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**<http://www.legislation.govt.nz/act/public/1989/0024/latest/DLM155054.html>**

**IN THE YOUTH COURT  
AT NORTH SHORE**

**I TE KŌTI TAIOHI  
KI ŌKAHUKURA**

**CRI-2017-244-000079  
[2018] NZYC 574**

**NEW ZEALAND POLICE**  
Prosecutor

v

**[ES]**  
Young Person

Hearing: 19 September 2018

Appearances: Senior Constable N Paterson for the Prosecutor  
G Anderson for the Defendant

Judgment: 19 September 2018

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**NOTES OF JUDGE A J FITZGERALD ON SENTENCING**

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[1] [ES], when Judges make important decisions like the one I must today, we cannot just say what the result is; I need to give reasons for how I make my decision. That is for a variety of reasons, including that a range of people will want to know how the decision was made, not necessarily just those people in the room today.

[2] You have admitted the following 12 charges;

- (a) Six charges of assault on a female.
- (b) Two for kidnapping.
- (c) One each for the following; threatening to kill, injuring with intent to cause grievous bodily harm, wounding with intent to cause grievous bodily harm and assaulting the police.

[3] Your former girlfriend, [FG], is the victim in relation to all of the charges except the assault on police charge. I acknowledge the presence of [FG], her mother and other supporters here today. The offending against [FG] occurred [over a 7-month period]. The assault on police occurred in October 2017 when they arrested you for the other offending.

[4] Today, I must decide what sentence to impose for all of the charges. There are a whole range of things I have to take into account before deciding what to do. That begins with the objects and principles that are set out in the law that applies in the Youth Court. That is contained in the Oranga Tamariki Act 1989. It is not necessary today to go through all of those objects and principles; perhaps the most relevant in your situation is the need for me to hold you accountable for what you have done, to encourage you to accept responsibility for it but also to acknowledge your needs and give you the opportunity to develop in responsible, beneficial and socially acceptable ways.

[5] There are then factors that I must take into account when it comes to sentencing. The first of those is the nature and the circumstances of the offending.

[6] The following brief summary of the offending is taken from the seven-page caption summary that the police provided, starting with the assault on female charges;

- (a) The first involved you pushing [FG] to the floor, grabbing her hair, shaking her aggressively, grabbing and vigorously twisting her wrists causing severe pain, kicking her, swearing and calling her names and then throwing a deck chair at the car that she was in as your mother drove her away from the property.
- (b) Secondly, holding a military-style knife, the blade of which was serrated on one side and sharp on the other, and holding that inches from [FG]'s neck. She feared that you were going to cut her throat because you had threatened to do so in the past.
- (c) Thirdly, punching her in the legs with your fist and then in the stomach so hard that you winded her, knocking her to the ground and then grabbing her by the throat and choking her, leaving a red mark.
- (d) Fourthly, grabbing her under both arms, lifting her off the ground, throwing her onto the ground with such force that her body bounced off the floor. She suffered pain to her shoulder, back and side.
- (e) Fifthly, grabbing her by the hair, dragging her out of the house, throwing her onto a deck. When she came back inside, you grabbed her again by the hair. The summary goes on to say that on several occasions you kicked her in the legs and shins, causing bumps and bruises.
- (f) Sixthly, punching her in the face with a closed fist, knocking her backwards, causing bleeding and a swollen lip.

[7] The first of the kidnapping charges relates to you keeping [FG] detained in your bedroom and refusing to let her leave. When she tried to do so, you would prevent her by standing or sitting in front of the door. She felt intimidated and if she

tried to leave you would hurt her. You kept her in your room for hours at a time and sometimes through the night. If she needed to use the toilet, you would follow her and escort her back to your room. There were two occasions when you locked her outside the house because you did not agree with the dress that she was wearing.

[8] The injuring with intent to cause grievous bodily harm charge and the second kidnap charge relate to you throwing [FG] around the room before holding her down on your bed and repeatedly punching her on the leg, causing bruising. She was crying and asked you to stop. At one point, she managed to free herself. You retrieved a bat which you swung at her head, hitting her on the forehead, forcing her to fall back on the bed. She was in pain and feeling dizzy. When she managed to raise herself from the bed you grabbed another one of your weapons, a wooden hammer, and swung it at her, attempting to hit her in the head but striking the wall instead. Damaging the wall further angered you and you started punching her and she ended up on the floor. You continued to attack her while she was on the floor, stomping on her as she tried to protect herself by rolling up into a curled position. You continued to attack her and kicked her in the chest about four or five times. She was having difficulty breathing and was hyperventilating. You were yelling and swearing abuse at her and refused to let her leave the room. Her injuries on this occasion included a bump to the forehead, a sore throat, severe bruising causing difficulty walking and sleeping.

[9] The threat to kill charge relates to you telling [FG] that, if she broke up with you, you would kill her. She was shocked, scared and believed that you would do so.

[10] The wounding with intent to cause grievous bodily harm relates to you putting your hands around [FG]'s neck on numerous occasions, applying pressure. In one such incident, [FG] was lying on her back and you were straddling her, pushing your hands onto her neck. She was unable to stop you doing so because you were too strong and she felt her head pounding and was unable to breathe. She was unable to be sure how long that you strangled her for but it was enough for her to black out and she thought you were going to kill her. When you eventually got off her, allowing her to breathe, you were standing over her with both fists clenched.

[11] It was on 15 October 2017 the police then came to visit you, having received a complaint for that offending. You were belligerent and disrespectful and then swore at the officers and threatened them. You advanced on one of the officers and appeared to be out of control. When you were back at the police station you kicked and punched the walls of the interview room and eventually were restrained by the use of pepper spray.

[12] This was therefore brutal, physical violence that continued over a period of about seven or eight months against a vulnerable victim; vulnerable in the sense that she was much smaller than you physically, unable to defend herself against your abuse and too scared to tell others about what was happening because of the repeated threats that you had made about what you would do if she did tell anyone.

[13] The next of the factors I must take into account concerns your personal history and characteristics and your social circumstances. [Personal details deleted]. You are [age deleted]. You were 15 at the time of the offending.

[14] There were notifications to Oranga Tamariki about care and protection concerns in your home from the time that you were 18 months old. There were then concerns about your behaviour from a young age. The first notification to Oranga Tamariki when you were a baby related to you disclosing having been hit by both parents. As well as physical violence, you were subjected to emotional abuse. That went on for a long period of time. In the forensic assessment, you scored in the clinically significant range for post-traumatic stress as a result of your experiences of abuse and your scores on the depression, anxiety and disassociation scales were mildly elevated. By the age of 12, you were displaying defiance towards authority figures, you had difficulties controlling your behaviour and you started becoming associated with an anti-social peer group, most of whom were older than you. You began to use alcohol and marijuana to excess. Your attendance at school became increasingly erratic and there were reports of you assaulting and threatening to kill fellow students. You began to obtain weapons which you stored in your bedroom and, on occasion, used them to threaten others as well as carrying them for your own protection. You meet the criteria for severe conduct disorder adolescent onset.

[15] In the report which is dated in July this year, you are assessed as high risk of re-offending. That risk is associated with factors such as substance abuse, relationships with delinquent peers, anger-related issues, poor relationships with your father and your mother's difficulty controlling your behaviour. In terms of potential victims of any future violence, that was seen as being most likely in the context of a close relationship rather than risk to the public generally. The report writers note that the estimated risk that I have mentioned only referred to your current risk and it may no longer be accurate within a few months. Your risk level can be reduced by you addressing those risk factors that I mentioned and also by working to build your strengths and the protective factors that were identified. Those include your capacity to engage well with pro-social adults and an ability to express and use skills that you have learnt in courses. You have demonstrated an ability to engage in a structured and supportive environment and you have a strong connection with your family and your Māori culture.

[16] After picking up on those things the authors of the report make recommendations, all of which are aimed at reducing the risk of offending, and they include that priority be given to the home environment and supporting the family in providing appropriate parental supervision, managing aggressive outburst and encouraging pro-social goals. Having a mentor, ideally a Māori male mentor, who can work with you as well as seeking employment and having ongoing specialist services to assist with alcohol and substance misuse as well as attending an appropriate activity programme, having psychological intervention to address the impact of your actions on others as well as your relationship with females to explore psychological issues are identified in the assessment as all being important so as to reduce the risk of further offending.

[17] The report writers also emphasise the need for you to have access to age-appropriate psychological treatments and ones that would not be available to you if you were in the adult system. That would be youth-specific evidence-based programmes to address the issues that underlie your offending and avoid the risk of becoming victimised by being put into a correctional facility.

[18] The next factor is your attitude towards the offending. Both the police in one part of the submissions and also [FG] and her mother have expressed some scepticism about your expressions of remorse and the attitude of you and your family towards the offending. The police point out that initially you denied the offending, saying that [FG] was lying, and your family supported you in that. Other sources suggest that you demonstrated some remorse and that that has developed as you have progressed through the ongoing therapeutic work and as your insight has increased. I accept that to be the case and note that the police say that your apology at the family group conference appeared to be given in a heartfelt manner.

[19] The next factor is the effect on the victim and the effect on [FG] has been immense. I have read her victim impact statement. It is difficult to measure the overall impact which is likely I think to be with her, if not for years, the rest of her life. Of course, as well as the physical injuries, some of which I talked about earlier, she has suffered in many other ways as well. For example, it has impacted on her schooling. Understandably, she did not want to go there and have people see the signs of physical injuries. She isolated herself from others. She had difficulty sleeping for a whole year, suffered anxiety, constantly on edge, she lost a lot of her friends over this time, she still lives in fear of you and has to put up with friends of yours seeing her at work, giving her funny looks, calling her names, saying horrible things to her. It is likely that her experiences will impact on future relationships.

[20] No agreement was reached at the family group conference about what the outcome should be and that is why today I have heard the submissions that both the police and Mr Anderson have made about the two options put forward.

[21] Finally, the underlying causes of the offending I think are probably apparent from everything I have already said. To a very large extent, your behaviour is the result of the horrible way that you were treated during your upbringing and the appalling things that you experienced as you grew up. That of course is not to excuse it, explains it, but you are now old enough to accept responsibility for your behaviour and do something to address it.

[22] The social work report concludes with the two options that have been put forward today. They are the two highest orders that are available within the Youth Court; supervision with activity which Mr Anderson advocates for on your behalf, and supervision with residence which is what the police advocate for which would see you go into a youth prison for a period of time. Both of those orders can be and will be followed by a period of supervision. I will return to say something about that later.

[23] In some of the material I have read, there is mention of the sentence you would face if you were in the District Court and there is no dispute; if you were there, you would go to prison. In some ways, that is a bit unhelpful and irrelevant because you are not in the District Court; you are in the Youth Court, which is not the District Court for young people. It is a completely different Court governed by completely different objects and principles. I mentioned those at the outset.

[24] Amongst the many differences is, for example, a strong emphasis on providing opportunities for rehabilitation because young people do have a greater capacity than adults to learn and change behaviour. As well as that, the use of custodial sanctions are to be a matter of last resort and when they are used they have to be for the shortest possible period. It is not just something that comes from the Oranga Tamariki Act; it is something that is a feature of the international conventions, to which New Zealand is a party, which the courts are required to have regard to when deciding on decisions such as the one I need to make today.

[25] Also, rather than young people being seen as autonomous, like individually responsible for their actions, young people in the Youth Court need to be seen in the context of their family and wider family. In that regard, wherever possible, family are to be involved in the decision-making and, wherever possible, the relationship between a young person and family strengthened in the responses to behaviour. I just mention that because that was something the forensic report I mentioned earlier on emphasised; that adequately reducing your risk involves finding the solution within the context of your family. Both plans put forward today aim to do that but obviously in different contexts initially, either within custody or not within custody.



[26] I acknowledge that there are positive signs of the good progress that you have been making and they are an encouragement towards capitalising now on the good progress that you have made. The report from Te Atea Marino regarding your alcohol and drug assessment and treatment describes you as being a pleasure to work with. An updated report has been provided today and you continue to receive ongoing one-on-one counselling but there has been no reported use of alcohol or other drugs for the entirety of your time with the service; this being from January this year through to now. The Man Alive programme say that you have been engaged there since February this year, that you have learnt to control your anger, to talk more about your emotions, your self-esteem is improving as your view about yourself has started to become more positive. They say that you have always shown a willingness to make changes to improve and to learn from your mistakes. They say that you are now more positive than you were before.

[27] You have been attending the Korowai Reconnect programme. You started there in May this year. They describe you as a respectful young man who is very easy to get along with. You have 100 percent attendance there and you engage well in their programme. You particularly love the tikanga Māori aspect. They too say that you have started to talk more freely about your feelings, that you have never acted out with physical violence towards anyone at the programme when you have been frustrated or angry. However, they say that you do get in a bad mood because you miss being home with your family and that is where you sometimes disengage but after talking things through they say you return to your normal self and re-engage in the programme. They say that you have matured a lot since the start of the programme.

[28] You first appeared on these charges on 15 November last year. I was the Judge that day. You were remanded in custody. Two weeks later, you were remanded on bail and have been on bail since with a 24 hour curfew and a number of other conditions and strict conditions. There have been no bail breaches throughout that whole 10 month period and, as well as that, no further offending of any sort.

[29] The plan for supervision with activity would see you return to live at home. You would still have a curfew. You would continue to have to engage in all of the therapeutic work that you have been engaged in, so that would be in relation to alcohol

and other drug counselling as well as continuing to abstain from such substances, engaging in psychological counselling, functional family therapy and the Shine programme for your mother. It has now been explained that as part of an activity order you would be involved in the Mind programme, with which I am familiar. That involvement, Monday through Friday, would be woven into the plan and fit around the other things in it which do include the opportunity to start casual work. The supervision with activity order is a six month order to be followed by supervision.

[30] The residence plan would see you placed in Korowai Manaaki, which is the youth residence in Auckland. There you would need to abide by the rules of the facility. The supervision with residence order has a maximum period of six months but you would be released at four months as long as you had not absconded, committed further offences and as long as your behaviour there was satisfactory.

[31] One of the youth justice principles is that you be kept in the community as far as practicable so far as the need to ensure the safety of the public and, as I have just mentioned, you have been in the community for some time now, doing well.

[32] Before I can impose the supervision with residence order, I would have to be satisfied that the supervision with activity order is clearly inadequate. I am not satisfied it is inadequate. I know that some hold the view that the only meaningful way someone can be held accountable is to send them into a prison. I think that is only really if people do not realise what happens in prison. It would be a completely different situation had you not been 10 months on restrictive conditions without any breaches or any further offending and had you not been engaging so well in the programme. I need to emphasise that on top of that 10 months you are now going to be sentenced to six months of supervision with activity, which does not have an early finish date at four months, to be followed further by supervision, which is a remarkably long period of time to be subject to the type of restrictions you have been and I am not satisfied that is clearly inadequate as a means of holding you accountable.

[33] Perhaps most importantly of all, though, the things that the forensic report identified as those most effective to reduce the risk of re-offending, which really are

to enable the ongoing engagement with the various programmes that you have been involved in and doing well in.

[34] The six month supervision with activity order is made on the basis of the plan that was presented with the addition of the Mind Programme. I am not making supervision order today, the one that needs to follow the activity order; I think it would be important to take stock of the situation towards the end of the activity order and make sure that the contents of any plan built on the progress that has been made during the duration of the activity order.

[35] I am assigning 6 March 2019 at 2.15 at this stage as the date for the making of the supervision order that would follow the activity order and ordering the social work report and plan for that.

A J FitzGerald  
Youth Court Judge