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IN THE YOUTH COURT
AT HAMILTON

I TE KŌTI TAIOHI
KI KIRIKIRIROA

CRI-2019-219-000310
[2020] NZYC 318

NEW ZEALAND POLICE
Prosecutor

v

[LB]
Young Person

Hearing: 17 June 2020

Appearances: S Gilbert for the Prosecutor
R Boot for the Young Person

Judgment: 17 June 2020

ORAL JUDGMENT OF JUDGE D C CLARK

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[1] [LB] was born on [date deleted] 2002 and is now [18 years old]. [LB] is charged with sexual violation by rape from [late December] 2018. The allegation involves [LB], the complainant and their mutual friend who have all known each other for a long time. [In December] 2018 [LB] was at his friend's house, a [location deleted] address, along with the complainant. The three were together in their friend's bedroom with the friend on his bed and [LB] and the complainant on a mattress on the floor. On three separate occasions [LB] made sexual advances towards the complainant by touching her bum and genitals on top of her clothing. Each time the complainant told [LB] in no uncertain terms she was not interested. [LB] climbed on top of the complainant and removed her pants and inserted his penis into her vagina. He stopped when the friend woke up, at which point the complainant got up and left the room and did not return. In the days that followed [LB] messaged the complainant repeatedly saying he was sorry.

[2] [LB] has applied to have the charge dismissed under s 322 Oranga Tamariki Act 1989. It provides: "A Youth Court Judge may dismiss 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".

[3] Helpfully, a chronology has been prepared setting out the circumstances surrounding [LB]'s appearance before the Court. The allegation relates to events that occurred [in late December] 2018:

> The allegation was reported to the police on 11 January 2019;
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> On 21 January 2019 the complainant was interviewed, (this is a Manuwai interview);
>
> On 19 April 2019 the police were advised that the complainant and young person [LB] had exchanged a number of messages post-incident where the young person [LB] had apologised. A copy of these messages was requested;

> On 3 May 2019 the police received copies of screenshots of messages from the complainant via email;
>
> On 19 September 2019 the police spoke with the young person [LB] at his home. The young person was informed of the nature of the allegations and advised that the police wished to interview him formally;
>
> On 30 September 2019 police obtained a statement from the other young person who had been present at the time of the alleged incident;
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> On 1 October 2019 the young person and his mother came into the [Police Station] for the purposes of an interview;
>
> A referral was made to a Youth Justice coordinator on 7 November 2019 and an intention to charge;
>
> Family group conference was convened on 3 December 2019;
>
> On 18 December 2019 the young person [LB] first appeared in the Hamilton Youth Court.

[4] In *Attorney General v Youth Court at Manukau*[1] Winkelmann J set out the test to be adopted when determining an application under s 322 of the Act. The enquiry into delay is a two-part process, firstly with the time period referred to has been unnecessarily or unduly protracted, where the time period is defined as the time elapsed between the commission of the alleged offending and hearing. Secondly, if there has been delay there is a discretion as to whether to dismiss the charging document. This discretion is only triggered if there is an undue or unnecessary protraction of the relevant period of time.

[5] It is necessary to consider whether the relevant period has been protracted in the sense that it is likely to be longer than would reasonably be expected in a case of

[1] *Attorney General v Youth Court at Manukau* [2007] NZFLR 103; [2007] DCR 243.

that nature. Not every delay at a discrete stage of the proceeding will result in protraction of the relevant period. Time lost during one phase may be made up in another. In that decision unnecessary delay was discussed. 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 perfection so that every day, no matter how minor, will trigger the exercise of the discretion. A delay caused by resource limitations will not usually be unnecessary delay. Police will inevitably have to allocate priorities between different investigations. The Court will not normally involve itself 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.

[6] At a certain point however, delay caused by resourcing constraints will be undue delay. If the Court is satisfied that the relevant time period has been unduly or unnecessarily protracted the Court then has discretion as to whether to dismiss the charge.

[7] This was also considered in *Police v T*.[2] Wild J said the following in relation to the issue of undue delay,

> No sensible distinction can be drawn between the words "unduly protracted" in s 322 and the words "undue delay" in s 25B Bill of Rights Act 1990. Not only are the words similar but the Parliamentary intent enacting them is similar, if not identical.

[8] Both Winkelmann J and Wild J considered it appropriate to adopt the test for undue delay that had been set out by Sopinka J in the Supreme Court of Canada decision *R v Morin*[3], which was adopted as the appropriate test to apply here by Court of Appeal in *Martin v Tauranga District Court*[4]. The test requires taking into account the following factors: the length of the delay; waiver of time periods; the reasons for the delay, including inherent time requirements of the case, actions of the

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[2] *Police v T* [2006] DCR 599.
[3] *R v Morin* (1992) 71 CCC (3d) 1; [1992] 1 SCR 771 (SCC).
[4] *Martin v Tauranga District Court* 1995 NZLR 419.

accused, actions of the Crown, limits of institutional resources and other reasons for delays and prejudice to the accused.

[9] In respect of prejudice, the existence of specific prejudice to a young person caused by delay will be a factor weighed in favour of dismissal, but the existence of specific prejudice is not a precondition to the exercise of the discretion. There will be a presumption that at a certain point in time general prejudice to the young person has been caused by the delay. The seriousness of the offence is a factor to be taken into account in the exercise of the discretion, although the weight attached to that factor will depend on the particular circumstances of the case. There is a public interest in seeing that those who commit offences dealt with through the Justice System and the more serious the offending the greater the public interest.

[10] When exercising the discretion under s 322, the Courts should take into account the purposes of Oranga Tamariki Act 1989 which include those set out in s 4(1)(i) which provides,

> … 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) recognising the rights and interests of victims; and
>
> (iv) holds the children and young persons accountable and encourages them to accept responsibility for their behaviour.

[11] As well as that there is a general principle, s 5(1)(b)(v) which refers to, "Decisions should be made and implemented promptly and in a timeframe appropriate to the age and development of the child or young person."

[12] In [LB]'s case I had helpful submissions both from counsel for the prosecution and also from [LB]'s youth advocate that dealt with some of the law that applies, the tests that are required and also referred to the balancing required between the individual rights of a young person against public or community interests, along with interests of a complainant and in respect of the first issue around delay. I refer to some of the submissions that have been made by counsel.

[13] There has been a chronology provided already but counsel for the prosecution in making this application found a statement by [Detective A] on 19 April 2019 who was asked to review files which had yet to be assigned to an investigator. [Detective A] identified [LB]'s file as a semi-urgent file which required completion and [Detective A] obtained messages from the complainant before the file was assigned to a police officer. Having said that, counsel for the prosecution after submitting that this indicated that there had been some semi-urgent demonstration that priority had been given to this investigation, acknowledged that there were some things that were difficult to explain. For example, since January 2019, the police had the young person [LB]'s name, having had that provided by the other person who was present at the location in December 2018, as well as a phone number and it is not clear how that information became misplaced and the police not apparently being able to identify [LB] for a while.

[14] One of the other things that was also acknowledged by the prosecution is that the other young person who was present was not interviewed for quite some time. The submissions outline in a very balanced way what happened since the complaint was made and I think that there is an acknowledgement that the time between complaint and the matter first getting to Court was a significant timeframe with the focus being on the second part of the enquiry as to whether there should be the exercise of a discretion to dismiss.

[15] The submissions made by the youth advocate in relation to whether there had been a delay focusses on the fact that this was not a complex incident as such, that there had not been any contribution to delay by [LB], that no time periods have been waived and that it was unclear as to why it had taken the length of time it did to finally refer [LB]'s case to a Family Group Conference in November of 2019. The advocate also said it was unclear as to why a statement was not taken from a material witness until the end of September 2019, that material witness being one of three people present at the alleged incident.

[16] Having considered the submissions it is clear that the focus has been on the second part of the enquiry as I have indicated whether there should be an exercise of my discretion to dismiss the charge against [LB]. It is clear that this requires a

balancing against a young person's rights, the public interest and also the interests of the complainant. It is clear also that the more serious the offending the greater the public interest.

[17] In respect of this, the prosecution also submitted that public interest includes also assisting in the rehabilitation of a young person by assuring he is held accountable for his actions, that he accepts responsibility for his offending and that he receives any appropriate treatment and if there was an exercise of discretion those outcomes would unlikely be achieved.

[18] The youth advocate for [LB] acknowledged that the charge he faces is serious, stressed again that delay could not be attributed in any way to [LB] and noted that there had been other cases where the Court had exercised a discretion to dismiss for similarly serious sexual offending and referred to *Police v C* and *Police v B*.[5] His submission is that the time between the complaint and hearing in [LB]'s case is an undue delay and that the Court should exercise its discretion under s 322.

[19] I have carefully considered the submissions that were made both by counsel for prosecution and also the youth advocate and in terms of the initial enquiry whether there has been an undue or unnecessary delay between the complaint and the hearing. There was a time period of just under one year before the matter came to Court and that is a significant time period. In terms of hearing, the submissions in respect of this application were heard in May and it is now June. The young person has elected trial by jury and if the matter were to continue, any time period between now and hearing is still likely to be a significant timeframe. There had been some mention of electing a trial by jury and the time that would take.

[20] It appears to be that having considered the circumstances in this Court that whether there was a Judge alone trial in the Youth Court, a Judge alone trial in the District Court, or a jury trial in the District Court there is likely to be a significant time period before time could be allocated to have the matter heard to a conclusion. That is a matter that needs to be taken into account.

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[5] *Police v C* (2000) 19 FRNZ 715; *Police v B* [2007] DCR 232.

[21] While the first enquiry looked at whether the delay was undue and I am satisfied that there was an undue or an unnecessary delay, one of the things that was not clear to me is the reason for any delay. The most that could be said is that some semi-urgency was given to the file but it still did not account for the delay that the matter took to come before the Court.

[22] Any decision made today affects not only a young person alleged to have committed offending but also a complainant. One of the things that I have considered as well is not specific prejudice but the things that happen as a result of a delay in any event. That can be stress, thinking about what is to happen or not happen and the impact that has on a person charged, or a complainant waiting being able to get on with their lives as well.

[23] Having considered the law referred to in each of the submissions made by the advocates and the circumstances surrounding the way in which [LB]'s case came before the Court, I exercise my discretion in favour of dismissing the charge. I have taken into account the seriousness of it and also the interests that need to be considered, including the interests of the complainant. I am satisfied however that dismissing the charge is appropriate pursuant to s 322.

D C Clark
Youth Court Judge