IN THE YOUTH COURT
AT MANUKAU

CRI-2017-292-000089
[2018] NZYC 261

NEW ZEALAND POLICE
Prosecutor

v

[TG]
Young Person

Hearing: 13 March 2018

Appearances: M K Regan / C D Piho for the Police
C Merrick for the Young Person

Judgment: 8 May 2018

RESERVED DECISION OF JUDGE S MOALA

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[1] [TG] appears for re-disposition on the following charges: two charges of dishonestly gets into motor vehicle; assault with intent to rob; aggravated robbery and failing to stop. He turns 18 on [date deleted] 2018.

[2] On 20 September 2017, Her Honour Judge Eivers sentenced [TG] to three months supervision with residence to be followed by a supervision order. He was granted an early release by His Honour Judge Hikaka on 14 November 2017. [TG] subsequently breached his supervision order and has active charges in the District Court.

[3] The police seek a conviction and transfer to the District Court for sentencing pursuant to s 283(o) of the Oranga Tamariki Act 1989. This is based on the seriousness of the offending, his breach of the supervision order, as well as his failure to address his offending through the rehabilitative sentences in the Youth Court.

[4] [TG] seeks a discharge pursuant to s 283(a) of the Act arguing that youth justice principles support such a sentence given that he has effectively served his sentence given the time he has spent in residence.

[5] After reading the various reports and submissions, and hearing from Mr Merrick and Ms Norrie, I convicted [TG] and transferred him to the District Court for sentencing before me. I reserved my reasons.

Background

[6] Between 2014 and 2016, [TG] committed 17 offences as a young person, including:

(a) burglary (x5);

(b) unlawfully gets into/takes motor vehicle (x7); and

(c) escapes lawful custody (x2).

[7] He was subject to a range of orders under s 283:

(a) Supervision order for 6 months and community work order endorsed on 26 February 2015, and was cancelled on 16 June 2015;

(b) Supervision with activity order for 3 months on 17 August 2015;

(c) Supervision order for 4 months approved on 12 November 2015 and was cancelled on 14 March 2016 due to non-compliance;

(d) Supervision order for 4 months on 12 March 2016; and

(e) Intensive supervision order with electronic monitoring on 4 April 2016.

[8] Finally,[TG] was subject to the first of two supervision with residence orders on 21 July 2016. After being granted early release on 18 November 2016, [TG] was then subject to the supervision component of that order for a period of six months.

[9] On [date deleted] 2017, while [TG] was still subject to supervision, he committed further serious offending:

Assault with intent to rob ([name deleted – store 1]) and dishonestly gets into ([stolen car details deleted])

(a) At around 12.40am, [TG] and his co-defendant ([BM]) drove a stolen [car] to the [store] in Otahuhu. [TG] and [BM] used a rock to smash the glass panes of the front door. Both were armed with black replica pistols. [TG] had a hood over his head to disguise himself. He was carrying a shoulder bag. Inside the [store] at the time were the two victims (who were employees). [TG] approached the first victim, grabbed him, and put a pistol to his head. At the same time, [BM] pointed a pistol at the second victim and demanded money from the safe. After being told that there was no money in the safe, [TG] and [BM] were chased out of the [store] by the second victim who was wielding a pool cue. [TG] and [BM] fled the scene in the [stolen car].

Aggravated robbery ([name deleted – store 2])

(b) Shortly after attempting to rob [store 1], [BM] and [TG] drove the [stolen car] to [store 2] in Auckland CBD. Once again, both young people were armed with black replica pistols. The only person inside [store 2] at the time was a shopkeeper (the victim). Once inside the store, [BM] pointed his black replica pistol at the victim and demanded that he hand over cigarettes and cash. Shortly afterwards, [TG] told the victim that if he did anything wrong, he had another gun in his bag and would shoot him. The victim emptied cash and cigarettes into boxes for [TG] and [BM] to take out of the store. While this was happening, [BM] kept his replica pistol aimed at the victim. [TG] and [BM] removed cash, cigarettes, and food from the store. After briefly leaving the store, the pair tried to return, but by that point the victim had locked the security doors behind them, preventing them access. [TG] and [BM] left in the stolen [car] with [TG] driving. The total value of property stolen/damaged during the aggravated robbery was $16,000. The store owner was required to pay a $1,000 insurance excess.

Failing to stop

(c) At 2.55am, approximately 30 minutes after leaving [store 2], an unmarked Police patrol car activated its red and blue flashing sirens indicating for the stolen [car] to stop. Rather than doing so, [TG] accelerated away at speed. At the time, he was driving in a residential area with a 50km speed limit. In attempting to flee Police, [TG] crossed the centreline, drove on the opposite side of the road, and turned off the [stolen car]'s headlights. After Police successfully deployed a tyre deflation device, [TG] and [BM] ran from the vehicle. Both young people discarded their replica pistols and other items. [TG] and [BM] were arrested shortly afterwards.

[10] On [date deleted] 2017, [TG] turned 17 years old. In late August 2017, while [TG] was remanded in custody at [location deleted] Youth Justice Residence, he went

on to commit further violent offending. That offending resulted in the following four charges being laid against him in the District Court:[1]

Assault with intent to injure and male assaults female

(a) While in the dining area of [the Youth Justice Residence], [TG] picked up a chair and threw it across a table towards other residents. He then swore at the first victim (a staff member) and punched him continuously to the head (about 10 times to the face). The first victim tried to restrain [TG], however he continued to punch the first victim with both hands (approximately 15 further times). When the second victim (a female staff member) tried to intervene, [TG] punched her to the arm and face (around 4 times).

Assault with intent to injure and common assault – [date deleted]

(b) [TG] got out of bed and started punching the victim (a staff member) with closed fists, causing him to stumble backwards. [TG] continued punching the victim to the face when he tried to restrain him. [TG] told Police that he punched the victim because the victim "was the closest".

[11] [TG] has pleaded guilty to all four of the above charges and is to be sentenced for those in the District Court [date deleted].

Additional District Court charges

[12] Finally, [TG] is charged with an additional 7 District Court charges. I note that [TG] is entitled to the presumption of innocence in respect of those charges. Accordingly, for present purposes no weight is placed on the alleged offending.

[1] Specifically, 2 x assault with intent to injure (s193, Crimes Act 1961), 1 x male assaults female (s194, Crimes Act 1961), and 1 x common assault (s196, Crimes Act 1961).

Breach of the current supervision order

[13] Within two weeks of being granted an early release from his second supervision with residence order, [TG] was failing to comply with a number of the conditions of his supervision order. He failed to attend alcohol counselling on [three occasions in] December 2017. On at least one of those occasions, he was driven to the counselling session by his mother but he walked away from the premises as soon as he was dropped off there.

[14] He failed to attend numerous sessions at [Institution name deleted] for his basic literacy and numeracy course in [month deleted] 2017.

[15] He breached his residential bail condition throughout December 2017 and January 2018. He was arrested and appeared on 14 December 2017 on new charges of burglary and unlawfully getting into a motor vehicle.

[16] On 19 December 2017, [TG] appeared for his first judicial monitoring before His Honour Judge Hikaka. He was given a warning that a breach application would be filed at the next Court appearance on 16 January 2018, unless he improved his behaviour.

[17] [TG] appeared at the Manukau District Court on [date deleted] 2017 for new charges of shoplifting and receiving property worth over $1,000. As a result, he was placed on a 24-hour curfew.

[18] [TG] failed to appear at the Manukau District Court on [date deleted] January, and failed to appear at the Manukau Youth Court [four days later]. Warrants for his arrest were issued.

[19] [TG] was arrested on [date deleted] February 2018. He appeared in Court and he was remanded in custody on his District Court charges.

[20] A disposition FGC was held on 21 February 2018 for the breaches of his supervision order. The delay in holding the FGC was due to [TG] having absconded from his bail address and police not being able to locate him until [his arrest].

[21] The disposition FGC resulted in a non-agreement. The matter was adjourned for a Social Workers Report and Plan.

[22] The social worker filed a report dated 13 March 2018 recommending conviction and transfer to the District Court for sentencing.

Legal principles

[23] Before a young person can be convicted and transferred to the District Court under s 283(o), the Court must:

(a) Consider the need to impose the least restrictive outcome; and

(b) Be satisfied that, in imposing such a sanction, any less restrictive outcome is clearly inadequate.

[24] When making an order under s 283(o) of the Act, the Court must also have regard to the relevant statutory factors listed under s 284(1).

Submissions by [TG]

[25] On behalf of [TG], it is submitted that considering the principles in s204, the factors listed in s284 of the Act and the need to impose the least restrictive outcome pursuant to s289, a s283(a) discharge on the remaining matters be granted (with acknowledgment on his record of the original order). Mr Merrick says that a s283(a) outcome is appropriate for the following reasons:

(a) [TG] spent 11 months in Youth Justice custody on the matters for which he is for re-disposition (aggravated robbery, assault with intent to rob, unlawfully getting into motor vehicle, failing to stop). Eight months were spent on remand, and three months following residence order being imposed. He has spent a further two months in custody following his arrest in the District Court on [arrest date] 2018.

(b) If the Court convicts and transfers to the District Court for sentence, it will trigger the need for the District Court to adopt the standard District

Court sentencing exercise mandated by the Court of Appeal in *Taueki* as modified by the Supreme Court decision of *Hessell*. The starting point could be in the vicinity of six years' imprisonment. [TG] would be entitled to a discount of approximately 50% for his guilty plea, youth, family support, and other mitigating features. He may end up with a sentence of three years' imprisonment. With all the time spent in custody, he would be eligible for parole almost immediately.

(c) If the Court discharged [TG] under s283(a), it could do so with the knowledge that he is to be sentenced on the DC matters and options available include prison, or community or home detention, coupled with supervision or intensive supervision.

(d) A prison sentence would be ineffective for [TG], this is particularly so given he is [around 17 years old], a male, and Maori. The Court is aware of the statistics for re-offending, re-arrest, re-conviction, and re-imprisonment for this demographic are much higher than others.[2] A transfer to the District Court on these charges would simply cycle [TG] into the prison system.

(e) A s283(a) on the remaining Youth Court charges would allow him to be considered for sentence purely on his District Court charges, and the sentencing Judge in that instance can have regard to his history, the charges, and the contents of a PAC report in coming to a sentence that does not involve charges for which [TG] has largely served his sentence for.

Decision

[26] In making this decision I am mindful of Judge Eivers' decision not to transfer. Her Honour noted that it was a difficult case because she needed to balance the nature of the offending against the need to rehabilitate [TG] to avoid future offending. She

[2] See para [7.33] of counsel's submissions dated 24 August 2017.

was persuaded that he should remain in the Youth Court to prioritise rehabilitation. Her reasons were:

(a) [TG] had spent 7 months in custody which was in excess of any supervision with residence order;

(b) he still had 8 months remaining to complete any Youth Court orders;

(c) if he was transferred to the DC and sentenced to imprisonment of between 2-4 years, he would be eligible for parole quickly and he would serve less time in prison than under a Youth Court order;

(d) the Youth Court provides better rehabilitative options than in the adult jurisdiction;

(e) the decision of *Churchward* regarding the adolescent brain;

(f) the UNCROC and the Bill of Rights and the Court's comments in *Pouwhare;*

(g) that his offending behaviour is associated with drug and alcohol use which needs to be addressed;

(h) he has good whanau support;

(i) the submissions based on the *Tu Mai te Rangi* report and the over representation of Maori in prisons; and

(j) that there is still a strong punishment for [TG] in being remanded in residence.

[27] Apart from his age and time left available for Youth Court interventions, I agree that most of the factors are still, to some extent, relevant.

[28] I begin by acknowledging the principles of keeping young people in the community and imposing the least restrictive sanction possible. I acknowledge the principles in *Churchward* and *Pouwhare,* article 37(b) of the United Nations Convention on the Rights of the Child, and the New Zealand Bill of Rights Act. I am also mindful of the "Beijing Rules" and the commentary relating to the principle that the placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period.

[29] In addition, I reviewed the *Tu Mai te Rangi* report on the Crown's failure to prioritise addressing the disproportionate rate of Maori imprisonment and reoffending. Although the report targeted the Department of Corrections, this Court acknowledges that there has been a lack of specific strategy to tackle the reduction of Maori imprisonment and reoffending. The Court is well versed in the statistics for Maori in prison. However, this Court can only address this problem within the boundaries set down by Parliament and the higher Courts.

[30] The District Court can use s27 of the Sentencing Act 2002 to call for a cultural speaker to address the Court on an offender's personal, family, whanau, community and cultural background. Section 27 and its predecessor was enacted because of Parliament's concern for the over representation of Maori in prisons. Whilst s27 has been underutilised by counsel and the Court, recently its use has increased in the Manukau District Court. The Court is regularly seeing s27 reports at sentencing hearings. Judges are now being asked to consider the cumulative and compounding effect of generations of post-colonial experience that have caused significant trauma and disruption of cultural identity for Maori. While s27(1)(b) requires a causal link between the cultural background and the commission of the offence, the Court cannot ignore the collective experience of Maori whanau, hapu, iwi and the relationship between this experience and contemporary Maori poverty and high-risk lifestyles including offending and reoffending.

[31] While I acknowledge the differences in approach between the Youth Court and the District Court, the District Court still has the ability and flexibility to deal with [TG] in an age appropriate way. The District Court is bound by the sentencing principles in s8 which include the offender's particular circumstances and his personal

and cultural background. Similarly, the District Court is still bound by the NZBORA and the principles in *Churchward* and *Pouwhare.* The District Court can also still take account of the UNCROC and the contents of the *Tu Mai te Rangi* report. I note that [TG] would be likely to receive significant discounts for the various personal and cultural mitigating features.

[32] I am aware that [the doctor], in his s333 report dated February 2015, noted that the WISC-IV was administered in 2014 and that [TG]'s cognitive ability was estimated to be in the borderline range with an IQ of 71. He acknowledged that [TG] had cognitive limitations and that despite his ability to understand right from wrong, when he was emotionally aroused, he would be at risk of impulsive acting out. [The doctor] found that [TG] met the criteria for Conduct Disorder, Adolescent Onset Type Mild. He recommended a number of rehabilitative approaches for him.

[33] Having considered the detailed reports on [TG] and the submissions filed by Counsel, I am satisfied that [TG] be transferred to the District Court for the following reasons:

(a) The nature of the offending is serious and warrants a starting point in the vicinity of 6 years' imprisonment. The use of replica pistols is an aggravating feature of the offending. The offending was serious and warranted a stern sentence in the Youth Court. He received a sentence of supervision with residence followed by a supervision order. The Police had applied to transfer him to the District Court for sentencing. In those circumstances, a s283(a) discharge would be a clearly inadequate response from the Court.

(b) The offending had a huge impact on the victims. The Social Worker's report dated 1 August 2017 outlines (at paragraphs [32] to [36]) the significant emotional, psychological, and financial harm suffered by [TG]'s victims.

(c) I am not persuaded that [TG] is remorseful. The social worker who has worked with him for a long time says that he appears to lack remorse

and has been unwilling to apologise to his victims. I note what the s336 report says but given his lack of compliance, I am not convinced that he is remorseful.

(d) I acknowledge that [TG] has spent significant time in residence and was granted early release from his supervision with residence order. However, the breaches of his subsequent supervision order showed not just a slack attitude but a complete disregard for the order. From a rehabilitative perspective, the supervision order following a residence order is more important. It is when the real hard work begins because young people are placed back into their homes and expected to do the rehabilitative work. Not only did he fail to attend his drug and alcohol counselling and his course at Ignite, he repeatedly breached his curfew and was arrested by the police on alleged new offending. He was warned by Judge Hikaka that if he didn't comply with the supervision order then a breach application was likely. None of these warnings had any impact on him. Even when his curfew hours were increased to 24-hour, this did not curb his behaviour. He continued to flout the rules and was again arrested for further alleged offending. This has been a pattern for [TG] in the Youth Court.

(e) The primary underlying causes of [TG]'s offending, as identified in previous Social Worker's reports and plans, include: his failure to take his offending seriously; his lack of effort to make positive changes while in the community or to minimise the impact of his offending on himself, his family and his victims; his continued use of drugs and alcohol; and a lack of discipline. [TG]'s attitude is abysmal. He is not interested in being compliant with any order in the Youth Court. I am not persuaded that any rehabilitative options will change his attitude. He has been given many opportunities to engage with rehabilitative programmes, but has failed to do so. A s283(a) order is not appropriate in his case.

(f) He re-offended in a violent way whilst he was remanded in custody subject to his supervision with residence order. The violence occurred on two separate occasions. He has pleaded guilty and is for sentence as an adult in the District Court. That is clear evidence that despite years of focussing on rehabilitation, it has not changed or deterred [TG] from offending. I consider this serious offending given the victims' vulnerability in their work environment.

(g) This is not a situation where [TG] has been subjected to violence, neglect or abuse. He has been well supported by loving parents. His father, has some understanding of gang life and being incarcerated. He also sets a good example for [TG] by working hard to provide for his family. There are other good role models for [TG] within the extended whanau. The family have strong connections to their marae and iwi. They live in a warm home. Despite this love and support [TG] has not changed.

(h) One of the underlying causes of his offending is permissive parenting. He did not have any boundaries growing up and accepts that he "never got in trouble". If the Court does not give him a consequence for the breach of his supervision order, then the Court is affording him the same unfavourable degree of leniency. It will send a clear message to [TG] that if he does not want to do something, he doesn't have to do it and there is no consequence. The Youth Court has been very understanding about his age, the stage of his brain development and recognised that he has needed support and rehabilitation rather than focusing on holding him accountable and responsible for his offending. He is now 17 years old and continuing to offend as an adult. It is time for the Court to take a different approach. The Court cannot be seen to be re-enforcing the "no consequence" approach adopted by his parents.

(i) The time [TG] has spent in youth justice residence will be taken into account in any sentencing imposed on him in the District Court. The argument that he would be released immediately if he was to receive a

sentence of 3 years imprisonment in the District Court does not support a s283(a) discharge. Practically, the outcome may be the same for both courts, but there is additional accountability imposed by a conviction in the District Court. In any event, a sentence of imprisonment is not inevitable in the District Court; [TG] can still fight for a community based sentence.

[34] This offending is serious and [TG] was given the opportunity of a sentence in the Youth Court so that rehabilitation could be prioritised given his age and vulnerabilities. Given that [TG] has not completed that rehabilitative sentence, I am not prepared to reward him with a s283(a) discharge. Doing so would reinforce [TG]'s belief that there are no real consequences for non-compliance with orders of the Court.

[35] I am satisfied that in the circumstances of this case, that [TG] be convicted and transferred to the District Court for sentencing pursuant to s283(o). Any less restrictive outcome is clearly inadequate in the circumstances of this case.

S Moala
Youth Court Judge