EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

IN THE YOUTH COURT
AT MANUKAU

CRI-2016-263-000219
[2018] NZYC 463

NEW ZEALAND POLICE
Informant

v

[SY]
Young Person

Hearing:	23 July 2018
Appearances:	Ms Norrie, with her Ms Olsen, for the Crown on District Court Matters and for the Police in respect of Youth Court Matters Mr Earley for the Young Person in respect of the Youth Court Matters Ms Tuilotulava in respect of the District Matters
Judgment:	8 August 2018

RESERVED DECISION OF JUDGE DAVID J HARVEY
on Application for Transfer to the District Court

Introduction

[1] Should the charges that [SY] is facing remain in the Youth Court or be transferred to the District Court pursuant to s 283(o) of the Oranga Tamariki Act 1989?

[2] Cases such as these are rarely straightforward and involve a careful balancing of a number of factors, together with an evaluation of the various options and outcomes that are offered within the District Court pursuant to the Sentencing Act 2002 and the Youth Court, pursuant to the Oranga Tamariki Act 1989.

[3] [SY]'s case has its own special complexities. There are a large number of charges. Some of them have been the subject of orders which have been cancelled and in respect of which redisposition is sought. Others are fresh charges. Some of the charges arose in the Manukau Youth Court. Yet others arose in the Auckland District Court and are the subject of not guilty pleas.

[4] In this decision, I shall first review the charges in respect of which transfer is to be considered. I shall then consider the procedural history and the background to the charges. Following that, I shall consider the legal framework within which my decision should be made, including some of the relevant case law. I shall then consider the arguments of the Crown and the defence, especially in respect of the relevant criteria under s 284 of the Oranga Tamariki Act, followed by a discussion of those factors as they pertain to this case. I shall then finally articulate the outcome in light of the reasons given.

Procedural History

[5] [SY] was born on [date deleted] 2001. He is now aged [over 17 years]. He appears for redisposition in respect of 12 charges, following a breach of a six month supervision order which was imposed following a supervision with residence order. That order was made by Judge Eivers in respect of the following charges:

[Location 1 deleted] Charges: 17 November 2016 – escaping from custody
17 November 2016 – aggravated wounding
17 November 2016 – aggravated injury

19 November 2016 – burglary
19 November 2016 – unlawfully in a building

[Location 2 deleted] Charges: 24 February 2017 – escaping from custody
24 February 2017 – aggravated assault
24 February 2017 – unlawfully takes a motor vehicle

27 February 2017 – aggravated robbery

25 February 2017 – aggravated assault
25 February 2017 – aggravated burglary
25 February 2017 – aggravated assault

[6] When [SY] came before Judge Eivers on 22 August 2017, the Crown sought a conviction and transfer to the District Court for sentencing pursuant to s 283(o) of the Oranga Tamariki Act. That application was opposed. Judge Eivers heard submissions and adjourned the matter to 20 September 2017 to consider written submissions and the various reports filed so that she could give her decision and she later provided written reasons.

[7] Judge Eivers noted the 12 charges, five of which arose from [location 1] and seven of which arose in [location 2]. She identified the most serious of the charges as:

(a) Aggravated wounding - 17 November 2016 in [location 1]
(b) Aggravated burglary - 25 February 2017 in [location 3]
(c) Aggravated robbery - 27 February 2017 in [location 4]

[8] For the purposes of this decision, it is necessary to outline the facts in respect of these charges. I take the facts from the decision of Judge Eivers of 2 October 2017:

Facts

Aggravated wounding - 17 November 2016

At the time of the offending, [SY] was residing at [Youth Justice facility 1] in [location 1]. He was in the [details deleted] with his two co-offenders, [OA] and [OB]. The victims were working as night shift attendants in the unit. At about 11.45 pm, one of the victims was attending to one of the young persons, [OA],

who was complaining of feeling unwell. [SY] and [OB] were in nearby rooms. Without warning, [OA] grabbed the victim's radio set, pushing him away. He fell backwards, hit his head on the door and lost consciousness. [OB] joined in, attacking another victim, punching him multiple times to the head with a closed fist and causing him to fall to the ground. He continued the attack, punching him to the head and stomping on him and demanding the keys to [the Youth Justice facility]. At the same time, [OA] punched one of the victims twice to the head and stomped on his head three times, continuing to attack him, punching and kicking him to the head and body.

At this point, [SY] opened the door to his room and entered the foyer. He ran to one of the victims and began kicking him in the torso. The three young people then began to run down the foyer to escape. As he passed the other victim, [SY] kicked him to the body as he lay on the ground. As a result of the attack, one of the victims received two lacerations and contusions to his scalp, nasal contusions and swelling to his face. The other victim received a bruise to his right forehead and swelling to the top of his head. Both men received treatment for their injuries at [location 1] Hospital. While at large, [SY] and his co-offenders burgled the house of [an elderly] wheelchair-bound victim.

Aggravated Burglary – 25 February 2017

Having escaped from [Youth Justice facility 2] on 24 February 2017, [SY] and another young person stole a [vehicle] from [location deleted].

The following day, together with an unidentified co-offender, they drove the vehicle to an address in [location 3]. [SY] armed himself with a round metal object, approximately 20 cm long. The other young person, [OC] and an unidentified associate armed themselves with knives which were about 20 cm long.

The group entered the property on foot and walked to the rear of the house, where they gained access through an unlocked back door. Once inside, they confronted the [over 80 years old] victim in the kitchen and demanded money.

The victim indicated he had no money but was pushed by [SY] down a hallway towards the bedroom. [SY] then pushed the victim into a bedroom and grabbed him around the neck with two hands. The victim attempted to push [SY] away. [SY] responded by threatening the victim with the words "I'll kill you", before pushing the victim to the floor. [SY] repeated his threat to kill the victim, who struggled back to his feet. [SY] then grabbed him by the neck and unsuccessfully attempted to push him to the floor.

The group then left the house. As they made their way from the property they saw the victim's neighbour, a [over 40-year-old] lady, who was outside on her phone to the police, having observed what was going on inside the victim's house. Seeing the lady, [SY] lashed out at her, kicking her in the leg. They then drove from the scene.

Aggravated Robbery – 27 February 2017

At about 12.20 pm on 27 February 2017, [SY], [OC] and another adult and a young person arrived at the [store 1 deleted] in [location 3]. [SY] and [OC] entered the store wearing hooded sweatshirts, which were pulled over their heads and bandanas, which were wrapped around their faces. [SY] was armed with a hammer. [OC] was armed with a spanner and crowbar. [SY] approached the victim with the hammer in his hand, ordering the victim to the ground. The victim complied. [SY] demanded the victim show him where the cigarettes were kept, instructing the victim to load the cigarettes into a black rubbish bag. [SY] assisted him with this.

[OC] demanded access to the store's cash till and took cash from the till. They then left the store on foot and made their way to a waiting car. Financial loss to the victim was in the vicinity of $12,000.

During the course of the robbery, a member of the public entered the store. [OC] instructed them not to contact the police. Once outside the store and realising the witness had contacted the police, [SY] got out of the vehicle and approached the witness. He threatened him with a hammer, which caused him to drive away.

> One of [SY]'s co-offenders was convicted and transferred to the District Court, where he was sentenced on 9 June 2017. He faced numerous charges. Another of [SY]'s co-offenders remained in the Youth Court and was dealt with by way of a six month term of supervision of residence. At the time of the decision of Judge Eivers, the co-offender [OC] was awaiting sentence.

[9] Judge Eivers gave careful consideration to the arguments that were submitted on behalf of the Crown and on behalf of [SY] by Mrs Tuilotalava. She took into careful consideration the factors noted under s 284 of the Oranga Tamariki Act. Stepping through and examining [SY]'s family background, behavioural issues that he had suffered from a young age, notifications to CYPF, his educational background, certain events which impacted upon him, his involvement with youth gangs and other aspects of risk of harm to others and the various assessments that had been carried out. She also made reference to the s 334 report which had been provided and the fact that some s 333 reports, which had also been obtained, provided insight into the underlying causes of [SY]'s offending.

[10] She described the case as one that sits in the balance. She considered that having regard to the various factors and legal principles, the least restrictive outcome would be for [SY] to remain in the Youth Court. This decision was made weighing up the seriousness of the offending against the greater public interest and using the rehabilitative supports available in the Youth Court to assist [SY] to make good choices in the future. She did not consider that Youth Court interventions were clearly inadequate to address the offending and she pointed to a number of factors which led her to this conclusion. As a result, she declined to transfer [SY] to the District Court for sentencing.

[11] [SY] was sentenced to a term of supervision with residence on all charges. He had been in custody continuously since December 2016, a period of 10 months pre-dating sentence.

[12] A report pursuant to s 314 of the Oranga Tamariki Act 1989, detailing [SY]'s progress in respect of that sentence, was made available to the Court on 5 December 2017. On that date, [SY] was granted early release from residence and a six month

supervision order was imposed. Conditions of that order included, among other things, the requirement that [SY] maintained weekly contact with the social worker, engage in counselling and therapy, engage with the MYMD programme and with Harmony Trust.

[13] On 16 February 2018, [SY] was arrested in relation to an aggravated burglary at [store 2 deleted]. He was charged in the [location 2] District Court and remanded in adult custody. On 9 March 2018, [SY] was granted electronically monitored bail back to his home address, where he was directed to reside subject to his supervision order. On 11 April 2018, he removed his EM bracelet and absconded.

[14] On 24 April 2018, a formal application for declaration of non-compliance with the supervision order was filed with the Court.

[15] Since [SY] was released from the residence on 5 December 2017 and whilst subject to the supervision order, he has been charged with the following charges:

(a) [Location 2] Crown

15 February 2018 - aggravated burglary - plea guilty

15 February 2018 - unlawfully uses a motor vehicle - plea guilty

15 February 2018 - unlawfully uses a motor vehicle - plea guilty

15 February 2018 - unlawfully uses a motor vehicle - plea not guilty- subsequently the subject of dismissal pursuant to s 147

(b) Auckland Police Charges

27 April 2018 - Injures with intent to injure – plea not guilty

27 April 2018 - Assault with intent to rob – plea not guilty

27 April 2018 - Endangering transport – plea not guilty

27 April 2018 - Injuring with intent to cause grievous bodily harm – plea not guilty

27 April 2018 - Assault with intent to rob – plea not guilty

27 April 2018 - Endangering traffic – plea not guilty

27 April 2018 - Theft of a motor vehicle – plea not guilty

27 April 2018 - Failing to stop – plea not guilty

27 April 2018 - Endangering transport – plea not guilty

[16] It is a matter of some concern that a number of allegations have arisen against [SY] whilst he was subject to the supervision order.

[17] At the time of Judge Eivers' decision, [SY] was aged [over 16 years old]. As I have already observed, he is now aged [over 17 years old].

[18] The 12 charges in respect of which he was sentenced to supervision with residence and supervision are the subject of the application for redisposition.

[19] The police identify three possible options available to the Court to respond to [SY]'s breaches of the supervision order:

(a) Convict and transfer [SY] to the District Court for sentencing, pursuant to s 283(o) of the Oranga Tamariki Act 1989.

(b) Impose an intensive supervision order with electronic monitoring, pursuant to s 283(k) and 296B(3)(c) of the Act, or

(c) Discharge [SY] pursuant to s 283(a) of the Act.

[20] In summary, the argument on behalf of the Police is that any less restrictive outcome than a conviction and transfer under s 283(o) of the Act would be clearly inadequate. The submission is made with particular reference to [SY]'s age and in recognition of the three District Court charges that he has yet to be sentenced upon. [SY] is also currently remanded in adult custody on all of his 13 District Court charges noted above.

[21] It is also submitted on behalf of the prosecution that neither an order of intensive supervision nor a discharge would properly address:

(a) The seriousness of [SY]'s Youth Court offending.

(b) The requirement to hold him to account for his behaviour and his failure to comply with his supervision order and

(c) The causes underlying his offending.

Legal Framework

[22] The power to convict and transfer the young person to the District Court for sentence is contained in s 283(o) of the Act. Section 283 provides a hierarchy of the Youth Court's responses if a charge against a young person is proven. The hierarchy is divided into a number of groups and as one travels up the hierarchy, the seriousness of responses increases. Section 283(o) falls under the heading of a Group 7 response. That is seen as the most restrictive outcome.

[23] The Act provides as follows:

Section 283 -

"A Youth Court before which a charge against a young person is proved may, subject to ss 284 – 290, make one or more of the following responses (grouped in levels of equal restrictiveness, the groups ranging from the least restrictive to most restrictive):

Group 7 response

(o) – exercise the powers conferred by one of the following sub-paragraphs:

(i) The Court may order that the young person be brought before the District Court for sentence or decision, and may enter a conviction before doing so; and the Sentencing Act 2002 applies accordingly if:

(A) The young person is of or over the age of 15 years; or

(B) The young person is of or over the age of 14 years and under the age of 15 years and the charge proved against him or her is a charge in respect of a category 4 offence or category 3 offence, for which the maximum penalty available is or includes imprisonment for life or at least 14 years".

[24] Section 289 of the Act sets out a number of factors which must be taken into account in making a response or a permitted combination of responses under s 283.

Section 289 provides as follows:

> **289 Court must impose least restrictive outcome adequate in circumstances**
>
> (1) A court making a response or a permitted combination of responses under section 283 (including, without limitation, under section 297(a) or (b)) must—
>
> (a) assess the restrictiveness of that outcome in accordance with the hierarchy set out in section 283; and
>
> (b) not impose that outcome unless satisfied that a less restrictive outcome would, in the circumstances and having regard to the principles in section 208 and the factors in section 284, be clearly inadequate.

[25] It should be observed that s 289(1)(a) and (b) also apply to applications under s 296B(1) where there is a declaration that a young person has, without reasonable excuse, failed to comply satisfactorily with the requirement of an order to which s 296B applies and substitutes or otherwise makes any other order or alternatively an intensive supervision order under s 296G (which must be treated as if it were a Group 5 response within the s 283 hierarchy) or any other order it is empowered to make under s 296E.

[26] Section 289(1)(a) and (b) also apply where there is an application for cancellation of a supervision with residence order where there has been an absconding from the custody of the Chief Executive and substitutes under s 316(2)(b) any other order under s 283 that it could have made when the order for supervision with residence was made.

[27] The prime directive in s 289(1) therefore requires the Court to undertake an assessment of the restrictiveness of the outcome within the s 283 hierarchy and directs that outcome should not be imposed unless a less restrictive outcome would be clearly inadequate, taking into account the principles of s 208 and the factors in s 284.

[28] In the interests of completeness, the principles in s 208 – the well-known youth justice principles - are as follows:

> **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.

[29] In addition, in deciding whether or not to make an order under s 283, the Court must take into account the s 284 factors.

[30] Section 284 reads as follows:

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.

(2) The court shall not make an order under any of paragraphs (k) to (o) of section 283 merely because the court considers that the young person is in need of care or protection (as defined in section 14).

[31] It may be seen, therefore, that the cross-referencing to the various sections of the Act, to which I have referred, create a labyrinth of factors which must be taken into account.

[32] The Youth Justice Principles set out in s 208 provide an umbrella of broad statements of goals, factors and considerations that should be taken into account in

considering actions and responses within the content of Part 4 of the Oranga Tamariki Act 1989.

[33] Some of those principles, such as those addressing the institution of criminal proceedings against a child or a young person, are not particularly relevant to the current consideration. Important principles to be taken into account, however, when one comes to consider a disposition under s 283 are those set out in s 208D – that a child or young person who commits an offence should be kept in the community so far as that is practical and consonant with the need to ensure the safety of the public. Other principles relevant to this consideration are:

> (e) … 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 persons, and
>
> (ii) The nature of such sanctions
>
> (f) … 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 circumstance.

[34] I should observe that the theme in s 208 (f)(ii) is further articulated in s 289 – that the Court must impose the least restrictive outcome adequate in the circumstances.

[35] In addition, the principle contained in s 208(fa) is relevant to the determination process in that 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 or young person's offending.

[36] It should not be surprising that, given the focus of the Youth Justice Principles and the directions contained in s 289, along with the factors that must be taken into account, that there has been a considerable amount of Judicial consideration of the circumstances which may merit the removal of a young person from the jurisdiction of the Youth Court to that of the District Court. Each case has its own unique facts and circumstances but some general guidance can be obtained from a consideration of some recent decisions.

[37] In *Police v [TG]*[1] [TG] had been sentenced to three months supervision with residence followed with supervision. He was granted early release. Within two weeks and while subject to the supervision order, [TG] re-offended and accrued a number of charges in the District Court. The prosecution and [TG]'s social worker sought conviction and transfer to the District Court for all outstanding Youth Court charges. [TG]'s youth advocate submitted that the outstanding charges should be the subject of a s 283A discharge, on the basis that [TG] had spent 11 months in youth justice custody on remand and a discharge would enable him to be sentenced on his District Court charges alone. [TG] was convicted and transferred to the District Court on all charges. The Judge set out a number of reasons:

(i) The nature of the offending was serious and warranted a starting point in the vicinity of six years imprisonment. When [TG] had first appeared, the prosecution had sought a transfer to the District Court with residence and supervision orders being imposed instead. Given those circumstances, the Court considered a s 283A discharge was a clearly inadequate response, even although a conviction and discharge in the District Court might be inevitable. The Judge noted that there was an additional accountability imposed by a conviction of the District Court.

(ii) The offending had significant impact on the victims.

(iii) The Court was not persuaded that [TG] was remorseful.

(iv) Although [TG] had spent a significant period in custody while on remand prior to the supervision with residence order, the subsequent breaches of the supervision order showed not just a slack attitude but a complete disregard for the order. The Judge observed that from a

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rehabilitative point of view the supervision order was when the real hard work began, because young people are placed back into their homes and are expected to motivate themselves to do the rehabilitative work. The Judge considered that there needed to be a consequence for the breach of the supervision order. If a consequence did not follow, the Court would be affording [TG] the unfavourable degree of leniency and would send the wrong message to him. The Judge observed that the Court had been understanding about his age, the stage of his brain development and recognised that he needed support and rehabilitation rather than the focus upon holding him accountable and responsible for his offending. However,[TG] was 17 years old and was continuing to offend as an adult, thus it was timely for there to be a different approach.

(v) [TG] had previously been given many opportunities to engage with rehabilitative programmes to address the underlying causes of his offending but had failed to do so.

(vi) [TG] had violently re-offended and was for sentencing in the District Court.

(vii) The time that he had spent in residence would be taken into account at the District Court sentencing.

[38] In the case of *R v [AF]*[2] [AF] had previously received supervision with residence followed by supervision for some 24 charges. He was granted an early release but subject to the supervision order, he re-offended and accrued seven charges in the District Court.

[39] He had previously been the subject of an additional supervision with residence order, two supervision with activity orders, two supervision orders and a community work order and he had persistently failed to comply with Youth Court orders. The Judge noted that the Youth Court had run out of options. Accordingly, he was convicted and transferred to the District Court for sentence on all charges.

[40] Those cases are helpful, in that they are recent and also contain a number of factual similarities to the case before the Court. However, the issue of the least restrictive option and whether or not a less restrictive option would be clearly

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inadequate must be taken into account, having regard to the directive language contained in s 289(1).

[41] In the case of *R v [name deleted]*[3], His Honour stated the legal test requires the Court to be satisfied that a less restrictive outcome is clearly inadequate. The addition of the word clearly creates high threshold and requires the Court to be clear that a less restrictive sentence would be inadequate before making an order to convict and transfer. Whether there is a lack of clarity about the adequacy of a less restrictive sentence, in other words, if it is not clear whether the less restrictive sentence would be inadequate, the Youth Court appears to be required by law to impose the less restrictive outcome.

[42] An example of the availability of a less restrictive outcome may be found in the case of *Police v [name deleted]*[4] which Judge Walker declined to transfer the case to the District Court. He observed that there was still enough time to work with the young person in the Youth Court jurisdiction – a period of some one year and four months. He was a first offender, although he faced a serious charge of wounding with intent to cause grievous bodily harm. The availability of rehabilitative outcomes and the period of time within which they might be utilised was a factor which led the Judge to consider that a less restrictive outcome to transfer to the District Court was available.

[43] In the case of *R v [JN]*[5] the clearly inadequate test was considered by Judge Lynch. In that case, there were two charges of wounding with intent to cause grievous bodily harm, when the victim was stabbed after being knocked out by a flying scooter. The Judge refused to transfer the matter to the District Court and applied the test in this way:

> "Not only has [JN] participated in a brutal pack or gang-like beating, he has stepped outside the pack and deliberately used a knife and stabbed the victim … so I understand how the victim rationalises that having committed an adult offence, [JN] ought to face adult consequences and, in this case, a jail sentence.

[3] Youth Court Waitakere CRI-2011-090-429, 16 August 2011, Judge Taumanu
[4] [2016] NZYC 584
[5] [2016] NZYC 504

> Having reached that point, do we dare contemplate what might emerge from jail after a sentence of imprisonment? For the sake of being punitive, does a monster walk out of the gates of jail? At the end of the day, the young man would have to be released, a young man inevitably fully-fledged to a gang and full of attitude and entitlement.
>
> There is still time to work with [JN] in the Youth Court. He has already been in residence for some time. A sentence with supervision with residence for six months, the maximum, is available. Section 289 creates a high threshold before the Court can transfer a young person to the District Court for sentence. The least restrictive outcome short of transfer must not only be inadequate but clearly inadequate. This is finely balanced, it could go either way. But if it is finely balanced, which is how I assess it, [JN] it cannot be said supervision with residence is clearly inadequate".

[44] The common theme which runs within the cases to which I have made reference is that in assessing whether or not an outcome would be clearly inadequate, the continued availability of possible outcomes within s 283, along with other outcomes, such as intensive supervision, may be taken into account. It must be recognised that effecting substantial behavioural change is not going to happen within the space of a few short months. Rarely is the path of rehabilitation a smooth one. Frequently there are stumbles, deflections from the path, interruptions and falling by the wayside. With the luxury of time, one may, as the words of the song would have it, "pick yourself up, dust yourself off and start all over again"[6]. Thus, the age of the offender and the amount of time for which Youth Court options may continue to be available appear to me to be important factors in considering the adequacy or otherwise of a less restrictive outcome.

[45] The other matter that must be taken into account is that of the assessment of the restrictiveness of the outcome within the s 283 hierarchy.

[46] The restrictiveness of the outcome under s 283(o) must necessarily involve a consideration of options that are available under the Sentencing Act and that is made clear in the language of s 283(o)(1), which states that the Sentencing Act 2002 applies.

[47] That assessment was undertaken by Judge Lynch in the case of *R v [JN],* where the effect of an imprisonment sentence was taken into account. In many cases it will

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[6] "Pick Yourself Up" Composed Jerome Kern, Lyrics by Dorothy Fields 1936 – written for the film "Swing Time"

be necessary to undertake a consideration of whether or not a sentence of imprisonment may be imposed.

[48] However, in other cases it may well be that, having regard to the age of the young person, the continued availability of Youth Court options may be of short term effect only and that other longer term supervisory or rehabilitation options may be more effective within the District Court jurisdiction. In that regard, a removal from the Youth Court to the District Court does not inevitably mean that a sentence of imprisonment will be imposed.

The Submissions of Counsel

[49] May I express my gratitude to counsel for their very helpful and full written and oral submissions. They, like Ariadne's thread, have been of vital assistance in navigating the labyrinth to which I have referred in paragraph [31].

[50] On behalf of the police, Ms Norrie argued that the principles contained in s 4(f)(i) of the Oranga Tamariki Act – the need to ensure that the young person is held accountable and encouraged to accept responsibility for his behaviour and s 208(g) – the need to consider the interests and views of any victim and have regard for the interests of any victims – are relevant. Against that background, Ms Norrie has made submissions in respect of the nine factors set out in s 284(1):

> **The nature and circumstances of the offending.**
>
> Ms Norrie focussed upon the charges of aggravated wounding, aggravated robbery and aggravated burglary. She submitted that the aggravated wounding offending involved a serious attack on two youth justice staff members, involving punching, kicking and stomping upon the complainants. [SY] did not appear to initiate the offending but his attacks came when the complainants had already been overcome and were lying on the ground. It is argued on behalf of the police that the attack was pre-meditated and intended to facilitate escape.

> Ms Norrie pointed out that the co-offender [OA] received a starting point of nine years imprisonment in the District Court for this offence alone, *R v [OA]* [7].
>
> [SY] went on to commit a further escape from custody, which was similar in nature to that carried out at [Youth Justice residence 1] and it also involved the youth justice worker being physically assaulted.
>
> The aggravated burglary involved an attack on an elderly man in his home, with multiple disguised offenders, all of who were armed with weapons. [SY]'s role in assaulting and threatening to kill the complainant was more serious than that of his co-offenders. Ms Norrie noted with some concern that elderly people were targeted in this offence and in a burglary of 19 November 2016.
>
> Ms Norrie argues that the aggravated robbery involved two armed offenders and two look-outs and getaway drivers. Using the guideline decision of *Mako*, she submitted that, on its own, this offending could attract a starting point in the District Court of around six years imprisonment. She went on to argue that on the charges of aggravated wounding, aggravated burglary and aggravated robbery, [SY] could face a combined starting point of around 13 years imprisonment.

Of course, the principle of totality would have to be taken into account.

[51] Ms Norrie's argument, particularly focussing on the potential sentencing outcomes that could be imposed for the offending if transferred to the District Court, was designed to emphasise that an outcome short of imprisonment or, at best, a consideration of imprisonment, would be clearly inadequate and that any youth justice sanction would fail to sufficiently emphasise the principles of accountability, taking responsibility and the interests of the victims.

[52] As to the nature of the circumstances of the offending, Mr Earley accepts that the aggravated wounding charge is a serious one, pointed out that the co-offender, who

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[7] [2017] NZYC 412

received a starting point of nine years and an end point of a five-year imprisonment sentence, was in a different category, as he had targeted the head of the victim.

[53] Mr Earley accepted that although the aggravated burglary was a serious one, he suggested that it was not the most serious of its kind, nor was the aggravated robbery and he emphasised that there was no actual use of violence.

[54] He answered the prosecution suggestion that a starting point sentence of 13 years imprisonment would be a crushing one for a young person and whilst seriousness was a consideration in the Youth Court, in the case of *Powhare v R*[8] the Court of Appeal has pointed out that:

> "The primary focus in the balance to be struck between offence and offender is the young person".

[55] Mr Earley also argued that although [SY] had breached his sentence of supervision, there had been significant engagement with it.

Personal History, Social Circumstances and Personal Characteristics of the Young Person

[56] The Crown has pointed to two very comprehensive reports that have been obtained pursuant to ss 333 and 334. There is a suggestion in the s 334 report that [SY]'s mother and her partner used physical discipline against him and the s 333 report states that physical abuse by [SY]'s father had been substantiated. It is clear that he was affected by his parents' separation in [date deleted], as well as by the death of two people close to him around that same time.

[57] The s 333 report also outlines that [SY] may have some connections to youth gangs, particularly the JLBC gang.

[58] Mr Earley points out that [SY] presents as a young person who is largely without hope in the future and who is capable of significant self-harm.

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[8] [2010] NZCA 68

[59] He emphasises that the events of [date deleted] – the separation of his parents and the deaths of two people close to him – had a significant effect upon him. He also emphasises that [SY] has been exposed to a degree of family violence in the past.

[60] Mr Earley argues that [SY] denied affiliations with any gangs.

The Attitude of the Young Person Towards the Offence

[61] [SY]'s persistent non-compliance with Court orders and his continued offending behaviour, argues the Crown, is indicative of his attitude towards his offending.

[62] Mr Earley argues that in August of 2017, when [SY] first came before the Court on these matters, he made an expression of remorse which was accepted and admitted the offending at an early stage.

The Response of the Family or Whanau to the Causes of Offending in the Young Person

[63] The Crown points out that [SY]'s parents are concerned about his offending, particularly against elderly victims and the risks that he poses to the community. His offending has brought shame on the family and, certainly, the attitude of his parents is that he has exhausted his options in the Youth Court.

Measures Taken or Proposed to be Taken by the Young Person to Make Reparation or Apologise

[64] Ms Norrie points out the police are not aware of any measures taken by [SY] or his whanau to apologise or make reparation to the victims. Mr Earley points out that the victims did not attend the family group conference and [SY] would have been otherwise forbidden from contacting them, although he did tender an apology later to the Court,

The Effect of the Offending Upon the Victims

[65] The effect upon the victims is set out in detail in the s 333 report. The two youth justice workers and the impact upon them is discussed in some detail, together with the victim of the aggravated burglary and the aggravated robbery. The victims of the youth justice facility offending have suffered considerably. One is seeing a psychologist and the doctor, due to his inability to sleep and his recurring nightmares and his return to work for around three to four hours, two to four nights a week. His family have observed changes in his personality. The other youth justice worker struggles mentally and physically and has memory loss, struggles with basic tasks. He, too, is seeing a psychologist and a physiotherapist. He has returned to work for a few hours each night. He is uneasy and wary.

[66] The victim of the burglary suffered damage to her leg as a result of the attack and cannot walk unassisted. The victim of the aggravated burglary says that he has moved on. The victim of the aggravated robbery said that he was affected financially, losing at least $8,000 of stock and his family is fearful of what might every day. Mr Earley acknowledges that the effects of the offending on the victims have been covered adequately by the Crown in their submissions.

Any Previous Offending, Penalties Imposed and the Effect of those Penalties on the Young Person

[67] The Crown points out that [SY] has previously received two supervision with residence orders. He failed to comply with the MAC programme while subject to his first supervision with residence order and did not qualify for any release. The s 334 report states [SY] was removed from the MAC programme after three weeks, due to non-compliance and physical and verbal assaults towards other young people.

[68] While subject to a subsequent supervision order at a [name deleted] residence, [SY] left the residence only days after his supervision began. He was offered a chance to return but declined to do so. The supervision order was ultimately cancelled.

[69] [SY] then received a further supervision with residence order on the index offences and was granted early release but re-offended shortly thereafter.

[70] Mr Earley concedes that there had been prior breaches of the orders but observed that the Court, on 27 September 2017, queried whether these interventions had been sufficiently intense and tailored in nature to assist [SY].

Any Decision, Recommendation or Plan made by the Family Group Conference

[71] Counsel for both Ms Norrie and Mr Earley concede no agreement could be reached at the family group conference.

The Underlying Causes of the Offending and the Measures Available for Addressing Those Causes So Far as It is Practicable To Do so

[72] Ms Norrie points out that the s 333 report indicates that [SY] is assessed as being of a significant risk of harm to others. His risk of re-offending is assessed as high. The factors related to this are his offending history, his family background, his disengagement from education, his anti-social peer group, his alcohol and drug use and his anti-social, pro-crime attitudes and beliefs.

[73] Ms Norrie submits that [SY]'s repeated failures to comply with Court- imposed orders and his behaviour since being granted earlier release from the supervision with residence order demonstrate that the causes of his offending had not been addressed or sufficiently dealt with.

[74] Thus, she submits that a District Court sentence is the only option available to the Court to address the underlying causes of [SY]'s offending and his risk of re-offending. In any event, argues Ms Norrie, he will be sentenced in the District Court for aggravated burglary and charges of unlawful use of a motor vehicle. Thus, she submits that whatever outcome occurs as a result of this decision for District Court-based offending, has a certain inevitably about it.

[75] Ms Norrie also points out that [SY] is remanded in adult custody for his District Court charges and, thus, practical difficulties would arise in his ability to complete any Youth Court order.

[76] Mr Earley points out that the s 333 report did note that any assessment of risk is dynamic in nature and should be re-assessed regularly to monitor change, preferably within a 12 month period.

[77] Mr Earley submits that there are other external factors which could be causative of [SY]'s offending, including the dislocation caused by his parents' separation, his exposure to family violence, drug use and underlying personality issues. His own sense of hopelessness may have some part to play.

[78] In addition to the s 284 factors, Mr Earley has submitted that there is a strong presumption that young people should remain in the Youth Court for sentencing or disposition, even in the event of a breach. He argues that transferring the young person to the adult jurisdiction is contrary to the intent of the United Nations Convention on the Rights of the Child, specifically Article 40(3), which provides:

> "Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law".

[79] Article 40(1) requires that "parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with and promotion of the child's sense of dignity and worth, which reinforces the child's respect for human rights and fundamental freedom of others and which takes into account the child's age and desirability in promoting the child's re-integration and the child assuming a constructive role in society.

[80] Mr Earley submits that this principle is substantially defeated by transferring the young person to the adult jurisdiction, particularly in light of prosecutions' argument advocating for the imprisonment of such a young person.

[81] He also argues that in sentencing a young person before the Youth Court, the Sentencing Act 2002 does not apply. Mr Earley is correct in that regard and I should also note that he is not arguing that the Court is precluded from considering likely Sentencing Act outcomes in its analysis or whether or not the matter should be transferred to the District Court pursuant to s 283(o). However, Mr Earley argues that

within the Youth Court a wholly different process is engaged than involved in adult sentencing and reminds me of the comments made by the Court of Appeal in paragraph [75] and [76] of *Pouwhare v R*[9] where it was said:

> "Whenever a young person is sentenced, in whichever Court that may be, the sentencing Judge exercises a discretion. But there is a fundamental difference between the principles that apply under the Sentencing Act in a court of general criminal jurisdiction and those that apply in the Youth Court by virtue of ss 5 and 208 in the CYPF Act.
>
> In the Youth Court for primary focus and the balance to be struck between offence and offender is the young person. In the principles, the CYPF Act obliges the sentencing Judge to take into account, and in the repertoire of orders that follows, it calls for the least restrictive and most positive of orders to be made; orders that extend beyond simply holding the young person accountable, but strengthen and assist him or her to make better choices; and highly desirable with the active support of their families".

[82] Thus, Mr Earley argues that although seriousness of the offence is a fact to be considered, it is not determinative in the way that it would otherwise have been in an adult jurisdiction.

[83] In essence, Mr Earley is emphasising that although the nature and the circumstances of the offending is the first of the s 284 factor to be considered, all the other factors must be weighted equally in considering whether or not a s 283(o) order is appropriate.

[84] In summary, Ms Norrie argues as follows:

(a) An order for intensive supervision which would subsist until [SY]'s 18th birthday – a period of six months – or a s. 283(a) discharge are not a sufficient response to [SY]'s Youth Court offences. Either response would fail to address the seriousness of the offending, would not hold [SY] accountable for his behaviour or for his failure to comply with the supervision order and would not properly address the causes underlying his offences.

(b) There has been an escalation of the level of violence in [SY]'s offending over the past two years. This is coupled with any lack of compliance with the Court order, family group conference plans and the conditions of residence and supervision. This, argues Ms Norrie, is borne out by

[9] Above n. 8.

his most recent non-compliance with his supervision order and subsequent re-offending.

(c) [SY] has exhausted all the resources within the Youth Court jurisdiction and conviction and transfer is the only option. In this regard, [SY] has had the benefit of two supervision with residence orders and has absconded twice from youth justice facilities, utilising violence on both occasions. Whilst subject to his first supervision with residence order, he failed to comply with the MAC programme and did not qualify for early release. He served only days of his subsequent supervision before breaching it. He went on to commit further offending. Having then been sentenced to a second supervision with residence order and granted early release, he breached his supervision order shortly thereafter and re-offended and now faces a number of charges in the District Court.

[85] Ms Norrie concedes that seriousness of the offending is only one factor to take into account but argues that it should be weighted more strongly than the number of the other factors, given that his offending represents a series of grave, violent acts committed against vulnerable victims. She argues that consistent re-offending demonstrates that Youth Court orders have failed to address [SY]'s problems. Thus, she concludes that any order short of conviction and transfer would be clearly inadequate to address the seriousness of [SY]'s offending, the risks that he poses and his failure to respond to previous orders.

[86] Mr Earley concedes that the charges are serious but they when came before Judge Eivers, it was considered that with the time on remand, supervision with residence followed by supervision would be adequate. The supervision with residence component was completed well and despite the breach of the supervision sentence, there has been some significant engagement that has been shown by [SY].

[87] Mr Earley concedes the inevitability of [SY]'s sentencing in the District Court in respect of those offences committed after he turned 17 and expresses the hope that it will be recognised that he is still capable of rehabilitation and re-integration. However, if these matters are to be transferred to the District Court, they will have an impact upon the outcomes for his adult-based offending.

[88] Mr Earley concedes that realistically, because of [SY]'s custody in an adult prison, he cannot undertake any Youth Court sanctions at this time and suggests in that regard that matters be dealt with by way of a discharge under s 283(a).

Discussion

[89] Having regard to the context of the principles set out in s 208 of the legislation, I shall commence this discussion by considering the s 284 factors and then in light of that consider the least restrictive outcome analysis required by s 289.

Section 284 Factors

Nature and Circumstances of the Offending

[90] There can be no doubt that [SY]'s behaviour in the conduct of the offending must be of considerable concern. Although the aggravated wounding involved a lesser level of participation on [SY]'s part, nevertheless the pre-meditated nature of the attack, with the intention of facilitated escape, was of concern and the injuries caused to the victims as a result of the attack were serious. It cannot be overlooked that [SY] went on to commit a further escape from custody, similar to this index offending.

[91] The aggravated burglary, likewise, was of a serious nature. The aggravating features of this offending involved the use of disguises, multiple offenders, the targeting of a vulnerable victim, coupled with actual violence and threats to kill the complainant. It should also be noted that there was a targeting of an elderly victim for offending of 19 November 2016. This aspect, involving the targeting of the vulnerable and the elderly, adds a disturbing level of menace to the offending.

[92] The aggravated robbery was serious and involved weapons, look-outs and getaway drivers. If [SY] were within the adult jurisdiction, there can be no doubt that sentences of imprisonment would have a certain inevitably to them and that the starting point, having regard to the aggravating features, would be high.

Personal History – Social Circumstances and Personal Characteristics

[93] I have had the benefit of two very full and comprehensive reports under ss 333 and 334. There can be no doubt that [SY]'s upbringing has been characterised by disruption and by violence and it may well be that in some respects this has validated the utilisation of violence on [SY]'s part. The disruptive events of 2013 have obviously had an impact upon him. I put to one side the allegation of his involvement in gangs.

The Attitude of the Young Person Towards the Offending

[94] It seems to me that [SY] lacks an understanding of the nature of consequences for wrong-doing and although he has expressed remorse, it does appear that remorse may well be as a result of the difficulties in which he finds himself and the fact that he may be facing consequences than any genuine empathy that he may have for his victim, or a deep understanding of the nature of his wrong-doing. I recognise that at his level of development, a full understanding of cause and effect, consequences and the real meaning of empathy may be a little too much to hope for. Nevertheless, [SY]'s response to sanctions and to consequences must be demonstrative of attitude and indicates a lack of willingness to recognise his wrong-doing and that he should do something about it and that others may be available to help him do so. In many respects, although his supervision with residence was carried out satisfactorily, his responses to supervision with activity had been more in the nature of rejection of the helping hand than anything else. Sadly, it does appear to me that [SY]'s attitude towards his offending leaves a lot to be desired.

The Response of the Family or Whanau to the Causes of the Offending in the Young Person

[95] It is clear that [SY]'s behaviour has reached the point where the family seems to be unable to assist or provide any solutions. [SY] has brought shame upon the family, who are of the view that they can do little to assist.

Measures Taken to Make Reparation or Apologise

[96] Although Mr Earley has a point that non-association conditions make such a course of action difficult and [SY] was limited to a letter of apology, and the absence of the victims from the family group conference make it difficult for a restorative process to take place, nothing has been done for the victims.

The Effect of Offending on the Victims

[97] I refer to my earlier comments in outlining the Crown submissions in this regard. The effect upon the victims has been significant, life-changing and of long-term detriment. Put simply, it cannot be said that the victims who are youth justice workers will ever recover the quality of life that they once enjoyed. Similarly, the victim of the burglary will be constantly reminded as a result of her injuries. The victim of the aggravated robbery, apart from being financially out-of-pocket, now is fearful of what might happen.

Previous Offending, Penalties Imposed and the Effect of Those Penalties on the Young Person

[98] I have already discussed [SY]'s response to the supervision with residence orders and his lack of compliance. Effectively, [SY] has been extended every opportunity to address his offending and the causes thereof and has somewhat callously rejected all of those opportunities.

Family Group Conference Outcomes

[99] As has been noted, no agreement could be reached at a family group conference.

Underlying Causes of Offending and the Measures Available

[100] The social worker's report, dated 19 July, indicates that [SY] may have been using methamphetamine, something that he recently just disclosed to his family and to his social worker. However, there can be no doubt that he presents as being a

significant risk of harm to others and the likelihood of his re-offending is assessed as high. Apart from his involvement with methamphetamine, other factors relate to family background, disengagement from education, his association with anti-social peers and what could be broadly described as anti-social or pro-crime attitudes and beliefs.

[101] Coupled with this, there appears to be a callous disregard on [SY]'s part for boundaries and a complete absence of understanding of the impact of his actions upon others. Although it could be said on one hand that supervision with residence, and supervision orders have failed, much of the responsibility for this must lie with [SY], who has rejected the opportunities that have been made available to him. In addition, he is currently in the District Court and will be facing sanctions within that jurisdiction notwithstanding the outcome of this decision.

[102] When looking at the s 284 factors, I place weight upon the nature and circumstances of the offending, [SY]'s attitude, the effect of the offending upon the victims and [SY]'s responses to the various orders that have been made in the past and the steps that he has taken, few though they might be, to address the causes of the offending.

[103] There can be no doubt that a Group 7 outcome of the transfer to the District Court is a very restrictive outcome within the s 283 hierarchy. The question is whether or not any other outcomes are available and whether those outcomes would be clearly inadequate, having regard to the factors to which I have made reference.

[104] In my view, a discharge under s 283(a) would be quite inadequate. It would fail to provide any sort of consequence for [SY] for what appears to be a wilful disregard for the orders of the Court, for the boundaries that have been imposed and for his obligations not to re-offend. The message it would send would be that there is an absence of consequences for misbehaviour.

[105] The effectiveness of supervision with residence, supervision or intensive supervision are, sadly, of limited utility. Part of the problem surrounds [SY]'s age and the period within which those particular outcomes might be available. [SY] will turn

18 in [a short period], at which time Youth Court and youth justice sanctions must come to an end. In addition, as I have said, he is facing District Court sanctions.

[106] [SY]'s problems cannot be solved within a [short] period. His expressed desire to attend Odyssey House, as set out in the social worker's report of 19 July, is something that could take place within the context of the District Court if that were considered appropriate. In my view, [SY]'s problems will require a lengthy process of rehabilitation and re-integration which will involve, as I have earlier suggested, potential fallings by the wayside. Whether [SY] has the internal discipline and willingness to make the changes necessary and to recognise that rehabilitation and re-integration will be a long-term process has yet to be seen and, certainly, his past performance would indicate that a large amount of work needs to be done.

[107] It follows, therefore, that the type of assistance and direction that [SY] requires is something that could not be accomplished within the limited timeframe available and given the nature of the problems that [SY] faces, together with the factors that I have mentioned under s 284, in my view a less restrictive outcome than directing this matter towards the District Court under s 283(o), would be clearly inadequate.

Conclusion

[108] The case that has been advanced by the Crown is compelling. The young person has had every opportunity offered to address the root causes of his offending. Various solutions that have been made available have effectively been rejected. It is doubtful that even the most forgiving advocate of the theory that within every person lie the seeds of redemption would recognise that there must be an end to attempting to protect the public by anodyne socially-directed solutions and to adopt a firmer and more direct approach to the problems that this young person's behaviour presents.

[109] Whilst there is a temptation to give him one last chance of rehabilitation and redemption, the reality is that those opportunities have been offered and rejected. Whilst there is a rejection, as the Crown argues that a rigorous sentencing analysis will result in only one outcome that will eliminate the possibility of community-based

rehabilitation-focussed results, at some stage protection of the wider community from the ravages and risks of this person's offending must take priority.

[110] It follows, therefore, that in respect of these charges, [SY] should be convicted and the matter should be transferred to the District Court for sentencing.

David J Harvey
District Court Judge