IN THE YOUTH COURT
AT AUCKLAND

CRI-2017-204-000191
[2018] NZYC 490

NEW ZEALAND POLICE
Prosecutor

v

[OV]
Young Person

Hearing: 20 August 2018

Appearances: D Robertson for the Prosecutor
D Hoskin for the Young Person

Judgment: 20 August 2018

ORAL JUDGMENT OF JUDGE A J FITZGERALD

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[1] [OV], you have admitted charges of sexually violating one victim on 7 February 2016 and then sexually violating another by rape on 30 July 2016. My job today is to decide what orders I should make to finalise those charges. You seek an order under s 282 Oranga Tamariki Act 1989. The effect of that order would be to make it seem as if the charges had never come to Court in the first place; a complete and unconditional discharge. The police submit that the appropriate order to make would be one under s 283(a) of the Act and that would leave a record that you appeared in the Youth Court for the charges but there would be no other order or penalty.

[2] When Judges make important decisions like this we cannot just say what the result is; we have to give our reasons and that is partly because a variety of people need to understand how the decision was made and not necessarily just the people who are here in this room today.

[3] There are many things I need to take into account in coming to my decision. They begin with the general objects and principles and the specific youth justice principles in the Act. It is not necessary to go through all of those now. Perhaps the most relevant one in your situation is the need for you to be held accountable for what you have done and encourage you to accept responsibility but also to acknowledge your needs and give you the opportunity to develop in responsible, beneficial and socially acceptable ways.

[4] Before the s 282 order can be made, the Act says that a Judge needs to consider all of the circumstances of the case. That means it is not necessary to go through all of the factors that have to be considered when any order under s 283(a) is made, but realistically given the police are advocating for the s283(a) order, it is necessary for me to go through the factors that must be taken into account on sentencing.

[5] The first of those is the nature and circumstances of the offending. On [date deleted] 2016, you were 16 years old. The first victim, [KW], was aged 14. You were both at the same school at that time. When the offending occurred, you were both on a [trip details deleted] and you had both been drinking alcohol and [KW] at least was intoxicated.

[6] You were [location deleted]. There had been some kissing which was consensual before [KW] became uncomfortable and went down to bed in the main [room]. After sending her texts asking her to return, which she refused to do, you went down into the [room], got into her bed, removed her clothing and performed oral sex on her. The next night you pressured her, telling her she owed you for the previous evening, before using some force to have her perform oral sex on you.

[7] On [date deleted] 2016 when the second offence occurred, you and the victim, [LD], were both aged 16. You were at a school friend's birthday party and both of you were heavily intoxicated. Again, there had been some kissing between you before you then tried to remove [LD]'s clothing which she resisted. You used both hands to push her down onto her knees in front of you forcing her to perform oral sex.

[8] You then removed her jeans, put her up on the bonnet of car, and tried to put your penis in her vagina while she was trying to push you off. However, you did manage to enter her. Afterwards she was able to get out of the [building] on her hands and knees, crying. As a result, she suffered some physical injuries; several bruises to her arms, pain to her pelvis and vagina which was inflamed and bleeding. There was emotional harm to both victims too but I will return to that shortly.

[9] So this is very serious offending. There are two separate incidents about five months apart. Two different victims. Some physical force was used after they had both refused your requests or efforts to have them engage in sexual activity. They both told you no and attempted to resist your advances. Both were vulnerable. The first victim was 14 years old, she was much smaller than you, she was intoxicated on at least the first night. The second victim was 16. Again physically much smaller than you and she was unable to succeed in resisting your efforts. She was also heavily intoxicated.

[10] Second factor is your personal history and characteristics and social circumstances. You are 18 years old now but will turn 19 in [date deleted]. You have loving and supportive parents who have stood by you throughout the Youth Court process. At the time of the offending you were in [year deleted] at school. As a result

of the offending, you were not able to continue at that school and you completed your education by correspondence.

[11] You are an intelligent and capable young man; an impressive NZQA record of achievement has been provided. You are now employed as a [employment details deleted]. There is a glowing testimonial provided from them.

[12] You are an avid and talented [sportsman, having competed] at a high level and that includes representing New Zealand overseas. Your goal is to be a professional [sportsman] and compete internationally. References provided tell of your outstanding talent and your potential bright future. Your concern is that any sort of record for this offending would prevent you from achieving your goals.

[13] The third factor, your attitude towards the offending. The police are sceptical about the sincerity of your remorse and they say that when the offending first came to light you denied any wrongdoing and blamed the victims. They also point out that in the initial SAFE assessment you did not express concern about the girls' welfare nor any remorse.

[14] Importantly though you have come a long way. You have engaged well in the SAFE programme and graduated from that recently. In their final report, SAFE say that your level of progress through the intervention over the duration of the therapy has been positive due to your high level of motivation, active engagement in the therapy process, proactive support from your family and supports and your willingness to be challenged and consider different perspectives. The assessments carried out indicate that there is a low risk of you being sexually harmful in the future.

[15] You have also completed a project entitled, "Toxic masculinity and rape culture," and I accept that in that you demonstrate an awareness of issues and there is evidence of the knowledge and maturity that you have gained as a result of the programmes that you have attended.

[16] There are also written letters of apology that provide a sign of remorse. So although the police have their doubts about the genuineness of your expressions of remorse, I accept that it is present.

[17] The fourth factor is the response of your family and I have already acknowledged the tremendous support that you have had throughout from both of your parents who are here again today. They have really done everything possible to help and support you through what I am sure has been a long, difficult and stressful process as the Court proceedings have continued. The length of time has been approximately 20 months.

[18] The fifth factor is measures to make reparation and apologise and I have already referred to the letters of remorse you have provided. As well as that you have paid $1000 reparation to [LD]. The first victim [KW] declined your offer of monetary reparation.

[19] The sixth factor is the effect on the victims. I have already made some mention of the physical injuries that were suffered by [LD]. This is no information suggesting any physical injury to [KW], however the emotional and psychological impact on her has been enormous. In her statement, she talks about becoming closed off after this happened, feeling like the world was no longer safe. She stopped enjoying life and doing the activities she [enjoyed]. She started having nightmares and flashbacks about what happened. She stopped eating, starting drinking and using pills to self-medicate and accidentally overdosed on pills and ended up in hospital. She cried all the time, could not get out of bed, could not trust people especially men. Her behaviour changed. She would lash out at family and friends, was agitated and hurt and in a lot of emotional pain. As a result she has been seeing a therapist who specialises in working with young people who have been sexually assaulted. She says some people blamed her for what happened and being at school was particularly difficult because it provided a constant reminder of what happened.

[20] Her mother, [name deleted], also provided a victim impact statement in which she refers to the effects she observed in her daughter that had included the change in her bubbly personality and other negative effects which she says have been significant

and long lasting. In fact it is likely both victims will suffer some adverse impact as a result of what happened for the rest of their lives.

[21] The second victim, [LD], did not provide a victim impact statement herself. Her mother, [name deleted], did and she has read that today. As we have heard, attending school after the rape was uncomfortable for [LD]. Initially she was the subject of rumours, which had an insidious effect. She struggled to cope at school and those impacts continued until she graduated. Recently memories of the assault have been disturbing her. As her mother says, one might feel that the assault has been put behind and then it becomes very present and affects the here and now.

[22] The seventh relevant factor is that you have no previous history for any sort of offending.

[23] The eighth factor is the plan that was formulated at the family group conference. The conference plan was made on 17 July 2017 and then that plan was approved in Court on 20 July 2017. I have already mentioned much of what was in that plan which you have successfully completed and in fact done an excellent job of doing so.

[24] You have completed the SAFE assessment and done that well. You have completed the project, you have made a donation and you have written apology letters. You were required to do 150 hours of community work and, in fact, you have done more than 200 hours collecting rubbish from foreshores around the Auckland harbours. As well as that you have attended an assessment and sessions of CADS to receive education around alcohol use. The record of the family group conference noted at the time that the police would be seeking the s 283(a) notation if the plan was completed well. If it was not, they indicated that they would seek to have you convicted and transferred to the District Court to be sentenced there.

[25] The ninth and final factor is underlying causes of offending and those I am satisfied likely have been identified and addressed by the involvement you have had in the SAFE programme which as I have mentioned you have successfully completed.

[26] The next factor I must consider are the disposition options about which I need to say some more. Sentencing for sexual offending in the Youth Court presents particular difficulties in many cases because there are no orders provided for in the Act that cater specifically for what is required in almost all cases. In most cases that come before the Youth Court there is usually agreement from everybody involved that a young person who admits charges of sexual offending should attend an effective evidence based programme such as SAFE so as to reduce the risk of re-offending. Programmes such as SAFE run between anything from six months to two years. In most cases, the time range is between 12 and 18 months which it was for you.

[27] There are no orders in the Act that run for that sort of timeframe and despite concerns raised about that point, when the Act was amended in 2010, nothing was changed. As a result the most common approach adopted is to keep the case in the Youth Court at least initially, to defer sentencing until the therapeutic programme is completed and that is again what has happened for you.

[28] All of the cases that Mr Hoskin has provided for today are ones that focus on the contest being between the two orders that I have already mentioned; s 282 and s 283(a). As far as a s 282 order is concerned, academic commentators such as Dr Nessa Lynch, have said Parliament probably envisaged that order was to be used to dispose quickly of trivial matters that should not have been brought before the Court in the first place.

[29] However, as she says, it is now regularly used for quite serious offending. She goes on to say that s 282 orders have been granted for reasonably serious sexual offending or in cases of minor-to-moderate sexual offending. I might just add that until amendments were made to the Act in 2010, it was not possible for someone your age, facing any offences that carried a maximum penalty of 14 years or more imprisonment, to have a s 282 order. Parliament changed that so must have intended that there would be cases involving reasonably serious charges where a s 282 order would be available. However, I agree with Dr Lynch that for sexual offending it is usually charges that are minor to moderate in nature. The s 282 order is far more commonly made when sexual offending occurs within the family, when the offender and victim are related, and the reason for that is probably obvious.

[30] Also, the approach to sentencing in the Youth Court is different to the District Court in several important respects. It is not a formulaic, arithmetical exercise as it is in the District Court. It is not as heavily tied to tariffs with consistency with other cases being an important feature. The objects and principles of the Act I have mentioned and the inclusion of the family group conference process and a variety of other aspects produce a much greater diversity of outcome for sentencing on serious sexual offending in the Youth Court. So comparisons to other cases that have been decided by Youth Court Judges are of limited value. Really each case needs to turn on its own particular facts.

[31] Because the cases provided for today focus only on the options argued for in your case, you could get the wrong impression that they were the only viable options. Again, in cases involving serious sexual offending, such as yours, conviction and transfer to the District Court for sentence is not unusual especially for a young person who is older at the time that the sentencing occurs such as you.

[32] It is not too hard to find examples. A search of the cases published on the District Court website is one place to find them. One case that is reported there is *R v King* which concerned a young person who had admitted four charges of sexual violation of a girl who was under 10 years of age and the offending occurred over a long period of time, so it is a more serious case that yours.[1]

[33] He was 16 and younger at the time of the offending. He was 18 at the time of sentencing. He was from a supportive family, he had a job and plans to attend tertiary education, he demonstrated full remorse and shame. Aside from the offending he led a blameless life in all other respects. He completed the equivalent of the SAFE programme and engaged very well in the programme.

[34] The Judge commented that he did all that was asked of him and he got credit for all of those factors and was transferred from the Youth Court to the District Court where he was sentenced to two years and nine months in prison.

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[1] *R v King* [2017] NZDC 26660.

[35] As I have said his offending was far more serious than yours but if you were convicted and transferred to the District Court, which you could have been, the starting point would have been imprisonment, possibly the end point as well. As recently as June this year, the police were questioning whether your case should in fact be dealt with in the Youth Court and they only recently decided not to pursue an argument that you should be sentenced in the District Court. They were right to do in the sense that there is jurisdiction for you to be sentenced here and you are fortunate that you are rather than being in the District Court.

[36] You do get very significant credit for the way that you have completed all of the family group conference plan and in fact gone beyond things that were in it and also for your excellent engagement with SAFE, for your youth, for your talents and potential and for your remorse amongst other things. But the s 282 order is not a realistic or appropriate option in your case having regard particularly to the seriousness of the offending and also after careful consideration of all the legal factors that I have summarised this afternoon.

[37] On both of the charges that you have admitted I am now making the order under s 283(a) of the Act which will record you having been in the Youth Court for the charges but there is no other order or penalty. In all of the circumstances, in my view it is a remarkably lenient outcome although I understand that you will not see it that way.

A J FitzGerald
Youth Court Judge