EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].



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**IN THE YOUTH COURT**
**AT MANUKAU**

**CRI-2017-204-000063**
**[2017] NZYC 810**

**NEW ZEALAND POLICE**
Prosecutor

v

**[ZW]**
Young Person

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|---|---|
| Hearing | 27 October 2017 |
| Appearances: | Sergeant Spendelow for the Prosecutor<br>C Bennett for the Young Person |
| Judgment: | 14 November 2017 |

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**RESERVED JUDGMENT OF JUDGE S MOALA**
**ON DELAY APPLICATION**

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[1] [ZW] applies for dismissal of four charges due to delay. The offending arose when a group of youth offenders rushed at and assaulted staff in an attempt to escape from a youth residential facility. [ZW] faces two charges of assault with intent to injure, intentional damage and attempting to escape custody.

[2] On 12 June 2017, His Honour Principal Youth Court Judge John Walker heard a delay application in respect of these charges. In his decision of 10 July 2017[1], he dismissed the application because although the delay was unnecessarily and unduly protracted, other factors weighed in favour of proceeding with the charges.

[3] [ZW] renews his application for dismissal based on delay. It is accepted that the delay has been unnecessarily and unduly protracted. [ZW] says there are new factors which should influence the exercise of the Court's discretion namely:

a) these charges require a 2-day s9 hearing in January 2018 whereas all other charges are awaiting a s14 hearing on 19 December 2017; and

b) the court is now in receipt of the s38 report which was not before Judge Walker when he heard the previous application.

*Legal principles*

[4] Section 322 of the Oranga Tamariki Act 1989 provides that a Youth Court Judge may dismiss a charging document 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.

[5] The first step is to determine whether the hearing has been unnecessarily or unduly protracted. If so, the judge has the discretion to dismiss the proceedings. In determining whether to do so, the Court must balance individual rights and prejudice to the young person, against the public interest.

*Judge Walker's decision*

[1] *Police v [ZW]*[2017] NZYC 472 (CRI:2017-204-000063, 10 July 2017)

[6] After analysing the period of delay and the reasons for the delay, Judge Walker concluded that the time lapsed was unnecessarily and unduly protracted. I agree with this finding and the reasons for it.

[7] Judge Walker then went on to consider the exercise of his discretion and dismissed the application. His Honour said in [22] to [27] of his decision:

> **[**22] It needs to be remembered that it is not these charges (Korowai Manaaki) which of themselves keep [ZW] in the Court process. He has other sets of charges which are serious and complex and have resulted in his being in custody. Even without the Korowai Manaaki charges his remand status would remain and the lengthy process required to dispose of those other cases would continue.
>
> [23] These are serious charges and arise in a custodial setting. The difficulties which staff at a Youth Justice Residence face daily in managing difficult and challenging behaviour make it particularly important, for ongoing management, that where offences have been committed against youth just ice staff, those proved to be responsible are held accountable.
>
> [24] There is a wider public interest in having charges of a serious nature determined, but there is particular public interest where the victim of alleged offending is a person entrusted with a statutory function.
>
> [25] The public interest in the cases being heard weighs heavily in this case.
>
> [26] The interest of [ZW] in having the case determined in a youth appropriate timeframe is tempered in this case by the co-existence of other sets of serious charges which of themselves make for delay. In my assessment [ZW]'s interests do not outweigh the public interest in this case.
>
> [27] The application is dismissed.

*Change in circumstance*

[8] It is accepted that since Judge Walker's decision, [ZW]'s other matters have progressed. He has a s14 hearing set down for 19 December 2017. These 4 remaining charges require a 2-day s9 fixture. There are no available dates before Christmas. [ZW] says that he is being charged as a party to the actual violence so he will be challenging the sufficiency of the evidence at the s9 hearing. I am told that there is CCTV footage of the incident. [ZW] says that further delay to include these charges is unacceptable given Judge Walker's finding on 10 July that the delay was already unnecessarily and unduly protracted.

[9] In addition, [ZW] says the two s333 reports are now available. [doctor 1]'s report dated 28 August 2017 opines that [ZW] is likely to be found unfit. [Doctor 2]'s report dated 30 August 2017 suggests that [ZW] will struggle with the Court process given his FASD, intellectual disability, and language difficulties. [ZW] says that in the end, if he is found unfit at the s14 hearing in respect of his other charges, including these four charges will not make a difference to the outcome.

[10] [ZW] says, considering those two factors, the circumstances to be considered in the exercise of the discretion to dismiss have materially changed, and that the Court should now exercise its discretion in favour of dismissal.

*Exercise of discretion*

[11] In terms of time frames, this offending occurred on 21 October 2016. The s9 hearing is likely to take place in January 2018. Given the contents of the two psychological reports, a s14 hearing for this offending can take place at the same time as the s9 hearing or shortly after that hearing depending on whether the psychologists are required to give evidence. I note that both reports include these 4 charges.

[12] In relation to his other offending, if [ZW] is found unfit to stand trial at his s14 hearing on 19 December, a s38 report will be required for disposition. Given the Christmas holiday period, disposition is unlikely to occur till late January at the earliest. It is therefore possible to marry up all matters before the disposition hearing without a long period of delay.

[13] I do not accept [ZW]'s argument that the psychological reports have changed the landscape so much that it now warrants a stay on these charges. As discussed, there is a real possibility that the 4 charges will marry up with his other charges at disposition. I am not prepared to undermine the s14 hearing on the other charges by accepting the reports for this hearing without hearing from the psychologists. The Police have already indicated that they may review their position on these 4 charges after the s14 hearing on 19 December.

[14] In terms of the prejudice to [ZW], I accept that there is general prejudice inherent in the delay till hearing. I accept that there are challenges in providing a fair

trial to child and youth offenders which mean that prompt disposition of charges is critical. I note the particular challenges for [ZW] outlined in the two reports.

[15] However, I consider the offending to be very serious in that it occurred whilst [ZW] was in custody. The staff are vulnerable especially when there is a group of young offenders acting together to outnumber and overpower staff. I am mindful of the rights of the victims to have those who are responsible held accountable for their actions. I am concerned about the totality of [ZW]'s offending and the assessments by the psychologists that he has a high risk of reoffending. If these charges stood alone it would be an easy decision to dismiss them based on delay.

[16] While I am concerned about the period of delay, in the end, I am satisfied that at this stage, the grounds raised by [ZW] are not sufficient to outweigh the public interest in proceeding with these charges.

*Result*

[17] The application for stay is dismissed.

[18] I direct that a s9 hearing for these 4 charges be set down for hearing as soon as possible.

S Moala
Youth Court Judge