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**IN THE YOUTH COURT  
AT AUCKLAND**

**CRI-2017-204-000014  
[2017] NZYC 636**

**NEW ZEALAND POLICE**  
Prosecutor

v

**[IX]**  
Young Person

Hearing	4 September 2017
Appearances:	E Mok for the Prosecutor C McGeorge for the Young Person
Reasons:	14 September 2017

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**REASONS FOR DECISION OF JUDGE A J FITZGERALD**

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[1] At the hearing on 4 September 2017 I decided to give [IX] the opportunity to carry out the plan prepared for him by his social worker Mr Cant for a minimum period of six months, rather than convict [IX] and transfer him to the District Court for sentencing.

[2] Brief reasons were given at the time but I said I would set out my reasons in more detail later and now do so.

[3] I have explained to [IX] that the option of being convicted and transferred to the District Court has not disappeared and could still happen if he does not comply adequately with the social work plan.

[4] In coming to my decision I had regard to the general objects and principles set out in ss 4 and 5 of the Oranga Tamariki Act 1989 (“the Act”) as well as the youth justice principles in s 208. I also took into account the following factors set out in s.284 of the Act.

#### **Nature and circumstances of the offending**

[5] On [date deleted] 2016 [IX] had an argument with his [sister] about him swapping a dirt bike belonging to her [child] for a mountain bike. The victim and her partner found [IX] [location deleted] and retrieved the bike.

[6] As the victim was walking home she was confronted by [IX] and other family members who then drove off. After the victim arrived home an argument developed between her, her father, and his partner. The victim was holding a police baton. The argument escalated and [IX] struck the victim on the head with a wooden stake causing her to fall to the ground unconscious. He then struck her again while on the ground. As a result she received a laceration to the right of her forehead requiring stitches, a fractured skull resulting in air on the brain, and bruising to her left shoulder and upper arm.

[7] There are some disputed aspects to the summary but not to the essential fact that [IX] struck his sister on the head with the wooden post causing the injuries

described. It has been suggested that [IX]'s behaviour had a lot to do with his disability. Even the victim is recorded to have said "I feel bad because he probably just misunderstood the whole situation".

### **Personal history and characteristics and social circumstances**

[8] [IX] was born addicted to Morphine and Benzodiazepines and spent six weeks following his birth in hospital for drug withdrawal. He was exposed again to opiates and Benzodiazepines through breastfeeding and had to be weaned off the substances again.

[9] Several areas of concern were identified when he attended kindergarten which resulted in specialist support being arranged and this continued throughout his schooling. Concerns existed throughout his schooling with problems in relation to socialisation, behaviour and language being noted.

[10] [IX] was exposed to family violence and neglect from a young age and his parents were dependant upon alcohol and other drugs. This resulted in him being placed in the care of [other family members]. He was reportedly violent towards his sister and came to notice for the concerning behaviours such as exposing his penis.

[11] Care and protection notifications were made from time to time. He was referred to CAMHS in May 2004 due to hyper-activity and disruptive behaviour. Again various concerns were noted such as high levels of anxiety, obsessive traits, emotional and learning difficulties. The problems he presented with were also attributed to family environment and pre-natal drug exposure.

[12] A notification was made to CYF in December 2006 regarding the exposure of [IX] and his sister to domestic violence. [IX] reportedly presented with evidence of traumatisation such as hyper-vigilance and extreme sensitivity to conflict.

[13] According to a high and complex needs assessment in 2007 [IX] suffered neglect, emotional and possible physical abuse in the care of his parents. His mood

reportedly fluctuated between withdrawn and highly anxious and he was easily frightened.

[14] Various other behavioural concerns are mentioned in reports on file such as being defiant with teachers, verbally rude and aggressive to his peers, and displaying violence towards his [family members] and difficult to manage as a child. [IX] is also reported to have suffered a head injury when falling off a skateboard, breaking his jaw and being knocked out.

[15] In 2014 he was before the Youth Court on a charge of assault with intent to rob and forensic assessments were carried out. He was assessed as having an intellectual disability with his full scale IQ in the extremely low range (63-76). Many of his adaptive functioning skills were in the low or extremely low range. Others were below average or borderline.

[16] In [date deleted] 2014 he poured petrol on his mother's house and threatened to burn it down. In [date deleted] he lit a fire at [location deleted] and a three metre tall tree caught fire.

### **The attitude of the young person towards the offence**

[17] [IX] has expressed regret for hitting his sister saying he did not want to hurt her but just wanted to stop the fight. He wants to talk to his sister and apologise but is currently unable to do so because [details deleted] and policy prevents them from seeing each other at the moment. He has written her an apology letter and she has responded with one saying she forgives him and does not want him transferred to the District Court.

### **Response and attitude of [IX]'s family to the causes underlying his offending and himself as the result of the offending**

[18] A very concerning feature of the case has been the unwillingness of [IX]'s family to engage in the process which has been to [IX]'s disadvantage. Initially the Youth Aid Officer wanted to have the matter dealt with by alternative action instead

of laying a charge and bringing the matter to Court. However neither [IX] nor his family would attend Family Group Conferences – and that includes the victim being unwilling to participate as well. Even when the charge was laid at Court [IX] and his family failed to attend court on a number of occasions which added to the delays.

[19] [IX]’s fitness to stand trial was raised and the Criminal Procedure (Mentally Impaired Persons) Act 2003 (“CP(MIP) Act”) process was triggered on 2 February 2017. That process was concluded on 19 June 2017 by a finding that [IX] was fit to plead and stand trial. Once that had been established he did not deny the charge, admitted it at a FGC on 28 July 2017 and confirmed that admission in court on 31 July 2017. Giving his disabilities he has been assessed as needing a communication assistant in order to properly engage in the process and that assistance has been (and continues to be) provided.

**Any measures taken or proposed to be taken by the young person or family to make reparation or apologise to the victim.**

[20] This is already covered above. The family have never wanted to be involved in any Court processes and have been unwilling to cooperate from the outset causing ongoing delay. [IX] himself is not primarily responsible for the delays as opposed to being caught up in the overall ongoing non-engagement of his family. The police remain sympathetic towards [IX] and, as I understand it, were not seeking to have him to be convicted and transferred to the District Court; it is the Crown that has adopted that position primarily on the basis of the charge being so serious but also because the non-engagement suggests an unwillingness to comply with the plan.

**The effect of the offence on the victim and the need for reparation**

[21] The victim forgives her brother and wants him to know she is there for him.

**Any Previous Offence Proved to Have Been Committed**

[22] [IX]’s previous charge was dealt with under s.282 and can therefore not be considered as part of a sentencing exercise.

### **Any decision, recommendations formulated by a family conference**

[23] The problem to begin with was they are a family not attending FGCs which resulted in this eventually coming to Court. The last FGC resulted in a non-agreement because of the Crown indication that they were seeking conviction and transfer.

### **The causes underlying [IX]'s offending and measures available to address those causes so far as it is practicable to do so**

[24] In this regard a significant factor is that the functional family therapy that Youth Horizons can provide is only available if Oranga Tamariki remain involved in the case. That requires [IX] remaining in the Youth Court. Youth Horizons Trust have accepted the referral and are able to begin their work which is anticipated to last for about 20 weeks. This is seen as a significant component of the plan to try and reduce the risk of future offending.

[25] There is also the specialist counselling involved that Mr Hibbs can provide regarding anger management. There is some uncertainty as to whether Taikura Trust will accept the referral because the latest assessments suggest that [IX] might not have an intellectual disability as legally defined.

### **Other factors**

[26] It was accepted in submissions that [IX] would be facing a sentence of imprisonment if transferred to the District Court and that is likely to be of a length that would rule out an electronically monitored or long term rehabilitative sentence. Even if such a sentence were available to him in the District Court there are important programmes, such as the FFT that Youth Horizons can offer, that would not be available.

[27] I am concerned that a major factor in the delays that have occurred in this case to date are the result of action and inaction on the part of [IX]'s family which have now exposed him to the risk of transfer and imprisonment. Such an outcome for him would be devastating particularly given his disabilities that make him especially

vulnerable. That is not only concerning in terms of his wellbeing but also for the community because sending him to prison rather than trying to focus more on a rehabilitative response would likely increase the risk he poses to the community once he is released. He would still be young then when released but in all likelihood much higher risk of re-offending.

[28] In considering such issues I have taken into account the international conventions to which we are a party and in particular UNCROC, the Beijing Rules and the Riyadh Guidelines. Use of such instruments as an aid to the interpretation of statutes has been endorsed by the higher courts on numerous occasions in the past. Their relevance in this case includes the emphasis on using custodial sanctions as a matter of last resort. The focus on the primacy of wellbeing in such conventions also means that when balancing young person's wellbeing on the one hand, with the use of sanctions on the other, the scales should tip in favour of wellbeing.

[29] Given the unusual combination of circumstances I have summarised I have therefore opted to withhold sentencing at this stage so that [IX]'s progress can be monitored as he carries out his obligations in the social work plan. That has the added benefit of him engaging in the Rangatahi Court where his progress will be monitored. It also leaves open the option of conviction and transfer if it comes to that. Although disposition will ultimately be a matter for the sentencing judge to determine I did indicate that I thought the option of a s282 discharge unrealistic.

A J FitzGerald  
Youth Court Judge