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IN THE YOUTH COURT
AT MANUKAU

I TE KŌTI TAIOHI
KI MANUKAU

CRI-2021-292-000033
[2023] NZYC 110

NEW ZEALAND POLICE
Prosecutor

v

[J B]
Young Person

Hearing: 4 April and 21 June 2022

Appearances: N Ward for the Crown
S Mandeno for the Young Person

Judgment: 17 February 2023

RESERVE DECISION OF JUDGE A M WHAREPOURI

[Reasons as to granting the defence application to dismiss charges pursuant to s

322 and refusal to make declaration as to non-compliance with s 214 of the Oranga Tamariki Act 1989]

Introduction

[1] [JB] was charged with threatening to cause GBH[1] and wounding with intent.[2]

[2] Both charges arise out of the same set of facts where it is alleged [JB] held a knife to the complainant's throat threatening to cut him, and then a short time later stabbing him in the chest. Having denied the charges, [JB] was for a Judge-alone trial on 4 April 2022. However, this trial date was vacated principally due to [JB] having recently given birth to a child and a new trial date of 27 June 2022 being set down (approximately 17 months after the alleged offending).

[3] The defence made two pre-trial applications. The first was for a declaration that [JB]'s initial arrest was unlawful due to non-compliance with s 214 of the Act. And second, that the charges to be dismissed pursuant to s 322 citing unnecessary and or undue delay. Both applications were opposed by the Crown.

[4] After hearing submissions from Crown and defence I determined that oral evidence from [Constable 1] and [Detective Constable A] was needed. It is for this reason that the applications were part-heard over two sitting days, 4 April and 21 June 2022.[3] At the conclusion of the second day, I ruled that:

(a) The initial arrest of [JB] as lawful in compliance with s 214 of the Oranga Tamariki Act 1989, and

(b) The charges would be dismissed pursuant to s 322 of the Act.

[5] I advised Crown and defence counsel that I would set out reasons in time for my rulings. My reasons in full are now set out below.

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[1] Contrary to s 306 of the Crimes Act 1961 and punishable by a maximum of 7 years imprisonment.
[2] Contrary to s 188(1) of the Crimes Act 1961 and punishable by a maximum of 14 years imprisonment.
[3] The second sitting day was to have been 4 May 2022, however, the hearing was remanded to 21 June 2022 on a Crown application brought about [Detective Constable A] testing positive for covid-19 and being required to isolate until 6 May.

Background

[6] On 30 January 2021, the complainant and [JB] connected online via a dating app called 'Tagged'. They agreed to meet in person prompting the complainant to drive to an address in [location X] to collect [JB]. When he arrived [JB] and two other girls hopped into the car. [JB] told the complainant they were her sisters. [JB] asked the complainant to drive to a [location Y] address one of her sisters could procure cannabis. Along the way the girls in the car began to bicker between themselves. [JB] then revealed she had with her a knife and bizarrely threatened to "cut" the complainant.

[7] When they arrived at the [location Y] address the complainant decided he wanted nothing to do with the trio and repeatedly implored [JB] to get out of his vehicle. [JB] refused and instead tried to cut him with her knife. The complainant was able to push the knife aside and he leapt out from the driver's seat. Standing outside his car the complainant threatened to call Police. [JB] then hopped out of the car and ran at the complainant swinging the knife wildly. The complainant held up his arms to defend himself. Despite suffering several cuts to his arms and a stab wound to his chest the complainant was able to run away a short distance down the street. A member of the public who witnessed the encounter then came to the complainant's aid by driving him to a nearby medical centre.

[8] After obtaining medical attention, the complainant spoke to Police and made a full written statement. Based on the information given to Police, [JB] was quickly identified as a likely suspect. [JB] was then wanted by Police to interview in relation to the attack.

The evidence

[9] [Constable 1]'s evidence was that she was on duty on 6 February 2021 when she responded to incident at 1pm outside the [location X] Police station. She spoke to a female who had driven to the station and reported that two females were sitting in the back seat of her vehicle refusing to leave the car.[4]

[4] NOE, p2.

[10] [Constable 1] then spoke to one of the girls in the car who identified herself as [JB]. The officer referred to the on-duty app using her phone and discovered [JB] was a suspect in an incident where the complainant had been stabbed.[5] Further, [JB] was wanted to arrest for interview.

[11] The officer then spoke to the on-call Crime Squad contact about locating [JB]. This senior officer (whose name [Constable 1] could not recall), reviewed the investigation file and confirmed to [Constable 1] that first [JB] was wanted to interview in relation to a serious wounding offence. Second, there was sufficient evidence by which to charge her with this offence. And last that [JB] should therefore be arrested.[6] Based on this information [Constable 1] placed [JB] under arrest.[7] The officer gave [JB] her bill of rights advice and then transported her to the Manukau Police station for interview.

[12] [Detective Constable A] was also working on duty on 6 February. He was advised of [JB]'s arrest and tasked to interview her by his senior officer.[8] [Detective Constable A] then reviewed and familiarised himself with the investigation file. When he was later advised that [JB] had arrived at Manukau he went down to the custody suite to receive her from [Constable 1].[9]

[13] On meeting with [JB], [Detective Constable A] introduced himself and explained that he wished to speak to her about the stabbing incident.[10] Before doing so however she would need a suitable adult to be present. He asked her to nominate such a person. Several names were discussed, and [Detective Constable A] made efforts to contact each of them to attend the station. Later, [JB] was joined by her mother at the station, and then subsequently her court appointed care-giver.

[14] After speaking to her mother and caregiver in private [JB] eventually declined to make any statement and refused to provide a voluntary sample of her DNA.[11]

[5] NOE p3.
[6] NOE, p5.
[7] NOE, p6.
[8] NOE, p14.
[9] NOE, p18.
[10] NOE, p15.
[11] NOE, p45.

[Detective Constable A] then spoke with a senior officer. Together they decided that [JB] should be charged and processed in the normal way.[12] The only time [Detective Constable A] gave [JB] her bill of rights advice was when she was eventually charged.[13]

[15] Based on the officer's evidence and other agreed dates, the key events can be set out in the following chronology:

(a) *30 January 2021* - The complainant alleges being the victim of a serious wounding.

(b) *6 February 2021* - [JB] having been identified as a suspect and the subject of a warrant to interview is spoken to by [Constable 1] in relation to an unrelated event. [Constable 1] later arrests [JB] and transports her to Manukau Police station. At Manukau Police station [JB] is spoken to by [Detective Constable A] but after speaking to her mother and caregiver declines to make a statement about the alleged offending. [JB] also declines to give a voluntary DNA sample is then formally charged.

(c) *8 February 2021* - [JB] first appears before a JP to do with the alleged offending and granted bail.

(d) *10 February 2021* - [JB] appears before the Youth Court.

(e) *20 May 2021*- [JB] re-appears in the Youth Court and formally denies her charges.

(f) *21 May 2021* - The Crown is transferred the file and assumes responsibility for the conduct of the proceedings.

[12] NOE, p26.
[13] NOE, pp22 and 32.

(g) *29 June 2021* - [JB]'s counsel writes to the Crown seeking outstanding disclosure.

(h) *14 July 2021* - The CRH is adjourned to 28 July 2021 to allow the Crown more time to review the investigation file and follow up on the defence request for specific disclosure. [Detective Constable A] is contacted by the Crown and tasked to take a number of investigative steps.

(i) *27 September 2021* - Trial call over is held. Trial date of 18 October 2021 is allocated.

(j) *29 September 2021* - [Detective Constable A] speaks to and obtains a statement from the independent witness who stopped and assisted the complainant.

(k) *18 October 2021* - Trial date vacated due to covid Alert level 3.

(l) *2 November 2021*- Nominal trial date of 29 November 2021 is allocated in the acknowledgement that [JB]'s pregnancy may rule the date as unsuitable.

(m) *26 November 2021* - The Crown files an application for a DNA suspect compulsion order.

(n) *2 December 2021* - [JB]'s counsel informs the Crown that [JB] now prepared to provide Police with a voluntary DNA sample. A new trial date 4 April 2022 is also confirmed with prosecution and defence.

(o) *17 December 2021* - A voluntary DNA sample is obtained from [JB].

(p) *23 December 2021* - [Detective Constable A] contacted [JB]'s counsel explaining that the supporting paperwork with the voluntary DNA sample was completed incorrectly.

(q) *10 January 2022* - [JB]'s counsel contacts [Detective Constable A] to explain she was on leave and due to return to work on 17 January. Further, due to the fact that [JB] had only recently given birth to her child an approach would be made to her to correct the paperwork at a later date which would be convenient to her and child.

(r) *10 February 2022* - [Detective Constable A] meets with [JB] and the DNA paperwork is completed correctly.

(s) *14 February 2022* - [Detective Constable A] submits the corrected paperwork to ESR.

(t) *18 February 2022* - At a call over the impending trial date on 4 April 2022 is thought to be vulnerable for several reasons but principally because of an anticipated 8 week delay in obtaining DNA results from ESR.

(u) *4 April 2022* - The second confirmed trial date is vacated. A new trial date is set down for 27 June 2022. The hearing time is instead converted into a pre-trial application to hear the defence claim that the case had been unnecessarily or unduly protracted.

Analysis

Was the initial arrest of [JB] lawful?

[16] Section 214 of the Act states relevantly:

> "(1) Subject to section 214A and sections 233 and 244, where, under any enactment, any enforcement officer has a power of arrest without warrant, that officer shall not arrest a child or young person pursuant to that power unless that officer is satisfied, on reasonable grounds,—
>
> (a) that it is necessary to arrest that child or young person without warrant for the purpose of—

> (i) ensuring the appearance of the child or young person before the court; or
>
> (ii) preventing that child or young person from committing further offences; or
>
> (iii) preventing the loss or destruction of evidence relating to an offence committed by the child or young person or an offence that the enforcement officer has reasonable cause to suspect that child or young person of having committed, or preventing interference with any witness in respect of any such offence; and
>
> (b) where the child or young person may be proceeded against by way of summons, that proceeding by way of summons would not achieve that purpose.
>
> (2) Nothing in subsection (1) of this section prevents a [PC] from arresting a child or young person without warrant on a charge of any offence where—
>
> (a) The [PC] has reasonable cause to suspect that the child or young person has committed a [category 4 offence or category 3 offence for which the maximum penalty available is or includes imprisonment for life or for at least 14 years]; and
>
> (b) The [PC] believes, on reasonable grounds, that the arrest of the child or young person is required in the public interest."

[17] The ability to arrest young people is constrained by s 214 so as to discourage Police from using their powers of arrest to circumvent the intention to charge FGC process provided for in s 245. As noted by Mallon J in *YP v Youth Court at Upper Hutt* at para [57]:[14]

> "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

[14] HC Wellington, CIV-2006-485-1905, 30 January 2007.

> 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"

[18] The onus is on the prosecution to demonstrate that one or other of the statutory requirements in s 214 existed justifying the fact of arrest. It is the reasonable belief of the police officer who makes the arrest that is crucial to the validity of the arrest.

[19] Having heard the evidence and from counsel I am satisfied that [Constable 1] must have been acting in reliance on s 214(2). In reaching my assessment of whether there were reasonable grounds I have regard to the fact that the officer had spoken to [JB] and first confirmed her identity. Then when also checking [JB]'s name in NIA there was an occurrence and the notation "wanted to interview sufficient to arrest". I recognise that the officer then contacted the on-call Crime Squad supervisor when realising that a warrant to interview had been issued to do with [JB] and ascertained that she was connected to a serious assault (stabbing). The supervisor read the file and told the officer the assault amounted to a serious wounding and that based on the contents of the investigation file there was sufficient evidence by which to charge [JB] with the alleged offending. While the supervisor told her what next to do, I am of the view that [Constable 1] had, armed with all that the supervisor had told her, sufficient knowledge herself to make up her own mind as to making an arrest. The fact the officer was following instructions does not derogate from the exercise of her own independent decision making. Recent authority also suggests knowledge held by another officer can be added to the knowledge of the arresting officer for the purposes of deciding whether that officer had reasonable grounds to believe one or other of the requirements in s 214(1) or (2) might exist.[15] It follows I have no trouble in accepting that [Constable 1] had reasonable cause to suspect based on what she had read in the NIA occurrence and learned from the on-call Crime Squad officer that [JB] had committed a wounding or category 3 offence as required by s 214(2)(a).[16]

[20] I am also satisfied the officer turned her mind to the public interest test laid out in s 214(2)(b).[17] [Constable 1] gave evidence that she had regard to the fact that

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[15] Supra fn 13.
[16] NOE p3.
[17] NOE p3.

alleged offending was serious, involving a knife attack on a member of the public and having taken place only one week prior. I recognise that the officer would have also been cognisant of the fact that [JB] was more than a mere suspect. And that she was dealing with [JB] in the context of a complaint made to Police about [JB]'s behaviour that was disorderly if not criminal. Preventing [JB] from possibly taking part in offending or reoffending or responding to offending or reoffending is something which can be had regard for in assessing the public interest. While the officer may not have turned her mind specifically to the question as to whether consultation with a YJ co-ordinator and the holding of an FGC pursuant to s 275 might have been a preferrable course of action, I am satisfied that even if she had done so her decision to rely on s 214(2)(b) remained a legitimate and reasonable one in the circumstances.

[21] In the end, I am satisfied the power available to Police under s 214(2)(b) was exercised validly.

Was there unnecessary or undue delay?

[22] Section 4(1)(i) of the Act states that those responding to alleged offending and offending by children and young persons must do so in a way that:

> "(i) promotes their rights and best interests and acknowledges their needs; and
>
> (ii) prevents or reduces offending or future offending; and
>
> (iii) recognises the rights and interests of victims; and
>
> (iv) holds the children and young persons accountable and encourages them to accept responsibility for their behaviour".

[23] Section 5 provides number of principles which must be observed when anyone, including the court, exercises any power under the Act. Importantly, s 5(1)(b)(v) says:

> "decisions should be made and implemented promptly and in a time frame appropriate to the age and development of the child or young person."

[24] Observance of the above principle allows for youth to be properly recognised as a circumstance possibly lessening culpability and to enable rehabilitation to occur

in a timely fashion recognising that the stage of development that may have contributed to the offending of children and young persons, and thus making successful rehabilitation more likely. When having regard to the various principles set out in s 5, there are also four primary considerations. They are:

> "(a) the well-being and best interests of the child or young person; and
>
> (b) the public interest (which includes public safety); and
>
> (c) the interests of any victim; and
>
> (d) the accountability of the child or young person for their behaviour."

[25] Section 322 provides for a discretion to dismiss any charge. It states:

> "A Youth Court Judge may dismiss any charge charging a young person with the commission of an offence if the Judge is satisfied that the time that has elapsed between the date of the commission of the alleged offence and the hearing has been unnecessarily or unduly protracted."

[26] The discretion is only triggered if there is an undue or unnecessary protraction of the relevant period of time.[18] "Unduly protracted" and "unnecessarily protracted" are conceptually different terms. The concept of "unnecessary" imports a notion of fault, with the focus normally on the conduct of the authorities.[19] "Unduly protracted", however, does not involve fault. As the Supreme Court has stated:[20]

> "Whether the time elapsed has been unduly protracted must be considered from the perspective of the accused and may

[18] *A-G v Youth Court at Manukau* [2007] NZFLR 103 at [48].
[19] *H (SC 97/2018) v R* [2019] NZSC 69 at [43]. In *A-G v Youth Court at Manukau*, Winkelmann J stated at [54] that: "unnecessary delay means no more than delay that could reasonably have been avoided. It will usually mean delay caused by default or neglect. The delay must be more than trivial. It is not appropriate to impose upon the Police or the Court system a standard of perfection so that every delay, no matter how minor, will trigger the exercise of the discretion. Further, a delay caused by resource limitations will not usually be unnecessary delay. Police will inevitably have to allocate priorities between different investigations. For example, it is likely that more serious crimes, such as homicides, will be given priority over less serious crimes when allocating resources. Although the suspected youth of an offender is one factor Police must take into account in allocating resources, because of the need for prompt investigation and prosecution of youth offending, it cannot self-evidently be the sole factor. The Courts will not normally involve themselves in second guessing the allocation of police resources, if satisfied that the need to investigate suspected youth offending very promptly is taken into account in allocating priorities for those resources. Resource considerations will also be relevant in terms of availability of Court time when informations are laid. Judicial and administrative resources are not and cannot be limitless".
[20] Supra fn 5 at [44].

> also depend on the application of the particular youth justice principle at issue. If an accused is still young, a relatively short delay may be considered unduly protracted, whereas such a delay would not be protracted for an older accused. Indeed, depending on the circumstances even long delays may not be considered unduly protracted for an older accused."

[27] The delay is to be measured from the date of the alleged offending to the date of the hearing. As noted by Winkelmann J:[21]

> "If no hearing date has been fixed, the Judge will be required to undertake an assessment of when the hearing is likely to occur. The Judge will then need to consider whether the relevant period has been protracted, in the sense that it is likely to be longer than would reasonably be expected in a case of that nature. The latter exercise is necessary because not every delay at a discreet stage of the proceeding will result in a protraction of the relevant period. Time lost during one phase may be made up in another, for example by the ordering of an expedited date for the depositions hearing or the hearing of the charge."

[28] Finally, assuming unnecessary or undue protraction is established the court's discretion should be exercised with a number of relevant considerations in mind. These considerations, where both types of delay are concerned, will include, among other things, the length of the delay, waiver of time periods, reasons for the delay (involving the inherent time requirements of the case, actions of the defence and prosecution, limits on institutional resources and other reasons), prejudice to a defendant, seriousness of the alleged offending and the public interest.[22]

[29] I start by considering the length of delay here. My calculation of 15 months is based on the period of time between the date of offending (January 2021) and the next likely date of hearing (June 2022). While a 15-month delay would not be out of the ordinary in the adult court, I am conscious of the fact that s 5(1)(b)(v) of the Act provides that decisions in the youth justice jurisdiction should be made in a timeframe appropriate to a child or young person's age and development. [JB] was 15 at the time

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[21] As she was then, in *A-G v Youth Court at Manukau*.

[22] See *Martin v Tauranga District Court* [1995] 2 NZLR 419, referring to the Canadian Supreme Court decision in *R v Morin* (1992) 71 CCC (3d) 1, 13.

of the offending and just having turned 17 by the time the June 2022 trial date is reached. A 15-month delay for a young adolescent girl can be significant.

[30] The reasons for delay is also important. Much of the delay, in my view, is without adequate explanation. There was no waiver of time period and nor was the delay explicable to any actions of [JB].

[31] [Detective Constable A]'s evidence was that he took no active step in the investigation of [JB]'s case for some 5 months between 7 February and 14 July 2021 despite being the officer-in-charge of the file. The explanation he offered for this delay was prioritising other more important jobs over [JB]'s case, complacency and his own poor time management. When finally spurred into action in April 2021 it took [Detective Constable A] until September 2021, seven months after [JB]'s arrest, to obtain a statement from the member of the public who witnessed some of the assault and later helped the complainant drive to the medical centre.

[32] But for the intervention of Covid-19 [JB]'s trial would have been reached in October 2021, meaning that the time between the offending and trial would only have been 9 months. While neither party was at fault for the covid delay, the trial could have proceeded 7 months later in April 2022. A key if not central reason for the trial date of 4 April 2022 being vacated was because of the fear that the ESR results would not be available by that time. The chief reason ESR results were still outstanding in February 2022 was because firstly the Police had not thought to apply to the court for a suspect compulsion order until November 2021 and secondly because Police had failed to ensure the necessary paperwork to accompany the sample had been properly completed when [JB] gave a voluntary DNA sample on 17 December 2021. In my view both are examples of Police ineptitude. Thus, the additional 6 week delay before [Detective Constable A] could meet with [JB] a second time to complete the DNA paperwork correctly was completely avoidable.

[33] I accept that the charged offending is serious and that there is a strong public interest in holding offenders to account especially where they use a weapon such as a knife to inflict harm. These are factors which count against dismissing the charges. But care needs to be taken not to overstate these matters in a context where the Police

themselves were not overly concerned enough to investigate the charges with reasonable due diligence. Had the [Detective Constable A] acted in a more timely way (and there is no good reason why he did not in this instance) the prosecution could not have been trial ready with the DNA evidence by the first trial date in October, 9 months after the alleged offending. And while the prosecution cannot be faulted for the Covid adjournment, the April date could have been firmed up sooner but for the error made by [Detective Constable A] in seeing to the DNA paperwork being properly completed the first time.

[34] The defence did not point to any specific prejudice suffered by [JB]. However, it is important to note that [JB] has been subject to restrictive bail conditions for some time, and that her own personal circumstances have changed with the arrival other baby. No doubt the time spent on bail has curtailed her liberty and delay has interfered to some degree with her mental progression to motherhood.

[35] In the end my view is that much of the initial 9 month delay (between offending and first trial date allocated) was unnecessary while a good portion of the following 6 month delay was undue.[23]

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Judge M Wharepouri
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 17/02/2023

[23] Not all the reasons for subsequent delay can be blamed on anyone such as [Detective Constable A] contracting covid.