IN THE YOUTH COURT
AT MANUKAU

I TE KŌTI TAIOHI
KI MANUKAU

CRI-2018-092-000459
[2019] NZYC 27

NEW ZEALAND POLICE
Prosecutor

v

[KS]
Young Person

Hearing: 23 November 2018

Appearances: K Leys for the Young Person
Sergeant D Cooper for the Police
Ms E Alesana for the Ministry of Social Development

Judgment: 23 January 2019

RESERVED REASONS OF JUDGE P RECORDON

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[1] Ms Leys, Youth Advocate for [KS], made an application on 23 November 2018 for the Court to dismiss four charges. The basis for the application was the failure of Oranga Tamariki to comply with timeframes for convening and holding a family group conference (FGC) as stipulated by s 249(4)(b) and (6) of the Oranga Tamariki Act 1989 (the Act). After hearing the evidence and submissions from the parties, the application was declined with written reasons to follow.

Background

[2] [KS] appeared before the Court on Thursday 20 September 2018 for re-sentencing in respect of 13 charges which had previously been the subject of a supervision with activity order. Also before the Court at that date were four "new" charges in relation to which the current dismissal application was later made. [KS] first appeared for three of the new charges on 17 September 2018, subsequent to his arrest in relation to an incident on [date deleted] 2018. Those charges include one count of unlawfully taking a motor vehicle, one count of reckless driving and one count of failing to stop. The fourth new charge, a burglary dating back to [early] 2018, first came before the court on 13 September 2018.

[3] An FGC had been directed at the 17 September 2018 appearance, with note made of the fact that there was a view to [KS] going to the START [location deleted] programme. The conference took place on 19 September 2018. The record reflects that the participants agreed that the supervision with activity order on the 13 "old" charges should be revoked and a new order imposed to allow [KS] to complete the START [location deleted] programme. It was agreed that [KS] would remain at [a Youth Justice Residence], then be released on bail on his new charges to START [location deleted]. The conference agreed that [KS]'s matters were to be brought on as soon as possible for orders to be made to ensure he did not miss the forthcoming programme start date.

[4] In respect of the new matters, the record shows that the participants agreed that the conference was to be reconvened in order to give the victims notice to attend and to allow for consideration of reparation. It was accordingly agreed that the conference was to be reconvened after the young person had completed [number of weeks deleted]

at START [location deleted], beginning [date deleted] 2018, so on or about 15 October 2018.

[5] [KS] came before the Youth Court the following day on 20 September 2018. A supervision with activity order was made in respect of the charges for resentencing, placing [KS] in the START [location deleted] programme as agreed. The four charges subject of the current application were indicated as not denied. In accordance with s 246(b) of the Act, Judge Hikaka accordingly directed an FGC and adjourned proceedings until 30 October 2018.

[6] At the 30 October 2018 appearance, no steps had been taken to convene or hold the FGC and the issue of delay was raised. On 5 November 2018 counsel appeared and indicated that an application to dismiss would be filed based on non-compliance with the statutory timeframes. On 6 November 2018, Ms Leys received notification that the conference was due to be held on 20 November 2018. The conference was indeed held on 20 November 2018.

The Law

[7] Following a direction under s 246(b), s 247(d) of the Act requires the Youth Justice Co-ordinator to convene an FGC. Section (2) of the Act provides a definition of "convene" as follows:

> **convene**, in relation to a family group conference, means to take the appropriate steps under…sections 247 and 253…in order to cause the conference to meet;…

[8] Time limits for convening and holding an FGC are provided in s 249 of the Act. Section 249(4) provides that where a conference is convened pursuant to s 247(d), the conference is to be convened not later than 7 days after the FGC direction was given, where the young person is detained in custody. If the young person is not detained in custody, the conference must be convened within 14 days of the direction having been given. Section 249(6)(a) of the Act requires the conference to then be completed within seven days of being convened, unless there are special reasons why a longer period is required.

[9] The status of the time limits specified in s 249 and the effect of a breach of those limits was discussed in the leading High Court case of *Police v V,* as referred to in submissions.[1] Hansen J held that the time limits set out in s 249 are not mandatory. Rather, it was considered a question of fact and degree in each case whether non-compliance with the stipulated timeframes is sufficiently serious to justify dismissal.

[10] Such a determination, according to that decision, includes consideration of the extent of the delay, the reasons for the failure to comply with the timeframes and the consequences of non-compliance. Hansen J held that, if the cause and consequences of non-compliance ultimately involve an unacceptable intrusion into the rights of the young person, it will be appropriate to dismiss the charge.

Extent of delay

[11] Turning firstly to consider the extent of the delay in [KS]'s proceedings resulting from the failure to comply with s 249. There was some dispute around whether notice of the FGC direction made on 20 September 2018 was provided to the youth justice coordinator. Ms Heke's evidence is that the direction was not communicated to her. I don't consider this to be an issue requiring determination. The direction was made as noted in the Court record, so should have been communicated to the coordinator. Given the agreement at the conference on 19 September 2018 to reconvene on or about 15 October 2018, there was a known breach of the timeframes in any event.

[12] The conference directed on 20 September 2018 was required to be convened by 4 October 2018 and to be held by 11 October 2018.[2] As noted, the conference was not convened until 6 November 2018 and did not take place until 20 November 2018. Delay in excess of a month was accordingly incurred. Ms Leys referred to the 41 or 42 days that lapsed between the first conference and steps being taken to convene the second.

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[1] *Police v V* [2006] 25 FRNZ 852.
[2] Oranga Tamariki Act 1989, ss 249(4)(b) and (6).

[13] The time constraints provided by s 249 are consistent with the principle in s 5(f) which requires decisions to be made and implemented within a timeframe appropriate to the young person's sense of time. In that regard, Sergeant Cooper considered [KS]'s familiarity with Youth Court processes relevant to the assessment of the extent of the delay. Sergeant Cooper referred to [KS]'s history of offending and the fact that he has very recently been resentenced to a supervision with activity order, having breached a previous Court order.

[14] In the context of [KS]'s circumstances, I do not consider that the delay caused by the lack of compliance with the statutory time limits was of an unreasonable or inordinate extent.

Reasons for non-compliance

[15] As far as reasons for non-compliance are concerned, Ms Heke filed a notice of special reasons for delay dated 2 November 2018 offering a number of points by way of explanation for the delay in convening the FGC. Ms Heke filed a further memorandum, dated 19 November 2018, providing a detailed chronology and reasons for her failure to convene. This memorandum was entered into evidence at the hearing when Ms Heke was called as a witness. Essentially, it was Ms Heke's view that [KS] was doing well at START [location deleted] and there was no prejudice to him by delaying the conference to allow him to complete the programme without interruption. Ms Heke formed this view on the basis of information received from the young person's social worker. While Ms Heke did discuss the matter with [KS]'s mother, unfortunately counsel was not kept part of any discussion.

[16] Ms Leys submits that none of the reasons provided by Ms Heke explain her failure to convene the conference or to communicate with counsel. Ms Heke has conceded that she should have consulted with the entitled participants and adjourned the conference by filing an 854 form. In Ms Leys view, appearance of the young person at the conference via audio-visual link from [location deleted] was an option. Ms Heke confirmed in evidence that this would have been technically feasible, but nevertheless referred to the obvious benefits of a young person appearing in person in terms of

providing a more meaningful restorative experience. Notably Ms Heke placed significant weight on this, given her knowledge that the victim wished to meet [KS].

[17] In *Police v V*, Hansen J noted that "negligence or gross inefficiency on the part of the youth justice coordinator may call for a condign response".[3] In this case, I am satisfied that neither was the case. Whilst it is unfortunate that the appropriate process was not followed to adjourn the conference, in my view, incompliance was ultimately a result of human error as opposed to negligence or gross inefficiency.

[18] As both Sergeant Cooper and Ms Alesana highlighted, Ms Heke had the young person's best interests at the forefront of her decision making and acted in accordance with her view of the "bigger picture" for [KS].

Consequences of non-compliance

[19] Finally, and most importantly, consideration must turn to the consequences of non-compliance. Ms Leys did not point to any particular detriment suffered by the young person. Sergeant Cooper and Ms Alesana highlighted that, by the time of the hearing, the conference had been completed without issue. It was Sergeant Cooper's submission that the errors were essentially administrative and no notable prejudice was caused.

[20] The seriousness of the offending and personal circumstances of the offender have been considered relevant to the assessment of the consequences of non-compliance, with greater latitude afforded in cases of repeat serious offending.[4] [KS] faces four charges: burglary, reckless driving, unlawfully taking a motor vehicle and failing to stop. As noted, he has a relatively lengthy history of similar offending and has recently been resentenced having breached a previous Youth Court order.

Conclusion

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[3] *Police v V*, above n 1, at [25].
[4] *Police v V*, above n 1, at [26].

[21] Ultimately, I consider there was clearly a breach of the timeframes set out in the Act. I do not consider that the special reasons provided by Ms Heke are such as to render the delay compliant with the Act. In the absence of such special reasons, the noncompliance may nevertheless be excused if deemed appropriate in light of the extent of the delay caused, the reasons for the failure to comply and the consequences arising from it. In *Police v V*, Hansen J noted that if strict compliance with time limits is insisted on in every case, the young person, their whanau, victim and the community may be denied the interventions available under the Act.[5] I consider the failure to comply with the stipulated timeframes and consequent delay in this case to have been unfortunate, but not altogether unjustified. Ultimately the lack of compliance has had limited prejudicial effect for the young person and does not therefore call for dismissal of the charges.

P Recordon
Youth Court Judge

[5] *Police v V*, above n 1, at [19].