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IN THE YOUTH COURT
AT GISBORNE

CRI-2017-216-000114
[2018] NZYC 470

THE QUEEN

v

[LH]

Hearing: 9 August 2018/On the papers

Appearances: S B Manning for the Crown
A M Sceats for the Young Person

Judgment: 4 October 2018

ORAL JUDGMENT OF JUDGE H L C RAUMATI

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[1] [LH] has not denied four charges:

(a) Assault with intent to injure;

(b) Sexual violation;

(c) Rape; and

(d) Threatening to kill

[2] The charge of assault with intent to injure was not denied at an early stage. The remaining three charges saw not denials being made on day 1 of the Judge-alone trial.

[3] The victim of the offending is [over 30] years old. She and [LH] live in the same neighbourhood and know each other by sight. At 8.00 pm on [date deleted] 2017, the victim was walking towards her home address. [LH] has followed her riding a drift trike. The victim has walked into an alleyway and [LH] has approached her saying, "You've got a nice arse." The victim has told [LH] he is a "pervert" and to "shut up". She has continued walking towards a tin fence [details deleted].

[4] She has begun to climb the back fence into her property when [LH] has come up behind her, reached under her skirt, pulled her underwear to the side, and pushed his fingers into her vagina. He has laughed whilst pushing his fingers into the victim's vagina two or three times. The victim has kicked out trying to stop [LH]. [LH] has said, "Don't fucking say that to me, now you're going to suck my dick."

[5] [LH] has pulled the victim down from the fence and punched her around the head approximately eight times. [LH] has begun walking away but has then gone back to the victim and dragged her to the ground overpowering her. The victim has called out for help. [LH] has covered her mouth with his hand and muffled her screams for help. [LH] has lifted the victim's skirt, pulled her underwear aside, and put his penis in her vagina. He has had forced sexual intercourse with her. [LH] has then left and the victim has immediately called the police.

[6] The next day, when [LH] has been taken into police custody, he said to his mother, "Wait till I fucking get out, I'm going to fucking kill that bitch. Fucking stab the bitch, Mum, fucking stab her."

[7] As a result of the attack, the victim was injured. She suffered a cut mouth, swollen lips, large bruising to her face, a painful shoulder injury, grazes on her arms and legs and trauma at the entrance to her vagina.

[8] [LH] was just [14 years] old at the time of the offending. He has been in custody since the time of the offending. He is now [15 years] old. He has been in custody for a little over ten months.

[9] The Crown position is that [LH] should be transferred to the District Court for sentencing pursuant to s 283(o) Oranga Tamariki Act 1989. That approach has been vocally supported by Oranga Tamariki. [LH]'s youth advocate opposes the application.

[10] I have received and considered written submissions filed by the Crown and [LH]'s youth advocate. On 9 August 2018, submissions were presented orally.

[11] It is accepted that if [LH] is transferred to the District Court he will be sentenced to a term of imprisonment. It is accepted that if [LH] remains before the Youth Court then the outcome will be supervision with residence (six months' maximum) followed by supervision (12 months' maximum).

[12] Mr Manning, for the Crown, in his written submissions helpfully set out how a District Court sentence of imprisonment might be constructed. Applying the principles in the guideline judgment of *R v AM,* the offending would fall within "rape band 2" and therefore attract a starting-point in the range of nine years' (108 months) imprisonment on a totality basis.[1] That starting-point would then be subject to significant reduction to reflect [LH]'s youth, personal circumstances, time spent in custody and guilty plea.

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[1] *R v AM* (CA27/2009 [2010] NZCA 114, [2010] 2 NZLR 750.

[13] Mr Manning submits that [LH]'s youth and personal circumstances might see a reduction in the range of 50 percent (down to 54 months). Allowing then a reduction of eight months (calculated at the time of filing submissions two months ago) for time spent in custody, and then allowing a 15 percent, or a seven-month discount for the guilty pleas, the end sentence might be three years and three months (39 months).

[14] Mr Manning points out then that [LH] would be eligible to be released on parole having served just over 13 months' imprisonment. He would, of course, be subject to a further two years and three months on parole.

[15] On those calculations, if a reduction for time spent in custody was not allowed for when calculating the end sentence, [LH] would be eligible for release having served just over 15 months' imprisonment. If the time [LH] has spent in custody was considered as time served, then, as at today, [LH] might be eligible for release in 5 months' time. By the end of February 2019 [LH] will have been in custody for 15 months.

[16] Allowing then until 6 December 2018 (a scheduled Youth Court date) for the filing of the required s 335 plans for implementation of any supervision with residence and supervision order, and allowing for [LH] to complete the entire supervision with residence order, the result could be [LH] being in custody for 18 months.

[17] The Crown and Oranga Tamariki argue that it is "highly likely" that if [LH] is sentenced to a term of imprisonment then that would be served at [Youth Justice Residence deleted] (up until turning 17 years of age).

[18] Section 34A Corrections Act 2004 provides that a young person who is serving a sentence of imprisonment "may be" detained in any residence approved by the Chief Executive of Oranga Tamariki. No guarantees, however, can be provided in this respect as no assessment as to whether or not [LH] would be accepted, is completed, until after any transfer out of the Youth Court.

[19] It is highlighted that even if that did not occur, [LH] would serve his sentence within a Youth Unit (Hawke's Bay Regional Prison caters for all youth offenders in

the North Island) within an adult prison. He would therefore be held with all prisoners from the North Island under the age of 21 years.

[20] Even if it is accepted that [LH] would spend a similar period of time in custody if he remained within the Youth Court's jurisdiction, as he would if transferred to the District Court for sentence, the Crown's objection to transfer is then based on [LH] being subject to a period of parole which would be more than twice the period of a supervision order with such providing a greater level of oversight and intervention, including greater access to professional assistance and intervention programmes, particularly a sex offender programme.

[21] The Crown questions [LH]'s readiness to engage in therapeutic intervention. Put simply, the submission is that in circumstances where it is not known when [LH] will be ready to engage, a transfer to the District Court will provide greater tools for a longer period of time, to cater for this.

[22] The Crown refers to psychological reports, cultural reports, and social worker reports to support their assessment of [LH] and how this will impact on his sentencing.

[23] What those reports also show is that [LH] has had a disadvantaged upbringing. That has shaped who he is and how he presents today. It would be easy to simply consider [LH] physically and forget that he is only 15 years old. Mentally, he is younger. Whilst a supervision order is only able to be made of 12 months' duration, the Youth Court maintains jurisdiction in terms of the expiry of the higher end orders until a youth attains the age of 18 years.[2]

[24] A supervision order against the Chief Executive comes with onerous conditions which are able to be well enforced by the supervisor.[3] The Court may impose any additional conditions which in its discretion will reduce the likelihood of further offending.

[2] Section 296 Oranga Tamariki Act 1989.
[3] Section 305(1) Oranga Tamariki Act 1989.

[25] If there is non-compliance with a supervision order then it is able to be cancelled and other orders imposed.[4] The net result of that could be the imposition of a variety of orders for an additional period of time up until [LH]'s 18th birthday.

[26] Interestingly, Oranga Tamariki's submission in response to the potential for this to occur, was why would we bother. That is, of course, against a background where the Crown is questioning the time that [LH] might engage in rehabilitation in support of their submission that transferring [LH] for sentencing in the District Court will address the need to impose a longer rehabilitative sentence.

[27] I am confused by Oranga Tamariki's approach which seems to suggest that appropriate rehabilitative engagement might appropriately be forced under a District Court sentence, but should not be forced under a Youth Court sentence. The suggestion is perhaps that we should only offer rehabilitation to youths who are able to identify that rehabilitation is required and ultimately in their best interests. Perhaps I have misunderstood the submission.

[28] If the question is why would we bother, the answer is of course a simple one. [LH] is a young person and should be treated as such, he is in serious trouble, and he is in need of serious help.

Analysis

[29] In considering whether or not to transfer a young person to the District Court for sentence, the general principles as set out in ss 4, 5 and 208 of the Act should be considered.

[30] Sections 4, 5 and 208 provide:

> **4 Objects**
>
> The object of this Act is to promote the well-being of children, young persons, and their families and family groups by—
>
> (a) establishing and promoting, and assisting in the establishment and promotion, of services and facilities within the

[4] Section 296B Oranga Tamariki Act 1989.

community that will advance the well-being of children, young persons, and their families and family groups and that are—

(i) appropriate having regard to the needs, values, and beliefs of particular cultural and ethnic groups; and

(ii) accessible to and understood by children and young persons and their families and family groups; and

(iii) provided by persons and organisations sensitive to the cultural perspectives and aspirations of different racial groups in the community:

(b) assisting parents, families, whanau, hapu, iwi, and family groups to discharge their responsibilities to prevent their children and young persons suffering harm, ill-treatment, abuse, neglect, or deprivation:

(c) assisting children and young persons and their parents, family, whanau, hapu, iwi, and family group where the relationship between a child or young person and his or her parents, family, whanau, hapu, iwi, or family group is disrupted:

(d) assisting children and young persons in order to prevent them from suffering harm, ill-treatment, abuse, neglect, and deprivation:

(e) providing for the protection of children and young persons from harm, ill-treatment, abuse, neglect, and deprivation:

(f) ensuring that where children or young persons commit offences,—

(i) they are held accountable, and encouraged to accept responsibility, for their behaviour; and

(ii) they are dealt with in a way that acknowledges their needs and that will give them the opportunity to develop in responsible, beneficial, and socially acceptable ways:

(g) encouraging and promoting co-operation between organisations engaged in providing services for the benefit of children and young persons and their families and family groups.

5 Principles to be applied in exercise of powers conferred by this Act

Subject to section 6, any court which, or person who, exercises any power conferred by or under this Act shall be guided by the following principles:

(a) the principle that, wherever possible, a child's or young person's family, whanau, hapu, iwi, and family group should participate in the making of decisions affecting that child or young person, and accordingly that, wherever possible, regard should be had to the views of that family, whanau, hapu, iwi, and family group:

(b) the principle that, wherever possible, the relationship between a child or young person and his or her family, whanau, hapu, iwi, and family group should be maintained and strengthened:

(c) the principle that consideration must always be given to how a decision affecting a child or young person will affect—

(i) the welfare of that child or young person; and

(ii) the stability of that child's or young person's family, whanau, hapu, iwi, and family group:

(d) the principle that consideration should be given to the wishes of the child or young person, so far as those wishes can reasonably be ascertained, and that those wishes should be given such weight as is appropriate in the circumstances, having regard to the age, maturity, and culture of the child or young person:

(e) the principle that endeavours should be made to obtain the support of—

(i) the parents or guardians or other persons having the care of a child or young person; and

(ii) the child or young person himself or herself—

to the exercise or proposed exercise, in relation to that child or young person, of any power conferred by or under this Act:

(f) the principle that decisions affecting a child or young person should, wherever practicable, be made and implemented within a time-frame appropriate to the child's or young person's sense of time:

(g) the principle that decisions affecting a child or young person should be made by adopting a holistic approach that takes into consideration, without limitation, the child's or young person's age, identity, cultural connections, education, and health.

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 their 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 their 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.

[31] The Court must have regard to all of the factors set out in s 284(1) of the Act. Section 284(1) provides:

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 themselves 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.

The nature and circumstances of the offences proved to have been committed by [LH] and [LH]'s involvement in those offences

[32] I have already set out what happened based on the summary of facts to which [LH] has "not denied" the offending. The nature and circumstances of the offending committed by [LH] are terrible. The gravity of the offending is most serious.

The personal history, social circumstances, and personal characteristics of [LH], so far as those matters are relevant to the offence and any order the Court is empowered to make in respect of it

[33] [LH]'s personal history and social circumstances reveal that he has had a disadvantaged upbringing. His upbringing has seen him exposed to a gang lifestyle as the consequence of the family he is a part of. As a consequence of that upbringing [LH] does not have the aspirations that a young person, who has not been subject to such an upbringing, might have. His personal characteristics have been influenced by his upbringing. He has been exposed to violence and other forms of abuse. Gang culture and lifestyle does not bring with it the ability to easily admit criminal involvement, show remorse, accept help, or acknowledging that rehabilitative assistance is required. Through a gang member's eyes, the offending committed by [LH] would not necessarily be seen with the same gravity as through the eyes of someone who is not a gang member.

[34] Naturally, what might be achieved under any order of the Youth Court will be influenced by [LH]'s makeup. That said, so will any sentence imposed by the District Court. A risk is that a District Court sentence might contribute to [LH] potentially wearing his offending as some sort of badge of honour in order to survive in the criminal justice system with other older offenders. I am of the opinion that it would likely set a course of life-long gang membership and lifestyle for [LH].

[35] Whilst that may be the course he is on at present, appropriate intervention via the Youth Court (and if appropriate perhaps even the Family Court) would surely create a greater opportunity to change this course.

The attitude of [LH] towards the offence

[36] It is acknowledged that [LH]'s attitude to the offending has not been particularly great. However, as I have set out above, his personal and social circumstances do not allow easily for this.

[37] Whilst late in the piece, [LH] has at least not denied the offending. That has saved the need for the victim to give evidence at trial.

Response of [LH]'s whānau to the causes underlying [LH]'s offending and measures available for addressing those causes and to [LH] himself

[38] [LH]'s immediate whānau's response to the offending has not been good. Their attitude to the victim has been poor. [LH] has had little familial support with acknowledging and addressing the offending. This will not change if [LH] is transferred to the District Court for sentence. It is said that [LH]'s mother and father are not in the best position to support [LH].

Measures proposed to be taken by [LH] or his whānau group to make reparation or apologise to the victim of the offending

[39] Nothing has been proposed.

The effect of the offending on the victim

[40] It must be accepted that the impact on the victim has been significant. Her victim impact statement says she relocated as a consequence of receiving threats from [LH]'s family. That she is wary of where she goes for a fear she may run into [LH]'s family. That whilst she was once an outgoing and carefree person, she now tends not to go too far from home unless she is with family or friends and does not like staying at home alone.

Any previous offence proved to have been committed by [LH]

[41] There is no proved offending. [LH] has successfully completed a family group conference plan for offending and was discharged pursuant to s 282 of the Act.

Any decision, recommendation, or plan made or formulated by a family group conference

[42] There was no such agreement as [LH], his whanau, and the Crown did not agree as an outcome (hence the opposed application to transfer to the District Court for sentencing).

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

[43] The Crown submission is that [LH]'s propensity for violence is at the heart of the offending. Any measures available to address this will need to be extensive and intensive if they are to have any chance of success. The situation is not assisted at this time by [LH] appearing not to accept responsibility for his actions.

[44] [LH]'s lay advocate submits that the underlying causes of [LH]'s offending will not be remedied by [LH] serving a lengthy term of imprisonment.

[45] Measures available to address the underlying causes for [LH]'s offending are available via both Youth Court and District Court sentences.

[46] The Crown submits that the need to protect the public should be taken into account. Section 284 is to be amended on 1 July 2019 to make this consideration mandatory. Ignoring the prospect of rehabilitation, it might be said that the public can only truly be protected, during the period [LH] is in custody. As I have addressed, such custodial period will be similar with either outcome.

[47] When it comes to s 208 of the Act it is possible that in terms of [LH]'s whānau, hapū, and iwi dealing with his offending, the net may not have, as yet, been cast far enough. As far as practicable, but keeping the need to ensure the safety of the public at the forefront, [LH] should be kept in the community. His very young age is a significant mitigating factor when it comes to any sanction to be imposed. Any sanction should take the form most likely to promote his development within his family group and of course take the least restrictive form as appropriate in the circumstances. Any measures for dealing with his offending should address the causes underlying the offending as far as it is practicable to do so.

[48] When considering how to deal with the offending, consideration has to be given to the interests and views of the victim and proper regard is to be had of the impact of the offending on the victim.

[49] The Crown submits that there are a number of examples of people of [LH]'s age who have been transferred to the District Court and who have been sentenced to terms of imprisonment. This is particularly so for those who have committed serious sexual offences. The legislation allows for offending with which [LH] has admitted to be dealt with either in the Youth Court or the District Court depending on all of the relevant circumstances.

[50] The Crown refers in particular to the case of *NZ Police v S-RA.*[5] Mr Manning acknowledged that the offending in this case was against three young children who were family members and occurred over a lengthy period of time. It was confirmed that the reference to the case was made not for the purpose of considering why the matter was transferred to the District Court for sentencing, or the length of the term of imprisonment imposed, but rather as an example of what is possible in terms of the

[5] *New Zealand Police v S-R A* DC Palmerston North, CRI-2012-254-34,15 February 2013.

post-release part of the sentence, which here, included release on parole conditions with an extended supervision order being made.

[51] Mr Sceats submits there is strong rehabilitative factors within youth justice when considering the applicable principles. He submits that the Sentencing Act 2002 principles, set out in s 8, provide a more punitive approach, with rehabilitation being a single principle. He refers to the Court of Appeal case of *Pouwhare v R* which confirms that when a young person is sentenced in the District Court or High Court, having been transferred for sentence by the Youth Court, the sentencing Judge is not required to take into account the youth justice principles provided for in the Oranga Tamariki Act.[6]

[52] However, also that a sentencing Judge should act in accordance with the United Nations Convention on the Rights of the Child to the extent that this is consistent with the Sentencing Act and that there is no top limit to the sentencing discount for youth.

[53] Mr Sceats submits, that clause 107A Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill which has been enacted and provides for an increase in the age in which orders under s 296(2) of the Act may expire, shows an increased desire to keep youths within the Youth Court system later into their teenage years. This indicates that the Youth Court should take all steps possible, where there is an appropriate sentence, to retain a youth before it.

Decision

[54] The question is whether [LH] is unable to be dealt with appropriately under the provisions of the Oranga Tamariki Act such that he must be transferred to the District Court for sentencing.[7] Prison is a poor deterrent of crime, save for the period a person is incarcerated. To subject a young person to a term of imprisonment will undoubtedly have a significant impact on the course of their life from that point.

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[6] *Pouwhare v R* (2010) 24 CRNZ 868 at [97].
[7] *Police v Rangihika* [2000] DCR 866 at 872.

[55] Here, the period that [LH] might spend in custody may be very similar whether he remains within the Youth Court or is transferred to the District Court for sentencing.

[56] When it comes to the post-custody part of any sentence a well-crafted plan to implement a supervision order can ensure that [LH] is presented with the opportunity to address the underlying issues behind the offending and engage in rehabilitation. If there is any issue with respect to [LH]'s engagement, and successful completion of supervision, further Youth Court orders are able to be made to address this and are able to be made through to the time that [LH] turns 18 years old. This includes the ability to still order his transfer to the District Court for sentence.

[57] The reality then is that, if it is necessary, the post-custody part of a Youth Court sentence can provide everything that is able to be provided by way of parole conditions with extended supervision.

[58] In all the circumstances then, I am not convinced that [LH] cannot be dealt with appropriately under the provisions of the Oranga Tamariki Act save for his transfer to the District Court for sentencing.

[59] The application to transfer for sentencing is declined.

H L C Raumati
Youth Court Judge