CASE NOTE: *H V R* [2019] NZSC 69 – APPLICATION OF SECTION 322 OF THE ORANGA TAMARIKI ACT 1989 WHERE THE ACCUSED IS AN ADULT

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I. INTRODUCTION

In *H v R,* the Supreme Court considered the application of s 322 of the Oranga Tamariki Act 1989, which allows a judge to dismiss a charge against a young person on the basis of unnecessary or undue delay, in circumstances where the accused is no longer a child or young person.[1] Mr H was convicted of eight charges of historic sexual offending against his sister and his daughter, and sentenced to seven years' imprisonment. The Court of Appeal dismissed Mr H's appeal against conviction and sentence. The Supreme Court granted leave to appeal against one of the convictions for rape of his sister, when Mr H was aged between 16 and a half and 20 years. Leave to appeal was granted on the question of whether, in dealing with the question of delay, the Court of Appeal correctly dealt with Mr H's age at the time of offending. The judgment canvassed the following issues:

1. the application of s 322 where the accused is no longer a child or young person;
2. the application of youth justice principles in such a case, where the accused is an adult;
3. the relationship between s 322 and a stay of proceedings or dismissal of charges under s 147 of the Criminal Procedure Act 2011;
4. the meaning of "unduly protracted" proceedings under s 322;
5. whether the discretion under s 322 should be exercised in this particular case; and suppression.

Whilst the Court found that s 322 applied to Mr H's case, and that the time elapsed between the offending and the trial was "unduly protracted", it refused to exercise its discretion to dismiss the charges due to the seriousness of offending and continued similar offending in the following decades. The appeal was unanimously dismissed.

II. APPLICATION OF SECTION 322 WHERE THE ACCUSED IS AN ADULT

A. WHETHER SECTION 322 APPLIES

Section 322 of the Oranga Tamariki Act permits a Youth Court Judge to dismiss any charge against a young person if they are satisfied that the time elapsed between the date of the alleged offence and the hearing has been "unnecessarily or unduly protracted".[2] Underpinning this section is the youth justice principle that decisions should be made and implemented within a time-frame appropriate to the child's or young person's sense of time.[3] For the purposes of s 322, a young person is defined as a person over the age of 14 but under the age of 18.[4] For the purposes of

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[1] *H v R* [2019] NZSC 69, [2019] 1 NZLR 675.

[2] Oranga Tamariki Act 1989, s 322. Note that at the time *H v R* was heard, the upper age threshold was 17 years, not 18.

[3] Section 5(f).

[4] Section 2(1).

jurisdiction and proceedings taken, a person's age is their age at the date of the alleged offence.[5] If a person is aged 19 years or over at the time the charging document is filed, proceedings are not required to be taken in the Youth Court.[6] Where a charge is so filed in the District Court, the Act specifies that s 322 shall apply "with all necessary modifications".[7]

There was a difference in opinion in the Court of Appeal and the Supreme Court as to whether s 322 could apply in cases such as Mr H's, where the accused was charged as an adult. The Court of Appeal held that s 322 only applies to cases while they are in the Youth Court. It therefore did not apply to Mr H, who was charged as an adult, with charging documents filed in the District Court.[8] This was despite counsel for the Crown accepting that s 322 applied to Mr H's case. Overturning this, the Supreme Court accepted both parties' submissions and held that s 322 applied to Mr H's case, as the section applies with all necessary modifications to persons charged as adults with an offence allegedly committed as a young person. The proceedings concerned an offence allegedly committed by Mr H when he was aged between 16 years and 20 years old. The Supreme Court held that since Mr H may have been 16 years old and therefore a young person at the time of the offending, he should be treated as a young person for the purposes of s 322.[9] This is in accordance with s 2(2) of the Oranga Tamariki Act, which states that the accused's age at the *time of offending* is the relevant age for any proceedings taken.

B. HOW SECTION 322 APPLIES

The Court held that when the accused is an adult, s 322 should be applied with reference to the relevant youth justice principles, singling out ss 4(f)(ii) and 5(f) of the Oranga Tamariki Act. Section 4(f)(ii) aims to ensure that children and young people are dealt with in a way that acknowledges their needs and gives them the opportunity to develop in "responsible, beneficial, and socially acceptable ways". Section 5(f) is the principle that decisions be made and implemented within a time-frame appropriate to the child's or young person's sense of time.[10]

The Court noted that where a person is charged as an adult for an offence committed as a young person, s 5(f) will usually have no direct application, as an adult will generally no longer have the sense of time of a young person. Circumstances where the principle may have direct application include where people are charged in their

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[5] Sections 2(2)(a)–(b).
[6] Section 2(2)(d). Note that at the time *H v R* was decided, this section provided for people aged 18 and years and over, not 19.
[7] Section 2(3).
[8] *H v R* [2018] NZCA 376 at [29], citing *R v M [Youth Justice]* [2011] NZCA 673, [2012] NZAR 137 at [25]–[32].
[9] *H v R,* above n 2, at [28].
[10] Note that since the 1 July 2019 changes to the Oranga Tamariki Act 1989, these provisions are no longer current. Section 9 of the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017 replaced the s 4 "Objects" that were in place at the time with s 4 "Purposes". There is no equivalent of s 4(f)(ii) in the current legislation. The current equivalent of s 5(f) is s 5(b)(i)(v), which states "decisions should be made and implemented promptly and in a time frame appropriate to the age and development of the child or young person".

late teens and early twenties for offences committed as children or young persons.[11] In these cases, given their age, the accused's sense of time is likely to be closer to that of a child or young person. Nonetheless, even where s 5(f) is not directly applicable, it may still be relevant to those charged as adults. One of the reasons for the principle in s 5(f) is to enable rehabilitation to occur in line with s 4(f)(ii). The Court also recognised that factors relating to development may be seen to reduce culpability and suggest that rehabilitation is more likely.[12]

The Court held that these youth justice principles may mean that the courts should exercise their discretion to dismiss a charge for delay under s 322, even where there has been serious offending, especially where the person seems to have been rehabilitated. This which may be demonstrated, for example, by a long period without any serious offending.[13]

III. RELATIONSHIP BETWEEN SECTION 322 AND A STAY OF PROCEEDINGS OR DISMISSAL OF CHARGES UNDER THE CRIMINAL PROCEDURE ACT 2011

Mr H twice applied for a stay of proceedings and a dismissal of the charges under s 147 of the Criminal Procedure Act 2011, due to the delay in bringing the charges. Both applications were declined by the High Court.

The Court has an inherent jurisdiction to stay proceedings. A stay of proceedings is not a dismissal or acquittal but rather means that no further action may be taken. The power to grant a stay is deemed necessary to "enable a court to prevent an abuse of its processes".[14] Section 147(1) of the Criminal Procedure Act provides that a court may dismiss a charge at any time before or during the trial, before the defendant pleads guilty or before the defendant's guilt is determined.

The question for both High Court Judges in the case of Mr H was whether the risk of prejudice from the delay was such that it rendered Mr H's trial unfair. For the first application, where the focus was a stay, Dunningham J held that although the delay was significant, the sum of the issues did not make it unfair to put the allegations before a jury.[15] For the second application, where the focus was s 147, Gendall J dismissed the application on the basis that no "new material of any substance" had arisen beyond that already before Dunningham J.[16]

The lawyer for Mr H submitted that the High Court was wrong to consider stay principles without reference to s 322 of the Oranga Tamariki Act. However, the Supreme Court instructed that s 322 should be considered separately to applications for stay and dismissal under s 147.[17] This is important guidance for practitioners, who when faced with a case where there has been such a delay, may need to consider

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[11] *H v R,* above n 1, at [32].
[12] At [33], citing *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446.
[13] At [34].
[14] *Wilson v R* [2015] NZSC 189 at [39].
[15] *[H] v R* [2016] NZHC 2009 at [64].
[16] *R v [H]* [2017] NZHC 1121 at [20].
[17] *H v R,* above n 1, at [40]–[41].

advancing multiple applications. An application to dismiss a charge under s 322 may involve different considerations, including reference to youth justice principles, then an application under s 147 or an application for a stay of proceedings.

IV. UNNECESSARILY OR UNDULY PROTRACTED PROCEEDINGS

Section 322 of the Oranga Tamariki Act allows for the dismissal of charges due to delay where the time elapsed between the date of the alleged offence and the hearing has been "unnecessarily or unduly protracted".[18] The Supreme Court accepted the submissions of both parties that "unnecessarily protracted" imports a notion of fault. In the case of Mr H, there was no fault involved in the delay, as the time elapsed was due to the delay in reporting. The Court specified that there are often good reasons for delays in reporting historic sexual offending, as recognised in s 127 of the Evidence Act 2006.[19]

The Court also agreed that "unduly protracted", on the other hand, does not import a notion of fault. The Court held that:[20]

> Whether the time elapsed has been unduly protracted must be considered from the perspective of the accused and may also depend on the application of the particular youth justice principle at issue.

In this case, the Court accepted that the time elapsed was so long that it would be considered unduly protracted under s 322.

V. DISCRETION TO DISMISS CHARGE

After finding that s 322 was applicable to the facts, the subsequent question was whether the discretion to dismiss the charges should have been exercised in accordance with youth justice principles. The Court noted that although s 5(f) was not directly engaged, as Mr H's sense of time was that of a mature adult at the time the charges were laid, the section was indirectly engaged, given the relevance of s 5(f) as referred to in the earlier discussion about the application of youth justice principles, and the general object in s 4(f)(ii), relating to rehabilitation, was relevant.[21]

The Court took into account the following factors, which in combination led to the finding that the charge should not have been dismissed under s 322:[22]

> (a) the rape charge was very serious, particularly given the victim's age;
> (b) Mr H was not "very young" at the time of the commission of the offence; and
> (c) most seriously, he had committed further offending of a similar type and in a "gross breach of trust", showing that he had not led a "blameless life" after the rape.

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[18] Oranga Tamariki Act 1989, s 322.
[19] *H v R,* above n 1, at [43].
[20] At [44].
[21] At [47].
[22] At [48]–[49].

VI. SUPPRESSION

The Court of Appeal initially suppressed publication of Mr H's name and identifying details pursuant to s 200 of the Criminal Procedure Act. The order was subsequently discharged after application by the Crown, taking into account the victims' views, neither of whom supported suppression of Mr H's name or details.[23]
Section 203 of the Criminal Procedure Act prohibits the publication of the name and identifying details of each complainant. The Crown submitted that revoking the suppression order for Mr H would not affect the operation of s 203, which may have required:[24]

> (a) distribution of the judgment to be limited to law reports or digests; or
> (b) redaction of the judgment to remove references to the relationship between Mr H and the victims.

The Supreme Court did not accept the suggestion of limiting publication of the judgment. Their Honours held that their judgments deal with important points of law, in which there is a clear public interest, and the judgments should accordingly be publicly available unless there are very good reasons to the contrary.[25] Additionally, the Court considered that publication in a law report or law digest of an unredacted judgment would breach s 203(3) of the Criminal Procedure Act, as it could lead to the identification of the complainants.[26]

Nor did the Court consider it "practical or desirable" to redact the judgment in such a way. The nature of the relationship was central to the seriousness of the crimes and issues such as explaining the delay. The specific dates were also important to include because of Mr H's age at the time of the rape and the timeframe of all the charges.[27] These details, which the Court considered necessary to include, could lead to identification of the complainants.

For these reasons, the Court released the judgment publicly but referred to Mr H as such, rather than his full name, to protect the identity of the complainants. Their Honours emphasised that no suppression order was in force relating to Mr H and that his name and identifying details could be published so long as there was no breach of s 203 of the Criminal Procedure Act in doing so.[28]

VII. CONCLUSION

The judgment of *H v R* provides clarification on the application of s 322 in the not unusual situation of an adult being charged for an offence committed as a child or young person. The Supreme Court has confirmed that s 322 does apply in these situations, and that the application of the provision must take into account youth

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[23] At [52]. Section 200(6) of the Criminal Procedure Act 2011 requires the court to take into accounts any views of the victim when determining whether to suppress an offender's name permanently.
[24] *H v R,* above n 1, at [53].
[25] At [56].
[26] At [57].
[27] At [54].
[28] At [58].

justice principles. Further, youth justice principles may weigh in favour of a court exercising their discretion to dismiss a charge under s 322.[29] The decision also provides some additional commentary on the meaning of unduly protracted and the appropriateness of suppression or redaction of identifying details.

[29] At [34].