IN THE YOUTH COURT
AT WHANGAREI

CRI-2015-288-000085
[2017] NZYC 462

NEW ZEALAND POLICE
Prosecutor

v

[JT]
Young Person

Hearing	23 June 2017
Appearances:	J Scott for the Prosecutor J Young for the Young Person
Judgment:	23 June 2017

NOTES OF JUDGE G L DAVIS ON SENTENCING

---

[1] [JT] appears in the Youth Court today to deal with a charge that has been laid under s 128 and s 128B Crimes Act 1961. There is an allegation that he has sexually violated a person aged sixteen years.

[2] The charge has been admitted by [JT] or to use the language of the Youth Court, it is not denied that non-denial was confirmed at a family group conference.

[3] The general background to the offending can be described as follows. [JT] and some of his friends had been consuming alcohol around about [date deleted]. They had also been smoking cannabis. He went to the victim's house, who I will refer to as [CN], and went to her bedroom window. He drew or attracted her attention and was invited in. [JT] at the time was extremely intoxicated as was some of his friends who also came into the room. Thereafter [JT] sought a kiss or something of that general nature from the victim. She replied, "No, you have [KP]," which I understand to be a reference to his then girlfriend. He persisted and sat down behind the victim. He grabbed her, wrapping his arms around her shoulders and began kissing her neck. She pushed him away. She continued to protest. In short, despite those protestations, he then jumped onto the bed and began to more aggressively ask for a kiss. Again he was rebuffed, he then rubbed her shoulders, pushed her down on the bed, pinned her down and to summarise the events thereafter and despite the protestations of the victim he raped her. He said to her something along the lines of, "I'll fucking rape again." I will return to that point shortly.

[4] [JT] was charged as I say with the rape and a family group conference was then convened. An initial plan was put together which was dependant on more assessments being undertaken. The assessments were completed and following that a second family group conference on 17 December, a plan was put together to deal with the offending.

[5] The plan involved a number of components that [JT] would be required to complete. The most significant of which was that he would complete a SAFE assessment as it was called. The SAFE assessment is a programme designed to deal with sexual offenders of all ages. The assessment was duly completed and over a

course of about eighteen months [JT] has successfully completed the SAFE Programme.

[6] [JT] seeks to have these matters disposed of in the Youth Court today.

[7] The Crown oppose the matters being disposed of in the Youth Court and the Crown's primary submission is that this offence is of such a serious nature that it should be transferred to the District Court and [JT] should be sentenced in that Court.

[8] Ms Young on [JT's] behalf asks that the matter remain in the Youth Court and that [JT] be discharged in accordance with s 282 Children, Young Persons, and Their Families Act 1989.

[9] The first point to note is that this is a serious offence. It carries with it a maximum term of imprisonment of 20 years. In certain instances, it is an offence that carries with it a warning under the three strikes regime. It is described for the purposes of the Crimes Act or the Sentencing Act as being a serious violent offence. If it were being dealt with in the District Court, a term of imprisonment in my view and a lengthy term of imprisonment would be inevitable. It is however not being dealt with in the adult Court today, it has been dealt with in the Youth Court and Youth Court sentencing principles apply. That of course includes the prospect of the matter being transferred to the District Court for disposition. Because it is being dealt with in the Youth Court, there are a number of pieces of the Children, Young Persons, and Their Families Act that this Court must have in mind.

[10] The first of those factors is s 208 Children, Young Persons, and Their Families Act which sets out the following principles which govern the operation of the Act:

> **208 Principles**
>
> Subject to section 5, any court which, or person who, exercises any powers conferred by or under this Part or Part 5 or sections 351 to 360 shall be guided by the following principles:
>
> (a) the principle that, unless the public interest requires otherwise, criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter:

(b) the principle that criminal proceedings should not be instituted against a child or young person solely in order to provide any assistance or services needed to advance the welfare of the child or young person, or his or her family, whanau, or family group:

(c) the principle that any measures for dealing with offending by children or young persons should be designed—

(i) to strengthen the family, whanau, hapu, iwi, and family group of the child or young person concerned; and

(ii) to foster the ability of families, whanau, hapu, iwi, and family groups to develop their own means of dealing with offending by their children and young persons:

(d) the principle that a child or young person who commits an offence should be kept in the community so far as that is practicable and consonant with the need to ensure the safety of the public:

(e) the principle that a child's or young person's age is a mitigating factor in determining—

(i) whether or not to impose sanctions in respect of offending by a child or young person; and

(ii) the nature of any such sanctions:

(f) the principle that any sanctions imposed on a child or young person who commits an offence should—

(i) take the form most likely to maintain and promote the development of the child or young person within his or her family, whanau, hapu, and family group; and

(ii) take the least restrictive form that is appropriate in the circumstances:

(fa) the principle that any measures for dealing with offending by a child or young person should so far as it is practicable to do so address the causes underlying the child's or young person's offending:

(g) the principle that—

(i) in the determination of measures for dealing with offending by children or young persons, consideration should be given to the interests and views of any victims of the offending (for example, by encouraging the victims to participate in the processes under this Part for dealing with offending); and

(ii) any measures should have proper regard for the interests of any victims of the offending and the impact of the offending on them:

(h) the principle that the vulnerability of children and young persons entitles a child or young person to special protection during any

investigation relating to the commission or possible commission of an offence by that child or young person.

[11] Some of those provisions include the principle:

That unless the public interest requires otherwise, criminal proceedings should not be instituted against or a child or a young person if there is an alternative means of dealing with the matter.

[12] The second principle to bear in mind is:

That the criminal proceeding should not be instituted against a child or young person solely in order to provide any assistance or services needed to advance the welfare of the child or young person, or his or her family whanau, or family group.

[13] The third significant principle is:

That any measures for dealing with an offender or offending by a young person should be designed:

(i) to strengthen the family, the whānau, the hapū, the iwi and family group of the child or young person concerned; and

(ii) to foster the ability of families, whānau, hapū, iwi to develop their own means of dealing with offending by their children and young persons.

[14] There is another principle:

That a child or young person who commits an offence should be kept in the community so far as that is practicable and consonant with the need to ensure the safety of the public.

[15] There is another principle:

That a child's or a young person's age is a mitigating factor in determining –

(i) whether or not to impose sanctions in respect of offending by a child or young person; and
(ii) the nature of any such sanctions.

[16] There is another principle that says:

Any sanctions imposed on a child or young person who commits an offence should

(i) take the form most likely to maintain and promote the development of the child or young person within his or her family, whānau, hapū, and family group; and
(ii) take the least restrictive form that is appropriate in the circumstances.

[17] There is another principle:

> That any measures for dealing with offending by a child or young person should so far as it is practicable to do so address the causes underlying the child's or young person's offending.

[18] So to summarise those principles, the Act requires this Court and those who administer the Act including the police not to charge a young person if there is a suitable alternate means of dealing with the matter. That whatever the outcome when criminal proceedings are initiated they should be focussed on the child or young person. That young person should be dealt with in the community as far as is practical and the sanctions that the Court imposes should wherever possible deal with the underlying causes of the offending.

[19] That however is not an absolute because the Act says that while there should not be criminal proceedings, they are initiated if there are alternate means of dealing with it. It makes it clear that that applies unless it is in the public interest. Similarly, factors that the Court have to take into account incorporate the gravity of the offending and the need to ensure that the safety of the public is ensured.

[20] In addition to that, when it comes to sentencing the Court must be bound by s 284 Children, Young Persons, and Their Families Act and again, I repeat that in full:

> **284 Factors to be taken into account on sentencing**
>
> (1) In deciding whether to make any order under section 283 in respect of any young person, the court shall have regard to the following matters:
>
> (a) the nature and circumstances of the offence proved to have been committed by the young person and the young person's involvement in that offence:
>
> (b) the personal history, social circumstances, and personal characteristics of the young person, so far as those matters are relevant to the offence and any order that the court is empowered to make in respect of it:
>
> (c) the attitude of the young person towards the offence:

(d) the response of the young person's family, whanau, or family group to—

(i) the causes underlying the young person's offending, and the measures available for addressing those causes, so far as it is practicable to do so.

(ii) the young person himself or herself as a result of that offending:

(e) any measures taken or proposed to be taken by the young person, or the family, whanau, or family group of the young person, to make reparation or apologise to any victim of the offending:

(f) the effect of the offence on any victim of the offence, and the need for reparation to be made to that victim:

(g) any previous offence proved to have been committed by the young person (not being an offence in respect of which an order has been made under section 282 or section 35 of the Children and Young Persons Act 1974), any penalty imposed or order made in relation to that offence, and the effect on the young person of the penalty or order:

(h) any decision, recommendation, or plan made or formulated by a family group conference:

(i) the causes underlying the young person's offending, and the measures available for addressing those causes, so far as it is practicable to do so.

(2) The court shall not make an order under any of paragraphs (k) to (o) of section 283 merely because the court considers that the young person is in need of care or protection (as defined in section 14).

[21] But to summarise, before a Court imposes any order under s 283 of the Act, the Court shall have regard to:

(1) The nature and the circumstances of the offence proved to have been committed by the young person.

(2) The personal history and social circumstances and characteristics of the young person so far as they are relevant.

(3) The attitude of the young person towards the offence.

(4) The response of the young person's family, whānau or family group to the offending and the young person himself.

(5) The measures taken or proposed to be taken by the young person, the family and the whānau to make reparation or apologise to any victim of the offending.

(6) The effects of the offence on the victim and the need for reparation to be made.

(7) Any previous offending that may have occurred.

(8) Any decision, recommendation or plan formulated at a family group conference.

(9) The underlying causes of the young person's offending and the measures available for addressing those causes so far as that is practical to do so.

[22] I have received detailed written submissions from the Crown and from [JT's] Youth Advocate Ms Young, and I have read all of those submissions in full, and I have also read materials that have been filed in support of the submissions by both the Crown and by Ms Young, and it is sufficient to say that it is acknowledged that this is a difficult decision for all of the parties involved in the offending for both the victim and her family who I acknowledge their presence in Court here today, but also for the young person and his family and I acknowledge also their presence in Court today.

[23] Turning to the factors or the principles that I have described in s 208 of the Act. I am mindful that the Court here must balance the gravity of the offending on the one hand against the principles of dealing with the young person as much as it is practical in a manner that keeps them in the community and strengthens the whānau hapū and iwi base.

[24] To that extent, the Crown position which is one that says in the first instance this Court should transfer the matter to the District Court and be dealt with in the District Court.

[25] I record the Crown's position to be that if this Court were to agree to that proposition, it is the Crown's position that [JT] should not be sent to jail and that they would be seeking a sentence of supervision imposed by the District Court and administered by the Community Probation Service.

[26] Looking at the factors in s 284 Sentencing Act 2002.

The Circumstances of the Offending

[27] I have outlined the factual circumstances of the offending by reference to the summary of facts. I have described this as being a serious offence. It involved serious violence. It has involved sexual violation in the face of protestations by the victim. In other words, the victim was fighting against the advances of the young person and she was asking, in fact begging so to speak him to stop the advances. There was penile penetration of the victim of the offending.

[28] I accept also that the victim was sixteen years of age at the time, but equally [JT] was 14 years of age at the time. He is now [age deleted], the victim is now [age deleted] as I understand it.

[29] The victim by her very nature was vulnerable. She was not able to fight off the advances or resist the advances. I have not narrated in full that one of the friends of [JT] who was present in the room also intervened and tried to get [JT] to stop the attack. He did not stop and continued despite the friend being unable to prevent it happening.

The Young Person's history

[30] The second factor that I am required to look at is the young person's history. Ms Young has quite properly pointed out that this is the first occasion that [JT] has

come to the police's attention. It is therefore the first occasion that he has come before to the Youth Court's attention.

[31] The next factor is the attitude of the young person towards the offence. I acknowledge here that it appears that [JT] has not denied this offence at an early opportunity. He also attended a family group conference where the victim and her whānau were present. Apologies were offered at that family group conference as well as various gifts that were given at the family group conference.

[32] [JT] it appears in the period since the offence was committed has attended the SAFE Programme. The SAFE Programme reports that I have received including the most recent report bearing the date 6 June 2017 described [JT's] individual treatment and therapy over the course as included amongst other things, a development of rapport and therapeutic relationship, an understanding of what harmful sexual behaviour may look like, the consent laws and what that may actually mean in a practical sense, healthy relationships within family as well as romantic relationships, the unhealthy mix of alcohol and sexual behaviour and empathy.

[33] The reports describe [JT] as demonstrating a willingness to reflect on his actions and the choices he has made. It also describes him as being willing and fully involved in his therapy. There have been a number of sessions that [JT] has attended both on his own and in family group sessions.

[34] The report concludes that over the past twelve months there has been a very positive change in [JT] as he is described a level of understanding concerning the impact of harmful sexual behaviour. That understanding has come about not only through the process of the SAFE network therapeutic intervention, but with his own stages of adolescent development and a willingness and commitment to completing his treatment.

[35] The therapeutic intervention the report says has focussed on addressing the risk factors identified has elevated for [JT] across a wider system supporting him and promoting strengths and factors identified as being protective. His level of progress

through intervention over the duration of the therapy has been positive and he has shown a readiness and preparedness to exit the treatment.

The response of the young person's family group to the offending

[36] The next factor that the Court has to consider is the response of the young person's family group to the offending. That again can be described in a positive way. Not only has [JT] undertaken the SAFE counselling designed specifically to address sexual offending but so too his whānau had become involved in the therapy sessions. That was anticipated as being part of the treatment plan following a comprehensive assessment that was undertaken and reported on 8 April 2016. The recommendations of that report were that there would be individual treatment or therapy sessions at the SAFE Offices in [location 1] but also monthly attendance at family therapy sessions in [location 2]. It appears that the family sessions would include not only [JT] but also his mother and his stepfather and the focus there would be on developing and supporting treatment and family goals.

[37] I understand in the periods since the offending has taken place, [JT] and his family have converted to [religion deleted] to use Ms Young's description, and there have been I understand positive steps made by the whānau including [details deleted].

[38] The next factor is the apologies or reparation and I have touched briefly on that.

[39] The next factor is the effect of the offence on the victim and the need for reparation to be made to that victim.

[40] I have to hand a victim impact statement that was read out in Court today. I record that given this victim impact statement was in my view akin to evidence being given by the victim, I ensured that no members of the public were present in Court other than [JT's] mother and stepfather each of whom were present at the family group conference.

[41] The victim of the offending has prepared a cogent and detailed victim impact statement which describes the impact of this offending on her. To paraphrase it, this has had a pronounced impact on her. There are understandable feelings of violation both of her house, her intimate personal space in her bedroom, she felt unsafe in her own bed and in her own home. In addition to that, it appears as though she has felt targeted not only by you on the night in question but also by other members of the community. [Details deleted]

[42] I can but impress on you that nobody deserves to be treated in that way. [Details deleted.] She feels that this process has not been supportive of her. She feels as though all of the support networks have been put in place to rally around you and she has been left on her own. She is feeling so miserable, so upset that she has begun to self-harm. It is saddening to hear that these effects or these issues that still continue to affect the victim of this offending now almost [number of years deleted] after the events took place.

[43] I invite the victim's advisor in the Court here today to ensure that all steps are taken to make sure that this matter is referred to the sensitive claims unit if it has not been already done at ACC, to ensure that the appropriate wrap around support can be made available to the victim and to her whānau so that whatever counselling that maybe required is made available to her at the earliest possible opportunity.

[44] It is for the Court simply to say that this is not your doing and it is important that we in society acknowledge that in a formal sense. This is not your fault. This is other people's fault, and it is the Court's chance today to bring those matters to the appropriate conclusion.

[45] I hope those words are of some modest comfort to you and to the whānau.

[46] The next factor that the Court has to consider is any previous offences that had been committed by the young person. I made this clear earlier, it is the first occasion that [JT] has come before the Courts or to the police attention.

[47] The next factor is any decisions or recommendations or plans made at the family group conference. I have touched very briefly on the plans that were made at the family group conference. There are two important points to stress about what has come out of the family group conference. The first, is that there are plans that are recorded as representing an agreement between all of the parties. I note from those who were present at the family group conference on 17 December, that there were a number of people present including the victim, her mother and father as well as numerous others.

[48] The family group conference records as is entirely appropriate the feelings of hurt and anger and sadness were evident. There was also a degree of nervousness recorded by [JT]. There were periods of tension and strain. The report records there were various plans that I have made reference to put in place as well as the SAFE Programme, but there were other aspects that were discussed such as community work, projects being completed, education being completed and the like but the family group conference plan records at point 10, "That if the young person fully completes all aspects of the plan within the timeframe set, the conference agreed that this matter be disposed of pursuant to s 282 Children, Young Persons, and Their Families Act 1989." And the plan that has been in place since December 2015 has been predicated upon completing the plan and upon a disposal under s 282 of the Act. The Court has adopted that plan but has made it very clear that the questions as to disposition how this would be dealt with, will be left opened and so while the plan has agreed to a disposition under s 282, the Court has indicated that aspect of the plan had not been agreed by it.

[49] The final aspect is the causes underlying the young person's offending and the measures available for addressing those causes so far as practical.

[50] I have touched on at length the work that [JT] has done at the SAFE Programme. The work that has been done by [JT's] family and the wrap around services that he has available to him.

[51] To that extent, I am satisfied that he has done everything that has been asked of him by the SAFE Programme which has been the centre point of the plan. I am satisfied that his family have also done what has been expected of them.

[52] There is one aspect that has been drawn to my attention today, and that is a end of treatment safety plan for [JT] which will be in place for three months from 16 May. It identifies a number of risk factors such as drugs and alcohol, peer pressure, social isolation and positive factors including his family, his friends and safety plan, sticking to the safety plan, making new plans for situations as they come up and strategies. There is a number of goals in the plan also.

[53] The most important aspect of the safety plan is identifying the various environments that [JT] moves in, and identifying the risks that come from those environments and the plans or the things that he can do to minimise those risks if the concerns come up.

[54] I note that there does not appear to be in the broader sense a heightened sexual awareness component, but that in my view on reflection transcends all of the environments that [JT] operates in, and the SAFE report appears to suggest that [JT] is now as a result of the counselling and programmes that he has undertaken a low risk of re-offending.

[55] I reiterate that the report describes [JT's] overall risk rating on the ERASER scale as being low. The ERASER scale is the estimate of risk adolescence sexual offence recidivism. It is an American risk assessor which takes into account both the dynamic risk factors and the static risk factors.

[56] The static risk factors are those things in [JT] environment that cannot change.

[57] Dynamic risk factors are those that do change such as friends, alcohol and those sorts of things. Significantly, the report describes the dynamic risk factors that were present in [JT] initial assessment are now scored as not being present at all. The environmental opportunities to re-offend sexually are now no longer existent in the eyes of the report writer.

[58] The Crown asked that this matter be transferred to the District Court as I have touched on already. The Crown say that if the matter is transferred to the District Court, a sentence of supervision can be imposed and it can be imposed for a

period longer than would be available to this Court if it was dealt with in the Youth Court jurisdiction and certainly if the Court chose to discharge you under s 282.

[59] What I inquired of Mr Scott specifically what courses maybe available in the District Court, what programmes maybe available, what specific supervisory plans can be put in place, he was not able to identify a particular course or programme.

[60] It appeared that all that remained was the general oversight that the Community Probation Service could provide to [JT] was all that remained.

[61] I am of the view that if that is all that remains and I have not overlooked the fact that a conviction would be entered if this went to the District Court, that there is very little available in the District Court that would not otherwise be available in the Youth Court. In fact I take the view that a properly developed supervision with activities order in the Youth Court would be likely to provide more oversight and supervisory functions than would be available in the general adult Court.

[62] For those reasons, I am of the view that given the progress that [JT] has made, this matter should not be transferred to the District Court for disposal. It should in my view be disposed of in the Youth Court today.

[63] The secondary issue is whether or not given the seriousness of the charge and the principles that I have referred to and s 208 and 284 of the Act, this should be dealt with by way of a supervision with activities order or it should be dealt with by way of an order under s 282 Children, Young Persons, and Their Families Act discharging [JT]. To that extent, I am required to have a look at a report prepared under s 334 of the Act which in turn also outlines the matters that I have made reference to or the factors as set out in s 284.

[64] Given the report from the SAFE team which says that, "[JT] has done everything required of him in the SAFE Programme and there is everything that he needs to be done has been done and the risk of [JT] re-offending by virtue of the eraser factors is now low." I am of the view that there would be little merit in the Court

making an order that [JT] is to attend and complete a supervision with activities programme.

[65] There is nothing in the social worker's report and I accept it has not been directed to the factors set out in s 307 of the Act which would leave me to think there is a course that is appropriate for [JT] to do in the first instance even if the point arose that there were deficits in the SAFE Programme that [JT] had not completed. So I do not see there being any merit in a supervision with activity order being undertaken also.

[66] That then leaves the Court with the question, what or how the matter should be disposed of should there be an order under s 282 Children, Young Persons, and Their Families Act or is the Court required to impose some other response as that as set out in under s 283 of the Act.

[67] Having discounted the need for a supervision with activities response, it is effectively then left to the Court to consider s 282 or group one responses which include discharging [JT] from the proceedings with no further order of the Court or penalty admonishing [JT], or group two responses that he is to come up before the Court if called upon within twelve months of the order, impose a fine that could have been imposed by the District Court, order that he has to pay reparation or something of that nature, or order that the parental guardian has to pay a emotional harm or a reparation order, order that he has to make some form of restitution or that there be disqualifications from driving or matters of that nature. There is also group three responses which look at matters such as supervision that I have touched on.

[68] The Court, I reiterate must impose the least restrictive outcome that is appropriate within the hierarchy of sentences.

[69] This is offending that in my view is serious in its nature. I take the view that despite the efforts of [JT], that this offending cannot go unmarked. It is too serious for that to occur but I do not believe that it is offending that needs any further response to it.

[70] I am of the view that this should be dealt with today by an order under s 283(3) of the Act, that [JT] be ordered to come up for sentence if called upon within twelve months after this order is made so that the Court may take any further action under the section.

[71] It is my view a good behaviour bond [JT] that will require you to continue to keep up with the good work that you have done in the period since this offending took place.

[72] My thanks to everybody for attending Court today. It has been a difficult two years for everybody involved. I hope that [CN] will be able to get any help that she requires and quickly and I wish her the very best for the future also. I wish the whānau all the best for the future also as well as [JT] and his whānau today.

[73] What we will do because this brings it to an end today and there will be an order under s 283(c) Children, Young Persons, and Their Families Act that [JT] is to come before the Court if required in the next twelve months.

G L Davis
Youth Court Judge