

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

This judgment cannot be republished without permission of the Court. Publication of this judgment on the Youth Court website is NOT permission to publish or report. See: Districtcourts.govt.nz

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-2020-288-000073
[2020] NZYC 602**

THE QUEEN

v

[SR]

Hearing: 20 November 2020

Appearances: J Johnson-Aufa'i for the Crown
D Hart for the Young Person

Judgment: 20 November 2020

ORAL JUDGMENT OF JUDGE L KING

[1] [SR] is not in court today. I have been advised by Mr Hart that the information he has is that he was spoken to by police yesterday and he is now uncertain of [SR]'s whereabouts. His social worker is also uncertain. The Crown who is prosecuting this matter is not seeking a warrant. There is a future appearance for [SR] in the District Court in respect of other charges.

[2] The matter has been set down today for the Court to determine the Crown's request to have the one charge in the Youth Court joined with charges that [SR] faces in the District Court. The charge that [SR] faces is that at some time in March 2018, he sexually violated [the complainant]. That charge was formally denied by [SR] on 9 October 2020. The Crown has purported to issue a notice pursuant to s 138 Criminal Procedure Act seeking to join the Youth Court charge with the two charges in the District Court.

[3] [SR] is the subject of a prosecution in the District Court which relates to allegations that he on different occasions sexually assaulted two young female complainants. The charges at this stage are sexual violation by rape and sexual violation by unlawful sexual connection and indecent act on a young person under the age of 16 years.

[4] [SR] has pleaded not guilty to the three charges in the District Court and elected a jury trial with not guilty pleas being entered on 5 October 2020. He is due to appear for a case review hearing in the serious sexual violence court on 11 December 2020. The notice issued by the Crown is to notify both the District and Youth Courts that it proposes that all charges the defendant faces be heard together in the one trial in the District Court. The submission is that joinder is automatic; leave is not required as both proceedings are still at case review stage and have not been adjourned for trial.

[5] The joinder of the Youth Court matter with the District Court charges is opposed by Mr Hart. His opposition is essentially that Youth Court is the proper forum for the charge that is currently before the Youth Court and that s 138 does not apply across jurisdictions.

[6] In essence, I agree with Mr Hart's submission. There are a number of matters that in my view are relevant. Firstly, in the Youth Court, a young person does not plead guilty or not guilty, so the terminology in s 138 does not apply to Youth Court proceedings. What would be akin to a not guilty plea would be if a young person formally denies a charge, and that has occurred. Therefore, even if there was the ability for joinder and even if s 138 did apply, then my view is that leave would be required given that [SR] has already denied the charge. My reasoning is based upon s 138(2) which requires a prosecutor seeking to give notice to join proceedings after the entry of a not guilty plea must seek the leave of the Court. My view is that a denial is the Youth Court equivalent of a not guilty plea.

[7] However, the difficulty for the Crown is even more fundamental than that. The Crown is essentially seeking that the jurisdiction of the Youth Court be subsumed into the jurisdiction of the District Court for the purposes of enabling the Youth Court charge to be joined with the District Court charges. That is not the intention of the Youth Court legislation and is not the intention of the purposes and principles of the Act. Specifically, the Youth Court is a specialist court dealing with children and young people who are alleged to have offended.

[8] A young person's age for the purposes of the Youth Court is the date of the alleged offending. At the time of this charge before the Youth Court, [SR] was 15 years old. It is irrelevant that the charge was laid when [SR] was 17 years old. The relevant period, in my view, is when the charge is laid and that is set out in s 2(2) of the Oranga Tamariki Act 1989. Therefore, the Youth Court purposes and principles clearly apply and the Youth Court is the proper forum for a young person to have the charges laid.

[9] On the issue of joinder, I also refer to the High Court decision of her Honour Gordon J in *R v Ward*.¹ It is a case on point and her Honour noted:

The Crown is therefore seeking to read into s 138 a bridge between two different courts of distinct jurisdiction. I do not consider that such a bridge exists... Section 138 does not in and of itself confer the power to transfer charges and proceedings between different courts. If such a power exists elsewhere in the law then a s 138 application can be considered in this context

¹ *R v Ward* [2018] NZHC 186.

and, having determined that joinder is appropriate, a judge may order that the relevant charges be transferred. This court is barred from considering joinder of a charge from the Youth Court as a matter of jurisdiction. Section 138 alone confers no such jurisdiction.

[10] Therefore, there is High Court authority that s 138 joinder is not available between the Youth Court and District Court.

[11] The alternative argument proffered by the Crown was that jurisdiction exists pursuant to s 275(2)(aa) which provides that all applicable pre-trial processes must take place before the Youth Court up to and including in terms of (aa):

In the case of a young person aged 17 years charged with a category 3 offence specified in Schedule 1A, on adjournment of the proceeding after the young person's first appearance, transferring the proceeding to the District Court to be dealt with in accordance with the Criminal Procedure Act 2011.

[12] In reliance, the Crown submits that the three requirements set out in subs (aa) are met in that [SR] is 17 years old, he is charged with a category 3 offence and that that offence is specified in Schedule 1A. I accept that the second and third grounds are met. However, the same difficulty for the Crown is that [SR]'s age for the purposes of subs (aa) is 15 years being his age at the date of the alleged offending. Therefore, the Crown's second argument fails.

[13] I refer to the recently released decision of his Honour Judge de Ridder in the Kaikohe Youth Court at [2020] NZYC 585 in which a similar argument was raised by the prosecution in that case. In that instance, his Honour had before him a young person who was 16 years old at the time of the alleged offending but charged when he was 17 years old. In reference to s 2(2), his Honour held this provision focuses on the age of a child or young person at the date of the alleged offence and provides that that age is determinative of whether or not there is jurisdiction to take proceedings and is also determinative of which court has jurisdiction in respect of proceedings for which there is jurisdiction. Sections 272 and 275 are not within the exceptions set out in subs 2(c)–(e) of s 2. There is nothing in either ss 272 or 275 that override the definition of a young person in s 2(2)(a) of the Act which has remained unchanged since 1995.

[14] Therefore, in respect of the arguments advanced by the Crown, both arguments fail. I find that the charge that [SR] faces must remain in the Youth Court. That will then deal with the matter for today.

[15] I strike out the Crown notice. I adjourn the matter to 23 December for a case review hearing. Counsel are directed to confer and file a joint case memorandum by 18 December being the Friday prior.

Judge L King
District Court Judge

Date of authentication: 21/12/2020

In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.