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IN THE YOUTH COURT
AT TIMARU

I TE KŌTI TAIOHI
KI TE TIHI-O-MARU

CRI-2019-276-000003
[2019] NZYC 397

THE QUEEN
Prosecutor

v

[TX]
Young Person

Hearing: 22 August 2019

Appearances: A McRae for the Crown
W van Vuuren for the Young Person

Judgment: 22 August 2019

ORAL JUDGMENT OF JUDGE J E MAZE

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[1] [TX] awaits final orders in the Youth Court on charges of setting fire to some vegetation, dishonestly taking and attempting to take cars in November 2018, intentional damage of windows in February 2019, assault with a knife and assault with intent to injure in April 2019 (the theft was withdrawn), posting a harmful digital communication in [date deleted] 2019, kidnapping and assault in May 2019 and finally escaping custody.

[2] The setting fire caused minimal damage, was readily extinguished by Fire Service and so was at the low end of the scale for an offence of this type although it did present some risks to the men who had to attend.

[3] The taking of the motor vehicle involved taking a vehicle, having an accident and causing damage. The vehicle was written off, I believe the victim has been paid out by an insurer.

[4] The second similar charge was an attempt at taking. It seems as though the vehicle was taken, used briefly and abandoned. The young person was with others and there was no damage.

[5] For the intentional damage, it seems that [TX] argued with the occupier and on leaving, threw a rock through a window.

[6] The two more significant incidents were to follow. Assault with intent to injure and assault with a weapon involved [TX] encouraging another young person to hit a victim and encouraging her to punch the victim and filming it and then [TX] punching the victim to the head and stomach and kicking her. One of the kicks to the head caused the victim to fall to the ground. While on the ground [TX] again kicked the victim this time in the stomach and when the victim screamed in pain she was told to be quiet. The video lasts for 15 seconds so it was a brief but obviously serious matter.

[7] On the second occasion the associate filmed while [TX] kicked the victim eight times to the legs and punched stomach and head of the victim eight times. She then pushed the victim over and threatened her. She then asked for a knife to be given to

her and she stabbed her in the thigh and calf. The video lasts two minutes 33 seconds. The victim did not apparently receive knife wounds according to the injuries list but bruising, so that is relevant in assessing the gravity of the offending but it is nevertheless, serious.

[8] There is a posting of a harmful digital communication which repeated threats and derogatory messages and it was very harmful emotionally to the victim.

[9] The kidnapping and assault involved punching the victim to the arm, telling the victim she was not going to be allowed to leave, and accepting an offer of some cannabis in return for allowing the victim to leave. The victim did try repeatedly to escape but was physically pulled back. When the victim was unable ultimately to supply the cannabis, [TX] left and the victim was left with some bruising. The escaping involved running off while in the process of being handcuffed. She was obviously later found and taken into custody. So there are very real concerns at the escalating seriousness of the offending, in particular the April incident and the kidnapping and assault. There is no doubt that if this was offending committed by an adult, imprisonment would be the outcome.

[10] [TX] is now aged 15 but she was 14 at the time of committing these offences. She has been on remand under s 238(1)(d) since 28 May 2019. That equates to three months and would be seen as the equivalent of a term of imprisonment, in effect, of six months almost. In practical terms that has meant that [TX] has been placed by the Chief Executive of Oranga Tamariki in a facility in [North Island location deleted] at a considerable distance from her home, her friends and most importantly to [TX], her family. They live in the [region deleted] of the South Island and have limited financial resources.

[11] The remand in custody was unfortunately necessary because of the unacceptable high risk of offending on bail and flight. The point of such a remand is to address those risks. A remand in custody is not a punishment for whatever activity was relied upon for the Court to consider those risks were established and so I must draw a clear distinction between deprivation of liberty to address risk and deprivation

of liberty as a penalty. If the remand is for the purposes of the former but has the effect of the latter, then that has to be taken into account on sentencing as a penalty paid.

[12] So the effect of the remand in custody is that [TX] has already served the equivalent of a prison sentence of six months when aged just 14 and now 15; the effect of that was that she was forcibly deprived of any realistic prospect of contact with her family except as might arise when appearing in Court. Her vulnerability is undeniable as she is, and has for some time, been under the care and protection provisions of the legislation. Those are, therefore, very significant penalties already paid by a young and vulnerable person.

[13] The s 333 report makes it very clear that lack of connection with her family is probably the most significant problem for [TX]. The report specifically refers to [TX]'s sense of abandonment and separation from her family. Her explanation which she has written herself for the April offending and which I place on the file with the summary of facts for that, again indicates the very high reliance she has on the security she gains from contact with and being surrounded by her family. To the extent that her family struggles to meet those needs and expectations in care, then protection provisions apply.

[14] She has a background of harm. She has been placed with multiple caregivers, which has further promoted her sense of separation from her natural family. She is somewhat desensitised to violence. There have been many attempts at self-harm and instances of using violence to resolve disputes. She engages in volatile friendships which in turn present greater opportunity for use of violence and as Mr McRae would say, greater risk. Her perception of herself and who she is, is a very real issue requiring urgent and complex attention. She is the subject of a high and complex needs plan under care and protection arrangements and that is in the process of review at present, largely as a result of this offending being drawn directly to the attention of the Family Court. Her significant therapeutic needs must be met before the risk of offending in the future is reduced and she lacks skills and emotional regulation.

[15] Oranga Tamariki had recommended supervision with activity as the appropriate penalty after completion as I say, of an equivalent six month sentence in

custody. However, Oranga Tamariki has now had the benefit of submissions from Mr van Vuuren and supports his proposal. He himself expresses concerns at an element of risk in relation to future offending. My discussions with [TX] tend to suggest, without putting undue weight on her ability at 15 to assess the situation, that [TX] is aware of the circumstances, and the consequences of offending, and is committed to trying to make changes. Her period of remand between release a week ago and today has resulted in an extremely positive report as to her willingness to co-operate, welcoming challenges, responding appropriately and learning new ways of responding.

[16] I refer to s 4. The purposes of my involvement with [TX] are to promote her well-being as well as the well-being of her family. I must consider to what extent services can be provided to affirm the position of the family and in this case the s 333 report underscores the importance of that. The purpose of the legislation is to assist [TX] to meet her own needs and her family to meet her needs. It is also to prevent harm and further offending but it is to maintain and strengthen relationships between [TX] and her family. It seems really very clear that most of the offending if not all of it can be lined up as having a direct link to the burden that [TX] bears as a result of separation from her family. Her well-being and her interests are central to the proceedings. I hope that I have enabled her participation in the process. I am taking her views into account and I am obliged to give her the support that is needed to reduce the risk of further offending.

[17] I may not make an order under 283 (k) to 283 (o) merely because she is in need of care and protection, s 284 (2). So it is very clear that I may not use Youth Justice proceedings to enforce or provide what should be provided under Oranga Tamariki's care and protection obligations. I have had the benefit of advice from the two Oranga Tamariki's social workers working with [TX] and her family. They are [name deleted] in Youth Justice and [name deleted] in Care and Protection. They both now support Mr van Vuuren's approach. [Name deleted] is here as counsel for child in the Family Court proceedings and he does not oppose the approach which is now proposed.

[18] That leaves the Crown speaking on behalf of the prosecution and, therefore, society as a whole and Mr McRae's submissions in effect are that supervision with

activity is necessary to prevent further offending, to recognise the rights and interests of the victim and to provide for accountability and responsibility, although Mr McRae acknowledges that [TX]'s letters do demonstrate her remorse and insight. He emphasises the need for control 24 hours a day seven days a week to prevent future offending. He says that the performance over the last six days is not enough to show that the current arrangements would be effective long term. I understand [name deleted] came to visit [TX]. That was not at [TX]'s instigation and intervention dealt with the problem.

[19] So the question for me is, in addition to the custodial sentence already served in effect, what else if anything, must apply in order to meet the purposes of the act and the aims and principles applying to the sentencing process, and having identified what they are, are they purely care and protection concerns or can they be dealt with within a family group conference plan and stringent bail conditions.

[20] I am obliged to take into account on sentencing the matters referred to in s 284, and the nature and circumstances of the offending. I have already indicated I view the April offending and the kidnapping and assault as serious. I must take into account [TX]'s personal history, social circumstances and personal characteristics and I have the s 333 report in particular there. I have to take into account her attitude towards the offending and she has produced what is undoubtedly a genuine apology and expression of remorse and she has shown an understanding of how her victims feel. I have to take into account the causes of the offending and her family's response to that. It seems to me at least arguable that a fair proportion of the cause of the offending is linked to [TX]'s loss of attachment. I must take into account apologies and reparation if any, the effect on the victims, her previous history, the recommendations of the family group conference and the rights of the victims which must be given proper recognition. Any sentence must reflect the need to provide for [TX]'s future safety but at the end it has to be the least restrictive outcome to achieve all of these aims. When I first raised my question seven days ago, it was on the basis that I was contemplating a response under s 283, if there was good reason to do so. Supervision with activity is the highest non-custodial tariff available short of convict and transfer.

[21] Having read Mr van Vuuren's submissions, I am satisfied that there is wisdom in the approach that he is advocating for, notwithstanding his own clearly stated reservations about risk. It seems clear that [TX] through this process has moved from entirely and utterly self-focussed responses to showing an understanding that she is part of a community, she must understand how others react to her and their expectations of her, and that is not confined to her family group. She has shown a remarkable response even thus far and obviously there is much work to be done. But given that I must impose the least restrictive outcome adequate in accordance with the hierarchy of penalties, I intend at this stage to follow the approach which is requested by Mr van Vuuren. [TX] does need to understand that there is no room for error. There can be no lapse.

[22] [TX]'s reliance upon her friendships is obviously part of the problem as I am aware that some of the young people concerned have themselves been the subject of charges but in the end it is time to be building, recognising the penalties she has already paid without removing from [TX] some ability to show her own contribution to her rehabilitation.

[23] So I am going to go for a plan to give you a chance to show that you can finish off putting everything right. I decline today to make an order as requested. We now need a family plan because there was no family plan before beyond supervision with activity.

Discussion

[24] Next time in Court is 10.30 on 20 September and bail rules are the same, and also you are to provide all electronic devices for review by [details deleted] each night at 9.00 pm or such other times or on request.

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Judge JE Maze
District Court Judge

Date of authentication: 28/08/2019
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.