EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

NOTE: NO PUBLICATION OF A REPORT OF THIS PROCEEDING IS PERMITTED UNDER S 438 OF THE ORANGA TAMARIKI ACT 1989, EXCEPT WITH THE LEAVE OF THE COURT THAT HEARD THE PROCEEDINGS, AND WITH THE EXCEPTION OF PUBLICATIONS OF A BONA FIDE PROFESSIONAL OR TECHNICAL NATURE THAT DO NOT INCLUDE THE NAME(S) OR IDENTIFYING PARTICULARS OF ANY CHILD OR YOUNG PERSON, OR THE PARENTS OR GUARDIANS OR ANY PERSON HAVING THE CARE OF THE CHILD OR YOUNG PERSON, OR THE SCHOOL THAT THE CHILD OR YOUNG PERSON WAS OR IS ATTENDING. SEE http://www.legislation.govt.nz/act/public/1989/0024/latest/DLM155054.html

IN THE YOUTH COURT
AT WHANGAREI

I TE KŌTI TAIOHI
KI WHANGĀREI-TERENGA-PARĀOA

CRI-2020-288-000020
[2020] NZYC 396

NEW ZEALAND POLICE
Prosecutor

v

[JH]
[RH]
Young Persons

Hearing: 4 August 2020

Appearances: Sergeant S Wilkes for the Prosecutor
D Sayes for the Young Person [JH]
D Whitehead for the Young Person [RH]

Judgment: 17 September 2020

RESERVED JUDGMENT OF JUDGE G L DAVIS

[1] [JH] and [RH] are brothers. They have each been charged with wounding with intent to wound in accordance with s 188(2) of the Crimes Act 1961. They are each youths and appear in the Youth Court jurisdiction.

[2] Each of [JH] and [RH] were arrested and brought before the Court. They each challenge the validity or the lawfulness of the arrest.

[3] Prior to their arrest, neither [JH] or [RH] had come to police attention. [JH] was 17 when he was arrested. He is now 18 years of age. [RH] was 15 when he was arrested. He is now 16 years of age.

Background

[4] The general background to the offending is that [in early] 2020 it is alleged that an altercation took place on [street name deleted – street 1] in [suburb A] sometime around 6.30 pm. During the course of that altercation it is alleged [name deleted – the complainant] was wounded. The address at which the altercation took place shares a common boundary with the property owned by [JH] and [RH]'s [close family member]. The evidence that I heard was not clear as to the precise location of the altercation and I have used the reference to an address purely for convenience sake.

[5] The police were called to the address. By the time the police arrived at the address, [RH] and [JH] had left the scene. However, their mother, [UT], was outside [RH] and [JH]'s [close family members'] house sitting in her [vehicle]. The police made general enquiries at the scene and [Sergeant A] approached [UT]. The evidence was that there was a lot of commotion and hostility at the scene when the police arrived.

[6] Accounts differed as to whether the hostility was directed by [the complainant] and his supporters toward [UT], or whether there was mutual hostility. Nothing turns

on that point. [UT] was described as being cooperative with the police and polite. The police asked her to leave the scene as her presence was causing some difficulty with [the complainant] and his supporters. I did not get the impression that [UT] was being asked to leave the scene because of her behaviour, but rather it was a pragmatic decision by the police to de-escalate the hostility at the scene.

[7] The alleged crime scene was secured by the police and [Sergeant A] then did *areas* around [street 1]. *Areas* were described as being police speak for a search. [Constable B] was looking for [JH] and [RH]. He did not find either of them. He then went to [JH] and [RH]'s house on [street 2].

[8] By the time [Sergeant A] arrived at the [street 2] address [JH] and [RH] were home. According to his notes he arrived at about 7.10 pm.

[9] [Sergeant A] approached the door and [JH] answered his knocks. [Sergeant A] asked [JH] if his mum, [UT], was home. [JH] was described as being pleasant and cooperative throughout his initial discussions with [Sergeant A].

[10] From this point the evidence of the police and the position of the young people differs significantly. Counsel for [JH] says that [JH] was asked to go and get his mother. After a brief discussion between [Sergeant A], [JH] and his mother, [JH] was left with [Sergeant A] for approximately 10 minutes and [JH] was questioned by the sergeant.

[11] The police deny any questioning of [JH] took place. The police acknowledge there was some general discussions between [JH] and his mother, but the police say those discussions were only to explain why the police were at the [street 2] address in the first place. For reasons that will become apparent I did not need to determine which version of events I prefer.

[12] Eventually [RH] came to the door. Again there are differences between the police version of events as to how and why [RH] came to the door and the version of events put forward on the young people's behalf. What is not in dispute is that [RH] was also cooperative throughout the visit by the police.

[13] [JH] and [RH] were each asked to accompany the police to the police station in [location A]. It is not in dispute that each of [JH] and [RH] went without incident to the police car. They were each asked to get into the police car and did so again without incident.

[14] It is not in dispute that the police asked each of [JH] and [RH] to accompany them to the police station. It does not appear that either [JH] or [RH] individually or together were advised that they did not have to accompany [Sergeant A] to the police station. It does not appear that [JH] or [RH], again either individually or together, were given any cautions pursuant to the New Zealand Bill of Rights Act 1990 in either language appropriate to their age, or in any other form for that matter.

[15] Counsel for [JH] raised with [Sergeant A] whether [UT] was asked to accompany [RH] and [JH] to the [Police Station] as a nominated adult. Once again, the evidence between the police and the young people differs on this point. [UT] gave evidence and said she was never asked to accompany either [JH] or [RH] to the police station as a nominated adult. In contrast [Sergeant A] says this question was specifically raised with [UT], however, [UT] said she could not attend as she had a young baby to care for.

[16] [Sergeant A]'s evidence was that he "…100 per cent asked her…" when questioned on this point.[1] The sergeant's evidence went further to say: "There's an obligation when we do speak to young persons to have a nominated person and/or a lawyer present, so I wanted to cover that off."[2]

[17] While it is good practice to do so, [Sergeant A] did not make any notes of the discussions between [JH] and [RH] or their mother while he was at the [street 2] address. The first formal record [Sergeant A] made was at the [Police Station] on 29 April 2020, some two months after the event.

[18] I am satisfied that [JH] and [RH] voluntarily went to the [Police Station] on the basis that they were to be returned to their address by [Sergeant A] or by another police

[1] Notes of Evidence page 31, line 21.
[2] Notes of Evidence page 31, line 28.

officer. I am also satisfied that each of [JH] and [RH] were entirely cooperative with [Sergeant A] throughout his initial discussions with them individually, with them collectively, and with [UT] at [street 2].

[19] In other words, I am satisfied that at that point in time there was no expectation on the part of the police, [JH] and [RH], or any other, that there would be anything other than the two boys being returned home.

The police car

[20] Having got into the police car, [JH] and [RH] began their journey from [street 2] to the police station in central [location A].

[21] The evidence I heard was that on the way to the police station [Sergeant A] received a phone call from [Constable B]. The phone call lasted no more than a couple of minutes. [Constable B] had taken a statement from the complainant and as a result of that statement [Constable B] rang [Sergeant A]. Following the phone call it appears the sergeant formed the view that: "They may be looking at a possible injury or wounding charge."[3] The evidence-in-chief was that the identity of the alleged offenders was not at issue.

[22] In the sergeant's evidence-in-chief he said:[4]

> I assessed the information that I had available to me and determined that voluntarily coming to the police station was not appropriate in this situation. I decided to place both [JH] and [RH] under arrest for assault. This was done to prevent re-offending and my decision was based on several factors: [UT] advises she does not have control of the boys and that they often roam the [suburb A] area on their own; a serious assault had just occurred involving [JH] and [RH] which had left an adult male with injuries; both [JH] and [RH] were currently suspects in another serious assault where an elderly male had been assaulted in the [suburb A] area whilst walking his dog and the verbal exchanges I witnessed on the street indicated a lot of hate and indicated further altercations were likely. I believed it was likely that further offences would occur if the boys were not dealt with appropriately by way of arrest based on previous behaviour and also the current heightened situation.
>
> To further justify the arrest, I believe that bail conditions needed to be imposed on the boys to prevent further offending. Bail conditions needed to be

[3] Notes of Evidence Page 34, lines 19 & 20.
[4] Read from a prepared statement by [Sergeant A] with the consent of Counsel.

> imposed through the court system and could not have been achieved by way of a summons.

[23] Between 20 to 30 seconds after the phone call from [Constable B], [Sergeant A] arrested each of [JH] and [RH]. The arrest took place while [JH] and [RH] were in the police car, en-route to the police station.

[24] During cross-examination the sergeant confirmed that it was the contents of the phone call that "turned it over the top" and convinced him to arrest each of [JH] and [RH].[5]

[25] In his evidence [Sergeant A] said the single ground for arresting each of [JH] and [RH] was "to prevent re-offending".[6] From that exchange I must be invited to infer that the sergeant formed the view that the arrest of [JH] was necessary to prevent him from re-offending. Entirely independently of any decision about [JH], I must also be invited to infer that the sergeant also formed the view that it was necessary to arrest [RH] to prevent him from re-offending.

[26] The sergeant formed the view that an arrest was necessary because [UT] could not control either or each of [JH] and [RH]. They each tended to roam the [suburb A] neighbourhood against [UT]'s wishes, the sergeant said. [UT] disputed saying this to the sergeant in her evidence. Unlike [Sergeant A], [UT] made contemporaneous notes of what occurred on 24 February. While her notes did not deal with the suggestion she could not control her boys. I do not need to find whose evidence I prefer on this point for reasons that will become clear later in this decision.

[27] [UT] was not phoned by [Sergeant A] following the arrest. That took place at the police station.

---

[5] Notes of Evidence Page 47, line 1
[6] Notes of Evidence Page 36, lines 20.

The police station

[28] Upon arrival at the police station a youth justice checklist form (POL 388) was completed by [Constable C] for [JH]. Under the heading "D: Arrest" the following grounds were circled as reasons to justify the arrest:

(a) to ensure appearance before the Court;

(b) to prevent CYP committing further offences;

(c) to prevent loss/destruction of evidence;

(d) to prevent interference with witnesses; and

(e) a summons will not achieve "the above".

[29] Similarly for [RH], a youth justice checklist form, (POL 388) was also completed. [Constable B] completed [RH]'s form. Under the heading "D: Arrest" the following grounds were circled as reasons to justify the arrest:

(a) to ensure appearance before the Court;

(b) to prevent CYP committing further offences;

(c) to prevent loss/destruction of evidence;

(d) to prevent interference with witnesses; and

(e) a summons will not achieve "the above".

[30] For [RH] an additional ground was used to justify [RH]'s arrest, namely:

> Where reasonable cause to suspect a category 4 offence or category 3 offence for which the maximum penalty available is or includes imprisonment for life or at least 14 years; AND believe on reasonable grounds that the arrest is required in public interest.

[31] At the police station [Constable C] completed the report to the Commissioner of Police following [JH]'s arrest. That report must be furnished to the Commissioner of Police within three days of a young person's arrest. The report must be furnished by the arresting officer. It was not.

[32] In [JH]'s case, the report to the Police Commissioner was completed by [Constable C]. The grounds for the arrest were described in the report to the Commissioner as being:

(a) to ensure appearance before the Court;

(b) to prevent further offending; and

(c) to prevent interference with witnesses.

[33] In [RH]'s case, the report to the Police Commissioner was completed by [Constable B]. Once again, the grounds for the arrest were described in the report to the Commissioner as being:

(a) to ensure appearance before the Court;

(b) to prevent further offending; and

(c) to prevent interference with witnesses.

[34] In contrast, during the cross-examination of [Sergeant A], the sergeant confirmed he formed the view that arresting each of [JH] and [RH] would strengthen their rights as it made the process more transparent.[7] When pressed during cross-examination the sergeant could not explain how the arrest process would strengthen each of [JH] and [RH]'s whanau unit.

[7] Notes of Evidence pages 39 and 40.

The Law

[35] A young person may be brought before the Youth Court in one of two ways. The first is by utilising the procedures set out in s 245 of the Oranga Tamariki Act 1989 ("the Act"), and then only after an intention to charge family group conference has been convened and held. The second is by way of an arrest of the young person.

[36] In this case each of [JH] and [RH] were arrested. The issue for the Court to determine is whether that arrest was lawful. In the event the arrest was lawful the matter can proceed for each of [JH] and [RH] down the usual pathway prescribed in the Youth Court.

[37] In the event the arrest was not lawful, I must determine whether the police can continue the process against [JH] and [RH] by way of the procedure prescribed in s 245 of the Act.

[38] The starting point is s 214 of the Act which sets out the process by which a young person may be arrested without warrant. The section places significant restrictions on the power to arrest and provides:

> **214 Arrest of child or young person without warrant**
>
> (1) Subject to section 214A and sections 233 and 244, where, under any enactment, any enforcement officer has a power of arrest without warrant, that officer shall not arrest a child or young person pursuant to that power unless that officer is satisfied, on reasonable grounds,—
>
> (a) that it is necessary to arrest that child or young person without warrant for the purpose of—
>
> (i) ensuring the appearance of the child or young person before the court; or
>
> (ii) preventing that child or young person from committing further offences; or
>
> (iii) preventing the loss or destruction of evidence relating to an offence committed by the child or young person or an offence that the enforcement officer has reasonable cause to suspect that child or young person of having committed, or preventing interference with any witness in respect of any such offence; and

(b) where the child or young person may be proceeded against by way of summons, that proceeding by way of summons would not achieve that purpose.

(2) Nothing in subsection (1) prevents a constable from arresting a child or young person without warrant on a charge of any offence where—

(a) the constable has reasonable cause to suspect that the child or young person has committed a category 4 offence or category 3 offence for which the maximum penalty available is or includes imprisonment for life or for at least 14 years; and

(b) the constable believes, on reasonable grounds, that the arrest of the child or young person is required in the public interest.

(3) Every enforcement officer who arrests a child or young person without warrant shall, within 3 days of making the arrest, furnish a written report—

(a) where that enforcement officer is a constable, to the Commissioner of Police:

(b) where that enforcement officer is a traffic officer who is a Police employee who is not a constable, to the Commissioner of Police:

(c) where that enforcement officer is an officer or employee of the public service, to the chief executive of the department of which that person is an officer or employee:

(d) where that enforcement officer is an officer of a local authority, to the chief executive of that local authority.

(4) Every report furnished pursuant to subsection (3) in respect of the arrest of any child or young person shall state the reason why the child or young person was arrested without warrant.

[39] However, I am of the view that s 214 of the Act cannot be read merely by reference to that section alone. The section must be read within the broader context of the Act. In July 2019 important changes were made to the Act. Part 1 of the Act contains important purposes, as well as principles to guide all those who exercise any power under the Act. Most importantly, there were amendments to the Act which incorporated the new ss 4A and 7AA, and repealed the previous ss 4 and 5 and replaced those sections with new provisions. In addition to the provisions in the Act, other important documents, including the Treaty of Waitangi and the United Nations Convention on Rights of the Child ("UNCROC"), need to be considered.

[40] Section 4 of the Act provides:

4 Purposes

(1) The purposes of this Act are to promote the well-being of children, young persons, and their families, whānau, hapū, iwi, and family groups by—

(a) establishing, promoting, or co-ordinating services that—

(i) are designed to affirm mana tamaiti (tamariki), are centred on children's and young persons' rights, promote their best interests, advance their well-being, address their needs, and provide for their participation in decision making that affects them:

(ii) advance positive long-term health, educational, social, economic, or other outcomes for children and young persons:

(iii) are culturally appropriate and competently provided:

(b) supporting and protecting children and young persons to—

(i) prevent them from suffering harm (including harm to their development and well-being), abuse, neglect, ill treatment, or deprivation or by responding to those things; or

(ii) prevent offending or reoffending or respond to offending or reoffending:

(c) assisting families, whānau, hapū, iwi, and family groups to—

(i) prevent their children and young persons from suffering harm, abuse, neglect, ill treatment, or deprivation or by responding to those things; or

(ii) prevent their children or young persons from offending or reoffending or respond to offending or reoffending:

(d) assisting families and whānau, hapū, iwi, and family groups, at the earliest opportunity, to fulfil their responsibility to meet the needs of their children and young persons (including their developmental needs, and the need for a safe, stable, and loving home):

(e) ensuring that, where children and young persons require care under the Act, they have—

(i) a safe, stable, and loving home from the earliest opportunity; and

(ii) support to address their needs:

(f) providing a practical commitment to the principles of the Treaty of Waitangi (te Tiriti o Waitangi) in the way described in this Act:

(g) recognising mana tamaiti (tamariki), whakapapa, and the practice of whanaungatanga for children and young persons who come to the attention of the department:

(h) maintaining and strengthening the relationship between children and young persons who come to the attention of the department and their—

(i) family, whānau, hapū, iwi, and family group; and

(ii) siblings:

(i) responding to alleged offending and offending by children and young persons in a way that—

(i) promotes their rights and best interests and acknowledges their needs; and

(ii) prevents or reduces offending or future offending; and

(iii) recognises the rights and interests of victims; and

(iv) holds the children and young persons accountable and encourages them to accept responsibility for their behaviour:

(j) assisting young persons who are or have been in care or custody under the Act to successfully transition to adulthood in the ways provided in the Act.

(2) In subsection (1)(c) and (d), assisting, in relation to any person or groups of persons, includes developing the capability of those persons or groups to themselves do the things for which assistance is being provided.

[41] Section 4A of the Act provides:

4A Well-being and best interests of child or young person

(1) In all matters relating to the administration or application of this Act (other than Parts 4 and 5 and sections 351 to 360), the well-being and best interests of the child or young person are the first and paramount consideration, having regard to the principles set out in sections 5 and 13.

(2) In all matters relating to the administration or application of Parts 4 and 5 and sections 351 to 360, the 4 primary considerations, having regard to the principles set out in sections 5 and 208, are—

(a) the well-being and best interests of the child or young person; and

(b) the public interest (which includes public safety); and

(c) the interests of any victim; and

(d) the accountability of the child or young person for their behaviour.

[42] Section 5 of the Act provides:

5 Principles to be applied in exercise of powers under this Act

(1) Any court that, or person who, exercises any power under this Act must be guided by the following principles:

(a) a child or young person must be encouraged and assisted, wherever practicable, to participate in and express their views about any proceeding, process, or decision affecting them, and their views should be taken into account:

(b) the well-being of a child or young person must be at the centre of decision making that affects that child or young person, and, in particular,—

(i) the child's or young person's rights (including those rights set out in UNCROC and the United Nations Convention on the Rights of Persons with Disabilities) must be respected and upheld, and the child or young person must be—

(A) treated with dignity and respect at all times:

(B) protected from harm:

(ii) the impact of harm on the child or young person and the steps to be taken to enable their recovery should be addressed:

(iii) the child's or young person's need for a safe, stable, and loving home should be addressed:

(iv) mana tamaiti (tamariki) and the child's or young person's well-being should be protected by recognising their whakapapa and the whanaungatanga responsibilities of their family, whānau, hapū, iwi, and family group:

(v) decisions should be made and implemented promptly and in a time frame appropriate to the age and development of the child or young person:

(vi) a holistic approach should be taken that sees the child or young person as a whole person which includes, but is not limited to, the child's or young person's—

(A) developmental potential; and

(B) educational and health needs; and

(C) whakapapa; and

(D) cultural identity; and

(E) gender identity; and

(F) sexual orientation; and

(G) disability (if any); and

(H) age:

(vii) endeavours should be made to obtain, to the extent consistent with the age and development of the child or young person, the support of that child or young person for the exercise or proposed exercise, in relation to that child or young person, of any power conferred by or under this Act:

(viii) decisions about a child or young person with a disability—

(A) should be made having particular regard to the child's or young person's experience of disability and any difficulties or discrimination that may be encountered by the child or young person because of that disability; and

(B) should support the child's or young person's full and effective participation in society:

(c) the child's or young person's place within their family, whānau, hapū, iwi, and family group should be recognised, and, in particular, it should be recognised that—

(i) the primary responsibility for caring for and nurturing the well-being and development of the child or young person lies with their family, whānau, hapū, iwi, and family group:

(ii) the effect of any decision on the child's or young person's relationship with their family, whānau, hapū, iwi, and family group and their links to whakapapa should be considered:

(iii) the child's or young person's sense of belonging, whakapapa, and the whanaungatanga responsibilities of their family, whānau, hapū, iwi, and family group should be recognised and respected:

(iv) wherever possible, the relationship between the child or young person and their family, whānau, hapū, iwi, and family group should be maintained and strengthened:

(v) wherever possible, a child's or young person's family, whānau, hapū, iwi, and family group should participate in decisions, and regard should be had to their views:

(vi) endeavours should be made to obtain the support of the parents, guardians, or other persons having the care of the child or young person for the exercise or proposed exercise, in relation to that child or young person, of any power conferred by or under this Act:

(d) the child's or young person's place within their community should be recognised, and, in particular,—

(i) how a decision affects the stability of a child or young person (including the stability of their education and the stability of their connections to community and other contacts), and the impact of disruption on this stability should be considered:

(ii) networks of, and supports for, the child or young person and their family, whānau, hapū, iwi, and family group that are in place before the power is to be exercised should be acknowledged and, where practicable, utilised.

(2) Subsection (1) is subject to section 4A.

[43] Section 7AA of the Act provides:

7AA Duties of chief executive in relation to Treaty of Waitangi (Tiriti o Waitangi)

(1) The duties of the chief executive set out in subsection (2) are imposed in order to recognise and provide a practical commitment to the principles of the Treaty of Waitangi (te Tiriti o Waitangi).

(2) The chief executive must ensure that—

(a) the policies and practices of the department that impact on the well-being of children and young persons have the objective of reducing disparities by setting measurable outcomes for Māori children and young persons who come to the attention of the department:

(b) the policies, practices, and services of the department have regard to mana tamaiti (tamariki) and the whakapapa of Māori children and young persons and the whanaungatanga responsibilities of their whānau, hapū, and iwi:

(c) the department seeks to develop strategic partnerships with iwi and Māori organisations, including iwi authorities, in order to—

(i) provide opportunities to, and invite innovative proposals from, those organisations to improve outcomes for Māori children, young persons, and their whānau who come to the attention of the department:

(ii) set expectations and targets to improve outcomes for Māori children and young persons who come to the attention of the department:

(iii) enable the robust, regular, and genuine exchange of information between the department and those organisations:

(iv) provide opportunities for the chief executive to delegate functions under this Act or regulations made under this Act to appropriately qualified people within those organisations:

(v) provide, and regularly review, guidance to persons discharging functions under this Act to support cultural competency as a best-practice feature of the department's workforce:

(vi) agree on any action both or all parties consider is appropriate.

(3) One or more iwi or Māori organisations may invite the chief executive to enter into a strategic partnership.

(4) The chief executive must consider and respond to any invitation.

(5) The chief executive must report to the public at least once a year on the measures taken by the chief executive to carry out the duties in subsections (2) and (4), including the impact of those measures in improving outcomes for Māori children and young persons who come to the attention of the department under this Act and the steps to be taken in the immediate future.

(6) A copy of each report under subsection (5) must be published on an Internet site maintained by the department.

[44] In addition, Part 5 of the Act sets out specific provisions relating to youth justice matters.

[45] Section 208 of the Act provides:

208 Principles

(1) A court or person exercising powers under this Part, Part 5, or sections 351 to 360 must weigh the 4 primary considerations described in section 4A(2).

(2) When weighing those 4 primary considerations, the court or person must be guided by, in addition to the principles in section 5, the following principles:

(a) that, unless the public interest requires otherwise, criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter:

(b) that criminal proceedings should not be instituted against a child or young person in order to provide any assistance or services needed to advance the well-being of the child or young person, or their family, whānau, hapū, or family group:

(c) that any measures for dealing with offending by children or young persons should be designed—

(i) to strengthen the family, whanau, hapu, iwi, and family group of the child or young person concerned; and

(ii) to foster the ability of families, whanau, hapu, iwi, and family groups to develop their own means of dealing with offending by their children and young persons:

(d) that a child or young person who commits an offence or is alleged to have committed an offence should be kept in the community so far as that is practicable and consonant with the need to ensure the safety of the public:

(e) that a child's or young person's age is a mitigating factor in determining—

(i) whether or not to impose sanctions in respect of offending by a child or young person; and

(ii) the nature of any such sanctions:

(f) that any sanctions imposed on a child or young person who commits an offence should—

(i) take the form most likely to maintain and promote the development of the child or young person within their family, whanau, hapu, and family group; and

(ii) take the least restrictive form that is appropriate in the circumstances:

(fa) that any measures for dealing with offending by a child or young person should so far as it is practicable to do so address the causes underlying the child's or young person's offending:

(g) that—

(i) in the determination of measures for dealing with offending by children or young persons, consideration should be given to the interests and views of any victims of the offending (for example, by encouraging the victims to participate in the processes under this Part for dealing with offending); and

(ii) any measures should have proper regard for the interests of any victims of the offending and the impact of the offending on them:

(h) that the vulnerability of children and young persons entitles a child or young person to special protection during any investigation relating to the commission or possible commission of an offence by that child or young person.

(3) If a court or person is exercising a power for the purpose of resolving alleged offending or offending by a child or young person, the court or person must be guided by, in addition to the principles listed in subsection (2) and section 5, the following principles:

(a) the principle that reasonable and practical measures or assistance should be taken or provided to support the child or young person to prevent or reduce offending or reoffending; and

(b) the principle that the child or young person should be referred to care, protection, or well-being services under this Act, if those services would be of benefit to them.

(4) Subsection (3) does not apply to a Police employee unless the employee is employed as a specialist in resolving offending by children and young persons.

[46] Much of s 208 of the Act was amended or repealed by the 1 July 2019 amendments to the Act. What is apparent by the numerous amendments to the Act was that significant change to the way in which young people were treated in court, and in the case of youth justice matters, out of court, came into force.

[47] In addition to the provisions in the Act I have made reference to the United Nations Convention on Rights of the Child or UNCROC to which New Zealand is also

a signatory.[8] Not only is New Zealand a signatory to the Convention on Rights of the Child the Convention was ratified by New Zealand on 6 April 1993. Further to that, UNCROC is specifically incorporated into the Act.[9]

[48] Article 37 of UNCROC provides:

> **Article 37**
>
> States Parties shall ensure that:
>
> (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
>
> (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
>
> (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
>
> (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

[49] Te Tiriti o Waitangi (or the Treaty of Waitangi), the Act and UNCROC are not identical in their terms, but in my view nor are they in conflict. What is clear is that each document sets minimum standards of conduct and benchmarks minimum standards that every young person is entitled to. These rights are not something that are optional, or something that may be aspired to as a best practice by police, Oranga Tamariki, or Judges for that matter – they are mandatory provisions, rights and protections afforded to every young person.

---

[8] *United Nations Convention on the Rights of the Child*, GA Res 44/25 (1989)
[9] Oranga Tamariki Act 1989, s 5.

[50] If these minimum standards are to be given weight by Parliament, the Courts must equally give the provisions weight.

[51] I am of the view that [Sergeant A] was exercising a function pursuant to the provisions of the Act when he began investigating the incident at [street 1]. Once he became aware that [JH] and [RH] were young people the additional safeguards set out in the Act ought to have been in the forefront of his mind. In my view they were not. What is clear is that [Sergeant A] paid little more than lip service to his obligations that are set out in the Act. Those obligations import obligations to give effect to the principles of the Treaty of Waitangi, Te Tiriti o Waitangi and UNCROC.

[52] Furthermore, I am of the view that [Sergeant A] was exercising a power pursuant to the provisions of the Act when he arrested each of [JH] and then [RH]. Again, the additional safeguards set out in the Act ought to have been in the forefront of his mind, and again, in my view, they were not.

[53] One of the principal objectives of the Act, affirmed by UNCROC is to divert young people away from the Court process. Section 245 discourages an over-readiness to bring prosecutions into the Court without first exploring out of court alternatives to prosecution. When an arrest is considered necessary there are a number of preconditions that must be satisfied. An officer must, however, turn their mind to consider whether an arrest is necessary. The belief formed by the officer must be on reasonable grounds. In other words, it is not an unfettered right on the part of the officer to arrest a young person.

[54] Section 214 of the Act prescribes the grounds as follows:

> (a) to ensure the appearance of the young person before the Court;
>
> (b) to prevent the young person from committing further offences; and
>
> (c) to prevent the loss or destruction of evidence.

[55] In addition, the officer must satisfy themselves that proceeding by way of a summons would not achieve the purposes listed above.

[56] From the evidence that I heard, by the time [RH] and [JH] were in the police car that:

(a) The crime scene was secure.

(b) The principal complainant had been interviewed and a statement was taken.

(c) [JH] and [RH]'s whereabouts was known. They were residing with their mother at [street 2].

(d) Each of [JH] and [RH] were cooperating with the police and any police investigations.

(e) [JH] and [RH]'s mother was encouraging each of [JH] and [RH] to cooperate with the police.

(f) [JH] and [RH]'s mother was herself cooperating with the police when asked.

(g) Each of [JH] and [RH] were prepared to go with the police to the police station to give their side of the story, or their version of events.

(h) There was no suggestion that either [JH] or [RH] would abscond from their home address.

(i) The seriousness of the charges and the matter being investigated by the police had not been fully established.

(j) Neither [JH] nor [RH] had previously come to police attention, nor had they been charged with any previous offences.

(k) At best, each of [JH] and [RH] were to be the subject of further enquiries by the police, in respect of another matter.

[57] The sergeant's evidence was that it was the content of the phone call in the police care that "turned his decision over the top" and to arrest [JH] and [RH]. It appears that the sergeant has not turned his mind to the need to get any explanation from either [JH] or [RH] about what may have occurred as they perceived it. The sergeant does not appear to have considered the possibility that the boys may each have acted in self defence.

[58] Returning to what was known to [Sergeant A] at the time of the arrest, I am not satisfied that there were reasonable grounds for [Sergeant A] to have arrested [JH]. Furthermore, I am not satisfied that there were reasonable grounds for [Sergeant A] to have arrested [RH]. It does not appear from the evidence that I have seen that the sergeant turned his mind to the need to arrest each of [JH] and [RH] individually. Neither does it appear that the sergeant turned his mind to whether those matters set out in s 214(1)(a) of the Act could be achieved by way of proceeding under s 245 of the Act.

[59] It does not appear as though the sergeant turned his mind to considering whether the matters set out in s 214(1)(a) of the Act could be achieved by proceeding by way of a summons. Although he makes reference to not being able to proceed by way of summons in his evidence–in–chief there is little explanation why that could not be the case.

[60] It appears that the motive for the sergeant to arrest [JH] and then to arrest [RH] was to enable court bail conditions to be imposed. That in my view is a misapplication of the Act and is not a mandated ground for arrest.

[61] It does not accord with the provisions of UNCROC. It does not give life to the concept that young people who are alleged to have committed an offence should be kept in the community as far as that is practical. It does not give life to the Treaty of Waitangi principle that tamariki are a taonga. It does not give life to the provision in the Act that the vulnerability of children and young persons entitles a child or young person to special protection during any investigation relating to the commission or

possible commission of an offence by that child or young person.[10] The Act does not mention protection, but rather "special protection".

[62] Arresting a young person so that bail conditions can be imposed by the Court does not accord with the concept of mana tamaiti the Act refers to. I cannot see how an arrest purely to enable bail conditions to be imposed would facilitate the protection or recognition of whānau relationships.

[63] Each of [JH] and [RH] spent a night in custody. That is the antithesis of mana tamaiti. It is the antithesis of the protection and recognition of whānau relationships.

[64] [Sergeant A] considered all these matters for no more that 20-30 seconds after the phone call from [Constable B]. Furthermore, he must have used that 20-30 seconds to consider the position for [JH], then independently of that, the position for [RH]. That amounted to not more than 10-15 seconds for each young person.

[65] Furthermore, I am not satisfied that the police have properly discharged their responsibilities to report to the Commissioner of Police. [Sergeant A] was clear that he had arrested each of [JH] and [RH]. It is clear that is so. [Sergeant A] did not fill out either [JH] or [RH]'s Youth Justice checklist. Neither did he complete the report to the Commissioner of Police required by s 214 of the Oranga Tamariki Act 1989.

[66] These reports are statutory requirements directed by Parliament. They are not optional. Once [JH] and [RH] were arrested the onus fell on the sergeant to complete the reports to the Commissioner of Police.

[67] In this case, the evidence satisfies me that the sergeant has acted unlawfully to the extent that he has used the arrest procedure to achieve the aim of imposing court-sanctioned bail conditions.

[68] The sergeant has failed to fill out the mandatory reports to the Commissioner of Police.

---

[10] Oranga Tamariki Act 1989, s 208(h).

[69] Equally significantly, the sergeant did not take any contemporaneous notes of the reasons for the arrests or any interviews with [JH], [RH] or [UT]. That is poor practice in my view.

[70] Weighing these factors up, I take the view that the sergeant did not have reasonable grounds to arrest [JH]. Furthermore, and quite separately from [JH], I take the view that the sergeant did not have reasonable grounds to arrest [RH]. I repeat my earlier view that each arrest was unlawful. The charges each of [JH] and [RH] face are to be dismissed.

[71] I take the view that given the failings I have referenced in this decision, and the recent changes to the Act and bearing in mind the UNCROC provisions, it would be an abuse of process to allow the charges to be re-laid.

Judge GL Davis
Youth Court Judge