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**IN THE YOUTH COURT
AT WAITAKERE**

**CRI 2016-290-000105
[2017] NZYC 439**

NEW ZEALAND POLICE

v

[OL]
Young Person

Appearances: Ms Mok for the Police
Ms Brown Youth Advocate

Sentencing: 23 May 2017

Reasons: 23 June 2017

REASONS OF DECISION OF JUDGE A J FITZGERALD

[1] On 23 May 2017 I sentenced [OL] to six months supervision with residence, to be followed by 12 months supervision, on charges of being party to causing grievous bodily harm with intent to rob on [date deleted] April 2016, armed robbery (with a

knife) on [date deleted] May 2016 and armed robbery (with a pistol) on [date deleted] February 2017.

[2] At the sentencing it was only possible to give brief reasons because of the amount of other work set down that day. I therefore said I would set my reasons out in full later and do so now.

[3] At the time of the first offence on [date deleted] April 2016 [OL] was 14 years old. He was with his 15 year old [sibling] [ML]. [ML] had created a fake profile and posted it on the dating service “Tinder”. [ML] connected with the victim and made arrangements to meet with him pretending it was for the purpose of having sex. In fact [ML’s] plan was to rob him. [ML] told [OL] [ML] would be meeting the victim in order to “gank” him and asked [OL] to come with [ML] which he did. [ML] met with the victim, got into his car and directed him to drive to an empty driveway nearby. When they arrived there [OL], who had been hiding in bushes, then ran to the car and hit it with a hammer. The victim attempted to accelerate away but [ML] then stabbed him in the chest causing a deep wound that penetrated his lung causing it to collapse. [ML] also tried to stab the victim in the neck before [ML] and [OL] ran away.

[4] In relation to the second offence on [date deleted] May 2016, [OL], [ML] and two others, made a plan to rob [a service station] in [location deleted] to get cigarettes. It was agreed [ML] would carry a knife and [OL] a hammer. At about 1.30am the group entered [the service station]. [OL] walked up to the till, partially removed a hammer from his hoodie and put it on the counter by the till. [ML] also walked to the till with a knife in [hand]. [OL] demanded cigarettes from the victim who said he would get them and went to a back office. [OL] and [ML] were unable to get to the till. One of the other offenders had walked around the store while [OL] and [ML] threatened the victim. The fourth offender held the door to ensure it did not close and lock them inside. After the victim went to the back office [OL] and [ML] took a plastic basket and filled it with chocolate bars and ice creams before running away.

[5] In relation to the third offence, on [date deleted] February 2017, [OL] was on his own. He went back to the same [service station] in [location deleted]. Upon entering he removed a black handgun from his hoodie and demanded money from the

victim and threw a black satchel onto the counter. The victim put the till on the counter and [OL] put the money in the bag himself. There was believed to be about \$200 in the till. [OL] also demanded tobacco which the victim put in the bag as well. Before leaving [OL] also put various chocolate bars in the bag.

[6] Given the number and nature of these offences the sentencing options were, realistically, limited to supervision with residence to be followed by supervision, which was recommended by the social worker and advocated for on behalf of [OL] or conviction and transfer to the District Court for sentence, which the police sought.

[7] I had regard firstly to the objects and principles of the Children Young Persons and Their Families Act 1989 (“the Act”); both the general objects and principles set out in ss 4 and 5 of the Act as well as the youth justice principles contained in s 208. I do not think it necessary to set those out here. In the present context the object contained in s 4(f) of the Act is the most relevant; namely to ensure that [OL] is held accountable, encouraged to accept responsibility for his behaviour but dealt with in a way that acknowledges his needs and gives him the opportunity to develop in responsible, beneficial and socially acceptable ways.

[8] I next turn to the factors that must be taken into account on sentencing.

The nature and circumstances of the offending

[9] Obviously each of the offences are serious and the fact that there were three separate incidents is particularly concerning. Aggravating features include premeditation, being armed with weapons on each occasion and causing significant emotional harm to the victims (and, of course, the victim of the first offence suffered serious physical harm caused by [OL’s] [sibling] [ML]).

Personal history and personal characteristics

[10] [Family and personal details deleted]. He turned 16 [date deleted]. During his upbringing the family moved numerous times and poverty has been a significant issue. The social worker says that “food insecurity, debt, bad housing and lack of support to

ask for help are common themes that have appeared throughout my assessment”. There is a history of relationship difficulties between [OL’s] parents as a result of which they separated. [OL] has a very close relationship with his mother and a poor relationship with his father. As a result of those dynamics, and being [details deleted], it seems [OL] has taken upon himself the responsibility as provider/carer and protector of his mother and siblings and it is suggested that the offending (such as the taking of chocolates and ice cream) were [OL’s] misguided attempts to provide things for his younger siblings that his mother could not afford. [OL’s] relationship with [ML] is very close too. Both [ML] and the mother are the victims of sexual abuse by [a close family member]. He has been imprisoned for that offending but that has caused a rift in the whanau. As a result there is said to be a lack of extended family support which has taken a huge toll on both parents.

[11] Most of [OL’s] education was completed in Kura Kaupapa where he did very well. A move to mainstream education in [year deleted] was “a shock to the system” for [OL]. Truancy and associating with anti social peers followed. There is reference to frequent cannabis use in recent times and some use of synthetics in the past. However drug use does not seem to be a significant problem and there is no suggestion it was a feature of the offending - both in the sense of [OL] being under the influence at the time or that a motivation was to get money to buy drugs.

[12] There are numerous positive references about [OL’s] character. He is described as a “natural born leader”, a good communicator with a mature outlook on life, a fit and well young man who is an all-rounder at sport. He is said to be excited about [details deleted] and motivated to stay out of trouble in future. [Details deleted]. [OL] is said to want to make changes in his life and to be aware of what he needs to do for change to occur.

The attitude of [OL] towards the offending

[13] The social worker refers to [OL’s] remorse being genuine and unquestionable and that he presents as being truly sorry for causing fear in his victims and making them feel unsafe within the community.

Response of whanau

[14] They are reported to be upset and disappointed with [OL's] offending and in particular the last offence committed in February 2017 given that he knew at the time he was going to [details deleted]. [OL's] [family member] also found that last offence particularly devastating because in [year deleted] she was [occupation deleted] held up at gun point and [OL] knew about that experience.

Any measures taken or proposed by the young person or family to make reparation or apologise

[15] [OL] was willing to attend a restorative justice meeting with victims. There is no reparation sought in relation to any of the offences.

Effect of the offending on the victims

[16] The effect on the victims has been immense. The victim of the first offence found it a terrifying experience, especially when [OL] had run from bushes towards the car with a hammer and then damaged the roof inside of the car with it.

[17] The victims of the second offence refer to being traumatised and not knowing when one of the victims will be able to return to work because of being fearful.

[18] In relation to the third offence, there is disbelief that [OL] would return to rob them again with a firearm.

Previous offending

[19] There has been no previous or other offending by [OL]. He was subject to a Family Group conference plan for the first two offences, being monitored at the Rangatahi Court, when the third offence was committed. He has been remanded in custody since then (ie; February 2017) and reports about his attitude and progress there are positive. It is said that he is doing well and responding positively to programmes in the residence.

[20] No agreement was reached at the family group conference.

The causes underlying [OL's] offending and the measures available for addressing those causes so far as it is practicable to do so.

[21] In a report provided by the Regional Youth Forensic Service the various issues I have referred to above regarding [OL's] past and current circumstances are assessed and recommendations made about how to address those. That includes alcohol and other drug counselling, engagement with a culturally appropriate mentoring service, counselling to help [OL] cope with negative emotions, especially anger, and therapeutic support around parenting, communication and conflict resolution. Support for the family by various services is also recommended.

[22] The social work report then sets out a customised plan to address the underlying causes and [OL's] needs – both within the residence and after release. A variety of specialised youth services and programmes are referred to.

Analysis of the sentencing options and counsels submissions

[23] For the police, on the one hand, reference is made to the likely sentence that would be imposed if [OL] was transferred to the District Court for sentencing. That is a starting point of five years imprisonment for the recent aggravated robbery and an uplift of two to three years for the other offending – and therefore an overall starting point in the region of seven to eight years before getting credit for youth and guilty pleas and anything else that might apply. On the other hand, the indication was that intensive supervision would not be opposed in the District Court if [OL] was transferred there - but clearly the reality is that no end sentence of imprisonment could possibly get down to below two years so as to enable such an option to be considered. An end sentence of between three and four years imprisonment seems likely.

[24] It was submitted for the police that the key factors weighing in favour of convictions and transfer to the District Court are:

- (a) Seriousness of the offending;
- (b) The need for long term rehabilitative measures;

- (c) Youth Court orders are insufficient in this case to:
- (i) Mark the severity of the offending and hold [OL] accountable;
 - (ii) Address any underlying issues relating to [OL] propensity for violence especially given the type of weapon he has used has escalated quickly in seriousness; and
 - (iii) Ensure the safety of the public.

[25] It was further submitted that a conviction and transfer to the District Court would adequately mark the offending but it would also ensure compliance with that sentence and provide for the long term rehabilitation that is required for [OL] given that Youth Court measures have been ineffective in the past. There is said to be a very clear need for a firm rehabilitative sentence given the Youth Court measures which have already been imposed but have not prevented [OL] from reoffending in an almost identical violent manner.

[26] However a significant issue regarding sentencing in the District Court is that the Corrections Department apparently cannot provide any rehabilitative programmes suitable for young people. I was told in Court that although Corrections are setting up a “Youth Team”, that has not yet happened and there is nothing available at the moment in terms of rehabilitative programmes for young people.

[27] Therefore the practical reality if [OL] is transferred to the District Court for sentencing is that he will receive a lengthy sentence of imprisonment but will receive no age appropriate rehabilitation or support at all. He would still be a relatively young man when he is released from prison but, in all likelihood, pose an even greater risk to public safety than at present given the absence of adequate, age-appropriate rehabilitation programmes.

[28] The alternative available is for him to remain in the Youth Justice [location deleted] Residence where he has already been for three months. With an additional six months supervision with residence he would then have a nine month custodial

sentence (subject to his entitlement for early release if he earns that). During his time in residence and after release whilst subject to a 12 month supervision order, he would have ongoing access to rehabilitation programmes designed for young people. The indications are that he is already responding well to the programmes being provided in the residence. He has never previously been subject to an order. He has only just turned 16 years old and so there is plenty of time still available for the Youth Court orders and youth appropriate programmes to apply.

[29] For [OL], Ms Brown points out that the following conclusions can be drawn from the cases where conviction and transfer to the District Court has been ordered previously:

- (a) The young person's age and the time available in the Youth Court for interventions to work is highly relevant. There is said to be a presumption against transfer unless the length of the supervision with residence order before the young person turns 18 is clearly inadequate.
- (b) The seriousness of the offending and likely term of imprisonment is relevant but not determinative.
- (c) In most cases where a transfer to the District Court was ordered the young person had reoffended while subject to a Group 6 order for serious offending.
- (d) The Youth Court provides greater prospects of reducing the risk of further offending than the District Court. This is an important public consideration.

[30] Although I acknowledge that this was a difficult and finely balanced matter I was not satisfied that the less restrictive outcome of supervision with residence followed by supervision would be clearly inadequate. Although it is certainly less punitive in terms of the time that [OL] would spend in a custodial setting it is the option that appears more likely to reduce the risk he poses to public safety.

[31] It is also the outcome that is more in accordance with the relevant International Conventions to which New Zealand is a party – in particular the United Nations Convention of the Rights of the Child and the Beijing Rules on Juvenile Justice which include such principles as the use of custodial sanctions being a matter of last resort and, when imposed, being for the shortest appropriate period of time.

[32] By a narrow margin, therefore, I was satisfied that the orders indicated above were the appropriate ones to make in these circumstances.

A J Fitzgerald
Youth Court Judge