IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC 1/2024

IN THE MATTER OF	An Appeal Hearing
BETWEEN	**H**
	Appellant
AND	**THE KING**
	Respondent

APPELLANT'S SUBMISSIONS ON APPEALS AGAINST CONVICTION AND REFUSAL TO GRANT PERMANENT NAME SUPPRESSION

DATED: TUESDAY, 7 JULY 2024

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COUNSEL FOR THE APPELLANT CERTIFIES TO THE BEST OF THEIR KNOWLEDGE THAT THIS SUBMISSION CONTAINS NO SUPPRESSED INFORMATION AND IS SUITABLE FOR PUBLICATION

APPELLANT'S SUBMISSIONS ON APPEALS AGAINST CONVICTION AND REFUSAL TO GRANT PERMANENT NAME SUPPRESSION

MAY IT PLEASE THE COURT, Counsel for the Appellant respectfully submits:

1. INTRODUCTION

1.1 The issue in this appeal is how the District and High Courts should approach sentencing and name suppression of young people, or adults who offended when a young person, once transferred out of the Youth Court or when the charges they face can no longer be resolved there. In this case the young person's case was removed through the actions of the Crown for reasons that proved unjustified.

1.2 H was involved in a fight in June 2021 which left one person dead. H was initially charged with injuring with intent to cause grievous bodily harm. As he was only 17 years of age at the time, his charge proceeded in the Youth Court. Six months later, however, he was charged with murder and his proceedings were transferred to the High Court. He later pleaded guilty to a reduced charge of injuring with intent to injure and successfully defended the charge of murder at trial.

1.3 When he appeared for sentence on the injuring charge, H sought to be discharged without conviction and permanent name suppression. He did so because that would have been the outcome in the Youth Court, which is where his proceedings were to have remained had the unsuccessful murder charge never been filed. While acknowledging the force in that submission, Brewer J declined both applications. He convicted H and refused him permanent name suppression. Those outcomes survived an appeal to the Court of Appeal, albeit the Court was split when it came to the discharge without conviction.

1.4 This Court granted leave to appeal, the approved question being whether the Court of Appeal was correct to dismiss the appeals.

Summary of argument

1.5 Brewer J should have determined H's applications as they would have been determined in the Youth Court. That is what parity with like offenders required. This was not a case in which the offending was too serious to be dealt with in the Youth Court; rather, it was a case in which the offending would never have left the Youth Court had it stood alone.

1.6 The same should apply to a person belatedly charged with offending that would be resolved in the Youth Court but solely as a result of the delay in charging meant that the Youth Court no longer held jurisdiction.

1.7 Indeed, if Brewer J could not sentence as above, once H had been found not guilty of murder at trial, Brewer J could even have transferred him back to the Youth Court under s 276A of the Oranga Tamariki Act 1989. Had that occurred, H would almost certainly have been discharged without notation and had his name permanently suppressed.

2. BACKGROUND

The charges and how they progressed

2.1 As noted, H was only 17 years of age at the time of the offending. He was accordingly subject to the Youth Court jurisdiction,[1] and that is where he made his first appearance when charged with injuring with intent to cause grievous bodily harm. At an early stage, the Crown filed notices under s 138 of the Criminal Procedure Act 2011 in both the Youth Court and High Court signalling its intention that the proceedings against H and others charged be joined. In the Youth Court, Judge King dismissed the notice as ultra vires. He did so in reliance on the following passages from a judgment delivered by Gordon J:[2]

> [70] The Crown is … seeking to read into s 138 a bridge between two different courts of distinct jurisdiction. I do not consider such a bridge exists.
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> …
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> [73] … s 138 does not, in and of itself, confer the power to transfer charges and proceedings between different courts. If such a power exists elsewhere, then a s 138 application can be considered in this context, and having determined that joinder is appropriate, a judge may order the relevant charges be transferred.
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> [74] Rather, this Court is barred from considering joinder of a charge from youth Court as a matter of jurisdiction. Section 138 alone confers no such jurisdiciton.

2.2 The Crown then wrote to the High Court to advise it did not seek joinder at that time but retained the view that, should both proceedings go to trial, they should be heard together in the High Court. Counsel for H wrote to the High Court in response, signalling his disagreement. He suggested there was a lack of jurisdiction

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[1] Oranga Tamariki Act 1989, s 2(2).
[2] *R v Ward* [2018] NZHC 1861 (This is the citation Judge King gave, although counsel has not been able to locate a copy of the judgment.)

to join the proceedings and that, in any event, H's proceedings were best dealt with in the Youth Court. For his part, Brewer J simply observed that there appeared "to be no statutory basis for the giving of the s 138 notice".

2.3 Joinder having been refused at that stage, the charge against H proceeded through various administrative and other hearings in the Youth Court. After some six months, though, the police charged H as a party to murder. Although H was by that stage 18 years of age, he made his first appearance or two in the Youth Court because he was only 17 years of age at the time of the offending. In accordance with s 275 of the Oranga Tamariki Act 1989, the proceedings were then transferred to the High Court.

2.4 Shortly before trial the Crown reduced the charge of injuring with intent to cause grievous bodily harm to one of injuring with intent to injure. The accompanying summary of facts alleged that H had kicked the victim once to the upper torso as he lay on the ground but did not identify what, if any, injury was caused. H accepted the summary and pleaded guilty to the charge, and successfully defended the murder charge at trial.

The High Court and Court of Appeal

2.5 At sentencing, before the Judge that took the plea and presided over the defended trial, H – by then 19 years of age – sought to be discharged without conviction and permanent name suppression. He did so because that is what would have occurred had the charge remained in the Youth Court. Brewer J recorded – and acknowledged – the logic behind the argument as follows:

> [45] Your lawyer points out that the only reason why you were not dealt with in the Youth Court for this offence was because you were also charged with being a party to the murder … However, you were found not guilty of the murder. Your lawyer submits, and I accept, that I should consider your case in accordance with the principles of youth justice as applied by the Youth Court.
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> …
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> [60] … I accept it must be influential that had you stayed in the Youth Court you would have permanent name suppression and that the reason you were tried in this jurisdiction did not result in a conviction that was not within the jurisdiction of the Youth Court.

2.6 Despite that acknowledgment, Brewer J declined both applications. Although he considered the overall gravity of H's offending to be low, he saw the consequences of a conviction as being no more than those that generally accompany a conviction,

and thought they were in any event softened by the fact that H had settled employment as an apprentice builder. As for name suppression, his Honour considered the adverse effects that notoriety might have on H fell short of extreme hardship.

2.7 H appealed both aspects of Brewer J's decision, running essentially the same argument he had in the High Court. The Court of Appeal was unanimous in upholding the refusal to grant H permanent name suppression, but split as to whether he should have been discharged without conviction, with the majority largely agreeing with Brewer J's analysis. Only the majority engaged with the argument that underpinned H's submissions, rejecting it essentially in the following terms:

> [35] The concept of parity is well understood in the context of the sentencing of co-offenders through the application of the principle in s 8(e) of the Sentencing Act 2002, relating to the general desirability of consistency. Mr Mansfield's proposition is a different one, directed to the equivalent treatment of an individual offender in different jurisdictions. His contention that the sentencing outcome for a young person must necessarily be the same irrespective of the sentencing venue is not consistent with well-established authority in this Court. Hence we are not able to accept his proposition.
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> [36] In *Pouwhare v R* this Court addressed the question of law whether, when a young person is transferred by the Youth Court to the District Court or High Court for sentence, youth justice principles under the OTA, as well as the principles in the Sentencing Act, must be taken into account by the sentencing judge. This Court agreed that in whichever court a young person appears for sentence it will always be relevant, and sometimes may be decisive, that they lack the maturity of an adult and are decidedly more vulnerable and impulsive. However, the Court was unable to accept that justice to young persons would be rendered incoherent unless all courts sentencing young persons were obliged to take account of the youth justice principles in s 208 of the OTA.

3. SUBMISSIONS

3.1 The submissions below are split into three sections. The first argues that, when determining H's applications, Brewer J and the Court of Appeal should have been guided by how they would have been determined in the Youth Court. The second applies that approach to the facts of the case. The third explores whether Brewer J could even have transferred H's proceedings back to the Youth Court for disposition.

3.2 Before getting into those sections, though, it is worth recapping some of the key provisions and principles when it comes to young people and the criminal justice system.[3]

3.3 Beginning with the New Zealand Bill of Rights Act 1990, s 25(i) affords every child charged with a criminal offence "the right … to be dealt with in a manner that takes account of [their] age." Next there is s 5(1)(b) of the Oranga Tamariki Act, which requires any exercise of power under the Act to be guided by the child or young person's well-being and to respect and uphold their rights under the United Nations Convention on the Rights of the Child. Among those rights are the rights, if charged with a criminal offence:[4]

> to be treated in a manner consistent with the promotion of the child's sense of dignity and worth … and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
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> …
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> To have his or her privacy fully respected at all stages of the proceedings.

3.4 As this Court observed recently in *M v R*,[5] provisions of this sort are "are underpinned by recognition of the importance attached to promoting the rehabilitation of child offenders and their reintegration into society."[6] The Court went on (footnotes omitted):[7]

> [61] Expert evidence, albeit discussed in the sentencing context, also supports the need for special care for the protection of children. This Court in *H v R* endorsed the various matters referred to by the Court of Appeal in *Churchward v R* in relation to sentencing. The passage cited by the Court in *H*, reflecting the discussion in Churchward, canvassed several matters including that:
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> (a) there are age-related neurological differences between young people and adults and young people may be more impulsive;

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[3] See this Court's recent discussion and summary in *M v R* [2024] NZSC 29 at [54]-[66].
[4] United Nations Convention on the Rights of the Child, Arts 40(1) and 40(2)(vii). The General Comment to the latter right observes that "the right to privacy also means that the court files and records of children … should be kept strictly confidential and closed to third parties except for those directly involved in the investigation and adjudication of, and the ruling on, the case."
[5] *M v R* [2024] NZSC 29.
[6] *M* at [60].
[7] Citing *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 and *H v R* [2019] NZSC 69, [2019] 1 NZLR 675.

(b) young people have a greater capacity for rehabilitation, especially because the character of a juvenile is not as well formed as that of an adult; and

(c) offending by a young person is often a phase which passes fairly rapidly, which means a well-balanced reaction is necessary to avoid alienating the young person from society.

[62] The Court of Appeal in *Churchward* also referred to research suggesting that during the development process the adolescent brain is affected by psychosocial, emotional and other external influences which can contribute to immature judgements.

[63] The factors discussed in *H* and *Churchward* also provide the reasons why there may be greater hope of rehabilitation in relation to a child offender, and so greater likelihood of reintegration into society.

[64] Drawing these threads together, the various obligations to which New Zealand is committed recognise the desirability of rehabilitation and reintegration of young offenders. Those obligations, and what we know from the expert evidence relating to youth offending, support a requirement to treat the interests of youth as a primary consideration in name suppression decisions.

Too little weight on what would have occurred in the Youth Court

3.5 Absent the ability to transfer H back to the Youth Court, Brewer J and the Court of Appeal should have placed more – indeed decisive – weight on how they would have been determined in the Youth Court.

3.6 As the majority pointed out when rejecting this argument, there is a reasonably settled body of case law to the effect that, when a young person who has been transferred out of the Youth Court appears for sentence in an adult court, sentencing proceeds in the orthodox fashion under the Sentencing Act 2002. But that body of case law – of which *Pouwhare v R*[8] is the most commonly cited authority – generally concerns sentencing for offending that was either too serious to be dealt with adequately in the Youth Court or sentencing of offenders who have outgrown it.[9] The present case is different.

3.7 By the time H appeared for sentence, the charge that had prompted his transfer out of the Youth Court was no longer live. Instead, Brewer J was sentencing him on a much less serious charge, which was never going to attract anything in the way of a sentence and would not have been transferred out of the Youth Court had it stood alone. In circumstances like this, the Court of Appeal and High Court have

[8] *Pouwhare v R* [201] NZCA 268, (2010) CRNZ 868.
[9] In *Pouwhare*, for example, the offending was deemed too serious to be dealt with in the Youth Court.

acknowledged the fairness in treating the young person as he or she would have been treated in the Youth Court.

3.8 *R v S* is an example.[10] The defendant there was 14 years of age when charged with rape.[11] He elected jury trial and was transferred out of the Youth Court.[12] On reviewing the evidence, the Crown decided the rape charge could not be supported and accepted a guilty plea to unlawful sexual connection.[13] At sentencing, the Judge acknowledged that, had unlawful sexual connection been the charge all along, the matter would have remained in the Youth Court.[14] He then endeavoured to sentence the defendant accordingly, ordering him to come up if called upon and suppressing his name.[15]

3.9 The defendant appealed his conviction on jurisdictional grounds and his sentence. In dismissing the conviction appeal and seguing into the sentence one, the Court of Appeal observed:[16]

> [18] We have held that the High Court possessed jurisdiction to deal with the second count. That includes all aspects of it, including sentence, as to which it was the Judge's responsibility to apply the relevant provisions of the Crimes Act and the Criminal Justice Act. There is no procedure for the High Court to refer a matter of which it is seized back to the Youth Court for the exercise of its specialist procedures.
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> [19] It is nevertheless relevant to the proper exercise of the High Court's sentencing discretion to take into account how the matter would have been dealt with if retained in the Youth Court. In *R v C* (CA 332/95, 28 September 1995) this Court followed its earlier decision of the same name:
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> > … *R v C* (CA 312/91, 17 December 1991), where a sentence of 2 years imprisonment for arson imposed on a 14 year old was quashed and a sentence of two years supervision with conditions was substituted. While strictly the provisions of the Children, Young Persons and Their Families Act 1989 ceases to be applicable following transfer of the case to the High Court the principles underlying particular sections normally should underly consideration of any sentence in respect of a young offender.

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[10] *R v S* CA284/02, 234/02, 31 October 2002.
[11] *S* at [6].
[12] *S* at [6].
[13] *S* at [7].
[14] *S* at [16].
[15] *S* at [17].
[16] *S* at [18]-[19].

3.10 Because this principle was not brought to the sentencing Judge's attention, the Court of Appeal re-sentenced the defendant. When doing so, it discharged him without conviction.

3.11 *R v Q* is another example.[17] There, Winkelmann J (as she was at the time) considered applications for a discharge without conviction and permanent name suppression made by a young person who originally faced a charge of manslaughter but ultimately pleaded guilty to one of assault.[18] Her Honour began by noting the parties' submissions about the relevance of what would have occurred had the charge proceeded in the Youth Court:[19]

> [23] [Mr Mansfield] observes that had Stephen's condition come to light before you were charged with manslaughter, your case would have proceeded through the Youth Court. There, youth justice principles would have been applied, you would not have received a conviction for your offending and likely would have been discharged. Mr Mansfield submits this is relevant in assessing issues of the consequences of the entering of a conviction in this Court…
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> …
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> [25] … [T]he Crown accepts that although the sentencing provisions of the Children, Young Persons, and Their Families Act do not apply, the youth justice principles that underlie that legislative scheme are available to me in sentencing you. They also accept that how you would have been dealt with in the Youth Court is a relevant consideration for me.
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> …
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> [40] The Crown accepts that the fact that the Youth Court would have automatically granted name suppression to you is an implicit acknowledgement of the degree of hardship a young person in your circumstances would suffer, as opposed to an adult. Again, it can be said that the Crown acknowledges the force of the submissions of your counsel in that regard…

3.12 Winkelmann J then granted both applications, the submissions just cited featuring in her reasons for doing so:[20]

> [17] … But because of your age I may also take into account the youth justice principles underlying the youth justice provisions of the Children, Young Persons, and Their Families Act.1 In this case I propose to do so. Were it not for the fact that you were initially charged with manslaughter you would be being dealt with on this charge through

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[17] *R v Q* [2014] NZHC 550.
[18] *Q* at [1] and [17].
[19] *Q* at [23], [25], [40].
[20] *Q* at [17], [33], [35], [41]-[42].

> the Youth Court justice system where youth justice principles would be applied…
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> …
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> [33] I also consider that it is a material consideration that if you were being dealt with before the Youth Court, as your counsel submits you would almost certainly be discharged on this charge, following a Family Court Conference. …
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> …
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> [41] Consideration of the issue of name suppression must begin with the fact that had you initially been charged with assault you would have had the benefit of automatic name suppression by virtue of the provisions of the Children, Young Persons, and Their Families Act. …
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> [42] Both your counsel and the Crown submit that the fact that the Youth Court would have automatically granted name suppression is an implicit acknowledgment of the degree of hardship a young person will suffer as opposed to an adult if your name is to be published and I accept this submission. …

3.13 This approach, which prioritises how young people would have been treated in the Youth Court if the reason for their transfer out of that Court falls away, seems to have motivated recent amendments to the Oranga Tamariki Act, in particular the passage of s 276A.[21] That section (on which more in the final part of these submissions) requires that young people be transferred back to the Youth Court in such circumstances.[22] The general concern appears to be to ensure young people are, whenever possible, dealt with in the jurisdiction designed specifically for them. Insofar as any young people fall through the cracks and find themselves "stuck" in adult courts,[23] judges should try to replicate as far as possible how they would have been dealt with in the Youth Court.

3.14 There is a certain fairness and logic to this approach. The Oranga Tamariki Act represents Parliament's considered view about how best to deal with young people, who present with a unique combination of needs and challenges.[24] There is an obvious focus on reintegration, rehabilitation, and second chances.[25] Convictions

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[21] This section was introduced on 1 July 2019 by s 116 of the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017 (2017 No 31).
[22] Albeit other pre-requisites have to be met as well.
[23] As might occur if the approach favoured by the Crown and the majority in the Court of Appeal to the relevance of H's turning 19 years of age to the Youth Court's jurisdiction is correct. This is discussed further in the final part of the submissions.
[24] Canvassed extensively in such cases as: *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446; *Dickey v R* [2023] NZCA 2; *H v R* [2019] NZSC 69, [2019] 1 NZLR 675; and *M v R* [2024] NZSC 29.
[25] Oranga Tamariki Act, ss 4, 4A, 5, and 208; *Pouwhare* at [76].

and publication are anathema as they are seen as barriers to those ends.[26] Considerations of that sort should not be diluted when a young person, through happenstance rather than by design, ends up in an adult court. They can and should heavily inform that court's assessment of the least restrictive appropriate sentence[27] or the hardship that will accompany publication.[28]

3.15 Indeed, as far as sentencing goes, this approach is required under s 8(e) of the Sentencing Act 2002, which says that courts must, when sentencing, "take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances."[29] The disposition options in the Oranga Tamariki Act reflect Parliament's view as to the "appropriate sentencing levels" for offending that would usually be dealt with in the Youth Court. They also represent "other means of dealing with … similar offenders committing similar offences". As such, they are a mandatory consideration. For the reasons given above and below, they should also be a guiding one.

3.16 If this approach is eschewed and the Sentencing Act and publication sections of the Criminal Procedure Act are applied in their usual way, reasoning and outcomes get turned on their heads. This is because the Youth Court and adult courts approach matters from completely different perspectives. Whereas convictions and publication are foreign concepts in the Youth Court, they are the norm in adult courts;[30] and whereas the Youth Court sees the destructive impact convictions and publication can have on the positive steps a young person has taken towards reintegration, adult courts often see those positive steps as a safety net against that destructive impact.

3.17 The result can be that, when faced with exactly the same set of facts, the Youth Court and adult courts reach radically different outcomes. In one, the young person is assisted and supported back into society with the protection that comes with permanent name suppression and all record of the charge having been erased; in the other, he or she is immediately and constantly burdened with the stigma of a

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[26] Convictions cannot be entered (unless the young person is being transferred to an adult court for sentence) and publication of a young person's name and identifying details is automatically prohibited: Oranga Tamariki Act, ss 283 and 438.
[27] Sentencing Act 2002, s 8(g).
[28] Criminal Procedure Act 2002, s 200(2)(a).
[29] Sentencing Act 2002, s 8(e).
[30] A discharge without conviction is the least restrictive outcome available under the Sentencing Act and can only be granted if a high threshold is met: Sentencing Act, ss 106 & 107.

conviction, not to mention the ever-present prospect of media attention. This does violence to the principle of parity, which is what s 8(e) of the Sentencing Act is meant to embody, and broader notions of equality before the law.

3.18 To reiterate, the submission is not that all young people who are transferred out of the Youth Court should be dealt with as they would have been in that Court. Rather, the submission is that, if the reason for their transfer falls away but they cannot for whatever reason be transferred back to the Youth Court, they should be dealt with in a way that best approximates how they would have been dealt with in that Court.

3.19 The same should apply if the person is not charged until much later, for offending committed when a youth, even if the jurisdiction of the Youth Court prevented a person of that age now being prosecuted in that Court. The delay in a complaint or of the laying of a charge, should not drive a different outcome.

3.20 At present, however, adult courts tend to approach such defendants as they would any other, albeit with what is considered an appropriate youth reduction.[31] Indeed, a recent attempt to sentence as suggested above was overturned by the Court of Appeal, the Court finding the District Court Judge erred in law when he said:[32]

> The cases … where it was said that youth justice principles could still be considered for adults who had offended as youths, are to my mind utterly meaningless if the practical application of those principles simply means knocking a few years off an adult sentence. That is to pay lip service to the concept of youth justice principles. Youth justice principles can only mean that consideration at least should be given to sentencing you now as you would have been sentenced then.

3.21 The result is that outcomes for such offending turn more on when it comes to light than factors traditionally associated with an assessment of culpability. If the offending comes to light when the young person is 16 years of age, for example, they might be discharged, publication of their name and identifying particulars will be automatically and permanently barred, and they will be encouraged to make something of themselves; but if it comes to light six years later, they might be denied such protections, sentenced to imprisonment or home detention, and have their lives tipped upside-down permantly with less of a prospect of being able to move beyond it even when they mature. This is unprincipled and unfair.

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[31] For example, *A v R* [2022] NZCA 651.
[32] *R v B* [2022] NZCA 62 at [18].

H's applications

3.22 Had Brewer J and the Court of Appeal approached H's applications in the manner suggested, they would almost certainly have granted them.

3.23 First and foremost, convictions cannot be entered in the Youth Court,[33] and publication of a young person's name or identifying particulars is prohibited as a matter of law.[34] No matter how serious the offending or how great the public interest in reporting it, if the Youth Court can adequately deal with it, the young person will not be convicted and his or her name will be unable to be published, as if permantly suppressed. That has been the outcome in the Youth Court in many cases significantly more serious than H's.[35] Brewer J and the Court of Appeal could have replicated those outcomes by discharging H without conviction and permanently suppressing his name.

3.24 Alternatively, they could have factored the considerations that underpin those outcomes into their assessment of H's applications. For example, the fact that convictions cannot be entered in the Youth Court is recognition of the seriously adverse consequences they carry for young people, and evidence of Parliament's view that they are a wholly disproportionate response to certain youth offending.[36] Likewise, the fact that publication is prevented permanently by law in the Youth Court is recognition of the extreme hardship publication causes young people, and evidence of Parliament's view as to where the balance lies when such hardship is pitted against the principle of open justice.[37]

3.25 From that starting point, it would have been a short step to discharging H without conviction and permanently suppressing his name. Nothing about his offending or his personal circumstances suggests such outcomes would be unjust. Quite the contrary. His offending was relatively low-level, impulsive, and committed when he was only 17 years of age. He pleaded guilty to it once the charge had been amended to properly reflect his culpability. He had no previous notations or

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[33] Unless the young person is being transferred out of that Court for sentencing: Oranga Tamariki Act, s 283(o).
[34] Oranga Tamariki Act, s 438.
[35] *Police v WP* [2021] NZYC 2, for example, involved two charges of sexual violation by unlawful sexual connection.
[36] This is relevant to the test for a discharge without conviction, which asks whether the "direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence": Sentencing Act, s 107.
[37] This is relevant to the test for name suppression, which requires a likelihood of extreme hardship upon publication and an assessment of how such hardship compares to the public interest in open justice: Criminal Procedure Act, s 200(1) & (2)(a).

convictions, despite having experienced hardship in his earlier formative years. Significantly, he had to endure a murder trial, with all the restrictions and jeopardy that came with it. Despite that, by the time he appeared for sentence, he had – rather impressively – secured an apprenticeship and was quietly getting his life back on track. That should have been the focus, keeping his life on track.

3.26 There are obvious similarities between this constellation of features and that which persuaded the Courts in *S* and *Q* to grant discharges without conviction and permanent name suppression. In *S*, for example, the Court of Appeal reasoned as follows:

> [29] … Given the similarity of the ages of the parties and, importantly, the fortuity of the appellant's being liable in this Court to the entry of a conviction, to which he would not have been exposed had the facts been elucidated earlier, we consider that, the appellant having been arrested and charged with rape, having for ten months faced that charge in respect of which no evidence was ultimately offered, and having undergone the experience of hearings in both the High Court and this Court, as well as the Youth Court, to discharge him without conviction is the appropriate order.

3.27 And in *Q*, Winkelmann J held:

> [35] I note the Crown's submission that you should be convicted to hold you to account for your actions and to deter you and others from similar offending. But I consider that you have already been held to account for your actions. In saying this I do not mean to diminish the magnitude of Stephen's family's loss. But as a 15 year old you had to confront the role you played in Stephen's death. You were excluded from your school, and indeed you have been excluded from any school to date. This has resulted in isolation from your friends. For several months you were charged with one of the most serious criminal offences, manslaughter. That would, I have no doubt, have taken a toll on any 15 year old boy. You have fully accepted your responsibility from the first, and indeed pleaded guilty to this charge as soon as it was formulated.

3.28 Brewer J and the Court of Appeal should have done likewise. Brewer J would likely have done so, if he considered he was permitted.

Transfer back to the Youth Court

3.29 In the course of its judgment, the majority in the Court of Appeal mentioned a submission made in passing for H that he could perhaps be transferred back to the Youth Court for disposition. It observed that transfer back to the Youth Court is available under s 276A of the Oranga Tamariki Act, which provides in part:

(1) This section applies if a proceeding has been transferred from the Youth Court to the District Court or the High Court under s 275 or s 276AB(1) and –

(a) the circumstances or reasons for the transfer of the proceeeding no longer apply; and

(b) the charge or charges are within the jurisdiction of the Youth Court.

(2) The District Court or the High Court must transfer the proceeding back to the Youth Court to be dealt with in that court, unless the interests of justice require the proceeding to remain, and be dealt with, in either of those courts.

(3) The transfer of the proceeding may occur at any time before sentencing.

3.30 The majority dismissed this possibility rather swiftly. It held that the pre-requisite in s 276A(1)(b) – that the charges to be transferred back are within the jurisdiction of the Youth Court – could not be satisfied because H had turned 19 years of age. That, in the majority's view, meant he "was no longer within the jurisdiction of the Youth Court." In support, it cited an observation made by the Crown that several of the disposition options usually available to the Youth Court would be unavailable to it on account of H's age.

3.31 It is worth considering the correctness of this approach, and how the other three pre-requisites for transfer back to the Youth Court apply to H. Doing so sheds light on how Parliament intended that young people be dealt with if the reason for their transfer out of the Youth Court falls away, and – if the Crown and the majority are correct – demonstrates how some young people might slip through the cracks and find themselves "stuck" in an adult court.

3.32 There are four pre-requisites for transfer back to the Youth Court under s 276A (which is reinforced in s 380A of the Criminal Procedure Act 2011).[38] If they are met, transfer is mandatory. They are:

(a) The initial transfer out of the Youth Court must have been under s 275 or s 276AB(1) of the Oranga Tamariki Act;[39]

[38] Criminal Procedure Act 2011, s 380A: "Proceedings commenced in the Youth Court and transferred to the District Court or High Court under section 275 or 276AB(1) of the Oranga Tamariki Act 1989 must, if the circumstances described in section 276A of that Act arise and the requirements of that section are met, be transferred back to the Youth Court."
[39] Oranga Tamariki Act, s 276A(1).

(b) The reason for that initial transfer must no longer apply;[40]

(c) The Youth Court must have jurisdiction over the charge to be transferred back;[41] and

(d) A transfer must be in the interests of justice.[42]

3.33 Taking these in turn, there is a sound argument that H's proceedings were transferred out of the Youth Court under s 275 of the Oranga Tamariki Act. Among other things, that section requires that, when a young person is charged with murder, the proceedings must be transferred to the High Court pursuant to s 36 of the Criminal Procedure Act.[43] That is essentially what happened here. Until H was charged with murder, the injuring charge had been progressing in the Youth Court jurisdiction. As soon as the murder charge was filed, though, both charges had to be transferred to the High Court.

3.34 Next, there is an equally sound argument that, by the time H appeared for sentencing, the circumstances or reasons for the transfer to the High Court no longer applied. That is because the jury had found him not guilty on the murder charge, the filing of which – as just set out – prompted his initial transfer out of the Youth Court. Brewer J effectively acknowledged as much in his sentencing notes when he said:

> [45] Your lawyer points out that the only reason why you were not dealt with in the Youth Court for this offence was because you were also charged with being a party to the murder … However, you were found not guilty of the murder. Your lawyer submits, and I accept, that I should consider your case in accordance with the principles of youth justice as applied by the Youth Court.

3.35 A useful analogy can be drawn here with s 276A(4) of the Oranga Tamariki Act, which applies to Schedule 1A charges (certain serious charges short of murder and manslaughter) and lesser related charges that follow them out of the Youth Court.[44] As an example of the circumstances or reason for the transfer out of the Youth Court no longer applying, the provision gives the young person being found not

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[40] Oranga Tamariki Act, s 276A(1)(a).
[41] Oranga Tamariki Act, s 276A(1)(b).
[42] Oranga Tamariki Act, s 276A(2).
[43] Oranga Tamariki Act, s 275(1)(a) and (2)(b).
[44] Oranga Tamariki Act, ss 276AA (which determines whether a charge is related) & 276AB (which requires that it be transferred to accompany a Schedule 1A charge).

guilty of the Schedule 1A charge, leaving only the lesser related charge.[45] There is no reason why the same logic should not apply to murder and lesser related charges.

3.36 The third pre-requisite is that the Youth Court has jurisdiction over the charge, which was the majority's first and last stop. But the approach it took arguably sits awkwardly with s 2(2) of the Oranga Tamariki Act, which provides that the Youth Court's jurisdiction turns on the young person's age at the time of the alleged offending (providing any charging document is filed before he or she turns 19). It states:[46]

> (2) Where any proceedings are being considered or have been taken in respect of any offence allegedly committed by a person when that person was a child or young person, the age of that person at the date of the alleged offence shall be that person's age for the purpose of –
>
> (a) whether there is jurisdiction to take any proceedings in respect of that alleged offence, and, subject to paragraph (d), which court has jurisdiction in respect of proceedings that may be taken; and
>
> (b) the proceedings taken, –
>
> but nothing in this subsection shall –
>
> …
>
> (d) require any proceedings to be taken in the Youth Court if, at the time the charging document is filed, that person has attained the age of 19 years[.]

3.37 As noted above, H was 17 years of age both when he offended and when the injuring charge was filed. By s 2(2), therefore, the Youth Court had jurisdiction over that charge, and the majority was arguably incorrect to conclude otherwise. While the Crown was correct to note that H's age meant various of the disposition options usually available to the Youth Court would be unavailable to it, that is not to be confused with the Youth Court having no jurisdiction at all.[47] The two are quite different.

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[45] Oranga Tamariki Act, s 276A(4).
[46] Oranga Tamariki Act, s 2(2).
[47] The Crown appears to have raised and relied on that very distinction in *Attorney-General v Youth Court at Manukau* [2007] NZFLR 103 (HC), where it is recorded, at [70], as having submitted: "The Crown contends that the Judge took into account an irrelevant consideration in deciding that the young persons had been prejudiced by the delay because they were about to attain the age of 17 and a half years and therefore the Court would have reduced sentencing options. It says firstly, no prejudice arises because the youth jurisdiction is still available; it is only five particular orders that have become unavailable. …"

3.38 The Crown, in its leave submissions, sought to reinforce the majority's point by observing that the Youth Court can only make disposition orders in respect of young people, which by the time he appeared for sentencing H was not. But that is not what the relevant sections of the Oranga Tamariki Act say,[48] nor is it how the Youth Court interprets them. Indeed, there are numerous examples of the Youth Court making disposition orders in respect of boys and girls who have reached 18 or 19 years of age and therefore no longer come within the definition of a young person.[49]

3.39 If the Crown and the majority are correct on this point, though, it simply demonstrates how some young people can be timed out of more favourable treatment by the glacial pace at which adult courts tend to move. The sense of urgency that is present in the Youth Court – recognising a young person's perspective of time and the importance of making the most of the productive disposition options available to it – is not nearly so present in adult courts. The result might be that, by the time the reason for the initial transfer out of the Youth Court has fallen away, the Youth Court's jurisdicion over the remaining charge has lapsed.

3.40 The final pre-requisite is that transfer back to the Youth Court is in the interests of justice. Several points, both general and case-specific, can be made here. There is a general concern throughout Part 4 of the Oranga Tamariki Act, which was designed specifically to deal with youth offenders, to keep such offenders within, or return them to, the jurisdiction of the Youth Court whenever possible.[50] That was Parliament's clear intention. Given that, there will almost always be a compelling argument for transfer back to the Youth Court. That is not to say it must necessarily succeed, but it should take strong counterveiling interests to displace it.

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[48] Section 282 of the Oranga Tamariki Act, for example, applies when "a charging document is filed charging a young person with an offence". Moreover, as noted above, by s 2(2) of the Oranga Tamariki Act, charges can be filed in the Youth Court against people who are 18 years of age (and thus no longer young people) provided they were 17 years of age or under when they allegedly offended. That in itself suggests the Crown's interpretation is untenable. The ability to commence proceedings would be pointless if there were no ability to impose disposition orders at their conclusion.

[49] *Police v CD* [2021] NZYC 91 (19 years of age; s 282 discharge); *Police v CK* [2014] NZYC 344 (18 years of age; s 282 discharge); *Police v WP* [2021] NZYC 2 (18 years of age; s 282 discharge).

[50] This is evident in special rules regarding transfer out of and back to the Youth Court (Oranga Tamariki Act, ss 275-277), as well as the hierarchy of disposition options which has transfer to the District Court as a last resort (Oranga Tamariki Act, ss 282-283).

3.41 There were no such counterveiling interests here. Parity in sentencing was not an issue, for example. The positions of H and the co-defendant could not have been further apart. One had pleaded guilty to injuring with intent to injure, while the other had been found guilty of murder. The issue for one was whether he should be convicted at all, while the isuse for the other was whether he should be sentenced to life imprisonment. This was not a situation, in other words, where the interests of justice required the same judge to sentence both offenders.

3.42 The lack of options available to the Youth Court was not an issue either, for similar reasons. Given his age, the low-level nature of his offending, and all he had been through in standing trial for murder, the only issue at H's sentencing was whether he should be convicted at all. Brewer J had nothing else in mind, and it is unlikely the Youth Court would have felt hamstrung by the lack of its usual options. Most likely it would have discharged H under s 282(1) of the Oranga Tamariki Act,[51] permanently suppressed his name,[52] and encouraged him to get on with his apprenticeship.

3.43 For the above reasons, it is arguable that Brewer J could have transferred H back to the Youth Court for disposition. That said, this should not be necessary in so far as the result for a youth offender should be the same no mater which court the charge is finally resolved in.

3.44 Finally, it is worth addressing a point the Crown raised in the Court of Appeal, presumably as a further argument against transfer. The Crown argued that the Youth Court should have considered and granted joinder of H and the proceedings of the others charged under s 277(5) of the Oranga Tamariki Act, which applies when "a young person is jointly charged with … an adult who is to have a jury trial" and provides as follows:

> (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.

[51] This section provides that: "If a charging document is filed charging a young person with an offence in category 1, 2, or 3, the Youth Court, after an inquiry into the circumstances of the case, may discharge the charge."
[52] Oranga Tamariki Act, s 438.

3.45 Had the Youth Court done this, the Crown argued, transfer of H's proceedings would have occurred under s 277(5), which in turn would have taken it outside the scope of s 276A. As the majority recorded the point:

> [26] Ms Clark for the Crown submitted that … the Youth Court Judge should … have made a determination under s 277(5) of the OTA as to whether the interests of justice required that the charge against Mr H remain in the Youth Court. …
>
> …
>
> [30] … we note the Crown's submission that if Mr H had been transferred to the High Court under s 277 he could not have been transferred back to the Youth Court for disposition, given that s 276A applies only to proceedings transferred under s 275 or s 276AB(1).

3.46 Four points can be made in response to this. First, as a matter of fact, H's proceedings were not transferred out of the Youth Court because he was jointly charged. As noted, the Crown's attempt to join the initial charge filed against him to the murder charge filed against the other charged was declined, and the charge against H proceeded through the Youth Court. It was not until he was also charged with murder that transfer took place. The only sensible reading of the situation is that transfer occurred because he was charged with murder.

3.47 Second, it is not clear that joinder would have been granted under s 277(5). Subsection (1) of that section states that the section applies when a "young person is charged with any offence jointly with any other person or persons". On a plain reading, the section is too narrow in scope to apply to H, at least as he was first charged. He and the other person charged were not charged jointly with any offence; rather, they were charged separately with separate offences, albeit arising out of the same sequence of events.

3.48 Third, even if joinder had been granted under s 277(5), transfer to the High Court would still have occurred under s 275, thus bringing the situation within the scope of s 276A. That is clear from s 275(1)(c), which says the section applies "if a young person … is to have a jury trial and be tried with a person with whom the young person is jointly charged, in accordance with s 277."[53] In those circumstances, if the young person is charged with a category 3 offence, as H was here, transfer to the trial court occurs after an adjournment for trial callover.[54]

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[53] Oranga Tamariki Act, s 275(1)(c).
[54] Oranga Tamariki Act, s 275(2)(a).

3.49 Finally, transfer back to the Youth Court under s 276A might still have been appropriate in those circumstances. The reason for transferring H out of the Youth Court would have been the convenience of holding a joint trial. But once that trial had been held and H had been found not guilty of murder, that reason would have lapsed and, for reasons already covered, there would have been no reason to keep him in the High Court. He could have been transferred back to the Youth Court for disposition on the much less serious injuring charge.

3.50 In short, therefore, whether H was transferred out of the Youth Court because he was charged with murder or jointly charged, he could have been transferred back at the conclusion of his trial.

Dated at Auckland this 7th day of June 2024

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