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**IN THE YOUTH COURT
AT WHANGANUI**

**I TE KŌTI TAIOHI
KI WHANGANUI**

CRI-2022-283-000017

CRI-2022-283-000018

[2022] NZYC 485

THE KING

v

[LH]

[EC]

Hearing: 5 October 2022

Appearances:

M M Wilkinson-Smith for the Crown

D Goodlet for the Young Person [LH]

K Pascoe for the Young Person [EC]

Judgment: 26 October 2022

REASONS DECISION OF JUDGE L C ROWE
[On application for young persons to be tried together with adult co-defendants]

[1] [LH] and [EC] are brothers.

[2] They are charged with the aggravated robbery of [name deleted – the first complainant] and [name deleted – the second complainant] of cannabis and tobacco at [location A] on [date 1] 2021.

[3] [LH] was 16 years old at the time of the alleged offence. [EC] was 15 years old.

[4] Charging documents for [LH] and [EC] were filed in the Whanganui Youth Court on 4 May 2022. The charging document for each young person refers to the alleged offence against them only. It does not refer to any co-defendants.

[5] The Crown alleges, however, that [LH] and [EC] committed the aggravated robbery with adult offenders including [defendant A], [defendant B], [defendant C], [defendant D], [defendant E], and [defendant F].

The allegations and charges

[6] It is alleged that on the evening of [date 1] 2021 [the first complainant] drove to [location A] with [the second complainant] to deliver some cannabis. When he stopped his car at the delivery address, someone opened the driver's door and told [the first complainant] that it was a robbery. This person produced a knife and tried to stab [the first complainant].

[7] [The first complainant] and [the second complainant] got out of the car. Other persons then emerged from nearby. Someone yelled "shoot them" and a firearm was discharged.

[8] [The first complainant] and [the second complainant] fled. When they came back to the car, the cannabis and other items were missing and three of the car's tyres had been slashed.

[9] The Crown says [defendant A] was the person who fired the gun and [LH] and [EC] were two of the other people involved in the robbery. At least one of this group was wearing a mask associated with the [gang name deleted].

[10] In early September, [the second complainant] was involved in a motor vehicle collision with a vehicle driven and occupied by [gang members].

[11] On [date 2] 2021, it is alleged that [defendant B], a patched member of the [gang], went to [the second complainant]'s home in [location B] and told [the second complainant] that, as a result of crashing into a car belonging to the [gang], [the second complainant] now owed them his dirt bike and \$1,000 cash.

[12] Later that night, other [gang] members, including [defendant D], [defendant E] and [defendant F], went to [the second complainant]'s address and said they had come to pick up the dirt bike.

[13] [The second complainant] feared for his safety and gave them his dirt bike.

[14] [Defendant E] rode the dirt bike from [the second complainant]'s address but was stopped by police soon afterwards. As he was a disqualified driver the bike was impounded. The police also impounded a vehicle driven by an associate of [defendant E]'s who was following him.

[15] The [gang] members believed [the second complainant] had called the police and they decided to retaliate against him.

[16] On [date 3] 2021, [defendant A], [defendant D], [defendant E], [defendant F] and [defendant C] went to [the second complainant]'s address in [location B] wearing [gang] patches. It is alleged [defendant D] was armed with a knife and [defendant A] was armed with a pistol.

[17] This group attacked occupants of [the second complainant]'s address, which included [the first complainant], and the [gang] members, during which various members of [the first complainant]'s and [the second complainant]'s whānau were seriously assaulted and/or threatened with the weapons brandished by [defendant A] and [defendant D].

[18] [Defendant B], [defendant D], [defendant E] and [defendant F] are charged with aggravated robbery in connection with the dirt bike taken from [the second complainant] on [date 2]. [Defendant B] is alternatively charged with demanding with menaces.

[19] [Defendant A], [defendant C], [defendant D], [defendant E] and [defendant F] face 16 further charges between them relating to the [date 3] fracas alleging their joint, or at times sole, responsibility for a range of offences. These include participating in an organised criminal group, aggravated burglary, wounding with intent to injure, threatening to kill, using a firearm in the commission of an offence, injuring with intent to injure and assault with a weapon.

[20] The young persons, [LH] and [EC], are not alleged to have been involved in the events of [date 2] or [date 3] 2021.

[21] The other adult defendants have elected trial by jury and are awaiting trial in the District Court.

The present application

[22] The Crown says the [date 1], [date 2] and [date 3] incidents are linked by common participants and victims.

[23] The Crown filed a notice under s 138(1) of the Criminal Procedure Act 2011 proposing that the charges against [LH] and [EC] be heard together with the charges against the adult defendants.

[24] The Crown has also filed an application seeking joinder of the charges against [LH] and [EC] with the charges against the adult defendants, citing not only s 138 of the Criminal Procedure Act but also s 277(4) of the Oranga Tamariki Act 1989.

[25] [LH] and [EC] oppose the Crown's application.

[26] The procedure by which this matter has been brought to the Court is not strictly correct.

[27] The applicable procedure is specified in s 277 of the Oranga Tamariki Act 1989, the relevant parts of which provide:

277 Provisions applicable where child, young person, or adult jointly charged

- (1) If a child or young person is charged with any offence jointly with any other person or persons (whether 1 or more young persons, adults, or children), this section applies.
- (2) If a child is jointly charged with any other person or persons, and that child is not charged with murder or manslaughter or does not elect jury trial, that child must be tried in the Youth Court along with any co-defendants who are also not to have a jury trial.
- (3) If a child is jointly charged with any other person or persons, and that child is to have a jury trial, that child must be tried in the same court as any co-defendants who are also to have a jury trial.
- (4) Subsection (5) applies if a young person is jointly charged with any 1 or more of—
 - (a) an adult who is to have a jury trial; or
 - (b) another young person who is to have a jury trial; or
 - (c) a child who is to have a jury trial.
- (5) Subject to subsections (2) and (3), the young person must be tried with the person or persons with whom he or she is jointly charged and who are to have a jury trial, and by the same court that is to try those persons unless the Youth Court, in the interests of justice, orders otherwise.

[28] The starting point under s 277(5) of the Oranga Tamariki Act is that, if a young person is jointly charged with an adult who has elected trial by jury, then the young person's trial will be by jury with the adult. This is only displaced if the Youth Court, in the interests of justice, orders otherwise.¹

[29] Counsel argued that, as the charging documents did not name the adult co-defendants, neither young person was jointly charged with the adult co-defendants in terms of s 277. I disagree.

[30] Section 138(1) of the Criminal Procedure Act provides a mechanism of informing the Court and the parties that co-defendants are jointly charged. Naming co-defendants in the charging document is another way of achieving this, as is amending a charge to add the names of jointly charged persons under s 133 of the Criminal Procedure Act.

¹ *TM and DR v Police* [2014] NZYC 306 at [9].

[31] Section 138 of the Criminal Procedure Act applies to Youth Court procedure with necessary modifications.²

[32] When all defendants are adults, a s 138(1) notice also serves to join the charges of all defendants together for a single trial, subject to the Court deciding on its own motion or via a severance application to order separate trials under s 138(4).³

[33] For defendants who are young persons, the mechanism for determining whether they stand trial with adult co-defendants is s 277(5) of the Oranga Tamariki Act, not s 138 of the Criminal Procedure Act.⁴ This is a “necessary modification” of s 138 created by s 277(1) – “If a ... young person is charged with any offence jointly with any other person or persons ... **this section applies**”.

[34] In this case, the Crown’s s 138(1) notice served to jointly charge [LH] and [EC] with the adult defendants. The starting point under s 277(5) is that they **must** stand trial with the adult defendants **unless** the interests of justice require otherwise.

[35] It was therefore not for the Crown to apply for transfer or joinder, as has occurred here. The charges against [LH] and [EC] are transferred to the District Court trial jurisdiction by statute subject to the Youth Court’s assessment of the interests of justice.

[36] Section 277(5) does not say that an application is needed for the Youth Court to assess whether it is in the interests of justice for young persons to stand trial in the Youth Court. The principles under which the Youth Court operates are such that the Youth Court should consider this in every case, whether there is an application or not.⁵

[37] The question then is whether it is in the interests of justice for [LH] and [EC] to be tried in the Youth Court separately from their adult co-defendants.

² Oranga Tamariki Act 1989, s 321(1) and Schedule 1(2).

³ *R v Johnson* [2018] NZCA 187.

⁴ *R v [W]* [2018] NZHC 1861 at [70] and [73], albeit this case was concerned with joining Youth Court charges with High Court charges against the same defendant. The principle is however the same ie s 138 is not the statutory mechanism to transfer charges from the Youth Court to another court for trial.

⁵ See particularly the primary consideration of the well-being and best interests of the young person under s 4A(2)(a), and the guiding principle that the well-being of a young person **must be at the centre** of decision making that affects the young person under s 5(1)(b).

Is a separate Youth Court trial in the interests of justice?

[38] I respectfully adopt the discussion of applicable principles traversed in the decision of Judge Lovell-Smith in *TM and DR v Police*.⁶ The principles which are most applicable to this case include:

- (a) The desirability of a joint trial which best uses resources and saves multiple witnesses having to give evidence twice.
- (b) The risk of inconsistent verdicts being reached in separate trials.
- (c) The nature and circumstances of the alleged offending and the young person's involvement in it.
- (d) The young person's age, including the time left in Youth Court for youth justice measures.
- (e) The young person's circumstances including offending history and whānau, social or personal circumstances.
- (f) Whether the Youth Court can offer a significantly earlier hearing date.

[39] The Court is also required to weigh the four primary considerations under s 4A(2) of the Oranga Tamariki Act, guided by ss 5 and 208 principles. This includes assessing factors such as the wellbeing and best interests of the young person, the public interest, interests of victims and whether the measures for dealing with young persons strengthen their whānau group and foster the whānau's ability to develop means of dealing with offending by their young persons.

Desirability of a joint trial

[40] This is not a significant issue in this case.

[41] The adult defendants' jury trial will be concerned with incidents on [date 1], [date 2] and [date 3] 2021. The trial is expected to last three weeks. Most of the charges faced by the adult defendants arise from the [date 3] incident, which will occupy a substantial proportion of the trial time. The [date 3] incident will require

⁶ See n 1.

evidence from approximately eight complainants, including [the second complainant] and [the first complainant].

[42] [LH] and [EC] are charged only in connection with the [date 1] incident. The only complainants giving evidence in relation to that incident are [the first complainant] and [the second complainant]. The evidence for that incident would likely occupy less than two days of trial time.

[43] If [LH] and [EC] stood trial in the Youth Court, [the first complainant] and [the second complainant] would give evidence twice in relation to the [date 1] incident only.

[44] There would accordingly not be a significant duplication of resources in the context of the significantly longer trial faced by the adults. It would also mean that [LH] and [EC] would largely be spectators for most of the adult co-defendants' jury trial.

Risk of inconsistent verdicts

[45] Once again, this is not a significant issue.

[46] There is some corroborative evidence of [the first complainant] and [the second complainant]'s account that they were robbed of their cannabis where a gun was discharged, including a Facebook Message [defendant A] sent afterwards, boasting "I shot the gun and had them running".

[47] The trial issue therefore is likely to be the identity of the participants. This will require the factfinder to individually assess the evidence of each defendant's involvement. If a factfinder at one trial determines that a particular defendant was or was not involved, this will not have much effect on whether a fact-finder at a separate trial finds that another offender was or was not involved.

[48] While there may be some common evidence as between co-defendants, this is unlikely to be determinative of whether it proves individual offenders' identities.

Nature and circumstances of alleged offending

[49] The Crown alleged [LH] and [EC] were joint participants in an aggravated robbery, but the allegations do not appear to suggest they were lead offenders.

[50] This factor is neutral.

Young persons' age in relation to youth justice measures

[51] [LH]'s birthdate is [date X] 2005. [EC]'s birthdate is [date Y – some 10 months after LH's birthdate] 2005.

[52] Youth Court jurisdiction now applies until a young person attains the age of 19 years.⁷ The Youth Court therefore retains jurisdiction in [LH]'s case until [date X] 2024 and in [EC]'s case, until [date Y] 2024.

[53] A Youth Court trial could occur as early as March 2023, which would leave sufficient time for Youth Court orders for both young persons in the event the charges were found proved.

Young persons' circumstances

[54] I was not provided much information about the young persons' circumstances. I must therefore proceed on the basis that neither young person has had previous significant involvement in the Youth Court.

[55] [LH] and [EC] are brothers and they are related to some of the adult co-defendants. This does not suggest they should stand trial with co-defendants with whom they are related. It is simply a factor in this case.

[56] I have not been given any information about the young persons' whānau, social or personal circumstances that suggest they should stand trial in either jurisdiction.

Whether Youth Court can offer a significantly earlier hearing date

[57] This is an important, if not decisive, factor in this case.

⁷ Oranga Tamariki Act, s 2(2).

[58] As noted, a trial could occur in the Youth Court as early as March 2023, whereas the adult co-defendants jury trial is not until November 2023, some eight months later.

[59] The alleged offending was in August 2021. The young persons were not charged until May 2022 and, if they did not stand trial until November 2023, there would be delays until trial of 27 months from the date of the offence and 18 months from the date the young persons were charged. A Youth Court trial in March 2023 would mean delays of 19 months and 10 months respectively.

[60] Delaying [LH]'s and [EC]'s trial until November 2023 would offend against the principle that decisions should be made and implemented promptly, and in a timeframe appropriate to the age and development of a young person.⁸

[61] Lengthy delays may impact more harshly on a young person, increasing strain and anxiety until trial. Delays may also erode a young person's sense of responsibility and accountability for the alleged offending.

[62] It is highly desirable that the young persons' trial is reached as soon as reasonably possible.

Balancing welfare and best interests with other factors

[63] [LH]'s and [EC]'s wellbeing is most likely to be served by a significantly earlier trial in the Youth Court.

[64] As noted, if the charges are found proved, they would be held accountable for their offending somewhat earlier than if they stood trial by jury.

[65] While there might be some extra cost in holding a separate trial in the Youth Court, it is not significantly greater in the context of this case overall. There is also public interest in earlier resolution of trials for young persons and, in the event the charges are proved, holding them accountable and allowing therapeutic youth justice principles to take earlier effect where appropriate.

⁸ Oranga Tamariki Act, s 5(1)(b)(v).

[66] If the charges are found proved, earlier resolution will improve the prospect of whānau being engaged to address the causes of their young persons' offending.

[67] While it is undesirable to create an extra burden on complainants, the extra burden in this case is not significant compared to the overall requirement on [the first complainant] and [the second complainant] to give evidence in relation to a far wider set of circumstances than just the events of [date 1].

Conclusion

[68] Given the above analysis, I conclude it is in the interests of justice for [LH] and [EC] to be tried in the Youth Court separately from their adult co-defendants. Youth justice principles, the wellbeing and best interests of the young persons, the public interest, and the whānau's interests strongly favour a much earlier Youth Court trial than would be the case if the matter went to a jury trial.

[69] There are no strongly countervailing factors that make a joint trial with co-defendants more desirable in the interests of justice.

[70] I accordingly order per s 277(5) that [LH] and [EC] jointly face trial for their [date 1] aggravated robbery charges in the Youth Court.

[71] I note the trial time estimate of Crown and defence counsel is two to three days, which would include writing time.

Judge L C Rowe

Youth Court Judge | Kaiwhakawā o te Kōti Taiohi

Date of authentication | Rā motuhēhēnga: 26/10/2022