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IN THE YOUTH COURT
AT NAPIER

I TE KŌTI TAIOHI
KI AHURIRI

CRI-2019-220-000020
[2019] NZYC 335

THE QUEEN

v

[ML]

Hearing: 25 July 2019

Appearances: A Bryant for the Crown
R D Stone for the Young Person

Judgment: 25 July 2019

NOTES OF JUDGE P J CALLINICOS ON SENTENCING

Introduction

[1] This is the Youth Court sentencing outcome for a young man, [ML], also known as [ML], who is but 15 years of age.

[2] At the commencement of this decision I indicated that in my signed notes I would make fuller reference to statutory provisions and principles than I did in Court. I did so for reasons of brevity in the delivery of the sentencing outcome and because Youth Court outcomes in situations such as that confronting [ML] raised important issues as to the practical resources available, or not, to support sentences either of this Court or the District Court.

The Charges

[3] [ML] is facing the Youth Court on three charges:

(a) the first, that between [date 1] and [date 2], he unlawfully got into a motor vehicle;

(b) the second that on [date 2] he attempted to commit an aggravated burglary of a [service station 1], and;

(c) thirdly, on that day he committed an aggravated robbery of [service station 2].

Process to Date

[4] He has been remanded in a youth residence pending determination of the charges and has been there since 11 March or thereabouts, now some four and a half months ago.

[5] He attended a family group conference on 21 May at which he admitted the motor vehicle and aggravated robbery charges. However, for some time there was

debate over the third charge which then amended to one of attempted aggravated burglary. That has been resolved.

[6] The family group conference process agreed that a social work plan and report be obtained for the purposes of sentencing and as to how an existing supervision order of 12 months be dealt with. That order had been made on 7 February, upon [ML] having completed a previous sentence of supervision with residence for another earlier aggravated robbery.

[7] Further reference will be made to [ML]'s Youth Justice history, but for introductory purposes it is sufficient to say that he has already been the subject of Youth Court orders for three previous aggravated robberies occurring on [dates deleted]. He is therefore appearing on his fourth aggravated robbery since January of last year and, at a superficial level, that would almost automatically indicate the need for an extremely harsh response, the most serious of which would be conviction in this Court and transfer for sentence. However, as the analysis of the requisite of the principles in the statutes indicates, such an approach would be unlikely to yield anything but a guarantee that [ML] would go on to be a very serious offender for many years to come.

Consideration of Options

Social Work Recommendation

[8] As required by s 334(2), for sentencing responses of group 3 and above, I directed a social work report under s 334 and plan under s 335.

[9] The social work report recommended that the Court should impose a further sentence of supervision with residence (SWR), for a period to align with the proposal that [ML] receive early release and attend a programme run by START Taranaki, that being available under the mandatory post-residential supervision order.

[10] I received full written submissions by Mr Stone for the young person and Ms Bryant on behalf of the Crown. I thank them for those thorough submissions and their

oral submissions in Court. They have both approached matters responsibly and in accordance with the relevant legal criteria.

Submissions for the Young Person

[11] Mr Stone argues strongly that [ML] should receive the outcome as recommended by the social worker. He correctly points out that an earlier intention that [ML] attend the programme at START had not occurred, in part due to [ML]'s own actions, and that it was a significant missed opportunity to attempt change in him. He says that the opportunities to effect such change for [ML] are significantly greater within the Youth Court jurisdiction than those under the Sentencing Act 2002 in the District Court.

[12] Mr Stone has known [ML] since he was [under 12], having been his counsel in care and protection matters in the Family Court. He said [ML] does very well when in an outdoors environment, can be a hard worker and is an intelligent young man. He submits that START programme would create a great platform in the hope that [ML] can make bigger ongoing changes in his life.

[13] He adds that [ML]'s father, who is present at sentencing today, advises him that he has addressed many of his previous life issues and, if that is correct, that is commendable because his son certainly needs significant positive guidance, especially at this most critical time of his life.

[14] Normally, in a Youth Justice sentencing I would detail the many sentencing factors found in s 284 and also the Youth Justice principles in s 208 of the Act. However, as they have been well canvassed within the social work report, Counsels' submissions and my record of earlier sentencings for [ML], I will not repeat them in full. I am acutely aware of those factors and will make only brief reference to them where necessary.

[15] In Mr Stone's supplementary submissions, I was informed as to the District Court sentencing outcome for [ML]'s [co-offender]. He was sentenced for the aggravated robbery charge to 10 months' home detention. Mr Stone and Ms Bryant advise that Her Honour Judge Mackintosh commenced with a five-year starting point

and came to the end point of 10 months' home detention. [The co-offender] was just shy of his seventeenth birthday at the date of offending. Certainly, in the District Court, parity of outcome is an important sentencing principle[1] and I must keep that in mind as well for [ML]'s situation.

[16] If [ML] were to be transferred to District Court, Mr Stone advises that his time spent in custody at the youth residence would be available to be taken into account in terms of parole matters for a release date. That position appears to be supported by Ms Bryant. As indicated, [ML] has already been in residence since March and if he were to be transferred to the District Court and imprisoned to an end point sentence of between 10 to 12 months, the net result would be that he could be serving between five and seven months in a Youth Justice residence. I was informed that given his age then any term of imprisonment until 17 would be served in a youth residence, rather than an adult prison. He has already, as I say, served a considerable period of time in a custodial situation if that approach were to be taken.

[17] Against that background, Mr Stone argues that an end point sentence of imprisonment in the District Court of 10 to 12 months less "time served" is not significantly different in custodial terms when compared with the time [ML] will have spent in supervision with residence, taking into account the remand time and a further 6 months Supervision with Residence for this offending. He argues that a Youth Court sentence of Supervision with Residence could not therefore be viewed as being a clearly inadequate outcome. I will make reference to the legal criteria in that regard shortly.

Submissions by Crown

[18] To paraphrase the Crown position, Ms Bryant submits that because of [ML]'s previous significant Youth Court offending a stern approach is required.

[19] However, [ML] has not actually been convicted of any previous offences in terms of Sentencing Act 2002 criteria[2]. He has certainly been the subject of Youth

[1] Sentencing Act 2002, s 8(a), (b) and (e)
[2] Section 9(1)(j)

Justice outcomes under s 283 of the Oranga Tamariki Act. But, bearing in mind he was two years younger than [his co-offender] (at the time of this offending he was [14] while [his co-offender] was almost 17), and at law does not have any "previous convictions", it is difficult to see that he would necessarily receive a much sterner outcome than the home detention received by his older co-offender if transferred to the District Court. As noted, if he was imprisoned, he would spend the term of imprisonment within a Youth Justice residence in any event. Those are important factors which must be taken into account when assessing the practical effect of each option.

[20] Ms Bryant is rightly concerned as to whether there is any guarantee that [ML] would be able to attend the START programme at the end of Supervision with Residence. I too was concerned as to the likelihood of [ML] being accepted at that programme. There is no guarantee that the youth will be accepted, as an application would need to be made. However, I understand he was previously accepted for that programme and, having regard to his background, there is a high chance that he would again be accepted.

[21] However, it is not merely attendance at a programme like START which is required if there is to be any hope of a reduction in [ML]'s behaviours and offending. As I will detail, an holistic approach of intense therapy is required for the whanau group, not merely for [ML]. To achieve this, much depends on what supports are available from Oranga Tamariki. The Ministry is the primary source of resource to give meaning to the s 283 group responses. Oranga Tamariki contract with the START programme and they have an obligation to work with organisations like START to ensure the young people in desperate need of services such as provided by START can receive it. The issues are deep-rooted and demand a longitudinal therapeutic approach.

Section 284 Factors – An Overview

[22] As noted, for the reasons I have outlined, I will not address the s 284 factors in detail. I highlight the following;

(a) [ML]'s offending is all too familiar in this Court; a group of young people at night, searching out an easy target for cash and cigarettes, attempting to smash through the doors of one service station before proceeding to enter a second and threatening the lone attendant before escaping with their limited gains,

(b) As with most serious young offenders, [ML] endured a harsh childhood development; a life of care and protections concerns, a lack of anything approaching adequate parenting, subjected to various abuses and neglect, exposed to significant family violence, moved between many whanau and non-kin placements, minimal (if any) meaningful education, exposure to significant adult abuse of alcohol and drugs. Unsurprisingly, he is disconnected from pro-social aspirations. Instead his normalisation is one of negative experiences, he idolises the mistaken whanau appearance of gang life. It is no surprise he stands where he now is,

(c) His attitude is poor; no remorse, no empathy, a sense of self-entitlement deriving from his resentment of his experiences and sense of place in the world. He actively avoided the social worker's attempts to engage him for the purposes of the report. His attitude serves merely to fuel his gang aspirations,

(d) His whanau have provided little in the way of meaningful response, except to express their disappointment. However, as indicated, his father has now engaged and attended sentencing. He states that he is addressing his own issues and wants to assist [ML], and indeed his other children who are in strife, to find a better future. One hopes the father can carry through on his new aspirations, as it may transpire to be critical to effect any change in [ML],

(e) There have been no measures to make reparation and no means to do so,

(f) There was limited information provided as to the effect upon the victims of the two service station offences. It is known that the victim of the aggravated robbery was traumatised by the robbery and feels especially vulnerable in that late-night employment,

(g) As noted, [ML] has previous proven offences and 'sentences' within s 284(1)(g);

(i) 14 June 2018 – 6 months Supervision with Activity for 2 Aggravated Robberies,

(ii) 18 October 2018 – 6 months SWR for a third Aggravated Robbery.

(h) There has been no identifiable effect derived from the previous penalties, including the mandatory post residence Supervision (imposed for 12 months on 7 February 2019). Under the supervision plan, it had been hoped that [ML] would undertake the START programme. However, four weeks after release from SWR he then committed the current offending,

(i) I will address the identified underlying causes of his offending in greater detail.

Concerns over Access to Meaningful Programmes

[23] For the purposes of a previous sentencing in October 2018, the Court received a psychological report covering in detail [ML]'s situation. These reports, obtained at considerable cost to the taxpayer, provide Judges with an enormous amount of information as to what drives such young people to commit the offences. They provide tailored recommendations as to what type of interventions are indicated as necessary to address the factors underpinning a youth's offending. And yet, seldom are there the actual resources and facilities available to give tangible application to the recommendations. That report made a variety of recommendations for [ML]. They

have not been implemented to any degree to date, due solely to the paucity of resources to produce meaningful sentencing outcomes.

[24] It is incumbent upon agencies, in this case Oranga Tamariki in the Youth Justice Sector and the Department of Corrections in the District Court, to ensure that proper resources are provided to give effect to any sentence based upon such recommendations. The issue is not the range of sentences available in the Youth Court or District Court, but the resourcing to support the sentences by way of access to appropriate programmes and the intense follow up work required to support the benefits gained at programmes.

[25] There is a substantial disconnect between the many Youth Justice principles on one hand and the resources available to give meaningful effect to Youth Court sentences on the other. That deficit applies as well to resourcing of some Sentencing Act sentences.

[26] In [ML]'s case, the state has expended considerable money in obtaining psychological reports and social work reports, yet little in the way of meaningful intervention has occurred. It is unsurprising that, without any appropriate supports being provided, that he has reoffended. He will continue to do so unless some urgent intense interventions are made.

[27] In September 2018 the psychologist, Ms Cherrington, made detailed recommendations for assistance not only to [ML], but his whānau. All too often, these wonderful reports are never backed up by the resourcing to implement anything approaching what the recommendations intend. They become part of a tick-boxing exercise because there is little in the way of meaningful and tangible supports available to support sentences passed based upon the reports. One hopes that the recent amendments to the Oranga Tamariki Act 1989, which do not apply strictly in this sentencing today, will yield some better supports to Oranga Tamariki to provide real resources for these vital recommendations.

[28] As I will detail, these concerns exist as well to situations where young people are convicted in the Youth Court, but are transferred to the District Court for

sentencing under the Sentencing Act. There are obstacles to accessing the resources to support the expert recommendations contained in the psychological reports for young people of [ML]'s young age.

Resources to Support Recommendations for [ML]

[29] In [ML]'s case, the recommendations made by the psychologist were:

(a) that he undergo a rehabilitation programme, being a practical-based outdoors programme that incorporates positive cultural identity and outdoors activities. Ms Cherrington specifically indicated the START programme, or something like the Mokaia Island programme. Sadly, that has not occurred.

(b) she recommended that following such a programme, there be a long-term placement needed to be sourced for [ML], a stable place where he could attend to other goals such as education of a vocational type towards employment. That has never occurred.

(c) she opined that he requires individual counselling to explore issues relating to his offending, his own identity, possible substance abuse and management of his emotions. In other words, unpackaging what has been a life-time experience of negative environments around him. I am not aware that any of those counselling recommendations have occurred.

(d) Fourthly, she recommended engagement with a Māori male mentor to promote his positive sense of what it is to be Māori and how a positive male should live his life. Aside from his proximity to staff at the YJ Residence and his well-intentioned and dedicated social worker, that recommendation has not been implemented.

(e) Ms Cherrington recommended multi-systemic therapy for [ML]'s family, an holistic approach for the whole whānau. That has not

happened. She recommended that a Whānau Ora approach be taken. That has not occurred.

[30] In effect, none of those recommendations have ever got off the ground. These recommendations ask a lot in terms of resource but, put simply, unless such comprehensive therapeutic tools and supports are provided for [ML] and his whānau, then there is no prospect of change. Even if such supports are provided, there is an immense challenge to undo the immense damage to [ML]'s development to date.

[31] Against that background, the issue of resourcing (or lack of it) for meaningful programmes and therapeutic interventions to support the sentencing options becomes highly relevant to which option I take.

District Court Options

[32] If I transferred [ML] to the District Court for sentence, the primary sentence advanced by the Crown is imprisonment, noting that such an outcome would immediately be at odds with the older co-offender. Home detention remains the more likely District Court outcome.

[33] However, intensive supervision would be a potential option, especially given the young age of this offender. However, there is no funding to enable [ML]'s attendance at the START programme through that form of sentence. Although the facilitators of the START programme would accept any young person in need of assistance, regardless of jurisdiction, they have no contractual arrangement with Corrections. That obstacle could be easily remedied if there was a will to do so. In [ML]'s situation, where he and his whanau have deeply entrenched issues, there is a need for a longitudinal wrap-around approach. A two-year intensive supervision sentence, with a very comprehensive package of longitudinal therapeutic interventions could well have been an option. Again, it is not the sentencing option which poses the obstacle, instead it is the lack of resourcing to support it.

[34] Accordingly, the options are rather limited in the District Court; imprisonment (which would mean incarceration to a Youth Justice residence) or Home Detention where the youth's home life is the very cause of his issues.

Youth Court Options

[35] I turn to what options are available in the Youth Court. There are few available intensive programmes to address the type of recommendations made in the s 333 report. Again, the lack of programmes is not reflective of a lack of will by organisations to provide them. Instead, it is the restrictive approach taken by the state agencies that inhibit access. The restrictions may be unintentional, but nonetheless they serve to handicap availability to appropriate measures to address the most serious youth offenders. In the case of START Taranaki, they are not concerned as to what sentence a young person must be on before they will accept them. Instead, the limitation on a young person's access to a programme derives from a requirement of Oranga Tamariki that for a young person to attend START, they must either be on an order of supervision or supervision with activity. If they could, START would accept young people even if only on bail conditions, a prospect which must surely accord with the youth justice principle of least restrictive outcome.

[36] It may be seen that, whether in the Youth or District Court, access to resource creates a serious limitation to the efficacy of sentencing outcomes. As stated, the statutory sentencing options themselves are not the problem.

[37] Both the Crown and youth advocate accept that nothing less than Supervision with Residence as the initial sentence would be appropriate for [ML] having regard to the youth justice principles in s 208. I agree. A Youth Court sentence would involve an initial programme of a residential nature under Supervision with Residence, followed by the mandatory response of supervision of up to 12 months. This supervision sentence would involve, in [ML]'s case, the START programme which provides opportunity an opportunity for a young person to reflect upon behaviours, be in an environment of structure and stability, where he is treated with respect and dignity (which imprisonment is unlikely to do). The programme for the young person would operate alongside concurrent interventions with the family in an effort to effect a shift in normality and aspiration.

[38] A key philosophy of the few programmes like START is that the initial 'wilderness' stage of the programme enables a young person to be taken out of their

comfort zone, a dynamic which opens them to the possibility of seeing their world differently. That stage is followed by more interactive individual mentoring and therapy. In the case of young people like [ML], his comfort zones comprise two parts. First, he exists in a familial environment of significant anxiety and dysfunction. It is nonetheless his comfort zone, as it is all he knows. The second emerging comfort zone is his increasingly institutionalised existence. He has spent most of the past 16 months in secure youth justice residences. While he manages quite well in such a situation, it is not a normality reflecting the wider world. The focus of the START programme is to change these normalities, both within the young person and also with the family. I am not aware that there are any other Youth Justice programmes, or indeed Corrections based programmes, that will provide such intense intervention to a 15 year old repeat offender.

Application of Youth Justice Principles

[39] The Youth Justice principles in s 208 support retention of [ML] in Youth Court rather than a transfer to the District Court with a probable outcome of imprisonment or home detention. Those options would not enable the intense therapeutic approach that I have outlined. There would be no access to the START programme in the District Court.

[40] The youth justice principles relevant to this case are:

(a) I am required to assess measures which will strengthen family and whānau, to foster ability of the family to develop means to deal with the young person's offending. The Youth Court option certainly does that, the District Court does not.

(b) a young person who commits an offence should be kept in the community, so far as that is practical or consonant with the need to ensure public safety. [ML] does pose a risk to the public safety. Both the Youth Court and District Court options involve aspects of removal from the community for a period of time. But if I were to transfer [ML] to the District Court and impose imprisonment, the actual period out of the community would not be much longer than Supervision with

Residence followed by attendance at START programme in any event. Whichever way the Court goes, the young person would soon be released back into the community. It is illusory to think there is any great protection by imprisonment or home detention, especially if there is no meaningful and appropriate therapeutic intervention to support those sentences.

(c) A further key principle of the Act is that any sanction imposed must take the form most likely to maintain and promote the development of the young person within their whanau. That principle is better met by retention in Youth Court.

(d) Any sanction must take the least restrictive form that is appropriate in the circumstances. In addition, the Court cannot impose an outcome unless it is satisfied that a least restrictive outcome would, in all the circumstances and having regard to the s 208 principles, be clearly inadequate[3].

Decision

[41] In the present case, I am led to a conclusion by a considerable margin that retention in the Youth Court is the appropriate outcome. It will far better address [ML]'s underlying causes of his offending than would transfer to District Court. This is especially so on the basis that the s 333 report recommendations are implemented.

[42] If I were to sentence this young person to District Court, then it will likely make him resent the system more than he does already. It would enhance his feelings of anger. It would separate him longer from his whānau and would increase his exposure to the very associates that he needs to be distanced from. Those probable outcomes would exacerbate his deficits and risks.

[43] Accordingly, I will deal with matters as follows:

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[3] Oranga Tamariki Act 1989, s 289(1)

(a) the current supervision order will be cancelled.

(b) He is sentenced to Supervision with Residence for the term of three months and two weeks. This sentence is on the basis, and in the hope, that he will be accepted to the START programme under a sentence of supervision. The commencement date for START is 7 October.

(c) an early release date is set for Wednesday 2 October 2019. Oranga Tamariki will need to liaise with START and with Mr Stone to discuss an appropriate remand situation for the intervening days before the actual commencement date on Monday 7 October. The sentence of Supervision with Residence of three months and two weeks yields the early release date of 2 October.

(d) assuming [ML] performs well at residence, the early release date will consider split sentencing. I forewarn that any supervision plan would need to be for the period of 12 months and must incorporate all the recommendations of the s 333 report. It is for Oranga Tamariki to liaise with whatever other agencies are available to provide all the supports recommended by Ms Cherrington in her report.

(e) A copy of this decision may be remitted to START Taranaki to outline the approach the Court is taking with regard to [ML] and in the hope that they will be available to accept him into their programme to provide him with the intense supports that he requires.

(f) Oranga Tamariki may release the s 333 report and any of the Youth Court documents or reports to START Taranaki to assist them in considering [ML]'s situation.

P J Callinicos
Youth Court Judge