IN THE YOUTH COURT
AT AUCKLAND

I TE KŌTI TAIOHI
KI TĀMAKI MAKAURAU

CRI-2019-204-000192
[2020] NZYC 328

NEW ZEALAND POLICE
Prosecutor

v

[FG]
Young Person

Hearing:	7, 8 May and 22 June 2020
Appearances:	H Clark for the Police M Winterstein for the Young Person
Decision:	22 June 2020
Reasons:	29 June 2020

REASONS FOR DECISION OF JUDGE AJ FITZGERALD
[Admissibility of evidence]

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[FG]'s charges and the issues

[1] [FG], who is now 16 years old, faces three charges of aggravated robbery and one of unlawfully getting into a motor vehicle.

[2] The first aggravated robbery, of [store 1], is alleged to have occurred on 16 September 2017 and the second, of [store 2], on 3 January 2018. [FG] was 13 years old at the time of both incidents. The remaining offences, aggravated robbery of [store 3] and unlawfully getting into a motor vehicle, allegedly occurred on 24 March 2018 when [FG] was aged 14.

[3] I must decide whether two written statements taken from [FG] by [Detective 1], on 25 September 2018 and 15 October 2018, and DNA evidence obtained from him by the police on those two dates, are admissible as evidence against him in relation to those charges. In doing so, I am asked to decide whether [FG]'s mother carried out her role as a nominated person adequately.

[4] The admissibility of the statements is to be decided primarily by reference to the Oranga Tamariki Act 1989 ("the OT Act"). Significantly, the new s 5 principles of that Act came into force on 13 July 2017 when it received the Royal Assent. Section 5(b)(i) of the OT Act therefore also requires consideration of whether [FG]'s rights under the UN Convention on the Rights of the Child ("the CRC") were respected and upheld.[1]

[5] The admissibility of the DNA evidence is to be decided by reference to the Criminal Investigations (Bodily Samples) Act 1995 ("the CIBS Act"). What, if any, relevance the CRC has with respect to the taking of the DNA samples is also considered.

[1] United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) ("the CRC").

Rights and vulnerabilities (Part One)

[6] The written statements were taken by [Detective 1] during the investigation of the alleged offending and therefore, under the OT Act, [FG]'s vulnerability as young person[2] entitled him to special protection.[3] Articles of the CRC contain important rights and guarantees regarding the fair treatment and trial of young people which will be considered too.

[7] Deciding the issues firstly requires an analysis of how the special protections contained in the OT Act were provided; in particular, whether [FG]'s rights were explained in a manner and in language that was appropriate to his age and level of understanding.[4] Similarly, were the rights and guarantees [FG] has under the CRC, and in particular those contained in article 40, respected and upheld?

[8] Secondly, under the CIBS Act, was [FG] informed of the necessary information in a manner and in language that he was likely to understand?

[9] Like many young people who come before the Youth Court, [FG] has a communication disorder. For many young people with such a disorder, that need can be adequately met by changes that all the professionals involved in the processes must make to the way they communicate, to enable the young person to adequately understand what is going on. [FG] however, is one of a smaller but still significant number, whose disorder is such that he also requires the support of a communication assistant to enable him to participate properly in the proceedings.

[10] That is one of several important factors to be considered in determining the issues in this case and putting into context the manner and the language that was used by the police officers to explain and to inform [FG] of his rights and the procedures he was to undergo.

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[2] References to young person throughout this judgement must to taken to include child, recognising that [FG] was a child at the time of the first two aggravated robberies.
[3] Oranga Tamariki Act 1989 ("OT Act"), s 208(2)(h).
[4] OT Act, s 218.

[11] This case illustrates the vitally important role that communication assistants now play in the New Zealand Youth Justice System by identifying communication difficulties for young people that had previously gone unrecognised and often misinterpreted, and also by enabling the meaningful participation of young people with communication disorders who enter the Youth Justice system. It also provides an opportunity to consider how the new and significant statutory requirement under the OT Act, to respect and uphold the rights of young people under the CRC, applies to cases such as this.

[12] Before turning to those and other relevant issues, it is necessary to provide more background information and a summary of the facts.

Age of the charges

[13] It is important to briefly explain how it is that charges dating as far back as September 2017 and January and March 2018, are still before the court in mid-2020 and only at the pre-trial stage.

[14] The charges were initially laid in the Youth Court in November 2018. Delay in laying them was due to [FG]'s alleged involvement not being detected until the DNA samples were taken from him and statements obtained on 25 September 2018 and 15 October 2018 and fingerprint evidence was analysed.

[15] On 18 March 2019 I declined an application to have the charges dismissed due to delay. At that time, the current pre-trial applications were flagged but not ready to be heard.

[16] There was also a challenge to the validity of the charges due to defects in the process of convening and holding a Family Group Conference ("FGC") under s 247(b) of the OT Act. In July 2019 the police conceded that the charges had been laid inappropriately and were granted leave to withdraw them.

[17] However, following a FGC on 17 September 2019, which failed to reach agreement about how the charges should be dealt with, the police laid them in court again on 30 September 2019.

[18] Another application to dismiss the charges due to delay was heard on 6 December 2019 by Her Honour Judge Lovell-Smith who declined that application for reasons set out in a written judgment issued on 20 January 2020.

[19] A hearing of the present applications was arranged for 30 March 2020 but could not proceed due to the COVID 19 Alert level 4 lockdown.

[20] These applications were brought on for the hearing on 7 and 8 May 2020 and were able to proceed on those days despite the Alert level 3 restrictions. It was possible to achieve that only because of the professionalism of counsel and Ms Kedge, who is [FG]'s communication assistant, as well as the diligence of Court management and staff. I am very grateful to all concerned for their part in enabling that to happen and for the efficient way the hearing was conducted in difficult circumstances.

Facts

[21] The issues to be determined are very much interrelated and need to be considered firstly by reference to the following facts.

25 September 2018

[22] [FG] was one of three young people apprehended following a burglary in Glen Innes on 25 September 2018. They were taken to the Mount Wellington Police Station where [Constable 3] was on duty. One of her tasks was to obtain DNA samples from them. This was especially important in relation to [FG] because he had suffered a cut in the burglary and left some of his blood at the scene.

[23] [Constable 3] phoned [FG]'s mother [HG] because he said he wanted her there as his nominated person. [HG] arrived at the station at about 5.00 pm, having just finished work.

[24] [Detective 1] had spoken to [FG] and his mother the day before this and arranged to meet them at the Glen Innes Police Station at 4.00 pm to talk about the aggravated robberies of [store 2] and [store 3].

[25] When [Detective 1] heard of [FG]'s arrest on 25 September 2018, she went to the Mount Wellington Police Station. At about 4.15 pm she saw [FG] there briefly and, when [HG] arrived at the station at about 5.00 pm, she gave her the Duties of a Nominated Person form. [Detective 1] explained to [HG] that she wanted to speak to [FG] about two aggravated robberies, that [HG] was there as his nominated person, and her role included making sure [Detective 1] conducted herself properly and that the role of nominated person was "…pretty much outlined on the form that was handed to her." That form explains that the role of nominated person is to:

(a) Ensure the young person understands their rights.[5]

(b) Ensure they understand if they are not under arrest they can leave at any time.

(c) Find out whether the young person wants to answer Police questions or make a statement.

(d) Support the young person before or after questioning.

(e) If at any time you do not understand what is required of you or you are not sure how to fulfil your role you should tell the interviewer immediately.

(f) If at any time you feel that the child or young person is not being treated fairly:

    (i) Tell the interviewer immediately. Do not wait.

    (ii) If you still have concerns advise the Police officer in charge of the station immediately.

[26] [HG] said she read the form and understood it and that, "I've read so many nomination forms, so I was aware what it looked like and what it stated."

[Constable 3] and the intention to charge DNA sample

[27] [HG] then spoke with [FG] alone before [Constable 3] saw them both to talk about the process for the intention to charge DNA sample she wished to take from [FG]. That discussion began at about 5.17 pm. [Constable 3] says she confirmed with

[5] The rights are also printed on the form and are essentially the same of those set out below at [40].

[HG] that she was present as [FG]'s nominated person and that she understood that her role for [FG] was, "…to ensure that [[Constable 3]] explained the form and that he understands what [she was] asking."

[28] [Constable 3] had met [FG] and his mother before and found them to understand and follow Police processes when they were explained. That included [FG] understanding his "Youth Bill of Rights" when she explained it to him.

[29] [Constable 3] explained to [HG] and [FG] that the reason for taking his DNA was that blood had been located at the burglary scene. It was therefore an "intention to charge" sample that was to be taken. She went through intention to charge DNA notice form 5A, POL 811 03/16, ("DNA notice form 5A") with [FG] and his mother and says she explained the contents in a manner she believed both could understand. This, she said, was done by following headings on the form and explaining the contents in a more simple way, confirming that [FG] and his mother understood as she went through the document.

[30] While explaining the form to [FG] and his mother, [Constable 3] said there were some questions about certain parts of the form, but she could not recall which ones. When those questions were asked she clarified further and confirmed their understanding. Those must have been questions asked by [HG] because [Constable 3] says the only question [FG] asked was after the DNA sample was taken. It took about 20 minutes to go through the form.

[31] DNA notice form 5A is a five-page, densely worded document containing a large amount of legal and complex terms and language. When asked under cross-examination to demonstrate how she had explained it, [Constable 3] largely just read from the form using mostly the wording in it, with some paraphrasing. However, she did say she went through it a lot more slowly with [FG] and his mother than how she did in court.

[32] After going through the form in that way, [Constable 3] got both [FG] and his mother to initial the bottom of each page and she told them that meant she had

explained the form and that they understood it. She said there was nothing about her interaction with [FG] at any point that indicated to her that he did not understand any of the things being explained to him. The method she used to check his comprehension was to ask, "do you understand?" At no stage did she ask [FG] to explain back in his own words any parts of the form to her.

[33] [HG] recalls [Constable 3] saying that she would be given time to read the form, but she only read some parts of it because she was really tired and just wanted to go home because she'd had a couple of hard days. She did not think [FG] understood what was happening, at least not fully, so she explained it in shorthand to him.

[34] In relation to [FG] signing the form, meaning he was thereby acknowledging that he understood what was in it, [HG] said, "No, all I just said it's for me to sign it, I'll sign it". However, when [Constable 3] said that [FG] needed to sign it too, because the form said, "signature of suspect" and then, "signature of parent" [HG] realised it needed two signatures. She said that the purpose of [FG] signing the form was because they were told to do so and it said on the form "signature of suspect." She also explained that it is not actually [FG]'s signature on the form; he just roughly wrote his name because he wanted to get out of there, she said.

[35] [HG] said [FG] did not understand the form fully, but he did know he was under arrest, that the Police wanted a DNA sample from him, and that he had no choice but to give it. She seemed adamant that the form she signed was her giving consent for the DNA sample to be taken from [FG] which had to happen because he was 14 years old and "that is what the law says." "That's the reason why I signed this consent form, because he was 14…and that's what the law says, 14. They can, well actually force you to take a sample." That is what she believed [Constable 3] had explained to her.

[36] [HG] said they were told that they were not leaving the station that night without giving the sample and says that [FG] said he just wanted to get out, to go home and he said that many times in front of [Constable 3].

[37] At 5:47pm [Constable 3] obtained a DNA sample from [FG]. She says he chose to take the buccal swab. [HG]'s evidence essentially was that she chose the method and [FG] then took the swab himself. There is nothing on the form he signed to indicate he chose that option nor that he declined the taking of blood by finger prick.

[38] It was after the DNA sample was taken that [FG] asked how he could be identified if his blood was at the scene, but they were only wanting to take a sample of saliva. [Constable 3] explained to him that DNA is specific to an individual and a sample taken from saliva can be matched against other items such as blood, spit, hair, skin and so on.

[Detective 1] and the first written statement

[39] At about 6:00pm, [Detective 1] spoke to [FG] with his mother present. She knew them both already and considered [HG] to be very competent and suitable as a nominated person.

[40] [FG] did not want the interview recorded on DVD and so it was limited to written notes kept by [Detective 1] who gave [FG] the following youth rights caution:

- You have the right to remain silent.
- You do not have to make any statement or answer any questions.
- If you agree to make a statement and/or answer any questions you can change your mind and stop at any time.
- Anything you say will be recorded and may be given in evidence in court – this means if you are taken to court for aggravated robbery what you say to me may be retold to the judge or jury.
- You have the right to speak with a lawyer and/or nominated person by you, or both, without delay and in private before deciding whether to make any statement or answer any questions.
- You have the right to have your lawyer and/or nominated person, or both, with you while you make any statement or answer any questions.
- Police have a list of lawyers you may speak to for free.

[41] [Detective 1] says she discussed with [FG] that a lawyer helps him with legal stuff, that he could have one at any time to help him, not just at court, and she had a list of lawyers who could give him advice for free.

[42] [Detective 1] says that she checked at the end with [FG] and with [HG] to confirm that they understood the rights they had discussed. She asked [FG] what the right to remain silent meant and he said he could, "just be quiet." She says she reminded [FG] that although he could stop talking to her at any stage, he could not leave because he was still under arrest for the burglary. They then had a discussion about the rights and his understanding of them after which, [Detective 1] says she and [HG] agreed that [FG] understood his rights.

[43] However, when asked about [FG]'s understanding of those rights at the hearing, [HG] said "as a typical boy he was just overwhelmed at the time and he was just tired and restless." She recalls telling him to be quiet and just wait patiently.

[44] [HG] did not seem to have a good or confident understanding of at least some of the rights caution. For example, when asked whether she understood that, generally, no one has to speak to the police she was genuinely surprised, and her spontaneous answer was, "are you serious?" With some further questioning she said she understood people have the right to remain silent.

[45] In relation to [FG]'s right to have a lawyer, [HG] said they both knew of that right but, "…at the time we didn't know no lawyers, 'cos this is all new to us." Shortly after, when asked whether she knew what assistance a lawyer could provide, other than to tell [FG] to be silent she said, "I think that's the reason why I was there. I was there just to be by my son's side, so he understood his rights." Her understanding was that they were there to talk about two burglaries, but she did not know how serious those charges were.

[46] It was clear that [HG] was not in a good frame of mind to be dealing with these issues that evening. As she explained, "I just came straight from work, straight to the Mt Wellington police station, [FG] was buggered, tired, over all of this, when finding

out my son's in the police station so, rushing from work to the police station to deal with him, yeah, tired, exhausted, angry, yeah, all those on that day."

[47] On reflection, [HG] said a lawyer could have given [FG] a lot of things that day, but she did not explain that to him. She accepts now that if a lawyer had been there, he or she might have encouraged [FG] not to make a statement but, at the time, she thought the best thing was to tell her son to be honest. That was what she always told [FG] in situations like this. [Detective 1] agreed that [HG] always told [FG] to just be honest.

[48] They then spoke about the aggravated robbery of [store 3] and [FG] admitted being involved and identified himself in the CCTV footage. He and his mother signed [Detective 1]'s note book where the conversation and admissions were recorded.

[49] There was then a break so that [FG]'s cut hand could be tended to by ambulance staff who had arrived at the station.

[50] At about 6.40 pm the interview resumed. [Detective 1] again gave [FG] his rights caution in exactly the same format as before.[6] He told [Detective 1] he did not know about the [store 2] robbery. He and his mother then signed the Detective's notebook again after that conversation was recorded.

15 October 2018 – the suspect DNA sample

[51] On 9 October 2018, [Detective 1] received results from ESR of the analysis of the DNA sample taken from [FG] on 25 September 2018, which linked him to the [store 2] robbery. She therefore visited him at home on 12 October 2018, explained that situation and said she wished to speak with him about it. However, because [HG] was unwell that day, the meeting was re-scheduled for Monday 15 October 2018.

[6] See above at [40].

[52] [Detective 1] arrived at [FG]'s home on 15 October 2018 with a male police officer at about 4.40 pm. Upon arrival, she gave [HG] the Duties of a Nominated Person form, explained that she wished to speak to [FG] again about the [store 2] robbery and said that his DNA had been found on a jumper that one of the offenders had worn around his face.

[53] From that point onwards, [Detective 1]'s evidence about what happened that afternoon is different to [HG]'s in several significant respects.

[54] [Detective 1] says that at 4.45 pm she requested a suspect DNA sample from [FG], and at 5.05 pm he consented to that and both he and his mother signed the suspect DNA Form 2, POL 771 03/16, ("suspect DNA form 2"). She had explained that the sample was sought in relation to both the [store 2] and [store 1] robberies.

[55] During the 20 minutes from 4:45pm to 5:05pm, [Detective 1] says they were all sitting together at the dining room table; that is, the Detective and other police officer, [FG] and his mother. [Detective 1] gave the form to [FG] and his mother to read, in accordance with her usual practice. They had the document there in front of them. She spoke to them about it as they went through it to ensure that they understood what it all meant. With each topic in the form, she ensured that [FG] understood and, for some at least, got him to tell her what it meant. She also had [HG] confirm that she believed [FG] understood the form.

[56] Suspect DNA Form 2 is another five-page densely worded document containing a large amount of legal and complex terms and language. [Detective 1] says she did not read the form to [HG] and [FG], but that [HG] read it out loud to [FG]. As they went through the form, and satisfied themselves that [FG] understood each paragraph, they got him to put his initials there. After completing that process, and having the form signed by both [FG] and his mother, a suspect DNA sample was taken from [FG] at 5.07 pm.

[57] In complete contrast to that, [HG]'s evidence is that the two police officers were sitting at the dining room table with [FG] while she was in between there

and the kitchen which was about two arms-lengths away. She had a [toddler] running up and down and she was cooking and therefore standing in the kitchen, or at the doorway between there and the dining room.

[58] [Detective 1], she said, was trying to explain the document to [FG] but he was too busy looking at the ground. [HG] said, "…[[Detective 1]] tried the best to explain it to him, but I think son didn't understand most of it 'cos, like I said, I had a [toddler] and I was up and down from the table."

[59] [HG] did not read the form to [FG]. It is very clear she was busy and pre-occupied with other things going on. She said [FG] did not read everything but just initialled the form. She said, "He didn't read through all this, I'm telling you now, he can barely keep still for 15 minutes at home." When asked if she believed he understood the form that day, she said, "No, not all of it".

[60] It became clear during cross-examination that [HG] believed that [FG]'s consent was not required for the taking of a DNA sample on this occasion, just as it had not been on 25 September. She again repeated her belief that he had no choice in the matter because "…he had come of age at 14." During re-examination she agreed that the DNA forms were different, that a court order could be obtained if necessary to get the DNA, and this time they could not "hold [[FG]] down".

[61] [HG] also explained that she ticked the box and wrote the word "YES" in the box next to where it says, "I consent to give a bodily sample" not [FG]. He only wrote is name next to where it says, "Signature of suspect" and wrote the date. She completed all of the other parts, "for me and him".

The second written statement

[62] After the DNA sample was taken at 5.07 pm, [Detective 1] gave [FG] his rights caution again in exactly the same form as she had on 25 September 2018.[7] That caution was given at 5.10 pm.

[7] See above at [40].

[63] Again, there is a significant difference between the evidence of [Detective 1] and [HG] about what happened next. [Detective 1] says she discussed each of those rights with [FG] as they went through them and both she and [HG] were satisfied that [FG] understood them all. On this occasion, [Detective 1] used some stickers she had created to record [FG]'s responses to the rights after they were read out.

[64] For example, in relation to the right to remain silent he again said, "It means I can be quiet." In relation to the advice that he did not need to make any statement or answer any questions, he repeated back those words, "I don't have to make a statement or answer questions."

[65] Regarding the right to speak to a lawyer or any person nominated by him without delay in private before deciding whether to make any statement or answer any questions, he said "I can talk to a lawyer." Although [Detective 1] accepted that was not an answer that demonstrated proper knowledge of the right, she said she had previously talked to him about that right and made sure he understood it.

[66] [Detective 1] says that when she gave this second lot of rights, [HG] was there while she was doing so and was "totally being involved." However, she could not recall if [HG] said anything. Although she did not ask [HG] whether she was satisfied that [FG] understood each of the rights separately, [HG] said she did believe he understood his rights as a whole.

[67] However, it is very clear from [HG]'s evidence that she was not "totally being involved." She was having to divide her attention between cooking in the kitchen, minding a [toddler], and trying to listen to what was being discussed in the dining room. She was not always at the table but was trying to listen. She said, "Whatever the conversations were, when it caught my ears, when I overheard something I said, "what?" "What was that?"

[68] [HG] said she could vaguely recall [Detective 1] telling [FG] about the right to remain silent. [HG] said he was sitting at the table quietly and, at one point, she told him to hurry up and talk because he was being quiet and had not said a word for a couple of minutes and she just wanted it over and done with. She said she wouldn't

have a clue if he understood that day that he did not have to speak to the detective about the robbery, and she was the one who wanted him to talk.

[69] After the caution, and before the statement was taken, [HG] did have a few minutes alone with [FG] because she wanted to know if there was anything he wanted to share with her first. He did not share anything. Apart from that there is no mention of her having time alone with him that afternoon to go through the various things a nominated person is required to.[8] [HG] did not talk to [FG] that day about his right to a lawyer. She said, "Actually I never mentioned it, no that topic didn't come up on this occasion."

[70] [HG] also said that while she was out of the room, [Detective 1] was asking [FG] questions and, she assumed, writing things down but she did not know if [FG] realised that he did not have to make a statement.

[71] At one point, [HG] overheard [Detective 1] mention a baby. That caught her attention. She was shocked to learn that a baby had been present when the [store 2] robbery was taking place. Her reaction was to say to [FG], "You've been involved with this son, this is a baby, it could have been your [sibling]". It is at this point that [FG] admitted that he was there at the scene of that robbery. At this stage [HG] is in the dining room yelling at [FG] who, she says, would have been "absolutely" aware that she was upset.

[72] I accept [HG]'s version of what occurred that day as well as her version of events on 25 September 2018 at the Mt Wellington Police Station. Where there is inconsistency between what she said, and what the police officers said, I accept her evidence. Throughout all of her evidence she was very spontaneous and genuine when answering questions and completely without guile. Significantly too, her evidence about such things as [FG]'s demeanour, levels of engagement, concentration and comprehension is also consistent with my own observations of him in court on a number of occasions, particularly the hearing on 7 and 8 May 2020. It is also consistent

[8] See above at [25].

with the independent evidence of professionals about such things, which is the topic to which I now turn.

[FG]'s communication and psychological assessments

[73] At [FG]'s first appearance at court on 18 October 2018, in relation to the burglary charge, he was seen by a forensic clinician who completed an indicative screen.

[74] Amongst other things that screen records that [FG] was unable to identify the roles of any professionals in court, although the clinician was unsure if this was due to limited understanding or reluctance to speak. The recommendations of the screen included that a preliminary fitness assessment be obtained, because of the way [FG] presented and what seemed to be his limited understanding. It was also suggested that cognitive and education assessments would be beneficial.

[75] A Speech Language Therapy report from Talking Trouble was provided on 22 October 2018. The report had been arranged by Oranga Tamariki to identify language and communication strategies needed to facilitate [FG]'s participation in a FGC. The following findings were made:

(a) [FG] had limited understanding of legal terminology. He did not know a variety of legal words such as "victim", "remorse", "guilty", "remand" and "not denied". For example, when asked "what is a victim?" he said, "a suspect".

(b) He had difficulties formulating a cohesive narrative which impacted on his ability to effectively communicate novel information.

(c) He displayed significant difficulties attending to and understanding spoken information that was imbedded in longer and syntactically complex sentences and short paragraphs.

(d) His limited understanding of legal vocabulary would have a significant impact on his ability to understand in settings that use such information.

(e) He had some awareness of his communication difficulties saying, "I can't even remember like what you said about nothing." And, "I don't understand you. I'm not good with those stuff."

[76] The assessment found that the oral nature of a FGC, complexity of language used and the need to listen for extended periods of time would present a significant challenge to [FG]'s capacity to listen, concentrate and understand.

[77] Detailed recommendations were made to help those communicating with [FG] to do so in a way that would enable his meaningful participation. Avoidance of jargon, metaphor, abstract vocabulary and legal terminology is necessary. Drawing events being described and use of resources such as Post It notes would help him.

[78] On 26 November 2018 the psychological assessment that had been ordered as a result of the indicative screen carried out on 18 October 2018 arrived.

[79] Reference is made in that report to an assessment by an Educational Psychologist in February 2018 who found that [FG] struggled to comprehend verbal information which may also affect his comprehension of written language.

[80] The authors of the Court ordered report diagnosed [FG] with Conduct Disorder (childhood onset) and Substance Use Disorder (alcohol and cannabis). They also noted that [FG] had suffered a physical assault to the head and face in February 2018 and would therefore benefit from a neurological assessment to investigate the possibility of a head injury.

[81] They found [FG]'s verbal comprehension skills were limited and said he would have difficulty listening for long periods, holding verbally presented information in his mind, and expressing this back when asked. It was therefore recommended he have a Communication Assistant in court. Their opinion was that he would likely be found fit to plead and stand trial with support from his Youth Advocate and a Communication Assistant.

[82] From that point onward [FG] has had a Communication Assistant who has used a variety of skills and resources to enable [FG]'s involvement in the proceedings. That has included the tools mentioned earlier such as pictures, diagrams and post it notes to help explain things being discussed.

[83] Also, since that time, the length of court sessions have been shortened to cater for [FG]'s limited concentration span. During the hearing on 7 and 8 May, none of the court sessions exceeded 45 minutes which had been agreed in advance to be the longest period of time [FG] could be expected to concentrate for. It was obvious when watching him in court that his attention to what was happening showed signs of starting to wane after about 15 to 20 minutes. Three of the sessions were less than 30 minutes, with one being 18 minutes long. Sometimes that was because it was a convenient point in the evidence to take a break, but it was also necessary to enable [FG] to follow what was happening and listen to the evidence with help from Ms Kedge.

[84] Both Ms Winterstein and Ms Kedge monitored [FG]'s concentration levels and suggested a break when that was needed. Ms Kedge also enabled [FG] to follow the evidence being given by witnesses, and what was happening in the hearing, by use of a computer on her desk from which she could send to a screen set up in front of [FG], words and images that converted the language into an intelligible format for him.

Law regarding the written statements

The OT Act

[85] Sections 215 to 224 of the OT Act are those which govern the rights of young people when questioned, charged with an offence, or arrested. The parts of those sections that are most relevant here are:

(a) Officers are required to explain certain rights to young people before questioning them[9] and in particular:

[9] Section 215(1).

(i) The young person is under no obligation to make a statement;

(ii) If he or she consents to make a statement, the consent can be withdrawn at any stage;

(iii) Any statement made can be used in evidence in any proceedings;

(iv) The young person is entitled to consult with a lawyer and any person they nominate.[10]

[86] The explanation of rights must be given in a manner and language that is appropriate to the age and level of understanding of the young person.[11]

[87] No written or oral statement made by a young person will be admissible unless such an explanation has been given and the young person has been given the opportunity to consult with a lawyer and the person they have nominated if they have expressed a wish to do so.[12]

[88] Those people who may be nominated by a young person are a parent or guardian, adult family of whānau member, or any other adult the young person selects. If the young person does not nominate someone the police officer can do so.[13]

[89] The duties of a nominated person are to:[14]

(a) take reasonable steps to ensure that the young person understands the rights that are explained to them by the officer; and

(b) support the child or young person before and during any questioning; and if the child or young person agrees to make or give any statement, during the making or giving of the statement.

[10] Section 215(1)(f).
[11] Section 218.
[12] Section 221.
[13] Section 222(1).
[14] Section 222(4).

[90] Any statement made by a young person will be admissible as long as there is reasonable compliance by an officer with the obligations imposed regarding explaining rights and providing the opportunity to consult with a lawyer and a nominated person.[15]

Case law

[91] The special protection afforded by the OT Act not only requires the use of language appropriate to a young person's age and level of understanding, but also that questioning be, as far as possible, at age appropriate times and in age appropriate conditions.[16]

[92] Police officers need to explain rights to a young person in a manner that ensures that the particular young person understands the various rights, but also how to exercise them.[17]

[93] The OT Act is drafted on the assumption that most young people will have little or no understanding or experience of what a lawyer is, how to instruct one, and what functions a lawyer will perform.[18]

[94] In *R v Z,* the Court of Appeal recorded its concern that the young person in that case:

> [92] …was facing questioning over such a serious charge without having had the benefit of legal advice. There must be a real issue, given the duty to offer special protection under s 208(h), as to whether more ought to be done to try and ensure that a child or young person in Z's situation takes legal advice.
>
> [93] The Canadian approach is to do just that. The brochure given to parents and guardians … positively encourages parents and guardians to ensure that legal advice is obtained for their children. It also tells parents not to urge their children to "confess" straightaway as this will rarely be in their best interests.

[95] Although the Court of Appeal in *R v Z* then went on to refer with approval to the Canadian approach of providing a brochure encouraging the taking of legal advice,

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[15] Section 224.
[16] *R v Z* [2008] NZCA 246, [2008] 3 NZLR 342 at [33].
[17] At [35].
[18] At [37].

it said later in *Campbell v R* that those comments did not go so far as to impose a positive obligation on a police officer to take that step.[19]

[96] In *R v Z* attention is drawn to the use of the term "explain" in s 215 of the Act as opposed to "inform" which is used in s 23 of the Bill of Rights Act 1990. In addition, the Court observes that merely informing a young person of the right to a lawyer, even in age appropriate language, would not meet the requirements of s 218 because it would not be dealing with the level of understanding of the particular young person.

[97] However, again in *Campbell,* the Court of Appeal pointed out that it is not part of the statutory scheme that the role of a lawyer be explained to a young person but then goes on to say that it is "…highly desirable this occur since the obligation under [the Act] is to explain the rights to the young person."[20]

[98] The presence of a nominated person does not diminish the responsibility on police officers to explain the rights in language that is appropriate to the age and level of understanding of the young person.[21]

[99] However, in the later *Campbell v R* decision, the Court of Appeal explained that although it is good practice for a police officer to ask a suspect whether they wish to have a lawyer (after being given advice as to their right to have one) that is not prescribed practice.[22]

[100] In that case the Court of Appeal also commented on the use of the language "and/or" in connection with the right to a lawyer and a nominated person. They encouraged the use of simpler language which makes clear that these are additional and not alternative rights.[23]

[101] Also, in *R v Z* the Court notes that the role of the nominated person includes taking reasonable steps to ensure the young person understands the rights explained to

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[19] *Campbell v R* [2014] NZCA 376, [2015] DCR 237 at [27].
[20] At [41].
[21] *R v Z,* above n 16, at [39].
[22] *Campbell v R* [2015] NZCA 452 at [43].
[23] At [46].

them and provide support during the interview. The Court said the nominated person is not merely a cipher; to carry out their role they need to know the jeopardy faced by the young person they are asked to support.[24]

[102] In relation to the involvement of a nominated person, the Court of Appeal in *Campbell* noted that, in contrast to *R v Z*, the police officers allowed Mr Campbell and his father an extended period to confer before commencing the interview. The Court also noted that the statutory duty on a nominated person under s 222(4)(a) of the Act is to take reasonable steps to ensure that the young person understands the rights caution.[25]

[103] The Court in *Campbell* also made it very clear that the question as to whether the explanation of rights given was adequate is always a fact-specific enquiry.[26]

[104] In *R v Z* the Court said that a bare statement of rights is not likely to be sufficient to meet the requirements of s 215 of the Act. If there is a failure to meet those explanations, then, absent reasonable compliance under s 224, the statement is inadmissible.[27]

The CRC

[105] As mentioned already, the principles in s 5 of the OT Act now require that the rights of young people under the CRC be respected and upheld.

[106] Article 37 is relevant in relation to the events of 25 September 2018, given that [FG] was detained that day having been arrested in relation to the burglary. Article 37 (d), which is concerned with procedural rights, provides that a young person deprived of his or her liberty has the right to prompt access to legal and other appropriate assistance.

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[24] *R v Z,* above n 16, at [87]
[25] *Campbell v R,* above n 19, at [25].
[26] *Campbell v R,* above n 22, at [44] citing *Campbell v R,* above n 19 at [18].
[27] *R v Z,* above n 16, at [41].

[107] Otherwise, it is article 40 of the CRC which is most relevant in this case. It aims to uphold the rights and ensure the safety of all children in conflict with the law who come into contact with the Youth Justice system and is set out in full in the appendix to this judgment. It is important to look carefully not only at the article itself, but also at the guidance the UN provides from time to time on its interpretation and application.

UN General Comment No. 24 (2019)

[108] On 18 September 2019, the UN's latest General Comment on Child Justice ("the UNGC") was issued, providing States parties with guidance on steps that should be taken to uphold children's rights under the CRC.

[109] In relation to article 40 the UNGC includes:[28]

> **D. Guarantees for a fair trial**
>
> 38. **Article 40 (2)** of [the CRC] contains an important list of rights and guarantees aimed at ensuring that every child receives fair treatment and trial…**It should be noted these are minimum standards**. States parties can and should try to establish and observe higher standards.
>
> 39. The committee emphasises that **continuous and systematic training of professionals in the child justice system is crucial** to uphold those guarantees. Such professionals…should be well informed about the physical, psychological, mental and social development of children and adolescents, as well as about the special needs of the most marginalized children.
>
> 40. Safeguards against discrimination are needed from the earliest contact with the criminal justice system and throughout the trial…**Accommodation should be made for children with disabilities, which may include**…**assistance with communication and the reading of documents**…
>
> 41. States parties should enact legislation and **ensure practices that safeguard children's rights from the moment of contact with the system,** including the stopping, warning or arrest stage…

[28] Committee on the Rights of the Child *General comment No. 24 (2019) on children's rights in the child justice system* UN Doc CRC/C/GC/24 (18 September 2019).

Effective participation in the proceedings (art. 40 (2) (b) (iv))

46. Developments in child-friendly justice **provide the impetus towards child-friendly language at all stages**, child-friendly layouts of interviewing spaces and courts, support from appropriate adults…and adaptation of proceedings, including accommodation for children with disabilities.

Prompt and direct information of the charge(s) (art. 40 (2) (b) (ii))

48. Authorities should ensure that the child understands the charges, options and processes. **Providing the child with an official document is insufficient and an oral explanation is necessary**. **Although children should be assisted in understanding any document by a parent or appropriate adult, authorities should not leave the explanation of the charges to such persons**.

Legal and other appropriate assistance (art. 40 (2) (b) (ii))

49. States should **ensure that the child is guaranteed legal or other appropriate assistance from the outset of the proceedings**, in the preparation of the defence, and until all appeals and/or reviews are exhausted.

Freedom from compulsory self-incrimination (art. 40 (2) (b) (iv))

58. **States parties must ensure that a child is not compelled to give testimony or to confess or acknowledge guilt**…"

59. Coercion leading a child to a confession or self-incriminatory testimony is impermissible. The term "compelled" should be interpreted broadly and not be limited to physical force. The risk of false confession is increased by the child's age and development, lack of understanding, and fear of unknown consequences, including a suggested possibility of imprisonment, as well as the length and circumstances of the questioning.

60. The child must have access to legal or other appropriate assistance, **and** should be supported by a parent, legal guardian or other appropriate adult during questioning

Free assistance of an interpreter (art. 40 (2) (b) (vi))

65. States parties should **provide adequate and effective assistance by well-trained professionals to children who experience communication barriers**.

[Emphasis added]

Other UN instruments

[110] Other UN instruments that provide guidance to States parties on the application of the CRC include the Beijing Rules,[29] Havana Rules,[30] and Riyadh Guidelines.[31] These are not legally binding documents, but they do provide further helpful guidance when determining what is required to properly respect and uphold the rights of young people under the CRC.

[111] Part 7 of the Beijing Rules provides that various rights, including the right to silence, the right to counsel and the right to the presence of a parent or guardian, shall be guaranteed. The commentary to Rule 7.1 describes the right to silence as being, **"the most basic procedural safeguard."** (Emphasis added).

[112] Also of significance is Rule 15, which states that throughout the proceedings a young person shall have the right to be represented by a legal advisor and also that parents or a guardian are entitled to participate unless denied that by a competent authority. The commentary to Rule 15 states that legal counsel and Legal Aid are **needed**, whereas the right of parents or guardians to participate **should be viewed as general psychological and emotional assistance.** (Emphasis added).

[113] Rule 18 of the Havana Rules states that young people should have the right to legal counsel and be able to regularly communicate with them.

European Court of Human Rights cases

[114] Given the requirement now under the OT Act to respect and uphold CRC rights of young people, it is worth looking at decisions from courts that are familiar with doing so. Such decisions are not binding on courts here, but I consider them relevant and helpful when determining what it means to respect and uphold a young person's rights on the issues relevant to this case.

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[29] *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* A/RES/40/33 (1985).
[30] *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* GA Res 45/113 (1990).
[31] *United Nations Guidelines for the Prevention of Juvenile Delinquency* GA Res 45/112/Res/45/112 (1990).

[115] On 27 November 2008, the Grand Chamber of the European Court of Human Rights ("ECHR") issued a landmark decision, *Salduz v Turkey,* on the issue of an accused person's right to legal representation at the investigation stage of proceedings and the fundamental importance of doing so if the accused is a minor.[32]

[116] Amongst other important things, the Court said:[33]

> 54. …the Court underlines the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at trial….At the same time, an accused often finds himself in a particularly vulnerable position at that stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence. In most cases, this particular vulnerability can only be properly compensated for by the assistance of lawyer whose task it is, among other things, to help to ensure respect of the right of an accused not to incriminate himself….Early access to a lawyer is part of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination….These principles are particularly called for in the case of serious charges, for it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies.
>
> 55. Against this background, the Court finds that in order for the right to a fair trial to remain sufficiently "practical and effective"…access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict that right…The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.
>
> …
>
> 60. Finally, the Court notes that one of the specific elements of the instant case was the applicant's age [17 in that case]. Having regard to a significant number of relevant international law materials concerning legal assistance to minors in police custody…the Court stresses the fundamental importance of providing access to a lawyer where the person in custody is a minor.

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[32] *Salduz v Turkey* Grand Chamber, ECHR 36391/02, 27 November 2008.
[33] At [54].

[117] That important decision was followed soon after by another, *Panovits v Cyprus,* where the ECHR expanded on the issue of a young person's right to a lawyer at the early stages of a police investigation:[34]

> 67. …when criminal charges are brought against a child, it is essential that he be dealt with in a manner that takes full account of his age, level of maturity and intellectual and emotional capacities…The right of an accused minor to effective participation in his or her criminal trial requires that he be dealt with due regard to his vulnerability and capacities from the first stages of his involvement in a criminal investigation and, in particular, during any questioning by the police…
>
> 68. The Court reiterates that a waiver of a right guaranteed by the Convention - in so far as it is permissible – must not run counter to any important public interest, must be established in an unequivocal manner and must be attended by minimum safeguards commensurate to the waiver's importance…Moreover, before an accused can be said to have impliedly, through his conduct, waived an important right…it must be shown that he could reasonably have foreseen what the consequences of his conduct would be…The Court considers that given the vulnerability of an accused minor and the imbalance of power to which he is subjected by the very nature of criminal proceedings, a waiver by him or on his behalf of an important right…can only be accepted where it is expressed in an unequivocal manner after the authorities have taken all reasonable steps to ensure that he or she is fully aware of his rights of defence and can appreciate, as far as possible, the consequences of his conduct.

A rights-based approach – The Netherlands

[118] As a consequence of these ECHR decisions, there have been changes to the approach Courts in some countries have taken to the issue of a young person's right to consult with a lawyer before and during the first police interview. For example, in a series of four cases, the Dutch Supreme Court interpreted the right to legal assistance from the early stages of police interrogation significantly more broadly when minors are concerned and held that they are entitled to a higher level of protection at the police interview stage of proceedings.[35] In doing so the Dutch Supreme Court pointed out

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[34] *Panovits v Cyprus* ECHR 4268/04, 11 March 2009 at [67].

[35] Dutch Supreme Court, ECLI: NL: HR: 2009: BH3081, 30 June 2009; Dutch Supreme Court, ECLI: NL: HR: 2010: BN7727, 11 November 2010; Dutch Supreme Court, ECLI: NL: HR: 2013: CA2555, 6 June 2013; and Dutch Supreme Court, ECLI: NL: HR: 2014: 133, 21 January 2014.

that it is up to the legislator or policy makers to draft guidelines regulating the right to have access to legal counsel in the initial stages of police interrogation.[36]

[119] Following that, the Board of Procurators General created a policy directive stipulating that accused minors have the right to legal counsel before police interrogation and the right to assistance by a lawyer or another representative during an interrogation.

[120] Now, children aged 12 to 15 are unable to waive the right to prior consultation with a lawyer in cases involving alleged felony offending (ie; charges where pre-trial detention is allowed by law); and 16 and 17-year-olds cannot waive the right when facing the most serious felony offences (more serious offences such as violent or sexual assault, rape, murder/manslaughter etc).[37]

[121] I will return to these important issues later.

Law regarding the DNA samples

The intention to charge DNA sample

[122] The authority [Constable 3] had for taking an intention to charge DNA sample from [FG] is found in s 24K of the CIBS Act because he is a young person and had been arrested for burglary, which is a relevant offence.

[123] Under s 24M of the CIBS Act she was required to hand [FG] a written notice containing the information in s 24N and inform him in a manner and in language he was likely to understand, of the following:

(a) What the triggering offence is; and

(b) Of the effect of sections 24P and 24R; and

(c) Of the effect of sections 48A, 49, 49A, 50A, and 54A; and

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[36] ECLI: NL: HR: 2009: BH3081 at [2.4].

[37] Ton Liefaard and Yannick van den Brink "Juveniles' Right to Counsel during Police Interrogations: An Interdisciplinary Analysis of a Youth-Specific Approach with a Particular Focus on the Netherlands" (2014) 4 Erasmus Law Review 206 at 209.

(d) That the sample will be analysed; and

(e) That a DNA profile derived from the sample cannot be used as evidence in criminal proceedings; and

(f) Of the effect of section 26(ab) and (ac); and

(g) Of the effect of section 60A.

[124] The CIBS Act requires that the form and content of the notice given in accordance with s 24N must be in a prescribed form and contain those same particulars together with any others that may be prescribed. Section 50A provides the right for the young person to have a lawyer present, or another person of their choice, and a parent or other person. The constable responsible is to ascertain whether the young person wishes to exercise those rights. All of those particulars are set out in DNA form 5A, the densely worded, complicated, 5-page document referred to earlier.[38]

The suspect DNA sample

[125] The authority [Detective 1] had to request a suspect DNA sample from [FG] on 15 October 2018 is found in Part 2 of the CIBS Act, and in particular ss 6, 7 and 8, because she thought she had reasonable grounds to believe that analysis of the sample would confirm [FG]'s involvement in the [store 1] and [store 2] robberies, and he was over 14 but under 18 years of age.

[126] As well as handing [FG] and his mother the prescribed form containing the particulars set out in s 7, with the modifications required under s 8 of the CIBS Act, [Detective 1] was required to inform [FG] of the following in a manner and in language he was likely to understand:

(a) The offences in respect of which the request is made; and

(b) That she had reasonable grounds to believe that analysis of a bodily sample taken from [FG] would tend to confirm or disprove his involvement in the commission of those offences; and

[38] See above at [31].

(c) That he was under no obligation to give the sample; and

(d) That if he consented to the taking of the sample, he may, at any time before the sample is taken, withdraw that consent; and

(e) He may wish to consult a lawyer before deciding whether or not to consent to the taking of a sample; and

(f) That the sample will be analysed and may provide evidence that may be used in criminal proceedings; and

(g) That if he refused to consent to the taking of the sample, and there is good cause to suspect that he committed the offence in respect of which the request is made, or a related offence, and that is an imprisonable offence or one against and of the provisions listed in Part 3 of Schedule 1, an application may be made to a District Court Judge for an order requiring him to give a bodily sample.

[127] The form containing all of the necessary particulars is Suspect DNA form 2; the five page, densely worded, complicated document referred to earlier.[39]

Case law

[128] *R v T* was a case concerned with the taking of a suspect sample, therefore requiring consent.[40] In relation to the procedure that must be followed in order to get consent the Court commented:[41]

> Not only is a suspect to be handed a notice containing the even more detailed particulars specified in s 7(b), but he or she is also to be informed in a manner and in language that the suspect is likely to understand of the [various] things listed…Importantly, it seems to us, Parliament is addressing the very real difficulty some people may have, in a stressful situation, in appreciating what they are being told and, particularly, in understanding the rights which they are being asked to waive. Some may not readily absorb the contents of a written notice, even one which is clearly stated. The Act is complicated. Hence the

[39] See above at [56].
[40] *R v T* [1999] 2 NZLR 602 (CA).
[41] At 612.

> requirement for additional oral advice about some basic matters. That advice was not given. There was accordingly a breach of the Act.

[129] In relation to the need for strict compliance with the statutory procedures including the need to provide the forms and also inform the person verbally of the very detailed and complicated information contained in them in a manner and in language they are likely to understand, the Court said:[42]

> "…unless a particular breach is minimal, in the sense that the Crown demonstrates that it can have no material impact upon the statutory process and therefore upon the rights of the suspect, the consequent unlawfulness must lead to the exclusion of the evidence of the blood sample. Parliament would surely not have gone to the considerable trouble of spelling out a very detailed procedure, controlling what is obviously a substantial intrusion into the privacy of an individual, if it did not intend that there must be strict compliance…It is also relevant that there is no "reasonable compliance" saving…"

[130] In *R v Kuru* the primary issue was the admissibility of a DNA sample taken from Mr Kuru in 1998, which he said was done without his consent.[43] The case concerned a suspect sample and so informed consent was a key issue. In the High Court, Toogood J reversed the finding of the District Court Judge.[44] Amongst other things His Honour found that even if Mr Kuru had signed his consent there was no evidence of the police officer explaining the rights orally to him. He concluded that the police had breached the procedures prescribed in the CIBS Act because the officer did not advise Mr Kuru orally of the matters he was required to inform him of.

[131] The observation was also made that the requirements of the CIBS Act go further than merely requiring the signing of a consent form (in that case). They also include an obligation to provide information orally to the donor of the sample "in a manner and in language that the person is likely to understand."[45]

[132] The decision was upheld by the Court of Appeal where the conclusion was that the DNA evidence had been improperly obtained because it could not be established

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[42] At 613.
[43] *R v Kuru* [2015] NZCA 414.
[44] *Kuru v New Zealand Police* [2015] NZHC 357.
[45] At [15].

to the necessary standard that Mr Kuru gave informed consent to the taking of the DNA sample in 1998.

Context and discussion

Communication issues

[133] Before recording my findings and analysis specific to this case, it is important to provide some context to the central issue here, namely [FG]'s significant communication disorder, the nature of which I set out earlier,[46] and therefore his understanding of those things that needed to be explained to him, or about which he needed to be informed, in a manner and in language he was likely to understand.

[134] The high prevalence of neuro-disabilities in young people in the youth justice system has been known across the youth justice sector for some time. With that goes the large number of young people who have communication disorders often co-morbid with their other neuro-disabilities.

[135] A report released in October 2012 by the English Children's Commissioner recorded that studies of speech and language skills in young offenders in the UK have demonstrated that many have impairment in both receptive and expressive language skills, with incidence rates reported to be as high as 60 to 90%.[47]

[136] Research carried out in New Zealand has arrived at a similar conclusion. An article published in 2017 found that 64% of youth offenders assessed were language impaired.[48] This was noted to be especially concerning given that most youth justice procedures rely heavily on oral language skills.[49]

[137] As a consequence of the growing awareness of this problem, Speech Language Therapists have increasingly become a vitally important part of the youth justice

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[46] See above at [73]-[84].
[47] Nathan Hughes and others *Nobody made the connection; the prevalence of neurodisability in young people who offend* (Office of the Children's Commissioner for England, October 2010) at 9.
[48] SA Lount, Suzanne Purdy and Linda Hand "Hearing, Auditory Processing, and Language Skills or Male Youth Offenders and Remandees in Youth Justice Residences in New Zealand" (2017) 60 Journal of Speech, Language, and Hearing Research 121.
[49] At 123.

system. It was not until they became involved over the past five years that the full extent of the problem was apparent.

[138] With this awareness came the realisation that the signs of such problems in young people often manifest in ways that have previously been misinterpreted as being evidence of such things as laziness, disrespect, rudeness, aggression and defiance.

[139] Of necessity, this awareness has seen efforts starting to be made by most professionals in the Youth Justice sector to cater for this problem by changing all of the ways we communicate with young people to ensure they understand what is happening and are able to participate properly in all aspects of the process.

The Rights Caution

[140] It has long been known that many people struggle to understand the rights caution. Research conducted overseas has often identified the problem as being at alarming levels. For example, research carried out in England and Wales found that of the 54 people assessed, only 11% demonstrated full understanding of the meaning of the rights caution.[50] Of particular concern was that 96% claimed to understand the caution fully but none of them did.

[141] International research has also looked specifically at young people's comprehension of the rights caution and consistently found the majority of those assessed do not understand, especially those under 15 years of age.[51]

[142] Research on this subject carried out in New Zealand, involving 104 participants recruited from two schools, assessed five aspects of New Zealand Youth Rights Caution:[52]

(a) Understanding the vocabulary used in the rights;

(b) Ability to remember the rights after they were read to them;

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[50] Susanne Fenner, Gisli H. Gudjonsson and Isabel C. H. Clare "Understanding of the Current Police Caution (England and Wales) Among Suspects in Police Detention" (2002) 12 Journal of Community and Applied Social Psychology 83.

[51] Thomas Grisso *Instruments for Assessing Understanding and Appreciation of Miranda Rights* (Professional Resource Press, Florida, 1998).

[52] Frances Gaston "Young People's Comprehension of the Rights Caution in New Zealand" (Master of Science in Forensic Psychology Thesis, Victoria University of Wellington, 2017).

(c) Comprehension of the rights;

(d) Ability to recognise the meaning of the right in different scenarios;

(e) Appreciation of the protection awarded by the right.

[143] The findings of the research included that:[53]

> The youth version of the Rights Caution does not assist young people with their understanding of their rights. The language in the youth version is too difficult and the additional information that it gives young people does not help them to understand. For the Rights Caution to be a comprehensible document that is accessible to young people, it needs to be revised.

[144] It must be noted that this research looked at understanding in a sample of young people from the general population who were attending school, which many young people in the youth justice system do not. The comprehension levels for those tested is therefore likely to be greater than in any group of youth offenders.

Rights and vulnerabilities (part two)

[145] The vulnerability that requires special protection be provided to young people under the OT Act is based on their developmental immaturity. As well as having limited life experience, a young person's capacity for consequential thinking is still developing and impulsive behaviour is common.

[146] Similarly, the CRC in its preamble states, "…the child, by reason of his physical and mental immaturity needs special safeguards and care, including appropriate legal protection."

[147] Clearly, both the OT Act and the CRC aim to ensure that special protection is provided for those reasons, whilst also recognising the young person's status as a human being who is entitled to have meaningful participation, and the ability and empowerment to make properly informed decisions about matters affecting them. The protections provided need to be special enough to address that vulnerability.

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[53] At 63.

[148] But we also now know from science, research, the involvement of Speech Language Therapists and forensic screens and reports provided, that there is an added and significant level of vulnerability in a large percentage of young people coming before the court that needs to be recognised and catered for properly. The prevalence of neuro-disabilities including communication disorders, is so great that the protection provided must be special enough to address that vulnerability too.

[149] Whilst decision making in court proceedings must be informed by precedent, it must also keep pace with what science and research tells us about issues that go to the very heart of the justice of a case. The protections and safeguards that the OT Act and CRC guarantee for young people because of their vulnerability must be real, meaningful and appropriate to the circumstances of each case.

Findings and analysis

The written statements

The OT Act

[150] Whether the explanation of rights given by [Detective 1] to [FG] on 25 September and 15 October 2018 was adequate requires a fact-specific enquiry.

[151] [Detective 1] was certain that [FG] was able to understand the rights caution she gave him on both occasions and was unshakably confident he could explain that back in a way that showed he understood. However, there was no evidence to support that and her views are completely at odds with all of the other evidence on the issue of [FG]'s comprehension and communication skills, apart from [Constable 3]'s, whose evidence I will comment on soon.

[152] [Detective 1] was not alert to the significant problems with [FG]'s level of understanding and seriously overestimated his comprehension of the rights caution. The detective was also confident that [FG]'s mother understood the rights and believed that [FG] did too, but again, that was not what [HG] said in evidence, which I accept.

[153] The approach to giving the rights caution here needed to cater for [FG]'s communication disability which is such that he has limited understanding of legal terminology so that even simple words such as "victim", "guilty" and "not denied," are not understood by him. When he spoke to the forensic clinician at court on 18 October 2018, he did not seem to know the roles of any professionals at court.[54]

[154] [FG] also has significant difficulties understanding spoken information, especially that imbedded in complex sentences which he was having to deal with on both occasions. That includes, for example, the use of the "and/or" wording in relation to the right to stop making a statement or to answer questions, and also the right to a lawyer and nominated person, which the Court of Appeal suggested be abandoned in favour of simpler language.[55]

25 September 2018

[155] On 25 September 2018 [FG] was at the Mt Wellington Police Station from at least 4.15 pm. He was engaged with [Constable 3] and the intention to charge DNA sample process from 5.17 pm until 6.00 pm when [Detective 1] gave him the standard youth rights caution. By that stage he was past the outer limit of his ability to concentrate.[56] He was overwhelmed, tired and restless. His mother, who had come from work, was exhausted, angry, and in no position to provide him with adequate advice as to his rights.

[156] The explanations [Detective 1] gave as examples of responses from [FG] regarding his rights do not demonstrate good knowledge on his part of what the rights actually mean and certainly do not show knowledge of how to exercise them, which is necessary.[57]

[157] Neither [FG] nor his mother had an adequate awareness as to why the assistance of a lawyer would have been important that night. As [HG] said, they did not know any lawyers as this was all new to them.[58] For [FG], at 14 years of age, and

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[54] See above at [74].
[55] See *Campbell v R,* above n 22, at [46].
[56] See above at [83].
[57] See above at [92].
[58] See above at [45].

having not been to court before, being told a lawyer would help with "legal stuff" and not just in court, would have been meaningless.

15 October 2018

[158] On 15 October 2018, the second written statement was taken at [FG]'s home. He was seated at the dining room table with [Detective 1] and a male police officer. That would have been intimidating. His mother, who was supposedly there as nominated person, was having to divide her time and attention between what was happening at the table, whilst cooking in the kitchen and looking after a [toddler] child who was running around. Not surprisingly, in those circumstances [HG] did not spend time that day going through rights issues with [FG], nor any of the other duties of a nominated person adequately. The issue of his right to a lawyer did not come up between them at all that day.[59]

[159] Section 218 of the OT Act not only requires that the language used when giving the explanation be appropriate but that the 'manner' must be too, which means "the way in which a thing is done or happens".[60] That therefore includes the circumstances at the time the statement was taken, which must also be appropriate.

[160] It was completely inappropriate to conduct the process of taking the statement (and obtaining the DNA sample) in the home at a time when [FG]'s mother was preoccupied with cooking in the kitchen, minding a [toddler] who was running around and then also expected to be there as the nominated person. She was not able to perform her duties as the nominated person adequately partly because of the manner in which the interview was conducted.

[161] Again, [FG]'s responses to [Detective 1]'s questions about the meaning of the various rights do not show an adequate understanding of the right and certainly do not show awareness of how to exercise it.

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[59] See above at [69].
[60] The Concise Oxford Dictionary, 9th edition.

[162] The fact that [FG]'s mother became upset at the mention of the baby seems to be the reason for [FG] admitting involvement in the [store 2] robbery. Also, when he was exercising his right to remain silent, it was his mother who told him to hurry up and talk because she wanted it over and done with.[61]

[163] On both 25 September and 15 October 2018, the explanation of rights by [Detective 1] was not given in a manner and language that was appropriate to [FG]'s age and level of understanding. The non-compliance is not capable of being saved by the reasonable compliance provision; it was far too serious for that.[62]

[164] Therefore, under the OT Act provisions, the two written statements are inadmissible as evidence against [FG].

[165] Despite that result, it is very clear that the protections provided by ss 215 to 224 of the OT Act are not very special at all, especially given what we now know about the vulnerabilities that many young people with neuro-disabilities like [FG] have on top of those they have by virtue of their age.

[166] The Court of Appeal say there is no positive obligation on the police to provide a young person and parents with a brochure that encourages the taking of legal advice before being interviewed,[63] that it is not part of the statutory scheme that the police explain the role of a lawyer to a young person; it is just "highly desirable",[64] and that although it is good practice for an officer to ask a suspect whether they wish to have a lawyer, that is not prescribed practice.[65]

[167] To make matters even worse, s 222 makes it a nominated person's responsibility to ensure a young person understands their legal rights. As is illustrated in this case and many like it, this is unrealistic and inappropriate.

[168] As a result of those problems, young people are not much better off than adults in terms of their right to legal advice before the first police interview and

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[61] See above at [68].
[62] OT Act, s 224.
[63] *Campbell v R,* above n 19, at [27].
[64] At [41].
[65] *Campbell v R,* above n 22, at [43].

representation during it. Under s 23 of the Bill of Rights Act 1990 the police must inform an adult of the right which means no more than to be made aware of it.[66] Under the OT Act an officer must explain the rights, which means to make something clear or intelligible or make known in detail.[67] However, for that large percentage of young people like [FG] who have communication disabilities, the language used to give such explanations is incomprehensible. In fact, we know from the New Zealand based research, young people without such disabilities cannot understand the rights caution.[68]

[169] However, the CRC does contain special protections that do recognise and accommodate young peoples' vulnerabilities, both on account of their age and also those with disabilities.

The CRC

[170] If [FG]'s rights under article 40 of the CRC were respected and upheld he would have had a lawyer present on both 25 September 2018 and 15 October 2018 as well as having his mother there as his nominated person. He would only have been able to waive that right to have a lawyer present if he expressed it unequivocally after all reasonable steps were taken to ensure that he was fully aware of his rights.[69]

[171] As well as that, appropriate accommodation would have been made for his communication disability which we know requires the presence of a communication assistant, and also sufficient breaks in the process would have been needed to enable him to maintain his concentration so as to comprehend the explanations. Anything less than that would fail to take into account his vulnerability due to both his age and his communication disability and would be in breach of the minimum standards for a fair trial guaranteed to him under the CRC.

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[66] *R v Mallinson* [1993] 1 NZLR 528 (CA) at 531.
[67] The Concise Oxford Dictionary 9th Edition.
[68] Frances Gaston, above n 52, at 63.
[69] *Panovits v Cyprus*, above n 34, at [68].

[172] It that regard it is important to look again at the guidance provided by the UNGC and those minimum standards that must be applied in relation to a young person's rights under article 40 of the CRC.[70] There are three main themes:

(a) The need to accommodate [FG]'s disability with the use of child-friendly language at all stages, which must include during police interviews and assistance with communication and understanding documents, which should be done by someone suitably qualified. This is in accordance with the well-established science and research regarding the needs of young people but is absolutely essential for someone like [FG] with a significant communication disability.

(b) The crucial need for continuous and systematic training of professionals across the whole youth justice system in relation to the needs and vulnerabilities young people have. Given the high prevalence of those with neuro-disabilities including communication disorders and the implications of that for all professionals, everyone including police officers, judges, lawyers, social workers, health and education professionals and more need to be receiving the necessary training, and calling in expert assistance when required, as in a case such as this.

(c) Access to a lawyer as well as having his mother present from the moment of contact with the system, including at the warning or arrest stage.

    (i) First, this is in accordance with the ECHR cases which spell out in very clear, strong terms why legal representation for a young person before and during the first police interview is important so as to provide a necessary procedural safeguard. Rights to a fair trial will in principle be irretrievably prejudiced when incriminating statements are made during an interview without access to a lawyer. The ECHR judgements set out an

[70] UN Doc CRC/C/GC/24, above n 28.

unanswerable case for ensuring young people, especially those under 15, have a lawyer present from the first police interview onwards. It is insufficient to only provide for compulsory legal representation from the point when the young person first appears at court.

(ii) Second, this has proper regard to key features of young peoples' vulnerabilities. In that respect [FG]'s situation is a very common one. He was 14 years old. Neither he nor his mother knew any lawyers and he would have had no idea at all why he might want to talk to one.[71] On 25 September he was beyond his ability to concentrate when the interview began, and he just wanted to get out of there. He had been saying so for some time.[72]At his age he is naturally impulsive and not thinking of the consequences of any decisions he makes which might include, for example, just saying things to achieve his goal of getting out of there. In addition and importantly, he does not understand many of the words being spoken nor the new and novel concepts people are trying to explain to him, or inform him about.

(iii) It is unrealistic to expect that a parent can adequately perform both the role of providing psychological and emotional assistance and also ensuring the young person understands their legal rights and this case provides a clear illustration why that is so. I will return to this issue.

[173] It is important to recognise that *R v Z* and *Campbell* are now 12 and 5 years old respectively. They were at a time when the issues around the prevalence of neuro-disabilities and communication disorders were not as well-known and were also before the statutory requirement to respect and uphold rights under the CRC was in place.

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[71] See above at [45].
[72] See above at [36].

[174] Given what we now know and given the guidance of the UNGC regarding the CRC, even the Canadian approach of handing out a brochure would not be sufficient to respect and uphold a young person's rights under article 40 of the CRC[73] adequately. Nothing less than the approach taken by the Supreme Court of the Netherlands would be required to meet that standard.[74] The new legislative requirement to respect and uphold all of the guarantees in the CRC for every child and young person should surely mean just that.

[175] On that basis, if I had found the statements admissible under the OT Act, I would rule them inadmissible as being in clear breach of article 40 of the CRC. [FG]'s rights in that respect were definitely not respected nor were they upheld.

The DNA samples

[176] Three features in particular of the relevant CIBS Act provisions in this case are of concern;

(a) The first is the inconsistency with the relevant provisions of the OT Act that I have addressed. On both occasions when a DNA sample was taken, the obligation on the police officer was only to inform [FG] of the various matters required under the CIBS Act in a manner and language he was likely to understand. As mentioned earlier, to be informed of a right means no more than to be made aware of it.[75] That is out of step with the obligation on an officer under the OT Act who, before questioning a young person, must explain the rights which means to make something clear or intelligible or make known in detail.[76]

(b) The second is the form, length and content of the documents that the two officers were required to inform [FG] about orally and in a manner and language that he was likely to understand. In that regard I draw

[73] UN Doc CRC/C/GC/24, above n 28 at [48].
[74] See cases listed above n 35.
[75] *R v Mallinson,* above n 66.
[76] See above n 67.

attention again to the assessment of [FG]'s communication disability which means he has a limited understanding of legal terms, significant difficulties understanding spoken information imbedded in longer and syntactically complex sentences, and a limited understanding of verbal vocabulary which impacts on his ability to understand in settings that use such information.[77]

(c) The third is that these procedures, which are a substantial intrusion into a young person's rights and privacy, can be permitted by the CIBS Act without providing legal advice. This is in breach of the young person's rights under the CRC that I have set out above.[78]

[177] On 25 September 2018 [Constable 3] informed [FG] of the contents of DNA notice 5A, by going through the densely worded, complicated, five-page document, reading the headings and paraphrasing the contents. That took about 20 minutes, about four minutes per page, which is not very long considering the nature of the content. The constable only tested [FG]'s comprehension by simply saying, "do you understand" after each part. At no stage was he asked to demonstrate that he could comprehend any of what she was saying. Her confidence that he could understand what he was being informed about is completely unjustified. It seems she too was unable to read the signs that were so evident to the professionals who carried out the communication and psychological assessments. Perhaps that is not surprising because, as mentioned earlier, such signs have gone unrecognised and misinterpreted to most in the Youth Justice system until recently.

[178] Equally her confidence that [HG] understood what she was trying to inform them about was misplaced. [HG] was clearly confused about the basis upon which [FG] was required to provide a DNA sample. She did however confirm that [FG] knew he was under arrest, that a sample was sought and could be taken by force if necessary.

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[77] See above at [75]-[81].
[78] See above at [170]-[175].

[179] However, it is very clear from the CIBS Act that Parliament intended that a young person be informed adequately about much more than that, otherwise the form would have been one page long and not five. The very clear statutory intention is that [FG] had to be informed of all the contents on all five pages verbally in such a way that he was likely to understand. I have no doubt at all, that did not happen here.

[180] Although the cases referred to above both concern suspect samples, where consent is required before a sample can be taken, the principles from those cases are still relevant in this situation. That is:

(a) The statutory requirement was to inform [FG] of the contents of the entire, complicated, five-page document in a manner and in language he was likely to understand. Given his limited understanding of verbal vocabulary, which requires a communication assistant to help him participate adequately in court proceedings and at FGCs, either far more time and extra-special care was needed, or realistically, the involvement of a communication assistant. Given that Parliament has placed responsibility for carrying out this extremely difficult task on the police, it seems to me that special training will be essential. No-one could possibly have informed a young person with a disability like [FG]'s adequately without either the necessary training or without getting someone suitably qualified where the disability requires that level of expertise. It did in this case.

(b) Because this involved a substantial intrusion into [FG]'s rights and privacy, strict compliance with the obligation to inform him of all the contents to the necessary standard was required. That was not done here, not by a long way, and there is no "reasonable compliance" saving provision in the CIBS Act. That in itself signals the clear intention of Parliament regarding the nature and quality of how the information is to be provided. Near enough is not good enough.

[181] The intention to charge DNA sample was therefore taken improperly and is inadmissible.

[182] The comments made above regarding the manner and language used to explain to [FG] his rights before questioning him on 15 October 2018 apply in this context as well.[79] It was completely inappropriate to seek to obtain [FG]'s informed consent to the giving of a DNA sample seated with two police officers at a table while his mother was preoccupied with other things to such an extent that she did not get to perform her basic nominated person duties adequately.

[183] Neither [Detective 1] nor [HG] read and informed [FG] of the contents of the form adequately and, as a result, he understood little if any of it. [HG] misunderstood the situation regarding the consent required from [FG] before the sample was taken and wrote "yes" on the form where it says, "I consent to give a bodily sample" and not [FG]. The suspect DNA sample was clearly taken without his informed consent and without him being informed adequately of the contents of the complicated, five-page Suspect DNA Form 2.

[184] Obviously, there can be no solution to the CIBS Act's non-conformity with [FG]'s rights under the CRC short of legislative change. However, the fact deserves mention. Unlike the OT Act, the CIBS Act makes no mention at all of the CRC despite coming into force after we had acceded to the CRC, and despite having provisions that specifically apply to young people and despite authorising the taking of bodily samples from them both by consent and by compulsion. The Act only seems to require legal representation in cases where a young person does not consent to the taking of a bodily sample and application is therefore made to the court for a compulsion order.

[185] The higher courts have said on a number of occasions that the CRC and the other instruments I have mentioned are useful aids to the interpretation of statutes and that they provide helpful guidance to the interpretation of our domestic law.

[186] For example, in *R v Rawiri,* Fisher J noted that New Zealand Courts pay regard to internationally accepted human rights principles embodied in international instruments to which New Zealand is a party.[80] Although Fisher J noted that the Beijing

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[79] See above at [158]-[160].

[80] *R v Rawiri* HC Auckland T014047, 3 July 2002 at [13]. See also *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) at 265; and *New Zealand Airline Pilots Association Inc v Attorney-General* [1997] 3 NZLR 269.

Rules are not ratified in New Zealand, they are still relevant. Winkelmann J [as she was then] in *TV3 v R* also considered the Beijing Rules relevant as well as the CRC.[81] In *Pouwhare v R* the Court of Appeal placed emphasis on the use of the CRC as an interpretive tool.[82]

[187] In this case, the conclusion I have reached regarding the inadmissibility of both DNA samples based on the clear and compelling facts, means it is not necessary to look to the CRC to help interpret provisions that may need to be considered in future cases where statutory interpretation is necessary to resolve issues.

Section 30 Evidence Act

[188] In *R v Z*, the Court of Appeal assumed that s 30 of the Evidence Act 2006 did not apply to evidence ruled inadmissible under s 221(2) of the OT Act, but did not decide the issue and the same approach was taken by the Court in *Elia v R*[83] although the Court was tentatively of the view s 30 does not apply.

[189] Although I therefore also adopt that approach in relation to the written statements, if s 30 did apply I would have exercised my discretion in favour of excluding the statements for the same reasons I do not exercise my discretion in favour of admitting the DNA samples that were obtained unlawfully.

[190] In relation to the balancing exercise required under s 30(2)(b) I find:

(a) *Importance of the right breached*: The rights breached are extremely important. In relation to the suspect sample that required consent, the process should have been carried out in a careful way that left no room for doubt that the sample was provided with properly informed consent. Given [FG]'s age and disability, extra special care was required but not taken. There can be few more important basic requirements in any justice process than to ensure the person understands what is happening and why, even when consent for the procedure in question is not

[81] *TV3 v R* HC Auckland CRI-2005-092-14652, 7 July 2006.
[82] *Pouwhare v R* [2010] NZCA 268, (2010) 24 CRNZ 868.
[83] *Elia v R* [2012] NZCA 243, (2012) 29 FRNZ 27 at [83].

required. This is fundamentally important. Parliament clearly intended that all of the detailed information was conveyed adequately. The failure to do so was a serious breach.

(b) *Nature of the impropriety*: There was no bad faith in the case of [Constable 3], just a lack of experience and training. In [Detective 1]'s case, it was more bad judgment than bad faith, as to the timing of the processes and involving [FG] in interviews well past his ability to concentrate on 25 September, but in relation to the entire process on 15 October 2018.

(c) *Nature and quality of the evidence obtained*: As a result of the DNA sample taken by [Constable 3], [FG] was linked to the [store 1] robbery because of DNA found on a discarded cigarette at the scene, and the [store 2] robbery because of DNA on a sweatshirt worn by one of the offenders. Otherwise it was the statement made to [Detective 1] on 25 September 2018 that linked [FG] to the [store 3] robbery and the statement on 15 October 2018 to the [store 2] robbery.

(d) *Seriousness of the offences*: The aggravated robbery charges are obviously serious.

(e) *Whether there were other investigatory techniques*: More time and care should have been taken, given not only [FG]'s age but his disability. The prevalence of such disabilities in the youth justice system and the overwhelming research regarding that fact and the extremely high levels of young people who do not comprehend such things as the standard rights caution means everyone involved in youth justice processes should adapt their work practices to cater properly for that.

(f) *Whether there are alternative remedies*: No.

(g) *Whether the impropriety was necessary*: It was not necessary.

(h) *Whether there was urgency*: There was no urgency.

[191] The important nature of the right breached here resulted in major intrusions into [FG]'s rights and privacy without him knowing adequately why. That was unnecessary because the proper procedure could have been followed and informed consent obtained if appropriate time and care was taken. Specialist assistance could have been organised if needed, which it clearly was.

[192] Speech language therapists are necessarily being kept extremely busy across almost all of the youth justice system in this part of the country at least, because of a fundamentally important issue that requires their skill to address; that of ensuring young people are able to understand what is happening in their case so they can participate meaningfully in it. That must occur from the very first contact they have with the system, through to the very end.

[193] In the circumstances of this case, exclusion of the evidence is a proportionate response to the impropriety, despite the quality of the evidence obtained and despite the seriousness of the charges.

[HG]'s performance as nominated person

[194] It would be very unfair to find fault with [HG] for not carrying out her role as nominated person adequately, because the fault is not with her. It lies in the completely unrealistic expectation that she would be there to not only provide her son with emotional support but would also ensure he understood his legal rights. [HG] clearly did not understand many of those rights properly herself and she is not alone; as pointed out earlier, most people do not understand the rights caution properly, and many of those who think they do, don't.[84]

[195] But there is more to ensuring that the legal rights are understood and exercised properly that needs to be recognised and understood. Objectivity and emotional

[84] See Susanne Fenner and others, above n 50.

detachment are also essential as this case, which is not unusual, illustrates. For example;

(a) On 25 September 2018 [HG] was called to come to the station and went there straight from work. In her own words she was "tired, exhausted, angry, all of those that day".[85] She was there to support her son who, in her words, was "buggered, tired, overwhelmed, over all this." She is then supposed to ensure he understands rights that she does not understand herself and should not be expected to. That is the job for a lawyer.

(b) On 15 October [HG] was expected to perform the role whilst cooking and minding a toddler and trying to keep an ear on the conversation when she was not in the room. When [FG] was exercising his right to remain silent that day, she told him to talk to the detective so as to get things over and done with. Her emotional reaction to hearing about a baby being at the scene of the [store 2] robbery saw her respond in a way that was contrary to her son's interests. If a lawyer had been there that issue would have been dealt with differently.

[196] I am sure these are reasons why the UNGC and the Beijing Rules commentary emphasise the need for a lawyer to be present as well as a parent. The ECHR cases also set out in clear, strong terms why legal representation at such interviews is necessary. It is not sensible to expect a parent or guardian to ensure that a young person understands their rights when, in all likelihood they do not understand them fully and, in any event are unlikely to have the objectivity and emotional detachment necessary to carry out that function properly.

[197] It is clear that under article 40 of the CRC, as clarified by the latest UNGC and other UN instruments, young people should have a lawyer present from the time of their first interview with the police onwards. Having ratified the CRC, that right is guaranteed to every young person in New Zealand. The OT Act now requires that this right be respected and upheld. That should mean what it says.

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[85] See above at [46].

Result

For the reasons given, both written statements and both DNA samples are inadmissible against [FG] in relation to the charges he faces.

A J FitzGerald
Youth Court Judge

Appendix

Article 40 of the CRC

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others 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.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. 4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.