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**IN THE YOUTH COURT**
**AT AUCKLAND**

**I TE KŌTI TAIOHI**
**KI TĀMAKI MAKAURAU**

**CRI-2021-204-000143**
**[2022] NZYC 54**

**NEW ZEALAND POLICE**
Prosecutor

v

**[MR]**
Child

Hearing: 24 January 2022

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

Judgment: 25 February 2022

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**JUDGMENT OF JUDGE A J FITZGERALD**
**[The arrest of a child]**

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**CONTENTS**

## INTRODUCTION

[1] [MR] is charged with raping and having unlawful sexual connection with [GL] on 8 July 2021. At that time, [MR] was aged 13 and [GL] was [slightly older]. Both were students at [school name deleted] ("the school").

[2] It is alleged that when [GL] was walking home from school on 8 July 2021, at about 3.00 pm, [MR] approached her and pushed her into some bushes beside the path. He unzipped her jacket, pulled at her shirt, ripping some buttons in the process, placed his hand inside her bra and squeezed her breast. Then, after pulling [GL]'s skirt up, and her shorts and underpants down to her knees, [MR] put his fingers inside her vagina. Next, he took off his belt, pulled his pants down and started to masturbate before pulling [GL]'s shorts and underpants down to her ankles and raping her. The penetration caused pain to [GL]'s vagina and stomach and there was blood on her thighs and on [MR]'s tee-shirt. [MR] then walked away. [GL] stayed in the bushes crying for about 20 minutes before going home and telling a family member what had happened. The police were contacted that day and [GL] gave an initial statement to them.

[3] On 21 July 2021, [GL] gave an evidential interview ("EVI") and [Constable A] was assigned to the case. After making enquiries at the school, viewing the EVI and some CCTV footage, [Constable A] consulted with senior police staff and the legal section. As a result, a decision was made to arrest and charge [MR].

[4] On 23 July 2021, [Constable A] contacted [MR]'s mother who went to the Police station with her partner and [MR]. Also present was Ms [J], a communication assistant the police had invited to help with the interview. When [MR], his mother and her partner arrived, they were taken to an interview room and told that [MR] was under arrest. [MR] was advised of his rights with help from Ms [J] who also helped [Constable A] explain the charges. [MR] did not want to make a statement, so he was then taken to the Auckland Custody Unit ("ACU") to be processed before being released on police bail to appear in the Youth Court on 29 July 2021.

**ISSUES**

[5] I must decide if [MR]'s arrest was lawful and what the consequences should be if it was not.

[6] Because he was 13 years old at the time of the alleged offending, [MR] is a child in terms of the Oranga Tamariki Act 1989 ("the Act").[1] That is relevant in a number of important respects I will explain later in this judgment. There are some issues and options that apply to children who come to the attention of police that differ from those for young people that are significant in this case.

[7] The powers of arrest under s 214 of the Act are limited:

(a) Under s 214(1), a police officer can only arrest a child if satisfied, on reasonable grounds, that it is necessary to:

(i) ensure the child's appearance in court; or

(ii) prevent that child from committing further offences; or

(iii) prevent the loss or destruction of evidence relating to an offence the child is suspected of committing, or preventing interference with any witness; and

in respect of all three grounds, proceeding by way of summons would not achieve that purpose.

(b) Under s 214(2), a child can also be arrested if there is reasonable cause to suspect that he or she has committed a category 4 offence or a category 3 offence for which the maximum penalty is life imprisonment or at least 14 years, and the constable believes, on reasonable grounds, that the arrest of the child is required in the public interest.

[1] A child is defined in the Oranga Tamariki Act 1989 as a person under the age of 14 years and a young person means a person of or over the age of 14 years but under 18 years. Because [MR] was a child at the time of the alleged offending, I will simply refer to "child" or "children" throughout the judgment and will not add the words "young person" or "young persons" as well unless that is relevant.

[8] Within three days of making an arrest, the officer must provide a written report to the Commissioner of Police stating the reason why the child was arrested without warrant.

[9] [Constable A] relied on all of the grounds referred to in paragraph [7] above when he arrested [MR] on 23 July 2021, so I must consider them all. Before doing so, it is necessary to set out more of the facts that emerged from the hearing on 24 January 2021, summarise counsels' submissions, and consider the relevant law.

## HEARING

### [Constable A]'s evidence

[10] In the statement [GL] gave to the police on 8 July 2021, describing the events which are summarised in paragraph [2] above, she named [MR] as the suspect. She recognised him because they went to the same school.

[11] The initial investigation was carried out by the Crime Squad whose tasks included doing the preliminary interview, attending the scene, making a referral to the specialist interviewing unit and getting a date for the EVI.

[12] Once an EVI has taken place, a file is usually assigned to the Child Protection Team in a case as serious as this. However, in this case the file was given to [Constable A]'s team on 21 July 2021 for investigation because the Child Protection Team had too much work. For 13 days therefore, nothing was done to investigate the matter any further or locate the suspect whose identity was known, despite the disturbing nature of [GL]'s disclosures.

[13] When [Constable A] received the file on 21 July 2021, he picked up the EVI DVD, read the synopsis of the interview, went to the school and obtained a statement from the associate principal, and made inquiries at several locations in search of CCTV footage. Amongst other things, it was discovered that on 9 July 2021, some older students at the school had chased [MR] because there was a rumour circulating that he had indecently assaulted a student the day before.

[14] [Constable A] then consulted with [Detective Sergeant B], the Youth Court Prosecutions Team and the Legal Section as to whether there were grounds to arrest [MR]. Those consultations involved ongoing discussions and phone calls on 21 and 22 July 2021. [Constable A] is unsure of the exact time the decision to arrest [MR] was made, but it was before he phoned [MR]'s mother on 23 July 2021 asking her to come to the station with [MR].

[15] The only other option that [Constable A] and those he consulted with considered before deciding to arrest [MR] was whether to consult a youth justice coordinator in accordance with s 245 of the Act, with a view to having an "intention to charge" Family Group Conference ("FGC") under s 247(b) of the Act. That option was not believed to be adequate to manage the risks in this case.

[16] [Constable A] said that the main reason for arresting [MR] was to have him on bail conditions to prevent any further offending. The seriousness of the alleged offending was the primary concern for the police who believed it was in the public interest to arrest [MR] and have bail conditions that he and his parents understood to prevent something similar from happening.

[17] A variety of factors contributed to the decision to arrest [MR] instead of consulting with an FGC coordinator:

(a) In relation to ensuring [MR] would appear in court, [Constable A] said the seriousness of the charges and [MR]'s age created a risk that he and his family may try and leave Auckland and go into hiding.

(b) Although [MR] had never come to police attention for anything before, that needed to be balanced against the brazen nature of the alleged offending that occurred in broad daylight in a public area and with a lot of people around. Those features were unusual and very concerning. [Constable A] also believed there was some planning and premeditation involved. CCTV footage from the same day showed [MR] with another female student kissing and "possibly touching in a sexual manner." It was not known if such actions were consensual, but if they were not,

[Constable A] believed it heightened the risk of further sexual offending.

(c) 8 July 2021, the day the alleged offending occurred, was a Thursday. The following day, 9 July, was the end of the school term. The new school term was about to resume on Monday 26 July 2021, so it was a priority to ensure there were conditions in place to prevent [MR] going back to school, because of the risk of him having contact with [GL] and also for the safety of other students who could be at risk.

(d) There was said to be a chance [MR] could have gone back and interfered with the scene and damaged CCTV cameras at the school.

(e) The police view was that the public interest was best served by getting [MR] on bail conditions that managed those risks and bringing him before the Youth Court as soon as possible.

[18] The two conditions of police bail that were considered sufficient to address the concerns were that [MR] not associate with [GL], or have contact directly or indirectly with her, and that he not go within 100 metres of the school.

[19] [Constable A]'s understanding was that once [MR] was on police bail, he would be given two opportunities of breaching that bail before he could be arrested for a breach. He thought [MR]'s Youth Aid officer would be notified of any breaches of police bail and they would be recorded in the system. He believed [MR] could only be arrested in exceptional circumstances for the first two breaches. Otherwise he could only be arrested for a third breach.

[20] As soon as [MR] arrived at the station with his mother and her partner, at 6.00 pm on Friday 23 July 2021, they were taken to an interview room and [MR] was arrested. There was no attempt at all to discuss anything with [MR] or his mother first.

[21] [Constable A] thought [MR] understood what a lawyer was because of [MR]'s body language and the conversation they had. He cannot recall exactly what [MR]

said and no notes were taken in relation to the giving of rights advice including consulting with a lawyer.

[22] [MR] declined to make a statement. At about 7.26 pm, he was taken to the ACU and placed in a holding cell for about three minutes before being led to the processing counter. This is the same place that all people suspected of committing a crime are processed including adults but there were no adults there at the time. After [MR] had been processed, he was released from the ACU on police bail to appear in court on 29 July 2021. The two conditions of bail were those referred to earlier.[2]

[23] [Constable A] says he did consider [MR]'s wellbeing and best interests and that is why "we did things as gently as we could." For example, [MR] and his mother were asked to come to the police station instead of arresting him at home. The police accompanied [MR] to the ACU, went through there as fast as possible without seeing adult prisoners, and dropped him home afterwards. While [MR] was at the ACU, the police executed a search warrant at [MR]'s home and went through his room. [Constable A] believed that the police did as much as they could to give [MR] support by not leaving him alone at any stage or letting him see police going through his personal belongings.

[24] Afterwards, [Constable A] completed the necessary form and sent it to the Police Commissioner on 26 July citing all grounds for the arrest referred to earlier.[3]

[25] [Constable A] has been in the police for six years in various roles but never in Youth Aid. In that time, he has dealt with about 10 children suspected of offending and with about 40 young people. He conceded that he was not aware of the finer details of the processes that apply for children or what happens when they go through court. He has had some training in relation to children and young people who come to police attention but not as much as a Youth Aid officer would receive. He has had no training in relation to the UN Convention on the Rights of the Child ("the CRC").[4]

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[2] See above at [18].
[3] See above at [7].
[4] United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) [CRC].

[26] None of the people [Constable A] consulted about the decision to arrest mentioned that the process is different for children than it is for young people nor the possibility of applying to the Family Court for a care and protection order on the grounds that the alleged offending was of sufficient nature or magnitude to cause serious concern for [MR]'s well-being.[5]

[27] [MR] made his first appearance in the Youth Court on 29 July 2021 with his mother and some others in support. Ms Winterstein raised concern about the arrest on that day. Bail conditions set by agreement were that [MR] continue living with his mother, that he not go within 100 metres of the school, that he neither associate with nor contact [GL] and that he not associate with females under the age of 16 years without adult supervision. [MR]'s mother has shown a responsible, concerned and cooperative attitude throughout the process so far. [MR] did not breach any conditions of his police bail nor has he breached any conditions of his court bail.

**Submissions**

***For the police***

[28] It was accepted that the onus is on the police to satisfy the Court that the relevant conditions under s 214 of the Act are met.[6]

[29] Ms Gourley submitted that although generally the process of consultation and an "intention to charge" FGC under s 245 of the Act is preferred, there are instances where immediate action is required. She pointed out that Mallon J had recognised that situation in *YP v The Youth Court at Upper Hutt* where she said;[7]

> "An arrest ensures that criminal proceedings are commenced promptly – they do not need to await the consultation and family group conference. This might be appropriate where an offence is particularly serious and there is a need for the community to see that prompt and adequate steps are being taken."

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[5] Oranga Tamariki Act, s 14(1)(e).
[6] *Police v Z K W-W* [2013] NZYC 580 at [17].
[7] *YP v Youth Court at Upper Hutt* HC Wellington CIV-2006-485-1905, 30 January 2007 at [58].

[30] Ms Gourley also pointed out that the term "public interest" is not defined in the Act, but it is used in various places including in the youth justice principles.[8] Again, in *YP v Youth Court at Upper Hutt*, Mallon J made the following observations of the public interest limb:[9]

> "An arrest under s 214(2) bypasses the steps that must be taken in s 245 before any information can be laid. Those steps include a requirement that the informant believe that criminal proceedings against the young person are 'required in the public interest'. Where there is reasonable cause to suspect that a purely indictable offence has been committed, criminal proceedings will ordinarily be appropriate. When the arrest procedure is invoked the young person does not receive the potential benefit that may arise from consultation between the informant and a youth justice co-ordinator and consideration of the matter at a family group conference. The public interest in an arrest should therefore be such as to outweigh the objectives of those requirements in s 214."

[31] Mallon J concluded that the fact "public interest" had not been defined in the Act meant it was intended to be interpreted broadly.[10] Her Honour also stated that the seriousness of the alleged offence is a relevant consideration when assessing whether the arrest is in the public interest.[11] The matters referred to in s 214(1) are also relevant in considering the public interest. This includes the need to ensure bail conditions are set where there is a risk of further offending or interference with witnesses.[12]

[32] It was noted that in *R v H,* Simon France J affirmed that consideration of the public interest includes the principles set out in ss 4, 5 and 208 of the Act.[13]

[33] Ms Gourley submitted that [Constable A] had reasonable grounds to believe [MR]'s arrest was required in the public interest because:

(a) the offences he suspected [MR] of committing are particularly serious;

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[8] Section 208. See below at [47].
[9] *YP v Youth Court at Upper Hutt,* above n 7, at [57].
[10] At [56].
[11] At [58].
[12] At [59].
[13] *R v H* [2017] NZHC 3223 at [15].

(b) it was necessary to prevent interference with [GL];

(c) it was necessary to prevent further offending; and

(d) the needs were urgent because the school holidays were due to end, meaning [MR] would be returning to the same school as [GL].

[34] In relation to the delay between the alleged offending and the arrest Ms Gourley disputed Ms Winterstein's submission that the relevant period was 15 days and argued that it was only two days. She submitted that the relevant period was from the EVI on 21 July 2021 to the arrest on 23 July 2021.

***For [MR]***

[35] Ms Winterstein challenged the lawfulness of the arrest by reference to both the relevant provisions of the Act as well as the relevant articles of the CRC given the statutory requirement that a child's rights under the CRC must be respected and upheld. She submitted that [MR]'s arrest, 15 days after the alleged offending, was not required on any of the grounds in s 214(1) of the Act and that there were not reasonable grounds for [Constable A]'s belief that the arrest was required in the public interest under s 214(2). [MR] had never been in trouble before, he and his mother attended at the police station voluntarily, cooperated at the time and have continued to do so since. No attempt was made to discuss anything with them before the arrest.

[36] It was submitted that the failure to ensure that a lawyer was at the police station on 23 July 2021 when [MR] was spoken to, was a breach of his rights under the CRC. If the police had ensured that a lawyer was present, it is possible that the legality of arrest could have been discussed, the viable options considered, and an unlawful arrest avoided.

[37] It was submitted that the alternative and less restrictive approach of consulting an FGC coordinator should have been adopted by [Constable A] in the circumstances of this case.

[38] Attention was drawn to the following comments of Simon France J:[14]

> "The statutory test focuses on the officer's belief being based on reasonable grounds. This allows scope of competing views on the wisdom of the decision without making it unlawful. I have noted I consider it was an incorrect decision but that is not the appellate issue. I consider it was a wrong decision because ***greater weight should have been given to keeping a child out of the Court system, and to giving the Act's alternative processes a chance.*** I am unconvinced that after a month had already elapsed it was imperative to sidestep the other route and am surprised the youth co-ordinator agreed. I am also influenced by my view that the incident was overcharged in order to meet the jurisdictional limit. [The emphasis was in Ms Winterstein's submissions]."

[39] Ms Winterstein submitted that the failure to adopt the Act's alternative processes here is such that the arrest was unlawful and that the consequence for that should be dismissal of the charges.

## LAW[15]

### The Act

[40] The Act governs the youth justice system and the Youth Court's place in it as well as the law concerning children in need of care and protection. This is of particular importance for 12 and 13-year-old children who come to the attention of the police because they straddle both parts of the Act and can move between them. Some understanding of the Act as a whole is therefore essential in a case such as this.

[41] Both parts of the Act have much in common. They share the same purposes[16] and general principles.[17] The duties on Judges and lawyers to explain what is going on to children and others, and to encourage children's participation are the same.[18]

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[14] At [23].
[15] In this section I have included just those parts of the relevant sections of the Act and articles of the CRC that are most relevant in this case. There is a strong emphasis in the Act on cultural proficiency understanding and involvement, especially regarding Māori children. Those important matters are not covered in the following analysis because it was not necessary to do so for the purpose of deciding the issues in this hearing and [MR] is of Niuean and Cook Island ethnicity, so Treaty of Waitangi considerations do not arise.
[16] Section 4.
[17] Section 5.
[18] Sections 10 and 11.

The centrally important function of the FGC is much the same; essentially all-important decision making must pass through the FGC process so that recommendations can be made to the court about a range of important issues in proceedings. Both parts have similar provisions for obtaining medical, psychiatric and psychological reports[19] and cultural and community reports.[20]

[42] There are then provisions that provide an interface between the two parts. For example, reporting and notifications of concern,[21] FGCs to deal with both youth justice and care and protection issues and make recommendations and plans[22] and FGCs to consider the exercise of "the pushback" which I will explain soon.[23]

***Purposes***

[43] The purposes of the Act are to promote the well-being of children, their families and wider family groups. That is to be achieved by complying with a long list of obligations including;

(a) Adopting approaches that are designed to affirm the mana of children, be centred on their rights, promote their best interests, advance their well-being, address their needs, provide for their participation in decision making that affects them, advance positive long-term health, educational, social, economic, or other outcomes and are culturally appropriate and competently provided.

(b) Children must be supported and protected to prevent them from suffering harm, including harm to their development and well-being as well as preventing offending or reoffending or in response to offending.

(c) Families must be assisted at the earliest opportunity to prevent their children from offending or reoffending and be assisted to fulfil their responsibility to meet the needs of their children.

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[19] Sections 178 and 333.
[20] Sections 187 and 336.
[21] Sections 15 and 18.
[22] Section 261.
[23] Section 280A.

(d) Responses to alleged offending by children must be carried out in a way that promotes their rights and best interests, acknowledges their needs; prevents or reduces offending or future offending, recognises the rights and interests of victims, holds children accountable, and encourages them to accept responsibility for their behaviour.

***Wellbeing and best interests***[24]

[44] For the care and protection provisions of the Act, the well-being and best interests of the child are the first and paramount consideration having regard to both the general principles and the care and protection principles of the Act.[25]

[45] For the youth justice provisions of the Act, the following are the four primary considerations, in relation to which regard must be had to the general principles and the youth justice principles of the Act.[26]

(a) the well-being and best interests of the child; and

(b) the public interest (which includes public safety); and

(c) the interests of any victim; and

(d) the accountability of the child for their behaviour.

***General principles***

[46] Every person who exercises any power under the Act must be guided by principles that include the following:

(a) a child must be encouraged and assisted, wherever practicable, to participate in and express their views about any proceeding,

[24] Section 4A.
[25] Section 13.
[26] Section 208.

process, or decision affecting them, and their views should be taken into account.

(b) the well-being of a child must be at the centre of decision making that affects that child and, in particular, the child's rights under the CRC must be respected and upheld, and the child must be treated with dignity and respect and protected from harm.

(c) taking a holistic approach that sees a child as a whole person including a wide range of considerations of both immediate significance as well as long term ones such as developmental potential.

(d) endeavours should be made to obtain the support of a child for the exercise or proposed exercise of any power under the Act and endeavours should also be made to obtain the support of the parents for the exercise of any power under the Act in relation to that child.

***Youth justice principles***

[47] The Youth Justice principles that are most relevant here are:

(a) unless the public interest requires otherwise, criminal proceedings should not be instituted against a child if there is an alternative means of dealing with the matter;

(b) any measures for dealing with offending by children should be designed to strengthen the family of the child concerned and to foster the ability of families to develop their own means of dealing with offending by their children;

(c) the vulnerability of children entitles a child to special protection during any investigation relating to the commission of an offence by that child.

**Children who come to police attention**

[48] As mentioned above, there are issues and options that apply to children who come to the attention of the police that differ from those for young people and that has a lot to do with the age of criminal responsibility which in New Zealand is 10. However, 10 and 11-year old children can only be charged with murder or manslaughter.

[49] Until 2010, the only way 12 and 13 year old children accused of offending could be dealt with by a court was for the police to apply to the Family Court to have the case dealt with as a care and protection issue under Part 2 of the Act. As mentioned earlier, such an application is made on the grounds that the child has committed an offence or offences of sufficient number, nature and magnitude to cause serious concern for the well-being of the child.[27] That option is still available.

[50] However, amendments to the Act in 2010 enabled the police to charge and bring some 12 and 13 year old children before the Youth Court under part 4 of the Act but only those facing a charge with a maximum penalty of 14 or more years imprisonment (other than murder or manslaughter) or a child who is a previous offender.[28]

[51] For all 12 and 13-year-old children who meet the criteria to be brought before either the Family Court or the Youth Court for alleged offending as described in the preceding two paragraphs, it is essential to understand what both of those pathways entail.

**Pathways for children**

***The care and protection pathway***

[52] If a police officer believes a child is in need of care and protection under s14(1)(e), that officer must report that concern to a youth justice FGC co-ordinator.[29]

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[27] See above at n 5.
[28] Section 272(1)(a),(b),(c),(1A),(1B).
[29] Section 18(3).

That officer's referral is made to the coordinator under 2 of the Act: the care and protection part.

[53] If, after the officer and FGC coordinator have consulted, the officer believes that applying for a care and protection order is required in the public interest, the co-ordinator must convene an FGC under part 4 of the Act; the youth justice part.[30]

[54] The functions of that FGC include considering care and protection matters for the child and making such decisions, recommendations and plans as necessary or desirable having regard to the general and the care and protection principles of the Act and care and protection considerations.[31] It is not open for that FGC to consider a criminal prosecution of that child.[32]

[55] However, if a 12 or 13-year-old child is before the Family Court on the grounds set out in s 14(1)(e), or as a result of the pushback,[33] any hearing of the allegations is essentially a criminal trial in all respects including the application of the criminal standard of proof, beyond reasonable doubt. The prosecution must also prove the child knew the offence was wrong or contrary to law.[34]

[56] Although the Family Court has the ability to impose bail like conditions on children both on an interim basis[35] and as part of disposition orders,[36] that cannot be done without notice or before there has been an FGC.[37] When such orders are made they include such things as where the child must reside, any specified person or people with whom they must not associate and any other conditions the court thinks fit to reduce the likelihood of further offending.[38]

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[30] Section 247(a).
[31] Section 258(1)(a)(i) and (ii).
[32] Section 258(1)(b) which talks about the FGC considering prosecution for the offence only refers to "young person" and it would seem therefore that it is not open to an FGC convened under s247(a) to consider prosecution of a child.
[33] See below at [61].
[34] Sections 197 and 198.
[35] Sections 92 and 96.
[36] Sections 91 and 96.
[37] Sections 70 and 72.
[38] Section 96.

[57] In addition to the standard disposition orders that are available in all care and protection cases, which include an order for the child to come up if called upon within two years,[39] there are specific orders provided in relation to children who come before the Family Court on s 14(1)(e) grounds, including admonishing the child and reparation for emotional harm and for loss of or damage to property.[40]

***The youth justice pathway***

[58] If a police officer believes a 12 or 13-year-old child has committed an offence for which that child can be charged and brought before the Youth Court, but grounds to arrest the child are not met, a charging document cannot be laid in the Youth Court unless the criteria in s 245 of the Act have been satisfied. They are:

(a) The officer believes criminal proceedings are required in the public interest; and

(b) Consultation has taken place between the officer and a youth justice FGC coordinator; and

(c) The matter has been considered at an FGC under the youth justice provisions of the Act.[41]

[59] At that FGC an issue that must be considered is whether the public interest requires criminal proceedings to be brought against the child or whether he or she is in need of care and protection and, if so, whether proceedings should be brought before the Family Court or in some other way, instead of criminal proceedings in the Youth Court.[42]

[60] If a child is arrested and brought before the Youth Court for a charge that is not denied by the child, the resulting FGC[43] must also consider whether the public interest requires continuing with criminal proceedings against the child or whether the child is in need of care and protection on the grounds in s 14(1)(e) and, if so, whether the

[39] Section 83.
[40] Section 84.
[41] Section 247(b).
[42] Section 258(1)(ba).
[43] Section 247(d).

matter should be in the Family Court, or dealt with in some other way, instead of remaining in the Youth Court.[44]

***The pushback***

[61] For all 12 or 13-year-old children who are charged and brought before the Youth Court, the Act enables a judge to refer the matter back to the prosecutor to consider making an application to the Family Court to have the case dealt with on a care and protection basis rather than continuing with it as a criminal proceeding before the Youth Court.[45] The ability for the judge to refer the matter back to the prosecutor in that way is referred to as "the pushback."

[62] When the pushback is exercised, a judge is able at any time to discharge the charge under s 282 of the Act but, if not discharged earlier, the charge is deemed discharged when the prosecutor's application first comes before a Family Court Judge.[46]

[63] So, for children who come to police attention, there is a very clear theme;

(a) If the care and protection pathway is chosen, transfer to the Youth Court for a criminal prosecution instead is not an option.

(b) However, if a criminal prosecution of a child in the Youth Court is being considered, or is taken, those exercising powers under the Act and every FGC must consider whether the matter should go to the Youth Court, or stay there, or whether it should be in the Family Court instead, to be dealt with on a care and protection basis, or be dealt with in some other way.

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[44] Section 258(1)(ba).
[45] Section 280A.
[46] A s 282 discharge deems the charge never to have been laid in the Youth Court; it is a complete and unconditional discharge.

**The CRC**

[64] The general principles of the Act, which must guide every person exercising powers under it, require that the rights of children under the CRC must be respected and upheld.

[65] Rather than set out the text of articles 37 and 40 of the CRC, which are those most relevant in this case, it is better to refer instead to the relevant parts of the latest UN general comment on Child Justice which was issued on 18 September 2019 ("the UNGC").[47] It provides guidance on how to understand and apply the relevant articles of the CRC so as to respect and uphold children's rights.

[66] It must be noted that article 40 in particular contains an important list of rights and guarantees aimed at ensuring that every child receives fair treatment and trial and that these are minimum standards. States parties are told they can and should try to establish and observe higher standards.

**The UNGC**

[67] The introduction to the UNGC includes the following:

> 2. Children differ from adults in their physical and psychological development. Such differences constitute the basis for the recognition of lesser culpability, and for a separate system with a differentiated, individualized approach. Exposure to the criminal justice system has been demonstrated to cause harm to children, limiting their chances of becoming responsible adults.
>
> 3. The committee acknowledges that the preservation of public safety is a legitimate aim of the justice system, including the child justice system. However, States parties should serve this aim subject to their obligations to respect and implement the principles of child justice as enshrined in the Convention on the Rights of the Child. As the Convention clearly states in Article 40, every child alleged as, accused of or recognised as having infringed criminal law should

[47] *Committee on the Rights of the Child General comment No. 24 (2019) on children's rights in the child justice system* UN Doc CRC/C/GC/24 (18 September 2019).

always be treated in a manner consistent with the promotion of the child's sense of dignity and worth. Evidence shows that the prevalence of crime committed by children tends to decrease after the adoption of systems in line with these principles.

[68] Diversion of children away from formal justice processes, and in particular criminal justice processes, is a strong theme in the UNGC. In relation to that it says:

> 15. …Diversion involves referral of matters away from the formal criminal justice system, usually to programmes or activities. In addition to avoiding stigmatisation and criminal records, this approach yields good results for children, is congruent with public safety and has proved to be cost effective.
>
> 16. Diversion should be the preferred manner of dealing with children in the majority of cases. States Parties should continually extend the range of offences for which diversion is possible, including serious offences where appropriate. Opportunities for diversion should be available from as early as possible after contact with the system, and at various stages throughout the process. Diversion should be an integral part of the Child Justice system, and, in accordance with art. 40(3)(b) of the Convention, children's human rights and legal safeguards are to be fully respected and protected in all diversion processes and programmes.
>
> …
>
> 72. The decision to bring a child into the justice system does not mean the child must go through a formal court process. In line with the observations made above in section IV.B, the Committee emphasizes that the competent authorities – in most States the public prosecutor – should continuously explore the possibilities of avoiding a court process or conviction, through diversion and other measures. In other words, diversion options should be offered from the earliest point of contact, before a trial commences, and be available throughout the proceedings.

[69] In relation to the age of criminal responsibility, the UNGC states:

> 21. Under article 40(3) of the Convention, States parties are required to establish a minimum age of criminal responsibility, but the article does not specify the age. Over 50 States parties have raised the minimum age following ratification of the Convention, and the most common minimum age of criminal responsibility internationally is 14. …

> 22. Documented evidence in the fields of child development and neuroscience indicates that maturity and the capacity for abstract reasoning is still evolving in children aged 12 to 13 years due to the fact that their frontal cortex is still developing. Therefore, they are unlikely to understand the impact of their actions or comprehend criminal proceedings. They are also affected by their entry into adolescence. As the committee notes in its general comment No. 20 (2016) on the implementation of the rights of the child during adolescence, adolescence is a unique defining stage of human development characterised by rapid brain development, and this affects risk taking, certain kinds of decision making and their ability to control impulses. States parties are encouraged to take note of recent scientific findings, and to increase their minimum age accordingly, to at least 14 years of age. Moreover, the developmental and neuroscience evidence indicates that adolescent brains continue to mature even beyond the teenage years, affecting certain kinds of decision making. Therefore, the committee commends States parties that have a higher minimum age, for instance 15 or 16 years of age, and urges States parties not to reduce the minimum age of criminal responsibility under any circumstances, in accordance with Article 41 of the Convention.
>
> …
>
> 25. The Committee is concerned about practices that permit exceptions to the use of a lower minimum age of criminal responsibility in cases where, for example, the child is accused of committing a serious offence. Such practices are usually created to respond to public pressure and are not based on a rational understanding of children's development. The Committee strongly recommends that States parties abolish such approaches and set one standardized age below which children cannot be held responsible in criminal law, without exception.

[70] I believe the requirement to respect and uphold the CRC rights of children applies not only to those who are the subject of proceedings, such as [MR], but also to children who are complainants and victims in proceedings under the Act.[48] [GL] also has rights under the CRC that must be respected and upheld here. Article 19 of the CRC specifically provides rights that should be respected and upheld for children who are the victims of crime. The most recent UN General Comment on article 19 of the CRC begins by stating that it is based on fundamental assumptions including

[48] *New Zealand Police v HH* [2021] NZYC 583.

respecting and promoting the human dignity and physical and psychological integrity of children who are victims whose rights must be recognised, respected and protected and whose best interests must be a primary consideration.[49]

## ANALYSIS

[71] My decisions must be informed by the purposes of the Act, having regard to the primary considerations and guided by the principles which include respecting and upholding the rights of children under the CRC.

[72] Those same things are what [Constable A] needed to have in mind when deciding whether to arrest [MR] because in doing so, he was exercising a power under the Act.

### Well-being

[73] The primacy of wellbeing, and the broad extent of what it encompasses, is important given that the purposes of the Act are the wellbeing of children, their families and wider family groups. What is relevant in that respect is set out in detail in s 4. It not only encompasses all aspects of [MR]'s being, and issues concerning his immediate and wider family, but it also requires consideration of the immediate and short-term implications of any decision, and also the medium to long term implications. References in s 4 to things such as long-term health, educational, social, economic and other outcomes make that clear. References in s 5 to such things as developmental potential are relevant too.

[74] In relation to the decision to arrest [MR], [Constable A] had a very narrow view of what was relevant in terms of [MR]'s wellbeing. For him it meant taking [MR] through the criminal law processes as gently as possible by arresting him at the police station instead of at home, taking him quickly through the booking process at the ACU and executing the search warrant when [MR] was not home so that he did not see the police going through his belongings.

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[49] *Committee on the Rights of the Child General comment No. 13 (2011) The right of the child to freedom from all forms of violence* UN Doc CRC/C/GC/13 (17 February 2011).

[75] However, issues relevant to [MR]'s wellbeing, even in the context of the decision to arrest, are far wider than that. The first of the general principles which guide those exercising powers under the Act requires having [MR]'s wellbeing, in the broad context set out in s 4, at the centre of decision making, and it was not. Some thought should have been given to the wider well-being considerations including balancing any immediate benefits of arrest and laying criminal charges against the longer-term risk of harm in doing so. Thought should also have been given, at that early opportunity, to discussing the situation with [MR] and his mother before deciding an arrest was necessary.

**The public interest**

[76] For [Constable A], the public interest was served by arresting [MR], having him on bail conditions to prevent the risk of further offending, and before the Youth Court as soon as possible. Those are public interest considerations but there is much more to the public interest than that.[50]

[77] The Act does not define what "the public interest" means, but it has been described as a broad concept that is intended to be interpreted broadly.[51] When considering the public interest, regard must be had to ss 4, 5 and 208 of the Act.[52]

[78] It is an important concept in the context of this case. The words "the public interest" appear in the Act 16 times and on 11 of those they are used in the context of children who come to police attention; their wellbeing, issues regarding their care, whether they should be dealt with in care and protection or criminal proceedings, and in relation to bail.

[79] The words first appear in s 4A as one of the four primary considerations in youth justice matters where it says "the public interest…includes public safety." It is therefore wider than public safety considerations alone. Importantly, s 4A requires that when considering the public interest, regard must be had to the general principles in s 5 of the Act and the youth justice principles in s 208. That is a very clear sign of

[50] See n 12.
[51] See above at [31].
[52] See above at [32].

just how broad the concept is; all those things must guide every person exercising powers under the Act and must be taken into account when considering the public interest.

[80] The first of the general principles requires, in particular, that [MR]'s rights under the CRC must be respected and upheld. It is therefore important to look at those rights.

***Rights under the CRC***

[81] If [MR]'s rights under the CRC were respected and upheld:

(a) He would not be prosecuted in a criminal proceeding because he is below the age that is considered appropriate for criminal responsibility. The UNGC states that documented evidence shows that 12 and 13-year-old children are unlikely to understand the impact of their actions or comprehend criminal proceedings and are affected by their entry into adolescence. Concern was expressed by the committee that drafted the UNGC about practices that allow for exceptions to the minimum age of criminal responsibility (as the Act does) and strongly recommended abolishing them.

(b) It would be recognised that exposure to the criminal justice system has been demonstrated to cause harm to children, limiting their chances of becoming responsible adults and also that evidence shows the prevalence of crime committed by children tends to decrease after adopting systems in line with the principles outlined in the UNGC, which are aimed at avoiding the use of criminal proceedings.

(c) Diversion away from a criminal justice approach, thereby avoiding stigmatisation and criminal records, would be considered despite the charges being serious, because it is known that such diversionary approaches yield good results and are congruent with public safety.

[82] These were not issues [Constable A] considered, and he acknowledged that the CRC is not something he has had any training in. Being aware however that he did not have expertise in relation to dealing with children, he consulted with others who do, but it would seem they did not consider such issues either. It appears that the only public interest factor they considered was the perceived immediate and short-term benefit of having bail conditions and getting [MR] into the Youth Court. However, such issues needed to be balanced against the medium and longer-term risk of harm that an arrest and criminal-law approach might cause and the potential public safety implications of that. There is an obvious public interest in adopting approaches that reduce the prevalence of crime and are congruent with public safety which is why the guidance provided by the UNGC should have been considered.

[83] As Ms Winterstein pointed out, if [MR]'s rights under the CRC were respected and upheld and a right's based approach adopted, he would have had a lawyer there at the police station on 23 July 2021 as well as his mother and Ms [J] who provided communication assistance.[53] However, currently under our domestic law, it is not mandatory for a lawyer to be present for a child at that first point of contact with the police. That does call into question whether the protections provided in the Act for children during an investigation are in fact special as the Act requires.[54] If a lawyer had been there it is likely he or she would have drawn to the attention of [Constable A] options and legal requirements that he, and those with whom he had consulted, had not considered and it is possible an unlawful arrest could have been avoided.

[84] Where [MR]'s rights under the CRC are at odds with our domestic law I have proceeded on the basis that the latter take priority over the former and that the rights a child has under the CRC act as an aid to the interpretation and application of the Act. Even if that is so, the rights-based considerations, such as those in the UNGC, carry significant weight given the statutory requirement to respect and uphold them and also because a rights-based approach is based on documented evidence and research, as is apparent from the text of the UNGC.

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[53] *New Zealand Police v [FG]* [2020] NZYC 328.
[54] Section 208(2)(h).

***Making endeavours***

[85] The general principles also require that endeavours should be made to obtain the support of children and of parents to the proposed exercise of any power under the Act and that did not happen here. The decision to arrest [MR] was made before [Constable A] phoned [MR]'s mother, and the arrest was affected as soon as she arrived at the police station with [MR]. There was no attempt to discuss anything first. This requirement is consistent with the principles that allow children to participate and express views in matters affecting them, to be treated with dignity and respect as well as fostering the ability of the family to deal with the alleged offending.

***Options***

[86] The first of the youth justice principles is that criminal proceedings not be instituted against a child if there was an alternative means of dealing with the matter, unless the public interest requires it.[55]

[87] The only alternative considered by [Constable A] and the people he consulted with was that which applies to young people. The Act does have a strong emphasis on using alternative means to Youth Court proceedings for dealing with alleged offending by young people. However, it has an even greater emphasis placed on not resorting to criminal proceedings for 12 and 13-year-old children but instead considering whether the care and protection pathway should be followed. Everyone exercising powers under the Act should have that in mind. The failure to do so here calls into question the reasonableness of the decision to arrest.

[88] In that respect it is relevant to look at what they sought to achieve by arresting and charging [MR]. [Constable A] believed that once [MR] was on police bail he could only be arrested on the first two occasions of breaching bail if there were exceptional circumstances. Otherwise the power to arrest was only available for a third or subsequent breach.

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[55] Section 208(2)(a).

[89] However, under s 214A of the Act, a constable can only arrest a child if there have been breaches of any of the bail conditions on two previous occasions. There is no exceptional circumstance proviso. Section 214A does not specify whether it applies to police bail as well as to court bail. The authors of Westlaw say it only applies to court bail but without giving any reasons for that opinion.[56] Such an interpretation would seem inconsistent with the purposes and principles of the Act. The issue is not one that was argued before me, so I make no definitive finding on it.

[90] For present purposes, what is relevant is [Constable A]'s understanding of the situation. He was content that the two bail conditions agreed upon were sufficient to manage the concerns the police had, even though they did not have power to arrest [MR] in the event of a breach of either condition on the first two occasions of breach. Given that nothing more restrictive than that was considered necessary, it further calls in to question the reasonableness of moving directly to arrest without speaking to [MR] and his mother first and without considering the alternatives that would have achieved the same result.

[91] The fact that [MR] and his family were not known to the police before this incident, is capable of being seen in two ways. The first is that the lack of history meant there was no factual basis for saying that [MR] would not go to court if required to and that he would not be cooperative in relation to staying away from [GL] and from school. As Ms Winterstein pointed out, [MR]'s mother had shown a cooperative attitude from the start by taking [MR] to the police station voluntarily. The alternative view, relied upon by the police, was that [MR] was an unknown quantity whose alleged offending was brazen and required urgent action.

[92] However, the police had done nothing for two weeks to locate [MR] and his family, despite [GL]'s disclosures on 8 July 2021. That delay was not explained by the police who did not consider it relevant. The submission made by Ms Gourley was that the relevant delay was only two days, from 21 July to 23 July 2021.

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[56] Simon France (ed) *Adams on Criminal Law – Criminal Procedure* (online ed, Thomson Reuters) at [CY214A.01].

[93] The 15 days of delay between the incident and the arrest is relevant to the issues of reasonableness and the necessity to arrest [MR]. To view it overwise is to overlook the significant fact that there was no evidence of him attempting to contact [GL], or of further offending, for two weeks. Those were the concerns the police felt a need to manage by way of bail conditions, but they had done nothing to see them put in place until two weeks after the offending had been reported.

[94] When the comments of Mallon J about the need for the community to see prompt and adequate steps taken are applied to the facts of this case, the time for action began from the moment the police received [GL]'s disclosures on 8 July.[57] As soon as [Constable A] was assigned to the case he acted promptly and decisively. The fact that there had been a delay of 13 days by the time he became involved increased the sense of urgency the police felt to affect the arrest because the new school term was looming.

[95] However, although the delay increased the urgency to act, it also provided the police with further information to consider and, in particular, whether moving directly to arrest was necessary given the delay and the absence of any reports of concern about [MR] in that period.

[96] Therefore, the failure to have regard to the two-week delay period when making the decision to arrest [MR] is another factor that calls into question both the necessity for and the reasonableness of the decision.

***Seriousness***

[97] The seriousness of the offence is a relevant consideration in assessing the public interest in an arrest.[58] However, other comments Mallon J made in relation to that issue need to be considered in context. That case concerned a young person not a child. It was at a time when 12 and 13-year-old children could not be charged criminally with offending other than murder or manslaughter. Now that they can, there

[57] *YP v Youth Court at Upper Hutt,* above n 7, at [58].
[58] At [58].

are considerations specific to children that are relevant to them that did not arise in that case.

[98] The comment about criminal proceedings ordinarily being appropriate where there is reasonable cause to suspect a purely indictable offence has been committed cannot be applied without qualification to 12 and 13-year-old children. Such children can only be charged with offences that correspond with the definition of what was a purely indicatable offence.[59] Given the scheme of the Act now regarding such children, it cannot be said that resorting to criminal proceedings in all cases will ordinarily be appropriate.

***Conclusion***

[99] In this case the public interest factors that [Constable A] needed to take into account before deciding whether to arrest [MR] included at least all of those I have summarised in this section. He did not do so and was not made aware of the need to do so by those with whom he consulted. That therefore calls into question whether the grounds for his belief that an arrest was required in the public interest were reasonable.

**FINDINGS**

[100] The police have not discharged the onus on them to show that the arrest of [MR] was lawful, and I find it was not.

[101] In relation to the decision to arrest generally, there was an unquestioning view that criminal proceedings under the youth justice provisions of the Act were the appropriate and indeed the only option available.

[102] There was no awareness that there were issues and options for a 13-year-old child that needed to at least be considered. As I have explained above, both the Act and the CRC require that consideration be given by everyone exercising powers as to

[59] *R v C-W* [2007] NZCA 216.

whether a care and protection approach is appropriate rather than criminal proceedings.

**Arrest under s 214(1)**

[103] In relation to the factors in s 214(1) of the Act;

(a) First, [Constable A] said that arrest was necessary to ensure [MR]'s appearance in court because otherwise he and his family might flee and go into hiding. However, [MR]'s mother had brought [MR] to the station voluntarily. She showed a responsible and cooperative attitude from the outset. At the time of arrival on Friday evening, there was no imminent need to make the arrest and no reason not speak to them and at least endeavour to get her support for what they were wanting to achieve, namely a commitment regarding no contact with [GL] and for [MR] not going to school on Monday. There was still ample time to do that. If [MR]'s mother had not come to the station with him, or if they were being uncooperative, then there might have been justification for using the power to arrest. To not even endeavour to speak to [MR] and his mother before making the decision to arrest on this ground was in breach of the guidance to do so and was unreasonable.

(b) Secondly, the bail conditions the police believed were sufficient to manage the risk of further offending, and of interference with [GL], were that [MR] was not to have any form of contact with [GL] and that he not go to school when the new term began on Monday. There was no suggestion that [MR] had made any attempt to contact [GL] in the preceding two-week period. There was no suggestion of further offending. The conditions sought were accepted by [MR] and his mother. Had they been unwilling to agree to such conditions on the Friday evening, there might have been justification to use the power to arrest. Again, the failure to endeavour to discuss these issues with [MR] and his mother, before deciding to arrest on this ground, was in breach of the guidance to do so and was unreasonable.

(c) Thirdly, the Crime squad had visited the scene on, or soon after, 8 July 2021 and CCTV footage had already been obtained before the evening of 23 July 2021, so there were not reasonable grounds to arrest [MR] on the basis he might interfere with the scene or with CCTV cameras.

**Arrest under s 214(2)**

[104] I also find that [Constable A] did not have reasonable grounds to believe an arrest was required in the public interest. His view of the public interest was far too narrow. In particular he did not have regard to any of the factors he was required to in either the general or the youth justice principles that I have summarised above. The public interest considerations that needed to be considered in this case, but were not, included:

(a) Having [MR]'s well-being, in the broad sense described in s 4 of the Act, at the centre of decision making;

(b) Being aware of and having regard to [MR]'s rights under the CRC;

(c) Making endeavours to speak to [MR] and his mother to try and get their support for what was wanted;

(d) Considering all of the options available for a 13-year old child before deciding that an arrest was required; and

(e) Having regard to the delay between the incident and the arrest before deciding an arrest was required.

**CONSEQUENCES**

[105] The Act does not say what the consequences of a failure to comply with s 214 are and there are two main lines of authority in the High Court on the issue.

[106] One is that an unlawful arrest of a child invalidates the charging document. If the arrest is unlawful the police have no lawful right to bring the child to Court unless s 245 is complied with, and if it was not, the Court has no jurisdiction to try the child.[60]

[107] The alternative view, based on obiter comments of Mallon J, is that:[61]

> "An unlawful arrest is still an arrest. The consequences of an unlawful arrest are a separate question. In some circumstances it may be appropriate to quash a conviction ... or dismiss [the charging document]. In others it may not."

[108] I believe the first option is the correct one.[62] Factors that favour that conclusion include:

(a) Seeing s 214 in context and in light of its purpose which is to prevent unlawful arrests. The only two ways a child can come before the Youth Court are either after an FGC as required by s 245 or following an arrest. The s 245 process is one of the primary means of achieving the principle that criminal proceedings not to be instituted against a child if there is an alternative means of dealing with the matter unless the public interest requires it.[63] It would subvert that principle and undermine the process provided in s 245 if the Police could rely on unlawful arrests to bring children to court.

(b) Under both the Act[64] and the CRC,[65] children must be treated with dignity and respect at all times. It would be disrespectful to children, and send the wrong message to them, to say that they must not act unlawfully but allow them to be before the court despite the police laying charges against them unlawfully.

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[60] *Pomare v Police* HC Whangarei AP 8/02, 12 March 2002.
[61] *YP v Youth Court at Upper Hutt,* above n 7, at [77].
[62] See generally: *Police v LM* YC Wellington CRI-2009-285-23, 21 April 2009; *Police v DK* YC Auckland CRI-2009-004-161, 10 August 2009; and *Police v SM* [2015] NZYC 666.
[63] Section 208(2)(a)
[64] Section 5(1)(b)(i)
[65] CRC, art 40(1).

(c) Article 37(b) of the CRC requires that the arrest of a child be in conformity with the law. If a prosecution was allowed to continue despite an unlawful arrest, it would undermine this right and indicate a willingness to tolerate unlawful arrests to some degree.

[109] *H v Police*[66] and *Police v V*[67] are both cases concerned primarily with the consequences of failing to convene and complete FGCs within the requisite time frame. *In H v Police,* Smellie J had held that the Act set mandatory time limits and failure to convene an FGC within the necessary time frame invalidated the FGC and removed the jurisdiction of the court to consider the [charging document].

[110] In *Police v V,* Hansen J held that the time limits were not mandatory and that failure to comply with them did not invalidate the FGC. However, he re-affirmed that if no FGC is held, then the Court's jurisdiction to consider the charge is removed.[68] In his judgment, Hansen J recorded that he had been told that Youth Court Judges were routinely dismissing charges in reliance on *H v Police* and that there were cases where judges had granted leave to the police to withdraw the charges so that the correct procedure through s 245 could be followed. He said of that practice,[69]

> "Judges will not have to resort to such devices if the implications of non-compliance are addressed on the facts of each case and charges are dismissed only in the circumstances that warrant that course."

[111] Since then, approaches taken by judges in the Youth Court have varied. When findings have been made that an arrest has been unlawful, and the requirements of s 245 have not been met, the status of the charging documents have been referred to in various ways such as being "invalid" or "nullities."

[112] The consequence of such findings has varied too. In some cases, the charge has been dismissed, essentially under s 147 of the Criminal Procedure Act 2011 which is deemed to be an acquittal.[70] In some such cases Judges have recorded their view

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[66] *H v Police* (1999) 18 FRNZ 593(HC) at 600.
[67] *Police v V* [2006] NZFLR 1057 (HC).
[68] At [17].
[69] At [20]-[22].
[70] Schedule 1 of the Oranga Tamariki Act states that s 147 applies to proceedings in the Youth Court.

that re-laying the charge in the Youth Court would be an abuse of process.[71] In others, Judges have indicated that it remains open to the police to take the charge back through the s 245 process.[72] In yet other cases, judges have granted leave for charges to be withdrawn.[73] Observations have been made that if a charge is invalid or a nullity as a result of an unlawful arrest, there is nothing for the court to dismiss or to grant leave to withdraw. Equally it has been observed that if a charge is invalid or a nullity there is nothing preventing the correct process being followed under s 245 and potentially a charge being laid properly in the future. The approach taken has been very much fact dependent as it should be.

[113] In this case it would defeat the very purpose of the Act to dismiss the charges and for the matter to end there. As mentioned already, the purposes of the Act include the well-being of children and there are reasons to be very concerned about the well-being of two children here: [MR] because of what he is alleged to have done and [GL] because of what has happened to her. I believe I am required to consider [GL]'s well-being in deciding what to do, both under s 4A of the Act which requires the interests of victims to be a primary consideration and also under article 19 of the CRC.

**OPTIONS**

[114] Further proceedings are therefore required but there are options. The first is for the process to continue in the Family Court as a care and protection matter rather than in the Youth Court as a criminal one. If I exercise the power of the "pushback" it is open to the police to make an application to the Family Court and I could then discharge the charges that are currently before the Youth Court at any stage under s 282.

[115] If that was to happen, the only difference between the proceeding continuing in the Family Court is that there would not be powers to arrest or detain [MR] for breaches of bail and no power to record a notation if the charges against him are proved. In every other respect the proceedings and options to address all issues that

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[71] *Police v SM* [2015] NZYC 666 at [37]; and *Police v JH* [2020] NZYC 396 at [71].
[72] *Police v LM* YC Wellington CRI-2009-285-23, 21 April 2009 at [26]; *Police v DS* [2016] NZYC 444 at [38]; and *Police v [DS]* [2016] NZYC 665 at [77]–[84].
[73] *Police v [IB]* [2017] NZYC 48 at [26]–[38].

arise would be the same. As to the first of those issues, it is relevant that [MR] has never breached any of his bail conditions. As to the second, making a notation if the charges are proved is by no means a certain outcome in the Youth Court for reasons that will be apparent from my analysis above of the relevant provisions of the Act and articles of the CRC.

[116] Another option is to provide the police with an opportunity to follow the s 245 procedure which could enable charging documents to be properly laid after there has been an FGC.

[117] As these are not issues that counsel have had an opportunity to be heard on, I will not make a decision about the option to be followed at this stage. A date for such a hearing can be allocated to allow time to consider this decision.

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Judge AJ Fitzgerald
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 25/02/2022