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IN THE YOUTH COURT
AT MANUKAU

I TE KŌTI TAIOHI
KI MANUKAU

CRI-2020-292-000251
[2021] NZYC 11

NEW ZEALAND POLICE
Prosecutor

v

[W R]
Young Person

Hearing: 2 November 2020

Appearances: S Norrie and N Walker for the Prosecution
J Munro and J Olsen for the Young Person

Judgment: 15 January 2021

RESERVED DECISION OF JUDGE P RECORDON

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[1] [WR] faces four charges of sexual violation by unlawful sexual connection. An application for dismissal of the charges pursuant to s 147 of the Criminal Procedure Act 2011 or alternatively pursuant to s 322 of the Oranga Tamariki Act 1989 has been filed on [WR]'s behalf. Both applications are opposed by the prosecution. Written submissions were filed and the matter came before the Court for argument on 2 November 2020. [WR] was present in Court accompanied by his mother and his [mentor]. A decision was reserved at the conclusion of oral submissions.

Delay application

[2] Firstly considering the delay application, section 322 of the Oranga Tamariki Act 1989 creates a discretion to dismiss charges where there has been unnecessary or undue delay:

> **322 Time for instituting proceedings**
>
> 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.

[3] In *Attorney General v Youth Court at Manukau* Winkelmann J confirmed the test to be adopted when determining an application under s 322.[1] The enquiry is a two-part process. Firstly, whether the time period referred to has been unnecessarily or unduly protracted, where the time period is defined as the time elapsed between the commission of the alleged offending and the hearing. Secondly, if there has been unnecessary or undue delay, whether to exercise the discretion to dismiss the charging document.

[4] The expression "unnecessarily or unduly protracted" has been held to have a meaning similar to the expression "undue delay" used in s 25(b) of the New Zealand Bill of Rights Act 1990.[2] In that context consideration of the following factors have been deemed appropriate:[3]

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[1] *Attorney General v Youth Court at Manukau* [2007] NZFLR 103; [2007] DCR 243 (HC).
[2] *Police v T* [2006] DCR 599 (HC).
[3] *Martin v Tauranga District Court* [1995] 2 NZLR 419 (CA) as endorsed by Winkelmann J in *Attorney-General of New Zealand v The Youth Court at Manukau* [2007] NZFLR 103.

(a) The length of the delay;

(b) Waiver of time periods;

(c) Reasons for the delay, including time requirements of the case;

(d) Actions of the accused, actions of the Crown, limits on the institutional resources and other reasons for delays; and

(e) Prejudice to the accused.

[5] Unnecessary delay must be delay that is no more than could reasonably have been avoided but must be more than trivial so as to avoid imposing a standard of perfection upon the Police or Court system.[4] Whilst "unnecessarily protracted" imports a notion of fault with the focus normally on the conduct of authorities, "unduly protracted" does not.[5] Whether the time elapsed is unduly protracted must be considered from the perspective of the accused.

Statutory Principles

[6] When determining a s 322 application, regard must be had to the purposes and principles in the Oranga Tamariki Act, including s 5(1)(b)(v) which provides:

> Decisions should be made and implemented promptly and in a timeframe appropriate to the age and development of the child or young person.

[7] The four primary considerations in s 4A(2) must also be borne in mind:

> (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.

[8] At this stage it is noted that counsel for the young person challenged the applicability of the above principles, which came into effect on 1 July 2019, given that the offending alleged in this case occurred before that date. Mr Olsen cited the

[4] *Police v ET* [2015] NZYC 412 at [8].
[5] *H v R* [2019] NZSC 69 at [42].

Supreme Court case of *H v R* to advance an argument that the principles to be applied are those in effect at the time of the offending.[6]

[9] Briefly, *H v R* related to historical sexual offending which occurred between 1955 and 1959 when the defendant was aged between 16 ½ and 20, and the victim was aged between 5 and almost 9 years. After a jury trial in 2017, the defendant was found guilty. At the time of conviction, he would have been aged about 62 years. One of the issues on appeal was whether s 322 of the Oranga Tamariki Act 1989 applied. The Court confirmed that it was indeed applicable and decided that youth justice principles that were still relevant, even though the accused was an adult, could still be applicable.

[10] Contrary to Mr Olsen's submission, however, on my reading the Supreme Court did not suggest that the principles to be applied when considering a s 322 application are those in effect at the time of the offending. In fact, the Court in that case considered the principles in effect at the time of the proceedings which, of course, were not in force at the time of the offending which occurred in the 50s. I agree with the prosecution that, as the current proceedings were commenced after the 1 July 2019 amendments, the Oranga Tamariki Act 1989 as it currently stands is operative and this court is required to apply that version of the Act; nothing in the transitional provisions require previous iterations, relative to the time of the offending, to be taken into account.

"The hearing"

[11] The relevant period requiring consideration under s 322 is "the time that has elapsed between the date of the commission of the alleged offence and the hearing". The Act provides no further clarity on what "hearing" means for s 322 purposes. In *Attorney General v Youth Court at Manukau* Winkelmann J found that "hearing" meant hearing of the charges or, if no date had been set, the projected date of hearing of the charges.[7] Mr Olsen advocated for such a prospective assessment in this case.

[12] In *R v M* the Court of Appeal, when noting the lack of clarity provided in the Act in relation to the word "hearing" for s 322 purposes, acknowledged the practical

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[6] *H v R* [2019] NZSC 69.
[7] *Attorney-General of New Zealand v The Youth Court at Manukau* [2007] NZFLR 103 at [34].

sense in Winkelmann J's approach.[8] However, the Court noted that it did not sit well with the reference in s 322 to "the time that *has elapsed* between the date of the commission of the alleged offence and the hearing", which appears to contemplate only a retrospective calculation from the date of the hearing, rather than a prospective estimation.

[13] The Court discussed with counsel the possibility that "hearing" in s 322 refers to the hearing of the s 322 application itself, which may or may not be at the same time as the hearing of the charge. The Court noted that if an application under s 322 is made before the hearing of the charge, then the period to be measured by the judge is the period between the date of the commission of the alleged offence and the hearing of the s 322 application as this would sit more easily with the use of the past tense in s 322, "has elapsed". The Court nevertheless acknowledged that this would not allow for consideration of the total delay between the alleged offending and hearing of the charge, except in cases where the s 322 application is made at the hearing of the charge. As the Court did not need to decide the point, it did not reach a conclusion on it and suggested that statutory intervention may be appropriate in the interests of clarity. The following excerpt from the discussion is notable for current purposes:

> [37] The CYPF Act generally indicates whether a hearing is of an application, information, or proceedings. Where "hearing" is used alone, its purpose is ascertainable from the context. It seems that the only place where "hearing" is used without a qualifier and where its meaning is not obvious from the context is s 322.
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> [38] The use of the past tense in s 322 may indicate that Parliament intended that the reference to "hearing" was to the hearing of the s 322 application, whether that be on the day on which the charge was being heard in the Youth Court or an earlier date. Adoption of that position would remove the need for a predictive assessment…

[14] Ms Norrie referred to a decision where Principal Youth Court Judge Walker acknowledged that, whilst in some cases the Court can readily assess prospective delay, in others that will not be possible.[9]

[15] Not only is there uncertainty around the date of [WR]'s potential trial, or whether it would take place in the Youth Court or before a jury, there is uncertainty as

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[8] *R v M (CA689/11)* [2011] NZCA 673 at [34]-[36].
[9] *Police v ZW* [2017] NZYC 472.

to whether there will be a trial at all given that he has not yet entered a plea. In the absence of further clarity around the meaning of "the hearing", or as to how these proceedings may progress, I see little merit in somewhat blindly estimating the total delay at this point. Rather, I will assess the delay in proceedings up to the date of the hearing of this application. [WR] reserves the right to advance a further s 322 application later in proceedings, if applicable.

Procedural background

[16] The charges against [WR] arise from offending alleged to have occurred between July and September 2017 when [WR] and the complainant were both [school year deleted] boarding school students and were aged 13 and [under 15] years respectively. A comprehensive chronology is set out in the prosecution submissions. To summarise into key phases for ease of analysis:

(a) Duration between most recent alleged offending and complaint: **2 years 2 months**

(b) Duration between the date of complaint to the Police to the referral for s 247(b) FGC: **2 months 3 weeks**

(c) Duration between referral for s 247(b) FGC and first appearance in the Youth Court: **3 months**

(d) Date of first appearance in Court to the delay hearing: **1 month 3 weeks**

Submissions for the young person

[17] Counsel for the young person argues that the delays in the present case are undue, unnecessary and, on the part of the state, egregious. Mr Olsen argued, despite the approach commonly taken in relevant case law, that there is no merit in breaking down the time period into "phases". Rather, he noted that it has already been over 3 years since the alleged offences and that it may well be in excess of 4 years by the time it gets to trial.

[18] In terms of unnecessary delay, Mr Olsen argued that the police have an obligation in cases involving young people to prosecute matters promptly, particularly when there is reporting delay, and that they failed to meet that obligation in this case. Mr Olsen referred to the fact that the complainant's first interview, which he states is what the Crown's case rises and falls on, took place in March yet the Family Group Conference didn't follow until May. He argued that the FGC should have taken place sooner. Mr Olsen also raised issue with the fact that the complainant wasn't re-interviewed for approximately 7 months after his first interview.

[19] As for undue delay, Mr Olsen reiterated that there is no requirement of fault on the part of the police or the courts and whether the time period is "unduly protracted" must be considered from the perspective of the accused. He stated that [WR] has suffered both general prejudice and specific prejudice.

[20] Mr Olsen outlined the substantial implications for [WR] as far as his removal from his school campus for most of the year is concerned. Following a phone call to the headmaster by police advising that [WR] was the subject of a police investigation of sexual allegations against a complainant at the school, he was stood down and has remained at home since. Mr Olsen accordingly noted the stark contrast between [WR]'s sporting and academic success at the beginning of the year and his current situation which, although supported greatly by Mum, sees him isolated from his peers, from sport and the benefits of the boarding component of the school programme. Mr Olsen underscored the particular detriment caused by this disengagement given that [WR] is in year 12.

[21] Mr Olsen also addressed the substantial developmental change in [WR], both physically and in terms of his understanding, since the time of the alleged offending. He stated that the 16 year old young person before the court now is quite different to the 13 year old said to have committed the crimes some 3 years ago. Mr Olsen noted that [WR] could be prejudiced by the implications of the difference in his maturity, and perceptions of the difference in his maturity, in a jury trial. He also noted the significance of the delay in initiation of reformative or rehabilitative measures and asserted that the 3 years, likely 4 by the time of trial, is a significant part of the young person's life, particularly in schooling.

[22] In asserting that there has been unnecessary and undue delay, Mr Olsen went so far as to assert that the delay is so serious it is egregious and urged the Court to mark its disapproval of the way this case was handled by the Police. He raised three main points under this head. Firstly, that the Police filed an indecent assault charge over which the Court lacked jurisdiction. Secondly, he raised issue with the fact that the Police notified [WR]'s school of the complaint a day after it was made in February before substantiating the allegation in any way. This notification, which ultimately led to [WR]'s suspension, was made too early in Mr Olsen's assertion. He submitted that [the Constable] didn't know the full extent of the allegations at that point and notes that the Police only confirmed they had sufficient evidence to charge on 14 August. Thirdly, Mr Olsen raised issue with the fact that the complainant was re-interviewed in September, 6 months after his initial interview. He noted that the second interview was arranged immediately after the defence indicated they were filing the current applications. He stated that the first interview was comprehensive and the second one was, in short, to plug evidential gaps. Mr Olsen went so far as to suggest the complainant was briefed to provide comments helpful for the prosecution and that, in effect, the Crown and police have acted inappropriately to strengthen the prosecution case.

Submissions for the prosecution

[23] The prosecution's position was that there has been neither unnecessary nor undue delay in this case either by way of prosecutorial or investigatory delay. Ms Norrie also argued that, should the Court find there has been delay of the nature envisioned by s 322, the Court shouldn't exercise its discretion to dismiss as there is strong public interest in having these charges determined given that they are allegations of serious sexual offending committed whilst in a private boarding school.

[24] Ms Norrie referred to a number of s 322 cases involving serious sexual offending, including *EW v Police* where Judge Malosi noted that:[10]

> The young person is entitled to have his day in Court to prove his innocence. The complainants are entitled to their day in Court to see EW held

[10] *EW v Police* CRI-2010-229-000007, Manukau Youth Court, 20 December 2010.

> accountable. Either scenario allows justice to prevail. Dismissing these charges for delay does not.

[25] In response to the submission that there has been unnecessary delay, Ms Norrie submitted that the investigation and subsequent prosecution has moved with relative speed and urged the Court to refer to the chronology. Ms Norrie stated that the timeline shows a diligent and expeditious investigation, particularly given the seriousness of the allegations, the context within which they are said to have taken place, and the need to take appropriate measures in terms of screening and interviewing other students and staff members.

[26] Ms Norrie noted that the overall investigation and pre-charge period in this case is less than 6 months. She further noted that the period from first appearance to the delay hearing was 3 months. In the prosecution's view, the only period of any notable length was after the offending had ended and before the complainant complained. Ms Norrie referred to the Supreme Court's reiteration in *H v R* that there is of course no attributable fault where a victim delays complaining, because there are often good reasons for delays in the reporting of historic sexual offending.

[27] In response to the allegation of undue delay, Ms Norrie acknowledged the impact of [WR]'s removal from the school campus but submitted that the decision to allow [WR] to school as normal rather than from home was a matter for the school board, not the Court.

[28] In terms of prejudice in raising an effective defence, Ms Norrie referred to *EW* wherein Judge Malosi was not concerned by prejudice to the young person in his ability to mount a defence given the protraction of time between the date of the alleged offence and when the matters were determined, which was approximately three years. Judge Malosi considered that the prejudice might cut both ways given the complainant's memory would be similarly affected.

[29] In relation to the potential prejudice experienced by [WR] at trial as a result of his developmental change since the time of the offending, Ms Norrie emphasised that the prosecution would of course be required to prove the charge, including *doli*

incapax, and submitted that the fact finder will have ample evidence and direction to reach a sound verdict.

[30] As for Mr Olsen's contention that the delay was so serious to be egregious, Ms Norrie highlighted that the prosecution had conceded dismissal of the indecent assault charge and reassured the Court there was no bad faith on the part of the police in laying that charge. Ms Norrie also asserted that there was no principled basis upon which to suggest the police action in communicating the allegations to the school was inappropriate. She stated further that, quite simply, it would have been open to criticism had they not.

[31] Ms Walker addressed the Court in relation to the re-interviewing of the complainant in September and firmly rejected there was any inappropriate conduct on the part of the prosecution. In short, Ms Walker confirmed to the Court that the action taken was standard practice as part of the Crown's evidential review. In every case that transfers from the police to the Crown, Crown counsel undertakes an evidential review which often results in further investigative inquiries. Ms Walker also rejected the contention that the second interview was undertaken to "plug the gaps" in the prosecution case. She told the Court that, under the Solicitor General's Guidelines, they are compelled to meet on at least two occasions with victims of sexual violation. She also stated that, in any event, the nature and content of the second interview speaks for itself in terms of rebutting Mr Olsen's assertions that there was some form of prompting or putting of words into the mouth of the complainant by the Crown or police. Ms Walker's submissions were accompanied by copies of full disclosure of all documentation relating to the second interview which had been promptly provided to Mr Olsen when requested.

Result

[32] In short, I do not consider there has been unnecessary delay in this case at the investigatory stage, nor at the initial prosecutorial stages. Mr Olsen has been largely unable to direct the Court to any period of delay which was realistically avoidable. The bulk of delay in getting to this stage is a result of the complainant not reporting the allegations as is frequently so in cases of this nature. The investigation, particularly

given the various restrictions in place at the time as a result of Covid-19, if anything, was quick. Similarly, the initial stages of prosecution have been no longer than would be expected for a case of this nature.

[33] Further, I do not consider that there was any merit in the assertion that the police conduct or the Crown's handling of this case can be described as egregious or neglectful. I am satisfied there has been no bad faith on the part of the prosecution and that their handling of the case has been diligent and thorough.

[34] The stronger argument advanced by the defence was that on the basis of undue delay. In the current case, the period between the most recent allegation and the hearing of the delay application has been a total of 2 years and 10 months. In *Brown v R* the Court of Appeal held the view that a tabulated comparison of delay periods involved in other cases is of little assistance; each case turns on its own facts.[11] In *M (CA427/11) v R* the Court of Appeal similarly held that the question of whether there has been undue delay is a "matter of judicial determination involving the balancing of interests rather than the application of a mathematical or administrative formula".[12]

[35] Whilst I am not particularly troubled by [WR]'s ability to raise an effective defence as a result of the effluxion of time, nor by the supposed prejudice he will face before a potential jury as a result of his developmental change, the effect on his schooling is significant. Educational engagement is of great importance for this young man, as it is for all young people. The negative impact of his removal from the school campus in an academic sense, as well as from a sporting, social and pastoral care perspective, is deeply concerning. This is particularly so given the significant stage he is at as a year 12 student.

[36] Notwithstanding, a couple of points must be noted in that regard. Firstly, the decision for [WR] to be removed from the school campus was not required by the prosecution or the Court. Rather, it was a decision of the school board after the police responsibly advised the school of the investigation into the current allegations. Notably, Mr Olsen stated in oral submissions that the school advised that [WR] is

[11] *Brown v R* [2015] NZCA 325 at [33].
[12] *M (CA427/11) v R* [2012] NZCA 270 at [86].

unlikely to be allowed to return to the campus next year, regardless of the outcome of the current applications.

[37] It follows, therefore, that [WR]'s educational disengagement has not been a result of the current proceedings or any delay within them, it has been a result of the allegations as and of themselves. If the Crown were to continue to cooperate and support [WR]'s educational engagement in terms of bail conditions or any potential Youth Court interventions, little prejudice arises from the charges proceeding to determination in this regard. [WR]'s return to the school campus is a separate matter to the current proceedings and it is for the board to decide, not the Court.

[38] It follows that I am of the view that the current proceedings have not gone beyond the timeframe that a case of this nature would usually require and the application under s 322 ought therefore to be dismissed.

[39] For completeness I note that, even if I had reached a finding of unnecessary or undue delay, I would not be inclined to exercise the discretion to dismiss.

[40] As acknowledged by Mr Olsen, the alleged offending is serious and there is public interest in serious offences remaining before the Court. In *Attorney-General v Youth Court at Manukau* Winkelmann J held:[13]

> There is a public interest in seeing those who commit offences dealt with through the justice system in respect of that offending. The more serious the offending, the greater the public interest…

[41] There is clearly high public interest in this case given not only the nature of the allegations, but also the fact that they are said to have occurred within a private boarding school where the complainant should have been able to feel safe. It is therefore in the public interest and in the complainant's interests for [WR] to be held accountable.

[42] Importantly, I am also of the view that it is in [WR]'s interests for the charges to be determined. Should he wish to enter a denial to the charges and proceed to trial, he should have a chance to defend the allegations and clear his name. Alternatively, if

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[13] *Attorney-General of New Zealand v The Youth Court at Manukau* [2007] NZFLR 103 at [60].

he were to not deny the charges or if they were to be found proven at trial, it would be in his interests, as well as in the public interest, for him to avail of the supports and interventions available under the Act. Whilst it is unfortunate that, if applicable, the interventions would be put in place later than may have been the case had the complainant reported the allegations earlier, dismissing the charges and removing those interventions in their entirety would not better facilitate justice in this case.

Section 147 Application

[43] A dismissal application has been filed on [WR]'s behalf on the alternative basis that there is no case to answer. Section 147 of the Criminal Procedure Act 2011 provides:

> **147 Dismissal of charge**
>
> (1) The court may dismiss a charge at any time before or during the trial, but before the defendant is found guilty or not guilty, or enters a plea of guilty.
> (2) The court may dismiss the charge on its own motion or on the application of the prosecutor or the defendant.
> (3) A decision to dismiss a charge may be made on the basis of any formal statements, any oral evidence taken in accordance with an order made under section 92, and any other evidence and information that is provided by the prosecutor or the defendant.
> (4) Without limiting subsection (1), the court may dismiss a charge if—
> (a) the prosecutor has not offered evidence at trial; or
> (b) in relation to a charge for which the trial procedure is the Judge-alone procedure, the court is satisfied that there is no case to answer; or
> (c) in relation to a charge to be tried, or being tried, by a jury, the Judge is satisfied that, as a matter of law, a properly directed jury could not reasonably convict the defendant.
> (5) A decision to dismiss a charge must be given in open court.
> (6) If a charge is dismissed under this section the defendant is deemed to be acquitted on that charge.
> (7) Nothing in this section affects the power of the court to convict and discharge any person.

[44] The principles relating to s 147 are well established in relevant authorities. In *Flyger* the Court of Appeal said:[14]

> … a Judge should not normally make an order for discharge pursuant to s 347(3) where there is before the Court evidence which, if accepted, would as a matter of law be sufficient to prove the case. The Judge's function in these circumstances is not to attempt to predict the outcome but to examine the evidence in terms of adequacy of proof, if accepted.

[14] *R v Flyger* [2001] 2 NZLR 721 at [13].

[45] Similarly, in *Parris v Attorney General* the Court of Appeal noted:[15]

> If the evidence is sufficient in law, if accepted, to prove the case, the Judge should leave the case to the jury and not withdraw it on evidentiary grounds.

[46] The Court of Appeal in *R v Gan* held:[16]

> …the role of the Judge on application for a discharge [under s 147] is whether the established facts are capable of supporting the inference contended for by the Crown, not whether the relevant inference should be withdrawn.

[47] It is well settled that s 147 focusses on the sufficiency of the evidence, rather than its quality. Questions of credibility and weight are for determination by the fact finder, as are matters of inference or questions of reasonableness. The Court must consider the prosecution evidence at face value unless it is manifestly discredited. The question is whether the prosecution evidence, taken at its highest, is such that a jury properly directed could or could not properly convict on it.

Background to the offending

[48] The charges arise from offending alleged to have occurred in 2017 when [WR] and the complainant were both [year deleted] boarding school students and resident in the same cabin. During the relevant period [WR] was 13 years old and the complainant was [under 15] years old. The allegations came to light in [early] 2020 when the complainant reported abuse to the school guidance counsellor after a presentation at a school assembly about sexual abuse.

[49] As noted, the complainant undertook two evidential video interviews, one in March this year and another in September. The allegations underlying each of the charges are set out in the prosecution submissions in the following excerpts from the complainant's first interview:

Charge 1 (CRN 0033): "the first bathroom incident"

(a) It was three weeks, a month later, that's just a rough guess.

(b) It was late at night, 11.00/12.00ish, the rest of the boys were asleep.

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[15] *Parris v Attorney-General* [2004] 1 NZLR 519 at [10].
[16] *R v Gan* [2016] NZCA 352.

He woke me up and told me to come to the bathroom. He shook me, just told me to come to the bathroom. He slept on the other side of the cabin. He just told me to come to the bathroom.

(c) I got up and went to the bathroom. He was waiting in the bathroom. He started kissing me and touching my penis with his hand.

(d) He started kissing my lips and he made me suck his penis and then he ejaculated in my mouth.

(e) I was leaning against the bench, where the sink is, he was standing there. He slid his hand down my body and then touched my penis over my pants, but not for long, just grabbed it and then let go.

(f) He went to the toilet, sat down, took his pants off and made me suck his penis. He grabbed my head and just put it down there.

(g) He told me to get on my knees, I was like "yeah", and that was all I can remember about what he said.

(h) He grabbed my head, forced it down, like push my head down onto his penis, um started sucking his penis and then he ejaculated in my mouth. It was yuck.

(i) I had my hands on his penis and I was just stroking it cos he told me to. He told me to stroke his penis and I did.

(j) I was feeling nervous, I was still scared about him, or like if anyone was going to come in.

(k) After he ejaculated I stood, washed my hands, and left. I went back to bed, felt weird, my mouth tasted yuck. My mouth tasted a bit foul, I was just still upset.

Charge 2 (CRN 034): "the second bathroom incident"

(a) This was in the school bathroom. It was quite a while after [the first time in the cabin bathroom], like a month and a half, something like that. I was a long time. I was just happy that it wasn't an all the time thing. I didn't want it to be a thing at all of course.

(b) It was at night later on, after homework. I came back from homework, I think he just told me to go into the toilet.

(c) It was just the same as last time, he made me suck his penis, kiss, yeah.

(d) I went into the toilet first in front of him, he started kissing me, yeah. Just with his lips on my lips.

(e) I was kind of used to it at this point. Like I wasn't scared or anything, just happened. Not used to it, but I wasn't like confused or anything, I know what was happening I guess.

(f) We were standing in the middle of the small bathroom, kissing. He went onto the toilet and sat there and took his pants off.

(g) I just went on my knees and I sucked his penis. I was just sucking

his penis and stroking it with my hands, and he just held my head down with his hand and he ejaculated in my mouth again. He made me swallow it, he told me to, I think. I just remember it being along the lines of "swallow it".

(h) I just wanted to get it over and done with, I just wanted to get out. I can't remember if he said anything, nothing bad or anything.

(i) I just get up and leave again. I think he just sat there and waited. I went back to the cabin and was chilling in the lounge and he comes back in with a couple other boys.

Charge 3 (CRN 032): "the third bathroom incident"

(a) I can't really remember it that well. It was at night, and midway through Term 3 or something like that. It was after the school bathroom, maybe like three weeks, a month.

(b) It was in the bathroom in the cabin, probably another late night like 12 o'clock and I think the rest of the boys in the cabin were asleep. I was in the bathroom and I just finished going to the toilet and he came in. Then he washed his hands, and then just started kissing me with his lips. And then he went into the toilet, just stood there, and I came in, and he took my penis out of my pants and put it in his anus.

(c) He just took my pants off, I was just standing there, wasn't doing anything. He turned around, facing the door of the toilet and then he grabbed my penis and put it in his anus.

(d) [Re it was "in for a little bit"] I didn't do anything, like it was there in his anus for maybe like 10 seconds or so, and then I just took it out.

(e) I don't think he said anything, did anything.

(f) I didn't like that, and then I said to him "nah, I'm not doing that", and I just left.

(g) For a very short time it was in there and then I walked away from him and then I walked past and I said "no", I was like "I'm alright", I'm pretty sure I said I didn't want it, and he's like "oh okay".

(h) I just didn't like it, the feeling of that, and I was just too tired and I was already kind of upset about something else, and I can't remember what it was, and I was like "Nah".

(i) Then I just walked out and left and went back to bed. I didn't do anything, I was just trying to sleep.

Charge 4 (CRN 035): "the cabin incident"

(a) I'm pretty sure this was the last time it happened. It was near the end of the year, classes had stopped in Term 4. I think it was the week after [an expedition].

(b) The rest of cabin went to play [sports] in the gym and it was just us, it was probably 1.00pm or 2.00pm. He just came up to me and started kissing me, and then we lay down on the bed and just kissed, then he

took his penis out of his pants and put it in my anus.

(c) He went and laid on the bed. I can't remember if he said anything. He took off his pants and his shirt. I just took my pants off, down to my knees just before I got on the bed. He was lying sideways, he was lying next to me.

(d) He kissed me and then put his penis inside me. It was just a quick kiss, I don't know, I think I turned around on the bed. Just with his lips on mine. We were just facing each other.

(e) I rolled over and he put his penis inside me. I can't remember anything being said, he didn't say anything.

(f) When his penis was in my anus, it was painful. And then he just was slowly doing it, and then he just stopped and got up and he's like "oh we need to go to [sports]". He was going back and forth with his penis, his penis was going in and out of my anus. I remember it hurting a lot.

(g) [*Did you notice anything about your anus after*?] It was a bit sore but that was it.

(h) I was just trying to be quiet and just, I don't know why I was trying to be quiet but I was, and yeah I was just nervous, especially because the [lodging mentor] could've come in looking and stuff.

(i) That finished shortly after and we just got ready and went to the gym because our [lodging mentor] was probably wondering where we were.

Elements of the charges

[50] Sexual violation by unlawful sexual connection is defined in ss 128 and 2(1) of the Crimes Act 1961 as follows:

> **128 Sexual violation defined**
> (1) Sexual violation is the act of a person who—
> (a) rapes another person; or
> (b) has unlawful sexual connection with another person.
> (2) Person A rapes person B if person A has sexual connection with person B, effected by the penetration of person B's genitalia by person A's penis,—
> (a) without person B's consent to the connection; and
> (b) without believing on reasonable grounds that person B consents to the connection.
> (3) Person A has unlawful sexual connection with person B if person A has sexual connection with person B—
> (a) without person B's consent to the connection; and
> (b) without believing on reasonable grounds that person B consents to the connection.
> (4) One person may be convicted of the sexual violation of another person at a time when they were married to each other.

2 Interpretation

(1) **…**

sexual connection means:

(b) A connection effected by the introduction into the genitalia or anus of one person, otherwise than for a genuine medical purpose, or –
  (i) A part of the body of another person; or
  (ii) An object held or manipulated by another person; or

(c) Connection between the mouth or tongue of one person and a part of another person's genitalia or anus; or

(d) The continuation of connection of a kind described in paragraph (a) or paragraph (b).

[51] The elements of the charges against [WR] that must be established by the Crown are therefore:

(a) That there was sexual connection between [WR] and the complainant in each of the ways specified:

  (i) CRN 0033 – connection between [WR]'s penis and the complainant's mouth (the first bathroom incident);

  (ii) CRN 0034 – connection between [WR]'s penis and the complainant's mouth (the second bathroom incident);

  (iii) CRN 0032 – connection between the complainant's penis and [WR]'s anus (the third bathroom incident);

  (iv) CRN 0035 – connection between [WR]'s penis and the complainant's anus (the cabin incident).

(b) That the complainant did not consent to the sexual connection;

(c) That [WR] knew the complainant did not consent to the sexual connection, or did not believe on reasonable grounds that the complainant consented to the sexual connection.

[52] As [WR] was 13 years old at the time of the offending, the prosecution must also rebut the presumption that children cannot be held criminally responsible as set out in s 272A(1)(d) of the Oranga Tamariki Act 1989 and ss 22 of the Crimes Act 1961. The following element is also therefore imported:

(e) That at the time of the sexual connection, [WR] knew it was wrong or contrary to law to have non-consensual connection.

Evidence relied upon:

Sexual connection

[53] The first element, that the alleged sexual connection occurred, is conceded in respect of each of the charges.

Consent

[54] The defence case is that the sexual connection occurred consensually in the context of sexual experimentation between two young boys. Mr Munro and Mr Olsen submitted on [WR]'s behalf that there is insufficient evidence to establish a lack of consent on the complainant's part. They relied on the case of *Christian v R* for the premise that there is no requirement for express consent in cases of this nature.[17] The defence further submitted that the complainant "engaged in actions which illustrated his consent" and referred to his account of going into the bathroom when directed, knowing sexual activity would occur, and in relation to the final incident, adjusting his body to facilitate anal connection.

[55] Ms Norrie on the other hand referred to the statutory authority that consent is not to be inferred merely by reference to a lack of protestation or physical resistance, nor is consent free and informed where there was a threat or fear of violence.[18] She referred to a number of circumstances arising from the complainant's accounts of the allegations which show he was not consenting. In relation to the first bathroom incident, the complainant reported that [WR] "grabbed" his head and "forced it down" onto his penis. When describing the second bathroom incident, the complainant stated that he was "just happy it wasn't an all the time thing. I didn't want to be a thing at all of course". In relation to the third bathroom incident, the complainant described [WR] taking his penis out of his pants and, "grabbing it" and putting it into his anus until he

[17] *Christian v R* [2017] NZSC 145.
[18] Crimes Act 1961, s 128A.

told him to stop. As for the fourth charge, Ms Norrie stated that the complainant's account, which could be read as him having been complicit, ought to be read within the broader context discussed below which provides explanation for why by that stage he was acting in that way.

[56] To that end, the prosecution case is that the sexual offending escalated beginning with a single incident of indecent touching after which [WR] threatened to kill the complainant if he told anyone. In addition to the four sexual violation charges, therefore, a charge of indecent assault was also initially laid against [WR]. It was conceded by the prosecution that there is no jurisdiction for this charge given [WR]'s age at the time of the offending and the 7 year maximum penalty it carries.[19] Notwithstanding, the prosecution seeks to rely on the complainant's account of the facts underlying the indecent assault as evidence in the prosecution of the sexual violation charges. That evidence, which arises out of the complainant's first EVI, was the subject of an earlier pre-trial admissibility ruling and is summarised in the prosecution submissions as follows:

> (a) It started about midway through the year. It slowly progressed from touching to kissing to sex and stuff.
>
> (b) The first time [on the way back to the dorm from doing homework] he told me to come into the bush, so I did, and he just started touching me and dry humping me and stuff, and I was just scared. He never hurt me or anything like that he just said to me "if you tell anyone I'll kill you" or something like that.
>
> (c) I was walking by myself, about 8.30 at night, he came up next to me and was like "come here with me" and I was like "okay". He started touching my backside with his penis, in his pants, and kissing me. His pants were still on.
>
> (d) He said "be quiet". I didn't say anything. I was shocked and scared. I didn't want to do anything because he's quite a violent person. He really likes to fight. He knows he's better than most people at fighting. He's quite manipulative. He'll just come behind you and kick your shins and it hurts. He does that to most people.
>
> (e) His penis was still in his pants, he put it up against my backside and left it there, while he was kissing me.
>
> (f) I turned around and he kissed me. He kissed my neck and then started kissing my lips and stuff, with his tongue. He was touching my head with his hands.

[19] Oranga Tamariki Act 1989, s 272.

(g) I was just confused I think, and really scared about a lot of things. I was just worried if he was going to hurt me or do something, then someone was going to find out.15 I was just nervous.

(h) We just went back inside after that. He said for me to wait cos he didn't want to go in together. I waited, I was crying. When I went inside he was his normal self. I was nervous to see him. There was no one else there so I just went to bed.

(i) [*Re [WR] telling you not to tell or he'd kill you*] I think that was after the first time, he just said that after. I was like "oh okay". I'm pretty sure I said that I was leaving. I was extremely scared. I was confused, like what just happened. I just walked back to the cabin. I was having a conflict with myself, like "what is happening, I'm in a cabin with him". Then he came in and was acting normal. I was just trying to understand what had happened. Obviously I understand what happened, but just trying to figure out what I was going to do or should I tell someone, should I not, or what should I do. I don't think he made those sorts of comments any other time, I think it was just that once.

(j) [*You talked about being really scared the first time, and not being scared the third time, but you said that you were really scared – tell me about being really scared*] I was just scared of him, like him being violent towards me. Like really, really violent. Like causing severe damage or killing me.

[57] The defence argued that [WR]'s threat to kill the complainant if he told anyone could have been because of the available suggestion he was gay. Mr Munro and Mr Olsen also argued that on their reading of the complainant's evidence, any reluctance as far as the alleged sexual conduct was concerned was merely because he was afraid others would find them, he was tired or not enjoying a particular activity, and that he liked that it would only happen occasionally. They further argued that the second interview conflicts with the first as far as consent is concerned and stated that the second interview needs to be tempered against the first.

[58] In order to prove a lack of consent on the part of the complainant, the prosecution also seeks to rely on broader evidence of the relationship between the two boys which shows a bullying context. The prosecution case, in broad terms, is that [WR] persistently bullied the complainant, behaved violently towards him and forced him to do things for him through threats of violence. That bullying, the prosecution says, became sexualised. In cases such as *Perkins*, a "general atmosphere of violence" has been held to be directly relevant to the issue of consent and to the complainant's

state of mind or seeming acquiescence to sexual activity.[20] The defence contended that the evidence of [WR]'s bullying of the complainant was "consensual fighting which at times got a bit of out of hand". Ms Norrie termed this a "gross mischaracterisation" of the evidence.

[59] In terms of the evidence relied upon to substantiate this bullying context, Ms Norrie referred to the complainant's own remarks in the second EVI that [WR] was "very violent", "manipulative", "assertive", dominating" and that he would force others to do things they didn't want to, such as chores. He stated that if he didn't do what he wanted or had requested, [WR] responded with violence and that he had suffered physical assaults several times which resulted in injuries, black eyes, cut lips, blood noses, and bruises to his body. He spoke of how [WR] always wanted to fight him and, if he refused, he would get angry.

[60] When asked to clarify evidence around consent to the alleged sexual conduct, the complainant said he was nervous and extremely scared as, if he didn't do it, [WR] might get angry. He said that he didn't know what would happen as he could be really violent, so he just "went along with it".

[61] The prosecution seeks to corroborate the complainant's account of this severe and persistent bullying context through the evidence of two classmates, [SO] and [PB]. [SO]'s perception was that the complainant was easily intimidated and was intimidated by [WR]. He noted that he would force him to do his chores and that he had seen [WR] physically beating the complainant. [PB] also noted that whilst [WR] bullied lots of boys, he bullied the complainant the most, probably because he was quiet. He recalled seeing him punch him hard.

[62] [SO] and [PB] were aware that the complainant had been suicidal and engaged in self-harming behaviour which they seemed to attribute to the bullying. Ms Norrie asserted that such a profound effect on the complainant's mental health was at odds with the defence submission that the bullying was little more than boarding house antics.

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[20] *Perkins v R* [2011] NZCA 665; *M(CA85/2013) v R* [2013] NZCA 239 at [30].

Reasonable belief in consent

[63] The defence argued that there is insufficient evidence to establish that [WR] lacked reasonable belief in consent. Mr Munro asserted that the lack of consent needed to be communicated to [WR] and referred to the fact that the complainant, in the third bathroom incident, said "nah, I'm not doing that" and that [WR] accordingly stopped. He therefore submitted that the complainant could object and that [WR] was otherwise of the understanding that he consented.

[64] The prosecution submission however was that the evidence is sufficient to show that [WR] knew at the time of the sexual connection that the complainant was not consenting or, alternatively, that no reasonable person in [WR]'s position could have believed that the complainant consented in such circumstances.

[65] Ms Norrie again seeks to place reliance on the wider bullying context to support the inference that [WR] knew the complainant was not consenting, or that no reasonable person would have believed that he was. She submitted that the fact that [WR] bullied the complainant and clearly considered him an easy target supports the inference that he knew that the complainant was not giving free and informed consent and that he was just acquiescing to his demands.

[66] Ms Norrie also referred to the circumstances surrounding the alleged conduct. After the alleged indecent touching in the bushes, [WR] is said to have threatened to kill the complainant if he told anyone and, as noted, and later physically "forcing" him to engage in the alleged conduct.

Doli incapax

[67] Ms Norrie relies on the case of *R v Kaukasi & others* for the submission that the starting point is that the prosecution can call evidence as to any fact or opinion, if it is logically relevant to the child's knowledge of the wrongfulness or unlawfulness of the alleged criminal act.[21]

[21] *R v Kauakasi & Ors* HC Auckland, 9 August 2002, T014047.

[68] In that case, the prosecution called two witnesses for the purposes of rebutting the *doli incapax* presumption. The first was a police youth aid officer who described the child as having been "streetwise" and "independent". The second was a former headmaster from a school attended by the accused who gave evidence of the level of understanding shown by him during the period he was a pupil, some 4 years before the offending when he was 9 years old. Given the accused's high truancy rate, this was the most recent schooling related evidence available.

[69] A later appeal ground was that prejudice would have arisen from the clear inference of misconduct available from the evidence of youth aid involvement or of truancy given the lack of any more recent educational evidence.[22] It was held that the slight references to such issues were merely background to the opinions the jury was invited to take into account; it was not suggested that they in themselves were probative of any fact in issue and the jury was directed accordingly.

[70] The prosecution in this case similarly seeks to rely on witness statements and school reports to support the submission that [WR] is a competent student who achieves well academically, his functioning at the time was not at a level below his peer group, nor did he have any cognitive limitations such that he would not have been able to understand right from wrong.

[71] To that end Ms Norrie seeks to rely on the evidence of [SF], [WR]'s former primary school teacher. [SF]'s evidence, which was the subject of a previous pre-trial ruling, is to the effect that she received reports of some alleged sexualised behaviour taking place in the school bathrooms, namely allegations of forced oral sex, and that she dealt with it in her capacity as principal. In the course of so doing, she had a one on one conversation with [WR] about the wrongfulness of non-consensual sexual activity. Ms Norrie stated that [WR] having previously been instructed on the issue of non-consensual sexual contact and expressly told it was wrong, against the law, and specifically, if he did it as a "big person" the Police would become involved, alongside the principal's opinion of his level of understanding, supports an inference that he

[22] *R v Rapira* [2003] NZLR 794 (CA).

knew it was wrong or contrary to law to engage in non-consensual sexual activity at the time of the current allegations.

[72] The prosecution also seeks to rely on the evidence of [AD], [mentor] for [WR] and the complainant's boarding school cabin. [AD]'s observations of [WR]'s behaviour was that he had an overbearing manner in the cabin and would be physical as well as verbal. Regarding [WR]'s understanding of wrongfulness, his opinion was that he "knew the systems, is quite smart and could exploit that if he needed to. He could say what he needed to say…"

[73] [AD] referred in his statement to [WR]'s mid-year report which noted that [WR] had reflected that the way he interacts with his peers was not the way he wanted to continue. He also referred to the end of year report which provided that [WR] "does not like how he behaved towards others at [the school] and is making conscious efforts to improve." Ms Norrie says that this evidence of [WR]'s insight into his own inappropriate bullying behaviour supports the inference that he was perfectly capable of distinguishing right from wrong at the time of the allegations.

[74] Regarding the more specific issue of knowledge that engaging in non-consensual sexual connection was wrong or against the law, [AD]'s statement also includes reference to [WR]'s involvement in Health class where the pupils learnt about the effect of relationships and puberty on their Hauora. He stated that [WR] demonstrated a good understanding of these topics, completing all tasks to a satisfactory standard and he showed maturity and composure throughout some challenging topics.

The prosecution also relies on the circumstances of the offending which it is submitted was furtive and that [WR] threatened to kill the complainant if told anyone about the first instance of indecent touching.

Result

[75] The law is clear that the crucial question in all cases of this nature is whether, as a matter of law, a properly directed jury could reasonably convict on the admissible

evidence. The fact finder must, in all but exceptional cases, determine questions of credibility and weight.

[76] The prosecution case is that the complainant did not consent, [WR] knew he didn't consent or at least he did not reasonably believe that he consented, and he knew in each instance that it was wrong or contrary to law. The prosecution case largely relies on the fact finder accepting the complainant's version of events. I agree with the Crown's submission that this is not a case where the complainant has been manifestly discredited or is so unreliable that it would be unjust for the trial to proceed. The question of the complainant's credibility and reliability are matters for the fact finder. I am satisfied that there is evidence that, if accepted by the fact finder, could establish [WR]'s liability for each of the charges he faces. The application under s 147 is also dismissed.

P Recordon
Youth Court Judge