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

IN THE YOUTH COURT
AT CHRISTCHURCH

I TE KŌTI TAIOHI
KI ŌTAUTAHI

CRI-2019-209-000146
[2019] NZYC 584

NEW ZEALAND POLICE
DEPARTMENT OF CORRECTIONS
Prosecutors

v

[FZ]
Young Person

Hearing:	15 October 2019
Appearances:	Sergeant G Nilsson for the Prosecutor New Zealand Police M Weatherstone for the Prosecutor Department of Corrections S McNulty for the Young Person
Judgment:	15 October 2019

ORAL JUDGMENT OF JUDGE B P CALLAGHAN

[1] This case involves a unique but not totally unforeseen problem thrown up by the recent increase in age limits for Youth Court jurisdiction. [FZ], who turns 18 on [date deleted] 2019, is before the Youth Court on a number of charges, all committed after 1 July 2019, being the date of commencement of the Oranga Tamariki Act 1989 amendment, whereby the Youth Court retains jurisdiction for 17 year olds.

[2] At the time of these offences, [FZ] was subject to an intensive supervision sentence and a community detention sentence imposed in the District Court at Christchurch on [date deleted] 2019, for offences committed when he was 17 and before the amendment came into effect. He has breached his community detention, cutting off his bracelet and absconding, and he appeared in the District Court on [date deleted] 2019, on two breach of community detention charges. I highlighted the fact earlier at the last hearing that it appeared these charges had been laid in the wrong Court and Probation are still making enquiries as to what steps it will take but it seems, to me, that they will need to be dismissed for want of jurisdiction. Probation may choose not to pursue the breach charges given what I think the outcome is likely to be.

[3] Accompanying those charges were an application to cancel and substitute his sentence of community detention.

[4] On [date deleted], Mr Smith represented him in the District Court. The application was accepted, and Judge Gilbert cancelled both community detention and intensive supervision.

[5] I do note that in the application it was suggested that intensive supervision would be automatically cancelled if the community detention sentence was, but I do not think that is right. However, for the present purposes, it does not matter, from my assessment. Technically, at the moment, [FZ] is due to be re-sentenced in the District Court on [date deleted] 2019 where he has a hearing before Judge Couch who was judicially monitoring his sentence of intensive supervision.

[6] There was one charge, a burglary, on which the sentence was not imposed and that charge (CRN ending 6447) was adjourned through to that date, and the date at the time of sentencing.

[7] As a matter of comment, I note that [FZ] cannot be subject to imprisonment or home detention on any of the District Court charges, as they were committed before he was 18 (ss 15B and 18 of the Sentencing Act 2002). In addition, on the current charges that [FZ] is facing, similarly, if the matters were transferred to the District Court, he could not be sentenced to either of those sentences. Ironically, the only custodial sentence available, if he remains in the Youth Court, is a s 311 supervision with residence order, which can be imposed for up to six months. That can extend past his eighteenth birthday. See s 296(2) Oranga Tamariki Act is amended by the 2019 amendment.

[8] The charges upon which [FZ] is before this Court, having been committed after 1 July are the following:

(a) Burglary on 10 August 2019 – [business 1];

(b) Burglary on 10 August 2019 – [business 2] in Hoon Hay;

(c) Burglary on 10 August 2019 – [business 3] (not the first time that he has committed an offence there);

(d) Intentional damage on 15 August 2019 by damaging a window in a pod that he was being transported in in a vehicle to [a youth justice residence].

[9] The District Court charges on which [FZ] has been sentenced to intensive supervision were as follows:

(a) Unlawfully taking a motor vehicle x3;

(b) Theft under $500 x2;

(c) Wilful trespass;

(d) Dangerous driving;

(e) Failing to stop for red and blue flashing lights;

(f) Unlawfully getting into a motor vehicle x2;

(g) Burglary (on which he has not been sentenced).

[10] [FZ] is well known to the Youth Court and has an unenviable history in having received three previous s 311 supervision with residence sentences. Most of his offending relates to dishonesty matters involving motor vehicles. He has received supervision sentences. He has 48 charges, or thereabouts, proved in the Youth Court.

[11] In order to try and bring some sense to the sentencing exercise, I have asked for his District Court counsel, Mr Smith, to be present and for Probation, who are prosecuting the breach of community detention charges, to have a prosecutor in Court today which has occurred. Just to make it clear, I am going to deal with all charges today, the Youth Court charges, in the Youth Court and I will sit in the District Court in respect of the District Court charges for the purposes of sentencing today.

[12] This afternoon was the time set aside to consider the application by the police that [FZ] should be transferred to the District Court for sentencing on the new matters and generally there was a lot of sense in that. That had been opposed by his youth advocate, Ms McNulty, in both arguments contained in the written submissions.

[13] Sergeant Nilsson today has accepted, for the purposes of this case, that there may be some sense in an outcome whereby [FZ] remains in the Youth Court for the current Youth Court charges because the sentencing options are more severe than what would occur in the District Court if the matters were transferred through to the District Court. That is really the nub of the matter today and I do not need to regurgitate all of the various sections of the Oranga Tamariki Act which require the Court to take into account a number of competing factors including rehabilitation, the position of the victims and the public generally, age of the offender, the extent of offending and the seriousness of it but some factors need to be taken into account.

[14] Interestingly enough, I have had the time to also have regard to the s 38 assessment that was prepared for the District Court sentencing in July. What is contained in that report by Ms Lewis, registered psychologist, is really not news to the Court given the plethora of reports that are on the Youth Court file and that I have come across, as have other Judges, throughout [FZ]'s time in the Youth Court.

[15] Suffice to say that there are a number of behavioural and cognitive issues still yet not defined or refined for [FZ], but he has been inches away from a diagnosis of intellectual disability and there are still continuing concerns, both in Ms Lewis' report, and a further report that was sent in today by Alex Richards, clinical psychologist from the Youth Forensic Team. These relate, in part, to his intellectual functioning.

[16] In Ms Lewis' report of 23 July 2019, there are comments that are made about [FZ]'s susceptibility to exploitation due to his low cognitive functioning and that whilst he may not meet the criteria for intellectual disability, there is no doubt that his cognitive functioning is significantly lower than his peers.

[17] These are merely just selections of what was contained in that report and indeed, interestingly enough, Alex Richards, in her most recent update of today's date, said this:

> We do not consider [FZ] to be a typical youth offender and should be understood to be a very vulnerable young man with very complex needs. [FZ] is a polite young man who has consistently attended sessions with his YFT psychiatrist and psychologist demonstrating motivation and slowly we have seen him start to development insight into himself and his behaviours. Within this context, regardless of outcome, YFT will continue to work alongside [FZ] to provide the adequate care he needs.

[18] Ms McNulty, who has acted for [FZ] for years, I think is quite right that in an institutional setting such as [FZ] is at the moment in [a youth justice residence] where he has been since August, he generally seems to comply well although I understand there was some upset yesterday.

[19] However, Ms McNulty in pursuing her application for the current charges to remain in the Youth Court, has talked about the new pilot in the programme at [the youth justice residence] targeted to 16 to 18 year olds with vulnerable, high and complex needs, a programme which is designed to be more therapeutic and to, as I

understand it, to assist in developing skills to be able to leave and be semi-independent, includes an Army programme, possibility of attending programmes run by Odyssey House, a life skills programme. That was something I was not aware of until it was mentioned by Ms McNulty.

[20] In her submissions, Ms McNulty acknowledged that subject to an earlier release hearing, given [FZ]'s history, that she could not really oppose a six month supervision with residence order if that were the outcome. In addition to his offending pattern, which seems to be once he is left outside of the institutional type programme, he does offend and clearly the matters in the reports I mentioned today and just about all of the reports show how easily he is lead. There is an element of protection of the community as well.

[21] I am conscious that I would not sentence [FZ] on the basis strictly of his care and protection needs because I cannot do that, but his issues are highly complicated and, as I said earlier, just inches away from an intellectual disability. So, it seems to me that a s 311 outcome is actually more positive for him and the community. I appreciate it is only a short period of time but the alternatives in the District Court do not really offer much more and he has already shown by his failure to comply with community detention and intensive supervision, an inability to really cope in the community on his own. That is not to say that he can be kept incarcerated forever, in any environment he cannot.

[22] I do not know how much confidence I have in a complete turnaround and I am really echoing what Mr Haggerman has said today and what he has said in his report. However, I think the option for me for him to remain in the Youth Court, as ironically, he can now, given the legislative amendments, is at least in the foreseeable future, a preferable option. Mr Smith, having considered the matter also, does not oppose that.

[23] So, what I intend to do is to indicate that I am prepared to consider, subject to approving the plan, a s 311 supervision with residence order which will necessarily entail a follow-up supervision sentence in lieu of transferring [FZ] to the District Court. However, it will only be upon receipt of the plan and its approval that I can action that.

[24] At that point, I would then be prepared to bring the District Court matters to an end, by the conviction and discharge because, in effect, I have taken his offending history both in the Youth Court and the District Court into account in coming to the conclusion that a s 311 is the preferable outcome for the reasons given.

[25] As to reparation, I think it is a forlorn hope to think that he will have any funds in the foreseeable future to pay any of this and Mr Smith has reminded me that Judge Couch took the same view. However, I will make a final decision on the issue of reparation when the matter comes back before me.

[26] The issue as to the two breach of community detention charges, I will deal with those at the next hearing, but I am indicating that they should be dismissed, for want of their jurisdiction to lay them in the District Court. I do not see much point, but Probation may have a different view in relaying the charges in the Youth Court. However, I will not finalise that matter today. So, I am going to remand [FZ] under s 238(1)(d) to 1 November at 10.00 am for a plan in respect of the s 311 outcome.

[27] I would just like to acknowledge the attendance of all of the support workers who have been working with [FZ] as well from the institutions mentioned and so we will adjourn until 1 November.

[28] If I adopt the course that I propose, I will be vacating the hearing date on [date deleted] because I will deal with the District Court charges in this environment but sitting in the District Court as I do today, but I will make a final decision on that on 1 November.

B P Callaghan
Youth Court Judge