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

IN THE YOUTH COURT
AT AUCKLAND

I TE KŌTI TAIOHI
KI TĀMAKI MAKAURAU

CRI-2021-204-000143
[2022] NZYC 109

NEW ZEALAND POLICE
Prosecutor

v

[MR]
Child

Hearing: 21 March 2022

Appearances: F Gourley for the Prosecutor
M Winterstein for the Child

Judgment: 30 March 2022

RESERVED DECISION OF JUDGE A J FITZGERALD No.2
[Consequences of an unlawful arrest]

Introduction

[1] In my judgment dated 25 February 2022 ("the first judgment"), I set out reasons for finding [MR]'s arrest was unlawful. However, I did not decide what the consequences of that should be without first hearing from counsel. The hearing on 21 March was arranged for that purpose.

[2] As I explained in the first judgment, the approaches taken by judges after finding an arrest to have been unlawful have varied as have the consequences. It is not necessary to repeat what I said in that regard, but my earlier comments should be read together with those that follow now so as to understand the full context.[1]

[3] For the police, Ms Gourley submitted that leave to withdraw the charges should be granted under s 146 of the Criminal Procedure Act 2011 ("the CP Act"). It was submitted that although the charging documents are a nullity, it is open to the court to grant leave to withdraw them under s 146 of the CP Act, or to dismiss them under s 147, because those sections apply to Youth Court proceedings by virtue of schedule 1 of the Oranga Tamariki Act 1989 ("the Act"). Additionally, because the charges are a nullity, it was submitted that there is nothing that can be pushed back by the court to the prosecutor, so the power to do that is unavailable.

[4] Ms Winterstein, for [MR], submitted that the charges should be dismissed under s 147 of the CP Act, thereby precluding them from being brought back before the Youth Court but with a care and protection pathway in the Family Court still being potentially available.

[5] The fact that these provisions are available to the Youth Court is important but does not necessarily mean that they can be utilised in this case. They will only apply if there is a charge that is capable of being withdrawn or dismissed. Therefore, an issue to be determined is whether a charge that is invalid or is a nullity is still a charge for the purposes of ss 146 and 147 of the CP Act.

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[1] *New Zealand Police v MR* [2022] NZYC 54 at [105] to [113].

Dismissal

[6] In *Pomare v Police*, Harrison J held that an arrest that does not comply with s 214 of the Act invalidates the charging document subsequently laid.[2] The word "invalid" that he used is synonymous with "nullity" which is a word that has been used by other Judges to describe the same thing.

[7] In *Thompson v R,* Whata J stated in obiter:[3]

> [18] Had it been necessary to do so I would have also dismissed the s 147 application had I resolved that the charge was a nullity. If there is nothing to correct pursuant to s 379, there is nothing to dismiss pursuant to s 147. Instead, I would have been minded to direct the Crown to withdraw the purported charge and relay it pursuant to the correct provision. I am reinforced in this view by the approach suggested by Mahon J in the seminal decision on nullity, *Police v Walker*. The learned Judge there noted:[4]
>
> > …I am satisfied that the terms of the information were so unintelligible as to constitute that document a nullity and consequently there was no process of amendment which would cure it. The prosecutor would have been entitled, upon hearing Mr Mitchell's application, to ask for the information to be dismissed without prejudice and then lay the charge again in proper form.
>
> [19] A similar conclusion was reached by Greig J in *Muirson v Collector of Customs*, who concluded:[5]
>
> > In the result the information was at all times a nullity, was not amenable to amendment because it was a nullity and was not saved by s 204. The appellant was never in jeopardy of valid conviction on that information and could not have been convicted of any charge under s 243 on it. In those circumstances the plea of previous acquittal cannot be sustained.

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[2] *Pomare v Police* HC Whangarei AP 8/02, 12 March 2002.
[3] *Thompson v R* [2016] NZHC 2753.
[4] *Police v Walker* [1974] 2 NZLR 418 (SC).
[5] *Muirson v Collector of Customs* [1982] 2 NZLR 506 (HC).

[8] It is clear from these decisions that if a charge is a nullity, it cannot be dismissed under s 147 of the CP Act. Although Mahon J referred to a dismissal without prejudice, that should not be confused with a dismissal under s 147 because the words "without prejudice" mean that the dismissal envisaged by Mahon J would not have been an acquittal.

Withdrawal

[9] However, the decisions are less clear as to whether leave can be given to withdraw a charge under s 146 of the CP Act where the charge is deemed to be a nullity. Whata J appears to allude to s 146 when he says he "would have been minded to direct the Crown to withdraw the purported charge" except that s 146 allows the prosecutor to withdraw a charge with the leave of the court; it does not give the court power to "direct the Crown to withdraw" a charge.[6]

[10] In *Police v DS*, Judge Walker took an approach where it seems neither leave to withdraw nor dismissal was granted. He held:[7]

> [37] In my view none of the preconditions for arrest existed and the arrest was unlawful. As a result of the unlawful arrest, the charging documents cannot be before the Court without there having been compliance with s 245 of the Act.
>
> [38] The charging documents are nullities but this does not preclude the police proceeding under s 245 of the Act. If at the end of that process the police decide to proceed by filing charging documents, this decision does not stand in the way of that happening. It may well be of course, that the process under s 245 results in alternative action avoiding the matter coming to Court.

[11] Having found the charging documents are nullities, Judge Walker does not say the police can "proceed again" or file "new charging documents" but merely says that the police can proceed under s 245 and, after that process, file charging documents. This suggests that he viewed the police as having never filed charging documents in the first place.

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[6] Criminal Procedure Act 2011, s 146(1).
[7] *Police v DS* [2016] NZYC 444.

[12] Ultimately, this issue is relatively inconsequential because once it has been found that the charge is a nullity, it cannot be progressed as the court does not have jurisdiction to consider it further. From an administrative point of view, directing or granting leave for the charge to be withdrawn ensures that it is removed from the system in an orderly fashion. The alternative would be that an invalid charge exists in the system without any way for it to be removed, potentially causing procedural and administrative difficulties.

[13] For those reasons, I find that there is jurisdiction to grant leave to withdraw the charges under s 146 of the CP Act. In a situation where charges have been found to be a nullity, granting such leave will essentially function as a direction to the police to withdraw them.

[14] Although I intend granting the police leave to withdraw the charges in this case, there are other issues that arose from the submissions that I think it is important to mention first.

The police position

[15] A strong impression created by the written submissions for the police is that, for them, arresting [MR] unlawfully was not a very serious matter that has caused no delay and that the s 245 process is simply a formality they will go through now to get a criminal prosecution back on track as soon as possible.

[16] For example, the large bold heading in the middle band on the front page of the submissions reads; "Police submissions on continuation of proceedings." Sub-headings within the document include: "Breach not egregious" and "No delay caused". There are then comments such as; "If the charges were withdrawn and re-laid, matters could proceed quickly" and "…if the charges were withdrawn and were subsequently re-laid in accordance with s 245, there would be no delay to the proceedings."

[17] In relation to the alternatives to criminal prosecution, they say that the need for accountability, protection of the public and the interests of the victim all count against the matter being dealt with in the Family Court as a care and protection issue. They

support this position by reference to some of the relevant provisions of the Act but on two occasions they also refer to "the interests of justice". That is not a concept in the Act itself and although it is not defined in the submissions, it appears to be relied upon as further justification for criminal prosecution as the way forward. Additionally, despite what was explained in the first judgment about the functions of a s 247(b) FGC, they refer to the FGC as not being precluded from considering the alternatives to criminal prosecution, instead of accepting that alternatives must be considered at such an FGC.[8]

[18] However, I acknowledge Ms Gourley's advice that the impressions I have referred to, from the comments made in the submissions, do not reflect the actual position of the police. I also accept that a wider reading of the submissions does suggest that the police position might not be completely fixed on criminal prosecution to the exclusion of other options at some stage.

Assessment

Egregiousness

[19] I think it was egregious for the police to have no regard at all for the law that applies to a 13-year-old child when they decided to arrest [MR]. At the time of the arrest, and at the first hearing, they did not even know the law regarding children was different in some important respects to that for young people. That is an egregious breach when considered in the context of the purposes of the Act which are to ensure the wellbeing of children, which is defined very broadly.

[20] Despite my findings, they still believe that the way they went about the arrest somehow mitigates the potentially harmful effects of it. They again put forward such things as making the arrest at the police station, hurrying [MR] through the process at the ACU and executing the search warrant at his home while he was being processed, as somehow counting in their favour as mitigation. As I pointed out in the first judgment, those things simply show how narrow their view of well-being is.

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[8] *Police v MR*, above n 1, at [59].

Delay

[21] I accept that the unlawful arrest has not created a discrete delay up to this point because, over much the same period, there have also been delays in getting the communication assessment and s 333 report due to COVID-19. However, there may be significant delays from this point onwards that do result from the unlawful arrest, depending on what action is taken by the police.

[22] An immediate impact of the proceedings now ending will be loss of the jurisdiction to get the s 333 report that we have been waiting so long for. A letter from Tū Māia, dated 28 February 2022, advised that the report would take a further six weeks. It is not yet available.

[23] There will be delays caused by the timeframes involved in the consultation and FGC process under ss 245 and 247(b). Then, as the police acknowledge in their submissions, there will likely be delays if they lay fresh charges in the Youth Court because applications will probably be made to dismiss those charges on the grounds of abuse of process and delay.

[24] In relation to abuse of process, the police may well have added further grounds for such an application by the contents of their submissions that I have referred to in paragraphs [15] to [17] above. Having proceeded unlawfully to start with, it is concerning that they appear intent on simply restarting the criminal prosecution process as soon as they can and to be dismissive of the alternative option.

[25] However, I accept Ms Gourley's submission that whether it would amount to an abuse of process is a question to be considered if the charges are re-laid and not before. The same is true in relation to delay. As Paul Davison J wrote in *X v District Court at Auckland*:[9]

> [44] While the right to be tried without undue delay remains engaged notwithstanding a withdrawal of charges, the appropriate time to assess any delay or abuse of process must be if and when charges are re-laid.

[9] *X v District Court at Auckland* [2020] NZHC 2952 at [44].

[26] If the police choose therefore to lay new charging documents in the Youth Court, there are likely to be significant delays almost all of which will be the result of the unlawful arrest of [MR]. The police have overlooked that fact.

Options

[27] Those delays would be avoided if the police were to apply to the Family Court to have the matter continue there as a care and protection proceeding in reliance on the grounds in s 14(1)(e). If they did so, it would avoid the pretrial applications referred to above.

[28] Regarding the Family Court option, the police say the need for accountability, protection of the public, the interest of [GL] and the interests of justice count against that.

[29] However, as I explained in the first judgment, the way accountability is addressed in the Family Court will be exactly the same as it would be in the Youth Court.[10] The only difference is the possibility of a notation being made in the Youth Court if the charges are proven, but the entry of a notation for a child is not a foregone conclusion.

[30] In relation to protection of the public, exactly the same conditions of bail that have existed in the Youth Court are available in the Family Court except that there is no power to arrest and detain. In that regard, however, it is relevant that [MR] has not breached any of his bail conditions since they were imposed in July 2021. That issue aside, it is arguable that the protection of the public would be better met in the Family Court than it is in the Youth Court for reasons I set out in detail in the first judgment; that is, approaching the matter in the way the UNGC recommends has been found to reduce the prevalence of crime, yield good results and to be congruent with public safety.[11]

[10] *Police v MR*, above n 1, at [55] to [57].
[11] At [67] to [69] and [81].

[31] It is also arguable that [GL]'s interests would be better met if the proceedings were in the Family Court, particularly because the avoidance of delay must surely be in her best interests too. The same protections and processes would apply to [GL] whichever court the case proceeds in. In terms of her experience of the process, there would be no difference at all except that the case is likely to progress more quickly in the Family Court.

[32] In terms of the proceedings, [MR]'s case would be managed by the same judge and would have exactly the same allocation of court time available to it. Any hearing of the charge would be exactly the same in every respect. There would be the same availability of specialist reports. Out of court processes, such as the centrally important FGC, would be the same.

[33] Based on the information currently available, I believe those factors all favour the exercise of the "pushback" if the police were to lay further charges in the Youth Court. However, as with the issues of abuse of process and delay, a decision about the pushback should only be made if the charges are re-laid.

Findings

[34] There is no jurisdiction to dismiss the charges under s 147 of the CP Act. In any event, I would not have done so for the reasons I gave at paragraph [113] of the first judgment. Nor is there jurisdiction to push the charges back under s 280A(2) of the Act.

[35] There is jurisdiction to grant the police leave to withdraw the charges under s 146 of the CP Act for the reasons given above.

Result

[36] The police are granted leave to withdraw the charging documents.

Judge AJ Fitzgerald
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 30/03/2022