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

IN THE YOUTH COURT
AT AUCKLAND

I TE KŌTI TAIOHI
KI TĀMAKI MAKAURAU

CRI2022-204-000335
[2023] NZYC 523

NEW ZEALAND POLICE
Prosecutor

v

[HJ]
Young Person

Hearing:	19 May 2023
Appearances:	S Teppett for Prosecutor M Winterstein for Young Person
Judgment:	24 July 2023

RESERVED JUDGMENT OF JUDGE O L CASSIDY

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[1] Children and young people are the most vulnerable members of our society and should be afforded special recognition and protection. This sentiment is encapsulated in the whakatauki; "He mokopuna, he taonga", children are a precious taonga that should be treasured, nurtured and protected.

[2] Special protection and recognition of children and young people is recognised in a legal context in Aotearoa when children and young people come to the attention of police or are involved in any investigation relating to the commission of an alleged offence pursuant to the Oranga Tamariki Act 1989 ("the Act"). It is also affirmed in international instruments such as the United Nations Convention on the Rights of the Child ("UNCROC") which was ratified by New Zealand in 1993 and incorporated into s 5 of the Act.

[3] [HJ] is a young person and appears in the Youth Court facing two charges of aggravated robbery and kidnapping pursuant to sections 235 and 209 of the Crimes Act 1961.[1] [HJ] was [under 16] when the alleged offending occurred on [Date 1] 2022.

[4] [HJ]'s youth advocate, Ms Winterstein challenges the lawfulness of [HJ]'s arrest.

[5] The police allege that in the early hours of [Date 1] 2022, [HJ] and a friend, [PS], approached and threatened the alleged victims, [Complainant 1] and [Complainant 2], with knives in [location 1 – local park]. [HJ] took [Complainant 2]'s wallet and removed his cards and cash. [PS] took property from [Complainant 1] and moved her to a nearby bush, where he sexually assaulted her by indecently assaulting her and then raping her.[2] During this time, [HJ] held [Complainant 2] against his will by using his knife. Following the sexual assault, [Complainant 1] offered to transfer [HJ] and [PS] money in exchange for letting them go. [PS] left with [Complainant 1] to walk to her apartment in order to get her phone to make the transfer. [HJ] remained with [Complainant 2] at knifepoint [at location 1]. Without warning [PS] ran away

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1 Both offences carry a maximum sentence of 14 years imprisonment.
2 [HJ] is not charged with the sexual offending.

from [Complainant 1]. After realising that he had missed several calls from [PS], [HJ] left, leaving [Complainant 2] alone at [location 1].

[6] Later that evening at 5.20pm, [HJ] was arrested by [Constable A] at [an apartment building – location 2] in Auckland. [HJ] was taken to the police station and questioned. He provided a statement in the presence of his mother, [JD], as his nominated person. While the interview was taking place, a search warrant was executed at [JD]'s apartment. [HJ] and [JD] were cooperative with the police throughout the arrest process.

[7] [HJ] was subsequently released on police bail to [JD] as she had assured [Constable A] that she would ensure that [HJ] would show up to Court the next day.

[8] On 8 November 2022, [HJ] appeared in Auckland youth court charged with aggravated robbery and was granted bail. He appeared again on 14 November 2022 and the additional charge of kidnapping was laid.

[9] On 12 December 2022, [HJ] appeared in youth court and denied the charges and an application to dismiss the charges due to unlawful arrest process was filed.

The issues

[10] The issues that the Court must determine are:

(a) Whether [HJ]'s arrest was lawful?

(b) If the Court finds that the arrest was unlawful, whether the Court should dismiss the charges pursuant to section 147 of the Criminal Procedure Act 2011("CPA") or grant leave for the prosecution to withdraw the charges pursuant to s 146 of the CPA?[3]

[11] There are two ways that a young person may be bought before the Youth Court jurisdiction. That is by way of an arrest without a warrant pursuant to s 214 of the Act

[3] Sections 146 and 147 are applicable to proceedings in the Youth Court under Sch 1(2) of the Oranga Tamariki Act 1989.

or by way of the provisions set out in s 245 of the Act. The powers of arrest without warrant are limited under s 214 as follows:

> **214 Arrest of child or young person without warrant**
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> (1) Subject to sections 233 and 244, where, under any enactment, any enforcement officer has a power of arrest without warrant, that officer shall not arrest a child or young person pursuant to that power unless that officer is satisfied, on reasonable grounds,-
>
> (a) That it is necessary to arrest that child or young person without warrant for the purpose of-
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> (i) ensuring the appearance of the child or young person before the court; or
>
> (ii) preventing that child or young person from committing further offences; or
>
> (iii) preventing the loss or destruction of evidence relating to an offence committed by the child or young person or an offence that the enforcement officer has reasonable cause to suspect that child or young person of having committed, or preventing interference with any witness in respect of any such offence; and
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> (b) Where the child or young person may be proceeded against by way of summons, that proceeding by way of summons would not achieve that purpose.
>
> (2) Nothing in subsection (1) prevents a constable from arresting a child or young person without warrant on a charge of any offence where-
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> (a) The constable has reasonable cause to suspect that the child or young person has committed a category 4 offence or category 3 offence for which the maximum penalty available is or includes imprisonment for life or for at least 14 years; and
>
> (b) The constable believes, on reasonable grounds, that the arrest of the child or young person is required in the public interest.

[12] Following an arrest every constable who arrests a young person must provide a report to the Police Commissioner within 3 days of making the arrest pursuant to section 214(3)(a) of the Act.

[13] The onus is on the prosecution to establish beyond reasonable doubt that the arrest without warrant was reasonable pursuant to s 214.

The hearing

[14] The pre-trial hearing was held before me on the 19 May 2023 and Ms Winterstein appeared for [HJ] and Mr Teppett for the prosecution. The arresting officer, [Constable A], gave evidence at the trial.

[15] [Constable A] became involved in the investigation following a report to the police by the alleged victim on [Date 1] 2022 and after CCTV footage enquires throughout the day.

[16] At 5.09pm, [Constable A] arrived at [location 2] with [Constable B]. [Constable A] was informed by [Constable B] that [HJ] had been spotted on the apartment's CCTV moving down the stairwell towards the foyer of the building. [HJ] came out of the stairwell and attempted to run away after one of the officers stated that he had wanted to talk to [HJ]. [HJ] ran into [Constable A], who placed him under arrest for aggravated robbery at 5.20pm.[4]

[17] [Constable A] described the events that evening as a fluid evolving situation and at the time of the arrest the police were unsure which of the offenders was responsible for the alleged rape.[5]

[18] Upon being arrested, [HJ] stated: "You can't arrest me, I'm [under 16] years old." [HJ] then provided [Constable A] with his full name and date of birth, which was confirmed through the National Intelligence application on [Constable A] police phone. Upon seeing his age, [Constable A] read [HJ] his rights by reading each line and clarifying with [HJ] if he had understood and accepted his rights.[6] [Constable A] stated that he failed to write down this exchange in detail due to the rushed nature of the situation,[7] but recorded that [HJ] understood his rights.[8]

[19] When cross-examined about what purposes and principals of the Act he considered when arresting [HJ], [Constable A] said he mostly considered s 214 in

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4 Notes of Evidence (NOE), at7 lines 14-17.
5 At 4 line 24.
6 At 9 lines 3-7.
7 At 9 lines 16-20.
8 Formal statement of [Constable A], 8 November 2022 at [16].

order to prevent further offending and prevent loss of evidence.[9] He also considered [HJ]'s welfare and he tried to make the process as painless as possible by reducing the time that [HJ] was in police custody.[10]

[20] During the course of the trial, he accepted that he was unsure of [HJ]'s exact age at the time of the arrest, whether [HJ] was attending school, where and who [HJ] was living with, whether [HJ] had any prior dealings with the police and whether [HJ] had any previous Youth Court history.[11]

[21] He accepted under cross-examination that he did not consider any international instruments protecting the rights of young people.[12] He also accepted that there were other ways of dealing with [HJ] that might include referring him to youth aid who specialise in dealing with young people.[13]

[22] [Constable A] then asked [HJ] to provide him with a statement and [HJ] was taken to the police station. [Constable A] also asked for [HJ] to provide him with a nominated person who could assist in obtaining this statement. [HJ] chose his mother, [JD]. While at the police station, a search warrant was executed at [JD]'s apartment. [HJ] and [JD] were cooperative with the police throughout the arrest, and [HJ] was subsequently released on police bail to his mother.

[23] Following [HJ]'s release to his mother, the appropriate paperwork including the Youth Justice ("YJ") checklist and report were completed. However, the YJ checklist was not completed by [Constable A]. Instead, he relayed information to his colleague who completed the checklist for him. [Constable A] thought he was completing a report of concern while his colleague was completing the checklist.[14]

[24] After a young person is arrested, a written report is required to be furnished within 3 days to the Police commissioner by the enforcement officer who arrests the child or young person. The report itself noted that [HJ] had been arrested at 5.20pm

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9 NOE, above n 4, at 12 lines 19-21.
10 At 12 lines 28-29.
11 At 9 lines 21-26 and 30-33.
12 At 13 lines 3-5.
13 At 13 lines 19-20.
14 At 17 lines 20-26, and 18 lines 26-28.

on 8 November 2022 by [Constable A]. The report noted the reasons for arrest were to ensure appearance before the Court, prevent further offending and prevent the loss of evidence and interference with the witnesses.

[25] Notwithstanding the above, [Constable A] confirmed under cross examination that he did not complete the report. His colleague completed the report and submitted the report to the police commissioner.[15] There was no specific reference of the charge noted in the report other than the offence code for aggravated robbery. Furthermore, [Constable A] was unable to explain why there was no entry in the question for consideration of a summons. That box was left unmarked.

Submissions

[26] Ms Winterstein and the prosecution filed submissions prior to the trial. Ms Winterstein filed supplementary submissions on 6 June 2023. The prosecution filed supplementary submissions on 23 June 2023 specifically addressing the consequences for the prosecution should the arrest be deemed unlawful.

[27] Ms Winterstein challenges the lawfulness of [HJ]'s arrest. She submits there were no reasonable grounds to arrest [HJ] for the following reasons:

(a) The alleged crime scene had been secured with CCTV footage obtained, which identified [HJ] and [PS];

(b) [HJ] had none or limited prior involvement with the police, and any such involvement was not known to the arresting officer;

(c) [HJ] and his mother had been compliant and attended at the police station, and provided a video interview statement with full admissions;

(d) There was no suggestion that [HJ] would abscond from his home address; and

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15 At 27 lines 4-12.

(e) There was outstanding evidence to assist in the officer's assessment.

[28] Ms Winterstein submits that it is not sufficient that the arrest was for one or more of the grounds, but that there must be a compelling nexus between the need to arrest and the objectively reasonable achievement of those grounds.[16] Ms Winterstein notes that there was nothing in the disclosure provided by the police to indicate that [Constable A] was personally aware of [HJ]'s circumstances or his background to be satisfied as to why an arrest was justified to achieve the purposes of s 214(1)(a) of the Act.

[29] It is submitted that the arrest was founded on the seriousness of the charge alone and [HJ]'s personal circumstances and the compliance shown by [HJ] and his mother displaced the need to arrest and charge him.

[30] Ms Winterstein submits the reasonableness of the arrest should be assessed in accordance with the purposes, principles and the international instruments that have been incorporated into the Act.[17] Additionally, greater weight should have been given to keeping [HJ] out of the Court system, and that he should have been given the opportunity to utilise the Act's alternative, less invasive and least restrictive processes.

[31] Ms Winterstein submits that the police ought to have provided a lawyer for [HJ] when they were contemplating arresting him and that a lawyer would have provided a procedural safeguard, satisfied [HJ]'s rights under the UNCROC and given recognition of his mana tamaiti.

Supplementary submissions

[32] Ms Winterstein submits that the reasons provided by [Constable A] at the pre-trial hearing for arresting [HJ] were unreasonable given the matters that he was required to consider before the decision to arrest was made.

[33] Regarding the reasonableness of the decision to arrest [HJ], she submits that:

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16 *Police v SM* [2015] NZYC 666 at [34].
17 Oranga Tamariki Act, s 5(1)(b)(i).

(a) A search warrant was already in the process of being executed at [HJ]'s residence, which would secure any evidence pertinent to the case;

(b) [Constable A] arrested [HJ] without any knowledge of his personal circumstances or prior involvement with police or youth aid;

(c) [Constable A] was unaware of whether [HJ]'s mother was going to help or hinder the police investigation and was unaware of the nature of the relationship between [HJ] and his mother;

(d) [Constable A] was concerned that if [HJ] was allowed to stay at the apartment, he would commit further offending, however, [HJ] was returned to his mother's care later that night;

(e) Despite [Constable A] reference to stranger rape and the public interest in his statement, [HJ] was arrested for aggravated robbery and was not charged with any sexual offending; and

(f) [Constable A] as the arresting officer did not fill out and complete the YJ checklist or the report to the police commissioner.

[34] Ms Winterstein submits that the principles and purposes of the Act were not considered in the way required by the arresting officer,[18] and the international instruments did not form any part of the officer's assessment of reasonableness of arrest.[19]

[35] It is submitted that given the seriousness of the charges and the significance of arresting a young person and placing them before the Court and subverting the alternative process through s 238(1)(b),[20] the police ought to have been sure as to the nature of [HJ]'s involvement and his particular circumstances before making the decision to arrest, detain and place him before the Court.

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18 NOE, above n 4, at 12 lines 19-25.

19 At 13 lines 3-5.

20 Where a child or young person appears before the Youth Court, the court shall release the child or young person on bail.

[36] In determining whether to allow the police to withdraw the charges or to dismiss the charges, Ms Winterstein, submits that the purposes and principles of the Act and the various instrumental instruments must be considered in the assessment of the decision.

[37] Ms Winterstein submits that [HJ]'s arrest was unlawful and contrary to the principles and purposes of the Act and in breach of s 40 of UNCROC. As such, [HJ]'s rights were not respected or upheld, and Ms Winterstein invites the Court to dismiss the charges as they are a nullity.

The prosecution submissions

[38] The prosecution submits that [Constable A] had reasonable cause to suspect that [HJ] had committed either aggravated robbery and/or sexual violation by rape and that the following factors support [Constable A]'s assessment that an arrest was in the public interest:

(a) The arrest was necessary to prevent [HJ] from committing further offences, as he was suspected to have been involved in other aggravated robberies at the location of the incident. Additionally, [Constable A] did not know who the perpetrator of the alleged rape was at the time of the arrest, and an arrest was made to impose strict bail conditions to mitigate the risks of further offending unachievable under the alternative set out under s 245 of the Act;

(b) The arrest was necessary to prevent the loss or destruction of evidence relating to the offence; and

(c) The arrest was necessary to prevent interference with the victim, [Complainant 1], since at least one of the offenders knew the building where she resided.

[39] The prosecution submits that these risks were serious enough to justify [HJ]'s arrest and noted that the use of alternative approaches set out under the Act do not trump or outweigh the presence of these identified risks.

[40] The prosecution submits that [Constable A] believed that [HJ] had committed multiple aggravated robberies at the time of arrest, which satisfies the first requirement for a lawful arrest under s 214(2)(a) of the Act. In addition to the evidence obtained by the Police following the offending on [Date 1] 2022, this belief was also in part due to the formal statement provided by the alleged victim, [Complainant 2], which stated that [HJ] had disclosed to him that [PS] and [HJ] had recently committed three previous aggravated robberies in [location 1].[21]

[41] The prosecution submits that the arrest complied with s 214 of the Act due to the circumstances of the alleged offending and [Constable A]'s knowledge of [HJ]'s age or identity at the time of the arrest. The prosecution further submits that the arrest was in the public interest, satisfying the second requirement for a lawful arrest under s 214(2)(b) of the Act, because:

(a) [Constable A] held a reasonable belief that [HJ] posed a risk of further offending. At the time of the arrest, it was unclear to the police who had committed the rape, and that both [HJ] and [PS] were suspects of this offending. Therefore, the fact that [HJ] was arrested for aggravated robbery was irrelevant. The arrest was not founded on the seriousness of the charge alone, but on the belief that [HJ] posed a threat of further offending since he was responsible for multiple aggravated robberies, and possibly rape;

(b) One of the suspects, [PS], had been arrested at the time of [Constable A]'s arrival at [location 2], but [HJ]'s identity was unknown at the time. His identity was confirmed by the building manager. Upon being approached, [HJ] attempted to flee but ran into [Constable A] who placed him under arrest. The prosecutor submits that this demonstrates

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21 Formal statement of [Constable A], 7 March 2023, at [17].

that [HJ] posed a risk of failing to appear or committing further offending;

(c) [Constable A] read [HJ] his rights and ensured that each line of these rights was understood.[22] [Constable A] recorded that [HJ] understood his rights.[23] [Constable A] considered [HJ]'s welfare as a young person and tried to reduce the amount of time he spent in custody.[24] [HJ] was released on bail into his mother's care. The prosecution submits that these considerations promote [HJ]'s rights and best interests under s 4 of the Act; and

(d) While [Constable A] had no knowledge of [HJ]'s identity and circumstances, this was not a situation where the police could have stopped [HJ], requested his particulars, then convened an FGC to address the very serious offending since [HJ] potentially knew where the victim of the rape lived and possibly had evidence of the offending in his possession. Although CCTV footage of the suspects had been secured, other evidence, namely the property taken from the victim, [Complainant 1], was outstanding and had yet to be secured. The arrest was in the public interest to prevent the victim from being interfered with and to secure any outstanding evidence relating to the offence.

Supplementary submissions

[42] The prosecution submits that if the Court finds that [Constable A]'s arrest of [HJ] was unlawful under s 214 of the Act, the Court will need to determine what the consequences will be for the continuation of the prosecution.

[43] The prosecution submits that in light of Judge Fitzgerald's decision in *Police v MR (No1)*, there is no jurisdiction to dismiss the charge under s 147 of the Criminal Procedure Act 2011 ("CPA"). The prosecution submits that Judge Fitzgerald had considered the well-being of both the young person and the complainant and stated

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22 NOE, above n 4, at 9 lines 3-7.
23 Formal statement of [Constable A], above n 8, at [16].
24 NOE, above n 4, at 12 line 32.

that it would "defeat the very purpose of the Act to dismiss the charges and for the matter to end there".[25] The prosecution submits that the same principles apply here, and that the principles and purposes of the Act would be appropriately served by granting leave to withdraw the charge.

[44] The prosecution further submits that an appropriate course of action would be for the Court to grant leave for the police to withdraw the charge, which would allow the police to decide whether to proceed under s 245 of the Act and subsequently, decide whether to re-file the charge. The prosecution submits the following reasons favour the withdrawal of the charge:

(a) The breach of s 214, if unlawful, was serious but not done in bad faith;

(b) There was nothing to suggest that [Constable A] intentionally acted in a way contrary to [HJ]'s well-being. At most, he was ill-informed as to the full extent of his obligations;

(c) [Constable A] considered [HJ]'s welfare as a young person and tried to reduce the amount of time [HJ] spent in custody;

(d) [HJ] was not held for an extensive period of time during the process of being arrested, interviewed, and then released on police bail conditions;

(e) Without seeking to minimise the seriousness of an unlawful arrest, the prosecution submits that this breach was not an egregious one, and [Constable A]'s actions highlight the inadequacies within the police of appropriate training for police officers dealing with young persons; and

(f) [HJ]'s alleged offending is serious, and this is reflected in the maximum penalty of 14 years imprisonment. The seriousness of the alleged offending lends to a high degree of public interest in holding [HJ] accountable for his actions and ensuring the safety of the public.

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25 *Police v MR (No 1)* [2022] NZYC 54 at [113].

[45] The prosecution submits that there is a need to respond to alleged offending by young people in a way that promotes their rights, but also prevents or reduces offending or future offending, recognises the rights and interests of victims, and holds the young person accountable and encourages them to accept responsibility for their behaviour.[26]

[46] The prosecution submits that whether there has been an abuse of process or unnecessary delay is a question to be considered only when the charge is re-filed, and not before.[27]

The Law

[47] The general purpose of the Act is to promote the well-being of children and young people. As set out previously the law recognises that children and young people are vulnerable members of society and therefore should be afforded special protection when coming to the attention of police or involved in any investigation relating to the commission of an offence. This is reflected in the purposes and principles of the Act which are set out in sections 4, 4A, 5, and 208 of the Act. Sections 4 and 4A provide:

> **4 Purposes**
>
> (1) The purposes of this Act are to promote the well-being of children, young persons, and their families, whānau, hapū, iwi, and family groups by—
>
> (a) establishing, promoting, or co-ordinating services that—
>
> (i) are designed to affirm mana tamaiti (tamariki), are centred on children's and young persons' rights, promote their best interests, advance their well-being, address their needs, and provide for their participation in decision making that affects them:
>
> (ii) advance positive long-term health, educational, social, economic, or other outcomes for children and young persons:
>
> (iii) are culturally appropriate and competently provided:
>
> (b) supporting and protecting children and young persons to—
>
> (i) prevent them from suffering harm (including harm to their development and well-being), abuse, neglect, ill

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26 Oranga Tamariki Act, ss 4(1)(i) and 4A.

27 *X v District Court at Auckland* [2020] NZHC 2952 at [44] per Paul Davison J.

treatment, or deprivation or by responding to those things; or

(ii) prevent offending or reoffending or respond to offending or reoffending:

(c) assisting families, whānau, hapū, iwi, and family groups to—

(i) prevent their children and young persons from suffering harm, abuse, neglect, ill treatment, or deprivation or by responding to those things; or

(ii) prevent their children or young persons from offending or reoffending or respond to offending or reoffending:

(d) assisting families and whānau, hapū, iwi, and family groups, at the earliest opportunity, to fulfil their responsibility to meet the needs of their children and young persons (including their developmental needs, and the need for a safe, stable, and loving home):

(e) ensuring that, where children and young persons require care under the Act, they have—

(i) a safe, stable, and loving home from the earliest opportunity; and

(ii) support to address their needs:

(f) providing a practical commitment to the principles of the Treaty of Waitangi (te Tiriti o Waitangi) in the way described in this Act:

(g) recognising mana tamaiti (tamariki), whakapapa, and the practice of whanaungatanga for children and young persons who come to the attention of the department:

(h) maintaining and strengthening the relationship between children and young persons who come to the attention of the department and their—

(i) family, whānau, hapū, iwi, and family group; and

(ii) siblings:

(i) responding to alleged offending and offending by children and young persons in a way that—

(i) promotes their rights and best interests and acknowledges their needs; and

(ii) prevents or reduces offending or future offending; and

(iii) recognises the rights and interests of victims; and

(iv) holds the children and young persons accountable and encourages them to accept responsibility for their behaviour:

(j) assisting young persons who are or have been in care or custody under the Act to successfully transition to adulthood in the ways provided in the Act.

4A Well-being and best interests of child or young person

(1) In all matters relating to the administration or application of this Act (other than Parts 4 and 5 and sections 351 to 360), the well-being and best interests of the child or young person are the first and paramount consideration, having regard to the principles set out in sections 5 and 13.

(2) In all matters relating to the administration or application of Parts 4 and 5 and sections 351 to 360, the 4 primary considerations, having regard to the principles set out in sections 5 and 208, are—

(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.

[48] A principal concern of the Act, under s 208 (2) (a), is to keep young people out of the criminal justice system and alternative means explored unless the public interest requires otherwise. This is countervailed by the arrest of the young person being in the public interest under s 214(2), where the principles and purposes under the Act must be considered by the arresting officer prior to the arrest. Section 208 provides:

208 Principles

(1) A court or person exercising powers under this Part, Part 5, or sections 351 to 360 must weigh the 4 primary considerations described in section 4A(2).

(2) When weighing those 4 primary considerations, the court or person must be guided by, in addition to the principles in section 5, the following principles:

(a) 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:

…

(d) that a child or young person who commits an offence or is alleged to have committed an offence should be kept in the community so far as that is practicable and consonant with the need to ensure the safety of the public:

…

(g) 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 (for example, by encouraging the victims to participate in the processes under this Part for dealing with 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:

(h) that the vulnerability of children and young persons entitles a child or young person to special protection during any investigation relating to the commission or possible commission of an offence by that child or young person.

[49] Section 5 of the Act sets out a number of principles which must guide any Court or person exercising power under the Act. Section 5 provides:

5 Principles to be applied in exercise of powers under this Act

(1) Any court that, or person who, exercises any power under this Act must be guided by the following principles:

(a) a child or young person must be encouraged and assisted, wherever practicable, to participate in and express their views about any proceeding, process, or decision affecting them, and their views should be taken into account:

(b) the well-being of a child or young person must be at the centre of decision making that affects that child or young person, and, in particular,—

(i) the child's or young person's rights (including those rights set out in UNCROC and the United Nations Convention on the Rights of Persons with Disabilities) must be respected and upheld, and the child or young person must be—

(A) treated with dignity and respect at all times:

(B) protected from harm:

(ii) the impact of harm on the child or young person and the steps to be taken to enable their recovery should be addressed:

(iii) the child's or young person's need for a safe, stable, and loving home should be addressed:

(iv) mana tamaiti (tamariki) and the child's or young person's well-being should be protected by recognising their whakapapa and the whanaungatanga responsibilities of their family, whānau, hapū, iwi, and family group:

(v) decisions should be made and implemented promptly and in a time frame appropriate to the age and development of the child or young person:

(vi) a holistic approach should be taken that sees the child or young person as a whole person which includes, but is not limited to, the child's or young person's—

(A) developmental potential; and

(B) educational and health needs; and

(C) whakapapa; and

(D) cultural identity; and

(E) gender identity; and

(F) sexual orientation; and

(G) disability (if any); and

(H) age:

(vii) endeavours should be made to obtain, to the extent consistent with the age and development of the child or young person, the support of that child or young person for the exercise or proposed exercise, in relation to that child or young person, of any power conferred by or under this Act:

(viii) decisions about a child or young person with a disability—

(A) should be made having particular regard to the child's or young person's experience of disability and any difficulties or discrimination that may be encountered by the child or young person because of that disability; and

(B) should support the child's or young person's full and effective participation in society:

(c) the child's or young person's place within their family, whānau, hapū, iwi, and family group should be recognised, and, in particular, it should be recognised that—

(i) the primary responsibility for caring for and nurturing the well-being and development of the child or young person lies with their family, whānau, hapū, iwi, and family group:

(ii) the effect of any decision on the child's or young person's relationship with their family, whānau, hapū, iwi, and family group and their links to whakapapa should be considered:

(iii) the child's or young person's sense of belonging, whakapapa, and the whanaungatanga responsibilities of their family, whānau, hapū, iwi, and family group should be recognised and respected:

(iv) wherever possible, the relationship between the child or young person and their family, whānau, hapū, iwi, and family group should be maintained and strengthened:

(v) wherever possible, a child's or young person's family, whānau, hapū, iwi, and family group should participate in decisions, and regard should be had to their views:

(vi) endeavours should be made to obtain the support of the parents, guardians, or other persons having the care of the child or young person for the exercise or proposed exercise, in relation to that child or young person, of any power conferred by or under this Act:

(d) the child's or young person's place within their community should be recognised, and, in particular,—

(i) how a decision affects the stability of a child or young person (including the stability of their education and the stability of their connections to community and other contacts), and the impact of disruption on this stability should be considered:

(ii) networks of, and supports for, the child or young person and their family, whānau, hapū, iwi, and family group that are in place before the power is to be exercised should be acknowledged and, where practicable, utilised.

(2) Subsection (1) is subject to section 4A.

[50] In *Police v MR*, Judge Fitzgerald held that a primary purpose of the Act is the well-being of children, and that public interest considerations were not just a narrow short-term assessment. He recognised the importance of discussing the situation with the young person's parent before deciding an arrest was necessary.[28]

[51] Judge Fitzgerald also noted the persuasiveness of the United Nations' general comment on Child Justice which provides guidance on applying the articles contained within the UNCROC. These articles uphold a rights-based approach towards child justice and encourage the presence of a lawyer when a child is in contact with the police. While the presence of a lawyer is not mandatory under domestic legislation, Judge Fitzgerald stated that a lawyer could have drawn attention to the police officer's legal obligations under the Act and prevented an unlawful arrest.[29]

[52] The general comment on article 40(2)(b)(ii) of UNCROC provides[30]:

> 49. States should ensure that the child is guaranteed legal or other appropriate assistance from the outset of the proceedings, in the preparation of the defence, and until all appeals and/or reviews are exhausted.
>
> 50. The Committee remains concerned that many children face criminal charges before judicial, administrative or other public authorities, and are deprived of liberty, without having the benefit of legal representation …
>
> 51. … the Committee is concerned that children are provided less protection than international law guarantees for adults. The Committee recommends that States provide effective legal representation, free of charge, for all children who are facing criminal charges before judicial, administrative or other public authorities. Child justice systems should not permit children to waive legal representation unless the decision to waive is made voluntarily and under impartial judicial supervision.

[53] In *Police v JH*, Judge Davis held that an unlawful arrest contravenes the provisions of the UNCROC, as well as the Treaty of Waitangi principle that tamariki are a taonga, and provisions in the Act recognising that the vulnerability of children and young persons entitles them to special protection during any investigation relating to the commission of an offence.[31]

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28 *Police v MR (No 1)*, above n 25, at [75].
29 At [83].
30 See General Comment No.24 (2019) on Children's rights in the child justice system UN Doc CRC/C/GC/24 (18 September 2019)
31 *Police v JH* [2020] NZYC 396 at [61].

[54] Relevant provisions of article 37 of UNCROC provides:

> (a) …
>
> (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used **only as a measure of last resort** and for the shortest appropriate period of time;
>
> (c) …
>
> (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Was the arrest unlawful?

[55] The leading authority is derived from *Pomare v Police*, where Harrison J held that an arrest under s 214, and the filing of a charging document under s 245(1) of the Act, were the two ways of lawfully bringing a young person to Court. If the arrest was unlawful, it invalidates the charging document subsequently laid, rendering it a "nullity", and resulting in the Court having no jurisdiction to try the offender.[32]

[56] In *Police v H*, Judge Druce held that the prosecutor must prove beyond reasonable doubt that the requirements of s 214(1)(a) and (b) have been satisfied, otherwise the charging document filed would be deemed invalid and the Youth Court would have no jurisdiction over the matter.[33] Likewise, in *Police v CG*, the failure by police to prove beyond reasonable doubt that it was necessary to arrest a young person under s 214(1) rendered the arrest unlawful.[34]

[57] In this case, [HJ] has no history of offending and "no proven track record of offending". [HJ] had turned [age removed – under 16] a few months before the alleged offending and was living with his mother at the time of the alleged offending.

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32 *Pomare v Police* HC Whangarei AP8/02, 12 March 2002.
33 *Police v H* YC Kaitaia CRN-5229003685, 20 January 2006.
34 *Police v CG* YC Upper Hutt CRI-2012-278-2, 9 July 2012.

[58] In *Police v CV*, the defendant challenged whether the arresting officer was satisfied on reasonable grounds that the conditions in s 214 were met and that a summons would not achieve the same purpose. CV had no previous dealings with youth aid or the Courts and lived at home. It appeared that CV was arrested for the purposes of imposing bail conditions, and that the police were not satisfied that the family could provide appropriate supervision. Judge Clark found that there were no reasonable grounds to find that the arrest was necessary to ensure appearance at Court, given CV had no "proven track record" of offending.[35]

[59] Although [HJ] attempted to flee upon his initial meeting with the Police,[36] I find that this does not demonstrate that [HJ] posed a risk of failing to appear or committing further offending. During the alleged offending, [HJ] had also run away from [Complainant 2] upon discovery of the missed calls from [PS]. It is possible that running away was an instinctual reaction to a stressful situation rather than an attempt to evade police capture. Additionally, [HJ] had already provided his name, and [Constable A] knew where he lived.[37]

[60] The police had already secured CCTV footage and an active search warrant was executed at [HJ]'s home shortly after his arrest, which would have secured any further evidence relevant to the offending regardless of [HJ] being arrested or not.[38]

[61] [Constable A] had no knowledge of [HJ]'s personal circumstances or prior involvement with the police or youth aid, nor of his relationship with his mother. When questioned by [Constable A], [HJ] gave his name and details freely. Furthermore, [HJ] and his mother were fully cooperative in giving his interview statement after being arrested by [Constable A].

[62] Given the degree of cooperation, [Constable A] should have at least consulted with [JD] before deciding to arrest [HJ].

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35 *Police v CV* [2021] NZYC 26 at [59].

36 *Police v HG* [2004] DCR 685; running away or attempting to evade police could be used in support of an argument that arrest was necessary to ensure attendance at court.

37 *Police v HG*; *ITW v Police* HC Christchurch CRI-2003-409-35, 11 September 2003; young person's reluctance to provide name and address held to be a strong contribution towards justifying an arrest.

38 Also, in *Police v SM*, above n 16, at [34]; Judge Walsh held that voluntarily working with the Police meant that defendant was unlikely to destroy or conceal evidence.

[63] In the prosecutions pre-trial submission, arresting [HJ] on strict bail conditions was given as a factor supporting [Constable A]'s assessment that an arrest was in the public interest.[39] However during the hearing, [Constable A] stated that arresting and charging [HJ] so he could be placed on bail was not a consideration for him.[40]

[64] In any event, arresting a young person for the purpose of placing them on bail and restricting their freedom does not align with the purposes and principles of the Act. Judge Davis held that arresting a young person so that bail conditions can be imposed by the Court does not accord with the concept of mana tamaiti under the Act, and an arrest purely to enable bail conditions to be imposed would fail to facilitate the protection or recognition of whānau relationships.[41]

[65] Once the police became aware that [HJ] was a young person, a lawyer could have been provided to ensure that he fully understood his rights and a lawyer could have drawn attention to [Constable A] legal obligations under the Act and the alternative options to arrest.

[66] It can be inferred that [Constable A] was an experienced police officer given his ranking, however, it was clear from his evidence that his knowledge regarding the arrest procedure and special protection afforded to young people under the Act and the UNCROC was limited and that he did not fully understand the extent of his obligations.

[67] I accept that the investigation was fluid and evolving that day however this should not have circumvented the special protection afforded to [HJ] under the Act. If [Constable A] had made further enquiries, he would have ascertained that [HJ] had no previous interactions or history with police. There was nothing to suggest that [HJ] would not appear in court by way of a summons. This would have allowed further time for the search warranted to be executed.

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39 Police submissions for pre-trial hearing, 8 March 2023, at 5, 4.2(a).
40 NOE, above n 4, at 13 lines 25–27.
41 *Police v JH*, above n 30, at [62].

[68] For the reasons set out above, I am not satisfied beyond reasonable doubt that the police had reasonable grounds to arrest [HJ] pursuant to s214 of the Act. As such I find that the arrest was unlawful.

Dismissal or withdrawal of the charges

[69] Given that I have found that the arrest was unlawful, I need to determine the consequences for continuation of the prosecution. That is whether the charges should be dismissed or whether I grant the prosecution leave to withdraw the charges.

[70] Statutory grounds for dismissal under s 147 of the CPA allows the Court to dismiss a charge if the Crown has not offered evidence at trial and in a judge-alone case, where the Court is satisfied that there is no case to answer. Section 147 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.
>
> …[42]
>
> (6) If a charge is dismissed under this section the defendant is deemed to be acquitted on that charge.

[42] CPA, s 147(5) is not imported into the OTA under Sch 1(2)(m).

(7) Nothing in this section affects the power of the court to convict and discharge any person.

[71] Section 146 provides:

146 Withdrawal of the charge

(1) The prosecutor may, with the leave of the court, withdraw a charge before the trial.

(2) The withdrawal of a charge under this section is not a bar to any other proceeding in the same matter.

[72] Outside of these statutory grounds, caselaw indicates that a charge may be dismissed when no useful purpose would be served by the continuation of the proceedings,[43] or when the continuation of the proceedings would be an abuse of process. Primarily, s 147 is accepted as the "orthodox response" to dismiss, rather than allow for a withdrawal of, a charge which does not proceed due to evidential insufficiency.[44]

[73] There have been a number of approaches taken by the court since the decision of *Pomare* over 20 years ago. Much of the earlier caselaw have opted to dismiss charges on the basis that the charging documents produced following an unlawful arrest are rendered invalid, or a nullity.

[74] In *Police v SM*, Judge Walsh held that following an unlawful arrest, the charging document laid by the police is invalid and is dismissed. His Honour also held that the police cannot invoke the procedure under s 245 after the charge has been dismissed and regarded an attempt to invoke s 245 as amounting to an abuse of process.[45]

[75] In *Police v JH*, Judge Davis held that bearing in mind recent changes to the Act and UNCROC provisions, it would be an abuse of process to allow the charges to be re-laid.[46]

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43 Nominal punishment being imposed for offence; unreasonably burdensome trial on the defendant; defendant has pleaded guilty and expense of trial on other charges unwarranted.

44 *R v Fawcett* [2021] NZHC 2969 at [17].

45 *Police v SM*, above n 16, at [37].

46 *Police v JH*, above n 30, at [71].

[76] Other cases have discussed the options available if the charge is deemed a nullity including the Police following the correct process under s245. In *Police v DS*, Judge John Walker held that where charging documents are nullities due to an unlawful arrest, it does not preclude the police from proceeding under s 245 of the Act. If at the end of the process the police decide to proceed by filing charging documents, this decision does not stand in the way of that happening. [47]

[77] Caselaw has also examined other considerations pursuant to the principles and purposes under the Act, such as the interests of the victim and the need to hold the young person accountable and have allowed for the withdrawal of charges.

[78] In *Police v IB*, Judge Lovell-Smith held that some of the reasons for leave being granted to withdraw the charges include the serious nature of the offending, and the need for the interests of the victim to be considered.[48] She also noted that any arguments regarding undue delay or abuse of process should not be explored before any new charges are laid.

[79] In *Police v MR*, Judge Fitzgerald discussed the different approaches taken by youth court judges since *Pomare*.[49] They can be summarised as follows:

(a) Cases where the charges have been dismissed pursuant to s 147;

(b) Cases where the Judge has indicated that it remains open to the Police to take the charges back through the s 245 process;

(c) Cases where Judges have granted leave for the charges to be withdrawn; and

(d) Cases where observations have been made that if a charge is invalid and a nullity, there is nothing for the Court to dismiss or grant leave to withdraw.

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47 *Police v DS* [2016] NZYC 444 at [37]–[38].
48 *Police v IB* [2018] DCR 574 at [37].
49 *Police v MR (No 1)*, above n 25 at [111]-[112].

[80] Judge Fitzgerald concluded that there is no jurisdiction to dismiss the charge under s 147 if it is a nullity.[50] He cited two HC authorities including *Thompson v R*, where Whata J stated in obiter that:[51]

> "… I would have also dismissed the s 147 application had I resolved that the charge was a nullity. If there is nothing to correct pursuant to s 379, there is nothing to dismiss pursuant to s 147.[52] Instead, I would have been minded to direct the Crown to withdraw the purported charge and relay it pursuant to the correct provision."

[81] I adopt the approach taken by Judge Fitzgerald and accept the prosecutions submission that it is a sound analysis.

[82] In [HJ]'s case, the charges of aggravated robbery and kidnapping are serious offences, being at the higher end of category 3 and carrying a maximum sentence of 14 years imprisonment.

[83] The police allege that [HJ] committed an aggravated robbery with [PS] and he prevented [Complainant 2] from leaving and seeking help by holding him at knifepoint while [PS] raped [Complainant 1]. I agree that the seriousness of the alleged offending lends to a higher degree of public interest in holding [HJ] accountable for the alleged offending and ensuring that rehabilitative measures are put in place so that he does not reoffend or find himself coming to the attention of the Police in the future.

[84] I accept that the breach was serious but not done in bad faith. As set out previously the police investigation was fluid and evolving that day and that there was nothing to suggest that [Constable A] intentionally acted in a way contrary to [HJ]'s wellbeing. However, it was clear from [Constable A] evidence that he was limited in his knowledge and obligations under the Act. This highlights the ongoing issue of the lack of training for all police officers in dealing with young people. The youth court is a specialist jurisdiction, with specialist lawyers, social workers and police youth aid officers however the reality is that when young people come to the attention of the police or offend, they are dealt with by front line police officers who are not trained to

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50 *Police v MR* (No 2) [2022] NZYC 109 at [8].
51 *Thompson v R* [2016] NZHC 2753 at [18].
52 CPA, s 379; no dismissal of charging document unless court is satisfied that there has been a miscarriage of justice.

deal with young people and are not fully aware or trained in their obligations under the Act.

[85] Along with the well-being and rights of the young person the youth justice purposes and principles include the interest of the victims, the need to hold the young person accountable and the public interests including the public safety. In the court's assessment allowing the prosecution to withdraw the charges and potentially re-lay them under s 245 of the Act would preserve the alleged victim's interests and promote [HJ]'s well-being by holding him accountable to his alleged offending in accordance with the purposes of the Act.[53] Withdrawal of the charges would also consider the public interest including the need to keep the public safe from serious offending.

[86] As such I invite the prosecution to seek leave of the Court to withdraw the charges of aggravated robbery and kidnapping.

[87] Any arguments regarding undue delay or abuse of process are not a matter to be considered in this decision but may be raised at a later stage if the police choose to lay new charges pursuant to s 245(1) of the Act.

_____
Judge O Cassidy
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 24/07/23

[53] Sections 4(1)(i) and 4A.