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IN THE YOUTH COURT
AT WHANGAREI

I TE KŌTI TAIOHI
KI WHANGĀREI-TERENGA-PARĀOA

CRI-2022-290-000043
[2022] NZYC 189

THE QUEEN
Prosecutor

v

[RA]
Young Person

Hearing:	20 May 2022
Appearances:	A Tupuola for the Crown T Donald and D Sayes for the Young Person M Reti as Lay Advocate
Judgment:	20 May 2022

MINUTE OF JUDGE G L DAVIS

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[1] [RA], or as he is known as [RM] or prefers to be known as [RM], is before the Court today. There are two charges that we are looking at. The first being an allegation that he, together with another person, committed an aggravated robbery in [location deleted – location 1] on [the date of offending] 2021 and secondly, on the same day, he failed without reasonable excuse to assist a constable executing a search warrant when he was required to do so.

[2] The issue for the Court today is to determine whether the arrest of [RM] by the police on 21 December 2021 was lawful and in the event the arrest is not lawful, what should happen to the charges.

Background

[3] The background to the offending is that [RM] was before the Court on a number of charges in the leadup to the robbery of the dairy. On [the date of offending], [RM] was before the Court. He had been granted electronic bail and he removed his electronic bracelet and absconded, as the word is often used, or, more to the point, ran away from his electronic bail address.

[4] The police allege that while [RM] was on the run, he committed the aggravated robbery of the dairy in [location 1]. The police say that that robbery was committed by more than one youth, but it also involved the use of a firearm.

[5] Matters move from there to around 3 December 2021. [RM] had the assistance of a local lawyer, or youth advocate as they are described in the context of the Youth Court, Mr Sayes. Mr Sayes had managed to get in contact with [RM] and had arranged for [RM] to present himself with Mr Sayes to the [location 1] Police Station.

[6] There had been some correspondence or email correspondence between Mr Sayes and one of the Youth Aid officers, [Senior Constable A], but unfortunately, when [RM] and Mr Sayes presented himself to the police, [Constable A] was not available.

[7] Nothing turns on that because, as I say, [RM] came to the police station, as had been agreed.

[8] He appeared in court that day and was readmitted to electronic bail and remained on electronic bail until he was arrested on 21 December.

[9] On 21 December, when he was arrested, he had a scheduled court appearance on his active charges and [RM] was arrested and presented in court that day and he was, again, readmitted to electronic bail. That is a general overview of what occurred on that day.

[10] [RM] was then charged with the aggravated robbery of the dairy and the failing to assist a person exercising their powers under the Search and Surveillance Act 2012.

[11] There are two ways in which a young person may be brought before the Court. The first is that a person may come before the Court utilising the provisions of s 245 of the Oranga Tamariki Act 1989. Section 245 provides:

> **245 Proceedings not to be instituted against young person unless youth justice co-ordinator consulted and family group conference held**
>
> (1) Where a young person is alleged to have committed an offence, and the offence is such that if the young person is charged the young person will be required pursuant to section 272 to be brought before the Youth Court then, unless the young person has been arrested, no charging document in respect of that offence may be filed unless—
>
> (a) the person intending to commence the proceedings believes that the institution of criminal proceedings against the young person for that offence is required in the public interest; and
>
> (b) consultation in relation to the matter has taken place between—
>
> (i) the person intending to commence the proceedings or another person acting on that person's behalf; and
>
> (ii) a youth justice co-ordinator; and
>
> (c) the matter has been considered by a family group conference convened under this Part.
>
> (2) Notwithstanding anything in subparagraph (i) of paragraph (b) of subsection (1), where the person intending to commence the

> proceedings is not an enforcement officer, the consultation required by that paragraph shall be consultation between a youth justice co-ordinator and an enforcement officer authorised in that behalf by the person intending to commence the proceedings.

[12] The short point behind s 245 is that a young person cannot be charged with an offence until such time as the matter has been referred to Youth Aid and a family group conference has been convened and only after that family group conference can a person be charged.

[13] The alternate process is set out in s 214 of the Oranga Tamariki Act which allows a young person to be arrested in certain circumstances.

[14] Section 214 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.

[15] Section 214(1) allows an arrest without warrant if an officer is satisfied on reasonable grounds that it is necessary to arrest a child or young person for the purposes of:

(a) Ensuring the appearance of the child or young person before the Court.

(b) Preventing the child or young person from committing further offences.

(c) Preventing the loss or destruction of evidence relating to an offence committed by a child or young person.

(d) The offence that the enforcement officer has reasonable cause to suspect that the child or young person having committed or preventing interference with witnesses in respect of any offence.

(e) Where proceeding by way of a summons would not achieve those purposes.

[16] Subsection (2) however, provides that a person may be arrested without a warrant where:

> (a) A constable has reasonable cause to suspect that the child or young person has committed a category 4 offence or a category 3 offence which the maximum penalty available is or includes imprisonment for life or for at least 14 years.
>
> (b) The constable believes on reasonable grounds that the arrest of the child or young person is required in the public interest.

[17] In other words, what that means is that if a person or if the police choose not to go down the 245 route, the young person may be arrested without a warrant if it is a category 3 or 4 offence that they are charged with and the constable believes on reasonable grounds that it is in the public interest that the young person may be arrested.

[18] This case turns, in my view, on what may be defined as the public interest as it relates to the facts and the circumstances surrounding [RM]'s arrest.

[19] Public interest is not defined by the Act at all. So, in many respects, this is an area of law that requires some measure of clarification.

[20] There is no dispute that the police went to [RM]'s address on 21 December and that he was arrested. There is no dispute that [RM] and his mum and other family members that were there did not interfere in the arrest process. There is no dispute that [RM] himself was compliant. He was in a bedroom down a hallway when the police arrived. He is said to have been lying on the bed. He got a shirt and put it on and picked up his phone. He was then handcuffed and taken outside and a pat-down search was undertaken by [Constable B] outside the address. The defence take issue with that aspect of the arrest.

[21] [RM] was then put in a police vehicle and commenced the journey which everybody agrees was about 10 minutes from the address in [location 1] down to the police station.

[22] On the way to the address, a comment was made to the effect of: "You've been busy boys," or words to that effect. [RM] did not respond. The defence take issue with that comment and I will return to why shortly.

[23] [RM] was then taken to the police station. There is no suggestion that [RM] was not, at any point, given his Bill of Rights cautions in the youth form and the appropriate steps were taken by [Constable B] to explain those Bill of Rights cautions to [RM] in a language that he would likely understand given his age. So, in that sense, the defence do not take issue with the manner in which the arrest was conducted.

[24] At the police station, [RM] was put in a room and he was then asked to provide the PIN number to his cellphone. [RM] did not say anything or do anything. He was asked again by [Constable B] and [RM], again, did not say or do anything. [Constable B] took from it a refusal to provide that PIN and gave rise to the charge of failing to assist a person exercising powers pursuant to the Search and Surveillance Act 2012.

[25] So, that is, again, part of the general factual matrix.

[26] The defence say that it was not in the public interest that [RM] be arrested. At the time of the arrest, he had presented himself to the Court, he had been granted e-bail. The police were aware at the time that investigations were ongoing into the dairy robbery. Notwithstanding all of that, [RM] was granted electronic bail on 3 December. He was at home. He had not breached his electronic bail. He was attending supported bail and other programmes and was doing very well on those programmes. He had been otherwise compliant and did not come to the police attention.

[27] When a young person is arrested, there are a number of pieces of paperwork that are required to be completed by the police officers. The first of those is a report to the Commissioner of Police that must be completed within three days. That report was filed and completed in an electronic form by [Constable B], and it appears as

though that was electronically filed at about 11 am. [RM] was arrested at about 9 am or thereabouts.

[28] The report appears to contain one error in so far as the arrest details make reference to an arrest on [the date of offending] 2021 at 6.18 am but there is no issue taken with that by the defence as such.

[29] What that report records is that the offence under the heading "Offence reasons" it says: "214(2) category 4 offence or category 3 offence which the maximum penalty available is or includes imprisonment for life or at least 14 years and in the public interest." In the arrest circumstances, it says: "The police spoke to [RM]'s mother at [address deleted] advising [RM] was to be arrested. Located and arrested without incident in bedroom of house."

[30] In addition to that, during the course of the arrest procedure, a Youth Justice checklist is required to be completed. There are a number of boxes heading boxes A through to G collectively.

[31] Then it appears at box B, the police have considered has a warning been considered? The answer is "yes". Has sufficient particulars been recorded for YAS to notify parents? Answer: "Yes". Then at box D under the heading "Arrest" the following is recorded:

D Arrest

[32] If satisfied on reasonable grounds that an arrest necessary:

(a) To ensure appearance before the Court. The answer is "no".

(b) To prevent CYP committing further offences. The answer is "no".

(c) To prevent loss, destruction of evidence. The answer is "no".

(d) To prevent interference with witnesses. The answer is "no".

(e) A summons will not achieve one to four then arrest CYP. Again, the answer is "no".

(f) Where reasonable cause to suspect the category 4 or category 3 offence which the maximum penalty available is or includes imprisonment for life or at least 14 years and belief on reasonable grounds that it is in the public interest. Answer "yes".

(g) Notification to Police Commissioner. Answer "yes".

[33] Box six largely reflects the wording of the report to the police commissioner as I have said.

[34] [Constable B] gave evidence in court yesterday. In his evidence contained in a statement which was admitted by consent, he recorded as follows:

(a) On Tuesday 21 December, I decided to arrest [RM] for aggravated robbery for the following reasons:

(i) The firearm used at [the Dairy] was still outstanding.

(ii) Youth Aid [Constable C] had advised [RM] was at course weekdays and doing well and was due to finish soon.

(iii) As per s 214 of the Oranga Tamariki Act, the offence was a category 3 schedule offence punishable by a term of imprisonment of up to 14 years.

(iv) [RM] was due in court on the same day for other matters.

(v) As per s 214 of the Oranga Tamariki Act, there was a risk [RM] would fail to appear as he had historically cut off his EM bail bracelet.

(vi) As per s 214 of the Oranga Tamariki Act, [RM]'s prolific dishonesty offending suggested he was likely to continue offending.

[35] On its face, the evidence given in court yesterday by the brief completed on 12 May 2022 is entirely at odds with the Youth Justice checklist completed on 21 December 2021 at 9.07. This anomaly was put to [Constable B] who said the checklist completed on 12 December was in error. There was no expansion as to what that may have meant.

[36] [Constable A] also gave evidence in court. There was some discussion as to the content of an email that was sent from [Constable C] to [Detective D] . That email records as follows, dated 6th of December:

> [Detective D], as discussed this morning, it is unfortunate [RM] was given bail on Friday. However, if the fingerprints come back and link [RM] to the aggravated robbery, I would suggest he get arrested/charged/bail opposed ASAP (even though he is currently on EM bail). Jurisdiction is pursuant to s 214(2). The big points are:
>
> Seriousness of his offending.
>
> Public interest (firearm still outstanding, high possibility he will reoffend.
>
> Possibility of escaping again (cutting off his EM bracelet).

[37] When [RM] presented himself to the police on 3 December in the company of his counsel, Mr Sayes, Mr Sayes had prepared an email which he asked [RM] and his family to keep handy and at the front door to the effect that if [RM] was questioned, or the police attempted to question, [RM], they were not to question [RM] without his lawyer present.

[38] In other words, [RM] had been under instructions from his lawyer to remain silent. A copy of that email was given to [Constable B] when [RM] was arrested, and the evidence was that [Constable B] was aware of the content.

[39] In cross-examination, [Constable B] was asked whether he was familiar with the concept of (**unclear** 10:33:17), he answered: "No."

[40] In legal discussions, the Crown position appeared to be that s 214 of the Oranga Tamariki Act, it was a code unto itself, it enabled the police to arrest a young person without warrant. The defence challenged that position.

[41] This was a matter that was considered by his Honour France J in a decision *R v DH*.[1] That was a case where DH was arrested one night for assault. About a month after the incident, she was charged with wounding with intent to cause grievous bodily harm. She was 13 at the time.

[42] Again, the argument turned, amongst other things, on the validity of the arrest and s 214 was considered in full.

[43] The arrest was held by the Youth Court to be valid and that point was taken to the High Court on appeal. The reasoning was that at the core of the Youth Court's decision, was that the power to arrest was founded in the Crimes Act 1961 and that the Act's principles did not apply.

[44] The principles in the Oranga Tamariki Act that are relevant, in my view, are set out in s 5 of the Act:

> **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:

[1] *R v DH* [2018] NZFLR 248; [2017] NZHC 3223; BC201762873

(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.

[45] In short, they say any Court that, or person who, exercises any power under the Act, must be guided by the following principles. The relevant principles here, in my view, include as follows:

(a) A child or young person must be encouraged and assisted wherever practical to participate and express their views about any proceeding.

(b) The wellbeing of a child must be at the centre of decision-making that affects the child and in particular a child or young person's rights (including the rights set out in the UNCROC and the United Nations Convention of Rights of Persons with Disabilities must be respected and upheld and the young person must be treated with dignity and respect at all times and protected from harm.

[46] Other principles include mana tamaiti and the child and young person's wellbeing should be protected by recognising their whakapapa and whanaungatanga responsibilities of their family, whanau, hapū and family group. Decisions should be made promptly. A holistic approach should be taken that sees a child as a whole person. Then a child and young person's place within their family, whānau, hapū, iwi, group should be recognised. In particular, it should be recognised that:

(a) The primary responsibility for caring and nurturing the wellbeing and development of the child lies with their family, whānau, hapū and family group.

(b) Effect of any decision on the child or young person's relationship with their family, whanau, hapū and family group should be considered.

(c) A child or young person's sense of belonging, whakapapa and whanaungatanga responsibility of their family should be recognised and respected.

(d) Wherever possible, the relationship between the child or young person and their family should be maintained and strengthened.

(e) Wherever possible, a young person's family, whanau, iwi, hapū and family group should participate in decisions and regard should be had to their views.

(f) Endeavours should be made to obtain his court appearance, guardians or other persons having the care of young people.

[47] Section 208 sets out principles specifically relating to Youth Justice. They are to be read as follows:

> **208 Principles**
>
> (1) a court or person exercising powers under this Part, Part 5, or sections 351 to 360, must weigh the four primary considerations described in section 4A(2).
>
> …

[48] So, in other words, what it is saying is that the principles in s 208 of the Act must also be read subject to the principles in s 5 of the Act. It appears that that lens was not utilised or looked through by the officers when they planned the arrest of [RM] nor when they took steps to formally execute the arrest there.

[49] His Honour France J, looking at that very point in the *R v DH* decision that I have made reference to was of the very clear view that the principles in the Act could simply not be overlooked.

[50] It was said in that case, the Youth Court observed that if they were relevant, they would have nothing to the s 214 test of public interest. His Honour said this was presumably a reference to the fact that the principle (a) in s 208 says proceedings should only have initiated against a child if it is in the public interest to do so and that was a clear overlap.

[51] His Honour believed that to be a clear error on the part of the Youth Court in that instance.

[52] In my view, that is a clear error on the part of the police here today in not considering the provisions of s 5 but, equally, s 4 of the Act also.

[53] That then raises the question, what is the public interest? And it takes us back to that point. If I am to take the contents of the Youth Justice checklist at face value, in other words [RM] was likely to appear in front of the Court, he was unlikely to commit further offending, he was not likely to cause loss or destruction of evidence, he was not likely to interfere with witnesses and the summons could achieve all of the purposes set out in the Act, what is left of the public interest? In my view, all that really can be said here was that all that was left was the firearm was outstanding from the [dairy] robbery.

[54] The alternate explanation is as [Constable B] suggested that the form was filled out in error on his part and rather than there being a likelihood that [RM] would appear in court, the opposite was likely. In other words, he was unlikely to appear in court, he was likely to offending, he was likely to interfere with evidence, he was likely to interfere with witnesses and a summons could not achieve all of those objectives.

[55] The difficulty with that explanation, however, is that when [RM] was presented in court, his bail was not opposed. The difficulty with that explanation from [Constable B] is that [RM] was readmitted to electronic bail the very day he was meant to appear in court and his bail conditions were varied in a way advantageous to [RM]. So, I have some difficulty reconciling the contents of the checklist with the evidence that [Constable B] gave in court.

[56] In my view, this is a situation, to be perfectly fair, where the position is much as it was described in [Constable A]'s email on 6 December. The police were not overly happy with the fact that [RM] had been granted place and set about to put in place a regime that would ensure [RM]'s bail would not be granted again.

[57] I do accept that there may be some public interest considerations in the fact that a firearm was outstanding but that also has to be measured against whether [RM] was likely to interfere with evidence? The form filled out by [Constable B] said "no". Was he likely to commit further offences? And I infer from that, with a firearm – "no". Further offences generally? The answer is no.

[58] So, when looks at all of those factors, I am of the view here that the police, in this case, have failed to look at the arrest procedure and the need for [RM] to be arrested through the lens that is required now by the Oranga Tamariki Act.

[59] It remains to be said that in the case of *R v DH* his Honour France J was also of the same view that the District Court in that case had failed to correctly apply the Act but, in that case, by a fine margin, the appeal ground failed. His Honour said the Youth Court applied the wrong test when assessing the arresting officer's action but by a narrow margin, the correct assessment does not produce a difference conclusion.

[60] In other words, when the High Court reviewed what had occurred in the *R v DH*, his Honour France J fell on the side of the police.

[61] In this case, I do not, and for the reasons that I have articulated here. The checklist makes it very clear that [RM] would appear in court. He was on electronic bail at the time. He was not likely to commit further offences. His whereabouts was known. He was doing well at course. While the firearm was outstanding, there was no suggestion that [RM] would assist in the loss or destruction of any evidence, he was unlikely to interfere with witnesses and, most significantly a summons could have achieved the same result. [RM], as I signalled, was on bail at the time. His whereabouts was known. He was actively engaging in the process at that time by virtue of work that his counsel had undertaken.

[62] I am of the view that the arrest procedure here was unlawful and the charges should be dismissed.

[63] There is one other comment that I need to make. I have some difficulty with the CRN210, failing to assist a person exercising a search power. The reason I say that is that s 220 of the Oranga Tamariki Act says, "nothing in ss 215A or 216 limits or affects any other enactment or rule of law that imposes a requirement on any person to supply information or particulars to an enforcement officer."

[64] Here, we have a young person, 14 years of age, let us not forget that, who is under legal instruction not to speak to the police. He is given his Bill of Rights caution

both in the proper form and in the form that is in language understandable by the young person where he has the right to silence, he is not required to make a statement. He is at the police station on his own. He does not have a nominated adult there nor does he have his lawyer there at the time and yet he is being required to provide information. That would seem, to me, to be fundamentally against the provisions of the Bill of Rights which confirm a young person's right to silence.

[65] It also, in my view, would be fundamentally against the tenor of The United Nations Conventions of Rights of the Children which fundamentally recognise that young people do not have the advantage of the cognitive development that would be attributable to an adult.

[66] In other words, a young person in a position where a person of authority is asking them questions is likely to make answers or give answers that may be ultimately detrimental to their own position. That is exactly what the Bill of Rights cautions are designed to prevent. That is exactly what the nominated person procedure, nominated adult procedure is designed to prevent and that is exactly what the need for youth advocates and lawyers to be present with young people is designed to prevent.

[67] [RM] should not, in my view, have been punished in the form of a charge being laid by virtue of the fact that he was exercising his right to silence and following advice that was given to him by his lawyer and advice that the police knew [RM] had been given.

[68] There may have been other processes by which that information could be obtained but not by, effectively, threatening, and ultimately following through with the threat, charges be laid. Each of those charges will be dismissed.

[69] I formally record that CRN209 and 210 are dismissed.

_____
Judge GL Davis
Youth Court Judge | Kaiwhakawā o te Kōti Taiohi
Date of authentication | Rā motuhēhēnga: 23/06/2022