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IN THE YOUTH COURT
AT OAMARU

CRI-2016-245-000009
[2018] NZYC 500

THE QUEEN
Prosecutor

v

[FY]
Young Person

Hearing: 29 August 2018

Appearances: H V Bennett for the Crown
M J de Buyzer for the Young Person
S Latu as Social Worker

Judgment: 29 August 2018

ORAL JUDGMENT OF JUDGE J E MAZE

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[1] [FY] now appears before the Youth Court for disposition. He was born on [date deleted] 2002, so he is now [age deleted].

[2] There are three charges proven and for sentence. They are unlawful sexual connection with a male 12 to 16 years. It is a serious offence carrying a maximum penalty of 20 years' imprisonment in the adult Court. There is also sexual connection with a young person aged 12 to 16 years, carrying a maximum penalty of 10 years' imprisonment and assault with intent to commit sexual violation, likewise carrying a maximum penalty of 10 years' imprisonment.

[3] I work from the summary of facts. I do not understand there to be any challenge to those. The two victims were [personal details deleted] aged 12 and 14. Several times, [FY] offended against the older boy by penetration of his anus with [FY]'s penis. The first time that occurred was before the 14-year-old turned 14. He suffered anal injury as a result and as I have said, penetration occurred more than once.

[4] [FY] separately committed similar offending against the younger boy but at a lesser level, threatening to injure him or members of his family if he told anyone. It came to attention because on the last occasion, when [FY] tried to force himself on the 12-year-old, the victim summonsed the courage to complain to his parents, despite his fears of the consequences threatened by [FY].

[5] The victim impact statements have been prepared by the boys' parents. Both express deep frustration and distress by the fact that [FY] presented himself to them as a friend and protector of the boys, who were themselves vulnerable, and he showed an understanding of their vulnerability. The parents were taken in by the way [FY] was able to present himself and they are distressed by the fact that there was nothing to alert them to the fact that [FY] was already before the Court for serious sexual offending. The impact upon both boys has been severe and is likely to continue to be so. There is the additional difficulty that their parents are struggling to cope with what has occurred. The point made very clear in the victim impact statements is that the parents see themselves as vulnerable because they had nothing against which to judge [FY]'s plausibility. There was nothing to alert them to risks from him, other than the

way he presented himself. That I will term verbal manipulation and it is of singular importance to this exercise. I will come back to that.

[6] At the time of committing the current offences, [FY] was before the Court subject to a plan in relation to two charges of sexual offending against an eight-year-old girl, indecent assault, assault and assault with intent to injure. The last two related to offending against his own parents. The sexual violence was against a girl, as I have said, aged just eight. He was again trusted in the child's company. He again used force to overcome resistance. It is said in the summary of facts for that matter that he put his hand over her mouth as she lay crying while he assaulted her. He digitally penetrated her vagina, causing injury, and he put his penis between her buttocks. On those charges, the agreement was that he would be subject to a therapeutic outcome. He completed the plan and he was discharged under s 283, despite the fact that by the time that came to be disposed of, the new offending had come to light.

[7] In accordance with the general principle s 5(f), that decisions affecting the young person should be made and implemented within the time frame appropriate to that young person's sense of time, and the Youth Justice principles under s 208, [FY] was discharged under s 283 on the earlier charges on the basis that the new charges would reflect the aggravating factor that he was subject to plan at the time of committing the offences now before the Court.

[8] The aggravating factors of the present charges I see as these:

(a) Firstly, the age of the victims and their resultant vulnerability to [FY]. I note, as do their parents, [FY]'s larger physical build and superior strength, and his willingness, not for the first time, to use force and threats of violence to overcome resistance.

(b) Secondly, the impact of the offending upon the victims. Sexual offending is well known to have serious and even life-long consequences for victims. The victim impact statements make for

distressing reading and there is repetition of some of those matters raised within the social worker's report.

(c) Thirdly, [FY] was subject to a plan for similar relevant serious sexual violence and was actually attending the programme while committing the offences. He had the benefit of several months of attendance at the programme while committing the offences.

[9] I also have to take into account as an aggravating factor the gravity of the offending for its type. This involves an assessment of the extent to which the basic elements of the offending are aggravated by some aspects of the particulars of the offending in question. That is offending by way of repetition, which is particularly important, and the degree of penetration.

[10] I identify the aggravating factors as being present to a high degree. [FY] is physically of a larger build. It is inevitable that his victims would have felt at a marked disadvantage trying to resist his advances. The offending has a high level of seriousness because it was repeated. It involved skin-on-skin contact and was of a highly intrusive nature. It is reflected in actions over and above the mere elements of the offending, serious though those elements are in themselves.

[11] Despite the fact that [FY] admitted the offending at a family group conference, and confirmed that in Court, he has, up until as recently as three weeks before the social worker's report of 10 August was finalised, continued to deny any offence against the 12-year-old and says that his actions with the 14-year-old were consensual.

[12] I acknowledge that I have been informed that he has retreated from that position and says that he accepts responsibility and he accepts that what he did was wrong in relation to both victims but that is a position which has apparently only been presented by [FY] from about mid-July 2018. I note that by that stage he had completed any benefit he was going to get from the STOP Programme. In itself, that shows that although he was attending STOP, for a considerable period of time even after he had finished it, he either had not learned or had refused to apply what he had

learned, about the meaning of consent. It shows a lack of empathy and empathy itself is a protective factor against recidivism.

[13] I must recognise the impact of the personal aggravating factors that [FY] that was on bail and subject to a plan for similar offending at a similar level of seriousness and was attending the treatment course while committing the offences. I guard against any double-counting to the extent that that may be reflected in the aggravating factors of the offending but I do not believe it has been. His attendance at the course must have alerted him to the seriousness of his actions and yet he continued. Of significance, he continued to do so without those who were in close association with him (performing in one way or another, to one degree or another, a monitoring role), being aware of what he was doing.

[14] Sentencing in the Youth Court requires consideration and application of a number of principles. I refer in particular to s 5 Oranga Tamariki Act 1989. In particular I must be guided by the principles of the need for family participation in decisions affecting the young person. The relationships between the young person and family must be strengthened and maintained if possible. I must assess the impact of decisions on the welfare of the young person and stability of the family. I must assess the young person's wishes and efforts to obtain support for the young person and family. I must bear in mind that decisions should be made within a time frame appropriate to the young person's sense of time. I must adopt a holistic approach, taking unlimited consideration of age, identity, cultural connections, education and health of the young person. I bear in mind s 6, that in all matters the welfare and interests of the young person must be the first and paramount consideration.

[15] I refer to and apply the principles set out in s 208. I must recognise any measure for dealing with the offending should be designed to strengthen the family, and to foster the ability of the family to develop its own means of dealing with the offending. I must apply the principle that a young person committing an offence should be kept in the community as far as is practicable and consonant with the need to ensure the safety of the public. I emphasise that in that particular provision, there is a deliberate reference to the safety of the public. I must acknowledge that the young person's age is a mitigating factor in determining whether to impose sanctions and the

nature of any such sanctions. Any sanctions should take the form most likely to maintain and promote development within the family and take the least restrictive form appropriate in the circumstances. Any measure for dealing with offending should, so far as practicable, address the underlying causes of the offending. I must consider the interests and views of the victims and any measures must have proper regard for their interests and the impact of the offending upon them.

[16] The application of the principles is mandatory. It is fundamental. It is what distinguishes the exercise of sentencing for proven offending in the Youth Court from sentencing for proven offending in an adult Court.

[17] The sentencing provisions themselves are set out in ss 282 and 283. Section 283 specifically divides the Court's responses into a hierarchy. Many of the submissions today have been addressed towards that sentencing hierarchy and the requirement that I must not impose any sentence which exceeds that which is sufficient to meet the aims and principles of sentencing. The least restrictive outcome is required. I will not attempt to summarise the various categories. I am aware that the parent or parents of the victims are present and I refer to these matters as much as anything to assist them to understand what has been the subject of submissions today. Plainly, of the final three in the hierarchy, group 5 refers to supervision with activity, group 6 to supervision with residence, and group 7 to convict and transfer to the District Court, which must only be reserved for the most serious of offending.

[18] The family group conference, in its wisdom, recommended supervision with activity to be followed by supervision. The main thrust was to provide further therapeutic intervention. In effect then, the period of time permitted by that combination would provide a not dissimilar time frame to the previous plan for the offending which has now being dealt with. I cannot avoid the reality that that earlier plan did not prevent the offending now before the Court. That approach did not succeed but of greater concern still is the fact that the therapy did not reveal to anyone the extent of [FY]'s continuing criminal behaviour. It is also plain he needs further psychological evaluation and assessment. It is clear that the revelation of the continuing offending was a total surprise to all involved under the previous plan. It

appeared to be working well. It appeared to be working with [FY]'s full co-operation and genuine participation.

[19] The social worker refers to [FY]'s "story-telling" as a strength but there comes a time in life when respect for the truth on important occasions and appreciating the seriousness of those occasions must override any value placed upon an ability to plausibly present untruths. That is one of the very things about which the victims' family complains. I am unable to tell from the information I have whether [FY] believes his stories when he tells them.

[20] In 2017 there were signs that while at school [FY] was being abusive and intimidating towards other pupils and staff. He had to stop working with a female therapist in the STOP Programme because of his attitude in 2017. Things, however, seemed to be settling in 2018 when the new offending was revealed because of the courage of the younger victim.

[21] The social worker's report details matters of which I was previously only aware to a limited extent, or unaware. As a result of the latest offending, [FY]'s departure as planned to [overseas] has been delayed. He has been held on remand in Youth Justice facilities which has itself been both distressing and disruptive, with several moves between facilities, not necessarily of [FY]'s making. I accept it has itself been a penalty. It has been difficult for him to cope with and it must be remembered it was linked to risk management.

[22] In mid-July, it appears [FY] told the social worker that he has learned from what has occurred and he will not re-offend but in light of his earlier denials, I accept not now repeated, and in light of his obvious verbal facility, it is difficult for me to be sure that this is a reliable position.

[23] As I have said already, intensive treatment is plainly required and all involved with [FY] acknowledge that. The social worker's report lists a number of underlying causes and risk factors to be addressed. It is plain [FY]'s personality does not make treatment easier. It is clear he struggles with imposing and applying boundaries upon himself. The family group conference recommendations promoted disposition of the

older charges and supervision with activity for the current charges. I accepted I needed a plan and report. It is fair to say I am now very troubled by the information which is before me.

[24] The Crown has, on late request, assisted with submissions. I am grateful to both counsel for the detail in their submissions. I apologise for the short time frame available to both and the impact that that short time frame has on the ability of each to respond to the other.

[25] The Crown's position is there is limited scope for continuing intervention in the Youth Court, largely really because of the age of [FY]. The aggravating factors and personal aggravating factors indicate a lengthy rehabilitative period is required, notwithstanding penalties paid thus far. The Crown emphasises that the least restrictive outcome is, in its submission, conviction and transfer to the District Court, with emphasis on a lengthy term of intensive supervision, accompanied by judicial monitoring. This would allow for further mental health assessment. I am reminded that I cannot ignore the fact that his past performance of the STOP Programme has in a sense only served to raise levels. Supervision with activity is, in the Crown's submission, plainly inadequate within the principles of Youth Justice and given the limited scope of any such sentence, the same applies to supervision with residence. The Crown submits it is proper to have regard to the need to protect the community, as well as provision for [FY]'s healthy rehabilitation and development. Community safeguard comes with the entry of a conviction. I am referred to the decision of *R v MC*[1] at paras [16] to [18], which list positive outcomes which can flow from the entry of a conviction.

[26] Mr de Buyzer has put a number of submissions before me. Dealing firstly with his written submissions, he reminds me of the principles which must be applied and in particular emphasises the need to place family at the centre of decision-making, to emphasise diversion from formal criminal proceedings, to protect vulnerable young people, to provide that sanctions should be the least restrictive possible, taking into account age and placement in the community where possible. Any measures must

[1] *R v MC*[2015] NZYC 48

address the underlying causes and I must emphasise the position of the victims and the impact of the offending upon them. He reminds me under s 284 I must take into account the nature and circumstances of the offending. He accepts that there was serious offending here, with manipulation or intimidation conceded. He reminds me that I must take into account [FY]'s personal history and circumstances but he points out that the Youth Court will embrace a wider jurisdiction from July 2019. He reminds me of the impact that the remands in residence have had for some six months now.

[27] While I must take into account attitude to offending, and Mr de Buyzer concedes there has been some vacillation by [FY], that needs to be seen in the context of what is known about his psychological position. When all is said and done, [FY] has accepted responsibility and written apology letters. He reminds me that I must bear in mind the family's response and the efforts to make amends. It is clear the victims are very angry and no practical amelioration is able to be offered at this point. He reminds me, and he accepts, that prior offending can be taken into account. He appears to concede that in this case that is highly relevant. He reminds me of the importance of the family group conference agreement, with the focus on treatment. Mr de Buyzer, in oral submissions, took that matter further and submitted that the police are not in a position to challenge in any meaningful way the agreed recommendation from the family group conference because of the effect of s 267.

[28] I am asked to consider in that regard what appear to be potentially overt comments of His Honour Judge N Walsh in *R v J P*[2]. His Honour said that the Youth Advocate had rightly pointed out that the Crown was "effectively stuck with the FGC plan." His Honour does not really enlarge upon what he means and neither does it purport to be a reasoned decision interpreting s 267 but in any event, as Ms Bennett has point out, the actual entirety of s 267 would not appear to preclude a challenge. In practical terms, I am not bound to accept the agreement from the family group conference and in practical terms, that argument appears to have somewhat limited scope.

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[2] *R v J P* [2016] NZYC 310

[29] Mr de Buyzer says that the important point is to identify and treat the underlying causes. In this case the least restrictive outcome which achieves identification and treatment of the underlying causes is that which is recommended or in the alternative, supervision with residence followed by supervision. He challenges that the situation has reached the point where there should be conviction and transfer to the District Court. He cites a number of cases where the Youth Court has retained jurisdiction for, amongst other things, serious sexual offending and that appears to be usually where there is sufficient time to complete a programme and available treatment options. So he says that the least restrictive outcome becomes supervision with activity followed by supervision.

[30] The decisions to which I am referred are *R v [name 2 deleted]*[3]. The young person in that case was 13 years of age at the time of the offending. It was a single event with several offences. This is more serious offending.

[31] The second decision is *R v TW*[4]. The young person was of similar age to [FY]. There were a number of serious charges but the distinguishing factors for this case are that it was offending while subject to programme and plan, and repetition of serious violence offences. Also in *R v [name 3]*, the only option in the adult Court was a full custodial sentence and the Judge concluded that that would do more harm than good. It is abundantly clear in this case that the Crown's argument is for conviction, transfer and intensive supervision.

[32] The next case referred to is *R v ER*[5]. It was a similar situation but with less serious charges. The age of the young person is not clear and the Judge kept the matter in the Youth Court "by a very fine margin." Then there is *R v JP*[6]. The young person was of a similar age, and highly vulnerable. There was offending on bail. There were signs of change. The young person displayed genuine and sincere remorse. The Court was adopting what was described as a well-designed programme.

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[3] *R v [name 2]* [2014] NZYC 222
[4] *R v TW* [2014] NZYC 380
[5] *R vER* [2016] NZYC 125
[6] *R v JP* [2016] NZYC 310

[33] The issue, plainly, lies in the tension as to where the most rehabilitative outcome can be achieved. There is no indication that anyone is seeking anything other than that outcome. It is clear that a rehabilitative sentence is called for. In effect, a number of penalties have already been paid by [FY]. The difficulty that I have is that I still cannot be satisfied that [FY] has taken full responsibility unreservedly. I have referred already to the late acceptance, sometime after he had completed the STOP Programme, that his actions were wrong and by that stage, he is intelligent enough to have known full well the jeopardy that he was facing. [FY] has shown himself to be adept at verbal manipulation. I refer to the victim impact statements. I refer to the fact that everyone dealing with [FY] on the first sentence on the first plan was surprised when the subsequent offending was revealed. He was able to appear fully compliant with STOP and able to appear to be making very real progress. Those matters are important because they heighten risk. Protection of the community is a proper aim for sentencing. We cannot ignore the fact that this offending occurred at a time when, as the victims' families have said, they were unable to see any measure which provided for the protection of their sons and the community. Given this, the risk levels to the community must therefore be seen as high at this point in time and the only amelioration of that comes by way of [FY]'s letters of apology and statement that he accepts he is in the wrong. I can only infer that the risks at this point remain high.

[34] On the basis that I have taken into account all of the matters to which I have been referred, and the principles which I must apply, I am satisfied that nothing short of conviction and transfer to the District Court will meet the aims of sentence, the Act, accountability and provision particularly for the safety of the community within the binding principles. I am satisfied that anything short of that, including retention in the Youth Court with a sentence of supervision with residence, would not be sufficient to address all of the principles and the concerns which arise in this case.

[FY] will therefore be convicted of this offending. I transfer the charges to the District Court. I will obtain a pre-sentence report to address in particular intensive supervision.

J E Maze
Youth Court Judge