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IN THE YOUTH COURT
AT

I TE KŌTI TAIOHI
KI MANUKAU

CRI-2020-292-000158
[2020] NZYC 629

NEW ZEALAND POLICE
Prosecutor

v

[GW]
Young Person

Hearing: 13 November 2020

Appearances: B Colville for the Prosecutor
M Winterstein for the Defendant

Judgment: 22 December 2020

RESERVED DECISION OF JUDGE S D OTENE

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[1] [GW], now aged 18 years, denies a charge of burglary of a community centre in [location deleted] [in early] 2019.[1] He challenges the admissibility of evidence of his fingerprints and a written statement taken from him by police. The broad context is that on 24 September 2019, in the course of a burglary investigation, [the first Detective Constable] interviewed [GW] and took impressions of his fingerprints. Those fingerprints were subsequently linked to the [2019] burglary of the community centre and to a November 2019 burglary of a residential dwelling. [GW] was interviewed by [the second Constable] on 8 March 2020 about his involvement in both burglaries and gave a written statement in which he made self-incriminating admissions. He has not denied the burglary of the residential dwelling.

[2] As distilled from the pleadings and submissions the fingerprints are contended to be inadmissible because:

(a) There was no lawful basis to take the fingerprints.

(b) The police did not discharge their duty to explain to [GW]'s mother, [NW], her role as a nominated person.

(c) The police did not discharge their duty to explain [GW]'s rights to him.

(d) [NW] did not discharge her duty to [GW] as a nominated person.

[3] The statement is contended to be inadmissible because:

(a) Police failed to discharge their duty to explain [GW]'s rights to him.

(b) [GW]'s father, [SW], did not discharge his duty to [GW] as a nominated person.

[1] Crimes Act 1961, s 231(1)(a).

[4] The prosecution makes the overarching submission that the challenges are not tenable because the same evidence cannot, having informed the police case in respect of another charge of burglary which is not denied by [GW], be admissible for that charge but inadmissible for another. I reject that submission in the circumstances of this case. A charge may be not denied for any number of reasons and so it does not follow that an absence of denial is a concession that each evidential strand proffered by the police is admissible. Nor is the court, in recording that a charge is not denied, engaging in a positive determination as to the admissibility of all the evidence informing that charge. For that reason, a potential determination that the evidence challenged here is inadmissible would not, as the prosecution submits, be inconsistent with the principles and purposes of the Oranga Tamariki Act 1989 or the Evidence Act 2006. Rather, the contrary could be so if a prosecution were permitted to proceed with evidence that would be inadmissible but for its earlier unchallenged proffer.

Background

Fingerprints: 24 September 2019

[5] On 24 September 2019 at 10:50 am [the first Detective Constable] attended [GW]'s home and spoke with him in connection to a burglary investigation. [GW] said that he was happy to speak with the Detective Constable and, in response to [the first Detective Constable]'s advice that because of his age he would need a nominated person, indicated that he wanted his mother to act in that capacity. [The first Detective Constable] did not explain to [GW] that he did not have to speak with him. The Detective Constable did explain that a nominated person was a support person to guide [GW] so that he understood the broader implications of a meeting with police, and to ensure that he was treated fairly and did not get taken advantage of because of his age. He did not ask [GW] to explain his understanding of the role of a nominated person.

[6] [NW] was at work when [the first Detective Constable] visited so he attempted without success to contact her on her mobile phone. Because [NW]'s work was adjacent to the [Police Station] the Detective Constable proposed, and [GW] agreed, that [GW] accompany him to the police station with a view to approaching his mother

at work. When by 12:40 pm contact with [NW] could not be established [GW] was returned home without being interviewed.

[7] [GW] and [NW] then attended at the station approximately one hour later. [The first Detective Constable] told [NW] that he wanted to interview [GW] about a burglary and discussed her undertaking a nominated person role. [NW] and [GW] agreed to a video recorded interview being conducted.

[8] In the absence of [GW], who was then in an interview room, [the first Detective Constable] gave [NW] what he describes as a "role of nominated persons brochure," in doing so saying to [NW]: "This is your role, it is to ensure he is treated fairly, that he understands what is happening, and that there is no sort of confusion." The Detective Constable did not explain [GW]'s rights to [NW]. Nor does he recall reading the form to her or talking specifically about [GW]'s right to a lawyer, his expectation being that she would read the form and familiarise herself with the role.

[9] He then provided [NW] and [GW] a period of approximately five minutes alone together in the interview room. The video-recorded interview commenced at 1:50 pm. [GW] was given his youth rights caution, after which the interview proceeded. The interview concluded at 2:11 pm.

[10] At 2:27 pm [the first Detective Constable] advised [GW] and [NW] that he wished to take voluntary fingerprints from [GW] and it was not compulsory [GW] provide them. They both agreed fingerprints could be taken.

[11] [The first Detective Constable] was guided by the POL 545 form titled "Voluntary fingerprints and photographs consent form for children and young people" as he undertook the following process:

(a) He read the form to [GW] and [NW] as printed. There is some ambiguity in [the first Detective Constable]'s evidence as he says that he gave information additional to that printed on the form but otherwise gave information as "standard…working through it as a checklist."

(b) [GW] read points one to five under the heading "Child or Young Person" and [NW] read points one to six under the heading "Parent, Guardian or Caregiver." Having read those points each signed the form.

(c) [The first Detective Constable] took [GW]'s fingerprints.

(d) [The first Detective Constable] ticked the six points on the checklist and then signed the form.

[12] [The first Detective Constable] did not ask either [GW] or [NW] to explain their understanding of the points he had read to each of them. Neither asked him for clarification of any matter. He took no other action in relation to potential consultation by [GW] with a lawyer aside from inviting [GW] and [NW] to read the relevant points on the form.

Written statement: 8 March 2020

[13] On 8 March 2020 at 11:50 am [the second Constable] attended [GW]'s home to speak with him about the community centre and residential dwelling burglaries in light of fingerprints at both premises being identified as his.

[14] [The second Constable] was received at the front door by [GW]'s father, [SW]. [GW] then joined them at the door. [The second Constable] explained the reason for his visit and that [GW] did not have to answer questions but was entitled to have someone with him if he did so. [The second Constable] asked [GW] who he wanted as nominated person and [GW] elected his father.

[15] At the request of [SW] and [GW], [the second Constable] accompanied them to the garage at their property. There, at approximately 12 noon he gave [SW] the POL 388A form "Advice to and Duties of a Nominated Person." He read out word for word to [SW] points L to K of the from which describe the role of a Nominated Person and then asked [SW] if he understood to which [SW] replied "yes." [The second Constable] did not read out points A to G (which summarise the rights of the

child our young person) or points H to K (which suggest to the nominated person the information he or she should ensure that they know). Rather, he says that he briefly went through those matters, asked [SW] if he was happy to sign the form which [SW] then did, albeit having first incorrectly written his name where the reference should have been to [GW] and then corrected the error. Having undertaken that process and, in the absence of any indication that [SW] did not understand his duties, [the second Constable] was of the belief that [SW] did so understand.

[16] [GW] was present during this discussion but walking around in the garage not apparently attentive to what was being said. [The second Constable] then asked [SW] and [GW] if they wanted to talk together privately before he asked any questions of [GW] at which point [SW] and [GW] spoke with each other in [the second Constable]'s presence about the fingerprints then declined to speak privately.

[17] At 12:10 pm [the second Constable] gave [GW] the youth rights caution, asking [GW] as each right was given to repeat it in his own words, and then recording those questions and [GW]'s answers in the written statement. [GW] endorsed the statement with his signature immediately after the rights questions and answers and [SW] was asked if he understood the rights to which he replied in the affirmative. [GW]'s answers satisfied [the second Constable] that [GW] understood his rights. [SW] did not make comment nor ask questions whilst [GW] was given the caution. Having completed that process, [the second Constable] at 12:16 pm commenced his interview of [GW] about the burglaries, recording the questions and [GW]'s answers in the written statement.

The fingerprints

[18] The first objection to admissibility, that there was no lawful basis to obtain the fingerprints, fails. The Policing Act 2008 empowers police to take fingerprints from persons lawfully in police custody.[2] That legislation is silent as to the taking of fingerprints in other circumstances. However, those provisions are not a code therefore it does not follow, as is suggested for [GW], that the absence of empowering legislation to take fingerprints from persons not in custody, but who volunteer

[2] Policing Act 2008, ss 32 and 33.

provision of that information, is without lawful basis. Moreover, the consequence of the finding the submission invites would be contrary to the very high public interest in the investigation of criminal acts and consequently, in deterring offending. It cannot be entertained for those powerful public policy reasons. Nonetheless, due to the very high public interest in the observation of individual rights and freedoms that our society recognises to be important, nor can investigation activities be conducted unfettered. The question is not whether there is a lawful basis for police to receive fingerprints voluntarily given. The question is whether [GW] was afforded his due rights in providing the fingerprints, and whether it can in fact be said he did so voluntarily.

[19] The rights of young persons who voluntarily provide fingerprints are not expressly prescribed by the Oranga Tamariki Act 1989 ("the Act") in the way, for instance, the Act does for the questioning young persons about offences. Nor is there any other enactment specific to the voluntary provision of fingerprints such as there is for bodily samples.[3] Nevertheless the Act recognises as a guiding principle that young persons by reason of vulnerability are entitled to special protection during any investigation relating to the commission or possible commission of an offence.[4] The police recognise that principle through the prescription of the processes and standards they consider a prerequisite to the taking of fingerprints voluntarily. These processes and standards are encompassed within the consent form [the first Detective Constable] utilised when taking [GW]'s fingerprints. Notably the officer must:

(a) Advise the young person and the parent, guardian or caregiver that:

(i) The young person does not have to give the fingerprints.

(ii) The young person and the parent, guardian or caregiver can speak to a lawyer about whether the young person should give the fingerprints. Additionally, the officer must tell the young person how he or she can contact a lawyer.

[3] Criminal Investigations (Bodily Samples) Act 1995. It is noted however that fingerprints are personal information such that the Privacy Act 2020 is relevant to their collection, storage and use.
[4] Oranga Tamariki Act 1989, s 208(2)(h).

(iii) The fingerprints may be used in criminal investigations, for identification purposes and in court in evidence at any time in the future.

(iv) The young person or parent, guardian or caregiver may change their mind at any time and if either change their mind they can ask for the fingerprints to be destroyed by writing to the police.

(b) Ensure the young person and parent, guardian or caregiver are given the opportunity to contact a lawyer prior to the consent process.

(c) Provide to the young person and parent, guardian or caregiver and explain to them the content of an information sheet.

[20] It seems there is no authoritative judicial statement as to the parameters of rights and obligations upon the taking of fingerprints voluntarily provided by young persons. This is not the case to set about defining those parameters because the matter has not been argued in that way. However, I observe that the standards and processes the police have adopted to regulate the taking of fingerprints voluntarily provided are in the spirit of the principles of the Act and prescriptive rights and obligations therein attaching to the questioning, charging and arrest of young persons. I therefore proceed on the basis that:

(a) If the taking of [GW]'s fingerprints fell short of the standards and process the police have adopted, it should be treated as improperly obtained, contrary to the s 208(2)(h) principle entitling young persons to special protection during an investigation relating to the commission or possible commission of an offence.

(b) In assessing whether those standards and processes have been adequately met I may be guided by the authorities that have considered the rights and obligations specifically prescribed in the Act in relation to questioning, charging and arrest.

[21] I hold the following matters contextually material:

(a) [GW] was aged 17 years when the fingerprints were taken, his birthday occurring [fewer than 20] days prior. He was seen by a forensic clinician at his first court appearance on the charge on 15 June 2020. The clinician completed an indicative screen. Relevantly it is recorded that [GW] "Recited charges. No problems with understanding." The court has not throughout the carriage of this or any other charges deemed it necessary to commission any other assessments as to his psychological or communication functioning. Nor has a deficit in that regard at either time when [GW] was interviewed and provided his fingerprints in September 2019 or interviewed in March 2020 been raised in submissions. I proceed therefore on the basis that at the relevant times [GW] did not labour under vulnerability other than that which is inherent by reason of his age. That said, I remain mindful that those vulnerabilities are not insignificant given that the capacity for consequential thinking, impulse control, emotional regulation and the like are affected simply because young persons are developmentally immature. Hence the special protection they are afforded.

(b) [The first Detective Constable]'s explanation to [NW] about her role as a nominated person was at best superficial. It is questionable whether she understood the jeopardy faced by [GW] to the extent she could properly discharge her duties as a nominated person.[5] However: there is no challenge to [GW]'s rights as required by the Act in respect of his questioning by [the first Detective Constable] being appropriately given to him at the outset of the recorded video statement; there is no issue raised as to adequacy of [NW]'s support to [GW] through the course of the questioning and the statement; [NW] did not give evidence by which it might have been better possible to assess her understanding of her role and whether reasonable steps were taken by her to ensure [GW] understood the explanation of his rights. On

[5] *Campbell v R* [2014] NZCA 376 at [25]

balance I am not moved to find that, at least for the purpose of the questioning of [GW] and the statement he gave, [NW] failed to discharge her obligations as a nominated person.

[22] Dealing specifically with the process instituted to take [GW]'s fingerprints I consider the following material:

(a) [The first Detective Constable] simply read to [GW] and [NW] the points the police process required him to tell each. There was no expanded explanation, nor any steps taken by [the first Detective Constable] to satisfy himself that [GW] and [NW] understood what they were told other than that they each signed the consent form and did not ask any questions.

(b) Assuming that [the first Detective Constable] provided the additional information sheet to [GW] and [NW], and that is not clear from his evidence at hearing, there is no evidence that its content was explained to them.

[23] Although, as here, the taking of fingerprints often occurs immediately or soon after questioning by an officer about an offence and so in practical and temporal terms it can be perceived as a unitary exercise, there are important distinctions to be borne in mind. The primary distinction is that questioning and statements will be limited to a discrete event or events. Fingerprints may be relevant to the offences subject of that questioning but as the consent form notes they may be used for other criminal investigations at any time in the future. Consequently, they may have relevance and prejudice beyond the issue at hand.

[24] In all these circumstances I find that [GW]'s fingerprints were improperly obtained because, when measured against the statutory spirit and guided by the judicial authorities, the bare recital of the points on the form and giving of an additional information sheet to [GW] was insufficient to ensure that [GW] understood what he was being told and how to exercise the opportunity being extended to him to contact

a lawyer.[6] Additionally, it would appear that the direction to officers to give the young person and their parent, guardian or caregiver the opportunity to contact a lawyer prior to the consent process was not observed. To the extent that there was that opportunity it was only during the consent process as [the first Detective Constable] read the points on the form to [GW] and [NW]. The process applied therefore fell short of the standards and process established by the police.

[25] The prosecution submits to the effect that any deficits in the process are cured by [GW]'s rights having been explained to him within the previous hour and therefore the process is compliant with the spirit of s 219. I reject that submission for the following reasons:

(a) The rights were given within the narrower context of questioning about a discrete event as described at [23] and were lacking connection to the more specific detail about the use to which fingerprints may be put and the ability of a young person, parent, guardian or caregiver to require their subsequent destruction.

(b) Inherent in the police prescribing a specific process and higher standards is a recognition that additional considerations apply to young persons' rights when voluntarily providing fingerprints.

(c) The prosecution submit that [NW] was not acting in the role of a nominated person at the time when the consent form was being discussed, rather, she was acting as a parent, guardian and caregiver. I accept that the point is arguable that the role of a nominated person has, on the face of it, connection limited to the giving of a statement by a young person, but this is not a matter that requires determination for present purposes. Rather the relevance of the submission is that it lends to the characterisation of the process of taking the statement being distinct from the process of taking the fingerprints and, therefore, that

[6] *R v Z* [2008] NZCA 246, [2008] 3 NZLR 342 at [35].

> rights consequent upon each are distinct and must be distinctly observed.[7]

[26] Having been improperly obtained I determine that the fingerprints are inadmissible.

[27] The Court of Appeal has taken the approach that s 30 of the Evidence Act 2006 does not apply to statements ruled inadmissible under s 221(2).[8] Fingerprint evidence is not on all fours with such statements, given the absence of express prescription in the Oranga Tamariki Act, however there would still seem to be an equal case for independence from s 30.

[28] If, however, s 30 is applicable, I take into account that burglary is a serious charge, I assess that there was no bad faith on the part of [the first Detective Constable] and that the evidence is reliable and probative. Fundamentally however, the fingerprints were not provided by [GW] after he was properly informed as to his rights, nor did he have a proper understanding of them, or the proper opportunity to exercise them. His consent cannot then be said to have been fully informed and voluntarily given. That is a breach of an important and basic right. Nor was there any urgency to proceed in the manner that occurred. I would therefore find that the balance in s 30(2) falls towards the exclusion of the fingerprints.

The written statement: 8 March 2020

[29] The adequacy of the explanation of a young person's rights when being questioned in relation to an offence[9] and to establish the admissibility of a statement given by a young person to an officer[10] is always a fact specific inquiry.[11] I hold the following matters material:

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[7] Oranga Tamariki Act 1989, ss 221(2)(b), 221(2)(c), and 222(1).
[8] *R v Z*, above n 6, at [35]; *Elia v R* [2012] NZCA 243, (2012) 29 FRNZ 27 at [83]. Neither counsel made submission on the applicability of s 30.
[9] Oranga Tamariki Act 1989, s 251(1).
[10] Section 221(2).
[11] *Campbell v R* [2015] NZCA 452 at [44].

(a) [GW]'s age when the statement was given, 17 years 7 months and, as described at [21](a), the absence of any particular concern about psychological or communication vulnerability.

(b) The statement was taken at [GW]'s home. There is no suggestion of extrinsic factors, such as events occurring at the home at the time or environmental factors present that might have been diverting or distracting [GW] or his father, [SW].

(c) As with [NW], [SW] did not give evidence by which it might have been better possible to assess his understanding of his role and whether he took reasonable steps to ensure [GW] understood the explanation of his rights.

Discharge of the Nominated Person Obligations

[30] The thrust of the submission for [GW] is that:

(a) It can be inferred that [SW] did not understand the process and hence was not able to discharge his obligations as a nominated person due to the combination of [the second Constable] having taken [SW] quickly through the duties of a nominated person, [SW] initially completing the nominated person form in error by entering his name rather than [GW]'s, and the limited amount of time taken by [SW] to familiarise himself with the role.

(b) [SW] did not in fact discharge his obligations as a nominated person because he did not speak with [GW] about the assistance a lawyer could have provided or explain to [GW] the nature of the charge and the peril [GW] faced in giving a statement.

[31] The evidence by which to evaluate [SW]'s understanding of his obligation as a nominated person is the "Advice to and Duties of a Nominated Person Form" signed by [SW], alongside [the second Constable]'s evidence. I assess that [the second

Constable] appropriately explained [SW]'s obligations to him by reading the specific requirements of the role and in asking for and receiving [SW]'s verbal affirmation that he understood. [SW] did not make any comment or present in a way that indicated a misunderstanding or lack of clarity about the role that should have prompted further explanation by [the second Constable]. I consider, in the absence of evidence from [SW] to the contrary, that I may accept his endorsement of the form, after the explanation and inquiry by [the second Constable], as reliably indicating that [SW] understood the role.

[32] However, I am not persuaded that [SW] understood the jeopardy faced by [GW] or that if he did understand that jeopardy, he took reasonable steps to ensure that [GW] understood his rights. [The second Constable] sought to question [GW] about a serious offence. The Constable made known from the outset that [GW] was linked to the offence by the fingerprint. That type of evidence is highly probative and yet has been determined now to be inadmissible. The jeopardy to [GW] of giving a statement in those circumstances is very high. It would have been in [GW]'s great interest to obtain legal advice as to the charge, the evidence and the advantages and disadvantages of giving of a statement. I consider that it was incumbent upon [SW] as the nominated person to speak with [GW] and to be satisfied that [GW] understood his right not to give a statement and his right to consult with, and make a statement in the presence of, a lawyer and that it was in his interest to in fact consult with a lawyer. Instead there was no discussion between [SW] and [GW] at any time about these rights and upon [SW] being provided the opportunity to speak with [GW] privately he declined. He should have accepted that offer. [SW] has not engaged with the proactiveness that the circumstances demanded. He has in fact acted as a cipher which authority says nominated person must not do. [12] He has therefore failed to discharge his duties as a nominated person.

[33] Ultimately, there has not been reasonable compliance with s 221(2)(b) as to save the admissibility of the statement.[13] [SW]'s participation was too passive to reach that threshold. I note the prosecution submissions that there is no statutory obligation on the police to compel a young person and nominated person to speak privately or to

[12] *Campbell v R*, above n 5, at [25].
[13] Oranga Tamariki Act 1989, s 224.

force a nominated person to engage with the young person and that there is very limited ability for the police to refuse an adult elected as the nominated person. I accept that position and that statutory options available to the police are limited when a nominated person is ill-disposed, for whatever reason, to the discharge of his or her obligations. But that does not diminish the imperative that the obligations be discharged. I observe also that when such circumstances are present there are practices that might be engaged to encourage the nominated person to properly discharge his or her obligations. For instance, a more assertive educative engagement with the nominated person, deferral of questioning, or the arranging of the attendance of a lawyer as to make consultation an immediately accessible option for the young person and nominated person.

The Rights Caution

[34] The essence of the submission for [GW] is that his rights were not explained by [the second Constable] in a manner that ensured [GW] understood those rights and how to exercise them.[14] In that regard reference is made to:

(a) [GW]'s partial explanation of the right to speak with a lawyer without delay and in private and [the second Constable]'s omission to elaborate on the aspects of that right which [GW] did not explain in his own words.

(b) [The second Constable]'s omission to elaborate what might be described as more technical aspects or phrases of complexity such as "evidence" and the role of a judge or jury.

(c) The six-minute window in which the rights were given as insufficient to ensure [GW] understood the rights and had an opportunity to give effect to them including consulting with a lawyer.

[35] The only contemporary evidence by which to evaluate [GW]'s understanding of his rights is his explanation in his own words after each right was given by [the

[14] *R v Z,* above n 6, at [35].

second Constable] and what might properly be inferred from his actions in declining to speak privately with his father, not asking to consult with a lawyer, and proceeding with an interview. I am left to assess that in the context of [GW] not presenting with vulnerability but for that inherent by his youth at aged 17 years and 7 months.

[36] [GW]'s explanation of his rights was coherent and conveys a sufficient comprehension of them. However, I am not satisfied that he adequately understood how to exercise those rights, and in particular how to exercise the right to consult with a lawyer. To arrange legal representation is beyond the capability of most young people. They will require assistance to exercise the right. They are unlikely to ask for legal representation if they do not understand that there is a tangible and timely means for it to be provided to them. Therefore, if the right is to be of the intended protective value, the young person needs to know when it is explained how it might practically occur. No doubt if [GW] had asked to consult with a lawyer [the second Constable] would have taken steps to facilitate that, but awaiting the inquiry is too late. Accordingly, I find that [GW]'s rights were not explained in a manner that ensured he understood how to exercise his right to consult with a lawyer.

[37] I acknowledge that this requires a proactivity on the part of police beyond that which may currently be exercised. However, in reaching this conclusion I have had regard to and am guided by the careful analysis of Judge Fitzgerald in *NZ Police v [FG]* of the law regarding the admissibility of written statements in light of the new s 5 principles that took effect on 1 July 2019.[15] Of particular relevance are the principles in s 5(b)(i), which states that a young person's rights under the United Nations Convention on the Rights of the Child must be respected and upheld by those exercising any power under the Act. I think that analysis demands the proactivity I identify.

[38] Accordingly, as a result of the failure of the nominated person to discharge his obligations and for the failure to explain to [GW] his rights in a manner that ensured he understood how to effectively exercise his right to consult with a lawyer, I rule the statement inadmissible.

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[15] *NZ Police v [FG]* [2020] NZYC 328.

[39] If s 30 of the Evidence Act 2006 is applicable, I find the balance in s 30(2) weighted towards exclusion of the statement. In reaching that determination I assess that there was no bad faith on the part of Constable and that the evidence is probative. However, the rights breached are very important, and the duties failed strike at fundamental protections upon which our system of youth justice is premised and there was no urgency to proceed at the time.

Result

[40] For the reasons given the fingerprints and the written statement of 8 March 2020 are inadmissible against [GW] in the charge of burglary of a community centre [in early] 2019.

Judge SD Otene
Youth Court Judge

Date of authentication: 22/12/2020
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.