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IN THE YOUTH COURT
AT PALMERSTON NORTH

CRI-2017-254-000061
[2017] NZYC 756

THE QUEEN

v

[EP]
Young Person

Hearing	13 October 2017
Appearances:	J Harvey for the Crown R Walker for the Young Person
Judgment:	13 October 2017

ORAL JUDGMENT OF JUDGE J D LARGE

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[1] [EP] appears in front of me today in the Youth Court for disposition of two charges of aggravated robbery. These occurred on [date deleted] and [date deleted] this year.

[2] The first robbery occurred at [the liquor store] when [EP] went in with five associates. His face was covered in order to disguise his identity as were his associates. One of them presented a pistol at the lone shop assistant. Another associate presented a knife. Throughout the elevated chaos of the robbery, [EP] and his associates screamed and yelled at the victim demanding she open the cash register and cigarette locker. Spirits were taken along with money, $476.80, cigarette products to the value of $2876.12 and the alcohol products totalled $1597.48. The victim was not physically harmed.

[3] The first robbery occurred and the victim impact statement said that she was on auto pilot for a couple of weeks and while there were no physical difficulties for her, there were psychological ones.

[4] The victim went to the family group conference and she accepted his apology and she felt sorry for him. But then he went on and was involved in the second aggravated robbery which was at the same premises, three months later. On that occasion it was [EP] and one other with unknown people, went to the same liquor store, hoods up, ran in. The other person was armed with a slasher. Bottles of alcohol were grabbed. The slasher was used to smash the computer screen. Another person went round the back of the counter and handed a bag to the shop assistant and demanded that she open it. [EP], at that stage, started taking money from the cash register, packets of cigarettes and tobaccos from the drawer and put it into the bag that the shop assistant was holding open.

[5] When [EP] was spoken to he acknowledged his involvement and pointed out his role on the CCTV footage. The others had been before courts in a variety of ways. [EP] had not.

[6] It was important that I mentioned the facts of the offending because, as the Crown have pointed out, aggravated robberies are serious offending.

[7] I am directing my comments to you [EP] because they affect you. This is all about you. Your family are here to support you. Mr Walker has argued on your behalf. Youth Justice are here to support you as well. The Crown has its job to do and has submitted that I should send you to the District Court for sentence pursuant to s 283(o) of the Act.

[8] Mr Walker submits that I should not do that and instead, under s 283(n) of the Act, impose supervision with residence followed by six months' supervision in terms of the plan that is before the Court from the social worker.

[9] I should say at the outset that that plan is a very thorough one and I understand the rationale, the reasoning in having the disposition hearing today rather than some weeks ago when it was originally scheduled. You are being given the opportunity of the Court imposing supervision with residence today so that in the usual course of events, you would be eligible for release in four months time which will be 13 February and there is a START Taranaki course commencing on [date deleted] 2018.

[10] Mr Walker has said that there is no place cemented for you but you have been interviewed and as best as he can put it, and these are my words not his, it seems extremely likely that you would be eligible for that course and be able to undertake that on your release, assuming you achieve early release from residence.

[11] But I am not at that point yet. I have considered and read the submissions filed by Mr Walker on your behalf and Mr Harvey on behalf of the Crown.

[12] Mr Harvey, in his submissions properly points out that (mirrored by Mr Walker's acknowledgement) that the lead case, which might not mean much to you [EP] but it means a lot to lawyers, is *R v Mako.*[1] This is serious offending and it would warrant a start point in the vicinity of four to five years imprisonment.

[13] During Mr Walker's submissions he referred to a report from [name deleted – the first report writer]. I had not seen that report so I adjourned this morning so I could look at that. I wanted to have a look at that because I needed to understand more about

[1] *R v Mako* [2000] 2 NZLR 170.

you [EP] to understand why you react in the ways that you do. That report is really helpful and has formed part of the platform for the other reports both from [the second report writer] and from the social worker.

[14] I have to look at your involvement in the two aggravated robberies. I have to consider whether you were a follower, as is suggested in the reports, or whether you were an instigator, a leader. The report from [the first report writer] very clearly indicates that you are a follower rather than a leader and that is an observation echoed by one of the police constables, [the Constable], when he spoke to [the first report writer]. You have presented to him as a young man who is easily led and very impressionable.

[15] Your background is fully canvassed in the reports and I do not intend to repeat it all now. Your family are here to support you. It may be through your upbringing you have not always had the support and ability that most young men have but you have developed the way you have because of your environment and the way you perceive the world. You did not engage in school, that was sad. You got upset with various people at various times because they were having you on about your inability to read and things like that. You responded by punching them really, that is the way I read the reports [EP] and your eyebrows tell me I have pretty much got that right. That is really sad because if you had been able to stay at school you may have been able to develop some skills that would allow you to be a leader rather than a follower. But like most young men you probably hide your insecurities by the false front of bravado. That is the impression people get when you behave in the way you do.

[16] Aggravated robbery is far too prevalent, that means there is too much of it in the community, particularly by young people. They need to understand that there are serious consequences. What I must do when I am deciding which of the two arguments I adopt or which decision I come to I have to consider that because the public have a right to be protected.

[17] In the Sentencing Act 2002 which does not necessarily apply here but the principles still fly around in my brain you have to be accountable for what you have done. There has to be a deterrent sentence and the Court has to denounce the conduct,

it should not condone it in any way. But you are not in the District Court yet you are still the Youth Court so there is a different set of criteria which are set out in s 4 of the Act. You have got to be accountable, that is common and you have got to be encouraged to accept responsibility for what you have done and, and this is the important part, subs (2) of s 4, you have to be dealt with in a way that acknowledges your needs and will give you the opportunity to develop responsible, beneficial and socially acceptable ways.

[18] I have to consider, in terms of s 208 of the Act that you should be kept in a community so far as it is practicable and consonant with the need to ensure the safety of the public. Where there are serious offences which clearly there are here there is clearly seen to be the need to protect the public and the public might wonder why the Youth Court does not automatically sent young people to the District Court where imprisonment can be imposed which I guess would be seen by many to be the ultimate deterrent and the ultimate accountability. But it is not as simple as that.

[19] What I also have to consider under s 208(f) is I must impose the least restrictive outcome appropriate to the circumstances. Section 283(o) which is the transfer to the District Court is the most restrictive order in s 283. But before making an order under s 283(o) I have got to be satisfied that a less restrictive outcome would be "clearly inadequate"; that is in the circumstances of the case.

[20] In looking at the issue of what is "clearly inadequate", what the test is there, I really quote Judge Taumaunu in *R v CT*[2] where at paragraph 15 the Judge said:

> The legal test requires the Court to be satisfied that a less restrictive outcome is clearly inadequate. The addition of the word "clearly" creates a high threshold and requires the Court to be clear that a less restrictive sentence would be inadequate before making an order to convict and transfer. Where there is a lack of clarity about the adequacy of a less restrictive sentence, in other words if it is not clear whether the less restrictive sentence would be inadequate the Youth Court appears to be required by law to impose the less restrictive outcome.

[2] *R v CT* YC Waitakere CRI-2011-090-0049, 16 August 2011.

[21] You might wonder what all that means [EP]. A lot of people's eyes glaze over when the law is being quoted but it is important that it be quoted so that everybody knows why I am coming to the conclusion I will be coming to shortly.

[22] You are a first time offender. Your role was on the, what is called the, periphery on the outer edges of it at least in respect of the first robbery. The second one you were more involved. Looking at the report of [the first report writer] gives me a much better understanding of the nature of your involvement and why you were involved.

[23] I have to consider whether the proposed plan, the option supported by Mr Walker and by the social worker of six months' supervision with residence followed by 12 months' supervision is clearly inadequate. I have to factor in your personal history, your social circumstances and to a degree I have referred to those already.

[24] I have got to factor in your attitude to the offence. When I do that I have got to take into account you, [EP]. Not any other 15, nearly 16 year old. You.

[25] If you had had interventions earlier by the youth justice system and had not responded to those interventions my decision would be much easier. But you have not had those interventions and fairly Mr Harvey has acknowledged that while the two aggravated robberies are serious because they are close in time, only three months apart, there was no intervention available between them. You have not had any other interactions with the Youth Court apart from these two charges.

[26] What I must consider is, given your age and the fact that the youth justice system is still available to you, is still the opportunity for interventions to be effective? I am prepared to order the supervision with residence followed by supervision rather than transfer you to the District Court for sentence.

[27] I do so because to transfer you to a District Court now would effectively remove the possibility of you changing. It would almost inevitably cast you into a future of jail and gang involvement.

[28] In *R v S P & P K T*[3] the Court said that because there was more than adequate time for a full intervention of the Youth Court at sentences the young person, (young people in that case), was able to respond positively to the rehabilitative initiatives. It concluded that a conviction and transfer would be manifestly excessive and at 42 said:

> If these young people were transferred to the District Court with a high probability of imprisonment would that option be more likely to promote an outcome where they never re-offended or more likely to do the opposite? I suggest that the latter outcome would be highly probable. It would in my view be highly probable that transferring these young men and imprisoning them for a period of time would all but promise them a very bleak future and a bleak future for the community.

[29] While supervision with residence is custodial it has a significantly greater rehabilitative support system than imprisonment. In essence I adopt that paragraph and its principles in respect of you. Your future will be much bleaker if you go to jail and the community will be much bleaker as well because you are more likely to come out from jail and re-offend because that will be the only family you will know. I decline to transfer you to the District Court and make an order pursuant to s 283(n) and supervision with residence six months, followed by 12 months supervision.

BREAK

[30] Following my decision, Mr Walker pointed out that s 311(2)(A) provided that the Court can, on making a supervision with residence order, adjourn the proceedings to a date approximately two thirds of the sentence to address the issue of early release and impose supervision at that time. Accordingly I make the order under s 283(n) for six months and adjourn the proceedings to the 12 February 2018 for an early release hearing and imposition of supervision and I amend the order I made earlier accordingly.

J D Large
Youth Court Judge

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[3] *R v S P & P K T* CRI-2015-241-000011/12 [2015] NZYC 586 & 587.