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IN THE YOUTH COURT
AT WELLINGTON

I TE KŌTI TAIOHI
KI TE WHANGANUI-A-TARA

CRI-2017-285-000021
[2018] NZYC 541

NEW ZEALAND POLICE
Prosecutor

v

[UG]
Young Person

Hearing: 13 September 2018

Appearances: E Light for the Prosecutor
B Crowley for the Young Person

Judgment: 13 September 2018

NOTES OF JUDGE A P WALSH ON SENTENCING

The Charge

[1] [UG] appears today for sentence. He has admitted a charge of aggravated wounding under s 191(1)(a) Crimes Act 1961. The maximum penalty for this offence is 14 years' imprisonment. At the time of the offending, [UG] was aged [under 15] years.

[2] This case highlights difficulties confronted by the Youth Court where a decision has to be made as to whether a young person should be discharged under s 282 or an order made under s 283.

Circumstances of the Offence

[3] On [date deleted] 2017, [UG] armed himself with a kitchen knife and left his home address. About 10.00 am that day the victim left her home to go to work. She headed onto a pathway that connected [street deleted] in Te Aro, Wellington. She had earphones in her ears playing music. They were connected to her cellphone in her pocket. At about the same time [UG] was standing at the top of the same pathway on [the street] watching people walk by. After spotting the victim, he followed her down the path without her knowledge.

[4] About 100 metres before the pathway exited onto [location deleted], he ran up behind the victim and stabbed her once in the top of her back with the knife, leaving it lodged in her back. The victim spun around. She did not realise at that stage she had been stabbed and questioned [UG] why he had hit her. He told her she was hurt and needed help. She then felt behind her back and on touching the handle sticking out of her back, realised she had in fact been stabbed.

[5] [UG] told the victim he would call for help and offered to take the knife out of her back. The victim told him not to touch the knife and tried to walk away, but each time she did, it appeared [UG] became agitated and stood in her way. She then decided to walk back towards her home address to seek help. As she did so she was trying to keep [UG] calm, telling him she was okay. During the walk up the path [UG] suddenly pushed the victim to the ground. The summary records he then kneed her in the face

and kicked her in the chest area, but [UG] has been adamant that he did not knee her or kick her. At the same time he pulled the knife out of the victim's back. He held it above his head with the blade pointing towards the victim, repeatedly telling her he needed to help her as she was hurt. The victim pleaded with [UG] to go and call for help as she did not have her cellphone on her. He left the victim on the ground and walked along the path heading back towards [the street].

[6] The victim managed to rise to her feet and walk back up the path to her home address where she sought assistance. When police were in the area searching for the offender, [UG]'s father came out and questioned the police. As a result of what he was told about the description of the male offender, he advised [UG] matched that description.

[7] The victim suffered a deep laceration on top of her back to the right of her spine. She was cut through deep tissue and muscle and required multiple stitches. It is also recorded she suffered mild concussion from injuries sustained to her head.

Sentencing Factors – Statutory Provisions

[8] After [UG] was apprehended by the police, he admitted what he had done. He told the police he wanted to steal a cellphone off a female, as a female would not be able to fight him back once stabbed. He further stated he had picked his victim in particular as the knife would be easier to lodge into her body.

[9] [UG] has not previously appeared before the Court. On 28 August 2018 there was a hearing. I noted at that stage submissions had been filed by the Crown and Mr Crowley had filed submissions in reply. At that stage the Crown sought an order under s 283(k) while Mr Crowley argued [UG] should be discharged under s 282. I indicated if the Crown was seeking an order under s 283(k) then a report under s 334 and a plan under s 335 needed to be prepared. I requested the Crown to notify the social worker by 5.00 pm on 29 August 2018 whether a section 283(k) order was sought, given the outcome of the plan formulated at the family group conference. The Crown subsequently advised it no longer sought an order under s 283(k) and now sought an order under s 283(c).

[10] There has been an issue relating to the involvement of the police in family group conferences and the role of the Crown raised by Mr Crowley. There have been three family group conferences held on 28 November 2017, 23 February 2018 and 24 August 2018. The police were in attendance at the first two family group conferences. The police were not able to attend the last family group conference as the Youth Aid officer was required to look after a sick child. Mr Crowley noted the Crown had been invited to attend the family group conferences but today Ms Light advised the Crown did not attend family group conferences as the police attended family group conferences.

[11] I take that matter no further, having noted the concerns raised by Mr Crowley and the response of the Crown. The reconvened family group conference on 24 August 2018 noted positive developments regarding [UG]. His parents had paid $6400 by way of reparation to the victim to compensate her for lost income and emotional harm. Equine therapy had been ongoing for [UG] and had proved to be of benefit to him. His parents have completed a multi-systemic therapy programme over 20 weeks. The therapist reported the parents had done a fantastic job managing [UG]'s behaviour. They had acquired skills and knowledge to support [UG]. It was noted there had been no aggressive behaviour from [UG] over the past 12 weeks at the time of the reconvened family group conference.

[12] Mentoring through [details deleted] had gone well. [UG]'s performance at school had improved markedly and at home it appeared his conduct had improved 100 percent. The unanimous decision at the reconvened family group conference was that [UG] be discharged under s 282.

[13] A social worker's report was prepared. This report was comprehensive, addressing issues relating to [UG]'s personal history, his social circumstances and his personal characteristics. The social worker supported a discharge under s 282. She noted [UG] had been born [overseas] and was raised in [number deleted] orphanages until he was [age deleted]. His parents had visited him from the age of 23 months on five separate occasions before they were able to legally adopt him. Generally, it can be said [UG] struggled to adjust after leaving the orphanages. In February 2010 it was noted the family were struggling with his aggressive behaviour.

[14] These factors are significant as they put into context the adverse circumstances of [UG]'s childhood and the challenges resulting from his conduct as he adjusted to a completely new environment in New Zealand. I note the observation of the social worker that while the summary of facts, when read, painted a very sinister picture, the reality of [UG] as he now presented before the Court was quite different. What is significant are the positive changes made by [UG] since [the offending].

[15] I have had regard to a number of statutory provisions under the Act. Section 4 sets out the objects and I have particular regard to s 4(f) which stipulates that:

> One of the objects is to ensure where children or young person's commit offences, they are held accountable and encourage to accept responsibility for their behaviour. They are to be dealt with in a way that acknowledges their needs and will give them the opportunity to develop in responsible, beneficial and socially acceptable ways.

[16] I have regard also to the principles set out in s 5(c)(f) and (g). I noted also the principles I must take into account under s 208 and in particular principles in paragraphs (a), (c), (e), (f) and (f)(a). I then had to have regard to factors in s 284.

[17] In reviewing those statutory provisions, I was mindful of observations made by the Court of Appeal in *Churchward v R*.[1] Mr Crowley had noted observations of the Court at [77] relating to youth factors in sentencing. While these observations are made in the context of a young person appearing in the adult jurisdiction, I consider the observations made by the Court about young people are pertinent. The Court noted there are age related neurological differences between young people and adults. Young people may be more vulnerable or susceptible to negative influences and outside pressures. They may be more impulsive. Young people have greater capacity for rehabilitation. The character of a young person is not well formed as that of an adult.

At [80] of that judgment, the Court noted:

> The New South Wales Department of Education and Training had stated adolescence was a period of development, particularly in the ability to produce, establishing an individual identity and developing logical and rational thought processes. It summarised research as follows:

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1 *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446.

(a) the ability to plan, consider, control impulses and make wise judgements is the last part of the brain to develop;

(b) adolescents are built to take risks and it is simply part of their biology;

(c) most adolescents know right from wrong, but the environment in which risk-taking and other behaviours occur can lead to inappropriate behaviour; and

(d) adolescents are more prone to react with gut instincts and impulsive and aggressive behaviour.

[18] When I come to the factors I must have regard to under s 284, I note the nature and circumstances of the offence. There is no doubt this was violent, serious offending; as noted, the maximum penalty is 14 years' imprisonment. The Crown's concerns are that the offending was premeditated and [UG] was after the victim's cellphone. It is fortunate the injuries suffered by the victim were not more serious. It is clear from her victim impact statement, the injuries she did suffer caused her considerable pain and discomfort for some weeks after the event.

[19] Mr Crowley had stressed [UG] denied kneeling on the victim and kicking her. Today he has stressed the concerns expressed by [UG] about what he did immediately after stabbing the victim and his concern to pull the knife from her back. As he acknowledged, it is very hard to understand rationally [UG]'s thought processes at this time; after stabbing the victim it appeared he realised the enormity of what he had done and was then trying to help her.

[20] There is considerable information about [UG]'s personal history, social circumstances and personal characteristics. I have had comprehensive social worker's reports and I note particularly the observations made by the social worker in the s 334 report. The Court obtained a s 333 report in November 2017. This report effectively provides a snapshot of issues relating to [UG] and in particular, concerns about behavioural issues affecting him and the challenges his parents had in dealing with that behaviour. As I have noted, [UG] was adopted by his parents at the age of [under 5] years. At page 7 of the s 333 report, the report writer made the following observations:

> [UG] has experienced early developmental adversity that may have contributed to his current offending and historically unusual/disruptive behaviour. Research indicates children growing up in orphanages/who are

> adopted (specifically from [location deleted]) are at risk in various domains of functioning, including their physical, socio-emotional and cognitive development. They may be at elevated risk for mental health disorders such as attention-deficit/hyper activity, depression, separation anxiety and oppositional defiance, exhibit disturbed behaviours, not receive adequate education and have developmental delays ([UG] did not speak until the age of four years). [UG] has been in institutionalised care for a significant proportion of his early years.

Further on, the report writer made this observation:

> The longer a child is institutionalised, the greater the increased potential for behavioural and other problems. If a child is adopted earlier in his or her life, this reduces some of the risks. It appears right from the start that [UG] was a child with a difficult temperament, being a full on, aggressively behaved, physical (headbutting mother and biting), a child with little sense of danger, impulsive and a risk taker. Temperament is relatively stable across time and several of these temperamental traits can be seen in [UG]'s current offending behaviour. Developmental delay and difficult temperament can both be predisposing factor for later development of mental health concerns including conduct and other disorders. [UG]'s genetic makeup is unknown and he may also have inherited some personality, mental health, temperament or other biological factors that have predisposed him to his offending, behavioural or mental health concerns from his biological parents.

[21] I have set out that background because it provided a description of issues relating to [UG]'s behaviour and areas for which he needed help. A family group conference plan was designed to address those issues of concern. That plan has been in effect for 12 months. When I had regard to the attitude of [UG], as I have noted, he admitted the offence when apprehended by the police and co-operated with the police. He has been compliant with his bail conditions which included a 24-hour curfew for a period. There were no breaches of bail. His performance at school has improved; there has been comment about a vast improvement in his attitude.

[22] In this case the response of the family has been described as *"outstanding"* and I am satisfied that is the case, having regard to the steps they have taken to support [UG]. Throughout their commitment to supporting [UG] has been unwavering. I noted the positive comments in the social worker's report about [UG]'s issues being addressed by his parents. It is fair to acknowledge that agencies involved with the parents have been impressed by their commitment and support of [UG].

[23] In this case very tangible steps were taken to make reparation and apologise to the victim. [UG] made a personal apology and was supported by his parents. They

made a reparation payment as I have noted of $6,400; $2,400 was to compensate the victim for actual loss suffered by her and $4,000 was paid voluntarily to compensate her for emotional harm. That payment demonstrates the sincerity of [UG]'s parents in wanting to put matters right and supporting [UG] in addressing that issue.

[24] I had regard to the victim's views which are recorded in a victim impact statement. Although the statement is undated, it is clear from the statement it was made about six weeks after the offending. That statement was prepared before the family group conferences were convened. It was not possible to update the statement. It is fair to say at the beginning the victim was understandably distressed and troubled by what had happened to her. I am advised that she was present at the first two family group conferences and her views evolved as she got to know [UG] and his family. It is understood the victim finally indicated she would abide the decision of the Court.

[25] I do not minimise the trauma she described and how it affected her. The injury itself involved the victim enduring considerable pain and discomfort for a number of weeks as described in her victim impact statement. No doubt this assault on her will have a lasting impact on her for some time.

[26] The recommendations of the family group conference were carried out successfully. Overall the plan formulated was challenging and required the full commitment of [UG]. He completed that plan with the support of his parents and that support is significant for the reasons I have outlined. There is no suggestion, at any stage, [UG] was unco-operative. It appeared he had faced up to what he had done and was prepared to be held accountable and put matters right as formulated by the family group conference plan.

[27] As to the causes of the offending, I have referred to the observations made by the social worker and the observations in the s 333 report. No doubt, the dysfunctional factors that affected [UG] in his early life, before adoption, have had a significant impact. I am conscious there may be an element of speculation because of lack of information as documented in the s 333 report but I consider the general observations made in the s 333 report are significant when I come to sentencing in this matter.

[28] The issue as I foreshadowed at the start of this sentencing is whether to discharge [UG] under s 282 or make an order under s 283(c) as sought by the Crown. In her submissions, Ms Light referred to the statutory provisions I have set out. She argued it was not appropriate to discharge [UG] under s 282, given the seriousness of the offending. The offending was such it required an order to be made under s 283(c) for [UG] to be called upon within 12 months.

[29] I accept the submissions of the Crown about the seriousness of the offending, however, there are other factors I must counterbalance in the sentencing weighing process. In his submissions, Mr Crowley emphasised the commitment and support of [UG]'s parents in the completion of the family group conference plan. I accept that submission. He noted the changes made by [UG] over the past 12 months and observed [UG] was no longer sullen and downcast but now transformed. He acknowledged the process of the Youth Court had forced [UG] to engage with the victim and confront his offending.

[30] In preparation for this sentencing, I researched a number of cases where the Court was being asked to determine whether a young person should be discharged under s 282 or an order made under s 283. I have been assisted by the submissions from the Crown and Mr Crowley. It is evident from my review of the cases that while the Court must have regard to the statutory factors I have taken into account, the sentencing must focus on the particular young person and on circumstances peculiar to that young person.

[31] In his submissions, Mr Crowley noted observations made by the Principal Youth Court Judge in *New Zealand Police v [names deleted]*.[2] In that case Judge Walker considered whether three young people aged 13 years should be discharged under s 282 or an order made under s 283(a). These young people had admitted a charge of arson, causing a loss of about $2.5 million. At paragraphs [49] and [50] Judge Walker made the following observations about factors the Court must consider:

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2 *New Zealand Police v [names deleted]* [2015] NZYC 239

> [49] It must be borne in mind that it is common place for young people to be discharged under s 282 for serious offences such as aggravated robbery. That is an intentional act – stealing with violence or the threat of violence using a weapon or in the company of others. Here, when recklessness is the mental element, and if the consequences of the offending are put to one side, there is much less culpability than there is in the case of aggravated robbery. The consequences, which were substantial cannot be ignored, but in terms of assessing culpability the ability to appreciate the likely consequences and the loss of $2.5 million must be questionable.
>
> [50] The seriousness of the offence does not preclude a discharge under s 282.

[32] In determining this issue, I noted it was agreed this matter should remain in the Youth Court jurisdiction. There was no application to convict [UG] and transfer him to the District Court jurisdiction. I consider that is a significant decision made at the family group conference. It recognised that [UG] should have the benefit of the Youth Court jurisdiction.

[33] When I focused on the various factors I have set out, I considered these factors were significant. [UG] was aged [under 15 years old] when the offence was committed. As I have noted, his actions are hard to understand rationally. While I accept the Crown's submission the offending was premeditated, I counterbalance that consideration with the fact that [UG] appeared to act impulsively. When he realised what he had done and the injury he had caused, he then tried to assist the victim. His actions are hard to understand on a rational basis, but having regard to the observations I have made about adverse factors relating to his early development, I consider those are significant factors I must weigh.

[34] Over the past 12 months there have been positive developments in the rehabilitation of [UG]. Throughout he has received and will continue to receive significant support from his parents. I am conscious in this sentencing process there is a public interest factor. I consider the public interest has been met in this case by the fact [UG] has been held to account for what he did. The Youth Court process was demanding and required him to undertake the completion of a comprehensive family group conference plan.

[35] I then come back to the seriousness of this offending. For the reasons I have set out, I accept the offending is serious. I then pose the question, having regard to

that seriousness, counterbalanced against the other factors I have considered, should [UG] be discharged under s 282 or an order made under s 283(a)?

Decision

[36] I have found this sentencing difficult. In the circumstances of this case I have determined [UG] should be given a chance to carry on with his life. In those circumstances, I have determined to discharge him under s 282. This is a decision I have not reached lightly but I consider, weighing all the positive factors and taking into account [UG]'s commitment to the FGC process throughout, it is appropriate the s 282 discharge be granted.

[37] Accordingly he is discharged pursuant to s 282.

A P Walsh
Youth Court Judge