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**IN THE YOUTH COURT
AT AUCKLAND**

**I TE KŌTI TAIOHI
KI TĀMAKI MAKAURAU**

**CRI-2018-204-000238
[2019] NZYC 436**

**NEW ZEALAND POLICE
Prosecutor**

v

**[KM]
Young Person**

Hearing: 9 September 2019

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

Judgment: 9 September 2019

NOTES OF JUDGE A J FITZGERALD ON SENTENCING

[1] [KM] is here today in the crossover list and I have both his Youth Court and Family Court proceedings before me. I have just explained to [KM] and everyone else present that in relation to his Youth Court charges, I am making a supervision order today and, in relation to the Family Court proceedings, approving the latest care and protection plan.

[2] The reason for announcing the result first and explaining the reasons why later is that it will take a while to set out all of my reasons because of the complex history to [KM]'s case and the complex range of issues [KM] has which need to be catered for and I did not think it appropriate to keep [KM] waiting to know the outcome while I talk about all that. I begin with the Youth Court matters.

[3] On 13 August 2018, Judge Bidois imposed a six month supervision with activity order in relation to all the charges [KM] faced at that time. That order was to take effect from 4 September 2018. The charges were:

- (a) Theft of a screwdriver and aviation snips on 7 February 2018.
- (b) Unlawfully taking a motor vehicle between 7 and 8 February 2018.
- (c) Aggravated robbery of a liquor store in [location deleted] on [date deleted] 2018.

[4] The supervision with activity order also replaced a supervision order which had previously been imposed on [KM] for 18 previous offences he had committed. For those 18 charges, he was sentenced to supervision with residence for six months which was then followed by the supervision order for 12 months. It was that supervision order that was cancelled and replaced by the supervision with activity order imposed on 13 August 2018.

[5] Under the supervision with activity order, [KM] was placed at [a rehabilitation facility] in [location deleted], but he absconded from there within a few weeks of arriving and then went on to commit the following offences in 2018:

- (a) Theft of tools and unlawfully taking a motor vehicle on 17 September.

- (b) Unlawfully getting into a motor vehicle on 19 September.
- (c) Unlawful taking of a motor vehicle on 23 September.
- (d) Unlawfully taking a motor vehicle, burglary, and aggravated robbery on 24 September.
- (e) Unlawful taking of a motor vehicle on 27 September.
- (f) Possession of tools for unlawfully taking motor vehicles and unlawfully taking a motor vehicle on 16 October.

[6] My job today was to decide what order to make in relation to those 10 charges I have just mentioned, but also to replace the supervision with activity order that has now been cancelled.

[7] I am not going to repeat the various issues that were covered by Judge Bidois when he imposed the supervision with activity order, nor talk about that offending, but of course I have taken it into account. Nor am I going to go over the issues Judge Harrison covered when she imposed the supervision with residence and supervision orders on 25 September 2017. But again, I have taken that into account and what those Judges said about all of that earlier offending can be read together with what I am saying now, so as to understand the full context.

[8] The approach I take to dealing with [KM]'s matters must be guided by the Oranga Tamariki Act 1989 which was recently amended, the changes coming into force on 1 July 2019. The general purposes of the Act to which I must have regard require promoting the wellbeing of [KM], as well as his family, whānau, hapū and iwi and in order to do that, the Act sets out a detailed and carefully defined list of requirements, duties and obligations.

[9] Wellbeing and best interests of a young person are the first and paramount consideration in all matters regarding care and protection issues and they are a primary consideration in relation to youth justice issues.

[10] The four primary considerations in all youth justice matters are: wellbeing and best interests of the young person; the public interest, which includes public safety; interests of any victim, and; accountability of the young person for their behaviour.

[11] General principles which must guide my decision include, again, considering [KM]'s wellbeing as being at the centre of decision-making; recognising his place within his family, whānau, hapū and iwi and also recognising his place within the community.

[12] Considering wellbeing as at the centre of decision-making includes respecting [KM]'s rights, including his rights under the UN Convention on the Rights of Children and the UN Convention on the Rights of Persons with Disabilities, it includes protecting mana tamaiti by recognising [KM]'s whakapapa and the whanaungatanga responsibilities of family, whānau, hapū and iwi; making and implementing decisions promptly and in a timeframe that is age appropriate and also taking a holistic approach, seeing [KM] as a whole person which includes but is not limited to his developmental potential, education, and health needs, whakapapa, cultural identity, disability, and age.

[13] There are also nine specific youth justice principles which I have regard to. I am not going to go through all of those but have taken them into account. They include: retention in the community wherever possible; age as a mitigating factor, and imposing the least restrictive sanction possible in the circumstances of the case. I also need to give consideration to addressing the causes underlying the offending when determining what the right response is and also giving consideration to the views and interest of victims.

[14] I just want to add some comments regarding the requirement in the Act to uphold [KM]'s rights under those UN Conventions. Our Higher Courts have said on a number of occasions previously that we should use those instruments as a helpful guide when it comes to interpreting the law and making decisions. Their status is now significantly increased given the requirement in the Act that the rights contained in those Conventions must be respected and upheld.

[15] As well as the Conventions, there are related international instruments to which New Zealand is a party which help guide Judges' decisions when it comes to applying the law which I should also mention, namely the Beijing Rules and the Riyadh Guidelines. Although they do not have the binding force under international law that the Conventions do, they still provide helpful guidance.

[16] The Rights Convention and the Beijing Rules include mention of the use of custodial sanctions as a matter of last resort, but emphasise that when they are used, they should be for the shortest possible period. The Rules also emphasise that the wellbeing of a young person must always be a primary consideration and that when it comes to balancing a young person's wellbeing against the need for public safety and sanctions, the scales should tip in favour of wellbeing.

[17] I next turn to the factors that must be taken into account on sentencing, set out in s 284 of the Act. First, there is the nature and circumstances of the latest offending. I have already mentioned what the charges are; the most serious of those are the aggravated robbery and burglary charges. The robbery was of a liquor store in [location deleted]. [KM] and two others entered that store, one of the three had a screwdriver and [KM] says that was not him. He accepts that he carried the till away. The burglary was of a convenience store. [KM] and others smashed the glass front door, tried without success to steal cigarettes, but got away with confectionary instead.

[18] As Ms George points out in her helpful submissions, the majority of all [KM]'s offences are property and dishonesty related, along with driving matters. Any charges involving violence or threats of violence appear to be when [KM] is charged as a party with other offenders. This participation is in line with opinions from others referred to in Dr McGinn's report that [KM] is a follower, rather than an instigator, and that he gravitates towards troublemakers and if he is told to do something, he will.

[19] Personal history, social circumstances, and personal characteristics. [KM] was born in [region A] and his paternal whānau are Māori from [region B]. There is not a large amount of information regarding [KM]'s cultural background and so I am unable to add much more to that brief comment. [KM]'s upbringing is described by his social worker as traumatic and tumultuous and underpinned by a criminal, violent, and drug-

infused whānau culture to which he was exposed from birth. In fact, his problems started before birth due to the alcohol his mother consumed during pregnancy, about which I will say more in a moment.

[20] As a result of that background, [KM] has a developmental history and severe behavioural problems and learning and social difficulties. There are extensive records of such things including him suffering rages, showing violence from as early as two years of age.

[21] Dr McGinn has diagnosed [KM] as having FASD and co-occurring ADHD. She says his behavioural and learning difficulties are exactly what she would expect given that diagnosis and that his difficulties are magnified by his postnatal disadvantage which saw him come to notice for serious care and protection concerns at a young age.

[22] In her detailed and helpful report, Dr McGinn explains that [KM]'s FASD which is a severe and pervasive neurodisability with behavioural symptoms, requires a different approach to reduce the risk of re-offending. Punishment has been shown to be ineffective to achieve that all-important goal. Instead, structure, support, and a high level of supervision are required in an environment that is controlled so as to reduce the opportunity for harm to make wrong decisions. Dr McGinn says care of a young person with FASD can safely be provided in the community as long as an FASD informed approach is used. In Dr McGinn's opinion, [KM] meets the criteria for mild intellectual disability and is therefore eligible for disability support services to enable him to succeed and transition successfully into adulthood.

[23] Having just said that, I am astounded to now be told today that the Ministry of Health do not accept that diagnosis by Dr McGinn and so as things stand at the moment, [KM] is not eligible for such services. Seemingly, part of the problem in that regard, is the Ministry of Health do not accept FASD as a disability either and so, for now, more services than those currently being provided for [KM] are needed.

[24] For [KM]'s sake and for the community's sake, it is especially important in my view to adopt an approach that will be most effective to reduce and manage any risks

of re-offending and so all available and necessary supports and services should be provided to keep [KM] on track and provide for public protection against the risk of reoffending which is increased if the supports and services are not provided.

[25] I am not going to go through all of the remaining s 284 factors individually, other than to mention the effect on victims about which there is limited information. The only information provided about effects on victims is a brief paragraph in the social work report that acknowledges that it would be fair to say, some of the more serious offences have had a significant impact on victims. Several conferences were held in relation to [KM]'s charges and victims chose not to attend. On some occasions, submissions were read out by the coordinator. Part of the problem with victim attendance was, it seems, that attending the conferences was described as "geographically challenging." The impact of [KM]'s offending on his many victims will have been significant, emotional, and sometimes having a physical and financial impact. Having said that, I am told no reparation is outstanding or sought.

[26] It is especially important to mention that [KM] has now spent 22 months in custody since August 2017. Four of those months were the supervision with residence order, the other 18 on remand. That is an extremely long period, due in part to the delays caused by the complexity of the fitness proceedings but also, of course, because [KM] did re-offend twice while subject to sentences and some of the offending is serious.

[27] Of course, [KM] could not possibly have received a custodial order in the Youth Court approaching anything close to that duration and it is unlikely he would have spent time in custody much longer than that, if at all, if he had been transferred to the District Court for sentencing. In my view, the time in custody has gone a very long way to satisfy the need to hold [KM] accountable.

[28] It is also important to note that a very careful transition process has been followed already in preparation for [KM] moving into [a rehabilitation centre] today. For a number of weeks now, [KM] has been living in the community home outside the residence in [location deleted] where he has been detained for most of the time on remand. [KM]'s behaviour throughout all of that time has been extremely good.

[29] I not only want to acknowledge how well [KM] has done during all of that period but the quality of the work that has been done by his social workers and others to source out the right sorts of FASD-informed programmes and arrangements for [KM] and carefully manage the transition, I am especially grateful and full of admiration for what they have been able to put together. The longer term plan is for [KM] to eventually be in the care of his Uncle and he will be transitioned there when the time is right.

[30] So, returning to the purposes and principles I must have regard to, I am satisfied that [KM]'s wellbeing and best interests and the public interest, including public safety, and also the victims' interests, are adequately satisfied by making the supervision order. Doing that is sufficient to uphold [KM]'s rights under the Conventions. I acknowledge that what [KM] will be doing under that order will not differ from what he will do had I imposed a notation under s 283(a), but I just felt that outcome was not sufficient to mark such serious, persistent offending.

[31] I am satisfied with the adequacy of the plan provided in support of the supervision order. In terms of cultural issues I have already mentioned that there is not a lot of information but I accept that the programme he is going into is culturally proficient and includes such things as noho Marae, kapa haka and waka ama. The relatively short duration of the supervision order will at least see that completed before the end of this year. The supervision order will be subject to judicial monitoring and the first progress report is sought for the crossover list on 7 October, which is four weeks away.

[32] As I mentioned earlier, I have approved the latest care and protection plan, which is in harmony with what has happened in the Youth Court. The orders in the Family Court will continue. There is to be a review of the plan in six months time and the file is to now be returned to the [location deleted] Family Court where those proceedings belong.

A J FitzGerald
Youth Court and Family Court Judge