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**IN THE YOUTH COURT
AT WHANGAREI**

**CRI-2018-229-000009
[2018] NZYC 331**

NEW ZEALAND POLICE
Prosecutor

v

[FW]
Young Person

Hearing: 1 June 2018
Appearances: M Smith for the Prosecutor
T Donald for the Young Person
Judgment: 1 June 2018

NOTES OF JUDGE S M R LINDSAY ON SENTENCING

[1] [FW] faces a charge of assault with intent to rob arising from an incident on [date deleted] 2018.¹ From the outset, [FW] admitted responsibility for his offending. On [date deleted – 13 days later] 2018, [FW] entered a plea of not denied to the charge.

[2] Mr Smith today appears for the police. New Zealand Police seek [FW] be transferred to the District Court for sentencing. I am asked to decide whether [FW]'s case remains in the jurisdiction of the Youth Court or whether [FW] should be convicted in this Court, pursuant to s 283, and pursuant to s 283(o) transferred to the District Court for sentence.

[3] Section 208 Oranga Tamariki Act 1989 enshrines the guiding principles for dealing with offending by children or young people.

208 Principles

(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 their family, whanau, hapu, and family group; and

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

¹ Charging document CRN 18229000011

(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:

[4] [At the time of the offending], [FW] was then aged 15 years [details deleted]. He was one month clear of an early release hearing and two months down the track from having appeared before Judge Davis in respect of sentencing on an earlier charge of aggravated robbery which had taken place earlier that same year. [FW]'s previous offending is at the very serious or high-end level.

[5] The United Nations Convention on the Rights of the Child provide that detention or imprisonment should be the measure of last resort and for the shortest period of time. [FW], your past offending is highly troubling, but perhaps all the more so given your first aggravated robbery was at 12 years of age and you have amassed a further three convictions for the same offending by the age of 15 years.

[6] Section 284 of the Act provides the mandatory considerations for the Court which are to be considered when a decision is to be made pursuant to s 283 of the Act.

[7] [FW], turning to your offending, you and an older young person [age deleted] years were in the main CBD area of [location deleted] when you came across another young person. The other young person appears to have approached you and the three of you walked off down a footpath. Your movements were captured on CCTV.

[8] You are described as lunging at the victim in a headlock-type manoeuvre, taking him down to the ground and punching and kicking, together with your co-offender. One of you is described as yelling, "Give me the wallet," and the victim was unable to swipe your hands away.

[9] The robbery was interrupted by bystanders who noticed what was taking place. The victim's injuries are described as minor in nature with some facial injuries, although he did spend a short while in hospital.

[10] You completed an interview with the police and initially suggested that you were being harassed by the victim. You became angry, so you gave him a hiding. However, you also admitted to assaulting the victim with the intention of taking his wallet. As it was described by you during the interview, the pair of you made the decision to "roll him".

[11] It would seem, [FW], that the robbery was motivated by a financial gain. When interviewed, your counsel expresses that you expressed feeling fearful of the older co-offender, but on balance I have heard a submission from Mr Smith that the CCTV recording reveals your able involvement in the robbery.

[12] [FW], it may not have seemed that serious on the day or to you at the time, but the robbery was serious. It was cowardly, the two of you attacked an unsuspecting victim. There is an argument that your offending on this occasion was at a lower level than two of your previous aggravated robberies, on both occasions you had used a weapon.

[13] [FW], when I listen to the submission that at the time you did not see your actions as all that serious, I need to also take into account your age, but having said that, I remind you or point out to you that if you had been of an age to immediately appear in the District Court, given your previous history, you almost certainly would have faced a sentence of imprisonment.

[14] So the conclusion must be that your initial view the offending was not so serious is a mistaken view, particularly when your actions are seen within the context of the law and within society's standards. However, [FW], you are not an adult. In your teenage inexperience, your personal circumstances, but also your pattern, as I observe, of falling in with other young people, some more sophisticated with social harm in their mind, is a potent mix.

[15] To better assess your offending requires an understanding of your personal history and social circumstances. The social worker's report records that you have witnessed domestic violence and substance abuse by your parents while growing up and that you still feel affected by it.

[16] Although your mother is no longer in a relationship, you continue to worry about her wellbeing and I have read that you see yourself as a self-appointed protector of your mother. There have been no male mentors either from your maternal or paternal side of the whānau.

[17] Also, [FW], you began using cannabis at a young age, as young as nine years. Previously you have attended the [details deleted] Youth Alcohol and Drug Service, which helped a little, as you explain, but have found it difficult to maintain sobriety.

[18] Ms Donald in her submissions makes the point that although you have whānau, in particular your mother and nan, who want to try and help and support you, that they acknowledge that they have been unable to provide adequate care for you at times.

[19] Ms Donald on your behalf also submits that you express a real desire to complete a sentence by way of a wraparound programme that provides you with real skills and confidence to eventually transition to independence and a productive life.

[20] Ms Reti, the lay advocate appointed in your case, [FW], has filed a report which I touched upon yesterday when you were first called. In her report, she makes the following submission on your behalf:

[FW] first appeared in the [location deleted] Youth Court in [date deleted] of last year in relation to a charge of aggravated robbery and by all accounts [FW]'s life has gone downhill since. In the seven months [FW] has been part of the system, very few positives have occurred in his life.

I can appreciate the fact that the negatives have been as a result of [FW]'s own doing or the bad choices he has made, however, one would expect that seven months down track something could have been done to counter the negatives or problems in [FW]'s life.

[21] I believe Ms Reti is alluding to the fact that when you offended in [date deleted] 2018, [FW], you were subject to a supervision order. Ms Reti goes on to observe:

When reading the assignment letter sent, I was shocked to see, “No fixed abode,” as [FW]’s home address. I have never come across this before and was confused because clearly [FW] has a mother and, albeit absentee, a father and yet his home address or where he supposedly lives is no fixed abode. I know that [FW] thinks highly of his mother and that over the years he has become her self-appointed protector. I know that when [FW] is away from his mother, he worries about where she is and what she is doing, is she safe, and so I was confused when it came to his address, “No fixed abode.”

[22] During the time you have been before the Court in 2018, you have been remanded in custody and on my rough calculation well over some 60 days. I have no adverse reports on you while at the residence, but perhaps more encouraging is that you have been actively involved in pursuing alternative sentencing possibilities by exploring the Start Taranaki programme and Te Ora Hou.

[23] Over the period of your Court appearance in relation to this offending before me, [FW], you have expressed being receptive to attending a programme such as Start Taranaki or Tirohanga Hou. You hope to benefit from it and get out of this cycle of offending. Your whānau recognise that at least for some extended period of time and beyond any Court sentence, you need to break old social contacts and find a new and more positive environment outside [location deleted].

[24] I heard yesterday from Ms Donald your mother intends to relocate, hoping this will better support you and your siblings. Ms Donald’s submissions point to the depth of love and affection you share with your mother and nan, but for reasons beyond them at this moment, it has been difficult for them to give you the support or resources that you need to effect change.

[25] [FW], you are young 15 year old, who, as I read the reports, has sadly experienced family trauma, but also there has been a paucity of support. I recognise for you that to be sentenced to imprisonment will only serve to expose you to a hard and cynical adult world which most likely would pose a risk to you, but almost certainly expose you to antisocial influences in such a way that I am concerned you may not come back from it.

[26] The rationale behind the sentences provided in the Youth Court is for young people to gain independence and aspire to a brighter future. For a boy of 15 years [details deleted], I see no good outcome for you within a prison.

[27] The community requires the imposition of a suitable punishment and also protection from offending. Ms Reti goes on to make additional comments in report, which I read into my decision.

After all of this offending, the police view is that [FW] should be part of the criminal jurisdiction. He should be bumped up to District Court, and although I can sort of understand where [Constable name deleted] is coming from, I cringe at the thought of a 15 year old Māori male of [personal details deleted] being sent to another jurisdiction because the charges are mounting and you have had enough.

By all accounts, the last family group conference held was a moot point for the professionals are involved. The police are saying one thing and [FW] and his whānau, through Ms Donald, are asking for something else, and after talking with whānau and Ms Donald seven months down the track, the question upmost in my mind is, have we, as the adults in [FW]'s life, done all that we can to help [FW] fix the things in his life that bring him here today or has the thinking turned to, "It's too late," close the book and move on?

I do not think it is too late, I think a 15 year old boy of no fixed abode needs to be given the opportunity of writing his cards so that in the least we can say we did all that we could have to effect change in [FW].

[28] I believe that our community would also echo the concerns voiced by Ms Reti, and indeed her submission echoes that of the Convention of Child Rights which New Zealanders are signatory to. The question that is before the Court is how has this happened that at 15 years of age, a young person vulnerable to offending, that you were described as no fixed abode, and yet subject to a supervision order?

[29] I next consider, [FW], your attitude to offending. There is a clear sense you are motivated to effect change and there is also the submission made from your mother that she too will support you with that. The reports filed in respect of this sentencing describe you as wanting to effectively stop the revolving door of offending in time and residence.

[30] It seems to me that you recognise there is little good to be had being incarcerated. In fact, it may well only serve to expose you to other more charismatic offenders. I note that at times you have been described as a follower.

[31] The next mandatory consideration is your family's response. Your mother supports you and intends to move in the hope of a better outcome for you, [FW]. Your mother has been at every Court appearance that I presided at and she has travelled both yesterday and today to support you here in Court. Although alone she has not had the personal resources to intervene and prevent your offending, she certainly wants you to achieve better life outcomes.

[32] [FW], I read your letter of apology and your heartfelt wish that could you turn back time, you would not have offended. I note also the completion certificates that were filed in support of your disposition hearing.

[33] Your history of criminal offending is entirely concerning. It underscores what a finely-balanced decision mine is as to whether you remain in the Youth Court or transfer to the District Court for sentencing. Your sad personal circumstances are an issue that causes me to carefully consider whether all has been done and whether or not the options available to the Youth Court have been exhausted.

[34] Ms Reti again in her report to the Court writes:

The youth justice process is I believe designed to make young people accountable for the things they do and also to look at any remedials to support young people when it comes to not going there again. Accepted is the fact that [FW] has gone there again a number of times, however, if we review what has been put in place during these times, can we honestly say we have done all that we can when our answer to the offending is locking the young person up?

I know in the real world, the adult world, [FW]'s offending can be seen as being of up there, however, realistically we are not in the big world yet. There is a small window of opportunity whereby we can (I believe) help [FW] effect positive change in his life.

[35] [FW], when I read the reports, review the file and step back from it, I have an overwhelming sense that all has not yet been done within the youth jurisdiction to help you.

[36] Yesterday I asked Mr Lusk if he would present for filing an alternative plan. I had indicated to counsel and Mr Lusk that I was not satisfied to proceed with the sentencing on the initial plan, which suggested to the Court or proposed to the Court

a disposition option of a three month supervision with activity, followed by a three month supervision order. Frankly, that was an inadequate response to the level of your offending if I was to consider you being retained within the jurisdiction of the Youth Court.

[37] Mr Lusk has kindly filed an additional report for review, it proposes supervision with residence order, followed by a longer supervision order, but with provision for you to attend the Start Taranaki programme commencing on 24 September 2018.

[38] I appreciate that the first proposal filed with the Court included for you to attend the Tirohanga Hou programme, which is a more therapeutic and outcome focused programme, the intention of the social worker, whānau and counsel being that you have that last window of opportunity to achieve or obtain better support and hopefully access strategies to help you in the future. It was not at the right level though for me to consider.

[39] I am obliged to the additional work undertaken by Mr Lusk and the social worker, because now I am in a position to properly consider the option in the Youth Court in terms of an appropriate sentencing outcome.

[40] The importance of having your own home and whānau support and resources that are around you, [FW], is that we all need a home to call our own, we need safety and stability and the knowledge of where the next meal is coming from. That responsibility rests with adults. Sadly, for whatever reason, that was missing from your day-to-day world in [date deleted] 2018.

[41] At the FGC held in advance of this disposition hearing, there was a non-agreement. The police officer in attendance did not support a Youth Court outcome. [Constable name deleted] is known to us all and his line in the sand would have been respected by the other professionals, although undoubtedly challenged.

[42] In considering you for sentencing today, [FW], I must consider the underlying causes of your offending and the measures available to address the causes so far as it

is practicable. At 15 years of age, it seems the chances of rehabilitation within the prison environment are dim. There is also concern around your wellbeing in terms of a level of vulnerability. It is a fair conclusion for a 15 year old that they are not going to cope well or survive in prison or certainly be rehabilitated, the concern being that you would be subject to the influence of older and more organised persons or groups who may hope to get you to align with their antisocial ambitions. This cannot be healthy for you, [FW], and I am also well aware that the more therapeutic approach, which is constrictive and outcome focused, offered by either Start Taranaki or Te Ora Hou, has not yet been explored or exhausted with you.

[43] Your mother sees hope, all the professionals around you also express hope and optimism about a better response for you, and there is no doubting that your past has in some way contributed to your offending in 2017 and earlier this year. My hope, [FW], is that my decision to combine a period of residence combined with a supervision order which shall achieve an intensive wraparound programme shall be positive but also meet the needs of the community in terms of penalty to your offending.

[44] My hope is that the social worker shall apply for your inclusion in the Start Taranaki programme and that this can be considered at the split sentencing. I offer the following comments for release to the social worker to support the referral to the Start Taranaki programme. I hope that the programme provider will favourably consider the application because of the opportunities that may well serve to be lifechanging for you, [FW], and certainly is that window of opportunity.

[45] I am satisfied, [FW], that I can retain you within the jurisdiction of the Youth Court. [FW], I have a plan before me that supports an order for supervision with residence, the proposed plan anticipates a period of six months and I am satisfied that that is the right timeframe to address your offending.

[46] I record that the six month timeframe brings you in line for the early release provisions under s 311(2A)(a). The early release or split sentencing hearing date should be scheduled on [date deleted] September 2018.

[47] I am aware from the social worker's report and the anticipated timeframe commencing the Start Taranaki programme being [date deleted] 2018. As part of imposing the supervision with residence order, I am obliged to confirm the following to you, [FW].

[48] You will remain in the [details deleted] youth justice residential facility under the full supervision of staff. Whilst in the residence, you will continue to establish new routines and I hope gain insight into your attitudes and behaviours that need adjustment so as that you may think and act differently upon your release to reduce your likelihood of re-offending.

[49] My order is imposed on the charge proved in the Youth Court, that now brings this hearing to a close.

S M R Lindsay
Youth Court Judge