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**IN THE YOUTH COURT
AT AUCKLAND**

**I TE KŌTI TAIOHI
KI TĀMAKI MAKĀURAU**

**CRI-2019-204-000192
[2020] NZYC 13**

NEW ZEALAND POLICE

Informant

v

[FG]

Young Person

Hearing: 6 December 2019

Appearances: H Clark for the Informant
M Winterstein for Young Person

Judgment: 20 January 2020

DECISION OF JUDGE J H LOVELL-SMITH

[1] The young person, [FG] is charged with three aggravated robberies and one charge of unlawfully getting into a motor vehicle. This is an application by the young person to have the charges dismissed on the basis of unnecessary or undue delay pursuant to s 322 of the Oranga Tamariki Act 1989 (“the Act”).

[2] The police oppose the application for dismissal because the time that has elapsed between the date of the offending and the hearing has not been unnecessarily or unduly protracted.

[3] The young person was born on [date deleted] 2004 and is aged [15 years].

Procedural Background

[4] The charges were initially laid on 8 November 2018.

- (a) 16 January 2019 - Case Review Hearing held.
- (b) 24 January 2019 - a delay application was signalled by the Youth Advocate. A pre-trial hearing was to proceed on 4 March 2019.
- (c) 12 March 2019 - the pre-trial hearing on delay was adjourned to 18 March 2019 due to further pre-trial issues over the legality of the charges, admissibility of the DNA evidence and admissibility of the young person’s admissions.
- (d) 18 March 2019 - Judge Fitzgerald dismissed the (first) delay application. The remaining pre-trial issues were not heard. Judge Fitzgerald directed that Counsel to Assist be appointed to prepare a brief for the young person’s mother, the nominated person (in relation to the DNA evidence). Oranga Tamariki were also to provide a statement from the Coordinator of the FGC in issue.

- (e) 2 April 2019 - when the charges were called a witness unavailability memorandum had been provided to the Court prior to the hearing. Counsel to Assist had not yet met with the young person's mother, due to a miscommunication regarding the role of Counsel to Assist in these proceedings.
- (f) 15 April 2019 - the young person's matters were called. The Youth Advocate advised that she had not heard from Counsel to Assist with respect to obtaining a statement from the young person's mother.
- (g) 30 April 2019 - the young person's matters were called. Ms DeCovy appeared as Counsel to Assist and advised she had not yet contacted the young person's mother. A communication assistant also attended Court. Directions were made on procedure for the pre-trial applications.
- (h) 20 June 2019 - the Court held that the pre-trial hearing could not proceed as the young person's Youth Advocate had attended the FGC in issue and a new Youth Advocate was assigned.
- (i) 13 July 2019 - the pre-trial hearing could not proceed due to the unavailability of Ms Timoteo from Oranga Tamariki.
- (j) 16 July 2019 - the pre-trial proceeded. The police sought and were granted leave to withdraw the charges following the Court's finding that the Family Group Conference prior to the charges being laid should have been adjourned in order that the young person and his mother could attend. The admissibility of the DNA evidence and the young person's statement were therefore not determined.
- (k) 17 September 2019 - a further s 247(b) conference was convened pursuant to the Act and held for the young person who attended with his mother. There was non-agreement recorded as reported by the

Youth Justice Coordinator. The charges were re-laid by the police on 30 September 2019.

- (l) 30 September 2019 - the young person appeared before His Honour Judge Fitzgerald in respect of these charges and was remanded at large without plea to 14 October 2019. A Youth Advocate was appointed on 1 October 2019.
- (m) 14 October 2019 - when the young person appeared before His Honour Judge Fitzgerald, the Youth Advocate advised that there were issues concerning time delay and that a pre-trial hearing would be required to resolve all the pre-trial issues in this case. A Case Review Hearing was directed and the young person was remanded to 7 November 2019.
- (n) 4 November 2019 - the Crown notified the Youth Advocate that they were now instructed by the police on this matter.
- (o) 7 November 2019 - The Case Review Hearing was further adjourned to a callover date as no dates were available.
- (p) 28 November 2019 - a joint memorandum outlining the issues to be argued at pre-trial were filed and considered by Her Honour Judge Ryan. As there were no two day hearing dates available coupled with the issues raised and the parties availability, it was agreed that the pre-trial issue of delay would be considered first.

Prosecution Timeline

[5] [Detective 2]'s statement and [Detective 1]'s job sheet outlines the details of the investigation and charging process. The police timeline is as follows:

16 September 2017 - [store 1 deleted] – the young person was 13 years old

[6] The young person faces one charge of aggravated robbery arising from the following alleged offending ([store 1] incident): Police allege at about 9:20 pm the

young person and a number of others drove to [store 1] in a stolen vehicle. The young person entered the store with five associates, three being armed with an umbrella, a screw driver and a Jim Beam bottle taken from the display inside the store. The complainant was alone in the store and was yelled at by one of the males demanding cigarettes. The young person, when entering, was holding a cigarette and dropped that cigarette when he walked behind the counter. He took a large quantity of cigarettes from the store and ran away. Seconds later he returned, kicked the complainant to the stomach area, grabbed alcohol and ran out again.

[7] The stolen vehicle [registration deleted] was located the next day, 17 September 2017 in Glenn Innes. It was examined the next day and finger prints were lifted from the vehicle as well as cigarette trays which were taken from [store 1] and found in the abandoned vehicle.

[8] [Store 1] was examined on the same day and a cigarette was recovered from behind the counter. The cigarette was sent to ESR for DNA analysis. That analysis was received by [Detective 2] on 10 November 2017 confirming the DNA was on the cigarette but did not match any profiles on the crime sample databank.

3 January 2018 – [store 2 deleted] – the young person was 13 years old

[9] The young person faces one charge of aggravated robbery arising from the [store 2] incident: Police allege that at about 12:30 pm the young person, together with [QR] and [CT] (both young persons) drove in the stolen vehicle to [store 2] in Mount Wellington. The complainant [ZD], another adult and a [young] baby were present.

[10] The alleged aggravated robbery involves [QR] smashing a freezer with a baseball bat, wrestling with the complainant and striking two to three times. The young person filled a bag with cigarettes and tobacco. The complainant huddled next to the adult and baby while [QR] stood over them and continued to strike the complainant with the baseball bat. The three young persons ran from the store in the stolen vehicle [registration deleted] which was abandoned nearby.

24 March 2018 – [store 3 deleted] – the young person was 14 years old

[11] The young person faces one charge of aggravated robbery and one charge of unlawfully taking a vehicle arising from the [store 3] incident: Police allege that at about 10:30 am the young person together with three young persons and one child as well as three unknown associates were travelling in a convoy in two stolen vehicles [registration 1] and [registration 2] to [store 3]. The group entered the diary with one of them wielding a hammer. [Complainant 1] was working alone and ran from the diary; the group stole cash till, cigarettes and a cell phone.

[12] The vehicle [registration 1] was abandoned in Glenn Innes; vehicle [registration 2] was located later that day in Botany.

24 September 2018 – Police investigative process – one day before alleged burglary

[13] In September 2018, [Detective 1] identified that the shorts worn by a male in the CCTV footage of the [store 3] were the same as those worn by an image of the young person on his Facebook page in March 2018. A decision was then made to speak to the young person regarding the [store 3] incident. On 24 September 2018, [Detective 1] visited the young person and his mother, and arranged for them to attend the Glenn Innes Police Station about the alleged burglary described below then occurred the next day.

25 September 2018 – alleged burglary Glenn Innes. The young person was 14 years old – DNA taken

[14] The young person was apprehended in relation to an alleged burglary. At about 1:00 pm police allege that the young person and two associates gained entry to [complainant 2's] home in Glenn Innes by smashing a glass window, removing property from the address and being chased by a member of the public who ultimately lost sight of them. They were then apprehended nearby in the Wimbledon Reserve.

[15] [Detective 1] was advised of the young person's arrest for burglary and went to Mount Eden Police Station where he admitted involvement in the aggravated burglary of [store 3] but denied involvement in the aggravated robbery of [store 2].

The officers dealing with the young person for the alleged burglary took a DNA sample from him.

20 September 2018 – burglary charge laid

[16] The burglary charge was then laid on 26 September 2018 two days following the alleged offending for which he was subsequently discharged.

[17] In October 2018 DNA evidence was seen linking the young person to the [store 1] incident and the [store 2] incident. On 10 October the police received the following evidence from ESR:

- (a) [Store 1] incident: the young person's DNA was on the cigarette left in the store.
- (b) [Store 2] incident: the young person's DNA was on the sweatshirt worn by one of the unidentified individuals involved in the [store 2] incident (the sweatshirt had been uplifted in the stolen vehicle, abandoned nearby).

The young person's Mother

[18] [Detective 1] visited the young person's mother on 12 October 2018 and was asked by them to return on 15 October 2018 which he then did and on that date advised the young person's DNA was located in relation to the [store 2] incident. [Detective 1] advised the matter would be reported to Youth Aid. An appointment was also made by [Detective 2] to meet with the young person's mother on 26 October 2018 with respect to the [store 1] incident, but [Detective 2] was then unavailable to make the appointment.

Finger print evidence also linking the young person to the [store 1] incident

[19] On 17 October 2018, [Detective 2] also received finger print evidence confirming the finger prints lifted from the cigarette trays which had been taken from the [store 1] and abandoned in the stolen vehicle found nearby matched the finger prints of the young person. The charge was initially laid on 18 October 2018 and the

issue of fitness was raised by the young person's former Youth Advocate in relation to the burglary charge.

[20] On 7 November 2018 charges were then laid for all matters except for the burglary which had already been laid in September 2018. Fitness was not raised in relation to those charges.

The Legislation

[21] Section 322 of the Act provides:

322 Time for instituting proceedings

A Youth Court Judge may dismiss any charge charging a young person with the commission of an offence if the Judge is satisfied that the time that has elapsed between the date of the commission of the alleged offence and the hearing has been unnecessarily or unduly protracted.

[22] Section 5(f) of the Act provides that, in exercising its powers under the Act, the Court must take into account:

The principle that decisions affecting a child or young person should, whatever practicable, be made and implemented within a time-frame appropriate to the child's or young person's sense of time.

[23] Section 6 provides:

In all matters relating to the administration or application of this Act (other than Parts 4 and 5 and Sections 351 to 360) the welfare and interests of the child or young person shall be the first and paramount consideration having regard to the principles set out in Section 5.

[24] The Court should also have regard to the general principles contained in s 208 of the Act, and the objects contained in s 4 of the Act. Section 4(f)(i) provides that one of the objects of the Act is "ensuring that where children or young person commit offences . . . they are held accountable, and encouraged to accept responsibility, for their behaviour."

[25] In *Attorney-General v Youth Court at Manukau*, Winkelmann J referred to the decisions of *Martin v Tauranga District Court* and *Police v T* and determined that

there was no ‘sensible distinction’ between unduly protracted in s 322 and ‘undue delay’ in s 25(b) of the New Zealand Bill of Rights Act 1990.¹

[26] At [54] Winkelmann J noted:

[54] . . . Unnecessary delay means no more than delay that could reasonably have been avoided. It will usually mean delay caused by default or neglect. The delay must be more than trivial. It is not appropriate to impose upon the police or the Court system a standard of perfections so that every delay, no matter how minor, will trigger the exercise of the discretion. Further, a delay caused by resource limitations will not usually be unnecessary delay. Police will inevitably have to allocate priorities between different investigations. For example it is likely that more serious crimes, such as homicides, will be given priority over less serious crimes when allocating resources. Although the suspected youth of an offender is one factor police must take into account in allocating resources, because of the need for prompt investigation and prosecution of youth offending, it cannot self-evidently be the sole factor. The Court will not normally involve themselves in second guessing the allocation of police resources, if satisfied that the need to investigate suspected youth offending very promptly is taken into account in allocating priorities for those resources. Resource considerations will also be relevant in terms of availability of Court time when informations are laid. Judicial and administrative resources are not and cannot be limitless.

[27] The following factors can assist in determining whether delay is unreasonable:

- (a) The length of the delay;
- (b) Waiver of time periods;
- (c) Reasons for the delay, including
- (d) Inherent time requirements of the case;
- (e) Actions of the accused;
- (f) Actions of the Crown;
- (g) Limits on institutional resources; and

¹ *Attorney-General v The Youth Court at Manukau* [2007] NZFLR 103; *Martin v Tauranga District Court* [1995] 2 NZLR 419; *Police v T* [2006] DCR 599.

- (h) Other reasons for the delays; and
- (i) Prejudice to the accused (Counsel's emphasis).

Youth Advocate's Submissions

[28] Counsel submits that there has been delay when looking at the overall length of time between the commission of the offence and the date of the eventual hearing of the matter, no pejorative connotations involved in the assessment required.

[29] The delay may not necessarily be systemic or prosecutorial, however, Counsel submits that there has been prosecutorial/systemic delay which impacted the decisions taken to withdraw the charges and ultimately relaying the charges in Court.

[30] Despite an oral decision given by His Honour Judge Fitzgerald on 18 April 2019 regarding a previous application for delay, a further period of 7 months has since elapsed which must be considered in the assessment for whether the delay is undue or unjust.

[31] A pre-trial hearing to address all the remaining challenges in the young person's case is estimated to take a further 1.5 days. Counsel is unaware of the court schedule and unable to confirm when the additional pre-trial will be heard.

[32] Counsel submits that when considering the date of offending, the date of the charges being laid in court, the time for the matter to reach its final date of hearing, estimated to be at least a further 4-6 months, there is sufficient grounds for a delay application to be made at this point in the proceedings and for the court to make a determination that the proceedings have been unduly or unreasonably protracted.

[33] At the time of the alleged offending, the young person was 13 and 14 years of age and by the time the matter is heard at a hearing, he may be 16 years old.

[34] The s 333 report ordered by the Court when fitness issues had originally been signalled noted at paragraph 37 that the Educational Psychologist reported that the

young person “struggles to comprehend verbal information which may also affect his comprehension of written language.”

[35] Although a full scale IQ score could not be obtained for the young person, at para 59 of the s 333 report, mention is made of a total score which places him in the low average range and very low range for immediate memory (List learning and Story memory), his weakest area. The Youth Advocate submits that this is relevant in terms of the young person’s ability to fully and actively participate in his trial.

Police Submissions

[36] It is clearly acknowledged that part of the time that has now elapsed is due to police seeking leave to withdraw the charges given the Court’s finding that the FGC should have been adjourned (for the young person and his mother to attend).

[37] With regard to the factors outlined by Winkelmann J in *Attorney-General v Youth Court at Manukau*, there has been no “undue” delay for the purposes of s 322 of the Act, in particular:

- (a) Length of the delay: The [store 1] incident occurred in September 2017; the [store 2] incident then occurred in January 2018 and the [store 3] incident in March 2018.

However, it was only in September 2018 that [Detective 1] identified shorts worn by a male in the [store 3] CCTV to a Facebook image which the young person had posted in March 2018. The Detective arranged to visit the young person and his mother promptly to speak to them about the alleged aggravated robbery. The very next day (25 September 2018) the young person was apprehended for the alleged burglary, resulting in a DNA sample being taken from him. On the same date [Detective 1] saw the young person, following his arrest for that burglary and he admitted involvement in the [store 3] incident. The next month, October 2018 ESR provided DNA analysis linking the young person’s DNA to both the [store 1] incident and the [store 3] incident.

The time between the young person's admission to one of the incidents and availability of forensic evidence linking him to the other two incidents was minimal. His admission was in September 2018, the forensic evidence was available in October 2018 and he was then charged on 7 November 2018 following his non-attendance at the intention to charge FGC. When charges were first laid, it was not practicable for these charges to be brought any earlier.

Between March 2019 and July 2019, the young person's matters were called five times before the pre-trial could proceed for various reasons. Counsel to assist was appointed and required to meet with the young person's mother. The Youth Advocate could not act in relation to the FGC issue and Ms Timoteo (from Oranga Tamariki) fell ill.

Limits of institutional resources: Police submits that limits on resources have not contributed to delay. In September 2018 as soon as [Detective 1] viewed a screenshot of a photo on the young person's Facebook page in which he appeared to be wearing the same shorts as a male in the [store 3] footage, she made an arrangement to meet with the young person and his mother.

There are no resourcing limitations evident in the investigation of the other alleged [store 1] and [store 2] incidents, given DNA and fingerprinting analysis was completed ultimately linking the incidents to the young person.

Prejudice to the young person: at 15 years of the young person has significant time left under the Youth Court's jurisdiction for Youth Court disposition orders to be made.

Although the first alleged incident occurred in September 2017, it is also alleged that the young person continued to offend in a very similar manner in January and March 2018 and the committed the burglary in September 2018. In terms of the young person's sense of time, the

police submit that it is relevant that the alleged offending, while first occurring some time ago, continued consistently up until September 2018.

Conclusion

[38] There has been a delay in relation to the withdrawal of the original charges which were then relaid in Court on 30 September 2019 and a further 7 months has elapsed since the decision of Judge Fitzgerald on 18 April 2019 declining to dismiss the charge for delay. There is no issue that the young person contributed in any way to any delay in these proceedings, nor has there been unnecessary delay caused by default or neglect on the part of the prosecution since the charges were relaid. The delay since the charges were relaid and the present day is due to issues relating to the conduct of the pre-trial hearings and lack of Court time to date. Any further delay in the Court schedule must be speculative at this stage.

[39] These are serious charges. The [store 2] offending allegedly involved the use of a baseball bat by a co-offender, when an infant was present and the young person actively removed property from the premises. The [store 3] alleged offending involved a co-defendant armed with a hammer and the burglary charge alleges that the young person entered a residential address.

[40] With regard to the concerns expressed by the young person's Advocate as to the young person's ability to fully and actively participate in his trial, Judge Fitzgerald noted in his Oral Judgment of 18 March 2019, in paragraph 12 "Although the young person was assessed as having cognitive functioning in the low-average range and meeting the diagnostic criteria of conduct disorder and substance use disorder, he was considered fit to stand trial, but requires the help of a Communications Assistant." A Communications Assistant was appointed as a result of the findings in the s 333 report.

[41] With regard to the young person's sense of time, although the first alleged offending occurred on 16 September 2017, I accept the police submission that he allegedly continued to offend in a consistent and similar manner until September 2018.

[42] The young person is aged 15 years and there is sufficient time left in this Court for Youth Court disposition orders to be made and his rehabilitation prospects taken into account although such prejudice should be considered a neutral factor.

[43] Although there has been delay as a result of the s 247(b) FGC not being properly convened and the charges having to be relaid on 30 September 2019, there has been no unnecessary or undue delay. I decline the application to dismiss the charges.

[44] Had I formed a different view, I would not have exercised my discretion in favour of dismissing the charges given the alleged offending is so serious and there is the public interest in ensuring young people be held accountable for their offending, are deterred from further offending and the causes of their offending addressed.

J H Lovell-Smith
Youth Court Judge