IN THE YOUTH COURT
AT NORTH SHORE

I TE KŌTI TAIOHI
KI ŌKAHUKURA

CRI-2021-204-000072
CRI-2021-244-000018
CRI-2021-244-000019
[2022] NZYC 95

NEW ZEALAND POLICE
Prosecutor

v

[JS]
[ML]
[AR]
Young Persons

Hearing:	9 March 2022
Appearances:	B Kirkpatrick for the Prosecutor G Earley for the Young Person [JS] K Leys for the Young Person [ML] S Mandeno for the Young Person [AR]
Judgment:	9 March 2022
Reasons:	31 March 2022

REASONS FOR THE JUDGMENT OF JUDGE A J FITZGERALD
[Whether to grant leave to withdraw charging documents or to dismiss them]

Introduction

[1] [JS], [ML] and [AR] were jointly charged with an aggravated robbery that is alleged to have occurred on [date deleted – the alleged date of offending] 2021. At that time [JS] and [ML] were aged 14 and [AR] was 15. The [complainant] was then aged 15.

[2] It was alleged that [JS], [ML] and [AR] were part of a group of five young people, some of whom robbed [the complainant] of his [brand name deleted] shoes in the vicinity of the [location deleted] bus station shortly after 1.00 pm on [the alleged date of offending] 2021.

[3] [JS], [ML] and [AR] were arrested nearly five weeks later, on 11 February 2021, and made their first appearance in the Youth Court on 17 February 2021. They were remanded on bail from that date onwards.

[4] On 17 February 2022, the Crown, who represented the police, advised the youth advocates representing the three boys, that [the complainant] wished to put the proceedings behind him and did not want the matter to go to trial. Given [the complainant]'s age, and unspecified issues personal to him, the police did not want to compel his attendance at a trail. Without [the complainant]'s evidence, the police did not have a case.

[5] For those reasons, the police applied for leave to withdraw the charging documents under s 146 of the Criminal Procedure Act 2011 ("the CP Act") which would not have prevented further proceedings in relation to this matter being brought in future.

[6] The youth advocates for the three boys opposed that application and submitted that the charging documents should be dismissed under s 147 of the CP Act which would be deemed an acquittal and bring the proceedings to an end.

[7] At a hearing on 9 March 2022, which was conducted by VMR due to the ongoing COVID 19 restrictions, I discharged the charging documents under s 147 of the CP Act, on the basis that I would set out my reasons in writing later which I now do.

The proceedings

[8] To understand how I reached my decision it is necessary to provide more of the background and history of the proceedings. What follows is a summary of the course of the proceedings and the issues that arose during them based largely on notes recorded by judges on the charging documents, two judicial minutes and the memoranda of counsel. There is little else on the files.

[9] At the boys' second appearance in court on 10 March 2021, concerns were raised about the lawfulness of their arrest. For [AR], Ms Mandeno filed an application challenging the arrest that day. Mrs Leys for [ML] and Mr Earley for [JS] indicated such applications were coming for those boys too.

[10] On 7 April 2021, all three boys denied the charge they faced and, again, concerns were raised regarding the arrest. It was also noted that disclosure was required from the police including information from NIA in relation to past contact between the three boys and the police.

[11] Disclosure issues were again raised on 5 May 2021, including a request for copies of search warrant applications, a formal written statement from the officer in charge, and any job sheets and note-book entries regarding the arrest.

[12] Concerns about the lack of disclosure regarding the arrest continued and eventually resulted in a telephone conference on 8 October. It seems that as more

information was provided by the police, the more questions emerged regarding who had made the decision to arrest the boys and on what basis.

[13] At another conference on 1 December 2021, to try and progress the disclosure issues, Judge Bennett said,

> [4] Mr Kirkpatrick [for the police] has made his best endeavours to provide as much information as he has to hand, however, it has been an unfolding process whereby the more enquiries that Mr Kirkpatrick makes with his police officers, the more information comes to light.

[14] Ongoing issues with non-disclosure were noted at yet another judicial conference on 13 December.

[15] As a result of these problems with disclosure, Ms Mandeno had made an application for disclosure under s 30 Criminal Disclosure Act 2008 for which a hearing was allocated for 26 January 2022. However, that hearing was adjourned due to the COVID 19 situation. A pre-trial hearing in relation to the arrest was set for 14, 15 and 16 March 2022 but was vacated given my decision to dismiss the charges.

[16] It is not necessary for me to delve into the lawfulness of the arrest, nor is it possible to do so in a meaningful way, without all of the evidence being available and tested. However, a concerning feature of this case was that a year after the lawfulness of the arrest was first challenged, the issue was still not resolved. Although some of the delay can be blamed on the COVID 19 lockdown in Auckland during the second half of 2021, that does not account for much of the delay which was due to the failure by the police to provide full disclosure in a timely way.

[17] That is also relevant to the decision made to dismiss the charges, because if proceedings were to be brought again in future, the unresolved issues about disclosure and the arrests would still need to be decided before any hearing of the charges. If the arrests were found to be unlawful, it is possible the charges would have been dismissed as a result.

[18] This is also very relevant to the important issues of delay and timeliness. Not surprisingly, all three youth advocates had given notice that, as a result of the delays that have occurred already, applications would be made to have the charges dismissed[1] if they had survived after the question of the lawfulness of the arrests had been determined.

[19] For the police, Mr Kirkpatrick acknowledged the significance of this issue in his written submissions where he said:

> "…The matter has two outstanding pretrial hearings which require determination before any trial could commence. Accordingly, there is a strong possibility that the Court would dismiss the charges pursuant to s 322 of the Oranga Tamariki Act 1989 due to delay if the charges were ever re-laid. The Court might consider that the application of s 322 limits the impact of any figurative 'Sword of Damocles' hovering over the young people.

The law

[20] My decision was made primarily by reference to the Oranga Tamariki Act 1989 ("the Act") and in particular the purposes,[2] the general principles,[3] the youth justice principles,[4] and the four primary considerations[5] in relation to youth justice matters which are;

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

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

(c) the interests of any victim; and

(d) the accountability of the young person for their behaviour.

[1] Oranga Tamariki Act 1989, s 322.
[2] Section 4.
[3] Section 5.
[4] Section 208.
[5] Section 4A.

[21] When considering those four factors, regard must be had to the general principles and the youth justice principles which makes the enquiry involved very broad.

[22] In relation to the general principles that means having regard to at least the following which are of most relevance in this case:

(a) The well-being of the young people as being at the centre of any decision making that affects them; and

(b) Respecting and upholding their rights under the UN Convention on the Rights of the Child ("the CRC");[6] and

(c) Making and implementing decisions promptly and in a time frame appropriate to the age and development of the young people.

[23] I believe the requirements to have well-being at the centre of decision making, and to respect and uphold rights under the CRC, applied not only to the three boys who were facing charges but also to [the complainant].[7] Article 19 of the CRC provides rights that should be respected and upheld for children who are the victims of crime which includes complainants in my view. They have the right to be heard, to have their views given due weight, to be treated with dignity and respect at all times and to have their best interests as a primary consideration.

[24] In relation to the youth justice principles it means having regard in particular to the vulnerability of young people entitling them to special protection during any investigation relating to the possible commission of an offence.

[25] I have also had regard to the two cases provided by counsel in relation to the application of ss 146 and 147 of the CP Act. However, the judgments provided related to proceedings in the High Court and were therefore of limited value in the context of this case. *X v DC*, which was relied upon by the police, was of little

[6] 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].
[7] *New Zealand Police v HH* [2021] NZYC 583 at [16] to [18].

assistance because the legal considerations were different to those that apply here, as were the facts.[8]

[26] *R v AB and CD* provided some helpful guidance including the following:[9] The decision to grant leave to withdraw a charge or dismiss it is a case-specific assessment and the following is a non-exhaustive list of potentially relevant considerations;

(a) The likelihood of further evidence emerging;

(b) The impact of the charges on the defendant. This includes matters such as the length of the period, what processes have happened such as a trial, whether there has been time in custody, and generally the effect of what has happened to date on the defendant;

(c) The reason for the evidential insufficiency arising;

(d) The seriousness of the charge;

(e) The existence of an ongoing investigation;

(f) The weight to be placed on the retrial provisions.

[27] That list also included that a dismissal is the orthodox response but that was followed immediately by Simon France J's comment that not much weight should now attach to that idea and that there is no presumption in favour of s 147 which is no longer the default position.

Assessment

[28] I began my assessment by reference to the four primary considerations in the Act, followed by the most relevant general and youth justice principles which

[8] *X v DC* [2020] NZHC 2952.
[9] *R v AB and CD* [2021] NZHC 3524 at [13] and [14].

I have referred to above. The considerations set out in *R v AB and CD* were incorporated into that assessment.

Well-being and best interests

[29] For all three of the accused boys, the impact of being arrested, placed on police bail, brought before the court and then remanded on court bail conditions for more than a year had a significant negative impact on their well-being. The substantial delays in progressing the issue regarding their arrest will have added to the stress and uncertainty of how long the legal process was going to take and the impact that would continue to have on their lives. In a number of respects their lives were on hold while the prosecution hung over them. Their well-being and best interests were served best by bringing the proceedings, and all of the stress and uncertainty surrounding them, to an end.

The public interest

[30] The police position was that the allegations made in this case were concerning and there was a public interest in holding the young people to account and aiming to reduce future offending.

[31] However, there is much more to the public interest than that and in any event, given the boys' denials and the presumption of innocence, those factors the police relied on carried less weight than they would have in a case where offending was proven.

[32] Although I am unable to make any meaningful comment about the strength of the police case, I note that the youth advocates representing the three boys raised strong criticisms and challenges to the evidence the police were relying on.

[33] The public interest is a broad concept that is intended to be interpreted broadly. When considering the public interest regard must be paid to ss 4, 5 and

208 of the Act at least. As well as that, s 4A required that regard be had to the principles in ss 5 and 208 when the public interest was being considered.[10]

[34] Amongst other things therefore, it was in the public interest in this case for the well-being of the young people concerned to be at the centre of decision making, for their rights under the CRC to be respected and upheld, for decisions to be made and implemented promptly and in a time frame appropriate to their age and development.

Victim's interests

[35] The reason for the police wishing to end the prosecution was [the complainant]'s wish to put the proceedings behind him and for the matter not to go to trial. [The complainant] was entitled to have his views in that regard given due weight and respected. His best interests were a primary consideration.

[36] I do not know if [the complainant] was aware that the police were seeking an outcome that would not have provided him with the finality he was seeking. There was no indication that his stance might change, and it was not suggested that his views should not be respected and given due weight.

[37] Additionally, I do not know if he was aware of the procedural problems with this case and that if charges were brought again at some time in the future there would have been pre-trial issues to resolve that might have resulted in the charges being dismissed and never getting to trial. If the charges survived the pre-trial applications it would take even more time after that to get to trial.

[38] Therefore, [the complainant]'s well-being and best interests were also best served by dismissing the charges.

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[10] See *New Zealand Police v MR* [2022] NZYC 54 at [76] to [79].

Accountability

[39] As I have mentioned already, limited weight could be given to accountability in a situation where the charges were denied and strong challenges were made to the nature and quality of the evidence relied upon by the police.

[40] There was no indication that further evidence was likely to emerge nor that the investigation was ongoing. The boys were entitled to the presumption of innocence. The retrial provisions were not an issue in this case.

[41] The seriousness of the charge was a relevant factor. Aggravated robbery is a serious charge, which carries a maximum penalty of 14 years imprisonment in the adult court system. A street robbery, which was the allegation here, is the least serious category of aggravated robbery.

Rights

[42] Under article 40 of the CRC, a child or young person alleged or accused to have infringed the penal law has the right to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law.

Timeliness

[43] The emphasis placed on the importance of timeliness became greater when the amendments to the Act came into force in July 2019. Until then, s 5(f) had required that decisions affecting children and young people should, wherever practicable, be made and implemented within a timeframe appropriate to the child's or young person's sense of time.

[44] The words "wherever practicable" have been removed in the new provision, s 5(1)(b)(v) of the Act, which simply requires that decisions should be made and implemented promptly and in a time frame appropriate to the age and development of the child or young person.

[45] Although the Act does not define what a time frame appropriate to the age and development of children and young people means, there are some clues in the youth justice provisions of the Act of what Parliament had in mind. For example, the time frames within which FGCs must be convened and held are largely measured in days and weeks rather than months.[11] The duration of the orders a court can make when sentencing, do not exceed 12 months for a stand-alone order. The longest combination of orders available is supervision with residence for a maximum of six months (with eligibility for early release being available at 4 months) followed by a supervision order for up to 12 months. Such a sentence is the highest in the hierarchy of orders available within the Youth Court.[12]

[46] With those sorts of time frames in mind, there will be concerns about delay in cases such as this where after 12 months pre-trial issues to do with disclosure and arrest have still not been resolved. To allow further proceedings to be brought at some stage in future, when such pre-trial issues will need to be resolved before the matter can proceed to trial, would push the time frames well past what is appropriate to the age and development of the young people concerned.

[47] An issue that remained unresolved in this case is whether the special protections that the young people were entitled to in relation to their arrest and the investigation of the alleged offending were provided.

Result

[48] For those reasons the charge of aggravated robbery that each of the boys faced was discharged under s 147 of the CP Act.

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Judge AJ Fitzgerald
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 31/03/2022

[11] Section 249 of the Act.
[12] Section 283 of the Act.