ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION AND IDENTIFYING PARTICULARS OF THE APPELLANT.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 1/2024
[2025] NZSC 62

BETWEEN	H (SC 1/2024) Appellant
AND	THE KING Respondent

Hearing:	19 August 2024
Court:	Glazebrook, Ellen France, Williams, Kós and Miller JJ
Counsel:	R M Mansfield KC and J E L Carruthers for Appellant Z R Johnston and H G Clark for Respondent
Judgment:	10 June 2025

JUDGMENT OF THE COURT

A **The appeal against conviction is allowed and a discharge without conviction is substituted.**

B **We make an order prohibiting publication of the name, address, occupation and identifying particulars of the appellant.**

REASONS
(Given by Kós J)

Table of Contents

[1] At issue in this appeal is how H, a young person—transferred out of the Youth Court to the High Court because of a more serious charge on which he was then acquitted—should be dealt with on a remaining charge that could always have been disposed of in the Youth Court.

Background

[2] H and T were members of a group of young people involved in a fight with another such group in downtown Whangārei on the night of 12 June 2021. H was then 17 years old; T was 20. The sentencing Judge, Brewer J, described it as "a moving fight with multiple confrontations between different members of the groups".[1] The whole swirling affray was captured on high-definition CCTV. Towards the end of it, T stabbed another participant, Mr Peihopa, who fell to the ground. H then ran in and kicked Mr Peihopa once in the upper torso, before fleeing the scene.

[3] The Judge found the evidence did not establish H *knew* that Mr Peihopa had been stabbed.[2] Nor was any injury identified as resulting from H's kick. The stab wound administered by T however proved fatal, resulting in T being charged with murder.

[4] H was charged in the Youth Court with injuring with intent to cause grievous bodily harm. In that Court he was entitled automatically to name suppression.[3]

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1 *R v [T]* [2023] NZHC 630 [Sentencing notes] at [9].
2 At [17]. T's confrontation with Mr Peihopa lasted only three seconds by the Judge's assessment.
3 Oranga Tamariki Act 1989 [OTA], s 438(3).

Some months later he was also charged as a party to the murder of Mr Peihopa. The two charges were then transferred to the High Court.[4] Name suppression was continued.[5] Shortly before trial in November 2022, the Crown reduced the injuring charge to one of injuring with intent to injure.[6] H pleaded guilty to that charge on 7 November 2022, the first day of trial. By this stage, he was 19 years of age. He was acquitted at trial on the charge of murder. T was convicted of murder and of assault with a weapon.

[5] By sentencing in March 2023, H was still 19 years old. He had no prior convictions. No application had been made on H's behalf for transfer of the injuring charge back to the Youth Court, the matter seemingly being overlooked.[7] Defence counsel sought discharge without conviction and permanent name suppression. Brewer J, however, convicted and discharged H and declined him permanent name suppression.[8] The Court of Appeal, by majority, dismissed his appeal against both determinations.[9] With leave, H appeals to this Court.[10]

Sentencing in High Court

[6] The basis upon which Brewer J sentenced H is summarised above at [2]–[3]. The Crown submitted an appropriate starting point was two to two and a half years' imprisonment, to which a 15 per cent discount should be applied for H's guilty plea. Defence counsel submitted he should be discharged without conviction because the only reason he had not been dealt with in the Youth Court for the injuring offence was because he was later charged with being a party to murder—a charge on which he had then been acquitted.

[7] The Judge noted that the only reason why H was not dealt with in the Youth Court was because he was also charged with being a party to the murder

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4 *R v [H]* YC Whangārei CRI-2021-288-22, 21 December 2021 (Minute of Judge King) [Transfer minute].

5 At [7]; *R v [T]* HC Whangārei CRI-2021-088-1433, 3 February 2022 (Minute of Brewer J); *R v [T]* HC Whangārei CRI-2021-088-1433, 31 October 2022 (Minute of Brewer J); and *R v [T]* HC Whangārei CRI-2021-088-1433, 14 November 2022 (Minute of Brewer J).

6 Crimes Act 1961, s 189(2).

7 See OTA, s 276A.

8 Sentencing notes, above n 1, at [56] and [66].

9 *[H] v R* [2023] NZCA 633 (Brown, Peters and Mander JJ) [CA judgment].

10 *H (SC 1/2024) v R* [2024] NZSC 31 (Glazebrook, Ellen France and Kós JJ).

committed by T—but on which charge H had been acquitted. The Judge accepted that he should consider H's case in accordance with the principles of youth justice as applied by the Youth Court. He accepted also that youth justice principles emphasising the need to keep young people in the community and to ensure they remain integrated and rehabilitated applied to H.[11]

[8] The Judge held the gravity of the offending itself was moderate, Mr Peihopa being helpless on the ground when H kicked him.[12] The Judge described H's act as having "all the hallmarks of impulsive risk-taking and actions of a young person disinhibited by drugs and alcohol and suddenly caught up with others in a rapidly moving and unexpected event".[13] Personal mitigating factors of remorse, community support (particularly from his employer) and time on bail meant the overall gravity should be assessed as low.[14]

[9] However, the Judge did not go on to accept the submission that H be discharged without conviction. No particular consequences of conviction, direct or indirect, had been identified. General, common consequences of conviction—inhibition of employment, travel and social regard—were identified by the Judge as having particularly negative impacts on young persons. Here, however, H had secure employment and the employer knew about the offending. Accordingly, the Judge could not conclude that entering a conviction would have consequences for H out of all proportion to the gravity of his offending.[15] The Judge therefore convicted and discharged H, given the time he had spent on restrictive bail conditions.[16]

[10] On name suppression, Brewer J proceeded on the basis that it was governed by s 200 of the Criminal Procedure Act 2011 (the CPA). He accepted it was significant that, had H stayed in the Youth Court, he would have enjoyed permanent name suppression and that the reason he was tried in the High Court did not result in a conviction that was outside the Youth Court's jurisdiction.[17] The Judge noted

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11 Sentencing notes, above n 1, at [45]–[46].
12 At [52].
13 At [48].
14 At [49]–[52].
15 At [52]–[54].
16 At [55]–[56].
17 At [60].

opposition by Mr Peihopa's whānau and the news media. He did not consider accurate reporting of H's part in the fighting which led to the death of Mr Peihopa would cause him extreme hardship. Even if it did, there was a very real public interest in knowing *T's* name—he having been convicted of murder—yet if H's name was suppressed T's also would need to be given the existing reporting.[18]

Court of Appeal

[11] H's conviction appeal failed, the Court of Appeal concluding (by majority) that his counsel's argument for parity—i.e. that the sentencing outcome for a young person must necessarily be the same irrespective of the sentencing court—was inconsistent with established authority in that Court. The majority, Brown and Mander JJ, continued:[19]

> [36] In *Pouwhare v R* this Court addressed the question of law whether, when a young person is transferred by the Youth Court to the District Court or High Court for sentence, youth justice principles under the [Oranga Tamariki Act 1989 (the OTA)], as well as the principles in the Sentencing Act [2002], must be taken into account by the sentencing judge. This Court agreed that in whichever court a young person appears for sentence it will always be relevant, and sometimes may be decisive, that they lack the maturity of an adult and are decidedly more vulnerable and impulsive. However, the Court was unable to accept that justice to young persons would be rendered incoherent unless all courts sentencing young persons were obliged to take account of the youth justice principles in s 208 of the OTA.

[12] Peters J, dissenting as to the conviction appeal, did not engage with the parity argument, but would have held that a conviction for a serious violence offence was out of all proportion to the gravity of the actual offending, particularly in terms of future (if not current) employment.[20]

[13] The Court was unanimous in dismissing the name suppression appeal, finding the threshold of extreme hardship was not reached on the facts.[21]

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18 At [63] and [65].

19 CA judgment, above n 9 (footnotes omitted) citing *Pouwhare v R* [2010] NZCA 268, (2010) 24 CRNZ 868.

20 CA judgment, above n 9, at [80]–[82].

21 At [65]–[66] per Brown and Mander JJ.

Conviction appeal: issues

[14] The conviction appeal gives rise to these two issues:

(a) Following acquittal on the charge of murder, should H have been transferred back to the Youth Court for the remaining injuring charge to be dealt with there?[22]

(b) Does the entry of a conviction against H in the High Court constitute a miscarriage of justice?[23]

[15] Counsel in fact advanced these issues in the reverse order, but the more logical course is to begin with whether transfer back should have occurred. That is because, as we shall see, s 276A of the OTA *required* the injuring charge transferred out of the Youth Court to be transferred back *unless* the interests of justice required the proceeding to remain in the High Court. That step was overlooked in the High Court.

Statutory framework

[16] We start with s 25(i) of the New Zealand Bill of Rights Act 1990 (the Bill of Rights), which provides that everyone charged with an offence has, in relation to its determination, the minimum right, "in the case of a child, to be dealt with in a manner that takes account of the child's age". To the extent possible, the primary legislation we have to construe in this appeal should be interpreted in a manner consistent with the Bill of Rights and with New Zealand's obligations under applicable international obligations, including those under the United Nations Convention on the Rights of the Child (UNCROC).[24]

[17] Section 5(1)(b) of the OTA provides that "the well-being of a child or young person must be at the centre of decision making that affects that child or young person", and s 5(1)(b)(i) refers to the need to respect and uphold rights of children and

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22 See OTA, s 276A.

23 See Criminal Procedure Act 2011, ss 232(2)(c) and 240(2).

24 New Zealand Bill of Rights Act 1990, s 6; and Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990). As to our approach regarding the latter, see *M (SC 13/2023) v R* [2024] NZSC 29, [2024] 1 NZLR 83 at [54].

young people under UNCROC. Relatedly, art 3(1) of UNCROC provides that "the best interests of the child shall be a primary consideration" in all actions undertaken by the courts and other institutions concerning children.

[18] "Child" is defined in art 1 of UNCROC as those below the age of 18; while the Bill of Rights has no explicit definition, we may take it that H (aged 17) was a child for the purposes of s 25(i) at the time of offending.[25]

[19] Relatedly, in the OTA a "young person"—on whom the Youth Court's jurisdiction focuses—is a person "of or over the age of 14 years but under 18 years".[26] However s 2(2) relevantly extends the Youth Court's jurisdiction beyond those under the age of 18 years in this fashion:

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

That is, the defining jurisdictional consideration for the Youth Court is *age as at alleged offending*, provided that if the person is 19 or more at the time of the filing of the charge, the proceeding need not be taken in the Youth Court.

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25 See *H (CA651/2021) v R* [2022] NZCA 132 at [30]; and see generally *M (SC 13/2023) v R*, above n 24, at [58], n 66.

26 OTA, s 2(1) definition of "young person". The extended definition for young persons in care under Part 7 of the OTA can be disregarded for the purposes of this appeal.

Transfer from or back to the Youth Court

[20] Section 272(3) of the OTA provides that, excepting murder and some other charges, the young person "shall be brought before the Youth Court to be dealt with in accordance with the provisions of this Act". In turn, subs (4) states that if a young person is charged with murder, then s 275 applies. That provision, along with s 36(2) of the CPA, required that, after the first appearance of H on the charge of murder, the Youth Court transfer the proceeding to the High Court. That is what occurred in this case.[27]

[21] Transfer *back* to the Youth Court *must* also occur in certain circumstances:[28]

> **276A Transfer of proceeding back to Youth Court**
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> (1) This section applies if a proceeding has been transferred from the Youth Court to the District Court or the High Court under section 275 or 276AB(1) and—
>
> (a) the circumstances or reasons for the transfer of the proceeding no longer apply; and
>
> (b) the charge or charges are within the jurisdiction of the Youth Court.
>
> (2) The District Court or the High Court *must* transfer the proceeding back to the Youth Court to be dealt with in that court, *unless* the interests of justice require the proceeding to remain, and be dealt with, in either of those courts.
>
> (3) The transfer of the proceeding may occur at any time before sentencing.
>
> (4) For the purpose of subsection (1)(a), in relation to a proceeding for a related charge that is joined to a proceeding under section 276AB(1), the reason for the transfer of the proceeding for the related charge may no longer apply if, for example,—
>
> (a) the young person has been found not guilty of the Schedule 1A offence in the District Court or the High Court; or
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> …

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27 Transfer minute, above n 4, at [3] and [5].

28 Emphasis added.

The mandatory nature of the obligation to transfer back in those circumstances is reinforced by s 380A of the CPA which, in effect, repeats s 276A of the OTA.

[22] It was accepted before us that the statutory scheme creates three prerequisites for mandatory transfer back under s 276A. They are as follows:

(a) the initial transfer out of the Youth Court must have been under s 275 or s 276AB(1) of the OTA;

(b) the reason for that transfer must no longer apply; and

(c) the Youth Court must still have jurisdiction in respect of the transferred charge.

If those prerequisites are met, transfer back to the Youth Court *must* then take place unless retention is required in the interests of justice.

[23] On the third point, a question arising is whether transfer back may occur after the young person concerned has turned 19—as was the case here. The Court of Appeal concluded that it could not, referring to ss 276A(1)(b) and 296(2) of the OTA.[29] The latter provision is to the effect that certain orders of a continuing nature that the Youth Court may make under s 283 must expire when the young person turns 19. Notably, however, that does not include "Group 1 responses"—i.e. discharge without further order and admonishment under s 283(a) and (b)—together with other non-continuing "Group 2 responses" under s 283(d)–(j). We will return to this particular question,[30] but now explain the Youth Court's dispositive powers.

Determination of charges and sentencing

[24] We focus here just on distinctive features of the youth jurisdiction. The Youth Court has a bespoke discharge power in s 282 of the OTA:

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29 CA judgment, above n 9, at [27]–[29].
30 Below at [33]–[36].

> **282 Power of court to discharge charge**
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> (1) If a charging document is filed charging a young person with an offence in category 1, 2, or 3, the Youth Court, after an inquiry into the circumstances of the case, may discharge the charge.
>
> (2) A charge discharged under subsection (1) is deemed never to have been filed.
>
> (3) If it is satisfied that the charge against the young person is proved, the court may make an order under any of the provisions of section 283(e) to (j)—
>
> (a) when it discharges the charge; or
>
> (b) at any earlier time after it completes the inquiry referred to in subsection (1).
>
> (4) The court must not exercise the power in subsection (3)(b) unless section 281(1) is complied with.

[25] Discharge is also one of the enumerated responses provided in s 283 of the OTA, applicable where a charge has been proved (which results in notation, rather than conviction).[31] As already noted, the first two of these—called "Group 1 responses"—are discharge and admonishment. Beyond discharge, s 283 sets out a series of responses of escalating seriousness.[32] As noted earlier, some of these are in effect timed out at 19 years of age by s 296(2). Section 284 then sets out factors required to be taken into account in the application of s 283, which in part overlap with, but materially depart from the approach that would be taken in the High Court under ss 8 and 9 of the Sentencing Act (which s 284 predates by a decade). Apart from some stray references otherwise in the OTA,[33] the Youth Court "disposes of proceedings" and makes orders under s 283, rather than "sentencing" young persons.[34]

Issue 1: Should H have been transferred back to the Youth Court?

[26] Mr Carruthers, who argued this issue for H, submitted the injuring charge should have been transferred back to the Youth Court. Addressing the three prerequisites for transfer back above at [22], he submitted the first two were clearly met in this case, as the Crown evidently accepted. The third was rejected by the

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31 See below at [41].
32 Section 283 of the OTA is reproduced in the Appendix: see below at [50].
33 See for example s 351(4) and the title to s 284 of the OTA.
34 Sections 281–295 of the OTA are headed "Disposal of proceedings in the Youth Court".

Court of Appeal, but wrongly, as the Crown also now accepts. The Youth Court had jurisdiction under s 2(2) but might be precluded from making some of the s 283 disposition orders because H had turned 19. Therefore, Mr Carruthers said, strong countervailing interests would be needed to retain a transferred charge which could and should otherwise be transferred back. The lack of some of the more serious disposition options in s 283 did not reach that threshold given the approach ultimately taken by Brewer J.

[27] Ms Johnston, for the Crown, accepted the first two prerequisites above at [22] were met, and conceded the Youth Court did have continued jurisdiction over the remaining injuring charge, for the reasons given by counsel for H. To that extent, the Court of Appeal was incorrect, and transfer was, as Ms Johnston put it, "available". However, no suggestion had been made to Brewer J that that course be taken, because it was in the circumstances unrealistic. He was best placed to determine culpability and outcome; the Youth Court's hands would have been tied in relation to dispositions at a level more serious than discharge or admonishment; and, a point the Crown eventually did not pursue, that a mandatory family group conference was inapt for a 19-year-old.

Discussion

[28] The starting point is the statute. Section 276A(2) *requires* the High Court to transfer a qualifying proceeding back to the Youth Court *unless* the interests of justice require the proceeding to be retained. As noted earlier, there was little argument that this was a qualifying proceeding, being a proceeding satisfying the prerequisites above at [22]. First, it is accepted the initial transfer to the High Court must have occurred pursuant to ss 275(2)(b) of the OTA and 36(2) of the CPA. Secondly, the Crown properly did not contest that the reason for transfer no longer applied once H had been acquitted of murder. Thirdly, the Crown likewise conceded Youth Court jurisdiction in fact continued here (while noting that some potential dispositions under s 283 would no longer be available) and that the Court of Appeal had been wrong to conclude otherwise.

[29] It may be noted that the Crown did *not* suggest that the fact H had earlier pleaded guilty to the remaining charge in the High Court meant that Court was bound, as a matter of jurisdiction, to undertake the sentencing exercise in place of the Youth Court. Rather, it conceded the latter's jurisdiction to deal with the transferred charge continued. Section 276A(3) supports that concession: transfer may occur at any time before sentencing. It follows s 276A(2) continued to apply, compelling transfer back unless the interests of justice required retention.

[30] As we see it, the Crown's point at [27] above about precluded disposition options goes to the final consideration—whether the interests of justice require the proceeding to remain in the High Court. In one respect we are bound to disagree with the written argument for the appellant, which had put the matter the wrong way round in suggesting "transfer must be in the interests of justice". The statute is clear to the contrary: it is *retention* that must be required in the interests of justice. That is to say, it must be clear the interests of justice cannot properly be served by disposition in the Youth Court.[35] For the same reason, to describe transfer back as "available" for a qualifying proceeding—as the Crown put it—tends to obscure the mandatory character of s 276A.

[31] The rationale for the mandatory statutory direction to transfer back is clear. It was recognised by Parliament when it amended the OTA in 2019 and further strengthened the presumption for transfer back at the third reading stage. At that point the legislature changed the interests of justice from a prerequisite for transfer back to a prerequisite for *retention*, thereby transferring the onus.[36] Disposition in the Youth Court, where it has jurisdiction and the reasons for the original transfer no longer apply, will be better calculated to achieve the s 5(1)(b) object of ensuring that the well-being of the young person is "at the centre of decision making that affects that … young person". The starting position is thus that the interests of justice are generally best met by bringing the defendant back to the Youth Court because the specialised processes and outcomes available in that Court are attuned to the particular needs, concerns and interests of young persons. That H was 19 does not

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35 As suggested in *R v Ormsby-Turner* [2023] NZHC 1099 at [13(a)] and [14].

36 The change was proposed in Supplementary Order Paper 2017 (329) Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill 2016 (224-2), cl 104.

alter that: he was a young person when he offended, and but for transfer on the more serious charge he ultimately was acquitted of, he would have been dealt with by that Court. We do not accept that a family group conference or social worker's report, if required, would not have been apt in the case of a 19-year-old.[37] Had transfer to the High Court not occurred, these steps would have taken place when H was 18.

[32] Nor do we see Brewer J's particular familiarity with the trial evidence as precluding transfer back. H had pleaded guilty on a summary of facts that makes clear that H ran up to Mr Peihopa only after he had been stabbed by T. As Brewer J noted in sentencing, the case was unusual in that the precise events, and their timing, were preserved on CCTV footage. The Judge's observations as to absence of knowledge of the stabbing at the time H kicked Mr Peihopa and lack of discernible injury in fact—summarised above at [3]—could have been recorded by the Judge in the transfer decision that should have been made, and doubtless would have been, had it occurred to anyone to raise s 276A. Nor, given the very different outcomes as between H and T, was it essential for the same Judge to undertake sentencing to maintain consistency. Indeed, the primary question here was not one of sentencing, but of conviction.

[33] The remaining objection taken by the Crown concerns the significance of the fact that a number of the dispositive outcomes provided to the Youth Court in s 283 would no longer be available to it. As we note above at [23], these precluded orders were ones of a continuing nature, such as orders for community work or supervision. Preclusion arose because of s 296(2) and the fact H was by now 19 years of age. We acknowledge the force of the Crown's argument on this point. But we do not consider it dispositive per se.

[34] Rather, given the mandatory direction of s 276A(2), the Judge determining transfer back in this case needed to consider whether the inability of the Youth Court to make one of the precluded orders (or other sentencing options open to the High Court) meant the interests of justice required the proceeding to be retained in the

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[37] We note, for instance, that H's 20-month High Court bail had a 24-hour curfew that allowed him to be out in the company of his mother so that he could work on his apprenticeship: Sentencing notes, above n 1, at [49].

High Court.[38] That would have required the Judge here to make a judgment as to whether, in all the circumstances of the offending, there was a realistic prospect that the Youth Court might otherwise wish to make such an order and that its inability to do so would be contrary to the interests of justice. That enquiry is necessary as part of the wider question of whether retention is in fact required in the interests of justice. And that wider question must also examine whether it is truly consonant with the interests of justice that a young offender who could and should otherwise be dealt with in the Youth Court—the reasons for transfer away from it having now ended—should now be denied the benefit of that jurisdiction.

[35] A robust judgment is required by s 276A. The decision is for the judge of the transferee court—here, the High Court—to make. In this case, it was not one which needed to be made until H's acquittal on the murder charge; had he been *convicted* on that charge, the injuring charge would probably have been of no practical, marginal significance. But upon the acquittal, s 276A(2) required a transfer back decision to be made on the remaining charge that had been transferred up from the Youth Court. Here the High Court Judge could bring to that decision all the information gleaned at trial, including as to the very limited participation of H in the attack on Mr Peihopa and H's unawareness Mr Peihopa had been stabbed. And he could bring to it also what he knew from submissions made on sentencing—so long as the decision was made before sentence was pronounced.[39] As counsel submitted, in all the circumstances, the only issue at H's High Court sentencing was going to be whether he should be convicted at all. In that respect the position was quite different from that facing the Judge in *R v Ormsby-Turner*.[40] That case bears some superficial similarity to this one, but the remaining offending was more serious and persistent and the Judge there concluded he could not be sure that imprisonment was an inappropriate option.[41] Another way of looking at that decision is to say that the underlying reasons for transfer from the Youth Court had not necessarily ceased to apply.

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38 We note that the "interests of justice" threshold prescribed in s 276A(2) of the OTA might include considerations other than outcome, such as timing and other matters pertinent to resolution of the charges, subject however to the considerations and principles stated in ss 4A(2), 5 and 208.

39 Section 276A(3).

40 *R v Ormsby-Turner*, above n 35.

41 At [30].

[36] Had the Judge here been asked to transfer the remaining charge back to the Youth Court, as he should have been, and had he then asked himself the questions posed above at [34], we think he would have been bound to have concluded two things. First, that given the facts found by the Judge and his intended disposition of the matter under the Sentencing Act, there was no realistic prospect that the Youth Court would have needed to be able to resort to one of the precluded orders, let alone imprisonment or other sanction available under that Act.[42] Secondly, that in the circumstances of both the offending and the offender here, it could not be consonant with the interests of justice that H, who could and should otherwise be dealt with in the Youth Court on the sole charge remaining, should be denied the benefit of that jurisdiction. Accordingly, the interests of justice did not require the proceeding to be retained in the High Court.

[37] H's remaining charge should therefore have been transferred back to the Youth Court.

Issue 2: Does the entry of a conviction against H in the High Court constitute a miscarriage of justice?

[38] Issue 2 gives rise to the following sub-issues:

(a) How would the remaining charge have been dealt with if it had been transferred back to the Youth Court?

(b) Does the difference in outcome constitute a miscarriage of justice?

[39] We record that we also heard argument on a further point: how should the High Court have dealt with H on the injuring charge if it was required to retain jurisdiction? As we have found that H's remaining charge should have been transferred back to the Youth Court, it is unnecessary for us to address that hypothetical enquiry.

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[42] As noted above at [23], the orders precluded by s 296(2) are of an enduring nature, including parenting education and mentoring courses, alcohol and drug rehabilitation programme attendance and coming back before the Court. None could have been necessary in this case.

How would the remaining charge have been dealt with if it had been transferred back to the Youth Court?

[40] Ms Johnston submitted that the Youth Court outcome, had transfer back occurred, cannot be known. That submission rather reinforces the need for the issues here to be considered in their correct order, which we have done. We have found already that the absence of some dispositive options on transfer back did not compel retention of the remaining charge in the High Court. Transfer back should have occurred. But we know two other things of importance. First, that sentencing in Youth Court would then proceed without those options being on the table. Secondly, that in all the circumstances of this case, the course that the trial Judge adopted in the High Court, absent transfer back, was conviction and discharge without sentence.

[41] Conviction is not a facet of Youth Court jurisprudence.[43] The scheme of the OTA is to inquire into conduct and, where a charge is "proved", make one of the dispositive "responses" provided in s 283.[44] No conviction as such is recorded; rather a "notation" is made of the fact the charge has been proved. Ms Johnston submitted that, in that sense, a s 283(a) discharge "leaves more of a 'record' than a discharge without conviction under the Sentencing Act", as the latter is a deemed acquittal.[45] We think this a distinction without an essential difference: in neither instance is there a conviction.

[42] Here there is no disputing the injuring charge was *proved*—at least in the sense that H pleaded guilty to it in the High Court.[46] While the outcome of a family group conference or the content of a social worker's report are not known here, there is no further adverse information beyond the trial Judge's sentencing notes. These recorded

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43 With the sole and rare exception of s 283(o)—inapplicable here.

44 As we have seen, s 282 also provides for discharge after inquiry, in which case the charge is deemed not to have been filed: see above at [24].

45 Sentencing Act 2002, s 106(2).

46 In the Youth Court the notation would then have been "PAIC", i.e. proved by admission in Court: Kevin Leary (ed) *Family Precedents* (online ed, Thomson Reuters) at [YC4.1.2]. See for example *R v AR* [2014] NZYC 372 at [3]; and *Police v B* [2001] NZFLR 585 (YC) at 586–587.

H's appreciation of his actions, remorse and work ethic in his then-apprenticeship.[47] Having regard to the requirements of s 284(1) and prior case law in the youth jurisdiction, we see no likelihood that a Youth Court judge would, or legitimately could, resort to any other available dispositive response beyond discharge—under s 282 (discharge altogether)[48] or s 283(a) (discharge, retaining notation but without further order or penalty).[49] As we are not remitting determination of the charge to the Youth Court, however, the precise form of discharge that would have been entered makes no practical difference here.

Does the difference in outcome constitute a miscarriage of justice?

[43] The injuring charge should have been transferred back to the Youth Court.[50] The consequence of non-transfer was a conviction which would not otherwise have been entered. That must constitute a miscarriage of justice. H's conviction on the charge of injuring with intent to injure will be set aside.

Name suppression appeal

[44] Finally, we address the name suppression appeal. In our view, it is effectively resolved by the conclusions reached in the conviction appeal that (1) the remaining charge should, as s 276A(2) required, have been transferred back to the Youth Court and (2) the role of this Court now is to refashion the outcome in the High Court to best reflect the result had transfer back to the Youth Court in fact occurred.

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47 Sentencing notes, above n 1, at [50]–[51]. We were advised at the hearing that the employer was no longer in business, meaning H had been unable to complete that apprenticeship, but that he had found alternative interim employment. He was however anxious to complete his apprenticeship with another employer. Having no prior convictions, non-entry of a conviction on the remaining charge was significant.

48 As in *R v RK* [2021] NZYC 556, involving a 16-year-old offender who seriously assaulted the victim at school causing physical and psychological injuries. The young person showed remorse and took full responsibility. See also *GTH v Police* HC Tauranga CRI-2006-470-11, 16 May 2006. That case involved an assault with a broken bottle. The efforts of the appellant to make amends were exemplary. Simon France J reconsidered the sentence afresh and ordered a s 282 discharge in place of a s 283(a) discharge. See also *HK v New Zealand Police* [2019] NZHC 3346. The 14-year-old offender there faced 14 charges including robbery and assault with intent to injure. She accepted responsibility and sent apologies to all victims. Gwyn J ordered a s 282 discharge in place of a s 283(a) discharge.

49 As in *FJF (a minor) v Police* HC Wellington CRI-2005-485-97, 13 December 2005. The appellant faced two charges of robbery and one of injuring with intent to injure. Ronald Young J declined to substitute a s 282 discharge in place of a s 283(a) discharge.

50 Above at [37].

[45] In that event, H's name and identifying particulars would have been suppressed. There is no contest as to that consequence. It is an invariable, automatic statutory requirement under s 438(3) of the OTA.

[46] H must therefore now be given permanent name suppression, in the same manner as if his charge had been disposed of in the Youth Court, as should have occurred. For the avoidance of doubt, we make that order under ss 233(3)(e) and 241(2) of the CPA.

[47] We record that in doing so, we have taken into account each of the matters considered very carefully by the trial Judge. We acknowledge the strongly-held contrary view of Mr Peihopa's whānau, but that must yield here to the mandatory application of name suppression in the Youth Court. We note that the Peihopa whānau's primary concern is, as we understand it, that T should be able to be publicly identified.[51] As to that, we record that T's name is not suppressed. He may therefore be identified as the person who killed Mr Peihopa, so long as that publication (including embedded links) does not in any way identify H.

Result

[48] The appeal against conviction is allowed and a discharge without conviction is substituted.

[49] We make an order prohibiting publication of the name, address, occupation and identifying particulars of the appellant.

Solicitors:
Crown Law Office | Te Tari Ture o te Karauna, Wellington for Respondent

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[51] Sentencing notes, above n 1, at [57]–[65].

Appendix: Section 283 of the Oranga Tamariki Act 1989

[50] We reproduce s 283 of the OTA:

> **283 Hierarchy of court's responses if charge against young person proved**
>
> The Youth Court before which a charge against a young person is proved may, subject to sections 284 to 290, make 1 or more of the following responses (grouped in levels of equal restrictiveness, the groups ranging from least restrictive to most restrictive):
>
> *Group 1 responses*
>
> (a) discharge the young person from the proceedings without further order or penalty:
>
> (b) admonish the young person:
>
> *Group 2 responses*
>
> (c) order that the young person come before the court, if called upon within 12 months after the order is made, so that the court may take further action under this section:
>
> (d) impose a fine that could have been imposed by the District Court if the young person were an adult and had been convicted of the offence following a trial in the District Court, and exercise any of the powers conferred on the District Court by sections 81 and 83 of the Summary Proceedings Act 1957 (other than the power to impose a period of imprisonment in default of payment):
>
> (e) order the young person or, in the case of a young person who is under the age of 16 years, any parent or guardian of the young person to pay a sum towards the cost of the prosecution:
>
> (f) order the young person or, in the case of a young person who is under the age of 16 years, any parent or guardian of the young person to pay to the person who suffered the emotional harm or the loss of, or damage to, property such sum as it thinks fit by way of reparation if the court is satisfied that any person (other than the young person) suffered, through or by means of the offence, either or both of the following:
>
> (i) emotional harm:
>
> (ii) loss of, or damage to, property:
>
> (g) order the young person or, in the case of a young person who is under the age of 16 years, a parent or guardian of the young person to make restitution in accordance with section 377 of the Criminal Procedure Act 2011:

(h) make an order for the forfeiture of property to the Crown if the forfeiture of that property would have been obligatory or could have been ordered under an enactment applicable to the offence if the young person were an adult and had been convicted of that offence by the District Court:

(i) make an order under section 293A (which relates to disqualification from driving):

(j) make an order that could have been made by a court other than the Youth Court under section 128 or 129 of the Sentencing Act 2002 (which relate to confiscation of motor vehicles) if the young person were an adult and had been convicted of the offence in a court other than the Youth Court, and, if the court makes the order, the following sections of that Act apply (to the extent they are applicable and subject to any necessary modifications):

(i) section 128 or 129 (as the case may be):

(ii) sections 129EA, 130, 131 to 136, 137, and 138 to 142:

Group 3 responses

(ja) make an order requiring the young person (if the young person is, or is soon to be, a parent or guardian or other person having the care of a child), or a parent or guardian or other person having the care of the young person, or both, to attend, in a manner specified by the court, and for a specified period of not more than 6 months, a specified parenting education programme:

(jb) make an order requiring the young person to attend, in a manner specified by the court, and for a specified period of not more than 12 months, a specified mentoring programme:

(jc) make an order requiring the young person to attend, in a manner specified by the court, and for a specified period of not more than 12 months, a specified alcohol or drug rehabilitation programme:

Group 4 responses

(k) make an order placing the young person under the supervision of the chief executive, or any person or organisation specified in the order, for a period not exceeding 6 months:

(l) make a community work order under section 298:

Group 5 response

(m) make a supervision with activity order under section 307:

Group 6 response

(n) make a supervision with residence order under section 311:

Group 7 response

(o) exercise the powers conferred by one of the following subparagraphs:

(i) the court may order that the young person be brought before the District Court for sentence or decision, and may enter a conviction before doing so; and the Sentencing Act 2002 applies accordingly if—

(A) the young person is of or over the age of 15 years; or

(B) the young person is of or over the age of 14 years and under the age of 15 years and the charge proved against the young person is a charge in respect of a category 4 offence or category 3 offence for which the maximum penalty available is or includes imprisonment for life or for at least 14 years:

(ii) the court may, in the case of a young person charged with a category 4 offence or an offence for which the maximum penalty available is or includes imprisonment for life and if the court considers that a sentence of imprisonment for life may be appropriate, order that the young person be brought before the High Court for sentence or decision and may enter a conviction before doing so; and the Sentencing Act 2002 applies accordingly if the young person is of or over the age of 14 years.