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**IN THE YOUTH COURT**
**AT ROTORUA**

**I TE KŌTI TAIOHI**
**KI TE ROTORUA-NUI-A-KAHUMATAMOMOE**

**CRI-2021-263-000109**
**[2021] NZYC 518**

**THE QUEEN**
**NEW ZEALAND POLICE**

v

**[PL]**
Young Person

Hearing: 24 November 2021

Appearances: L Evans for the Crown
J Drayson for the Prosecutor New Zealand Police
M Simpkins for the Young Person

Judgment: 24 November 2021

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**RULING OF JUDGE M A MacKENZIE**

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## Introduction

[1] [PL] appears today. Initially, the purpose of [PL]'s Youth Court appearance today was for me to receive some more information from Oranga Tamariki about the question of electronically-monitored bail. Mr Simpkins also invites me to consider the issue of s 272A of the Oranga Tamariki Act 1989. I will do so and I intend to deal with that issue first.

## Section 272A of the Oranga Tamariki Act 1989

[2] [PL] is aged 12 years old. He has been charged with aggravated robbery. That is a very serious crime.

[3] At an earlier date, Mr Simpkins, his youth advocate, said that [PL] accepts that he was involved in the aggravated robbery, but a non-denial could not be entered because the Court needed to make a finding under s 272A of the Oranga Tamariki Act. In legal language, that is known as doli incapax. That will be something that [PL] would have no idea about, in fact most people in New Zealand would have no clue about what doli incapax means. It is a common law presumption that children under a particular age are incapable of evil and therefore should not be culpable or held responsible for criminal acts or omissions.

[4] There are two pieces of law which are relevant here. Firstly, there is s 22 of the Crimes Act 1961 which provides that for children aged between 10 and 13, there is a rebuttable presumption that they cannot be held criminally responsible unless the prosecution proves that the child knew what he or she did was wrong or contrary to law. This rebuttable presumption also is found in s 272A of the Oranga Tamariki Act.

[5] Mr Evans for the Crown has filed very helpful submissions.

[6] On the subject of the law, where a child aged between 10 or 14 is charged with an offence, knowledge that the act or omission was wrong or contrary to law becomes an essential ingredient of the charge … and the existence of this necessary ingredient must be proved by the Crown before the child can be convicted.

[7] In terms of s 272A itself, where it applies, the charge cannot be proved before a Youth Court unless the Youth Court is satisfied that the child knew either that the actual omission constituting the offence was wrong or that it was contrary to law.

[8] In his helpful submissions, Mr Evans refers to a case *R v Kaukasi*[1] which confirmed that in approaching this question, the starting point is the assumption that the Crown can lead evidence of any facts or opinions if logically relevant to the child's knowledge of the wrongfulness or unlawfulness of the particular criminal act alleged.

[9] The question of what information the Court can take into account was also considered in a comprehensive way in a Youth Court decision *R v NM*.[2] This is a decision of Her Honour Judge Lovell-Smith. As Her Honour noted, evidence that can be used to rebut the presumption includes:

(a) statements/admissions made by the child;

(b) the type and seriousness of offences and circumstances surrounding the commission;

(c) the behaviour of the child before and after the act;

(d) the child’s criminal history/previous dealings with police;

(e) evidence of parents or home background;

(f) evidence from lay persons, including teachers, principals, youth aid officers and sport coaches; and

(g) evidence of psychologists/psychiatrists, for example, a report ordered pursuant to s 333 of the Oranga Tamariki Act.

[10] Judge Lovell-Smith’s assessment of the information that can be taken into account was drawn from an Australian case *R v JA2*. In that case, after reviewing

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1 *R v Kaukasi* HC Auckland T014047, 9 August 2002.
2 *R v NM* [2016] NZYC 14.

English, Australian and New Zealand authorities, the position was summarised as follows:

(a) There is a strong presumption against criminal capacity in children aged 10-14.

(b) A finding of guilt may be made only if the Crown has displaced that strong presumption by "strong and pregnant evidence" to the contrary.

(c) It is insufficient to displace the presumption to prove that the child voluntarily and intentionally did the acts constituting the offence.

(d) The child must have known the act was wrong by reference to the ordinary standards of reasonable men and women in society generally, going beyond mere disapproval or the imposition of disciplinary sanctions.

(e) The Crown must establish, beyond reasonable doubt, the same degree of knowledge or wrongfulness as an accused must negative on the balance of probabilities to attract an acquittal on the grounds of insanity. The knowledge of wrongfulness must relate to the offence in question in particular and not merely a general knowledge about right and wrong.

[11] There are a number of strands of information which I draw together to consider this issue. Firstly, there is the report of 8 November 2021 of Dr Kevin Austin. Dr Austin discussed in that report [PL]'s understanding of the offending. He noted that [PL] agreed with the details outlined in the summary of facts other than saying that his 14-year-old brother was not present. [PL] confirmed to Dr Austin that in the lead up to the offending he was feeling bored and wanted to steal cigarettes. He knew the offending at the time and now was contrary to the law. When asked why, he said, "Everyone knows not to do that", that it was "not the right thing to do" and that the offending was "wrong because it involved hurting someone's feelings". He described using a weapon during the offending to intimidate the victims and to protect himself. Dr Austin notes that [PL] went on to state, "I knew it was against the law" and said, "I was in a stealing mindset". When questioned about this further, [PL] described being influenced by an antisocial friend who is now in custody. It was Dr Austin's

professional opinion that it is likely that [PL] understood at the time of the offending, as he does now, that his actions were wrong and contrary to law.

[12] But that is not all the information that there is available to the Court. I have a written statement of [PL]'s mother, [KL]. There is also information from [report writer A]. [Report writer A] is a long-serving non-sworn member of the New Zealand Police. She has been involved in the Youth Development, Police Youth Services for 14 years.

[13] [PL]'s mother says that [PL] knows what is right from wrong and that his actions in robbing the gas station was something that was against the law. It is her view as [PL]'s mother that [PL] knows that what he did was wrong. She says though, realistically, that [PL] has always had a defiant attitude and when he knows something is wrong or against the law, he will do it anyway and regardless of the consequences. She says she has raised her children to have strong morals and with a sense of right and wrong. She gives an example about stealing cigarettes and that he knew it was wrong to steal the cigarettes and knew it was wrong to smoke so he hid from sight when he would smoke them.

[14] [Report writer A]'s affidavit also sheds light on the issue of whether [PL] knew what happened was wrong in terms of the aggravated robbery. [Report writer A] says that [PL] has been taught right from wrong from his parents at a young age, along with all his siblings. His knowledge of what is right and wrong has been supported and reinforced by police when any offending matters have been dealt with. However, this has not stopped [PL] from offending. He will offend to impress his peers and be socially accepted by them. This is one of the drivers of his offending. He does not seem to think about what he is doing at the time of offending but he does after he has committed an offence.

[15] It is [report writer A]'s professional opinion through all her dealings with [PL] over the past four years and 10 months that he knows the difference between good and bad behaviour and the difference between right and wrong. Of concern is what is set out by [report writer A] at paragraph [20] of her affidavit; that is, that she has visited [PL] several times since he has been at [youth justice residence 1] and [PL] has said he wants to continue doing ramraids and aggravated robberies when he gets out and

he understands that he is in [youth justice residence 1] due to this offending and he knows that he may go back to [youth justice residence 1] if he re-offends.

[16] The combined weight of what his mother has to say, what [report writer A] has to say and Dr Austin's report, particularly of 8 November 2021, satisfies me in terms of s 272A that [PL] knew that the act, being the aggravated robbery, was wrong. Therefore, the Crown have rebutted the presumption contained in both s 22 of the Crimes Act and s 272A of the Oranga Tamariki Act.

**Bail**

[17] The second issue is electronically-monitored bail. I need to decide whether to grant [PL] electronically-monitored bail? The EM bail proposal is for [PL] to return home to live with his mother with some supports in place.

[18] In order to consider the proposal, I need to take into account not only the information I have, but also the law. The law tells me to take into account the risk of absconding and the risk of offending in terms of bail. The risk of [PL] interfering with witnesses or evidence is not a live issue here. The two risks and, indeed, high risks are the risk of absconding and a risk of offending.

[19] There is a lot of information that I have in order to decide whether or not to grant [PL] electronically-monitored bail. I need to weigh up that information against the two risks which I identify. There is a high risk of absconding as detailed, particularly given the contents of Dr Austin's report of 8 October 2021 and [report writer A]'s recent affidavit of 26 October 2021. There is also a high risk of offending also drawing from [report writer A]'s affidavit, the information from his mother and the two s 333 reports.

[20] Added to the risk profile of offending is the fact that whilst at [youth justice residence 1], [PL] was drawn into a riot allegation which took place in [date deleted] 2021. I have read the information as to [PL]'s role in the alleged riot. [PL] was clearly drawn into it with other young people. The information available to the Court is taken from a secure care application which was filed. A serious event occurred on [date

deleted – date 1] 2021 where young people tried to break out of [youth justice residence 1]. [PL] and other young people rushed out of their bedrooms after the incident was instigated by another young person. [PL] was involved in this and gained access to the roof of the [unit name deleted] along with six other young people. He was next observed in the kitchen of [the unit] at 1.40 in the morning on [date deleted – the following day] 2021 where [PL] and another young person were observing pouring water on the floor. [PL] and a number of other young people were taken to the police station in the early hours of the morning. I accept that [PL] was not the instigator of the incident but along with a number of other young people, he was swept up in the drama of what happened overnight on [date 1] 2021.

[21] The critical question is whether the EM bail proposal meets or mitigates the risks I have identified to an appropriate level so that EM bail can be granted?

[22] I have heard submissions both from Mr Evans, for the Crown, and Mr Simpkins.

[23] It is the firm position of the Crown that it is not appropriate for [PL] to return home. In making that submission, Mr Evans understandably relies on the recommendations of the s 333 report dated 8 October 2021. Mr Evans rightly draws the Court's attention to the recommendations section of that report. Mr Evans notes that [PL] presents with a very high risk of re-offending. As Dr Austin says, [PL]'s psychological difficulties are entrenched and will need a coordinated intensive approach to make sustainable changes. This would include psychology, psychiatry and social work.

[24] Importantly though, Mr Evans submits that following on from Dr Austin's recommendations, [PL]'s home is not an appropriate place to meet his needs given that Mrs [KL] is raising several children on her own, struggling with her own issues and has a number of stressors in the home. It was Dr Austin's opinion that a residential school option such as Westbridge should be explored. It was his opinion that [PL] would benefit from a residential school for a period of at least 18 months during which time [PL]'s parents would need considerable support to resolve personal difficulties and align their parenting. Dr Austin also recommended that [PL]'s parents would

benefit from a family therapy approach, such as multi-systemic therapy commencing six months before [PL]'s return.

[25] Mr Evans also raises issues about [PL]'s brother [AL] being at home. Essentially, he is making a submission that the best predictor of future behaviour is past behaviour, because Mr Evans submits that [AL] being at home has not stopped him from re-offending.

[26] Mr Evans is also concerned about the likely risk of absconding because Dr Austin's opinion is that [PL] is likely to abscond from any placement that is not secure. It is the Crown's position that a residential school option should be explored for [PL] and that going home is just not appropriate. If he was to go home, then intensive support would be required.

[27] On the other hand, Mr Simpkins supports the proposal for [PL] to return home on electronically-monitored bail with intensive supports in place. One factor today is that there is a proposal now for [PL] and his whānau to engage in Family Functional therapy which I agree should be put in place.

[28] Responsibly, Mr Simpkins does not step back from acknowledging that there are risks and vulnerabilities if EM bail is granted for [PL] to return home. He does not try and convince me that the EM bail proposal is risk-free; that would indeed have been a foolhardy submission and Mr Simpkins knows better than to make such a submission because it does involve risk. But, as Mr Simpkins notes, a residential schooling option is not on the table. That is because, as per the report from [report writer B], such an option does not appear feasible because of [PL]'s risk profile which is ironic really - the very assistance he needs is denied or not available to him because of the risk that he presents.

[29] A grant of electronically-monitored bail for [PL] to return home is a risky situation. There remains a risk of absconding and there remains a risk of further offending. It is of significant concern to the Court that [PL], at aged 12, knowing that it was wrong, committed an aggravated robbery. I am not going to step back from assessing there to be a high-risk of absconding and of offending.

[30] By the narrowest of possible margins though, I consider that a robust EM bail proposal with significant supports in place will mitigate the risks to an acceptable level so that EM bail can be granted. I need to say that the current proposal would not be my first choice in terms of a proposal to mitigate the two risks I have identified, but it is the only proposal that the Court has to work with. My preference would have been a proposal for [PL] to be in a more secure environment, but I have robustly challenged Oranga Tamariki about the availability of care and protection secure residence placements. There are no such placements available. This is the only proposal which is on the table and, as such, I recognise that the time has come for EM bail to be granted to [PL] despite being alive to the risks involved.

[31] One factor pointing towards a grant of bail here is an interplay here between the provisions of the Oranga Tamariki Act. There are provisions which say that I must take into account the risk of absconding and the risk of offending, but equally, there are other provisions of the Oranga Tamariki Act which I must take into account, bearing in mind [PL]'s age. In particular, s 5 of the Act says that decisions about a child or young person must be made in accordance with appropriate timeframes. There is also the issue of the United Nations' Convention on the Rights of the Child. ("UNCROC"). This convention becomes relevant in terms of decisions being made about young people, bearing in mind timeframes. There are also issues about detention which come into play in terms of both s 5 of the Oranga Tamariki Act and also UNCROC.

[32] While on some levels, [PL] being at [youth justice residence 1] is a safe environment in terms of the fact that it protects the public, it offends against principles contained in the Oranga Tamariki Act, particularly in terms of s 5 of the Act, for [PL] to remain there. It is a matter of balancing all relevant statutory principles.

[33] A significant issue is the need to protect the public. Being at [youth justice residence 1] has not, on the face of it, stopped [PL] from offending but because of [PL]'s age, he has been unable to be charged in relation to the rioting situation. Live and looming large is the need to protect the public in terms of the risk of re-offending, given the very serious aggravated robbery that [PL] was involved in knowing that it was wrong, so the EM bail proposal needs to be robust.

[34] The first way it is robust is that it involves electronic monitoring. Of course, electronic monitoring is no 'silver bullet', as it is only ever as good as someone's ability to comply and [PL] does have a history of absconding. But he has got every reason to comply with the terms of electronic monitoring because if he does not, the only option will be for [PL] to be in a secure environment and the only available option for a secure environment will be a Youth Justice residence because Oranga Tamariki has told me that there are no other secure residential placements available. So if that is not an incentive for [PL], then I do not know what would be.

[35] Also, there is a wraparound support plan which will form part of the EM bail conditions, including supported bail. Bail conditions are:

(a) [PL] is, as a condition of electronic monitoring, to be at home 24-hours a day apart from activities which are permitted as per the supported bail plan and approved by the Department of Corrections EM bail team.

(b) [PL] is to comply with the terms of the supported bail plan. That is a tight plan which would see [PL] picked up every day. He will be under the direct supervision of [social service name deleted] staff from 8.30 am on Wednesdays and will be returned home at 4.00 pm daily.

(c) [PL] is to comply with the education plan that has been put in place and is set out on page 2 of the updated social worker's report of 23 November 2021. [PL] has been confirmed as enrolled at [school deleted]. [Name deleted] is to be his specialist teacher. The learning plan will be supervised by mentors at [the social service]. That plan includes numeracy and literacy at Numberworks on Monday, Tuesday, Thursday and Friday. This will all be conducted in the time allotted to education in [PL]'s current supported bail plan and will take place at the [Marae name deleted] in person and online. [PL] must comply with the terms of the education plan.

(d) [PL] and his whānau are to engage with Family Functional Therapy which is to be arranged and funded by Oranga Tamariki or any other

organisation Oranga Tamariki arranges. [PL] must take part in that Family Functional Therapy.

(e) The electronically-monitored bail will commence on 5 December 2021 when [AL] moves to the [Trust name deleted] programme as part of the electronically-monitored bail terms and conditions. Neither [AL] or [PL]'s other brother, who is currently before the Youth Court, are permitted to reside in the whānau home. The purpose of that condition is to mitigate the risk of [PL] re-offending. It is not to punish [PL]'s brothers but simply is to recognise the high risk that [PL] presents in terms of re-offending. He needs to be in a supported environment and in a home which encourages prosocial behaviour rather than the temptation to engage in further criminal behaviour.

(f) [PL] is not to possess or use a cellphone.

(g) [PL] is not to access any social media sites. This includes but is not limited to Facebook, Messenger, Tiktok, Instagram or any other social media site [PL] would ordinarily use.

(h) [PL] is not to have contact with directly or indirectly[3] any gang associates or members except for his brother, [LL].

(i) [PL] is not to have any contact directly or indirectly with three other people; [names deleted].

(j) [PL] is not to have any visitors at home unless arranged and approved by his adult whānau members.

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[3] Directly or indirectly means not in person and not by any other type of communication, so not by phone and not by social media.

**Other matters**

[36] I appreciate that there has been some disquiet on the part of Oranga Tamariki about [PL]'s placement at [youth justice residence 1]. While I agree that has not been optimum, it simply recognises the dual risks I have identified.

[37] I do need to address one particular matter raised in the social worker's report of 14 November 2021 relating to the fact that [PL] was ordered to be held at a Youth Justice residence in August 2021. It is not entirely accurate to record simply the fact that [PL] was facing a charge of escaping custody. That, in my view, does not entirely place [PL]'s situation in context. I accept that a charge of escaping custody may have been brought and that could not legitimately have been brought because of [PL]'s age. But what that report did not in fact say and should have, is that [PL] was actually before the Court for the aggravated robbery charge, a charge that can be laid in respect of a 12-year-old. [PL] could not have been remanded to a Youth Justice residence absent that charge and the information set out in the report should have been accurate and should have referred to the fact of the aggravated robbery charge because that is the only way that [PL] could have been held in a secure Youth Justice residence. I do not intend to delve into the rights and wrongs of that decision, it was not made by me, but what does need to be recognised is [PL]'s level of risk and that that level of risk has to be managed in an appropriate way.

[38] I need to say, for [PL]'s benefit and the benefit of everyone else involved, is that the outcome in the future for [PL] is going to be very poor in the event that this electronically-monitored bail along with supported bail does not work. That is because there are no residential or community options.

[39] Any breaches of this would be taken seriously by the Courts and if it does not work, then the only possible outcome would have to be a remand in a Youth Justice residence, no matter how unpalatable that might be. Oranga Tamariki have come out strongly saying there are no secure residential placements available in the community, and so if [PL] being at home falls down for whatever reason, then the situation is not particularly promising about what any future remand is going to look like, so there is every incentive for this to work.

[40] I do need to sound a note of warning to Oranga Tamariki: this is a vulnerable placement and it is only going to work if all the threads are together and there is good support from Oranga Tamariki. I appreciate that some of this is down to [PL]. Oranga Tamariki and other professionals cannot control [PL]'s behaviour and if he is determined to not stick to the rules in terms of EM bail, then there is nothing that other people involved can do because it is only ever as good as [PL] being prepared to stick to the rules and make it work.

[41] But the whānau and [PL], particularly given his age, are going to need some robust and thorough support in terms in all respects. Really, it comes down to what Dr Austin described as "a bio-systemic plan for [PL]." I am sure [PL] does not know what that means because I do not actually know what that means, but what I take from that is that coordinated involvement from all spheres which will include some psychological or psychiatrist assistance is needed. The Family Functional Therapy will help with that. There does need to be a tight supported bail in place and including a tight educational plan. All the moving parts need to come together to support [PL] to try and make this work.

[42] EM bail therefore is granted on the terms and conditions I have set out.

[43] This ruling is to be typed up urgently and placed on the file.

[44] Finally, I vacate the s 272A hearing which was allocated for 30 November 2021.

[45] I enter a non-denial to the charge of aggravated robbery and direct a family group conference which is 14 December at 11.45 am. I will allocate half an hour for that.

[46] I have made a direction on the record that this ruling is to be transcribed urgently and I will direct that it released to counsel, both the Crown and Mr Simpkins, and Oranga Tamariki. It is to be released to the police, [and two other people]. I will ask for it to be expedited so that it is available to everybody.

Judge MA MacKenzie
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhenga: 25/11/2021