**IN THE YOUTH COURT**
**AT CHRISTCHURCH**

**I TE KŌTI TAIOHI**
**KI ŌTAUTAHI**

**CRI-2019-009-001139**
**CRI-2020-209-000037**
**CRI-2019-209-000261**
**CRI-2020-209-000019**
**[2021] NZYC 119**

**THE QUEEN**
Prosecutor

v

**[MK]**
**[JF]**
**[SD]**
**[TS]**
Young Persons

Hearing: 22, 23 24, 26 February 2021

Appearances: S Bicknell for the Crown
N Pointer for [MK]
AG James QSO for [JF]
CD Eason for [SD]
E Bulger for [TS]

Judgment: 29 March 2021

**RESERVED JUDGMENT OF JUDGE B P CALLAGAHN**

## Introduction

[1] [MK], [JF], [SD] and [TS] are all jointly charged with Aggravated Robbery under s 235(b) of the Crimes Act 1961. It is alleged that on [date 1] 2019 at [a park] they robbed [the complainant] of his specialized mountain bike, cap and vape.

[2] [MK] is an adult but because the other three defendants are subject to Youth Court jurisdiction, the hearing is in the Youth Court.

[3] The Crown alleges that at about 6pm on [date 1] 2019, the defendants were part of a joint enterprise to rob the complainant of his property, and that they were together at the time of the robbery and that they each sufficiently participated in the robbery. The Crown maintain that the four defendants approached the complainant at [the park] and used or encouraged the use of violence against the complainant to steal his cap, his vape and his mountain bike. The Crown allege all the defendants planned and participated in the robbery.

[4] There is no doubt that violence was inflicted on the complainant by more than one of the defendants and that his property was taken. The complainant suffered bruising to his left eye and experienced headaches following the assaults.

[5] His bike and cap were later found at [SD]'s home at [address deleted — address 1], but the vape has not been recovered. The evidence is that all the defendants, who knew one another, were at or near the scene of the incident at [the park]. The issue in this case is the involvement and actions of each of the defendants.

## Evidential / Legal issues

[6] The identification of the defendants is a significant issue here. In respect of identification evidence, I remind myself of the need for caution before relying on

identification evidence, and I have regard to s 126 of the Evidence Act 2006. I also remind myself that honest witnesses can be mistaken, and miscarriages of justice arise from incorrect identifications, or more particularly, when it is not proved beyond reasonable doubt that a defendant was the offender.

[7] The Crown must prove the charge against each defendant beyond reasonable doubt. The fact the defendants have chosen not to give or call evidence does not change that. The defendants, apart from [TS], made statements to police via DVD interviews. In the case of [MK] there was a question and answer statement as well. The defendants' statements are only admissible against themselves and not the others. They are properly part of the Crown case and I can give them such weight as is appropriate, just like other aspects of the evidence. I can accept all or part of the evidence and/or reject all or part of the evidence.

[8] To prove an offence under s 235(b) of the Crimes Act 1961, the Crown needs to prove that each defendant was physically present, shared an intention to rob and played an active part in the robbery.[1] Robbery is theft accompanied by violence or threats of violence to any person or property, used to extort the property stolen, or to prevent or overcome resistance to its being stolen.[2]

[9] In respect of aggravated robbery and the involvement of each defendant, the Court of Appeal in *R v Feterika,* helpfully outlined the approach to be taken:[3]

> [32] The result is, as we understand these cases, that the primary issue for the jury, whenever an aggravated robbery is alleged under s 235(1)(b) is whether each accused, and there must always be more than one, is complicit in the joint enterprise. It is not relevant whether under s 66 one may be a principal and another a party. That distinction has no part in the analysis. Section 235(1)(b) is sufficient unto itself.
>
> [33] Two or more persons must be physically present and share an intent to rob, inherent in which is the intent to steal using their collective force should that be called for. Sharing that intent, each must play some definite part to accomplish the design. One may assault or threaten assault and rob and on a s 66 analysis be a principal. Another may be present when the assault happens or threats made, and the robbery is accomplished, and do little more than afford active support. This person may on a s 66 analysis be a party. Under s 235(1)(b) he or she will still be a principal.

[1] Previously s 235 (1)(b).
[2] Section 234(1) Crimes Act 1961.
[3] *R v Feterika* [2007] NZCA 526.

> [34] If, by contrast, two or more persons are present and assault or threaten assault and one robs without the other or others anticipating that or willing it, that will fall short of aggravated robbery under s 235(1)(b). The principal offender will be guilty of the included offence, robbery, and perhaps assault. Any secondary offender may under s 66(1) be a party to the robbery and also be guilty of assault, but not more.

[10] The Court also added in respect of a defendant who was not one of the main participants in the alleged offending:[4]

> [37] In the case of lesser players certainly, but perhaps also sometimes in the case of major players, the Judge will need to clarify for the jury what part that player played actually. The jury will need to know that to find that player guilty of aggravated robbery they must be satisfied beyond reasonable doubt that he or she:
>
> (a) Intended to rob - to steal by violence or threats of violence - knowing that intent to be shared by at least one other person immediately present.
>
> (b) Assaulted or threatened assault, or was immediately present and at least actively encouraged it.
>
> (c) Stole from the person assaulted or threatened, or was immediately present and at least actively encouraged it.

[11] I have taken into account all the evidence, and submissions made by counsel at the hearing.

[12] There are four witnesses to the incident who have given evidence; [two names deleted — the first and second witness], the complainant, and [GB]. Unsurprisingly some of their evidence is not exactly in line with others. I remind myself that it is not uncommon for eyewitnesses to give conflicting views of what occurred and often this can be put down to the trauma or impact of the offending on the witness, the vantage point from which they have seen the offending, and whether or not they were distracted by other events.

[13] I note in *Edwards v R*, the Court of Appeal commented on this very aspect and the role of the fact-finder in respect of such evidence:[5]

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[4] At [37].
[5] *Edwards v R* [2018] NZCA 93 at [19].

> In a criminal trial, particulars of events may vary between witnesses. Traumatic events commonly produce eyewitness error. Here, Messrs Grace and Edwards had similar builds and superficially similar facial appearances, so there was scope for confusion as to which of them was doing what. The essential task for the jurors was to isolate the elements of the offence alleged and ask whether the evidence left them sure as to guilt on each element. Inconsistencies in evidence may leave a juror with uncertainty as to one or more elements. Or it may cause the juror to doubt the reliability or credibility of a witness, so that that witness's evidence is either disregarded or downgraded in addressing the essential task. But after undertaking that exercise the question remains: is a broadly consistent evidential substratum left from which the jury could legitimately be sure of the defendant's guilt?

[14] At the end of the day, it becomes a question as to whether there is a sufficient evidential basis or substratum for the Court to safely conclude that a charge has been proven beyond reasonable doubt.

**Background**

[15] At the time of the alleged offending, [SD] lived at [address 1] with his mother [name deleted]. On [date 1] 2019 [SD]'s girlfriend, [GB], was at [SD]'s place.

[16] [SD] and [GB] had previously agreed to sell [SD]'s vape to the complainant for $42. The complainant had deposited $12 into [GB]'s bank account by internet banking. He contacted [GB] and they agreed to meet at about 6:00 pm at [the park] to complete the transaction.

[17] While [GB] was at [SD]'s place, the other defendants arrived. It appears that it was common knowledge that [GB] was going to meet the complainant and there was some discussion over this transaction and the money that was to be received.

[18] [GB] left [the road that SD lived on] on her own and went to [the park] at 6:00 pm to meet the complainant. The defendants left later and went to [the park]. The evidence suggests that they may have gone on one or two bikes. [SD]'s mother considered that the four defendants left in two groups, [JF] and the person who turned out to be [MK] first and then after this her son [SD] and [TS].

[19] While [GB] was seated on the park bench with the complainant, the defendants arrived, and the complainant was assaulted by some or all of them. It started with him

initially being kicked in the face/head by one of them, and then being kicked and/or punched a number of times by at least one other as well. While he was being assaulted, one of those present searched through the complainant's pockets and took the vape from him that he was holding. [GB] said that it was [JF] who first came up and kicked the complainant in the head and then carried out an assault on him. During the assault, the complainant's vape, bike and cap were taken by one or more of the defendants.

**Discussion - Evidence**

[20] The complainant said that he first noticed the defendants arriving at [the park] out of the corner of his eye and he thought there may have been up to five. Clearly, any description by any of the witnesses, including the [the first two witnesses], that there may have been five people involved is incorrect given it is clear from the evidence that the only people at the incident apart, from [GB] and the complainant, were the four defendants.

[21] The complainant said one of the defendants came up to him and kicked him in the face with a roundhouse kick and then began to assault him. [GB] says this was [JF]. The complainant said he was trying to protect himself and had his arms over his head to protect the sides of his head. He said the assault continued. During the assault somebody was trying to get hold of his vape which he was holding and told him to drop it. That person was searching through his pockets as he was being assaulted.[6]

[22] The complainant said he thought there may have been two or three people assaulting him as the assault continued. He said that based on the timing of the force, there must have been a second person punching him as the original assailant could not have continued to hit him like he did.

[23] [GB] said she was alarmed when [JF] started to assault the complainant, but once she noted the [the first two witnesses]' presence, she thought she could leave the complainant as help was on the way. She said she took off and walked down the railway tracks to a park behind [SD]'s place at [address 1], and then she went home.

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[6] See NOE page 11.

She did not go into [SD]'s place then but returned later that night. It appears that she did not immediately leave.

[24] [The first witness]'s evidence broadly coincides with [GB]'s. She said as she approached the incident there was a female, obviously [GB], standing some distance away. This must have been before [GB] left. [The two witnesses] were driving south past [the park] at the time the assault occurred and witnessed it. [The first witness] said she saw a number of assailants attacking the complainant while he was on the bench seat. She described the incident as an "arms and legs" attack, that is punches and kicks. She wound down her window, and they called out for them to stop and tooted the car horn. They parked the car on the opposite side of [the other road] and both went towards the bench where the assault was occurring.

[25] [The first witness] said that as she approached, all the attackers except one dispersed. The first one to leave rode away on a bike which was standing against a nearby tree. She was unable, at that point, to specifically identify all of the attackers and could not recall the exact number.[7] Her evidence suggests two or three people were attacking the complainant. She said one of them was acting aggressively and went up to the complainant and punched him in the head before taking off on a bike. She described him as "the horrible one". I note in passing, that the complainant's helmet was not taken, although the complainant initially thought it had been. [The first witness] saw it on the ground, she said near where the "the horrible one" person picked the bike up from. The evidence clearly points to this person being [SD] as he admits to assaulting the complainant at this point by punching him twice. He was adamant he did not ride away on the complainant's bike. I am unable to say on the evidence if he left on the complainant's bike, given that [the first witness] described this bike being taken from a different location to where the complainant said he had left his bike and that the defendants may have taken two bikes to the [park]. He said he put it up against the wooden edging board containing the bark mulch, near the front of the bench. It is quite clear that one of the assailants took the bike.

[7] Later she saw [JF] at a bus stop on [a third road] and she identified him as being this first one to leave, see NOE p 98.

[26] [The second witness] said when he saw the assault there was one individual in particular laying into the complainant. He said this person tried to drag the complainant at one stage. He said this individual was a male caucasian, with long curly hair and, he thought, dark grey clothing. He said he saw his face pretty clearly. He did not identify this person. He said the group then started to disperse when he got out of the car, and he saw this main assailant take off on a bike, which is what [the first witness] saw. When he approached the complainant, the complainant said they had taken his phone. He then followed one of the males ([MK]) on foot and focused on him. He agreed that he had not seen [MK] punch or kick the complainant.[8]

[27] [The second witness] kept an eye on [MK], who walked away northwards down [a road] towards [the road that SD lived on]. [The second witness] followed at a distance and was on the telephone to police. Meanwhile [the first witness] took the complainant to her car and followed her husband and [MK] in the car. It appeared the other defendants walked off down the train tracks, and all eventually ended up at [address 1].

[28] [The first witness] then drove up to where [MK] was walking and confronted him. She asked him to turn out his pockets, thinking he might have the complainant's cell phone, which went missing in the attack. It was later discovered lying on the ground by the bench. [MK] denied any wrongdoing and complied with [the first witness]'s request.

[29] [The first witness] and her husband followed [MK] to [address 1] where he entered the property. [The second witness], who was walking, continued his telephone contact with police and reported this. [The two witnesses] remained with the complainant outside the property until after the police had arrived and had spoken with them.

[30] The complainant then went with [the first Constable] and sat in his car outside [address 1]. Police carried out a search and found the complainant's bike and cap in the garage, and the complainant identified them as his. While in the police car, the complainant saw [the second Constable] (then Acting Sergeant) come out with [TS],

[8] NOE, page 127.

who had been arrested for a breach of a curfew. The complainant recognised him as being the one who had searched through his pockets during the incident. He said he told [the first Constable] that this person was one of those who searched through his pockets. [The first Constable's] recollection is that he said to him that he was one of the people who assaulted him.

[31] [SD]'s mother gave evidence and confirmed that the three defendants had been visiting [SD] at her place. She knew [TS] and [JF] but did not know the other defendant, [MK]. [MK] had arrived with [JF] and they had come from Kaiapoi. Obviously, she was wrong to think that they arrived on bikes but that is not a particularly important fact. She did not see [GB] there at all during the afternoon or evening, and her evidence suggests that, as far as she was concerned, [GB] was not there. Clearly that was wrong because [GB] was there. Her evidence suggests she had other matters on her mind that day, so it is understandable that she thought this. She did have other tasks to perform inside, including getting tea ready for her family, and also getting a younger child ready for bed. From time to time she noticed the defendants out in the backyard riding bikes and heard discussions.

[32] She said she overheard the defendants talking about [GB] meeting someone at [the park] and that they should go down there to see what was going on. Some of the defendants were suggesting to [SD] that she was 'hooking up' with him and [SD] said to her at one stage that they were going to go down there. She said she told him she did not think it was a good idea. She felt as if the other defendants were baiting [SD] about [GB] being with the complainant. She said she saw [JF] and [MK] leaving and going down [the other road] towards [the park], and then discovered [SD] and [TS] had also gone. She had said earlier to them, when they were talking about going, that they had better not get into any trouble. She said they came back in two groups and then she discovered the complainant's bike in the garage. Initially the defendants were reluctant to let her enter the garage, but when she finally did, she discovered the stolen bike.

[33] Following the discovery of the stolen bike, she became aware of police outside her place. Upon hearing this, [JF] and [MK] jumped over the rear fence and left the property. Fortuitously, the [the first two witnesses] saw them on [the road that SD

lived on] waiting for a bus to [location deleted], as they were driving home. The [the first two witnesses] recognised the two from the incident and [the second witness] telephoned the police. [The first witness] recognised [JF] as being the first one who fled from the incident on a bike. [A third Constable] eventually stopped the bus and took [JF] and [MK] into custody. At this point [JF] was in dark clothing and the photograph of him taken by [the third Constable] shows dark and reasonably long hair.

[34] [GB]'s evidence is that apart from [JF] assaulting the complainant, she was initially unsure of who else was involved. When pressed she did say that the others must have been involved but was unable to be specific. Her evidence as to the remaining defendants' involvement has been criticised as unreliable and one defence counsel described her evidence as being 'mobile' because she went from being uncertain as to what the others were doing, to effectively agreeing that they must/may have been involved.

[35] Clearly, I have to view her evidence with some circumspection, given that she was originally charged as an offender and the possibility that she was downplaying her involvement. When she was interviewed, she was clearly a suspect and it was suggested that she had waylaid the complainant at [the park], awaiting the arrival of the others who were going to rob him. She denied this. Counsel for the defendants, and particularly Mr James for [JF], criticised her evidence because of her alleged partisan approach in exonerating [SD], and the way she changed her evidence about the others' involvement in the latter part of her interview.

[36] As her evidence unfolded, she appeared to accept that some of the other defendants were involved, but she remained uncertain as to what they may have done. In my view, her description of how the incident occurred, with [JF] starting it, is compelling. The evidence fits in with the complainant's evidence of how the assault started, even though he could not identify his assailants. That is not surprising given that he had never seen them before and that the assault came out of the blue.

[37] [GB]'s inability to be more accurate about the specifics of who did what afterwards, could well be explained by the trauma of the initial assault, and her removing herself from the bench and standing away from it and then eventually

walking away when [the two witnesses] intervened. This fits in with [the first witness]'s evidence that there was a female standing away from the immediate scene when she come upon it.

[38] However, I struggle with the suggestion made by counsel, Mr James in particular, that [GB] somehow concocted her version of events to exonerate [SD] when she met up with him later that evening. While she has not given evidence of the others' specific involvement, one could hardly think she has been complicit in minimising his involvement, when he himself admitted his involvement and said that the others were involved. She was also prepared to accept others were involved.

[39] So I have cautiously examined [GB]'s evidence, but I feel able to rely on it to the extent that [JF] started the assault and then some of the others were involved. [GB]'s evidence about [JF] being involved also dovetails with [the first witness] saying it was the male, who turned out to be [JF], who she first saw leave on a bike after she and her husband intervened. [The second witness]' description of the person assaulting the complainant broadly fits in with it being [JF].

**Defendants statements to Police**

[40] The three defendants, not [TS], who made statements to police talked about there being a discussion to go down and attack or 'jump' the complainant, although they differed as to who was to be involved. [MK] and [JF] said this discussion did not involve them, nor did they admit any part in the assault.

[41] As to the second person assaulting the complainant, the complainant was unable to identify him. As will now be obvious, I am satisfied that the first person who assaulted him was [JF][9] and that the person searching his pockets was [TS].[10] As to who the second assailant was, it would have been either [MK] or [SD]. I reject [JF]'s contention that he was not involved.

[9] See evidence of [GB].
[10] See evidence relating to identification of [TS] some hours later at [the road SD lived on].

[42] [SD] admitted in his interview that they planned to 'jump' the complainant at [the park], when [GB] was meeting him. This discussion took place at [the road that SD lived on] before they left. [SD] went on to describe to [a Detective], that 'to jump him' meant to "walk up to him like, just give me your shit".[11]

[43] In the interview with police on [the day after date 1] 2019, [SD] admitted assaulting the complainant towards the end of the incident by giving the complainant a couple of jabs. He demonstrated this. He said the complainant was lying down and he did this as he saw [the two witnesses] intervening. He said he then took off on his bike. This matches [the first witness]'s evidence of witnessing one of the offenders, who she described as the "horrible one", punching the complainant in the face as she was approaching towards the end of the incident. [SD] in his interview acknowledged that he saw "the three of them" over the top of the complainant after one of them kicked him, and then they all just got in and beat the "shit out of him".[12]

[44] Again, I note that what [SD] says of the others' involvement in this incident is not evidence against them. However, it is evidence against [SD], and, at the very least, he admits to assaulting the complainant towards the end of the incident, knowing the others had been assaulting him.

[45] [JF] denied being involved in the incident but admits being at [SD]'s place at [address 1], and going to [the park] with [MK] after [SD] and [TS] had gone down to 'jump' the complainant. He said that when the [the first two witnesses]' car pulled up, he and [MK] took off. As a result of his interview, it is clear that [JF] was in the vicinity of the incident and he was aware a bike was taken. His explanation for jumping over the fence at [the road that SD lived on] after he returned there, was that he thought he was on a curfew. This turned out to be incorrect, but nevertheless it is believable.

[46] It is interesting to note that although [JF] exonerates himself from any criminal activity, he said that he was aware of [GB], [SD] and [TS] hatching a plan to 'jump' the complainant. Of course, this is not evidence against [TS] or [SD].

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[11] Page 15/16 DVD interview.
[12] Page 16 DVD interview.

[47] [MK] says from the discussions at [SD]'s place in [the road that SD lived on] he was aware of a plan by [GB] and [SD] to rob the complainant of his money and cell phone. He says he went to [the park] and saw [SD], mainly, assaulting the complainant. He said that [TS] threw one punch and he said [SD] took the complainant's bike. He said he was standing near the railway line with [JF] and they were not involved. I do not believe his statement, for what it is worth, where he said [JF] was not involved, but it is not evidence against [JF]. He admits that the incident broke up when [the first two witnesses]' intervened. There is no specific evidence of [MK] assaulting the complainant. If [MK] was watching from a distance, he may or may not have been a party to the assault.

**Discussion**

[48] The Crown case, as advanced by Ms Bicknell in her closing submissions, is that the joint enterprise, or plan to rob the complainant, was not finalised until the group arrived at [the park].

[49] It seems clear from [SD's mother]'s evidence that [SD] was baited by some of the others about the possibility or suggestion of [GB] 'hooking up' with the complainant. The evidence is equivocal as to the reason the defendants left to go to [the park]. [SD] seemed to have been intent on 'jumping' the complainant, likely because he thought that [GB] may have been 'hooking up' with the complainant. Suffice to say that it is difficult to discern if there was any agreed overall plan when the defendants left [the road that SD lived on], bearing in mind that their statements cannot implicate the other defendants. I cannot find that there was a joint plan or enterprise arrived at by the defendants when they arrived at [the park], other than for some or all of them to assault the complainant, which is self-evident. There is simply no admissible evidence, explicit or implicit, that they concocted a definite plan either at [the road that SD lived on] or at [the park]. The evidence suggests to me that the theft of the complainant's property was a by-product of the assaults, but not pre-planned by them as a group.

[50] I accept the evidence of the complainant, the [the first two witnesses] and [GB] as to the incident. While there are differences in their evidence as to various aspects

of the assaults they saw and their identifications, I am satisfied overall their evidence is reliable.

[51] I am satisfied that the complainant mis-described [JF]'s physical appearance as the first one to assault him, when he talked of his height and hair colour/style. Given the specific evidence of [GB], I am satisfied that this mis-description does not detract from her evidence that it was [JF] who first assaulted the complainant. The [the first two witnesses]' evidence also backs up [GB]'s evidence. As to the subsequent identification of [TS] by the complainant at [the road that SD lived on], for the same reason, I do not place any weight on the possible mis-description of the boy searching his pockets. Clearly, the complainant suffered a number of assaults by repetitive kicking and punching by [JF] and, on [SD]'s own admission, two punches to the head by him. It is likely other punches were administered by the second boy who was earlier involved in the assault. It may well have been [SD] who was involved before [the first witness] arrived or it may have been [MK]. The complainant did not say that the one who searched his pockets assaulted him.

[52] I accept there is a difference in what the complainant said about [TS]'s involvement, namely that he was the one searching his pockets, and what [the first Constable] said the complainant said to him, that [TS] was involved in the assault but without mentioning [TS] searching his pockets. Both were certain what they said was correct. When [the first Constable] was questioned in cross-examination about his accuracy on what the complainant said, he confirmed he made his statement the next day when this was fresh in his mind.[13]

[53] When the complainant was questioned about this, he said he had a clear image of this person and that he believed he was the one. The complainant's evidence is to be preferred on this given the recency of the assault and the effect on him. At that point [the first Constable] would not have had the full understanding of the details of the incident. In any event, there is no doubt that on either's evidence, the complainant spontaneously pointed him out as one of the defendants involved, even if he did not

[13] See cross-examination by Ms Bulger at pp 26 and 27 NOE.

mention the detail to [the first Constable]. I accept the complainant's evidence about [TS]'s involvement.

[54] I am satisfied that [TS] searched through the complainant's pockets and took the vape from him. I have no hesitation in accepting the complainant's identification of [TS] as being the person who searched through his pockets when he saw him come out of [the road that SD lived on] with [the second Constable]. This was in my assessment a spontaneous identification and he was not asked by [the first Constable] to identify him.

[55] Incidentally, Ms Bicknell questioned the complainant and asked him if the one feeling his pockets was the one who grabbed his vape. He said this was the same person. This was a leading question because the complainant had not earlier said that the person telling him to drop his vape and searching his pockets had actually taken it. However, by implication it is quite clear that it was the same person because of the interest shown by the searcher in the vape, the fact that that person told him to drop it, and the fact the vape went missing.

[56] I cannot say with any confidence who the second person who assaulted the complainant was. I cannot find it proven beyond reasonable doubt. It is possible that it was [MK], or indeed [SD], who clearly assaulted him at the end. It appears from the evidence that [TS] did not punch or kick the complainant, although searching his pockets was a form of an assault, and indeed he carried out that act when he was aware the complainant was being assaulted.

**Conclusion so far**

[57] I am satisfied beyond reasonable doubt that [JF] assaulted the complainant by kicking him and punching him to the head numerous times, and that he was the first one to become involved.

[58] I am satisfied that [SD] at the very least punched the complainant twice in the head towards the end of the incident even though [the first witness] only saw him

throw one punch. While I have a suspicion he was involved earlier in the incident, I cannot be sure.

[59] I note that the Crown suggests that [JF] and [MK]'s method of leaving the [the road that SD lived on] address when police arrived could be an indication of their guilt. If it is, it is only a factor, and not a very strong one. Their explanation that they wanted to avoid involvement with police carries equal weight. While [JF] clearly lied to police about his participation, I have rejected his version by accepting the combined evidence of [GB] and [the first witness]. I am not so sure that [MK] lied about where he was, because there is not sufficient evidence to say he was an assailant. [The two witnesses]' evidence of the incident and the involvement of numerous assailants is largely uncontested, except for [the first witness]'s identification evidence, particularly as to [JF] being the one, she saw leave immediately.

[60] As indicated, there is insufficient evidence for me to find any of these defendants formed a common or joint enterprise for the purpose of robbing the complainant at any time before the incident. Overall the evidence equally suggests it possible that those involved had different motives for going to [the park]. While [SD] did admit an intent to rob the complainant, on the admissible evidence, I cannot find that it was shared by any of the others, either at [the road that SD lived on] or at [the park]. It seems to me that generally all the defendants seemed to have an *"animus"* against the complainant, even though they did not know him.

[61] I am satisfied that [TS] did take the complainant's vape while he was being assaulted by at least two of the others ([JF] definitely and possibly [SD]), and [TS] was aware the complainant was being assaulted and was unable to resist. However, I cannot find that [JF] took anything nor that he had any intent to rob the complainant. The only intent he had was to assault and injure him.

[62] As to [MK]'s involvement, he clearly did not take any items away, that is the cap and/or the bike. I have a suspicion that he was involved in the physical assault, but on the evidence to date, I cannot say beyond reasonable doubt that he was involved as a principal or a party. I cannot say with any certainty who took the cap, and I cannot say with any certainty who took the bike, other than it was one of the defendants apart

from [MK]. The evidence as to who took the bike comes down to it being either [TS] or [SD]. The evidence shows [JF] left on a different bicycle leant against a tree, which clearly was not the complainant's. As noted above, the evidence also suggests that [SD] may have left on a different bike. So, the strongest possibility is that it was [TS], but I cannot completely discount that it may have been [SD]. As to whether [JF] took the cap, it could have been any of them, although [MK] did not have it when confronted by [the second witness].

[63] However, as it will become obvious by the end of this decision, I am adjourning these proceedings to consider amending or altering the charges against [SD], [JF] and [TS]. Therefore, as the hearing is technically not finished, I do not dismiss the charge against [MK] at this point, given the possibility of further evidence being called.

**Charges**

[64] On my assessment of the evidence, the defendants [JF] and [SD] are guilty of intentional assault on the complainant. Further, given that they were both attacking his head, I find that they intended to injure the complainant. [JF] kicked and punched the complainant in the head area. There was at least one kick, and numerous punches. At the very least, [SD] punched him twice to his head. To attack someone's head, in the manner [JF] did, leads to the irresistible inference that he intended to cause him injury. Again, the same irresistible inference applies to [SD] delivering punches to the defenceless complainant following the assault he must have witnessed from [JF], and possibly another. The complainant suffered injuries of bruising to the left eye, and continuous headaches for a period after the attack. I am inclined to the view that [JF]'s assault was likely to have caused more injuries than [SD]'s, but that is only speculation given that they both had attacked the complainant's head, and both played a part in the injuries he suffered.

[65] As to [TS], I am satisfied in taking the vape from the complainant, he intended to permanently deprive the complainant of it, and he did this dishonestly and without claim of right. Obviously, he could well be guilty of an assault by forcibly going through the complainant's pockets. Theft is an included charge of aggravated robbery, and in my view, the prosecution has proven that [TS] stole the complainant's vape. I

consider that theft is the preferable charge, aggravated, as it is by his stealing this knowing that the complainant was being assaulted.[14]

[66] Section 143 of the Criminal Procedure Act provides that the Court can find a defendant guilty of an included charge:

> **143 Included offences**
>
> If the commission of the offence alleged (as described in the enactment creating the offence or in the charge) includes the commission of any other offence, the defendant may be convicted of that other offence if it is proved, even if the whole offence in the charge is not proved.

I consider the wording of s 143 only allows for the substitution of one offence, not two.

[67] In respect of charges for [SD] and [JF], I am of the view that the charges should be amended under s 133 of the Act to charges of assault with intent to injure. These are not included charges. Section 133 provides for amendments generally:

> **133 Amendment of charge**
>
> (1) A charge (including any of the particulars required to be specified in a charging document under section 16(2)) may be amended by the court at any stage in a proceeding before the delivery of the verdict or decision of the court.
>
> (2) The amendment may be made on the court's own motion or on the application of the prosecutor or the defendant.
>
> (3) A Registrar may, in respect of any offence other than a category 4 offence, exercise the power under subsection (1) if the prosecutor and the defendant consent to the amendment.

[68] However, if a charge is to be amended during a trial – which is the case here – it is governed by s 136 of the Act:

> **136 Procedure if charge amended during trial**
>
> (1) Despite sections 21 and 133, during the trial a charge may be amended to substitute one offence for another offence only if—
>
> (a) there appears to be a variance between the proof and the charge; and
>
> (b) the amendment will make the charge fit with the proof.

[14] Section 143 CPA.

> (2) A charge must be amended under subsection (1) if in the court's opinion the defendant will not be or has not been misled or prejudiced in his or her defence by the amendment.
>
> (3) Subsection (4) applies if, in the court's opinion, the defendant has been misled or prejudiced in his or her defence by any amendment of a charge made during the trial under section 133.
>
> (4) If, in the court's opinion, the effect of the defendant having been misled or prejudiced might be removed by adjourning or postponing the trial, the court may make the amendment and—
>
> (a) adjourn the trial; or
>
> (b) postpone the trial and discharge the jury.

[69] The learned editors of Adam's Criminal Law opine that only one offence can be substituted for another, and that any other additional offences must be added under s 136A. I am inclined to agree with Adams given the wording of s 136.[15]

[70] As to the taking of the bike and cap, they were clearly taken by one or more of the defendants other than [MK]. I conclude that when all four defendants returned to [the road that SD lived on], they were aware the complainant's bike was there and it had been stolen. As stated, I cannot be sure who actually took it from [the park], except it was not [MK]. The evidence does not enable me to identify the principal or any party to their theft.

[71] I have also reflected on whether there could be a receiving charge proffered. [SD]'s Mother says all the defendants would not let her into the garage where the stolen bike was. However, her evidence is not detailed enough to say what each of the defendants knew or were doing in respect of the bike, apart from generally being uncooperative with her in respect of letting her into the garage. Possibly all or some of them might be guilty of receiving. Therefore, as much as it is likely one or more of them were guilty of receiving, I cannot say with any safety which ones were. In any event as detailed above I consider that I can only, by amendment or inclusion, add one charge. I note that any additional charges could have been added under s 136A during the trial.

[72] However, before finalising my judgement in respect of all defendants, I consider I should give counsel for these defendants the opportunity to be heard as to

[15] See Adams on Criminal Law at CPA 136-02.

whether they consider their respective clients have been misled or prejudiced by the proposed changes to the charges. In the first instance, I request that counsel for [JF], [TS], and [SD] file memoranda as to the issue of prejudice/being misled. If need be, I will then direct whether or not there should be a further hearing in respect of the changes. In my assessment, given how the hearing proceeded and the evidence called, I do not see any of these defendants being prejudiced or misled.

[73] I therefore remand all the charges on the basis I have outlined, until such time as the position as to their amendment is clarified.

B P Callaghan
Youth Court Judge

Signed in Christchurch on March 2021 at am/pm