IN THE YOUTH COURT
AT MANUKAU

CRI-2016-292-000362
[2017] NZYC 48

NEW ZEALAND POLICE
Prosecutor

v

[I B]
Young Person

Hearing	12 January 2017
Appearances:	E McCaughan for the Prosecutor S Waapu for the Young Person
Judgment:	12 January 2017

ORAL JUDGMENT OF JUDGE JH LOVELL-SMITH GIVING REASONS

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[1] The Young Person was charged with aggravated robbery and unlawfully getting into a motor vehicle. There is no issue that a Family Group Conference ("FGC") was not convened within the statutory 21 day time limit required by s 249(21) of the Children, Young Person and the Family Act ("the Act"). The issue was whether the charges should, and can be, withdrawn pursuant to s 146 of the Criminal Procedure Act 2011 ("CPA") on application of the police, or whether the charges should be dismissed pursuant to s 147 of the CPA. I declined the application of the Youth Advocate to have the charges dismissed and granted leave for the charges to be withdrawn on 12 January 2017 with reasons to follow.

Background

[2] The Young Person was born on [date deleted] 1999.

[3] The Young Person was charged with:

(a) Aggravated robbery; and

(b) Unlawfully gets into a motor vehicle.

[4] Section 245 of the Act was not complied with as the FGC was not convened within the mandatory 21 day timeframe. On the basis of the failure to convene the FGC within the required statutory timeframe, counsel for the Young Person applied for the charges to be dismissed.

[5] The Police accept that the intention to charge FGC was not convened within the 21 day time limit required by s 249(2) OF THE Act as the Court is bound by Smellie J's decision in *H v Police*. However, the police oppose the application to have the charges dismissed; instead submitting that leave should be granted for the charges to be withdrawn pursuant to s 146 of the CPA.

Police submissions seeking withdrawal of charge

[6] The alleged summary of facts states:

CIRCUMSTANCES

Unlawfully gets into motor vehicle

At about 12 am on the 12th of July 2016, a [motor vehicle] bearing the registration [registration deleted] was stolen by an unknown person from [location deleted]. This vehicle is the property of the victim in this matter, [victim 1].

At about 6.40 am on the 13th of July 2016, [I B] was a passenger in [registration deleted – the stolen vehicle], travelling in tandem with another stolen vehicle on [location deleted].

Aggravated Robbery

The two vehicles stopped outside [the victim convenience store] situated at [address deleted] and [I B] entered the store together with three other associates. The victim in this matter [victim 2] was working in the store by himself.

One of the associates had a wheel brace with them and on entry, he threw the wheel brace at the Victim narrowly missing him.

The wheel brace smashed in to a microwave breaking its door.

Another associated went behind the counter and took out trays of cigarettes.

[I B] and the other three associates also left the store with several trays of cigarettes.

[7] The police submit that the case against the Young Person is relatively strong as to whether the Young Person was part of the group of robbers for the following reasons:

(a) CCTV footage shows that only one of the robbers was [details deleted] and that this person had distinctive marks on their [body part deleted].

(b) A police officer familiar with [I B's] appearance will give evidence that she has similar distinctive marks on her [body part deleted].

(c) Police located one of the stolen vehicles used in the robbery approximately 24 hours after the robbery.

(d) Empty cigarette trays which had been stolen during the robbery were found in the locked boot of the vehicle.

(e) [I B's] fingerprints were on one of the stolen cigarette trays. The police officer's identification regarding the distinctive marks on [body part deleted] was made well before police were aware that [I B's] fingerprints had been found on the cigarette tray.

[8] The police submitted that balancing interests against the interest of the victim and the wider public interest in having offences dealt with by the Court, leave to withdraw the two charges should be granted.

[9] The police note that the defence application for the charges to be dismissed was brought once police advised counsel for the Young Person that police intended to seek leave for the charges to be withdrawn.

[10] It is further submitted that there was no failure on the part of the police which prevented the FGC being convened within the required period.

[11] The Young Person has a significant Youth Court history and this history is relevant in determining whether the charges should be withdrawn or dismissed.

[12] With respect to the relevant case law, it is submitted that there is nothing that prohibits the Court from granting leave for the charges to be withdrawn Justice Smellie in *H v Police* did not comment on the issue, simply ruling the appeal should be allowed. With regard to *Police v V* and Rodney Hansen J's comments that re-laying charges was "to risk an abuse of process". The police submit that Justice Hansen was reiterating what s 322 of the Act states and that a charge can be dismissed if a 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. The police acknowledge that if charges were re-laid it would be open to the Young Person to argue that s 322 applies. However, such an argument would be highly fact dependant.

[13] Dismissing the charge at this stage on the basis that police may intend to seek a further intention to charge FGC, and may lay charges after that FGC, and that such

an approach may be an abuse of process due to delay, would amount to pre-determination of that argument.

[14] Dismissing the charges would be inconsistent with the wording of s 245(1) and there is nothing in the words of the section that suggest that the process cannot be "restarted" if it misfires for some reason.

[15] It is submitted that dismissal would be inconsistent with the approach taken by Judge Walker in the following cases:

Police v DS [2016] NZYC 444

[16] This case involved an unlawful arrest making the charging documents nullities. Judge Walker held that although the charging documents were nullities, that did not preclude the Police proceeding under s 245 of the Act and in effect ruling there was no bar to the Police attempting to "re-start" proceedings by using the alternative "intention to charge FGC" process in s 245, despite the Police not previously complying with the requirements of s 245.

Police v S (2004) 20 CRNZ 1046

[17] In this case the FGC was not convened within the required timeframe because the Police failed to provide the Youth Justice Co-ordinator with the summary of facts.

[18] In determining whether the charge should be dismissed or whether leave should be granted for Police to withdrawn the charge Judge Walker balanced a number of considerations including:

(a) The interests of the young person in having the proceeding determined in a timely fashion;

(b) The interest of the victim in having the offence dealt with by the Court; and

(c) Whether there was a need for a disciplinary approach.

[19] Taking into consideration the particular facts, Judge Walker considered that leave ought to be granted to withdraw the charges.

Submissions of the Young Person in Support of Application to Dismiss Charges

[20] Counsel for the Young Person noted that in *Police v DS* [2016] NZYC 444 the concern was the lawfulness of the manner in which the young person had been brought before the Court pursuant to s 214 of the CYPFA and an arrest without a warrant. As the arrest was unlawful, the charging documents were nullities. However, Judge Walker noted that there was nothing that would preclude the Police from proceeding under s 245 of the Act. On this basis counsel for the Young Person submitted that *Police v DS* should be distinguished.

[21] With respect to *Police v S* (2004) 20 CRNZ 1046 the FGC had been directed by a Youth Court Judge pursuant to s 246(1)(b) and the time limit in s 249 had not been complied with. It was therefore not a FGC pursuant to s 245 of the Act.

[22] In *M v Police* (2008) 26 FRNZ 982, Judge Malosi dismissed a charge of wounding with intent to cause grievous bodily harm for failure to comply with s 245(1) of the CYPFA.

[23] I note however, Judge Malosi did not determine the option to grant leave to withdraw the charges was not available. Rather, that in the circumstances the police had fallen short of the mark in a "monumental way" and the young person, who was entitled to due process, did not receive it. Her Honour stated that this meant the complainant was left with the harsh consequence of being left without recourse in the Youth Court and this was completely unavoidable, ending the decision by noting that it was hoped the police would not make the mistake again.

[24] In *Police v T M-P* YC Whangarei, CRI-2011-288-000072, 12 October 2011, Judge Lindsay dismissed a charge of wounds with intent to cause grievous bodily harm, after the statutory timeframe of s 249(2) was exceeded. Again in this decision, I note that Judge Lindsay did not turn her mind to whether or not the option to grant

leave to withdraw the charges was available, or whether it was in fact sought by the police. In my view it can stand for no more than a decision on the facts of that case.

[25] In *Police v B P* [2014] NZYC 938 Judge Fitzgerald dismissed a number of charges following non-compliance with FGC time frames. However, in this decision, Judge Fitzgerald did not address whether there was jurisdiction within the legislation to consider an application for leave to withdraw charges, following failure to comply with timeframes and the decision does not assist the submission that the charges must be dismissed.

Discussion

[26] There is no dispute as to the fact there was non-compliance with the statutory timeframes for the FGC and as a result the Court did not have the jurisdiction to hear the charges.

[27] The issue that remained was whether or not the Court should grant leave for the charges to be withdrawn, or whether the charges should be dismissed.

[28] In my view it is submitted that none of the cases presented can be seen as representing a persuasive principle as to why the only option available following the contravention of a statutory timeframe for a FGC is the dismissal of charges, as seems to have been advocated for by counsel for the Young Person.

[29] Rather, the cases are indicative of whether leave should be granted for withdrawal or the charges should be dismissed is a very fact heavy question which requires close examination of all the circumstances of the case, including the reasons for the non-compliance of the statutory timeframes and whether these reasons justify a punitive approach to the actions of the relevant parties involved, as well as whether the public interest lies in dismissing the charges, or granting leave to withdraw.

[30] For completeness I refer to two other cases. *Police v K N* [2015] involved 6 charges of indecent assault on a child under 12. The timeframe for holding the FGC was breached. There was also a secondary issue in that the time between the offending and the date of the hearing was unnecessarily or unduly protracted. Although Judge

Hikaka did briefly discuss the option of withdrawal, it was noted that the delay in the case invited dismissal. His Honour stated there was a public interest in rehabilitation and this required the statutorily required steps to be taken. The delay in the circumstances prohibited such an action and as a result, the charges were dismissed.

[31] In *Police v JIS* YC Nelson CRI-2005-242-71, 21 July 2005 Judge Whitehead declined leave to withdraw charges on the basis that FGC timeframes were exceeded due to an administrative error, and to allow the charges to be withdrawn.

[32] The Act specifically imports both s 146 of the CPA, withdrawal of charge, and s 147 of the CPA, dismissal of charge, into Youth Court proceedings. Section 245 does not specify the procedure that is to occur if timeframes for FGCs are exceeded, simply stating no charging document may be filed and in effect removing the Youth Court's jurisdiction to hear the charges.

[33] There is no doubt that the Court does not have the jurisdiction to hear the charges in question, but on the case law and the legislation, leaves it open to either dismiss or grant leave to withdraw the charges.

[34] In making a determination as to whether to grant leave to withdraw or to dismiss the charges, the general principles in s 5 of the Act, as well as the youth justice principles in s 208 of the Act are applicable.

[35] The following factors are specifically relevant to the current situation.

1. s 5(f) of the Act the principle that decisions affecting a child or young person should, wherever practicable, be made and implemented within a time-frame appropriate to the child's or young person's sense of time.

    (i) Although any delay is not acceptable, this is not a case where there is a significantly protracted area of time; there have not been considerable delays. The Young Person is also at the upper limits of the Youth Court jurisdiction. Although one is

sensitive to her sense of time, the sense of time of a 17 year old, not a young child.

(ii) Given the limited delays present, and the age of the young person, it is submitted that these two factors fall heavily in favour of granting leave to withdraw the charges. Such an option leaves open the potential for the charges to be re-laid following the correct procedure. If this is done, the Young Person would not be prohibited from raising questions of delay. However, there are insufficient delays to justify dismissing the charges at this date.

s 208(a) of the Act the principle that, unless the public interest requires otherwise, criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter, ands 208(fa) of the Act the principle that any measures for dealing with offending by a child or young person should so far as it is practicable to do so address the causes underlying the child's or young person's offending;

(i) The Young Person is alleged to have been involved in very serious offending. The charge of aggravated robbery carries with it a maximum penalty of 14 years' imprisonment. There is significant public interest in holding those accused of serious crimes accountable for such actions.

(ii) The Young Person does have a significant Youth Court history. The overarching s 5 principles set out in the Act aim to promote the welfare of children and young people. There is public interest in leaving the door open for an appropriate rehabilitative response in the youth justice area to the current offending, before the door is effectively shut, with [I B] losing any final chances in the youth jurisdiction, moving from a jurisdiction whether the primary focus and concern is on the offender, to the adult jurisdiction where the primary concern

in on the offence: *Pouwhare v R* [2010] NZCA 268, (2010) 24 CRNZ 868 at [77].

2. s 208(g) of the Act sets out the following principles that –

(i) in the determination of measures for dealing with offending by children or young persons, consideration should be given to the interests and views of any victims of the offending; and

(ii) any measures should have proper regard for the interests of any victims of the offending and the impact of the offending on them.

(iii) The interests of the victims can only be promoted through granting leave to withdraw the charges. Should the charges be dismissed. A dismissal for all purposes is treated as an acquittal. Granting leave to withdraw the charges acknowledges and promotes the victims' rights to some extent.

[36] Taking all the circumstances of this case into account, I am satisfied there is no need to punish or make an example out of the police or their processes and dismissing the charges is not justifiable as a punitive response to the actions of any of the relevant parties involved.

Conclusion

[37] In my view that leave should be granted to withdraw the charges for the following reasons:

(a) The cases indicate that leave to withdraw can be granted and the risk of an abuse of process is an issue which should only be addressed if charges are re-laid;

(b) The offending is serious and the interests of the victim need to be considered;

(c) The case against the Young Person is strong;

(d) The Young Person has a significant Youth Court history;

(e) The Young Person is not particularly young, she was approximately 16 ½ at the time of the offending, and turned 17 on [date deleted] November 2016;

(f) The failure to convene the FGC within the required timeframe had nothing to do with the police.

(g) There is no suggestion that there is a systemic issue with CYFS failing to comply with deadlines for convening FGCs which would warrant the charges being dismissed in order to "send a message"; and

(h) Any argument regarding undue delay or abuse of process should not be explored before any new charges are laid.

[38] In balancing the Young Person's interests against the interests of the victims and the wider public interest in having offences dealt with by the Court, having consideration to the underlying principles of the Act and the circumstances of the particular case, leave is granted to withdraw the charges.

JH Lovell-Smith
Youth Court Judge