s 138 of the Criminal Procedure Act 2011. The reasons for the decision made now follow.

Background

[3] [WC], [EB] and [LF] are charged with sexual offending against [the complainant]. The offending relates to three separate however consecutive incidents alleged to have occurred [in September] 2019. The complainant was aged 14 years at the time.

[4] [WC] was aged 16 years 3 months at the time of the alleged offending and was around 17 years 5 months at the time of this decision. He is charged with raping the complainant, the most serious of the allegations against any of those young people facing charges in these proceedings.

[5] [EB] was aged 15 years 9 months at the time of the alleged offending and was aged about 16 years 11 months at the time of this decision. He faces two charges of doing an indecent act on the complainant.

[6] [LF] was aged 16 years 9 months at the time of the alleged offending and has just turned 18 years. He is charged with assaulting the complainant with intent to sexually violate her.

[7] [WC] first appeared in the Youth Court in relation to this matter on 17 June 2020.

[8] [EB] first appeared on 26 August 2020. At that appearance the prosecution gave notice that the charges against [EB] be joined with the charge against [WC]

pursuant to s 138(1)(b) of the Criminal Procedure Act 2011. [EB] denied his charges when he appeared on 9 September 2020 and sought to be tried in the Youth Court jurisdiction.

[9] [LF] first appeared on 4 September 2020 when again the prosecution gave notice pursuant to s 138(1)(b) proposing that the charge against [LF] be heard with the charges against [WC] and [EB]. [LF] denied his charge when he appeared on 16 September 2020 also seeking to be tried in the Youth Court.

[10] However, on 6 October 2020, [WC] elected trial by jury and his matters were adjourned for a trial callover and he was transferred to the District Court. He next appears in January for the setting of a trial date.

The legal position

[11] Section 138 Criminal Procedure Act 2011 follows:

138 Trial of different charges together

> (1) The prosecutor may, by notifying the court before which a proceeding is being heard, propose that—
>
> > (a) 2 or more charges against 1 defendant be heard together; or
> >
> > (b) the charges against 1 defendant be heard with charges against 1 or more other defendants.
>
> (2) Despite subsection (1), the prosecutor must seek leave for the charges to be heard together if the notification involves a charge in respect of which the proceedings have been adjourned—
>
> > (a) for trial, if the trial procedure is the Judge-alone procedure; or
> >
> > (b) for trial callover, if the trial procedure is the jury trial procedure.
>
> (3) Unless the court makes an order under subsection (4), charges must be heard together—
>
> > (a) in accordance with any notification given under subsection (1); or
> >
> > (b) if leave is granted under subsection (2).
>
> (4) If the court before which the proceeding is being conducted considers it is in the interests of justice to do so, it may, on its own motion or on the

application of the prosecutor or a defendant, order that 1 or more charges against the defendant be heard separately.

(5) An order under subsection (4) may be made before or during the trial, and,—

(a) if it is made during the course of a Judge-alone trial, the court must adjourn the trial of the charges in respect of which the trial is not to proceed; and

(b) if it is made during the course of a jury trial, the jury must be discharged from giving a verdict on the charges in respect of which the trial is not to proceed.

[12] As can be seen in the relevant statutory provisions, under s 138(3)(a) of the Criminal Procedure Act, the charges against all three young persons must be heard together unless the Court considers it is in the interests of justice to make an order for severance under s 138(4) of the Criminal Procedure Act. This would mean that [EB] and [LF] would also need to face trial in the Adult court instead of the Youth Court.

[13] Section 277(5) of the Oranga Tamariki Act is also relevant in these proceedings, prescribing in this case that [EB] and [LF] must be tried alongside [WC] in the District Court unless the Youth Court in the interests of justice orders otherwise.

[14] Section 277 Oranga Tamariki Act 1989 follows:

277 Provisions applicable where child, young person, or adult jointly charged

(1) If a child or young person is charged with any offence jointly with any other person or persons (whether 1 or more young persons, adults, or children), this section applies.

(2) If a child is jointly charged with any other person or persons, and that child is not charged with murder or manslaughter or does not elect jury trial, that child must be tried in the Youth Court along with any co-defendants who are also not to have a jury trial.

(3) If a child is jointly charged with any other person or persons, and that child is to have a jury trial, that child must be tried in the same court as any co-defendants who are also to have a jury trial.

(4) Subsection (5) applies if a young person is jointly charged with any 1 or more of—

(a) an adult who is to have a jury trial; or

(b) another young person who is to have a jury trial; or

(c) a child who is to have a jury trial.

(5) Subject to subsections (2) and (3), the young person must be tried with the person or persons with whom he or she is jointly charged and who are to have a jury trial, and by the same court that is to try those persons unless the Youth Court, in the interests of justice, orders otherwise.

(6) Subject to subsections (2) and (3), if an adult is jointly charged with 1 or more children or young persons, the following provisions apply:

(a) if any of the co-defendants is to have a jury trial, the adult must be tried with that person in the same court; and

(b) if none of the co-defendants is to have a jury trial, and the adult either does not or is not eligible to elect to be tried by a jury, the adult must be tried with the co-defendants in the Youth Court, unless the Youth Court, in the interests of justice, orders otherwise.

(7) If none of subsections (2), (3), (5), and (6) applies, the persons charged must be tried in the Youth Court by a Youth Court Judge.

(8) In any proceedings to which this section applies, the powers of any Youth Court Judge in respect of any defendant who is not a child or young person are limited to such powers as are exercisable by the Youth Court Judge as a District Court Judge elsewhere than in the Youth Court.

(9) If any defendant, not being a child or young person, is convicted in the Youth Court,—

(a) any sentence imposed or order made must be one that could have been imposed or made if that defendant had been convicted following a trial in the District Court; and

(b) that defendant must for all purposes, including section 184 of the Criminal Procedure Act 2011, be deemed to have been convicted in the District Court.

(10) If an adult is tried with a child or young person in the Youth Court under subsection (6)(b) or (7), the following apply in respect of the adult, with the necessary modifications:

(a) all applicable pre-trial processes under subparts 1 to 3 of Part 3 of the Criminal Procedure Act 2011; and

(b) sections 60 to 62(1), 62(3) to 65, and 116 of that Act (which relate to sentence indications).

(11) This section is subject to sections 272A, 274, and 275.

(12) For the purpose of this section,—

adult includes a person aged 17 years charged with a Schedule 1A offence

young person does not include a person aged 17 years charged with a Schedule 1A offence.

[15] In these proceedings [EB] and [LF] have applied for an order pursuant to s 277(5) that their charges be severed from [WC]'s charge and remain in the Youth Court on the basis that it is in the interests of justice to do so. Neither however object to their charges being tried together in the Youth Court.

[16] The court records that useful guidance was gained from several helpful authoritative judgements which have dealt with similar cases. In *Police v CP and Ors,*[1] Her Honour Judge Malosi when dealing with a severance application for eight young people who were charged with five others, with wounding with intent to cause grievous bodily harm. Her Honour concurred with His Honour Judge Thorburn's decision in *Police v H,*[2] that more weight was to be put on the implied principles and protective factors of the Act (in regard to the arising issues) and that the (Youth Court) jurisdiction should be offered unless there was some good reason not to offer it. Despite twenty people (including the complainant) having to give evidence twice, Her Honour, in offering Youth Court jurisdiction focused particularly on the issue of time delays and the need for youth people to participate in their hearing in a meaningful way.

[17] In terms of the issues relating to timeframes, it is noted that s 5(1)(b)(v) Oranga Tamariki Act, requires that decisions are made and implemented promptly and in a time frame appropriate to the age and development of the child or young person. It is further noted that the earlier corresponding provision from s 5(f) of the Act was amended and the conditional phrase "wherever practicable" was removed. Thus, the court quite simply has important obligations in overseeing prompt and appropriate progressing of youths' matters.

[18] Section 208(h) of the Oranga Tamariki Act (acknowledging the vulnerability of children and young people entitling them to special protection) should also be considered in this regard, along with Article 40(2) of the United Nations Convention of the Rights of the Child (UNCROC) which provides that every child alleged or accused to have infringed penal law has at least the guarantee of having the matter

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[1] *Police v CP and Ors* YC Pukekohe CRN 10257000040, 17 September 2010.
[2] *Police v H* [2004] DCR 97.

determined without delay by competent independent and impartial authority or judicial body in a fair hearing according to law.

[19] Section 25(i) of the NZ Bill of Rights Act also provides that everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights: "(i) the right in the case of a child to be dealt with in a manner that takes into account the child's age".

Reasons for decision

[20] As already noted, the conclusion reached by the court in this application was that the interests of justice were better served by [EB] and [LF] having a separate Youth Court trial, separate from [WC]'s trial in the adult court.

[21] It is accepted that there are of course competing interests. The court well appreciates that ordering separate trials means that there has to be two trials rather than one trial. Logistically this would likely involve more work for those involved and also mean that a very small number of witnesses including the complainant would be required to give evidence twice.

[22] While the Crown argued that it would be artificial to separate out the factual allegations between two separate hearings, the court considered that this would not in fact be unduly difficult. Although it is said that the events occurred at the same venue on the same occasion and in the same room, each of the incidents were separate from one another. It is also noted again that the charges faced are different for each of those charged (as well, obviously, as to what would need to be proved).

[23] The evidence as to what happened would primarily be called from those who were present being the complainant and in each separate case, the alleged offender. Also, in terms of [EB] and [LF] their two trials would still be heard together so in fact it would merely be [WC] whose case would be separately heard.

[24] Furthermore, it is noted that, in terms of the sequence of the different allegations, it was [WC]'s whose was first in time, so hearing those involving [EB]

and [LF] together would still allow for some connectedness in the flow of that evidence in the same hearing noting those allegations were consecutive.

[25] Regarding the issue of prosecution witnesses needing to give the same evidence at two separate trials, it is noted that this affects a relatively small number of perhaps three or four witnesses, though of course for the complainant in particular this could be very difficult. However, this can be significantly mitigated by the fact that the evidence would be for two much shorter periods than one more extended and comparatively lengthy period during which these witnesses would be subjected to cross-examination by several lawyers. Moreover, to have a hearing in the comparatively much less formalistic setting of the Youth Court than in the District Court with a jury also present would likely be preferable for all witnesses, and especially so for the complainant who is a youth herself.

[26] A significant issue in the court's consideration relates to time frames, first noting that the whole tenor of statutory provisions relating to young people facing hearings in the criminal justice system is that matters should not be unduly protracted and dealt with within time frames that have meaning for a young person (as earlier referenced).

[27] Already there has been a lengthy delay in terms of when the offending allegedly occurred in [September] 2019. At the time this jurisdictional decision was made, already over year has passed. A hearing in the Youth Court for [EB] and [LF] can likely be held in the first quarter of 2021. However, a trial in the District Court would not likely be heard as a firm fixture until the end of 2021 which would mean than more than two years could have passed by then since the time giving rise to the allegations.

[28] Not only would this involve much greater delay, but, in the event that the charges were proved against [EB] and/or [LF] any steps towards accountability and rehabilitation could be taken far sooner and potentially to greater effect by matters being progressed in the Youth Court whereas waiting for trial in the District Court in effect means that no such steps are taken under the auspices of the court for over two years since the original incident. The Crown conceded in the hearing that if this was

so, it would be a very significant period after the offending had occurred within which no meaningful response would be taken.

[29] Another very important and related consideration relates to the available timeframes within the Youth Court jurisdiction to be undertaking any plans or Orders were charges proved, particularly in the case of [LF] who turned 18 on [details deleted]. While the Crown submitted that in respect of [LF] if found guilty of his charge at trial there remained a reasonable possibility that there would still be time for [LF] to serve orders under s 283 before he turned 19 on [date deleted] 2021 the court does not consider this is be a very realistic possibility.

[30] A further issue which favoured a trial in the Youth Court related to [EB], for whom there is evidence of a low cognitive function with a likely corresponding need for a communication assistant. Although, of course, arrangements can be made for this to be provided in the context of a jury trial with breaks in the hearing of the evidence also being accommodated, the court considers that these sorts of arrangements can be managed more effectively and comfortably in the different environment of the Youth Court. Keeping a jury trial waiting while breaks are taken to accommodate and manage such issues is more potentially problematic and pressuring on parties than the alternative scenario in the Youth Court.

[31] A further issue which was raised on behalf of [LF] was that his name is a family name which is shared by his relation whose infamy for past criminal offending is still very, well known in the community. The concern raised on behalf of [LF] is that jurors might well make an adverse association and conclusion because of his name. Even if a judge made a direction against doing that, that direction itself could draw attention to that matter.

[32] In terms of prejudice, it was also argued on behalf of [EB] and [LF] that [WC]'s more serious charge, along with likely reference to such matters as his apparent gang associations (which might emerge from the surrounding narrative) could cause there to be a flow-on prejudice to their positions, by inference or implication.

[33] Though noted, even without these additional matters suggesting that there is a risk prejudice being raised, the court has been satisfied that severance with separate trials is in the interests of justice.

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Judge L Tremewan
District Court Judge

Date of authentication: 23/12/2020
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.