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**IN THE YOUTH COURT
AT AUCKLAND**

**I TE KŌTI TAIOHI
KI TĀMAKI MAKĀURAU**

**CRI-2018-204-000150
[2020] NZYC 35**

**NEW ZEALAND POLICE
Prosecutor**

v

**[MQ]
Young Person**

Hearing: 20 January 2020

Appearances: Sergeant D Robertson for the Prosecutor
M Winterstein for the Young Person

Judgment: 20 January 2020

REASONS FOR DECISION OF JUDGE A J FITZGERALD
[An early release hearing]

Reasons: 28 January 2020

Introduction

[1] On 23 September 2019, I sentenced [MQ] to six months' supervision with residence and allocated a hearing on 20 January 2020 to decide if he would be released early from that sentence.

[2] At that hearing, after considering the relevant reports and hearing submissions from Sergeant Robertson for the police and Ms Winterstein for [MQ], I did not grant [MQ] early release and explained my reasons to him briefly. It was not possible to give my reasons in full at the time because of the amount of other work set down for hearing in court that day but I do so now.

Early release hearings

[3] When a supervision with residence order is made under s 311 of the Oranga Tamariki Act 1989 ("the OT Act"), the Court must adjourn proceedings to a date to decide whether the young person will be released from that sentence on the date on which two-thirds of the period of the order will have lapsed. Section 314 of the OT Act requires that the young person must be released on that date if the Court is satisfied that during the period the young person has been in custody he or she has:

- (a) Neither absconded nor committed any further offences; and
- (b) Behaved and complied with any obligations placed on him or her by the s 335 plan satisfactorily, or any misbehaviour and non-compliance has been minor; and
- (c) Complied satisfactorily with any condition of the order to undertake any specified programme or activity.

[4] For the most part [MQ]'s behaviour during the time he was subject to the supervision with residence order was at least satisfactory. However, he was involved in an incident on 27 October 2019 at [residence deleted] (the Youth Justice residence where he was serving the sentence) which was the main focus of the early release hearing.

The 27 October 2019 incident

[5] At about 1.00 pm on Sunday 27 October 2019, some young people in the [unit A] at [the Youth Justice residence] assaulted a staff member and took some keys from him. [MQ] was not one of the young people involved in the assault. The keys were used to open a gate to get out of the unit and into a van that was parked there on a ring road that runs between the external walls of the residence and the high fences into the various units at the residence. [MQ] was one of several young people who then escaped from the [unit A] and either got into the van or on top of it.

[6] After trying unsuccessfully to jump from the van onto the roof of the [unit A], this group drove along the ring road to [unit C]. There they tried to incite young people inside to deal to the staff. An unsuccessful attempt was made to open a locked gate at [unit C] before the van was then driven on to [unit B]. There, one of the young people in the van used a key to open the padlocked gate to [unit B]. Some young people from that unit jumped into the van which was then driven on to [unit D].

[7] The external exits from the residence had all been blocked by this time and so the van was limited to moving on the internal ring road only. The young people were not able to get out of the residence itself.

[8] Once at [unit D], objects were collected by some of the young people and used to break guttering. A camera was smashed and thrown at a window, cracking it. A number of young people dug a hole in the roof, exposing insulation. [MQ] was alleged to be one of those. Another young person called for a lighter and another took off his shirt which was used as a wick to light a fire on the roof of the unit. Fire services were called.

[9] The young people involved were shouting verbal abuse and used the fence line to get into [unit C]. Some young people were abusing staff and throwing things at them and threats were being made. Those allegedly involved in breaking the guttering at [unit C] included [MQ].

[10] These events continued throughout the afternoon and negotiations took place to persuade the young people to come down. By about 7.00 pm, all of the young people involved had surrendered themselves.

[11] As a result of these events, some of the young people were placed in secure care afterwards. Later, five applications were made to authorise an extension of time in secure care for up to 14 days for five of the young people including [MQ]. He did not oppose that application which was granted on 31 October 2019.

[12] In the days shortly before the early release hearing on 20 January 2020, the police laid charges against nine of the young people allegedly involved in these events, including [MQ] who they have charged with intentional damage under s 269(2)(a) Crimes Act 1961. Based on the information available on 20 January 2020, it seems unlikely that the correct legal procedures have been followed before laying the charge against [MQ] at Court, and perhaps the other young people too. There has not been an intention to charge FGC yet and there are no grounds to justify arresting [MQ] to appear on whatever date is set for a first appearance.

[13] In the caption summary the police have prepared in support of the charges laid, they say the following damage was caused as a result of events on 27 October 2019:

- (a) [Unit D] damaged guttering, TV aerial missing, cowl missing off aluminium ducting, louvered grills broken and DWV vent broken.
- (b) [Unit B], a hole in the corrugated roof, damaged guttering, TV aerial missing and coax cable damaged, cowl missing from aluminium ducting, DWV vent broken, flashing damage, louvered grills broken and missing.

- (c) [Unit C], two holes in the corrugated roof, TV aerial missing, damaged flashing, cowl missing from dryer ducting, louvered grills broken and missing and DWV vent broken. The total value of the damage caused has not yet been costed.

Early release report

[14] The report provided by [CL], residential case leader at [the Youth Justice residence], recommended early release on the grounds that [MQ] had neither absconded nor committed further offences and, all things considered, had behaved in a satisfactory manner throughout his time in residence.

[15] [MQ]'s admission to secure care as a result of the 27 October 2019 incident was the only one during his time in residence. On 18 October 2019 he was caught smoking cannabis that had been supplied to him by his girlfriend, at his request, but that was assessed as being misbehaviour of a minor nature.

[16] Although the report does not downplay the 27 October 2019 incident, it was submitted that [MQ]'s involvement in it needs to be seen in the context of his diagnoses with ADHD and FASD which cause him to be easily influenced by others and to act impulsively.

[17] It was also pointed out that [MQ] has achieved a lot during his lengthy time in the residence; not just during the period of the supervision with residence order but the 15 months he was on remand prior to sentencing.

[18] Following his release from secure care on 11 November 2019 [MQ] soon returned to level 3 on the BMS scale. In many respects he has done very well in residence and has shown increasing insight into his behaviour and maturity in his decision making. He is talented at music, an avid sportsman and has demonstrated excellence in, and taken on a leadership role in relation to, his Maori heritage; he is a confident and fluent speaker of Te Reo and understands Tikanga well.

Police submissions

[19] For the police, Sergeant Robertson submitted that [MQ] should not be granted early release because he absconded and committed further offences and misbehaved in a way that is serious, because the events of 27 October 2019 amount to a major breach of security over a period of several hours involving substantial damage.

[20] In relation to the absconding, it was submitted that [MQ] had absconded by getting out of [unit A] and being at large within the residence compound.

[21] With regard to further offending the charge recently laid by police against [MQ] at the [location deleted] Youth Court is pointed to.

[22] The stronger ground in the police submissions was pointing out that [MQ]'s involvement in the 27 October 2019 incident was evidence of unsatisfactory behaviour and the nature and scale of that incident cannot be described as minor.

Submissions for the young person

[23] For [MQ], Ms Winterstein submits that he has neither absconded nor committed further offences. [MQ] did no more than escape from his unit; there was no chance of him escaping from the residence compound which would be necessary to qualify as absconding.

[24] It was also submitted that the allegations regarding [MQ]'s involvement in the events of 27 October 2019 remain just that; allegations which are contested to some extent. No charges have yet been proven and until they have been it cannot be said that [MQ] has committed further offences.

[25] Ms Winterstein draws strength from [CL]'s s 314 report, and submits that [MQ]'s involvement in the events of 27 October 2019 should be measured against his behaviour throughout the time he has been in residence. When that is done, and all things are considered, it is said that his role in the 27 October events can be considered minor. He was not the instigator of those events and his tendency to follow others and act impulsively is a result of his ADHD and FASD. His behaviour throughout his lengthy period on remand (15 months) was generally good and he has achieved a

number of positive things. He had only moved into the [unit A] a few days before the events of 27 October. He simply followed along with what was happening and since these events has returned to good behaviour and been on level 3 of the BMS.

Findings

[26] I accept Ms Winterstein's submission that it cannot be said [MQ] has absconded in a situation where he was able to get out of his unit, but not out of the residence itself. It is not known whether any of the young people involved realised that they had no chance of getting out of the residence compound because all external accesses had been closed and therefore whether their intent was to abscond or just to participate in the riot. It seems to me that if they had thought there was a chance of escape, the most that could be established on the available evidence is that there was an attempt to abscond. I do not find that simply getting out of the unit and on to the ring road inside the external perimeter walls amounts to absconding.

[27] I also accept Ms Winterstein's submission that it cannot be said that [MQ] has committed further offences. The language in s 314 suggests that Parliament contemplated more than just an allegation of further offending. By using the words "...committed further offending..." I infer the intention to be that further proved offending is necessary to qualify. That would require either proof of a charge at a Judge Alone Trial, or an admission to a charge at a FGC being later confirmed in court. It is only at that point that the charge is proved. The laying of a charge in court is not sufficient to establish that [MQ] has committed further offences, especially in a situation where the charge appears to have been laid unlawfully.

[28] As Ms Winterstein points out, all we have at the moment are untested allegations, some of which are disputed. There has not been an opportunity to test the evidence at either the secure care or early release hearings. It is very often the case at both types of hearing that the court must decide what to do on the basis of disputed facts that are not able to be properly tested. Both types of hearing require a decision on the day and very often the cases are set down in busy court lists with no prospect at all of calling witnesses for cross-examination. In all such cases the Judge is required

to do the best he or she can on the available untested evidence plus the submissions of counsel. That is what I did here.

[29] For those reasons I decided that [MQ] had not absconded, nor had he committed further offences.

[30] For the most part, [MQ]'s behaviour during the period of the supervision with residence order has been satisfactory. His misbehaviour on 27 October 2019, however, was certainly not minor. I agree with Sergeant Robertson that what the young people involved in that incident did, amounted to a major breach of security over several hours involving substantial damage and was a serious and concerning incident. It was for that reason I decided [MQ] could not be released early from the supervision with residence order. He will therefore need to serve the full six-month period, meaning he will be released now on 22 March 2020.

[31] I accept that [MQ]'s ADHD and FASD mean he is easily led and tends to act impulsively but, as I said to him at the hearing, he needs to keep working hard on how to say "no" in situations like the one he found himself in on 27 October 2019. His disability in this respect is life-long. He is gradually acquiring the tools to enable him to act appropriately in such situations. To his credit, he was accepting that a consequence of not saying "no" on 27 October 2019, was to not achieve early release.

[32] In my view the period during which behaviour is to be assessed for the purposes of a s 314 hearing is the term of the supervision with residence order. That is clear from the section's wording, "...during the period that the young person has been in that custody...". Therefore, for the purpose of the early release hearing, I did not consider it appropriate to have regard to his behaviour during the 15 months he was on remand in [the Youth Justice residence] before he was sentenced on 23 September 2019. As I explained to [MQ], the long period on remand, and his good behaviour during it, were factors that counted in his favour when it came to sentencing him to orders in the Youth Court instead of transferring him to the District Court for sentencing.

[33] [MQ]'s social worker had provided the report and plan necessary for me to make a supervision order which will apply following [MQ]'s release from residence. I acknowledge the hard work that has gone into preparing the plan and, for the most part, I am very happy with it.

[34] However, I had not been provided with [MQ]'s care and protection plan which is also due for review now. As indicated in my sentencing decision of 23 September 2019, it is important, in my view, to coordinate what is happening for [MQ] in both the Youth Court and the Family Court and that the plans in both courts are in harmony with each other.

[35] For that reason, [MQ]'s Youth Court and Family Court proceedings are set down for hearing in the crossover list on 24 February 2020 for the approval of both plans and the making in the supervision order.

A J FitzGerald
Youth Court Judge