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**IN THE YOUTH COURT
AT WAITAKERE**

**I TE KŌTI TAIOHI
KI WAITĀKERE**

**CRI-2019-290-000178
[2020] NZYC 67**

**NEW ZEALAND POLICE
Prosecutor**

v

**[XR]
Young Person**

Hearing: 21 January 2020

Appearances: Senior Constable S Wanden for the Prosecutor
N Silich for E Brown as Youth Advocate

Judgment: 21 January 2020

MINUTE OF JUDGE A J FITZGERALD

[1] At a Family Group Conference (“FGC”) on 17 January 2020, [XR], who is 17 years old, admitted charges of assaulting her father with a chisel and assaulting a police constable on 6 November 2019.

[2] The FGC formulated a plan which includes [XR] being referred to the Odyssey House residential programme, doing community work, apologising to her father (which she has done) and continuing to obey her bail conditions. A direction had previously been made that she undergo a psychological assessment but that has not yet happened.

[3] When [XR] appeared in Court earlier today, I refused to approve that plan and explained that, in my strong view, she should not be dealt with in the Youth Court for this offending. These are my reasons.

[4] On 6 November 2019, [XR] became angry with her father because he refused to give her alcohol. She picked up the chisel and attempted to stab him but did not actually do so. The police were called. They arrested [XR] and took her in a police car to the station where she was placed in a cell. While in custody she threatened a female police constable who tried to reach for her taser. [XR] continued to grab at the constable’s equipment and pull her hair until she was restrained. The constable suffered no injuries.

[5] [XR] had never come to police attention before these events; there have been no previous incidents of this type the police had any knowledge of.

[6] When [XR] first appeared in the Youth Court on 7 November 2019, she was remanded in the custody of Oranga Tamariki. When she reappeared on 12 November 2019, the charges were denied and her bail was opposed by the police but granted by the Youth Court Judge. [XR] then reappeared in Court on 26 November and 3 December 2019.

[7] On 10 December 2019, the charges were no longer denied and so a FGC was directed. The Judge also made a direction that day, under s 280 of the Oranga

Tamariki Act 1989 (“the OT Act”), for a referral to a care and protection coordinator. I expect that direction was made because of the excellent report, dated 7 December 2019, prepared by [XR]’s social worker, Mira El-Haddad, which includes the following:

Summary of Causes Underlying Offending

- 9.1 The underlying causes of [XR]’s offending are clear and precise. [XR] is a 17 year old female who has been diagnosed with autism, intellectual disability and anxiety and due to the lack of appropriate supports at home she has naturally developed difficult behaviours that have become impossible for her parents to manage in the right way.
- 9.2 [XR]’s parents, [YR] and [ZS], have failed to develop the appropriate skills to manage and parent [XR]. This is not a result of ill intent but is the result of their very low capacity to learn and apply new skills as well as their own mental health diagnoses. Thus, they have resorted to medicating [XR] with a concerning amount of unprescribed controlled drugs, illegal drugs and alcohol; at times sedating her and going against all professional advice given to them over the years. For [YR] this was the only way he could manage [XR] and minimise any risk of harm she could potentially cause to herself and others. As a result, [XR] has developed a drug dependency and her behaviour, health and wellbeing has only continued to deteriorate and has now been compromised.
- 9.3 In addition to this, [XR] grew up in a household where she was exposed to a substantial amount of physical violence and emotional abuse as a direct victim and as a witness. Both [XR]’s parents constantly struggle to reach agreements and work together in [XR]’s best interests. They have always presented in conflict and continue to do so.
- 9.4 [ZS] has also spoken about generational trauma and unresolved conflict between her family and [YR], without detailing this she informed me that [XR] is well aware of the trauma her family carries and at times sees herself to blame, not only for the current circumstances for trauma and conflict that took place in her family before she was born.
- 9.5 [XR]’s home environment can be described as chaotic and unsafe. It does not offer the right opportunities and supports that she needs to improve her wellbeing and manage her diagnoses. [XR] is substance dependent and from her home environment has learnt to utilise violence and aggression to seek drugs. This is now a behaviour that is normalised for [XR] and deeply embedded as a result of her parents outrageous and medically abusive means of managing her.

[8] Given that report, it is no wonder the Judge on 10 December 2019 made the referral to a care and protection coordinator with a view to a care and protection FGC

being convened. Unfortunately, the Court did not process that referral and apparently it has only arrived at Oranga Tamariki offices very recently. I was told in Court today that the care and protection coordinator's intention at the moment is to await the outcome of the Youth Court proceedings on the basis that if there is a plan implemented in the Youth Court there will be no need to convene a care and protection FGC.

[9] In my view, dealing with [XR]'s case under the youth justice provisions of the OT Act is first in breach of the provisions of the Act itself. Ms El-Haddad clearly recognised the significance of [XR]'s wellbeing in the current context and was obviously alert to the significance of that in terms of the emphasis on wellbeing under the new provisions of the OT Act. Those new provisions, and the pre-existing requirement that criminal proceedings not be instituted against young people if there is an alternative means of dealing with the matter (unless the public interest requires otherwise) are clear, obvious and strong reasons for looking at alternative ways of dealing with [XR]'s case.

[10] Secondly, dealing with [XR]'s situation in the Youth Court runs contrary to her rights under the Child's Rights Convention ("the CRC"), which is significant because the OT Act now requires that her rights under the CRC must be respected and upheld.

[11] In that regard, it is worth taking note of the latest UN general comment on child justice issued on 18 September 2019. This is the first such general comment issued by the UN since 2007 and, importantly, it places a strong emphasis on avoiding criminalising the behaviour of children and also an emphasis on diverting them wherever possible from criminal law processes. In the introduction to the general comment it points out, amongst other things, that children differ from adults in their physical and psychological makeup and that requires a separate system with a differentiated individualised approach. The UN comment points out that exposure to the criminal justice system has been demonstrated to cause harm to children, limiting their chances of becoming responsible adults. It also goes on to say children accused of having infringed criminal law need to be treated in a manner consistent with their sense of dignity and worth and that the evidence shows that the prevalence of crime

committed by children decreases after the adoption of systems in line with those principles.

[12] It is deeply troubling to see youth justice powers and facilities continuing to be used to manage [XR]'s behaviour. She is an already traumatised young woman who is now being further traumatised by the approach being taken here which will be doing more harm than good. Continuing to use youth justice powers and facilities to manage the problem will inevitably cause even greater harm.

[13] It is important for me to acknowledge that the issues to be addressed in [XR]'s case are serious and present major challenges to the various professionals involved. For example, I do not underestimate the difficulty the police faced on 6 November when dealing with the situation in [XR]'s home and having to manage a very distressed and uncooperative young woman. I also accept that in the early stages, a continuation of the Youth Court process seemed necessary given that [XR] had initially denied the charges and so it appeared that a Judge alone trial was required.

[14] However, from the time when Ms El-Haddad's report became available it should have been very clear to everyone involved that this was a case that required a care and protection focus and approach. I am concerned at what appears to be an unquestioning attitude on the part of seemingly everyone, except Ms El-Haddad, that [XR] should continue to be prosecuted through the Youth Court. The record of FGC held on 17 January 2020, with its formulaic YJ plan, and the way the matter was presented to me in Court, indicated that viable alternatives had not been considered – and they must be.

[15] For those reasons I refused to approve the YJ FGC plan but did strongly encourage [XR] to go and have a look at the Odyssey House residential programme which she is interested in doing.

[16] I questioned the need to obtain a s 333 psychological report through the Youth Court given [XR]'s involvement with CAMHS and because I was told she is currently engaged with [a mental health service provider] and on medication. However, [XR]'s mother explained that neither of those things are correct. [ZS] said that [the mental

health service provider] have not been involved with [XR] for some time and she is not currently taking any medication. After discussion, therefore, I have allowed the psychological assessment to continue through the Youth Court given that it is already underway and appointments with [XR] and others are organised or soon to be arranged.

[17] In the meantime, I have adjourned [XR]'s case to the crossover list on 18 February 2020 and directed that the youth justice FGC reconvene because at least that is time limited, and must happen, unlike the FGC a care and protection coordinator might convene. Given the indication that the care and protection coordinator is not planning on convening a Care and Protection FGC I **urge** the Youth Justice FGC to take the opportunity available under s 261 of the Act to talk about the very clear and obvious care and protection issues that arise here and come up with a sensible plan that can be applied outside Youth Court involvement.

[18] In the meantime, [XR] is now remanded at large rather than on bail.

[19] It is important to acknowledge here the work done by Ms El-Haddad. Her excellent report and advocacy for [XR] are great examples of outstanding social work.

A J FitzGerald
Youth Court Judge