IN THE YOUTH COURT
AT MANUKAU

CRI-2017-292-000117
[2017] NZYC 313

NEW ZEALAND POLICE
Prosecutor

v

[J F]
Young Person

Hearing	2 May 2017
Appearances:	M Regan and J Rhodes for the Prosecutor C Bennett for the Young Person
Judgment:	2 May 2017

Oral Judgment of Judge G F Hikaka - Section 247(b) FGC

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[1] [J F], born [date deleted] 2000, is charged that on [date deleted] 2016, being armed with an offensive weapon, namely a Phillips head screwdriver, robbed the complainant of bottles of liquor. The charge was filed under Crimes Act 1961 s 235(c) and carries a term of imprisonment of a maximum of 14 years. The charge was first before the Court on 6 March 2017. On 31 March it was indicated that there would be a delay application and a timetable set for the application for dismissal.

[2] The application changed as a result of disclosure and the s 322 CYPF Act dismissal application is no longer pursued. But what is pursued is an application for dismissal on account of failure to convene the family group conference within statutory constraints.

[3] Today I heard evidence from, [a Youth Justice co-ordinator], and heard submissions from Mr Regan on behalf of the police and Ms Bennett on behalf of [J F].

Facts

[4] By way outline, the offence occurred [date deleted] September 2016. A referral was made by police to a youth justice co-ordinator on 25 November 2016. On 1 December [the Youth Justice co-ordinator]was allocated responsibility for the family group conference. The consultation and notification process pursuant to s 247(b) occurred on 8 December 2016. On 16 December [the Youth Justice co-ordinator] discussed the FGC arrangements with [J F's] caregiver, his aunt Ms [F] by telephone. There was confusion over the process and what was involved, so an agreement was made to talk again later. It was intended, at least by [the Youth Justice co-ordinator], that she visit Ms [F]. In the preliminary discussions of 16 December, [the Youth Justice co-ordinator] told Ms [F] that it would be helpful for wider family to be involved in the discussions prior to the FGC.

[5] On 19 December [the Youth Justice co-ordinator] contacted Ms [F] again by telephone. Ms [F] was unable to meet with her on that day and she was looking to capitalise on work opportunities through that period of time leading up to and during the Christmas-New Year. In view of that, [the Youth Justice co-ordinator] said she explained the process and set up the family group conference for 23 January 2017 at

10.00 am at the Child, Youth and Family office in[location deleted]. Ms [F] could not confirm that that was a suitable date because her work roster was not available. [The Youth Justice co-ordinator] said she would make contact in January after she returned from leave.

[6] A letter dated 19 December 2016 was sent by CYFS to Ms [F] inviting her to contact [the Youth Justice co-ordinator]. That letter advised that a referral to the Youth Justice co-ordinator had been made. Regarding that letter, [the Youth Justice co-ordinator]'s evidence today gave a general outline of how the process works. That process meant that the administration part of CYFS usually sent a letter of the sort sent on 19 December, as soon as the co-ordinating responsibilities were allocated. Accordingly [the Youth Justice co-ordinator]'s evidence was that the letter should have been sent on 1 December.

[7] On 19 December, following the telephone discussion with Ms [F], [the Youth Justice co-ordinator] sent an email to a police officer advising she had spoken with Ms [F] and had pencilled in 23 January at 10 o'clock for the FGC but could not confirm that date until January when she returned to work and Ms [F] had her work roster available.

[8] [The Youth Justice co-ordinator] entered into her work computer system that the date of convening the conference was 23 December. She was aware that by virtue of the statute she had 21 days to convene which would have been 29 December, but on account of her leave, she attributed 23 December to the date of convening the conference. On 23 January 2017, [the Constable] was advised of the FGC and went to CYFS [location deleted] offices. [The Constable] was told on arrival that the FGC could not go ahead because family could not make it and another day would be set.

[9] On 14 February 2017 a family group conference was held and was attended by [J F], his aunt Ms [F], his father, his uncle, [the Constable] and a different co-ordinator. The record of the conference showed that the police would lay a charge of aggravated robbery.

[10] In her evidence the Youth Justice co-ordinator confirmed that;

(a) she was not sure why the letter was sent on 19 December;

(b) she did not follow up with Ms [F] on her return to work in January;

(c) no invitations were sent to anyone;

(d) the only steps she took were on 19 December by way of her discussion with Ms [F] and her email to police.

[11] She accepted as a result of the letter and the uncertainty about the time, date and place of the FGC, that there was potential for confusion.

[12] Notwithstanding all that, she deposed in her affidavit which was accepted as her evidence in addition to her oral testimony, that the FGC was legally convened. She also deposed that the victim had been consulted when another co-ordinator took up the file in January 2017 and set up and held what was characterised as a FGC on 14 February 2017.

[13] Another factual matter is that from what was recorded as FGC outcomes on 23 January 2017 and 14 February 2017, nothing indicated whether victims had been consulted or invited or whether any views were conveyed to those who had gathered.

Issues

[14] The issues are;

(a) First, whether a family group conference had been convened and;

(b) Second if not, what is the consequence? It was accepted that as it was a s 247(b) process, if not convened as required by law, then the decision of *H v Police*[1] applied and what was intended to be an FGC would be described as a nullity and invalid;

[1] *H v Police* [1999] NZFLR 966, (1999) 18 FRNZ 593

(c) Third, if a nullity, should that lead to dismissal or leave to withdraw the charge.

Convene

[15] On the first issue, a number of factors apply. There is no dispute that this was intended to be a family group conference convened pursuant to s 247(b) after consultation with an enforcement officer and notification by an enforcement officer of the desire to charge [J F] with the offending. Accordingly, ss 248 to 250 of the Act apply and the date needed to be fixed.

[16] I have already detailed what was done in accordance with the intention to fix the date. "Convene" is defined in s 2 of the Act. Reference to that definition was made in *Police v JB*[2] at [59] that was referred to by Mr Regan. The then Principal Youth Court Judge Becroft noted that convening means, and I quote:

> "…At the least, this includes fixing the day, time and place at which an FGC is to be held. Under s 253, it also includes taking all reasonable steps to ensure that notice of the time, date and place of the conference is given to every person entitled to attend that FGC."

[17] Section 251 details those entitled to attend the FGC. Section 251(1) refers to a variety of people and position holders entitled to attend and I suggest that the quorum would be the young person alleged to have offended, the parents and/or guardians, the Youth Justice co-ordinator, prosecutor and the victim.

[18] [J F]'s matters had not been to Court at that stage so youth or lay advocates were not involved. The clear evidence established that only [J F]'s aunt and a police officer had been alerted to time, date and place of the conference.

[19] The function of the conference where there is an alleged offence in which proceedings have not been commenced, is noted at s 258(b) of the Act. The FGC is to consider whether the young person "should be prosecuted for that offence or whether the matter can be dealt with in some other way, and to recommend to the relevant enforcement agency accordingly".

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[2] *Police v J B* [2015] NZYC 488, (2015) 30 FRNZ 540, [2016] DCR 8

[20] Consideration of the purposes and principles of the Act which underpin the any youth justice process is required. I do not intend to detail the relevant content within each of the relevant sections but s 4(a) and (f) and s 5(a) and (f) apply as do s 208(a) and (g) which are of particular importance in [J F]'s case. The overall effect is that one is guided by,

(a) the well-being of children, young persons and their families,

(b) ensuring accountability and acceptance of responsibility for offences committed;

(c) opportunity to develop in responsible, beneficial and socially acceptable ways;

(d) opportunity to take part and have their views taken into account;

(e) implement decisions affecting the child or young person during the timeframe appropriate to their sense of time,

(f) interventions to take the least restrictive form possible;

(g) to give consideration to the interests and the views of any victims of the offending; and

(h) any measure should have proper regard to victims' interests and the impact of the offending on the victim or victims.

[21] Those underlying principles are important when considering s 253(4) which refers to the failure to notify any person in accordance with that section "…shall not affect the validity of the proceedings at a family group conference unless it is shown that the failure is likely to have materially affected the outcome of that conference."

[22] On behalf of [J F] it was submitted that first, his family not attending the 23 January FGC would have materially affected the outcome, and second, that [J F] is at

an age and at a stage of development that it is important that he be involved in any decisions regarding his future.

[23] In addition to not only [J F] and his family's non-attendance and, the process leading up to the FGC was not as it should have been, counsel also submitted that the victim not being involved at all in any of the pre-FGC consultation or in the convening process, meant that the function of this particular conference, the decision about prosecution or dealing with the matter in some other way, was not even able to be considered on account of the victim or even the victim's views, were not available for consideration.

[24] Mr Regan submitted that there are times when the police actually represent views of victims. That is accepted and understood but the statutory responsibility for notifying the victim of the family group conference lies with the youth justice co-ordinator, and, as [the Youth Justice co-ordinator]'s evidence made clear, the only person she spoke to about the conference was Ms [F], and the only other person advised was the police officer she emailed after speaking with Ms [F] by telephone.

[25] Had the victim been invited and or even given an opportunity to attend or convey views, may have made no difference to the outcome. But the process adopted in [J F]'s case does call into question, attendance or views of those I have already referred to as the core group of those who should attend a family group conference for alleged offending, and without them, the point of having a family group conference in the first place. By definition, could what occurred have even been considered a family group conference.

[26] To expand on the recognised value of FGCs, I note Principal Youth Court Judge John Walker's reference to FGCs in an address on 10 August 2016. He noted FGCs have been described as New Zealand's "gift to the world", a "lynchpin" and "the jewel in the crown". He noted the FGC draws on traditions of restorative justice and at the heart of restorative justice is a commitment to "repair the damage created by criminal offending and to restore the balance of relationships within society." His Honour took

that quote from the paper of Gabrielle Maxwell and James Liu "The Defining Features of a Restorative Justice Approach to Conflict"[3].

[27] In the same paper His Honour referred to victim involvement. He noted that there had been an improvement in the numbers of victims consulted prior to family group conference and 88% either attended or made submissions where they were not physically present. Eighty percent were satisfied with the process to the extent they felt their views were listened to and considered. Seventy five percent were satisfied that things were put right for the FGC participants, including themselves. That information was sourced from the Cabinet Domestic Policy Committee "Enhancing Victims' Rights Review – Victims of Offending by Children and Young Persons" from the Minister of Justice[4].

[28] I refer to the above to emphasise that victims are important within the context of criminal offending. If that is not plain enough in the context of youth justice, it has certainly been made abundantly clear as a result of the Victims' Rights Act 2002 which purpose is to improve provisions for the treatment and rights of victims of offences and also, the amendment in 2014 (again in March 2017) to the Sentencing Act 2002 to require adjournment of sentencing to ensure restorative justice processes are engaged. Those processes maximise the opportunity to "restore the balance" for those who have been offended against and give them an opportunity to have their say.

[29] Judge Walker's decision *Police v S N*[5] considered a situation where police withdrew at the beginning family group conference but the remaining participants carried on and formulated plans. There was a very clear note of disapproval by His Honour for the approach taken by police in that case. I refer to it not only to note that the importance of core participants in a family group conference but also for comments made at [13] regarding victims. I quote:

> 'Conferences, so well attended, have considerable potential to identify the underlying causes of offending, fashion interventions designed to deal with

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[3] Gabrielle Maxwell, 'The Defining Features of a Restorative Justice Approach to Conflict' in G Maxwell and James H Liu (eds), *Restorative Justice and Practice in New Zealand: Towards a Restorative Society* (Institute of Policy Studies, Wellington, 2007) 5-28 at 8.

[4] Cabinet Domestic Policy Committee, *Enhancing Victims' Rights Review – Victims of Offending by Children and Young Persons* (Minister of Justice, Wellington, 2011) at 12.

[5] *Police v S N* [2015] NZYC 239, [2015] DCR 175

> those underlying causes, hold young people to account not only by the provision of sanctions as part of the plan, but through the very process of confronting the victims and understanding the effects of their actions on others. Where victims are present, which was the case here, the restorative value of such a Conference is extremely high. Often in the context of a Family Group Conference positions held at the beginning, once all of the circumstances are considered, the young person has had an opportunity to participate, and there is increased understanding of the components leading to the offending. Attitudes can, and often do, change. This is a major strength of the process.

Regarding police withdrawing from the FGC in that case, His Honour noted at [14], "The decision not to participate must affect the integrity of the process and its outcome."

[30] In my view the same observation applies when an entitled and very important person in the youth justice context, the victim, is not consulted about or invited to a FGC.

[31] In [J F]'s case we have his caregiver aunt, Ms [F], who had two telephone discussions with the co-ordinator and was, in the second of those discussions, given a time, date and place for a family group conference, and, then an email to a police officer with respect to a pencilled-in date. That is it. No one else was consulted or involved. Again the questions arise, can what followed be considered, first, a proper process as envisaged in the definition of "convene," and second, whether what was organised for 23 January could be considered a family group conference?

[32] For the reasons referred to above, the answer to both questions is no. It was not what could be considered a family group conference, primarily because the victim was not involved at any stage. Indeed, even the conference in February which was purported to have been the result of an adjournment of the 23 January conference, in my view, would struggle to meet the definition of a family group conference given what I have already referred to. Also, other than [the Youth Justice co-ordinator] referring in her affidavit to another co-ordinator involving the victim in discussions leading up to the February meeting, there is no mention of the victim at all. Nothing in either record taken from 23 January or 14 February 2017.

[33] I do not overlook the submission that it is possible that the police may have represented the victim in the January and February FGC as submitted by the police today. Anecdotally that does occur on occasion. There is no evidence to suggest that happen in [J F]'s matter. There is statutory provision for the victim to be involved in person or by representative. The victim was not involved by way of the statutory conduit ([the Youth Justice co-ordinator]) in any process leading up to 23 January 2016.

[34] Having come to that decision I note that *H v Police* is usually referred to in the context of s 247(b) FGC statutory timeframes. However, I also note that that appeal which found that the timeframes in s 247(b) were mandatory, succeeded on two points, both referred to at page 604 of the decision. The first point was with respect to not convening the family group conference within the time stipulated in the Act, and the second point was the failure of the family group conference to consider the case properly.

[35] In [J F]'s case, without the involvement of the victim, the function of the family group conference was unattainable, that is, it would not be possible to properly determine whether the young person should be prosecuted or whether the matter could be dealt with in some other way. Therefore the FGC could not consider the case properly.

[36] Therefore I accept the submission that the victim's involvement could have materially affected the outcome of the conference, had they been notified and had the opportunity to attend or at least put forward their views. Section 253(4) is not available to the prosecution of this charge in [J F]'s case.

[37] It is accepted that by virtue of Smellie J's decision in *H v Police* that the charge was a nullity on the basis that he found that any conference had not been convened as required.

Dismiss or Withdraw

[38] The prosecution sought leave to withdraw the charges under s 146 Criminal Procedure Act 2011 which applies to Youth Court proceedings.

[39] Counsel for [J F] submitted that there is something of a circular argument to a withdrawal application, on the basis that it may imply that the charge had some validity whereas a nullity has no validity.

[40] It can be a matter of semantics. According to the *Oxford Dictionary,* a nullity is an act or a thing that is legally void, in the state of being legally void or invalid, being of no importance or worth.

[41] First, the legal process would not stand to have a matter entered into its system, be found to be a nullity, but nonetheless remain in its system. It needs to be dealt with in some fashion and a usual manner of dealing with things that do not belong in the court system is to either dismiss or allow them to be withdrawn.

[42] In the case of a dismissal s 147(6) Criminal Procedure Act comes into effect deeming a dismissed charge to be an acquittal. Again, the *Oxford Dictionary* definition of dismissal refers to an order or a sending away, and, treating something as unworthy of serious consideration. That definition does not apply in this case because the reason [J F] was before the court in the first place was for serious offending.

[43] Because the process itself has been found wanting, does not mean that it is not a serious matter. Aggravated robbery has a maximum penalty of 14 years' imprisonment, is a serious charge and therefore of significant potential impact on a person's life. There is also a significant public interest in seeing how allegations of serious offending are dealt with by the justice system.

[44] It is clear that there is a victim of the offending. [J F] was allegedly involved. The victim has had no opportunity for input at this stage

[45] For those reasons it is appropriate to allow the charge to be withdrawn.

[46] If there are issues regarding abuse of process or delay, they can be considered in the future but I reiterate that for serious offending there is a significant public interest.

[47] While it could be argued that the process does not continue today because of the technicalities concerning a failure to comply with the process itself, the process has been found wanting on account of not complying with a very important principles underlying the process, namely the involvement of victims.

[48] The Solicitor-General's Prosecution Guidelines, though not directly on point, give the prosecution the ability to, an early stage seek to have a matter withdrawn to ensure that the proper and timely processes are properly adhered to.

Decision

[49] Accordingly, for the reasons given, the charge is withdrawn by leave.

G F Hikaka
Youth Court Judge