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

IN THE YOUTH COURT &
FAMILY COURT AT **CRI-2019-204-000017**
AUCKLAND **[2019] NZYC 271**

I TE KŌTI TAIOHI
KI TĀMAKI MAKAURAU

NEW ZEALAND POLICE
Prosecutor

v

[XA]
Young person

Hearing: 10 June 2019
Appearances: D Robertson for the Prosecutor
F Godinet for the Young Person

Judgment: 10 June 2019

ORAL JUDGMENT OF JUDGE A J FITZGERALD

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[1] [XA], who is 14 years old, is here at the Auckland Youth Court crossover list today.

[2] In relation to [XA]'s Youth Court case, he has admitted eight charges. An aggravated robbery on [date deleted] 2018; the victim was [employment deleted] who was threatened and stabbed in the shoulder by [XA] with a screwdriver, but not so as to penetrate the victim's clothing. Wilful damage by scratching graffiti on a bus stop. An assault, which was a technical assault, of a victim who told him to stop the graffitiing. [XA] did not actually hit the victim but he attempted to. Disorderly behaviour by yelling across the road at the victim, who had retreated there. Obstructing police, who were driving by and intervened. Also, three charges of escaping custody.

[3] [XA] has been remanded in custody under s 238(1)(d) since 31 January this year and he has been placed at [a youth justice residence] in [location A], which is towards the other end of the country from his whānau, who live in [location B].

[4] A s 333 forensic report was ordered at [XA]'s first appearance in the Youth Court on 31 January 2019 but was not completed until 3 May 2019.

[5] A FGC, held on 26 February 2019, did not reach agreement about anything. That was partly because the s 333 assessment had not started. In relation to custody. it was because there was no suitable placement to be bailed to in the community. However, it was noted that the care and protection social worker had made a Hub referral, but there was no availability.

[6] Another FGC was meant to occur before 6 May 2019 but did not, because the s 333 report had still not been done and there was still no placement available for [XA] in the community as a result of the Hub referral. It was also noted that it was significantly important that a rehabilitative placement be found for [XA].

[7] We now, finally, have the s 333 report and know that [XA]'s rehabilitative needs are significant and complex. They include assessment and treatment for his sexualised behaviour and sexual risk. It must be emphasised, however, that [XA] is

not facing any charges in the Youth Court in relation to sexual offending. That is an issue that has been raised in the context of his Family Court care and protection proceedings but is also something that has been picked up in the s 333 report.

[8] That report recommends finding for [XA] an emotionally available caregiver where respectful relationships are fostered and [XA] can observe and model positive behaviour from adults around him. Structure, stability and rule-setting are also necessary. It is also recommended that [XA] should be referred to appropriate specialist Mental Health services for further diagnostic clarification. [XA] has particular strengths in te ao Māori, kapa haka and te reo, all of which need to be nurtured.

[9] A youth justice FGC was held last Wednesday, 5 June. Although there is no mention in the record of that conference of any victim-related issues, such as reparation and apologies being addressed, I am told today they were. Firstly, it was accepted that it is not possible for reparation to be paid to the victims here. An apology was made at the family group conference, in fact, a detailed, heartfelt, sincere written apology was provided and I have seen a copy of that today. An edited version of it has been handed on now to the police so it can be passed to the victim. With that done, it is agreed that all victim-related issues are now addressed.

[10] It is also accepted that the more than four months [XA] has spent on remand in custody in a residential youth justice facility is more than sufficient to hold him accountable and encourage him to accept responsibility for the offending. In fact, it equates to a supervision with residence order for the maximum period, with the mandatory release at two thirds for good behaviour. There is no way that [XA] would have been facing such an order if it was only his Youth Court matters being dealt with.

[11] On the face of it, therefore, the Youth Court proceedings are ready to be finalised today. At the FGC on Friday [XA]'s whānau and youth advocate were in favour of the proceedings being resolved by the making of an order under s 282 of the Act. Police youth aid commented that they would agree with the making of a s 282 order, but only on the basis that a suitable placement was found for [XA].

[12] That brings me to the situation with regard to [XA]'s care and protection proceedings. In the Family Court, on [date deleted] 2019, a declaration was made that [XA] is a young person in need of care and protection on the grounds set out in ss 14(1)(a) and (d)(i) and (ii). When making that declaration Her Honour Judge Somerville said, amongst other things, the following:

> "The concern of Mr Weeks [who is [XA]'s Family Court lawyer], and quite rightly so, is that [XA] is currently in a youth justice residence because of the Youth Court oversight. He has been there already for nine weeks but it is very clear that that is not the right place for [XA] when there are care and protection issues, also, because the declaration has now been made by the Court that [XA] needs to be cared for by the Ministry, ensuring that the care and protection issues are addressed. The Youth Court does not provide care and protection oversight. The Youth Court addresses offending under the Act, and accordingly, there is concern that the Youth Court residence has been used inappropriately for the care of [XA]."

[13] Almost unbelievably, the situation is much the same today. I was told at the outset today that no community placement had been found and that there was no care and protection facility for [XA] to go to. [XA] has support from members of his whānau today and they have told me they would dearly love to have him home. However, they accept that is not realistic, given that they live in [location details deleted]. [XA]'s care and protection social worker has been looking for placement options and waiting for the outcome of the referral to the Hub, but apparently nothing has been found.

[14] Everyone recognises that a very specialised place is required for [XA] with suitably skilled caregivers to manage his behaviour and risks but, seemingly, nothing has yet been found despite months of searching. I accept that things have been complicated by [XA]'s refusal to engage in the STOP programme in [location A], and that things are yet to be organised with the SAFE programme in [location C], but that has been known about for a long time and should not have stood in the way of the Chief Executive or social worker taking steps to make sure that what is needed to address [XA]'s care and protection concerns is organised.

[15] What Oranga Tamariki have wanted me to do today is not resolve the Youth Court proceedings but keep them going solely for the purpose of detaining [XA] in the youth justice residence so that they can continue to search for a suitable place for [XA] to stay. Another month was suggested. If I do not order that, I was told earlier on

today that Oranga Tamariki would be looking at putting [XA] up in a motel with a tracker. However, I am told now that there is a place for him at [service deleted] which is a community placement in [location C]. It seems some therapy and wrap-around supports can be organised. Of course, being in a motel with trackers would be completely inappropriate, but so too would ongoing remand in a youth justice residence when the time has come for the youth justice matters to be resolved.

[16] In deciding what to do I have reminded myself today to look back to the objects and principles of the Act, to start with. For example, there is the important youth justice principle that criminal proceedings not be instituted against a young person just for the purpose of providing assistance or services to address welfare-related issues. Equally, it must be completely unacceptable to continue Youth Court proceedings solely for the purpose of addressing unmet care and protection concerns.

[17] A comment was made in submissions earlier today for Oranga Tamariki about [XA]'s situation being unusual. Whilst I acknowledge that it is serious and complex and, of course, every young person's situation is unique, the situation he faces in terms of the issues for today is not at all unusual. In fact, I would say it is common in all crossover lists to have young people in need of care and protection being held in youth justice facilities only because a suitable placement cannot be found for them in the community. The reality is, until we had crossover lists, that problem was just going unchecked. Now that we have a forum where it can be discussed, it is common to a very large proportion of cases in the lists.

[18] The attitude that Oranga Tamariki have brought to this, that it is acceptable to be using the youth justice powers and facilities to address care and protection problems, clearly still prevails. Even under the current legislation that is completely inappropriate but it will be even more so under the changes to the Act which come into force on 1 July this year.

[19] If I was to do what Oranga Tamariki had asked me to do today I believe I would not be applying the law correctly, and also would be acting in breach of obligations the Court has under the international conventions to which New Zealand is a party, in particular, the UN convention on the rights of children and the Beijing rules on juvenile justice.

[20] As well as that, I think it would send a message that this attitude and practice within some, but not all, offices of Oranga Tamariki is acceptable and would be permitted by the Court. In my view, it cannot be, and it is not today, and I do not think should ever be again.

[21] So, firstly, in relation to [XA]'s Youth Court matters, I have carefully considered all of the circumstances of his case and, with the agreement of all concerned, all of [XA]'s charges are discharged under s 282 of the Act.

[22] We have had a discussion today about the plan that has been presented regarding [XA]'s care and protection. The plan that has been provided is, in broad terms, setting out those things that need to be provided to address [XA]'s need for care and protection. In the plan there are a number of dates by which it is indicated that referrals will be made. One option was to adjourn to obtain a more detailed plan. After discussion, though, I am prepared to proceed on the basis suggested, which is to approve the plan as it is, monitor the implementation of it, and call for an early review.

[23] Mr Weeks is not opposed to that course of action. On that basis, the social worker plan dated 31 May 2019 is approved. The s 78 interim custody order is discharged. An order is made under s 101 of the Act granting custody of [XA] to the Chief Executive of Oranga Tamariki.

[24] There is to be a formal review of that plan in three months' time, however, I just want to monitor the implementation of that plan. For that purpose, the matter is to be called in the crossover list on 15 July this year at 11.45 am. On that date, I want a report from [XA]'s care and protection social worker about the progress being made, organising all of those things that are contained in the plan.

[25] There has been discussion today about an order being made under s 110 of the Act, appointing the Chief Executive an additional guardian of [XA]. In relation to that, I require that an application be filed and served, and would expect that such order could be made on 15 July this year, unless there is any opposition to the making of the order, in which case directions might be required to organise a hearing.

[26] [XA], can I just summarise what that was all about, and I will just start with your Youth Court charges. I have made an order now that has brought to an end the eight charges that you have had in the Youth Court. We call it a s 282 order, but the main thing you need to know about it is that it will leave no record that you had come to the Youth Court in relation to those charges, so, they are all finished completely.

[27] What we all want to focus on now is that you get the help and support you need to keep on a good pathway in the community, and so a lot of work is going to be happening in relation to your care, your schooling, nurturing your interest and talents in te ao Māori, and your protection. Today I have approved a plan which I am hoping will see all of that start happening soon and will be keeping a close eye on the progress being made. The next court date is 15 July when I will get a report from your social worker about how things are going.

[28] This decision needs to be typed back and a copy placed on both [XA]'s Youth Court and Family Court files. I also want a copy to be sent to the Regional Managers of Youth Justice and Care and Protection at Oranga Tamariki plus a copy to the Commissioner for Children's office.

A J FitzGerald
Youth Court and Family Court Judge