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**IN THE YOUTH COURT
AT PORIRUA**

**CRI-2016-291-000010
[2016] NZYC 444**

NEW ZEALAND POLICE
Prosecutor

v

DS
Young Person

Hearing: 2 June 2016

Appearances: I S Auld for Police
C Smith for Young Person

Judgment: 27 June 2016

RESERVED JUDGMENT OF JUDGE JOHN WALKER

[1] There are two ways by which a charge may be validly brought before the Youth Court. The first is by way of the procedure in s 245 of the Children, Young Persons, and Their Families Act 1989, through consultation and following an Intention to Charge Family Group Conference. The second is by way of an arrest of the young person.

[2] There are restrictions on the right to arrest a young person and non compliance with the restrictions means that the arrest is not lawful and a subsequent charging document is a nullity. There is nothing validly before the court.¹

[3] In this case the Young Person, DS, has been arrested and the issue for me to decide is whether the arrest was lawful.

[4] DS faces charges of sexual offending against his 6-year old [relationship deleted]. The offending alleged is rape and unlawful sexual connection.

[5] On 21 March 2016 he was arrested on a single charge of sexual violation by unlawful sexual connection. He was brought before the Youth Court on 22 March 2016. Following this first appearance, further charging documents were filed, charging him with other offending against his [relationship deleted].

[6] The starting point is s 214 of the Act which restricts the power of arrest of a young person without warrant. Section 214 provides:

214 Arrest of child or young person without warrant

(1) Subject to section 214A and 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—

(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

¹ Pomare v Police (12/3/02 High Court Whangarei AP8/02 Harrison J

(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

(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—

(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.

(3) Every enforcement officer who arrests a child or young person without warrant shall, within 3 days of making the arrest, furnish a written report—

(a) where that enforcement officer is a constable, to the Commissioner of Police;

(b) where that enforcement officer is a traffic officer who is a Police employee who is not a constable, to the Commissioner of Police;

(c) where that enforcement officer is an officer or employee of the Public Service, to the chief executive of the department of which that person is an officer or employee;

(d) where that enforcement officer is an officer of a local authority, to the chief executive of that local authority.

(4) Every report furnished pursuant to subsection (3) in respect of the arrest of any child or young person shall state the reason why the child or young person was arrested without warrant.

[7] The reason for such a restriction on arrest is that by bringing a young person to the Youth Court by way of arrest, the very important steps that would otherwise be required before a young person could be brought before a Court, and which underpin the youth justice procedure, are avoided.

[8] Section 245 of the Act requires that before a young person can be brought to court proceedings be in the public interest and that there be consultation and that there be a family group conference. Section 245 is in the following terms:

245 Proceedings not to be instituted against young person unless youth justice co-ordinator consulted and family group conference held

(1) Where a young person is alleged to have committed an offence, and the offence is such that if the young person is charged he or she will be required pursuant to section 272 to be brought before a Youth Court then, unless the young person has been arrested, no charging document in respect of that offence may be filed unless—

(a) the person intending to commence the proceedings believes that the institution of criminal proceedings against the young person for that offence is required in the public interest; and

(b) consultation in relation to the matter has taken place between—

(i) the person intending to commence the proceedings or another person acting on that person's behalf; and

(ii) a youth justice co-ordinator; and

(c) the matter has been considered by a family group conference convened under this Part.

(2) Notwithstanding anything in subparagraph (i) of paragraph (b) of subsection (1), where the person intending to commence the proceedings is not an enforcement officer, the consultation required by that paragraph shall be consultation between a youth justice co-ordinator and an enforcement officer authorised in that behalf by the person intending to commence the proceedings.

[9] All three of the pre-requisites in s 245 must be satisfied before a charging document can be filed in Court. If that does not happen, the only other way a charging document can be properly before the Court is if the young person has been arrested.

[10] The processes under s 245 are of critical importance to the Youth Justice process. A recognised strength of the New Zealand process is that young people are diverted from formal court proceedings wherever possible and alternatives are explored to deliver accountability and intervention. The restrictions on avoiding this process reflect the importance attached to alternative action, and generally that court proceedings are to be a last resort rather than the usual outcome of apprehension for an offence.

[11] It is for this reason that when a young person is brought to the Youth Court by way of arrest there should always be careful scrutiny of the decision to arrest by

Youth Aid Prosecutors, Youth Advocates and Judges to ensure that the necessary processes are upheld.

[12] The first issue is whether the arresting officer, Detective Mercer, was satisfied on reasonable grounds that the arrest of DS was necessary to ensure his appearance before the Court or to prevent him from committing further offences, or to prevent the loss or destruction of evidence or interference with witnesses.

[13] On 10 March 2016, DS's [relationship deleted] had disclosed to her mother and a neighbour that DS had been sexually abusing her over a period of about a year between April 2015 and March 2016. DS's mother, Mrs MS, had contacted Child Youth and Family and the police had become involved.

[14] Mrs MS had discussed the allegations with DS and he denied that he had sexually abused his [relationship deleted]. He was not aware, before his arrest, that the matter had been discussed beyond the family with Child Youth and Family and the police.

[15] On 21 March 2016 DS's [relationship deleted] was interviewed and she detailed her disclosure. She alleged a course of sexual abuse which included [details deleted].

[16] Following the interview, Detective Mercer discussed the case with Detective Munro and Detective Sergeant Warren.

[17] Detective Mercer, in his formal written statement, says at paragraphs 10 – 16

10. Several factors were considered at this stage, and they included:

11. The child victim made significant disclosures of very serious offending (rape, unlawful sexual connection) by her 14yr old [relationship deleted].

12. DS and the victim were actively being kept separate by their parents (different households) however DS's access to other children was not restricted.

13. While the offending was against his younger [relationship deleted], in the family home, DS's potential risk to the public was not known. There had been no psychological assessment to date.

14. DS was likely to find out that the victim, and his mother and father had been speaking to authorities. This was likely to be an overwhelming revelation with major ramifications for the future of the family unit and his own life. We considered it a strong possibility that he would take flight in an effort to avoid confronting the issue or might harm himself.

15. The concern about him harming himself was reinforced by the information from CYFS about the family history of self-harm.

16. The victim had described [details deleted]. If DS had been allowed to remain at the scene, with the knowledge that Police were involved, he would have had the opportunity to destroy that evidence.

[18] And at paragraph 17 he says:

It was decided that immediate action was necessary to locate, and speak to DS about the offending. He was to be arrested for the offending and placed before the Court.

[19] In Detective Warren's notebook record, she has recorded the following:

Discuss risks of waiting until tomorrow to deal with offender. Agree due to seriousness of offending offender required to be spoken to today.

Mrs MS advises moc's [mother of complainant] concerns that once confronted, offender will "leg it" and she fears he might try to 1x [commit suicide]- [Details deleted].

Task Dets Munro and Mercer to travel to the foc's [father of complainant] address to locate, interview, arrest and charge offender.

Offender to be held overnight at WN central hub for Porirua Youth Court tomorrow.

[20] Detective Mercer was the person effecting the arrest, so it was he who had to be satisfied under s 214. It seems from the notebook entry that it was Detective Sergeant Warren who directed that the arrest take place. She records "*task Detectives Munro and Mercer to travel to the father of complainant's address to locate, interview, arrest and charge offender*".

[21] On this basis Detective Mercer was following the direction of his superior officer and it is not apparent from the notebook that he made any independent assessment of the reasons for the arrest, as he was required to do, as the arresting officer.

[22] Detective Mercer was required under s 214(3)(a) to furnish a written report to the Commissioner of Police stating his reasons why the young person had been arrested. This report is required to be furnished within three days of the arrest. Detective Mercer, however, did not do so until 19 April 2016. This was completed after the Youth Advocate had indicated in Court that the validity of the arrest was to be questioned. This notification was given in Court on 7 April 2016.

[23] There is no explanation for the late completion of the report, but it does give rise to an inference that the restrictions under s 214 were not considered by Detective Mercer, or any of the other detectives considering the case after the formal interview of the complainant. The report, not surprisingly when the detective had at least by then had s 214 in focus, reflects the requirement of s 214 and addresses the requirements in the order in which they appear in the section. This gives rise to a concern that the belated completion of the report has been influenced by after the fact reasoning while addressing the specific requirements of the section.

[24] I do not consider that I can place reliance on the report as truly reflecting what was in Detective Mercer's mind at the time of the arrest. A contemporary record would obviously carry more weight.

[25] I return to what was known to Detective Mercer at the time the decision to arrest was made and determine whether he could have been satisfied on reasonable grounds of any of the preconditions in s 214.

Arrest necessary to ensure appearance before the Court?

[26] Detective Mercer spoke to Mrs MS. He learned that she was worried about DS harming himself when he found out that the police were involved and worried about him running away from the police and his family. He had previously run away from his father's home. Detective Mercer had information from the Child Youth and Family social worker that the wider family had a history of suicide and suicide attempts. It is only the risk of not appearing in Court that could be a basis for an arrest. The risk of suicide and self harm, which is about the safety of DS and his interests, is not a justification under s 214(1)(a)(i). In any event the risk of suicide or

self harm, without any real assessment of this risk in relation to DS, would have to be regarded as speculative.

[27] It should be noted that the impact of arrest, and being held in the Wellington Central police station cells overnight, could be expected to be very traumatic for a 14-year old and, if there was truly a risk of self harm, such an event might have been considered to increase the risk rather than reduce it. I note that DS was expected by the police to be released the next morning on bail when he was brought before the Youth Court. The risk of self harm, if it existed, was going to continue regardless of any bail conditions.

[28] It seems unlikely that a 14-year old in DS's circumstances could avoid attending Court in due course if the alternative to arrest had been followed. There was no real risk of him avoiding appearing in court.

[29] I do not consider that there were reasonable grounds for Detective Mercer to be satisfied that an arrest was necessary to ensure DS's attendance at Court.

Arrest necessary to prevent further offending?

[30] The only information the police had related to offending by DS against his [relationship deleted]. There was no basis for Detective Mercer to be satisfied that there was a risk of further offending against her. Following the initial disclosure to Mrs MS, DS and his [relationship deleted] had not been permitted to have any contact without direct adult supervision. The risk of any offending against her by DS was being properly managed within the family. Having regard to the steps which the family had already taken to ensure the complainant's safety there was no real risk of further offending against her. There was no basis for the detective to be satisfied that there was a risk of DS offending against others.

Arrest necessary to prevent loss or destruction of evidence?

[31] The disclosure by the complainant that [details deleted] might be found at Mrs MS's home but the question is whether an arrest of DS was necessary to avoid such evidence being removed by him.

[32] DS was living with his father at a separate address. There was nothing to prevent the police carrying out a search of Mrs MS's house following the disclosure by the complainant. That interview was completed at 1.00pm on 21 March 2016. There was co-operation from Mrs MS and Detective Warren notes discussing with Mrs MS securing the scene at her home address, in particular DS's bedroom and his [relationship deleted]'s bedroom. Any search could have been carried out with her consent either DS was spoken to or while he was being spoken to by police.

[33] There could be no reasonable grounds for Detective Mercer to be satisfied that an arrest of DS was necessary for the purpose of securing any evidence that might be at his mother's home.

[34] I do not consider that there were reasonable grounds for the detective to be satisfied that any of the preconditions for arrest under s 214(1) existed in this case.

[35] I turn to consider the available justification for an arrest under s 214(2) which applies because the offence here alleged is a category 3 offence, carrying a maximum sentence of 20 years imprisonment.

[36] There does not appear to me to be any basis for the arresting officer to believe that the arrest was necessary in the public interest. In his report to the Commissioner, Detective Mercer says:

It was in the interest of the public to arrest and ensure Court bail conditions to protect the public.

There was no basis for Detective Mercer to believe that DS posed any risk to the general public.

[37] In my view none of the preconditions for arrest existed and the arrest was unlawful. As a result of the unlawful arrest, the charging documents cannot be before the Court without there having been compliance with s 245 of the Act.

[38] The charging documents are nullities but this does not preclude the police proceeding under s 245 of the Act. If at the end of that process the police decide to proceed by filing charging documents, this decision does not stand in the way of that happening. It may well be of course, that the process under s 245 results in alternative action avoiding the matter coming to Court.

John Walker
Youth Court Judge