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IN THE YOUTH COURT
AT WHANGANUI

I TE KŌTI TAIOHI
KI WHANGANUI

CRI-2016-283-000107
[2019] NZYC 627

THE QUEEN

v

[SQ]

Hearing: 4 December 2019

Appearances: M Wilkinson-Smith for the Prosecutor
R Simon for the Defendant

Judgment: 4 December 2019

NOTES OF JUDGE D G MATHESON ON SENTENCING

Introduction

[1] This is my decision about final disposition of three charges that have been before the Court now since December 2016. It is a decision about [SQ] and his family. It is a decision about the label I attach to an order to discharge [SQ] from these proceedings after three years of engagement with the youth justice process.

[2] Do I discharge him under s 282, or do I discharge him under s 283? The Crown asks also that I consider imposing a sentence of to come up if called upon pursuant to s 283(c).

[3] At the start of the day there were three charges before the Court, sexual violation by rape, attempted sexual violation by unlawful sexual connection namely penetration of the victim's anus by his penis, and attempted sexual violation in relation to oral sexual engagement. The first two charges were admitted by [SQ] a long time ago, but the third was denied. It has lain alongside the other two and at the end of the process, the Crown solicitor has today confirmed to me that the Crown seeks leave to withdraw that charge and I consider that that is most appropriate. Accordingly, that third charge is now withdrawn.

[4] I wish to acknowledge counsel for their helpful written submissions.

Background

[5] The defendant was born on [date deleted] 2002 and he is now 17 years of age and will turn 18 on [date deleted]. The victim was born on [date deleted] 2008. The defendant is [a relative of the victim].

[6] In early December 2016 the victim's mother reported to the police that her daughter had disclosed she had been sexually abused. The child was interviewed and disclosures therein identified that there had been ongoing abuse between January 2016 and December 2016.

[7] [SQ] first appeared in the Whanganui Youth Court on 14 December 2016 and he was bailed into the care of Oranga Tamariki. On 5 July 2017, [SQ] admitted the

charge of sexual violation by rape and the amended charge of attempted sexual violation by anal penetration but denied the charge of sexual violation by oral genital connection.

[8] A family group conference had been convened prior to that Court hearing and it had been agreed that [SQ] should engage in therapeutic processes and that meant travelling to [residence deleted] which is a provider of residential treatment for youths and young men who have engaged in harmful sexual behaviour.

[9] A placement became available there mid-October 2017. A report of 2 September 2019 identifies that at the time of referral, [SQ] was in treatment with WellStop. While in treatment, unfortunately, he had also engaged in inappropriate sexual behaviours with a female peer in a school setting when he sent her a photo of his penis to her social media account. It was determined that ongoing community-based treatment was not safe given this.

[10] Since his admission to the programme in [the residence] there have been a number of reviews on his progress via AVL and [SQ] and I have gotten used to meeting by way of television. That is not a standard approach of this Court, but given the logistics, it has been appropriate and it has worked well, in my view. I have been able to develop a relationship with [SQ] over time and I am comfortable that the process is suitable even for the purpose of disposal today.

[11] [SQ] and I have benefited from a number of reports provided for the regular reviews and I have considered all of those reports in reaching my determination today.

[12] In June of this year, I directed that a family group conference be convened to consider what we were going to do with [SQ] at the end of the process. The family group conference of July recorded that [SQ] was likely to successfully complete his programme by late August and there was a proposed community plan up until today.

[13] The family group conference recorded a unanimous decision for [SQ] to receive a s 282 discharge at the competition of his community plan. Directions were

made for me to dispose of matters today and I have received, as I have noted, written submissions.

[14] Since release from residence, [SQ] has been living with his mum in [location deleted]. He has been curfewed in the evenings, and has been engaged in employment. [SQ] will be pleased to learn the curfew will no longer apply as he leaves this Courtroom today.

[15] It is the position of the Crown, and always has been the position of the Crown, that while there may be no further punitive response required, a s 282 discharge is inappropriate and a s 283 discharge should be the response. The Crown also submits that as an alternative, s 283(c) should be considered which would be that the young person come before the Court if called upon within a 12 month period.

[16] It is the position of defence that the s 282 discharge is appropriate given all of the work that [SQ] has completed, the clear message from the family group conference and the fact that it has been a process of some length.

The Law

[17] Any decision of this nature needs to consider a number of different sections under Oranga Tamariki Act 1989. In particular, it is important to reflect upon the basic principles which can be found in s 4 which deals with purposes, s 4A which is a new section and which deals with wellbeing and best interests of the child and young person and s 5 which deals with the principles. All of those provisions, as they were written at the time this process has been engaged in, have been to the forefront of all of those professionals who have been involved and I commend them for that.

[18] As to s 4, the wellbeing of the young person and children involved in this family, assistance for this family in coming to terms with the issues that were identified, the maintenance and strengthening of family relationships and the promotion of the young person's rights and interests, attention to the prevention and reduction of future offending and recognition of the rights and interests of the victim

and holding the young person to account and to accept responsibility for offending have all been considered.

[19] As to s 4A, the principles of wellbeing and best interests, public interest, victim interests and accountability have been part and parcel of the process.

[20] As to s 5, the processes involved [SQ] being encouraged and assisted to participate in the process and healing this family has been a central focus such that the principles, of s 5 have been acknowledged.

[21] In this decision, I consider that s 5(1)(b)(v) is important and that says that, "Decisions should be made and implemented promptly and in a timeframe appropriate to the age and development of the young person."

[22] The process, as [SQ] well knows, has lasted some three years which is a significant portion of his life, but such was the issue that needed addressing, I do not consider that the timeframe has been overly long. That timeframe has been helpful.

[23] Moving from the more general principles, the Court must also take into account the youth justice principles that are found in s 208. Those identify that when weighing the principles identified in 4A, the Court must also be guided by those principles which once again identify the importance of family, and retention of young people in the community as far as practicable. In this case, a residential programme was essential. Age is a mitigating factor in determining whether or not to impose sanctions and the nature of any sanction. Sanctions should be framed in a way to promote the retention of the child within his family and to take the least restrictive form that is appropriate in the circumstances.

[24] Any measures for dealing with the offending should so far as is practicable, address the causes underlying the young person's offending and should have proper regard for the interests of any victims.

[25] I believe the [residential programme] has clearly satisfied all of those principles and I now need to move on to s 284 which identifies factors that I need to take into account on sentencing and I will go through those shortly.

[26] Section 282 identifies that if a charging document is filed charging a young person with an offence, the Youth Court, after an inquiry into the circumstances of the case, may discharge the charge and a charge discharged is deemed never to have been filed.

[27] Section 283 provides a hierarchy of Court responses and a s 283(a) response is a group 1 response which says, "The Court may discharge the young person from the proceedings without further order or penalty."

[28] Section 283(c) is a group 2 response that provides, "The Court may order the young person come before the Court if called upon within 12 months."

[29] In his written submissions, the Crown solicitor helpfully referred to commentary in the well-known textbook on criminal matters of *Adams*. There it is said "that a discharge under s 282 deems a charge never to have been filed. The issue of the record created by 282 discharge is somewhat murky. In theory, a 282 discharge means that no record is kept of offending, however, a 282 discharge does appear on the police national computer system. There remains a police discretion to alert the Court to previous 282 discharges should a young person reappear before the Youth Court. However, the statute explicitly excludes previous 282 discharges from the mandatory factors to take into account when sentencing."

[30] Under s 284(g), the Court shall have regard to any previous offence proved to have been committed by the young person not being an offence on which he has been 282 discharged.

[31] Mr Mallalieu in his submissions then went on to refer to comments in a decision of *Police v HC* where the different impacts were revealed.[1]

[1] *Police v HC* [2016] NZYC 218, at [11].

[32] In *Police v ND*, the young person was party to unlawful sexual violation and intimate visual recording.[2] Significant factors were abuse of alcohol, peer pressure, poor judgement and bravado. The issue was whether 282 or 283(a) should be applied. The offending was admitted at a family group conference and the youth carried out the plan plus a rehabilitation programme. His Honour Judge Walsh considered the observations made by the Court of Appeal in *Churchward v R* and acknowledged that there were age-related neurological differences between young people and adults and that young people may be more vulnerable or susceptible to negative influences and outside pressure.[3] The character of a young person is not as well formed as that of an adult. Nevertheless, although that young person had no physical role in the offending, the Judge found the visual recording was central and caused significant trauma. He considered it inappropriate to s 282 discharge and a s 283 discharge was granted.

[33] Agreement with recommendations. The Court may discharge an order under 282 or 283(a) once a family group conference recommendation has been implemented provided the Court agrees with the recommendations and they can be carried out informally.

[34] As I have already noted to the victim's mother, the burden of responsibility is now upon my shoulders having been guided by the comments from the family group conference and the victim.

[35] The discretion for a 282 discharge is extremely wide. Whether a Court discharges under the section will depend on the circumstances of the case and in particular, the seriousness of the offence. In considering this issue I need to consider the provisions of s 284.

[36] Section 289 provides that the Court must impose the least restrictive outcome adequate in the circumstances. The Court must not impose an outcome unless it is satisfied that a less restrictive outcome would, in the circumstances and having regard to the principles in s 208 and the factors in 284 be clearly inadequate. In essence the Court is directed when making a response to assess the restrictiveness of the outcome

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[2] *Police v ND* [2018] NZYC 602.
[3] *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446.

in accordance with the hierarchy and not impose that outcome unless satisfied that a less restrictive outcome would clearly be inadequate.

[37] Mr Mallalieu then, in his written submissions, referred to a decision of the High Court in *M v New Zealand Police*.[4] It is a helpful reference point as in that case it involved a 14-year-old who raped a 16 year old. There, the High Court noted that there were five issues that could be seen as relevant.

> (a) That while there were significant mitigating features, including age, acknowledgement of responsibility and completion of a Safe programme, there were also powerful countervailing features. Sexual violation by rape with a maximum penalty of 20 years was the most serious on the criminal calendar and the offending was a bad example of its kind. The youth in that case was undeterred by resistance and intervention of a friend.
>
> (b) Secondly none of the cases that were cited to that Court which involved a lesser discharge involved rape as opposed to the lesser species of sexual violation or indecent assault. Although that did not quarantine it from this form of youth justice resolution, this was, however, a bad instance of its kind.
>
> (c) The Court of Appeal has recognised the seriousness of offending may be a reason by itself to transfer charges to the District Court." The Court made reference to *Pouwhare v R* where it was said that:[5]
>
> Some offences may simply be too serious for the youth justice regime to cater for.
>
> (d) Assessments of risk of re-offending in this context have a short lifespan due to rapid developmental changes during adolescence. Because of its absoluteness nature, a s 282 discharge would presumably preclude curial reference to this offending in the event of future offending however unlikely that may currently seem.
>
> (e) While the notation might remain something of a stain, care must be taken not to assume that employers, immigration officials, and others with an interest in the youth's past will necessarily be unreasonable or unfair in the treatment of the notation.

[38] Turning from those basic principles to my consideration of s 284 factors:

> (a) The nature of the offending. It is appropriate that I remind us what happened, and I read from the summary of facts. Between the dates of

[4] *M v New Zealand Police* [2002] BCL 1007.
[5] *Pouwhare v R* [2010] NZCA 268 at [73].

1 January and 7 December 2016, [SQ] visited an address in [location deleted] on a number of occasions. This was the home address of the victim. The victim in the matter is [under 10] years of age. [SQ] is her [relative]. Between the above dates, while staying at the victim's home address, [SQ] grabbed her bottom and squeezed it on multiple occasions both on top of and under the victim's clothing. In late November while staying the night at the victim's address, [SQ] entered her bedroom. [SQ] removed the victim's pyjama bottoms and penetrated her vagina with his penis without her consent. The victim began to cry and scream. She asked [SQ] to stop and told him he was hurting her. [SQ] passed the victim a teddy bear, told her to squeeze it and fight the pain. The victim continued crying asking [SQ] to stop. [SQ] removed his penis from her vagina and shortly afterwards attempted to insert it into the victim's anus. [SQ] continued to penetrate/attempt to penetrate both vagina and anus multiple times in that one occurrence. [SQ] removed his penis from the victim's genitalia and grabbed the back of her head. Clearly this was significant and serious offending over the course of some period. Clearly, he breached the trust of his family and abused a child just over half his age. It was offending that continued even when the victim asked him to stop and he told the victim not to say anything. If he had been 18 years of age, a starting point of imprisonment around 10 years would have been, I consider, within range.

(b) Personal history and social circumstances and personal characteristics of the young person so far as those are relevant to the offence. I have had the benefit of numerous reports that identified frailties within the family structure with risk factors of isolation, difficulties in socialisation with peers and some cognitive limitation. There is a raft of material, but I do not today see the need to go back through all of that as it has already been considered in terms of the rehabilitative aspects.

(c) Attitude towards the offence. The initial reports identified a lack of empathy and insight into the seriousness of the offending and the impact of the offending on the victim. There was also a concerning attempt to apportion blame on the victim. It was during this initial period that [SQ] photographed his penis and copied it through social media to a girl in his class. That he did this while undergoing a community-based assessment and treatment process heightened concerns and those concerns were appropriate. It has been pleasing to observe progress and reports and in particular the final report, although even earlier this year there was still some residual anger and blaming.

(d) The response of the young person's family. Just as [SQ] has gone through a lengthy process, so has his family. Initially, his father was blaming the victim and her mother who is his daughter. Fortunately, that totally inappropriate response has gone. Mother, on the other hand, has from the earliest days recognised the seriousness of the behaviours. The family response has crystallised with intensive therapy into a most positive one and I wish to acknowledge the family at large for that.

(e) Measures taken or proposed to be taken to make reparation or apologise. One of the great challenges for [SQ] through this process has been his completion of appropriate apology letters. Initial attempts were assessed as superficial and showing little empathy. The report writer now has noted a positive shift and I was pleased to learn that the family group conference as to disposition process assisted in facilitating some healing and that the apologies are now at a level that have meaning and empathy.

(f) Effect on the victims. I had before coming into Court read the moving victim statements. The Court's process was added to in a valuable way through those statements being read today by the young girl's mother. I am not sure whether one really needs any victim statements to identify the impact of such offending on an [under 10]-year-old child. I consider that the impact of the events of 2016 are likely to have a lifelong reach.

The process itself though I hope will go some way for her to be able to move on and certainly for her mother, [SQ]'s [relative], to move on. The impact has been significant. Family relationships and trust were torn asunder and the little girl struggles and her mum feels guilt. I need to address her directly now and say that she should not feel guilt. She is not to blame and neither is her daughter. They are victims and [SQ] has acknowledged that and he should be acknowledged for that now. They are hurt but they do not seek retribution. They do not seek conviction. They need to know from me that either option I am considering today does not involve a conviction.

(g) Previous offences. We can move on, there have been none.

(h) Family group conference. This is an opportunity to identify that this is yet another example of the wonderful work done by the youth justice community here in [locations deleted]. The police, from an early stage, saw that a therapeutic response was in the best interests of the victims and the community at large as well as [SQ]. There were some rough beginnings, but perseverance and ongoing support have, in my view, been worth it. The family group conference convened at the Court's request recommended a discharge under s 282. I of course as a Judge am not allowed to be privy to the discussions that go on within that family group conference. I wish to acknowledge all of those involved and wish to acknowledge their sincerity. It is a process that I, as those who work in this area know, have considerable respect for.

(i) Underlying causes. The causes underlying the offending were identified as pornographic use, social isolation and lack of emotional availability of parents. Those areas became the focus of much of the therapy and the response in the end has been positive. As part of the final review process an AIM 3 assessment was completed and identified that there remained some issues. The sexual assessment was identified as a relatively high number. This needs to be clarified. The number is high because of the nature of the original offending, its duration and

> frequency and escalation in sexual behaviours and a degree of aggression in the abuse, ignoring distress and possibly being motivated by revenge. There were also concerns recorded under developmental heading as at times [SQ] struggles connecting with others on an emotional level. He has spent his childhood struggling to connect with his peers and at times has been the victim of bullying. This has been much improved. I have been privy to that and I have watched the young hesitant boy of three years ago develop into a young man who has the ability to engage. There have also been concerns about self-regulation with a tendency to anger and frustration linked to difficulty in problem solving in a mature way. Overall, the report noted that although he should not need ongoing intensive therapeutic support, he would need support and guidance with his transition back into the community. Over recent months since August, he has had that and I am pleased to note that under the current configuration of the Oranga Tamariki legislation, that can continue to be available to him until he is 25. I encourage [SQ] to lean on that and family to lean on that at any stage.

[39] That is the s 284 assessment process completed and I now turn to my conclusions.

[40] Firstly, as to the request of the Crown for a s 283(c) to come up if called upon sentence, I must say I struggle with this and I am not going to impose it. Firstly, I note that these matters have been before the Court now for some three years and as I have noted already, the decision should be made and implemented promptly and in a timeframe appropriate to the age and development of the child or young person. There have already been two years of residential therapy preceded by community therapy. To go on further I think goes against finality and the victims and this offender need finality. [SQ] has done all that was asked of him and to dangle another year on top would, in my view, be cruel and unnecessary.

[41] If he were to offend again, I am not convinced this matter would need to be revisited. He has, after all, been in a residential curfew environment for three years. What he has undertaken has not been a soft response.

[42] In addition, I am not convinced that s 283(a) and 283(c) sit comfortably together. I have not developed that in argument, but I think that it would be a situation of one or the other and not both. The Crown does not push the point further in that regard.

[43] In addition, I note that the sentencing straddles the transition from the former configuration of the Act to the current configuration. Under the former configuration, as I recall it, 18 years would have been the end point. Now it is 19. I would be loathed to impose an order now that I could not have imposed at the time when the offending was committed or first came before the Court.

[44] For these reasons, and essentially because I think that [SQ] has done all that has been required of him and that there has been a transition back into the community, I decline to make a s 283(c) order.

[45] Turning then to the main focus of argument today, s 282 or s 283? For [SQ], it may not mean a lot today as he has sat and listened to me go on for some time. He is to be discharged either way.

[46] However, this was significant offending involving a breach of trust over a period of 12 months. I acknowledge the wonderful work of the youth justice team and the family group conference recommendation. However, I simply cannot condone a result that is suggestive that this offending effectively never happened. That would be an insult to a frail victim.

[47] In my view, it would be wrong for her to be the one left with a lifetime scar and for [SQ] to be free on the basis of the charges simply disappearing as though they had never happened. This offending simply cannot disappear, a mark is needed.

[48] In reviewing the cases referred to me and in particular the decisions of Judge Davis in *New Zealand Police v HC*, Judge Walsh in *ND v Police* and Downs J, I consider the seriousness of this offending is too great for s 282 to be an option. It is available, but it seems to me that where it has been used has tended to be for offending at an indecency level.

[49] In terms of s 289(1)(b), I consider a s 282 result would be clearly inadequate. I am not prepared to be part of a process that puts to one side the events over the course of 2016. I acknowledge [SQ]'s work and he is entitled to a discharge, but it is under s 283(a).

[50] [SQ], you are now discharged from the Court on all of these charges. The proceedings are at an end. I congratulate you on your work and I wish you well for the future in [location deleted]. Good luck with the north-westerlies and I wish you and your family all of the best.

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Judge DG Matheson
District Court Judge

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