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**IN THE YOUTH COURT
AT HAMILTON**

**I TE KŌTI TAIOHI
KI KIRIKIROA**

**CRI-2018-219-000117
[2019] NZYC 319**

THE QUEEN
Prosecutor

v

[BG]
Young Person

Hearing: 26 March 2019

Appearances: S Gilbert for the Crown
M McIvor for the Young Person

Judgment: 26 March 2019

DECISION OF JUDGE JOHN WALKER ON DISPOSITION

[1] After a Judge alone trial I found a charge of aggravated robbery and a related car conversion brought against [BG] to be proved. I now need to decide what level of response there should be. There is common ground that the issue before me is whether [BG] should be subject to an order for supervision with residence, the highest level of response within the Youth Court jurisdiction or whether he should be convicted and transferred to the District Court for sentence. The Crown position is that [BG] should be subject to a conviction and transferred to the District Court.

[2] In determining this issue I must be guided by the Youth Court principles as set out in s 208 Oranga Tamariki Act 1989. In particular (c), (d), (e), (f), (fa) and (g) which I will set out fully in the written form of this judgment. I also need to take into account s 5 general principles. I do take into account the United Nations Convention of the Rights of the Child that detention or imprisonment should be a measure of last resort in respect of young people and for the shortest appropriate period of time.

[3] In the written submissions provided by the Crown earlier than today's submissions it was argued that the principles in the United Nations Convention on the Rights of the Child could be taken as part of the Act and to repeat them would be a tautology. New Zealand has ratified the Convention and there is considerable value in my view in being reminded of the principle which, under current legislation is not given specific reference in the Act. I should say that the forthcoming changes to the Oranga Tamariki Act due on 1 July do contain a provision that the United Nations Convention on the Rights of the Child and the rights of those with a disability be taken into account.

[4] I turn to the mandatory considerations under s 284 of the Act. These are the factors to be taken in to account when considering an order under s 283. Firstly the nature and circumstances of the offending. Now this was a planned robbery. First a getaway car was found and taken and driven to the dairy. A sole shop proprietor was confronted by force of numbers, weapons were displayed. There was clearly a threat of violence. The proprietor sensibly retreated and activated the fog cannon which had the effect of stopping the robbery.

[5] It is serious offending. In the adult Court the starting point would be between four and five years' imprisonment. While that does not of itself mean that there should be a conviction and transfer, it is useful when determining the level of seriousness of the offending being considered.

[6] Turning to consider the effect on the victim. While no injuries were sustained she was frightened. Her children were in the shop with her and she was concerned about them. In her victim impact statement she describes the emotional toll, made worse by the fact that she had been subject to three previous robberies in that same store. Not surprisingly her and her husband decided they had to sell the business, the stress had become too much and so there was emotional and financial consequence. The owner of the car that was taken suffered financial loss being the cost of repair.

[7] I turn to consider the personal history and social circumstances and personal characteristics of [BG]. [BG] was just 15 at the time of the robbery. He is now [aged 15]. He had already been subject to an order for supervision with residence in respect of an aggravated robbery which was a sentence imposed after a breach of an earlier supervision with activity order that was made and an assault with intent to rob.

[8] These offences took place in [late 2016] and [mid-2017] respectively. According to the criminal record [BG] would have been 13 and a half when the aggravated robbery took place and just over 14 when the assault with intent to rob took place. At the time of this current offence [BG] was still subject to the supervision part of the sentence, having completed his time in residence.

[9] I have the benefit of a social worker's report, a cultural report and a psychological report recently directed. [BG] has been raised in a home where family violence has been a feature. To his mother and father's credit, intervention programmes have been completed by them but violence has occurred in the home up to 2017. The cultural report which I have read details [BG]'s father's background and the cycle of violence.

[10] While in residence [BG] has been diagnosed with ADHD and medication prescribed. He was taking medication but he stopped doing so on his release from

residence. There is still ongoing difficulties in that regard with [BG] deciding from time to time that he does not want to take medication. In the absence of medication considerable work is required to control his behaviour and impulsivity.

[11] Education has been challenging for [BG] and all those trying to assist him. [BG] also suffers from a hearing defect which is soon to be operated on, no doubt that will also have had an effect on his education, together with his ADHD.

[12] [BG]'s parents while disappointed by his offending behaviour continued to love and support him. They are concerned about his ability to adhere to conditions imposed on him and see a risk of him re-offending, particularly if he continues to associate with those he has previously associated with. There has been a family group conference but no plan or recommendations could be agreed at that conference.

[13] I turn to consider the underlying causes of the offending. A combination of exposure to violence, disruptive schooling, ADHD, early drug use and association with offending peers is likely to have contributed to the offending. The effects of all of this on [BG]'s decision making ability will have been substantial and exacerbated by the under developed brain of a 15 year old.

[14] The social worker details the range of intervention programmes which would be available to [BG] in residence. The social worker describes how transfer of [BG] between residences has, while undertaking the last order, disrupted completion of the programmes he was undertaking. For this reason the social worker recommends a further chance to complete a Residence Order without disruption. In my view [BG] should not be regarded therefore as having had an opportunity for intervention which has not been successful.

[15] The social worker notes some improving behaviours while in residence although it has to be noted that for reasons which are not described he has been subject to some time in the secure wing at the residence, generally used for behavioural management.

[16] I have read the cultural report. It is very detailed and provides the background story. Questions were raised by the grandparents about fetal alcohol spectrum disorder but this has been excluded by the psychologist having interviewed [BG]'s mother. [BG] has become disconnected from his culture and while respectful of tikanga, has limited knowledge of it. He is said to be talented when it comes to poetry.

[17] Under s 289 Oranga Tamariki Act I need to assess the restrictiveness of a conviction and transfer, the highest response available and one of the two options being considered by me today. I am required not to impose that unless I am satisfied that a less restrictive outcome, here supervision with residence, in the circumstances and having regard to the principles in s 208 and the factors in s 284, would be clearly inadequate.

[18] [BG] was 15 at the time of this offending. He has been in custody since his arrest, a period of about nine months, equivalent to an imprisonment sentence of 18 months. In assessing the adequacy of supervision with residence I need to assess the overall effect from a custodial point of view of such a sentence. An order for supervision with residence would be for six months in terms of the residential component. Even allowing for earlier release, that would mean at least another four months in custody which would be a total of 13 months, equivalent to a sentence of 26 months' imprisonment. On this basis on a conviction and transfer for sentence and having regard to his age that would likely be not far removed from any prison sentence that might be imposed.

[19] I also need to consider what, if any, adolescent specific programmes would be available to Corrections for a 15 year old. The answer is very little although it is likely that he would be held in residence serving any sentence of imprisonment until such time as it was thought appropriate to transfer him to a prison.

[20] The ability to follow any residence order with a monitored supervision order under Oranga Tamariki social worker control must also be weighed. The long list of intervention programmes available at residence for [BG] must be factored in, as must the ready access to the resident psychiatrist and psychologist at [the youth justice residence].

[21] [BG]'s history of reverting to offending almost immediately on release from residence underscores the need for work to be done not only with him but with the environment to which he will return. Returning [BG] from wherever he is held to the same situation with the same influences, the same associates, without working with that environment before he is returned and expecting some different result is simply wrong.

[22] It cannot be expected that a 15 or 16 year old with [BG]'s background will be in a position to resist influences of others to engage in offending behaviour without enormous support placed around him. It may well be that he needs to be found employment with one of his iwi affiliations away from [location deleted] and if I am to impose supervision with residence the work needs to start now on the transition plan, not when he is back in the community.

[23] Huge amounts of work are put into our young people in residences as is displayed in the long list of interventions that are available, there is work experience on farms, the independent living, the teaching, the nurturing, the three meals a day, the care and support. To return such young people, having had those interventions and seeing another way of life, to exactly the same environment in which they were previously is cruel and in the long-term interests of the community does nothing. There is time while young people are in custodial remand for the work to start on the environment to which it is expected that they will return and I urge that to happen in this case.

[24] A supervision with residence order would ensure that [BG] stays at the current [youth justice residence] and continues with the interventions already under way. Public interests requires that the opportunity for changing [BG]'s life trajectory be taken where that is consistent with the public's safety. In my assessment no appreciably longer custodial time would be imposed in the District Court and there is greater chance of achieving long-term public safety if [BG] remains where he is. The ability to follow a residence component with 12 months of monitored adolescent-support. There is another advantage of the youth justice provisions over Corrections facilities and Corrections' ability to maintain that level of adolescent-appropriate supervision.

[25] Now balancing all of those matters I conclude that the proper outcome in this case is six months' supervision with residence and I make that order today. An earlier release hearing date will need to be fixed and my anticipation is that the longest supervision order available will be what needs to be imposed on that day.

[26] But again I signal that in terms of the supervision plan, putting [BG] back in exactly the same position is not something that I will contemplate. The work needs to start with social workers and whānau to provide an alternative.

[27] The parents have made an offer of reparation of \$500 paid by instalments. This is a family without much means at all. I have concluded on balance that to put financial stress on the family would not be helpful in terms of the long-term arrangements that need to be made for [BG]'s rehabilitation and I decline to make a reparation order.

[28] Those orders are made in respect of the car conversion and the aggravated robbery. The early release hearing will take place on 24 July.

John Walker
Principal Youth Court Judge