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**IN THE YOUTH COURT
AT WHANGAREI**

**CRI-2016-227-000011
[2016] NZYC 371**

THE POLICE
Prosecutor

v

MN
Young Person

Appearances: M Smith for the Crown
S Moala for the Young Person

Judgment: 16 June 2016

RESERVED JUDGMENT OF JUDGE S M R LINDSAY

[1] MN is charged with being an accessory after the fact of murder pursuant to s 176 Crimes Act 1961.

[2] The young person is charged together with [co-accused details deleted]. DP has entered not guilty pleas and elected trial by jury.

[3] On 5 May 2016, MN indicated the offence was not denied. Counsel for MN seeks to have the charge heard and determined in the Youth Court.

[4] The Crown opposes the application stating the presumption provided by s 277(5) of the Children, Young Persons and Their Families Act 1989 cannot be displaced by the defence. Mr Smith submits the young person should be tried with his adult co-accused in the High Court.

Legal principles

[5] Section 277 of the Children, Young Persons and Their Families Act 1989 governs the jurisdiction for trial where in this case MN is charged together with an adult.

277 Provisions applicable where child, young person, or adult jointly charged

- (1) If a child or young person is charged with any offence jointly with any other person or persons (whether 1 or more young persons, adults, or children), this section applies.
- (2) If a child is jointly charged with any other person or persons, and that child is not charged with murder or manslaughter or does not elect jury trial, that child must be tried in the Youth Court along with any co-defendants who are also not to have a jury trial.
- (3) If a child is jointly charged with any other person or persons, and that child is to have a jury trial, that child must be tried in the same court as any co-defendants who are also to have a jury trial.
- (4) Subsection (5) applies if a young person is jointly charged with any 1 or more of—
 - (a) an adult who is to have a jury trial; or
 - (b) another young person who is to have a jury trial; or

- (c) a child who is to have a jury trial.
- (5) Subject to subsections (2) and (3), the young person must be tried with the person or persons with whom he or she is jointly charged and who are to have a jury trial, and by the same court that is to try those persons unless the Youth Court, in the interests of justice, orders otherwise.
- (6) Subject to subsections (2) and (3), if an adult is jointly charged with 1 or more children or young persons, the following provisions apply:
 - (a) if any of the co-defendants is to have a jury trial, the adult must be tried with that person in the same court; and
 - (b) if none of the co-defendants is to have a jury trial, and the adult either does not or is not eligible to elect to be tried by a jury, the adult must be tried with the co-defendants in the Youth Court, unless the Youth Court, in the interests of justice, orders otherwise.
- (7) If none of subsections (2), (3), (5), and (6) applies, the persons charged must be tried in a Youth Court by a Youth Court Judge.
- (8) In any proceedings to which this section applies, the powers of any Youth Court Judge in respect of any defendant who is not a child or young person are limited to such powers as are exercisable by the Youth Court Judge as a District Court Judge elsewhere than in a Youth Court.
- (9) If any defendant, not being a child or young person, is convicted in a Youth Court,—
 - (a) any sentence imposed or order made must be one that could have been imposed or made if that defendant had been convicted following a trial in a District Court; and
 - (b) that defendant must for all purposes, including section 184 of the Criminal Procedure Act 2011, be deemed to have been convicted in a District Court.
- (10) If an adult is tried with a child or young person in the Youth Court under subsection (6)(b) or (7), the following apply in respect of the adult, with the necessary modifications:
 - (a) all applicable pre-trial processes under subparts 1 to 3 of Part 3 of the Criminal Procedure Act 2011; and
 - (b) sections 60 to 62(1), 62(3) to 65, and 116 of that Act (which relate to sentence indications).
- (11) This section is subject to sections 272A, 274, and 275.

[6] The application is opposed on the grounds that no reasons have been advanced to displace the assumption of a joint trial and that the statutory

presumption of a jury trial can only be displaced pursuant to section 277(5) should the Youth Court find it is, “In the interests of justice,” to do so.

[7] In the decision of *TM & DR v P* [2014] NZYC 306 Judge Lovell-Smith applied case law under the previous s 275 provisions as a useful guide to the Court in determining whether the interests of justice consideration is applicable. Judge Lovell-Smith found:

[9] The statutory presumption contained in s 277(5) is to be displaced only where it is “in the interests of justice” to do so. Counsel have submitted that when considering whether the interests of justice consideration embodied in s 277(5) of the Act is applicable, the case law developed under the old s 275 provisions may provide useful guidance. I agree that these factors continue to be relevant and are as follows:

- (a) The nature, seriousness and circumstances of the alleged offending and the young person’s alleged involvement.
- (b) The young person’s age.
- (c) Time left in the Youth Court for youth justice measures.
- (d) The young person’s personal and offending history, including previous contacts with Youth Aid, other law enforcement agencies, the Youth Court and other jurisdictions, and prior commitments to institutions.
- (e) The young person’s social and personal circumstances, including incapacity, disability, lack of maturity, etc.
- (f) The interests and views of any victims and impact of the offending on them.
- (g) The principle that a young person should be held accountable and accept responsibility for his or her behaviour.
- (h) Whether the Youth Court can offer a significantly earlier hearing date.
- (i) The interests of the young person in being dealt with under the rehabilitative provisions of the Act.
- (j) Other advantages of a Youth Court hearing compared with jury trials.
- (k) The desirability – for victims, witnesses and the alleged offender – of a joint hearing if the young person is charged with adults.
- (l) The prosecutor’s attitude.

- (m) Family and cultural aspects, which were considered important but not decisive.

[8] Counsel both made submissions as to the application of s 25(i) of the Bill of Rights Act 1990 and the need for a child (being under the age of 18 years) to be dealt with in a way that takes into account the age of that child.

[9] Both Counsel have made submissions on the United Nations Convention on the rights of the child. Having being ratified by New Zealand in 1993 it reinforces or strengthens the rights affirmed in the Bill of Rights Act.¹

[10] Likewise both Counsel made submission or reference to expert opinion evidence presented by Dr Chaplow in the case of *R v Churchwood* [2011] 25 CRNZ 446 [CA].

[11] Counsel for the young person urges the Court to follow the lead of higher Courts in the exercise of its discretion to place weight to MN's youthfulness and the impacting psychological and social influences that are powerful considerations, particularly so for this particular young person.

[12] In considering the various factors under the previous s 277 provisions the following are relevant to MN. Counsel have made submissions addressing the factors highlighted by Judge Lovell-Smith as provided guidelines to the Youth Court.

The nature, seriousness and circumstances of the alleged offending and the young person's alleged involvement

[13] The offence carries a maximum penalty of seven years' imprisonment.

[14] Counsel are at odds as to the perceived seriousness of the offending. Ms Moala argues the charge of accessory after the fact and the factual circumstances are not serious.

¹ Article 3 and Article 4 Uncroc

[15] Mr Smith argues otherwise. The position for the Crown is that together the young person and [co-accused details deleted] took steps to remove and destroy evidence being crucial to the police homicide investigation.

[16] In effect, it is alleged the steps taken by MN, together with [co-accused details deleted], were to assist DP and others to, “Get away with murder.”

[17] Counsel for MN argued the distinguishing factor between MN’s case and earlier decisions whereupon the young person has not retained Youth Court jurisdiction was MN’s alleged offending did not involve serious violence earlier decisions involved (those young people taking a central role in charges of violent offending).

[18] I am not convinced it is helpful to endeavour to distinguish the seriousness of this charge from other cases by identifying or focusing on violence as the key determinative factor. The charge before the Court does not lend easily to a comparative analysis. What can be said however is MN’s alleged actions lent support (post offending) to the most serious of violent offending and his actions, if proven, strike at the heart of justice. I say this because it is alleged MN’s actions involved the disposal of evidence fairly central to the homicide enquiry and the trial of adult defendants.

[19] This is no criticism of Counsel for MN but her submission was the allegations being MN destroyed items worn by the deceased however, this description does not go far enough. It is alleged MN destroyed an item that was used as a weapon in the death of the deceased victim.

The young person’s age

[20] MN is 16 [details deleted].

Time left for youth justice measures

[21] There are just on 12 months for Youth Court orders to be available to MN.

[22] If the matter was heard in the Youth Court there is a strong possibility that a Judge alone trial could be scheduled at some time late in 2016, so within the year period available for Youth Court orders. However, this reduced the time available for disposition of Youth Court orders.

The young person's personal and offending history, including previous contact with Youth Aid

[23] This is MN's first appearance in the Youth Court and he has no prior involvement with the Youth Court.

The young person's social and personal circumstances, including incapacity, disability, lack of maturity, etc

[24] MN's personal circumstances are sad and troubling. There can be no underestimating his difficult family and social circumstances. MN has experienced adversity from as young as 25 months of age when his mother passed away. MN was [details deleted] exposed to a gang culture. MN was sexually abused by his teacher and later as a young teenager attempted suicide. In 2015 MN lost his older sister to suicide. MN has been out of education since 2014. MN has been in a relationship with an adult woman and this high risk relationship has resulted in serious criminal charges.

[25] There is an undeniable force to the submission MN has been at risk and a victim of abuse. It is submitted MN's vulnerability is heightened. [Details deleted].

The views of the victim and impact of the offending on them

[26] The victim is survived by whānau. Although it is submitted that admissions by defence could be tendered, that would reduce the trial time, it still does not avoid the necessity for a second trial. A second trial process will inevitably delay closure and bring with it anxiety and grief.

[27] To an extent it is accepted that adjustments can be made in the High Court for a jury trial however, Ms Moala argues that such adjustments would extend the length of the trial adding to difficulties for MN. An extended trial, although onerous, is

likely to be a challenge of itself. For the victim's family and given the enormity of their loss, the prospect of facing two trials can only be viewed as an even greater burden.

The principle that a young person should be held accountable and accept responsibility for his or her offending

[28] It is accepted the Youth Court can consider pursuant to s 277(5) the availability of the Youth Court jurisdiction as opposed to the High Court.

[29] It is acknowledged the Youth Court may be able to offer an earlier hearing date than the High Court.

[30] Accountability can be rendered by either the Youth Court or the High Court.

The interest of the young person and being dealt with under the rehabilitative provisions of the Act

[31] Rehabilitation can be provided for in both jurisdictions.

Other advantages of a Youth Court hearing compared with jury trials

[32] I accept Mr Smith's submission that the High Court would most likely adjust the trial process to accommodate the young person and in doing so address the concerns raised by Ms Moala as to how well MN would cope sitting through a complete and lengthy trial.

[33] Ms Moala made the submission that if retained in the Youth Court the young person would not face a high end tariff. At this point I cannot commit to the likelihood of sentencing outcomes for the young person. This submission was made really to lend weight to Counsel's assessment the charge was not serious.

The Prosecutor's attitude

[34] The parties have diametrically opposed positions. The Crown supports the charge proceeds to the High Court but Counsel to MN strenuously resists the same.

The desirability for victim's, witnesses and alleged offender – of a joint hearing if the young person is charged with an adult

[35] Counsel make the submission to the effect the evidential process may be streamlined in such a way to condense the hearing time for MN's trial as distinct from the High Court trial.

[36] On behalf of the Crown it is submitted the reality of proving a charge of murder and despite concessions on the part of defence, the Crown must still call police and civilian witnesses.

[37] It is evident on the submission of Mr Smith the Crown would be required to call witnesses and there would be a duplication of a trial process. The call upon civilian witnesses within the context of a gang trial comes with complexity. Evidence would also be required to satisfy the telephone conversations between MN and [co-accused details deleted] on 19 February 2016 and 20 February 2016.

[38] A powerful consideration and in my view one that must be weighted towards a joint hearing is the number of witnesses common to both trials. The preliminary list of witnesses prepared indicates a total of just under 70 witnesses and of these there are 16 civilian witnesses. Perhaps an additional and complicating factor is that eight are likely to be subject to applications to the High Court for anonymity. The dynamic of the trial given the context of this offending is likely to place additional pressure on the scheduling of witnesses at trial. The availability and the large number of police staff does not of itself rule out complicated issues at trial for the Crown. Concessions on the part of the defence does not void the fact the Crown must establish the victim was murdered and then shall be a duplication of witnesses at two trials. Moreover it is alleged that MN took steps to dispose of the murder weapon, a central item at the High Court trial.

Conclusion

[39] The submission on behalf of MN is that his youthfulness and the fact it is alleged his role was less than others charged in relation to the events on the 31 December 2015 should sway the Court's decision in favour of Youth Court jurisdiction. Other significant considerations include MN's complex and troubling

social background. All of which may encourage MN to act against himself to protect [co-accused details deleted].

[40] It is not alleged MN was a central character in the murder of the victim. However, his actions lent support to those who are alleged to have murdered the victim. It is alleged MN disposed of material evidence including a murder weapon. It is alleged MN's actions were central to the disposition of this evidence.

[41] MN may not have been responsible for the death of the victim. However, it is alleged his actions go to the heart of attempting to frustrate the apprehension of those responsible for the death of the victim and to bring them to account. My view remains (as I explained at the submission hearing), the charge before the Court is serious.

[42] MN's young age and his complex personal circumstances are powerful factors but this submission of Mr Smith as to the complexity of two trials, the number of witnesses required and the effect on the deceased's family, victims of this offending, is an irresistible force.

[43] On review of the Youth Court file I do not believe Counsel has sought to apply to have MN's matters dealt within the Youth Court and to exercise his right to withdraw election at any time pursuant to s 276 of the Act. Leave is reserved for counsel to make such application.

[44] I am satisfied the interests of justice can be met with MN tried together with his adult defendants in the High Court. The application filed on behalf of MN is declined.

S M R Lindsay
Youth Court Judge