**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI O AOTEAROA** **SC 1/2024**

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| **BETWEEN** | **H** |
| | **Appellant** |
| **AND** | **THE KING** |
| | **Respondent** |

# RESPONDENT'S SUBMISSIONS ON APPEAL

**1 August 2024**


Te Tari Ture o te Karauna
Crown Law

PO Box 2858
Wellington 6140
Tel: 04 472 1719

Contact Person:
Z R Johnston | H G Clark
Zannah.Johnston@crownlaw.govt.nz | Hannah.Clark@crownlaw.govt.nz

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**SUMMARY**

1. H was involved in a fight in the Whangārei CBD on the evening of 12 June 2021, when he was 17 years old. During that fight H's brother fatally stabbed a young man named Haze Peihopa. Mr Peihopa collapsed. H kicked him as he lay on the ground. Both brothers stood trial for murder in the High Court. At the start of trial, H pleaded guilty to a charge of injuring with intent to injure Mr Peihopa (by kicking him on the ground). The jury acquitted H of murder, but convicted his brother.

2. On the injuring charge, Brewer J convicted and discharged H and declined permanent name suppression. Appeals against both decisions were dismissed by the Court of Appeal. H invites this Court to conclude youth justice principles required a different result. He says "decisive weight" should have been placed on "how the applications would have been determined in the Youth Court", and this required both permanent name suppression and a discharge without conviction.

3. The High Court was obliged to apply the statutory tests in the Sentencing Act 2002 (**Sentencing Act)** (discharge without conviction) and the Criminal Procedure Act 2011 (**CPA**) (name suppression). H's youth, both at the time of the offending (17), and by sentencing (19), was an important consideration, which was given due weight by Brewer J in determining both applications. The outcome H may have received had he remained in (or been returned to) the Youth Court was relevant to the Judge's decisions, but in the statutory context it cannot be "determinative", as the appellant contends.

4. The statutory tests, and other relevant considerations, led Brewer J to decline to discharge H without conviction and refuse permanent name suppression. There was no error in this reasoning, and the appeals should be dismissed.

## BACKGROUND

### The offending

5. On 12 June 2021, H and his brother met several friends on their way to a bar. Mr Peihopa was already at that bar with his friend, Mr Tohu.

6. Just before midnight, Mr Peihopa and Mr Tohu came out of the bar. They were confronted by the H brothers and their group. A verbal confrontation became a physical mêlée. At one stage early on, Mr Peihopa appeared to use a bottle as a weapon. H's brother fought with Mr Peihopa, and Mr Peihopa swung him around.

7. The fighting died down and Mr Peihopa began to move back towards the bar. H's brother took a knife from one of his friends, and stabbed Mr Peihopa.

8. H was with his brother as he fought with Mr Peihopa, using the knife. After Mr Peihopa stumbled and fell to the ground, H kicked him in the upper torso. Both brothers left the scene and were arrested nearby.

9. Mr Peihopa died in hospital at 12.33 am on 13 June 2021.

### Procedural history

10. The procedural history, together with H's age, is set out in an appendix.

11. H was born on 28 July 2003. He was 17 years old when he was charged in the Youth Court with injuring with intent to cause grievous bodily harm.[1]

12. On 24 June 2021 the Crown filed notices of joinder in both the Youth Court and the High Court, for H's injuring charge to be heard together with his brother's murder charge in the High Court. The Youth Court rejected the notice as ultra vires[2] and Brewer J considered that there was no statutory basis for any joinder application.[3]

13. H was charged with murder some months later, in December 2021. By this time he was 18.

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1 Mr H was born on 28 July 2003. The offending occurred on 12 June 2021.

2 Minute of Judge L King, 25 June 2021: Supreme Court Case on Appeal (**SCCOA**) at 53.

3 Callover Minute of Brewer J, 1 July 2021: SCCOA at 57.

14. H was 19 at the time of trial in November 2022. At the outset of trial H pleaded guilty to an amended charge of injuring with intent to injure, reflecting the kick to Mr Peihopa after the assault by his brother.

15. The Crown alleged that H was guilty of murder because he had helped his brother carry out a fatal knife attack.[4] In the context of this fast-moving street fight, the Crown's case was that H's older brother called for "the blade" which another participant handed him[5] while H stood close by.[6] They approached Mr Peihopa, who advanced on H's brother, and the fatal attack ensued. H tried to punch and kick Mr Peihopa, and his brother stabbed him to the rib area. Once Mr Peihopa lay on the ground, H kicked him to the upper body.[7]

16. At the conclusion of the Crown's case H applied for a dismissal of the murder charge on the basis the evidence was insufficient. This was declined by the trial Judge.[8] H's brother was convicted of murder; H was acquitted.

17. H's name was suppressed throughout trial.[9] An interim order is in place pending the outcome of this appeal.[10] His brother has not sought suppression for his own benefit, but because they share a last name, and media reported the defendants were brothers, H's brother has "de facto name suppression".[11] Despite having been convicted of murder, he cannot be identified.

18. Mr Peihopa's whānau are opposed to suppression. [12]

*Sentencing*

19. Both brothers were sentenced by the trial Judge, Brewer J.

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4 Crown closing: Court of Appeal Case on Appeal (**CACOA**) at 100.

5 Crown closing: CACOA at 97.

6 CACOA at 98.

7 CACOA at 99.

8 Minute of Brewer J, "Section 147 application", 10 November 2022: CACOA at 82.

9 At first appearance at High Court callover on 3 February 2022, Brewer J continued interim name suppression until the start of trial due to his age. Callover Minute of Brewer J, 3 February 2022 at [5]: SCCOA at 57.

10 Judgment of the Court (decision granting leave): *H (SC 1/2014) v R* [2024] NZSC 31 (SCCOA at 12).

11 Minute of Brewer J, 14 November 2022 (CACOA at 87).

20. On the murder charge, Brewer J imposed a finite term on H's brother of 18 years' imprisonment with a minimum term of seven and a half years.[13]

21. H sought a discharge without conviction. In declining the application, Brewer J found:[14]

21.1 H did not know Mr Peihopa had been stabbed at the time he kicked him, and there was no identified injury from H kicking him while he lay on the ground.[15]

21.2 There is a need to keep young people in the community and to ensure they remain integrated and rehabilitated.[16] The gravity of the offending was moderate, as Mr Peihopa was helpless on the ground when H kicked him, having just fought alongside his older brother.[17] But when taking personal mitigating factors into account (20 months on bail,[18] letters of support particularly from his employer, and remorse[19]) the overall gravity was assessed as low, involving impulsive risk-taking of a young, intoxicated person.[20]

21.3 The direct or indirect consequences of a conviction were not out of all proportion to the gravity of the offending.[21] No specific consequences were relied upon beyond the impact on him as a young person. His Honour explicitly took note of the potential effect on employment, travel and reputation. Notably, H had

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12 Sentencing decision at [62]: SCCOA at 50.

13 A Crown appeal against this sentence was unsuccessful: *R v H* [2023] NZCA 636.

14 Pursuant to s 106 of the Sentencing Act.

15 Sentencing notes at [17]: SCCOA at 43.

16 Sentencing notes at [46]: SCCOA at 47.

17 Sentencing notes at [52]: SCCOA at 48.

18 Mr H was on a 24 hour curfew but was allowed to be in the company of his mother – she had gone to work with Mr H and stayed on site so that he could continue his building apprenticeship: see sentencing decision at [49], SCCOA at 48.

19 Sentencing notes at [49] to [51]: SCCOA at 48.

20 Sentencing notes at [47] and [52]: SCCOA at 48.

21 Sentencing notes at [53] and [54]: SCCOA at 48 and 49.

become gainfully employed as an apprentice builder and his employer was aware of the offending.[22]

22. Taking into account the time H had spent on restrictive bail conditions, Brewer J concluded no further sentence was necessary. H was convicted and discharged.

*Application for name suppression*

23. At the outset, Brewer J noted that had H been in the Youth Court, permanent name suppression would have been automatic. His Honour also observed the special importance of youth at both stages of the name suppression inquiry.[23]

24. H's application focussed on extreme hardship arising from publication of the fact he was charged and tried for murder, having participated in the fight which led to his brother's murder conviction.[24] Brewer J accepted that notoriety at a young age could be particularly damaging. But accurate reporting of H's role in the offending would not meet the extreme hardship threshold. According to Mr Peihopa's family, the brothers' names were already known by the local community.[25]

25. Brewer J observed that even if the extreme hardship threshold was met, his Honour would not have exercised the discretion to suppress H's name.[26] Suppression of H's name would necessarily involve suppression of his brother's name, as they had already been reported as brothers.[27] There was a "very real point of public interest" in knowing his brother's name.[28]

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22 [redacted]

23 His Honour stated "In another case, this time in the Court of Appeal in *DP v R*, it was held that nothing in the law precludes a Court from recognising the special importance of youth at either the jurisdictional or discretionary stages of the name suppression inquiry": Sentencing notes at [59]: SCCOA at 49, citing *DP v R* [2015] NZCA 476.

24 Sentencing notes at [58], SCCOA at 49.

25 At [62]: SCCOA at 50.

26 At [65]: SCCOA at 50.

27 At [64]: SCCOA at 50.

28 At [65]: SCCOA at 50.

The deceased's family were opposed to name suppression.[29] Accurate reporting would also let the public know what H's role actually was.[30]

**Court of Appeal**

26. H appealed to the Court of Appeal. He contended the outcomes for him must necessarily be the same irrespective of the venue. The Court concluded that proposition was inconsistent with well-established authority, which the Court declined to depart from.[31]

27. The Court unanimously upheld the High Court's decision that the threshold of extreme hardship was not met. Accurate reporting of H's part in the offending would not cause him extreme hardship.[32] Accordingly it was unnecessary that the Court reach any conclusion as to the discretionary stage of the test.

28. A majority[33] upheld the High Court's refusal to discharge H without conviction. There was no error in the Judge's assessment of the gravity of the offending or the consequences of conviction. Peters J, in a partially dissenting judgment, would have allowed that aspect of H's appeal as her Honour considered too much weight had been placed on H's current employment status.[34] The Court agreed, though, that s 106 of the Sentencing Act applied (rather than the OT Act).

**THE ISSUE IN THIS COURT**

29. This Court has granted leave for a further appeal of both decisions. The appellant's core argument for both appeals is the same: the High Court should have reached the equivalent outcome as the Youth Court would have if H was dealt with there. The respondent accepts the likely outcome in the Youth Court is a factor for the Court to consider whenever dealing with a young person under the adult criminal justice regime. But the Court

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29 At [62]: SCCOA at 50.

30 At [64]: SCCOA at 50.

31 Court of Appeal decision at [35]: SCCOA at 25.

32 Court of Appeal decision at [66]: SCCOA at 34.

33 Brown and Mander JJ.

34 Court of Appeal decision at [72]: SCCOA at 35.

must do so within the applicable statutory context, which is necessarily different from that which applies in the Youth Court.

**CHARGES AGAINST YOUNG PEOPLE**

30. When charges are filed against young people[35] they are usually determined in the Youth Court. In that Court, there is a statutory prohibition on publication of proceedings (unless leave is granted) and publication of the names of young people and their parents is prohibited.[36] Where charges are admitted or proved in the Youth Court the outcomes are varied. Discharges[37] are common, but they are often ordered after certain criteria or a particular plan has first been undertaken.[38] Orders under s 283 of the Oranga Tamariki Act 1989 (**OT Act**) appear as a notation on the person's criminal record, but these are not convictions (other than where the case is transferred to the District Court under s 283(o)).

**Transfer to adult courts**

31. There are a number of situations in which charges against young people can be transferred to an adult court. This occurs when:

    31.1 the charge is murder or manslaughter,[39]

    31.2 the young person elects trial by jury,[40]

    31.3 the young person is jointly charged with others who are to have a jury trial and transfer for a joint trial is in the interests of justice,[41]

    31.4 the young person is aged 17 and charged with a serious offence,[42]

    31.5 the offending is admitted or proven and a conviction and transfer to the District Court for sentence is warranted,[43] or

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35 The position for children – those under the age of 14 – is more complex and not addressed here.

36 OT Act, s 438.

37 Either an absolute discharge under s 282, or a discharge under s 283(a).

38 A young person may be given several months to complete the plan and following successful completion of the plan the young person will receive the discharge. If the plan is not successfully completed, a higher order response may be imposed.

39 OT Act, s 275(1)(a).

40 OT Act, s 275(1)(b).

41 OT Act ss 275(1)(c) and 277.

42 OT Act, s 275(1)(ba) and Schedule 1A.

31.6 the offending is alleged to have occurred when the defendant was a young person, but they have reached the age of 19 by the time of charge.[44]

32. These provisions reflect policy decisions that:

32.1 The serious offences of murder and manslaughter need to be determined in open court and by a jury.[45] Similarly, certain serious offences committed by older young persons (aged 17) should be dealt with in the adult courts.[46]

32.2 There is an important public interest in the determination of associated charges in a joint trial. A joint trial avoids witnesses having to give evidence at more than one trial, mitigates the risk of inconsistent verdicts and avoids the risk of disparity in sentence.[47]

32.3 The Youth Court is designed with young people in mind. There are key differences in process and outcome. Once a young person has turned 19 it is no longer appropriate for them to face charges in the Youth Court, or to receive outcomes aimed at young people.

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43 Applying the criteria in the OT Act: ss 283(o), 284(1A) and 285.

44 The charging document must therefore be filed in the District Court, see s 2(2) of the OT Act. Prior to 30 June 2019, the age at which a young person was to be charged in the District Court was 18.

45 Murder and manslaughter charges are Category 4 and must be tried by jury, see s 74 CPA. The only exception is by application of the prosecutor on the basis of juror intimidation that cannot otherwise be avoided (s 103 CPA; s 102 does not apply). A jury trial is not available in the Youth Court.

46 Schedule 1A of the OT ACT was introduced on 1 July 2019, when the definition of a young person was extended to include young persons who were 17 years old at the time of the offending (see s 2(1)) – with the exception of 17 year olds who commit (generally, more serious) offences specified in Schedule 1A. The Youth Court does not have jurisdiction for a young person aged 17 years at the time of the offending where the offence is one specified in Schedule 1A (see s 272(3)(baa)). Procedurally, a 17 year old who has committed an offence specified in Schedule 1A will appear once in the Youth Court for their first appearance, for the proceeding to be transferred to the District Court to be dealt with in accordance with the Criminal Procedure Act (see s 275(1)(ba) and s 275(2)(aa)). If the Youth Court determines that a non-Schedule 1A offence is a "related charge" (see s 276AA), then that offence may also be transferred to the District Court or the High Court to be dealt with together with the Schedule 1A charge (see s 276AB).

47 In setting out the factors in favour of joint trials, the Court of Appeal has stated that "What the New Zealand cases show, and indeed most of the cases from other jurisdictions, is that there is a substantial public interest in having a joint trial of those who are said to have jointly committed a crime. The reasons are primarily to avoid the risk of inconsistent verdicts, to have all aspects of a joint enterprise considered at one and the same time, and to prevent duplication of time and effort for witnesses and the Court system generally…" (*R v Fenton* CA223/00, 14 September 2000, at [25]). See also for example the discussion in *R v W M* [2024] NZHC 319.

32.3.1 The processes in the Youth Court are fundamentally different to those in the adult jurisdiction. Family Group Conferences (**FGCs**) are a key component of the youth justice system in New Zealand. They give a young person's family members a legislative entitlement to participate in decision making.[48] Any Youth Court sentencing order[49] requires that a FGC is first convened,[50] in which the participants (parents, guardians, family, whānau, and victims) meet to consider and ultimately recommend the ways in which the Court might deal with the young person.[51]

32.3.2 Outcomes in the Youth Court are also different from those in adult courts. Youth Court sentencing options are designed to reflect their different needs. Once the young person reaches the "statutorily defined transition point"[52] (currently age 19[53]) certain youth-specific sentencing outcomes should no longer be imposed. This ensures children and young people are not mixing with older offenders,[54] and that orders are not imposed that are not suitable given the defendant's age.[55] This should not be viewed as the loss of "softer" sentencing options, but statutory recognition that at the specified age "certain options are no longer appropriate".[56]

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48 OT Act, s 2(2)(d). Once a person has attained the age of 19, the charging document must be filed in the District Court.

49 OT Act, s 283.

50 OT Act, s 281.

51 OT Act, s 281(1).

52 As described in *Attorney-General v Youth Court at Manukau* [2007] NZFLR 103 at [71], Appellant's bundle at page 304.

53 Prior to 17-year-olds being brought within the Youth Court jurisdiction for most offences with the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017 the age at which Youth Court orders expired was 18.

Prior to September 2010, Youth Court orders expired six months after a young person turned 17.

54 Where the Youth Court makes a "supervision with residence order" (OT Act, ss 283(n) and 311), the child/ young person typically resides in a secure youth justice facility together with other children and young persons.

55 For example the Youth Court may also make several sentencing orders against parents and caregivers: OT Act, s 283, ss (e), (f), and (g): the Youth Court may make orders that where a young person is under the age of 16, any parent or guardian is to pay the cost of the prosecution, emotional harm/ reparation, or restitution.

56 See the discussion in *Attorney-General v Youth Court at Manukau* [2007] NZFLR 103 (HC) (a case

32.4 Youth Court outcomes will be inappropriate or insufficient in some cases. That may be because there is a need for stronger outcomes because of the seriousness of the offending, the impact on victims or the risk posed to the community by the young person.[57] Sometimes a longer-term sentence is required, extending beyond the time at which Youth Court orders can apply, either to provide for sufficient rehabilitation or to provide appropriate accountability or public protection. The older the young person is (the closer to their 19th birthday) the more likely this outcome becomes.

**Young people remaining in adult courts**

33. Where a young person is sentenced in an adult court, they must be sentenced in accordance with the Sentencing Act (rather than the OT Act).[58] Their youth will nonetheless be a powerful mitigating factor.[59] Likewise, name suppression is determined in light of the presumption of open justice, within the framework of the CPA, and youth principles are a primary consideration to be given powerful weight.[60]

**Young people returning to the Youth Court**

34. Where the reason for transfer to the adult court is no longer applicable, then a young person may be transferred back to the Youth Court pursuant to s 380A of the CPA and s 276A of the OT Act.[61] In some cases – and this case is an example for reasons outlined below – transfer back to the Youth Court will not be able to occur because there are other reasons why the adult court is the most appropriate forum. The focus of this appeal is on the relevance of hypothetical Youth Court outcomes in this situation. Is it a

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involving an application for the dismissal of charges due to undue delay): Appellant's bundle at 284.

57 See OT Act, ss 283(o), 284(1A) and 285(6).

58 OT Act, s 283(o)(i) refers to the application of the Sentencing Act, and see the discussion in *Pouwhare v R* [2010] NZCA 268, (2010) 24 CRNZ 868 (CA): Appellant's bundle at 127.

59 See the discussion in *Churchward v R* [2011] NZCA 531 at [77] and [78]: Appellant's bundle at 97; and *Pouwhare v R* [2010] NZCA 268 at [96]: Appellant's bundle at 152.

60 *M v R* [2024] NZSC 29 at [66]: Appellant's bundle at 63.

61 This explicit statutory power to transfer back was introduced in 2019 when s 276A OT Act was inserted, along with s 380A CPA. See Oranga Tamariki Legislation Act 2019. It was not a feature of the law prior to the CPA 2011.

relevant consideration (as the respondent submits) or is the adult court bound to seek to replicate such an outcome (as the appellant contends)?

**RELEVANCE OF THE LIKELY OUTCOME IN THE YOUTH COURT**

35. Where transfer out of the District Court has occurred because Youth Court orders would be an insufficient response to the offending, little weight can be placed on the likely Youth Court outcome. (The appellant does not appear to contend otherwise.) But where the reason for transfer out of the Youth Court no longer applies, the outcome they may have received at a Youth Court disposition hearing becomes more relevant. It is a factor that can guide decision-making within the statutory framework of the adult criminal justice system. But the reason why a particular legislative regime applies cannot *fundamentally* change the applicable test.

36. The reason why a young person has nevertheless remained in the adult court (here, because H was 19 and the High Court was best placed to sentence him) is also a relevant consideration.

37. The hypothetical Youth Court outcome is a relevant consideration, but cannot be *determinative* of an application for name suppression or discharge without conviction for three core reasons:

    37.1 In the adult courts, the Judge's decisions are governed by the statutory tests in the Sentencing Act (for a discharge without conviction) and the CPA (for name suppression). The OT Act does not apply in the adult courts and young people are not exempt from the adult statutory tests.

    37.2 The exercise is necessarily speculative. A District or High Court Judge could only ever estimate the likely outcome in the Youth Court. Sentencing is necessarily a discretionary exercise, and a range of outcomes will be available.

    37.3 A Youth Court outcome cannot be replicated as a hypothetical, with different information than the Youth Court would have available to it, by a different Judge acting within a different framework. As such, this should not be a determinative factor.

38. These reasons are now considered in turn.

**The statutory tests**

39. As this Court will be aware, the relevant provisions of the CPA and Sentencing Act do not provide for different tests for young people and adults; while open textured, they are nevertheless age neutral. Given that statutory context, the creation of any presumptive outcomes (as to suppression or conviction) for young people appearing in the District or High Courts, for whatever reason, is a matter for Parliament. It is not open to this Court to require an adult court to replicate a Youth Court outcome.

40. Whichever court a young person is in, their age is a key factor in assessing the appropriate sentence and whether they should receive name suppression. These statutory tests must be read in light the right of children to be dealt with in a manner that takes account of their age,[62] and of New Zealand's international obligations, particularly the United Nations Convention on the Rights of the Child.[63]

41. The appellant's core argument is that an outcome in an adult court must be the same as a Youth Court. But any hypothetical Youth Court outcome is reached by the application of the OT Act – which does not apply, and should not be applied by other means. Each of the two relevant statutory tests has room to admit youth as a highly influential factor (including the possible outcome which could have come about in the Youth Court had the matter been heard there). But neither can accommodate youth, or a hypothetical Youth Court outcome as the determinative factor.

42. The appellant is essentially asking this Court to create an exception to ss 106 and 107 of the Sentencing Act for young offenders who might otherwise have been dealt with in the Youth Court. The Court of Appeal was similarly asked to create a category exception in *Dickey*[64] and declined to do so because:

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62 New Zealand Bill of Rights Act 1990, s 25(i).

63 See the discussion in *M v R* [2024] NZSC 29 at [54]-[66], Appellant's bundle at 59 to 63.

64 *Dickey v R* [2023] NZCA 2: Appellant's bundle at 175.

42.1 "Creating a category exception for youth murderers would be inconsistent with the statutory scheme and could only be done by Parliament. The Children's Commissioner suggested and some of the appellants' counsel submitted we should create a special category for young persons. We must, however, not trespass upon Parliament's domain."[65]

42.2 Youth is relevant within the existing framework: "young persons may present with a combination of mitigating circumstances relevant to the offending and personal mitigating factors which together are capable of establishing manifest injustice".[66] When sentencing a young person for murder a court must always undertake a s 102 (manifest injustice) analysis, giving careful consideration to whether life imprisonment is manifestly unjust.[67]

43. In short, the Court of Appeal concluded it would be wrong to create a category exception at common law; that would be a matter for Parliament. The same can be said here.

44. Likewise, in relation to name suppression this Court has rejected a submission that there should be a governing presumption in favour of suppression for young people.[68] Youth is a primary consideration that is to be given powerful weight within the applicable statutory framework.[69] A primary consideration cannot be made a decisive one, as the appellant contends here.

45. Automatic suppression in the Youth Court reflects a policy view that young people are likely to suffer a greater degree of hardship from publication

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65 *Dickey v R* [2023] NZCA 2 at [169]: Appellant's bundle at 155.

66 *Dickey* at [177]: Appellant's bundle at 155.

67 *Dickey* at [177]: Appellant's bundle at 155.

68 *M v R* [2024] NZSC 29 at [65]: Appellant's bundle at 42. This Court considered that "…to treat youth interests as comprising the governing presumption in favour of name suppression for young offenders outside of the Youth Court would not fit with the statutory scheme for name suppression in the Criminal Procedure Act and the importance it places on open justice. It is a part of the context in which that scheme is to be construed that, if the child or young person was appearing in the Youth Court, they would have automatic name suppression. But to establish youth principles as a governing presumption for name suppression decisions under the Act would require specific statutory provision."

69 This Court considered "…it would not be consistent with the statutory scheme to interpose a governing presumption in favour of name suppression for youth" (at [66]): Appellant's bundle at 42.

than adults and are less able to deal with the associated stigma. This can be factored into the analysis of whether extreme hardship is made out for a young person (and whether suppression is in the public interest). But it does not follow that a Youth Court outcome must be replicated for young people who appear in adult courts. That would be to effectively create a presumption in favour of suppression.

46. The desirability of consistency in sentencing levels (a principle in s 8(e) of the Sentencing Act) does not require the adult courts to approximate a Youth Court outcome. The result "should be the same no matter which court the charge is finally resolved in".[70] But the consistency principle simply emphasises the general desirability of "similar offenders committing similar offences in similar circumstances" to receive consistent sentences. Where offenders have differing personal circumstances – including different ages at the time of sentencing – the principle does not require a sentencing Judge to impose the same sentence. Put another way: a sentencing court is not required to impose the same sentence on a 19-year-old as it would for a 17-year-old (all other things being equal). In both situations their age at the time of the offending, and at sentencing, will be relevant.

47. Moreover, the result cannot be exactly the same where the statutory framework differs markedly. The difference is clear in the name suppression context: statutory suppression in the Youth Court, a presumption of open justice under the CPA. As to sentencing, there is a significant overlap between the principles that guide sentencing under the Sentencing Act (including the recognition of youth as a mitigating factor[71]) and the principles that guide outcomes under the OT Act. But there are also important differences. The focus in the Youth Court is on the

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70 Appellant's submissions at paragraph 3.43.

71 See s 9(2)(a) of the Sentencing Act (the age of the offender is a mitigating factor). See also the discussion in *Churchward v R* [2011] NZCA 531 at [77] and [78]: Appellant's bundle at 78. Youth is relevant to sentence as there are age-related neurological differences between young people and adults, imprisonment has a greater impact on young people, and young people have a greater capacity for rehabilitation. Criminal convictions at a young age may impact on the ability of a young person to gain meaningful employment and play a worthwhile role in society. See also *Pouwhare v R* [2010] NZCA 268 at [96]: Appellant's bundle at 127, as to the "radical effect on sentence, unconstrained by any normative percentage, even where offending is serious" that youth may have.

offender's best interests,[72] whereas in the adult courts the Judge must start with the objective seriousness of the offending and then adjust the sentence to take account of the offender's personal circumstances (including youth).

48. Finally, to treat a hypothetical Youth Court outcome as a relevant, not determinative, consideration is consistent with the authorities relied upon by the appellant:

48.1 In *R v S*, the Court of Appeal held it was "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".[73] But the Court still proceeded to assess the appropriate sentence in accordance with conventional sentencing in the adult courts.

48.2 In *R v Q*,[74] Winkelmann J held the likely Youth Court outcome was "a material consideration".[75] In that case, but for the manslaughter charge that had brought Q to the High Court, but was later amended to assault, he would have been dealt with in the Youth Court without a conviction.[76]

**A Youth Court outcome cannot be known**

49. An estimated, or speculative, outcome in one statutory context should not drive the outcome in another. And no outcome in the Youth Court is a foregone conclusion. As with any sentencing exercise, the ultimate outcome in the Youth Court will vary depending on the individual facts and

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72 The well-being and best interests of the young person are the first and paramount consideration (OT Act s 4A(1)). The other primary considerations are the public interest (including public safety), the interests of the victim, and the accountability of the young person for their behaviour (s 4A(2)). There are further principles that guide the exercise of power under the OT Act, set out in ss 5 and 208. These principles emphasise the role of the whānau at the centre of decision making, avoiding criminal proceedings wherever possible, imposing the least restrictive outcome and taking into account the age of the young person.

73 *R v S* CA284/02, 234/02 at [19]: Appellant's bundle at 159.

74 *R v Q* [2014] NZHC 550: Appellant's bundle at 163. Q was a 15-year-old whose manslaughter case had been subject to heavy publicity before it transpired his punches had not in fact caused the victim's death and the charge was reduced to assault.

75 *R v Q* at [33]: Appellant's bundle at 172.

76 *R v Q* at [17]: Appellant's bundle at 167.

circumstances of a case and the exercise of discretion by a sentencing Judge.

50. The Youth Court is a jurisdiction in which there is a significant entitlement for families, and victims, to participate in outcomes and young people typically complete rehabilitative plans before sentencing. Another Judge could only ever estimate the outcome, or reach their own view of what should happen in the Youth Court.

51. There are certainly examples of objectively serious offending being dealt with by a discharge in the Youth Court, either an absolute s 282 discharge (charge deemed never to have been filed), or a s 283(a) discharge (a notation on a criminal history).[77] But whether such an outcome would have been reached in the particular facts of an individual case is necessarily uncertain.

52. For example, in this case a discharge was possible, but not inevitable. The Youth Court in its discretion could have ordered a higher-level disposition for this offending (particularly if the greater enquiries made in the Youth Court had identified a particular rehabilitative need), or possibly convicted and transferred the matter to the District Court for sentence (particularly given H was 19 years old).

**A Youth Court outcome cannot be replicated**

53. Consideration of the likely outcome in the Youth Court also requires some hypothesising as to the results of processes that have not, and will not, occur in an adult court. Discharges are often granted in the Youth Court following completion of a plan that has been agreed upon by a FGC. In this sense, the process for obtaining a discharge in the Youth Court is quite different to that in an adult court; there is often a long rehabilitative path a young person must follow before they receive their final disposition. In effect, young people can complete the rehabilitative portion of a sentence under judicial monitoring before their disposition.

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77 See *Atawhai v Police* [2024] NZHC 1820 at [22].

54. This point is well illustrated by references to the three cases the appellant has cited as examples of offenders receiving discharges in the Youth Court (at age 18 or 19) for serious offending.[78] All were discharged following completion of a long-term FGC plan:

54.1 WP[79] committed serious sexual offences when he was 16. As part of a FGC plan over the course of 18 months he completed 36 sessions of a STOP programme, wrote letters of apology and remorse, and was subject to bail conditions for nearly two years. Following successful completion of that plan he was discharged under s 282.

54.2 CD[80] also committed sexual offences at age 16. He was also subject to an FGC plan over a long period, attended a Well Stop programme for six months, apologised to the victim, was supported to deal with drug dependency and completed drug education sessions. His family agreed to make an emotional harm payment to the victim. After successful completion of that plan, now aged 19, CD was discharged under s 282.

54.3 CJK[81] intentionally made an intimate video recording at a swimming pool. Following his admission of the charge, it was agreed at an FGC he should attend the STOP programme, which he did for two years while regular reports were provided to the Court. He successfully completed the plan and was discharged under s 282 at the age of 18.

55. The distinction between a s 283(a) and s 282 discharge must also be noted. A s 282 discharge deems the charge to never have been filed. But a s 283(a) discharge is also a possibility, and this type of discharge appears on a criminal history as a Youth Court notation (not a conviction). In this sense, a s 283(a) discharge leaves more of a 'record' than a discharge

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78 See the cases in the appellant's footnote 78.

79 *Police v WP* [2021] NZYC 2: Appellant's bundle at 275.

80 *R v CD* [2021] NZYC 91: Appellant's bundle at 307.

81 *Police v CJK* [2014] NZYC 344: Appellant's bundle at 325.

without conviction under the Sentencing Act (which a deemed acquittal and does not appear on a criminal history).[82]

**THIS CASE**

**There was jurisdiction to transfer H to the Youth Court for sentence**

56. Following his acquittal on the murder charge, H could have been transferred to the Youth Court to for disposition there on the injuring charge. As the appellant points out, the Youth Court had *jurisdiction* over the remaining charge, so transfer was available under s 276A of the OT Act. However, no suggestion or application appears to have been made to Brewer J that he *should* transfer H to the Youth Court. It is unsurprising that this was not regarded as a realistic option given:

    56.1 As the Judge who had presided over H and his brother's trial, Brewer J was best placed to determine his culpability, and the appropriate outcome. Also, consistency in outcomes is supported by the same Judge sentencing those jointly charged or charged with connected offences.

    56.2 If the case had been transferred to the Youth Court for disposition, this would have triggered the need for a FGC[83] and a mandatory social worker's report.[84] This process is not particularly apt for a 19-year-old.

    56.3 As has been outlined above, most orders that can be imposed in the Youth Court "expire" when the young person turns 19, regardless of when they are imposed.[85] The only options available in the Youth Court would have been a discharge,[86] admonishment,[87] a lower-level order without any rehabilitative

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82 Sentencing Act s 106(2): A discharge under this section is deemed to be an acquittal.

83 Under s 281(1) OT Act, subject to section 248, where a charge against a young person is proved before the Youth Court, the court shall not make any order under section 282 or section 283 unless a family group conference has had an opportunity to consider ways in which the court might deal with the young person in relation to the charge.

84 OT Act, s 334.

85 OT Act, s 296.

86 Either under s 282 of the OT Act (which deems the charge was never filed) or s 283(a) (a discharge without further order or penalty; this appears as a notation on criminal history, but is not a conviction).

87 OT Act, s 283(b).

component or an order convicting H and transferring him to the *District Court* for sentence.[88]

57. While the majority of the Court of Appeal was wrong to conclude there was no *jurisdiction* to return H to the Youth Court,[89] transfer would not have been in the interests of justice for the above reasons.

**The original transfer to the High Court was not unjustified**

58. The appellant also submits H's transfer to the High Court was "unjustified".[90] That is not the case. He was charged with murder following a review of the file and based on an assessment of the sufficiency of evidence and public interest in prosecution. He was then correctly transferred to the High Court under s 275(1)(a) OT Act.

59. The jury's acquittal does not demonstrate the decision to charge him was "unjustified". An acquittal is a public determination by the jury that the charge was not proven beyond reasonable doubt; it is not equivalent to a finding the charge should never have been filed.

60. H actively participated in a street fight which resulted in Mr Peihopa's death. He was in the vicinity when his brother was handed a knife, could be seen looking back at his brother holding the knife down by his side, and then joined his brother in fighting Mr Peihopa. The Crown's case was that he helped his brother, who swung the knife several times before inflicting the fatal wound. The question of H's liability for murder was appropriately put before a jury.

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88 OT Act, s 283(o).

89 The Court of Appeal held: "We agree with the Crown's submission that having turned 19 years of age Mr [H] was no longer within the jurisdiction of the Youth Court. The High Court could not then order that he be transferred to the Youth Court for sentencing…" at [29] of the Court of Appeal decision: SCCOA at 23. The Crown's written submissions had stated that "Once a young person turns 19 they can no longer be subject to Youth Court orders: by the time of sentencing, return to the Youth Court for disposition was not an option and its processes could not apply to Mr [H] directly. While the Youth Court has sometimes discharged young persons under s 282 of the OT Act for more serious offending than Mr [H]'s injuring charge, the Youth Court has a wide discretion when it comes to disposition, with responses ranging from a discharge without further penalty through to entering a conviction and transferring the young person to the District or High Court for sentencing" (Respondent's submissions dated 16 June 2023 at paragraph 31– filed in the Court of Appeal). It is acknowledged that the Crown's written submissions opposing leave to appeal to this Court overstated the lack of jurisdiction "… Mr [H] had turned 19 years old by the time of sentencing. The Youth Court no longer had any jurisdiction to impose Youth Court orders" (Respondent's submissions in opposition to application for leave to appeal dated 22 March 2024 at paragraph 10).

90 Appellant's submissions, paragraph 1.1.

61. Notably, the murder charge survived an application for discharge under s 147 of the CPA at the end of the Crown case.[91] Brewer J reviewed the evidence, including the CCTV, and concluded it was "available for the jury to infer that in those seconds, and against the background I have mentioned, [H] was helping his brother knowing that he would use the knife, with murderous intent, and cause Mr Peihopa's death".[92]

**Application of the statutory tests in this case**

*Name suppression*

62. H's application for name suppression was appropriately considered in light of his young age, and by reference to what "would have been" the position in the Youth Court. No more was required when applying the statutory tests to a young person.

63. H's application was advanced under s 200(2)(a) of the CPA. It was submitted that publication would cause him extreme hardship, particularly given his young age (17 at the time of the offending, 19 by sentencing). Brewer J found extreme hardship was not made out. In doing so, the Judge recognised automatic and permanent name suppression would have applied in the Youth Court.[93] The Judge further noted this was an "influential" factor.[94] But accurate reporting of his part in the fight, and his acquittal for murder, would not cause extreme hardship. The Court of Appeal agreed the high threshold for extreme hardship was not reached here.[95]

64. This decision is consistent with this Court's decision in *M v R*: youth principles were given primary consideration by Brewer J. Notably here H was not particularly young, and no longer a young person by the time any publication would occur. His youth remains relevant, but he is also likely

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91 Minute of Brewer J [Section 147 application] at [22]: CACOA at 85 and 86.

92 Minute of Brewer J [Section 147 application] at [22]: CACOA at 85 and 86.

93 Sentencing notes at [57]: SCCOA at 49.

94 Sentencing notes at [60]: SCCOA at 49.

95 Court of Appeal decision at [66]: SCCOA at 34.

better placed than his younger self to cope with any attendant publicity (and his case is distinguishable from others on this basis[96]).

65. There is a further reason why the High Court should not be required to adopt the position with respect to name suppression that would have applied in the Youth Court. The murder charge H faced could never have been within the jurisdiction of the Youth Court, so appropriately fell to be considered by the High Court Judge. Brewer J was required to consider both whether H's name should be published as a person *convicted* of injuring Mr Peihopa, but also as the person *acquitted at trial* of involvement in his murder. There is no rule that publication of an acquitted person's name would result in extreme hardship, nor that publication of an acquittal is not in the public interest. The fact suppression prior to trial is not automatic confirms an acquittal cannot be decisive on a name suppression application.[97] As this Court has previously held, both acquittals and convictions can give rise to legitimate public interest and debate.[98]

*Discharge without conviction in this case*

66. In this case, H's sentence was determined with considerable emphasis on his youth, taking into account that the charge he pleaded guilty to was unlikely to attract a conviction if sentenced in the Youth Court jurisdiction.

67. H's application for a discharge without conviction was advanced solely on the basis of youth.[99] The statutory test Brewer J was required to apply is set out in s 107 Sentencing Act:

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96 Both S (*R v S* CA284/02, 234/02) and Q (*R v Q* [2014] NZHC 550) remained young people (under 17) at the time their applications were determined, DP (*DP v R* [2015] NZCA 476) was 14 (and also had other vulnerabilities).

97 See the discussion in *Leary v R* [2010] NZCA 195.

98 *Rogers v TVNZ Ltd* [2007] NZSC 91.

99 Submissions filed on his behalf in the High Court referred to his lack of criminal history and good prospects of being successfully reintegrated into the community. "If this Court allows him to, he can move forward with his life with the opportunities available to him he currently has, such as secure employment and the ability to one day travel overseas as he hopes. Those prospects would be permanently damaged should he receive a conviction for violent offending. For the Defendant as an adult to be prevented from having life opportunities because of a conviction received from conduct from when he was a youth, is out of all proportion to the gravity of the offending." (High Court submissions for sentencing para 6.42).

> **107 Guidance for discharge without conviction**
> The court must not discharge an offender without conviction unless the court is satisfied that the direct and indirect consequences of a convictionwould be out of all proportion to the gravity of the offence

68. This requires a three-step process: identifying the gravity of the offence; identifying the direct and indirect consequences of a conviction; and determining whether the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offending.[100] If the court determines that the consequences of conviction sufficiently outweigh the gravity of the offence, the next step is to consider, in the exercise of its discretion, whether to grant a discharge.

69. H's youth was front and centre: Brewer J took H's youth into account the assessment of H's culpability (reducing offending of moderate gravity to low), and also the particularly negative impact of a conviction on him as a young person.[101] Beyond the consequences on him as a young person no specific consequences, direct or indirect, were relied on.[102] H had stable employment as an apprentice, and that could continue despite a conviction.

70. Brewer J was aware that an outcome in the Youth Court would not have involved a conviction, and he was asked to take this into account.[103] His Honour clearly did so, given the reference to the policy reason why young people are not usually convicted: "A conviction can inhibit employment, may affect the ability to travel overseas and can affect social regard. These can have particularly negative impacts on young persons."[104] No error is apparent.

**CONCLUSION**

71. The outcome H may have received had he remained in (or been returned to) the Youth Court was relevant to the Judge's decision whether to grant permanent name suppression, and how to sentence him. But given the

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100 See *Bolea v R* [2024] NZSC 46.

101 Sentencing notes at [53]: SCCOA at 48.

102 As noted by Brewer J, Sentencing notes at [53]: SCCOA at 48.

103 H's submissions in the High Court asserted that if it were not for the decision to charge him in the High Court, he would have received a Group One or Group Two response under s 283 OT Act.

statutory context, a possible Youth Court outcome cannot be given decisive weight.

72. In this case Brewer J, appropriately, gave significant weight to H's youth in making both decisions:

72.1 In respect of name suppression, Brewer J was influenced by the fact H's name would have been suppressed if he had remained in the Youth Court. But this factor of itself did not equate to extreme hardship. No error is apparent in this analysis.

72.2 As to sentence, considerable weight was given to H's youth in the assessment of the gravity of the offending, the consequences of conviction, and the decision whether to discharge H without conviction. The Judge should not be required to attempt to replicate the outcome if the charge had been before the Youth Court. The decision to decline a discharge without conviction should be upheld.

1 August 2024

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Z R Johnston | H G Clark
Counsel for the respondent

**TO**: The Registrar of the Supreme Court of New Zealand.

**AND TO**: The appellant.

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[104] Brewer J sentencing notes at [53]: SCCOA at 48.

## Appendix: procedural history

| | Event | Age | Court |
|---|---|---|---|
| 12 June 2021 | Date of the offending | 17 | |
| 14 June 2021 | H charged with injuring with intent to cause grievous bodily harm in the Youth Court[105] and remanded in the custody of the chief executive of Oranga Tamariki to Korowai Manaaki | 17 | Youth Court |
| 24 June 2021 | The Crown filed a notice in both to both the Youth Court and the High Court that it intended to file a notice of joinder, for H injuring charge to be heard together with his brother's murder charge in the High Court. The Youth Court rejected the notice as *ultra vires*[106] | 17 | Youth Court & High Court |
| 1 July 2021 | Brewer J determined that there was no statutory basis for any joinder application[107] | 17 | High Court |
| 9 July 2021 | H granted bail following a Family Group Conference, to reside with his aunt in Auckland | 17 | Youth Court |
| August and September 2021 | Two case review hearings adjourned | 17 | |
| **28 July 2021** | **H's 18th birthday** | | |
| 21 December 2021 | Police charged H with murder;[108] a final case review hearing in the Youth Court | 18 | Youth Court |
| 3 February 2022 | H's first appearance at a High Court callover, interim name suppression granted[109] | 18 | High Court |
| **28 July 2022** | **H's 19th birthday** | | |

105 Charging document CRN: 21288000050 (CACOA at 18).

106 Minute of Judge L King, 25 June 2021.

107 Callover Minute of Brewer J, 1 July 2021.

108 Charging document CRN: 21288000205 (CACOA at 22).

109 Callover Minute of Brewer J dated 3 February 2022 at [5].

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|---|---|---|---|
| 7 to 14 November 2022 | Murder trial commences. H pleaded guilty at the commencement of trial to an amended charge of injuring with intent to injure<br><br>At the conclusion of the Crown case, H's application to have the murder charge dismissed under s 147 of the CPA was declined[110]<br><br>H acquitted of the murder charge | 19 | High Court |
| 24 March 2023 | At sentencing H was convicted and discharged; his brother was sentenced to 18 years' imprisonment | 19 | High Court |
| 22 June 2023 | Court of Appeal | 19 | Court of Appeal |
| **28 July 2023** | **H's 20th birthday** | | |
| | Application for leave to appeal to Supreme Court granted | 20 | Supreme Court |
| **28 July 2024** | **H's 21st birthday** | | |
| 19 August 2024 | Supreme Court appeal hearing | 21 | Supreme Court |

110 Minute of Brewer J, "Section 147 application", 10 November 2022 (CACOA at 82).