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IN THE YOUTH COURT
AT WHANGANUI

I TE KŌTI TAIOHI
KI WHANGANUI

CRI-2019-283-000040
[2020] NZYC 249

THE QUEEN

v

[DV]

Hearing: 20 May 2020

Appearances: H C Mallalieu for the Crown
R B Crowley for the Young Person

Judgment: 20 May 2020

ORAL JUDGMENT OF JUDGE D G MATHESON

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[1] These proceedings concern [DV]. He faces three charges; aggravated robbery, kidnapping and common assault. The charges were first laid mid-August 2019 and [DV] has been in custody since [date deleted] August 2019. He has been remanded throughout pursuant to s 238(1)(d) at the youth justice facility in [location deleted].

[2] At an early stage [DV] entered a not denied and admitted the charges at family group conference but there was no agreement as to disposition nor whether the matter be transferred to the District Court for sentencing or not.

[3] In October, last year, Judge Barkle tracked that decision for a hearing on 6 November. On 6 November I came to Court and I adjourned the argument because I wanted more information. In particular I sought an updated s 333 report which is a report from a psychologist and once that report was to be made available, I directed that Oranga Tamariki provide a plan and report pursuant to ss 334 and 335. They had 21 days after the 333 report to file that. The 333 report was not filed until mid-January and on 29 January I declined an application for e-bail and directed a cultural report and adjourned the matter to 25 March as a nominal date.

[4] On 25 March I adjourned the matter further to 6 May as the cultural report and social report were not yet available and, in any event, the coronavirus situation meant I was only able to engage with [DV] by telephone on that day and that sort of engagement is totally inappropriate for an issue as significant as this.

[5] In the meantime, I note that the designated social worker, who had significant knowledge about the background of [DV] and his situation, was unable to complete his report for very legitimate and sad reasons and further arrangements needed to be made for that purpose. The circumstances of that delay are such that there can be no criticism whatsoever about that.

[6] The cultural report was finally filed on 27 April and a social worker's report and plan were also filed. We were tracking for me to do what I am doing today in early May, but once again the pandemic meant that [DV] and I could not be in one

place and I needed to eyeball him about what he has been up to and what I am doing and I was not prepared to do that by way of television or phone.

[7] He is now before me to decide whether or not I transfer him to the District Court to sentence him to what could only be an imprisonment term, or whether I deal with him in this Court by way of a Youth Court "imprisonment" term. There are no other options. Does he go to prison in the youth residence, or does he go to the adult prison?

[8] He is not walking out of this courtroom today a free man.

[9] The factual background to the charges is as follows. As to the common assault. [DV] was at the [location deleted – location A] Police Station on 16 August. The victim was in the charge room. [DV] was moved into the charge room and, without warning, struck the victim. He punched him several times to the face and head before being restrained by the police. The victim received a bleeding nose. In the overall scheme of things this charge is of nominal consequence and the engagement had a bit of history at a lower level in terms of these two young men.

[10] The issue of significance today is the aggravated robbery and the kidnapping.

[11] At about 5.23 pm on the evening of [date deleted] August 2019, some 10 minutes or so before sunset, [DV] and two associates were walking along [street 1], [location A]. They continued walking on [street 1] past [another street]. At about 5.40 pm the three of them entered the victim's house through her unlocked back door. She was, at that stage, [a woman in her seventies] living alone. She had significant health issues. At this time she was home alone, in bed reading a book. There were no other lights on in the house. She heard the back door open and thought that it may be one of her caregivers letting themselves into the house. A few minutes later she realised that she did not have a carer due that day and she got out of bed and walked down the hallway towards the kitchen calling out, "Hello, who is there?"

[12] As she approached the kitchen, she realised that the kitchen light was now turned on. She saw that there was a teenage male Māori boy standing in her kitchen.

She demanded that he get out of her house. At that point she was pushed in the back into the kitchen by one of the three offenders she realised were in her home.

[13] She recalls that the first chap she saw in the kitchen did most of the talking. That, it would seem, was [DV]. He told her to shut up or they would hurt her. All three used words to the effect that if she did not shut up they would do her over as they demanded money from her. [DV] told her they were Mongrel Mob from [location A] and they had been awake for the past three days on drugs. The older co-offender had a nunchaku hanging from his neck at the time.

[14] The victim was pushed down the hallway into her bedroom. The offenders demanded she tell them where her money and jewellery was kept, continually saying, "Where's your stuff?" She fell on her bed and gathered up items of jewellery and secretly put them into her pocket. She handed over some cash. Her cellphone was connected to her charger which was plugged into the bedroom wall. The cellphone was inside a wallet type phone case containing numerous cards belonging to her. [DV] took her cellphone and charger.

[15] She was pushed back into the kitchen. [DV] tied her hands behind her back using a nylon hairdressing cape that she had at her address. He searched through her phone case looking through her cards and asked her for the PIN number to her debit card.

[16] She was then pushed into the lounge and pushed onto her couch. While she was seated on the couch, one of the offenders tied her legs together using two of the victim's tea towels from the kitchen. Another co-offender repeatedly said, "Make sure she's tied up."

[17] The three of them continued searching her address looking through drawers and cupboards. On several occasions they returned to the lounge to ensure she was still there. They used a large nylon bag belonging to the victim to put assorted items of property in to. She managed – and this, I think identifies her fortitude – to wiggle her hands free while the three offenders were searching her address, untied the tea towels from around her ankles and ran from the house. She ran to a neighbour's

address, knocked on the door and screamed out, "Help, help, phone the cops, my home is being home invaded, they are over there now." She was really shaken and distressed and appeared to be in shock.

[18] The offenders ran from the victim's address with her property along local streets. They were captured on CCTV.

[19] [DV] and his mates' victim sustained pain and tenderness to her arms and shoulder area from being pushed around, but very fortunately she did not require medical attention. There has, nevertheless, been significant impact upon her and a very humble reparation amount from this young man amounting to $134 is sought.

[20] It is against that factual background [DV] that I need to make a decision as to disposition.

[21] Mr Mallalieu, for the Crown, seeks a transfer to the District Court for sentencing and in such sentencing looks to a term of imprisonment in the range of three years end point. As the Crown notes, the issue is whether the offending can best be dealt with by sanctions available in the Youth Court or whether the offending and [DV]'s personal circumstances are such that the only option available is for the matter to be transferred to the District Court for sentence.

[22] The Crown refers to the provisions of ss 283 and 284 Oranga Tamariki Act 1989. The Crown helpfully refers to the Court of Appeal decision in *R v P* where the purpose of transfer was identified as making available a wider and more punitive range of sanctions than a Youth Court could impose.[1] Reference was also made to *Pouwhare v R*, where it was observed that s 283(o) recognises the orders that are within the Youth Court's power to make will not always serve.[2] Some young persons will always have to be sentenced in the Court of general criminal jurisdiction because their offences may be too serious for the youth justice regime to cater for.

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[1] *R v P* CA59/03.
[2] *Pouwhare v R* [2010] NZCA 268.

[23] Subsequently, in *P v Police*, Downs J commented at para [32], "Potential sentence is therefore clearly relevant to whether the offending is too serious to be dealt with in the Youth Court."[3]

[24] The Crown then helpfully referred to several decisions where transfers were made to the District Court and then several decisions where they were not. In particular Mr Mallalieu made reference to a decision of Her Honour Judge Lovell-Smith in *Police v AZ* where Her Honour noted at para [43]:[4]

> [43] In determining whether or not to convict and transfer the young person to the District Court for sentence pursuant to s 283(o) of the Act, the Youth Court principles set out in s 208 of the Act are relevant. Having regard to *Police v SD*, I take into account article 37(b) of the United Nations Convention on the rights of the child: detention or imprisonment shall be used only as a measure of last resort and for the shortest appropriate period of time; and r 19 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, otherwise known as the Beijing Rules, the placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period.
>
> [44] I accept the submissions of both counsel that there are a number of conclusions that are able to be drawn from these cases and policy considerations.
>
> (a) Age and time available in the Youth Court jurisdiction for intervention is highly relevant. There is a presumption against transfer.
>
> (b) The seriousness of the offending and the likely term of imprisonment in the District Court is highly relevant but not determinative.
>
> (c) In most cases where a transfer to the District Court is awarded, the young person had re-offended, while already subject to a Group 6 order for a similar serious offence. That is supervision with residence.
>
> (d) The Youth Court provides greater prospects of reducing the risk of further offending than the District Court. This is an important public consideration.

[25] As the Crown noted, the issue in this case is whether the interventions proposed by Oranga Tamariki would be clearly inadequate, taking into account the need to hold

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[3] *P v Police* [2017] NZHC 2445.
[4] *Police v AZ* [2019] NZYC 88.

the young person accountable for his serious offending and to ensure the public interest is appropriately met.

[26] The Crown then went on through s 284 factors, noting a significant involvement with youth justice, significant exposure to family harm as a child, remorse at the family group conference, concern of family about his future, and noting ongoing care and protection matters involving the family.

[27] The Crown also noted the significant impact of the crime on the victim. The Crown then referred to previous offending, but with respect I do not consider that it is appropriate that I do so under 284(1)(g).

[28] As to the family group conference results, there was no agreement.

[29] The Crown noted ongoing exposure to family harm, alcohol and drug abuse, lack of engagement in formal education, lack of engagement with community-based supports by family, as all being the underlying causes of offending.

[30] As to 284(1)A, the Crown noted that this offending was serious, that there is some history, that the offending has had a significant impact on the victim and that the defendant is a high risk of harm to the community given the nature of the offending and taking into account previous behaviour that had involved engagement with the Court.

[31] The Crown notes that the only Youth Court option possible would be supervision with residence.

[32] If the matter was transferred to the District Court, then the *R v Mako* and *R v Hemopo* decisions, identify that a starting point of between seven to 10 years would be appropriate.[5] In the circumstances the Crown identifies aggravating features of invasion of a private home, a vulnerable victim because of age and health, detention for a period of time, offending involving threats of violence and in conclusion reaches a view that a seven year term of imprisonment as a starting point, would be in range.

[5] *R v Mako* [2000] 2 NZLR 170 CA; and *Hemopo v R* [2016] NZCA 242.

[33] The Crown then, quite properly, identified potential discounts for youth and matters of a cultural background and also for early plea.

[34] An end point of two years 11 months to three years four months was thus arrived at.

[35] Because of the seriousness of the offending and the personal circumstances of this young man, the Crown believes that a transfer to the District Court would allow for a wider and more punitive range of sanctions.

[36] Mr Crowley, for [DV], opposes the transfer. He referred to *Police v JG*, a decision of Judge Lynch in the New Plymouth Court who commented that transfers to the District Court for sentence are rare.[6] Mr Crowley suggests that six months supervision with residence and 12 months supervision would be sufficient to adequately hold the young person accountable.

[37] Referring to the purposes and principles of dealing with youth, he suggests an holistic approach be adopted with accountability and responsibility and reparation being taken into account. He noted the Court must deal with him in a way that acknowledges his needs and give him the opportunity to develop in a responsible, beneficial and socially acceptable way. He noted that keeping young people in the community, so far as practicable, and consonant to ensure public safety, while also maintaining and promoting the development of a child and his family is appropriate. He says I should adopt the least-restrictive sentence appropriate in the circumstances.

[38] Referring to Judge Lynch's decision, he further noted the Court must bear in mind the need to impose the least-restrictive outcome and the Youth Court sanction available must be clearly inadequate before a transfer is made. He noted that where there is a lack of clarity about the adequacy of the least-restrictive sentence, the Court is required by law to impose the least-restrictive outcome.

[39] He then went through the s 284 considerations and in the main identified the same factors as the Crown. He accepts that this is extremely serious offending but

[6] *Police v JG* cited Court in the Act newsletter, issue 69, March 2019.

identified several cases involving sexual offending where young people had been retained within the Youth Court jurisdiction.

[40] He suggests that realistically after transfer to the District Court and taking discounts for youth, plea, cultural reports and so on, that an end point of no more than two years would be appropriate, but he does acknowledge the difficulty with a potential electronic address.

[41] He believes that a youth justice result is, in the circumstances, the most appropriate one.

[42] The social worker went through a similar analysis as counsel did and taking into account the time that [DV] has been in custody already, suggested a very short period of supervision of three months would be appropriate. The social worker identified that such a result would fit within the precepts of the legislation and, in particular, the public interest and the interests of the victim and the accountability for his behaviour. The social worker referred to s 208 and notes that a release to Mother's care would be appropriate for the wellbeing and best interests of the young person.

[43] It is the view of the social worker that accountability has already been met by the time he has been in custody. The young person has indicated goals of remaining free from alcohol and drugs and engaging with supports and returning to education. These are positive goals and in the social worker's view are attainable now from the base of his mother's home. The recommendation is that the young person be released to that home with weekly monitoring by social workers and for the young person to engage with the Youth to Men Programme and alcohol and drug support.

[44] It is noted that with the COVID-19 pandemic, that the supports would not initially be available as optimally appropriate, but limited phone and video calls would be available. Things have moved on since that report was filed and face to face engagement would now be available.

[45] In addition to those submissions and reports, I have two psychological reports and also a report from an experienced cultural reporter. As to the psychological report

which was prepared in January of this year, the reporter noted that when discussing the offending, [DV] was slightly detached and matter of fact about the nature of it and any likely punishment. She noted he was of [iwi deleted] and Samoan descent. His closeness to his mother was evident and there is a familial acknowledgement that [DV] was subjected to observing significant domestic violence between his parents and was, himself, subjected to physical abuse at the hands of his father. It is also acknowledged that there were significant alcohol issues in the home.

[46] The report identifies Mother's struggle to handle her sons and their offending. The report notes that [DV] had reacted violently towards his mother in the past and that he expressed sadness for the victim and he acknowledged that once she had seen them, they just kept doing what they were doing.

[47] The reporter identified that given his background, this type of offending seemed inevitable. It is believed that the remorse expressed is genuine, but there is a significant history of concerning violence.

[48] The reporter noted that [DV] enjoys the routine of youth residence and has been generally positive within that structure. He has high to average cognitive ability, notwithstanding he has had no regular schooling since primary school. He has got anger issues, and has been involved in smoking cannabis since the age of 10. In a social context he used bullying and intimidation and aggression to manage social relationships. It is clear that his mother's issues need to be sorted out before she could be a positive factor in his rehabilitation and I note it is pleasing to get reports that that is well in train.

[49] The materials identify a conduct disorder and substance abuse disorder with anger and restricted emotional connections. Predisposing factors include previous physical abuse and adult domestic violence and alcohol abuse. Perpetuating factors to his offending include lack of daily activity and routine, boredom and not being involved in any schooling or training at the time of his offending. Protective factors for this young man include his ability to engage and cognitive ability. His previous cognitive assessment places him in the high average range for overall cognitive functioning with a particular strength in perceptual reasoning tasks.

[50] The reporter then formulated, using the Te Whare Tapa Whā process, a well-known and well-utilised Māori model of wellbeing which refers to the four domains of wellbeing including spiritual, physical, psychological and relationships as all being intertwined and essential for both individual and family wellbeing.

[51] The Taha Whānau domain about relationships identifies strengths and his connections with his mother, and loyalty to his immediate family but also weaknesses in relation to the physical abuse an often dysfunctional relationship with his mother. The aggressive nature of his father's relationship is also a very strong negative.

[52] The Taha Wairua domain refers to his identity and capacity for faith and wider communion. [DV] clearly identifies with both his Māori and Samoan background but there are weaknesses and these need to be developed. Mother has returned home and the aspiration is for this young man to return to that home as well so that his identity can be developed from the half of his whānau based in the heart of [his iwi] country; [location deleted].

[53] The Taha Tinana domain refers to the physical health, and in that respect [DV] is physically robust. But this needs to be developed in a structured way and engagement with team sports and the like, it seems to me, would be an advantage.

[54] The Taha Hinengaro domain relates to psychological wellbeing, cognitive functioning and the capacity to communicate, to think and to feel. Strengths include his previous assessed strengths in perceptual reasoning, cognitive skills; being a hands-on kinetic learner who is able to pick up practical tasks easily. He has appeared to show genuine remorse. Areas needing attention include his limited emotional reasoning and connection to other moral reasoning emotions such as empathy and guilt.

[55] Overall it is seen as important that an holistic approach to his wellbeing is undertaken. The report identifies the need for regular counselling and empathy work and anger management, substance abuse counselling, development of cultural identity, resolution of family relationships issues that will involve Mother receiving support. Education needs to be developed on the basis of what has already been started in youth

residence. He is a young man who needs stimulation and when he is bored, problems arise.

[56] The cultural report commences with a general reference to the culpability of colonisation and the need for those involved with this young man to be true to the Treaty principles identified as important, not only within the Treaty but within the legislation itself.

[57] The report identified that whānau was everything for [DV] and the report writer suggests that there are resources within the extended whānau who could be his mentors once he returns to the community. It is the engagement with that extended family resource that is critical to his transition back into the community according to the cultural reporter and that that transition is a successful one free from crime.

[58] Unfortunately the cultural reporter identified that she was unable to engage face to face with some of the resource she identified and unfortunately the Crown was able to draw to the attention of the Court that some of the prospective mentors had some frailties that would be of concern. Nevertheless the strength of family support is evident from this report and it has trickled down through all of the reports I have just referred to.

[59] This decision needs to be made, taking into account the provisions of the Oranga Tamariki Act 1989. I, with respect, refer to the significant decision of Judge A J Fitzgerald in *New Zealand Police v MQ* dated 23 September 2019, and in particular paras [17] through to [35] and paras [62)] and [64)] of that decision.[7] It is not my intention to go through those paragraphs now, but they will be included in my written record of this because they encapsulate significant issues that I have taken into account:

> **The Oranga Tamariki Act 1989**
>
> [17] Changes to the Act that came into force on 1 July this year are the most significant in the nearly 30 years of the Act's operation. It is clear that the Act must now be interpreted and applied with a more sophisticated and nuanced understanding of Te Ao Māori.

[7] *New Zealand Police v MQ* [2019] NZYC 456.

[18] The Objects section is replaced by the Purposes of the Act which are to promote the wellbeing of young people, their families and whānau, hapu and iwi by complying with a detailed and carefully defined list of duties, principles and obligations imposed on decision-makers.

[19] It is not necessary to detail all of those now but it is important to note that they include the following:

1. Establishing, promoting or coordinating services that;

    a. firstly, are designed to affirm mana tamaiti,are centred on young people's rights, promote their best interests, advance their wellbeing, address their needs, and provide for their participation in decision-making,

    b. advance positive long-term health, educational, social, economic or other outcomes;

    c. Are culturally appropriate and competently provided.

2. Families, whānau, hapu and iwi must be assisted to both prevent both young people from suffering abuse and from offending.

3. A Practical commitment to the Treaty of Waitangi is required as is recognising mana tamaiti, whakapapa and the practice of whanaungatanga.

4. Wellbeing and best interests of young people are the first and paramount consideration in all matters regarding care and protection issues and are a primary consideration in relation to youth justice issues.

[20] The four primary considerations in relation to all youth justice matters are:

    1. firstly; wellbeing and best interests of the young person,

    2. secondly; public interest which includes public safety,

    3. thirdly; interests of any victim and

4. fourthly; accountability of the young person for their behaviour.

[21] Other principles include taking a holistic approach which means seeing the young person as a whole person which includes, but is not limited to, developmental potential, educational and health needs, whakapapa cultural identity, disability if any and age.

[22] The nine youth justice principles include imposing the least restrictive sanction possible in the circumstances and addressing causes underlying offending when determining responses and giving consideration to the views and interests of any victim.

[23] As well as those purposes and principles, the Act imposes obligations on the Chief Executive of Oranga Tamariki which include ensuring that the

policies and practices that are implemented have the objective of reducing disparities by setting measurable outcomes for Māori children and young persons who come to the attention of Oranga Tamariki. The duties of the Chief Executive also extend to recognising and providing a practical commitment to the principles of the Treaty of Waitangi promoting the establishment of services designed to improve the wellbeing and long term outcome for young people and the adoption of policies that are designed to provide assistance to young people who lack adequate parental care or require protection from harm or need accommodation or social or recreational activities.

[24] The Chief Executive is also required to ensure where practicable that any services funded to reduce the impact of early risk factors for future involvement in the care, protection or youth justice systems are coordinated with other government funded activities for improving outcomes for children.

[25] All of those provisions are relevant in [MQ]'s case as I will explain shortly.

The UN conventions

[26] The strong emphasis on wellbeing requires amongst other things that a young person's rights under the UN Convention on the Rights of Children and the UN Convention on the Rights of Persons with Disabilities must be respected and upheld.

[27] Previously, on a number of occasions, the higher Courts have endorsed the use of the international instruments to which New Zealand is a party as providing helpful guidance to the interpretation of our law. The amendments to the Act greatly elevate the significance of those conventions and young peoples' entitlements under them to all the rights and the protections they promise. Respecting and upholding such rights must be done.

[28] The preamble to the Rights Convention includes recognition that children, by virtue of their age, are entitled to certain safeguards and protection including legal protection. Articles that are relevant in [MQ]'s case include;

1. Article 2, which requires a focus on ensuring that particular groups of children and young people including disabled youth and indigenous youth are not discriminated against;

2. Article 3, which requires that his best interests be a primary consideration as does the Act;

3. Article 37(b) which states that custody shall be used only as a measure of last resort and for the shortest appropriate period of time;

4. Article 37(c) and (d) require that young people in custody be treated humanely and be separated from adult prisoners in custodial settings;

5. Article 40 which provides that sanctions and outcomes should be consistent with the promotion of a young person's sense of dignity and worthy and also provides that a variety of dispositions shall be available to ensure that a young person is dealt with in a manner appropriate to his or her wellbeing and proportion to their circumstances and the offence;

6. Article 40(2)(b) provides for the right to have the matter determined without delay.

[29] The Act also recognises the importance of timeliness and in s 5(1)(b)(v) requires that decisions be made and implemented promptly and in a timeframe appropriate to the age and development of the young person.

[30] There has been significant delay in reaching this point in the proceeding for [MQ] largely as a result of the complicated legal process to determine his fitness to plead and stand trial for these and other charges. As a result of that process, Principal Youth Court Judge Walker found [MQ] to have FASD, attention deficit hyperactivity disorder ("ADHD") and low intellectual functioning and that these are mental impairments, but that [MQ] was fit to plead and to stand trial.

[31] [MQ] does not have an intellectual disability and FASD is not yet recognised officially as a disability which seems extraordinary when one looks at the impact it has on functioning, but that state of affairs means [MQ] may not necessarily qualify officially for the rights and protections under the UN Convention on the Rights of People with Disability. Having said that, his particular needs have been catered for to some extent throughout the proceedings. For example, he has the support when necessary of a communication assistant to enable him to participate in the process and Ms Bonetti is here today again to fulfil that role.

[32] Returning to the Rights Convention, it also picks up on the principle that young people are to be treated in a manner that takes into account their age and the desirability of promoting their reintegration and assuming a constructive role in society.

[33] Unlike the Rights Convention, the Beijing Rules and Riyadh Guidelines do not have binding force under international law but they set out recommended guidelines on minimum standards for youth justice systems and are therefore relevant.

[34] Rule 5.1 Beijing Rules provides that sanctions and outcomes must emphasise wellbeing of the young person and ensure that any reaction to young offenders shall always be in proportion to the circumstances of both the offender and the offence.

[35] Perhaps the strongest statement on the importance of wellbeing is in the general comment, number 10 of the Committee of the Rights of the Child adopted in 2007. It makes it clear that when balancing the young person's wellbeing on the one hand, and the need for public safety and sanctions on the other, the scales should tip in favour of wellbeing.

[62] In *New Zealand Police v SD,* Principal Youth Court Judge Walker in March 2018 set out the following response he had received from Corrections to an inquiry he had made about what youth-specific interventions would be available if the sentence were to be managed by Corrections either in prison or in the community. The response he received was as follows:[8]

[8] *New Zealand Police v SD* [2018] NZYC 169 at [40].

> In the space of youth (17 to 25 years) within the Department of Corrections there are unfortunately limited services available. If sentenced to a custodial term, he may be eligible for the Young Offenders Programme. This is a specific programme/unit targeted to those under 20 in a custodial space. This is offered in Christchurch and Hawke's Bay Prisons. If sentenced to a community-based rehabilitative sentence, there are again limited resources. The only programme available in Auckland is a Mauri Toa Rangatahi (Power of Youth) Programme which is offered once per financial year per district. The current programme is running in South Auckland. I apologise I do not have a forecast roster as of yet. There are multiple agencies in the community in which we can encourage the youth to engage with. However, it has proven difficult once they reconnect with antisocial associates and the like as I am well aware you would know.
>
> [63] When I met with Corrections officials in Wellington last month and asked them whether there had been any change in that situation since March 2018, I was told there had not been yet. Corrections is working on developing youth-specific programmes in order to cater for young people, who they define as being 17 to 25 years of age, but at this stage, the changes have not yet amounted to any improvement in the situation as Judge Walker recorded in March last year.
>
> [64] The reality would therefore be that after being released more dangerous from an adult prison, there would be no youth-specific programmes and no adequate monitoring of his situation in the community.

[60] A further decision of consequence is that of Her Honour Judge J H Lovell-Smith in *New Zealand Police v TM* of December 2019.[9] At para (14) she referred to a decision of *DP v R* where the Court summarised the comments of the Court of Appeal in *R v Churchwood* as follows:[10]

> In *DP v R* the Crown summarised the comments of the Court of Appeal in *R v Churchwood* as follows, in *Churchwood v R* this Court referred to expert evidence of the type which justifies about special need for protection of the young person recognised by UNCROC in s 25(1) New Zealand Bill of Rights Act 1990. In summary:
>
> (a) In terms of criminal culpability, young people suffer deficiencies in their decision-making ability due to the relatively unformed nature of the adolescent character. There are age-related neurological differences between young people and adults.
>
> (b) During the development process the adolescent brain is affected by psycho, social, emotional and other external influences which we add could include where relevant, family instability and alcohol and drug abuse, contributing to immature judgement.

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[9] *New Zealand Police v TM* [2019] NZCA 608.

[10] *DP v (CA148/2015) v R* [2015] NZCA 476; and *Churchwood v R* [2011] NZCA 531 (2011) 25 CRNZ 446.

> (c) Young people are more impulsive than adults and have less of an orientation on the future than adults.
>
> (d) Young people have greater capacity for rehabilitation, particularly given that the character of a juvenile is not as well formed as that of an adult. The weight to be given to the rehabilitative capacity diminishes where the offending is serious. We would add, nevertheless, that the extent that the extent at the existence of serious offending does not equate with the conclusion that a child is beyond redemption. (e) Offending by a young person is frequently a phase which passes fairly rapidly and thus a well-balanced reaction is required in order to avoid alienating the young person from society.

[61] At paragraph [15] Her Honour then went on:

> I was also referred to Judge Walker's comments on the impact of imprisonment on young offenders in *New Zealand Police v SD*. If SD receives imprisonment, which is the most likely outcome in the District Court, he would very likely spend his time with all of the tensions and violence that go with prison environment. If he is open to being influenced by others, as seems to be the case, he will likely emerge an older and more hardened person. He will likely have no assistance to do anything else. His risk of offending will, at best, be unchanged but more likely be increased. Public safety would not be enhanced by any of that happening.

[62] Of course it is also relevant to refer to *R v Mako*, where at para [58] it was noted that forced entry to premises at night by a number of offenders seeking money, drugs, or other property, violence against victims where weapons are brandished, even if no serious injury is inflicted would require a starting point of seven years or more.[11] Where a private house is entered the starting point would be increased under the home invasion provisions to around 10 years. In *Hemopo*, the Court of Appeal said at paragraph [14]:

> We are, however, of the view that starting points of more than seven years' imprisonment continue to be appropriate for aggravated robbery involving invasion of a private home, notwithstanding the repeal of the Crimes Home Invasion Amendment Act 1999 which had increased the maximum penalties for crimes involving home invasion.

and at [16]:

> In our view Judge Down was also able to consider the detention of the victim to be a further aggravating factor. As this Court noted in *Mako* associated offending such as vehicle conversion, detention or abduction of victims and hostage taking will add to the overall criminality and must be assessed for sentencing in totality.

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[11] *R v Mako* [2000] 2 NZLR 170 (CA).

[63] Against all of that, I now turn to s 284 factors.

(a) The nature and circumstances of the offence.

[64] I have already referred to the summary of facts and, clearly, on any assessment this was serious offending involving a group of youths invading the home of a fragile and elderly woman, manhandling her, binding her and demanding property from her. Fortunately no weapons were used and no significant physical harm was occasioned to her, other than tenderness arising from being robustly handled. It is not only physical harm that needs to be considered, however, and there has been significant psychological harm which I will address in a moment.

(b) The personal history, social circumstances and personal characteristics of the young person so far as those matters are relevant to the offence and any order the Court is empowered to make in respect of it.

[65] I have taken some time already to identify these issues as they were referred to in the s 333 report. The circumstances revealed are all too often presented in this Court. Domestic violence and alcohol abuse on the part of the parents, lack of formal education, drug addiction and violent behaviours on behalf of the young person. Added to that is boredom which seems to me to be a feature of this young man's offending.

(c) *The attitude of the young person towards the offence.*

[66] The reports identified that although [DV] was slightly detached and matter of fact about the nature of the offending, and likely punishment when speaking to the psychologist, he did express what appeared to be genuine remorse and he did, in the family group conference setting, give an appropriate apology. He would like another chance and sees the need for a mentor to ensure his engagement with the community is successful.

[67] His attitude, it seems, as the months have gone by at the [youth justice residence] has developed and it is, according to a senior member of staff who orally presented to me today, something that is certainly improving.

(d) *The response of the young person's family, whānau or family group to the offending of the young person and to the young person as a result of the offending.*

[68] Mother is upset about the offending and encouraged [DV] to accept responsibility from the earliest point he was able to do. She acknowledges her own frailties and has reconnected with her whānau in [location deleted – location B]. She would like to see the child come home with her. I need to say that in previous engagement with the Court I have not had an overly positive view of Mother's engagement, and her influence upon her family and the reports identify why that would be the case. She has significant frailties and it is to her credit that she is attempting to make good those. She is in the right place to do that. In [location A] she was isolated from the strengths of her family, whatever they may be. Her improving her situation cannot but help [DV]. It was disappointing for me in recalling earlier times that mother put her own needs, in my view, ahead of [DV]'s by not supporting what I considered to be a very positive placement in [location B].

[69] Father was not too happy about the offending either but believes his son knows what needs to happen and he will support him. Sadly, his frailties are very evident and, at the moment he is in trouble with the law yet again.

[70] I have also received information from extended family that is significantly supportive of the young man. Some of that was in the context of the bail hearing I dealt with earlier this year and I am also aware from the cultural report that there are maternal family in [location B] willing to help. That family needs to know that for any young man, the social capital of knowing your extended family is important. That family needs to know that this young man's situation is precarious if he is not able to link appropriately with his whānau. They will need to support him whenever he transitions back to the community and from whichever prison he does that from.

[71] I add a note of caution though, that that family needs to reflect upon its own involvement with the criminal justice system.

(e) Any measures taken or proposed to be taken by the young person, or the family whānau or family group to make reparation or apologise to any victim of the offending.

[72] I am aware that this family is apologetic to the victim. I think that there is also, today, a positive sign that the humble amount of reparation sought is to be met immediately.

(f) The effect of the offence on any victim of the offence and the need for reparation to be made to that victim.

[73] The latter I have just addressed. As to the impact, as I have already noted, this has been significant. Understandably this lady was frightened that she was going to be raped and had prepared a response should that occur. She was unwell at the time of the offending. She was able to relay through the family group conference process the impact, both physically and mentally upon her and she has, as I have already noted, articulated very well the nature of the impact upon her in her victim statement.

[74] To her credit she has then left it to the police and the Court to develop an appropriate outcome. She has every reason to be upset that the sanctity of her home was invaded. It must have been terrifying for her and, sadly, the impact will be lifelong.

[75] I am hoping that this process today in itself might allow her the chance to shut the door on this and move forward.

(g) Any previous offence proved to have been committed.

[76] There have been any number of offences but s 282 discharges mean they cannot be taken into account by me. What is relevant is that there have been no orders made against [DV].

(h) Family Group Conference Recommendation.

[77] There is no family group conference recommendation because there was no agreement although it is relevant that admissions were made at the family group conference and an apology given.

(i) Underlying causes.

[78] As to the causes underlying the offending, they are readily apparent from the comments of the psychologist. Early exposure to alcohol abuse, domestic violence, parental relationship breakdown, dysfunction in that parental relationship prior to breakdown, early engagement in drug use, disengagement from Samoan and Cook Island heritage, maternal disassociation with the social capital of maternal whānau, a lack of formal education all conspire to what could be seen as an inevitable end result, particularly when there is an underlying cognitive ability that has become bored and frustrated with the inadequacy of his caregiving environment.

[79] Turning to 284(1A). This was serious offending. While there is no conviction history, there is significant history of criminality with numerous charges laid in the Youth Court including robbery, assault on the mother and dishonesty which have all been resolved through completion of plans. Some of those plans were somewhat truncated as a result of custodial remand but there have been no s 283 orders.

[80] Your victim, [DV], needs to hear a message from me that your behaviour cannot be tolerated. Clearly a person who is prepared to invade the home of an elderly victim, a matter of months after discharge from the Court identifies a risk profile that is concerning. A history of violence born from an upbringing of violence and deficient parenting brings with it a self-fulfilling prophecy that means risk for the community.

[81] However, as has been noted by other Judges, the risk to the community may very likely be multiplied, if you were to enter a prison from the portal of the District Court. Judges Walker and Fitzgerald have identified frailties of the ability of the adult criminal justice system in providing appropriate supervision of young men, such as you, through a prison release process.

[82] This is serious offending and in my view if [DV] were to be transferred to the District Court for sentencing, a starting point of imprisonment in the region of seven to 10 years would be well within range. This is an offence that involved a home invasion with three offenders wearing disguises. The degree of planning does seem to be somewhat negligible but clearly there was a plan to enter a home to obtain goods. Some of the property taken was of sentimental value and has not been recovered. The victim was elderly and frail and the impact has been severe. The detention aggravates.

[83] Fortunately. although there were threats, no weapon was used and no significant physical harm was done. The detention appears to have been for a somewhat limited time and the lack of sophistication of the whole event is revealed by the fact that the victim was able to make her escape next door. That is fortunate.

[84] In the circumstances I consider a starting point of 90 months' imprisonment or seven and a half years would not be out of range in the District Court. From that a deduction of 40 to 45 percent for youth and the cultural issues is also within range and then a further discount of 25 percent would been appropriate, producing an end point somewhere in the region of 37 to 40 months' imprisonment.

[85] That sort of assessment clearly takes the matter well out of the realms of a short term of imprisonment and home detention would not be available and given the seriousness it just could not be justified in any event.

[86] Such is the significance of this offending, had this decision been made in October of last year I consider I would have had no option but to transfer to the District Court and the end result would have been in excess of three years' imprisonment.

[87] In my view that would have meant that the risk profile of [DV] would have been increased and that, in my view, would have resulted in this young man coming out of prison a fully-fledged adherent to a gang. If such a process had been engaged, then he would have been eligible to apply for parole after 12 to 13 months.

[88] In this case, time, in my view, has come to the rescue of you [DV]. The delay in obtaining reports, and there can be no fault attached to that delay, has allowed you

to establish a track record at the [youth justice facility] that has identified a willing engagement across the full spectrum of activities. There was an initial unhelpful moment but I put that to one side.

[89] You have embraced your culture. You have embraced education. You have embraced physical fitness. You have detoxified.

[90] Clearly a significant statement needs to be made from the bench that this sort of offending is simply unacceptable.

[91] In the Youth Court the most significant punishment that can be imposed is supervision with residence to a maximum of six months, followed by supervision up to 12 months. This was the sentence that Mr Crowley submitted was appropriate back in 2019. Back then, in my view, that would have been inadequate.

[92] If I were to sentence you now to six months' supervision with residence, you would be eligible for early release after four months. Given your very positive engagement at the youth residence, were you to be sentenced to youth residence today for six months, then it would seem early release would be likely and that that would occur around 20 September which would be some 13 months after you were placed in custody.

[93] Were you to be sentenced in the District Court, you would be eligible for parole about 13 months after you were in custody as the time spent in youth residence would be taken into account.

[94] If I transfer you to the District Court there will be a small delay while a pre-sentence report is obtained. It seems to me it would effectively mean only a matter of several months in an adult or youth prison before parole eligibility was available.

[95] Having gone through that somewhat complicated process, would a sentence of supervision with residence producing an incarceration period of 13 month against a potential for parole after the same length of time, be clearly inadequate?

[96] Drawing on the authorities referred to earlier, I am not satisfied that it would. What I am satisfied is, that the recommendation of the three months' supervision only whilst well-meaning, is woefully inadequate given the seriousness of the offending.

[97] This Court needs to make a statement. It occurs to me that in previous years the lack of such a statement may have left the door open to the bored mind of this cognitively developed young man to push the boundaries. This is not the case of someone who has previously received orders under s 283 offending again.

[98] As a result of s 282 treatment, he comes for sentence, effectively, as a "clean skin" although to close my eyes to his history would be naïve. He does have a risk profile but I am of a view that that can be attended to by a group six response.

[99] Given that he has been in custody since August, this is not a soft response and it acknowledges the seriousness of his offending but it also facilitates the development of a rehabilitation plan.

[100] I am not yet ready to throw this young man on the scrap heap. I think he has reached a critical point in his life and is ready to take a positive step forward.

[101] Is it better for the community that he is released back to it, tainted by the dysfunction of an adult prison or is it better for him to return to it with a comprehensive youth focused plan around him? I say the latter and today I have had the benefit of hearing from a person who has worked with him throughout the time he has been in custody.

[102] Accordingly I have determined not to transfer you to the District Court [DV] but to hold you accountable by a group six response. The seriousness of the offences requires the full extent of that response to be invoked. There is no need for me to delay for further reports and I now sentence you to youth with residence for a period of six months and thereafter you will be subject to 12 months' supervision.

[103] The reason 12 months is necessary is because this is a situation not only of your frailties but also the frailties of the environment which have brought you to this

point. Considerable oversight is going to be needed to develop rehabilitation. Three months would be woefully inadequate for that.

[104] I impose 12 months' supervision but the plan for that will be developed to coincide with the early release hearing, which will be in September.

[105] The issue of reparation is also now developed by me. Having given notice to your mother, and she having agreed, I now make a reparation order for $134 against her and direct that that be paid within 24 hours. It has to be made against your mother [DV] because you were only 15 at the time of this offending.

[106] The order for six months' supervision with residence will run from today, 20 May to Friday 20 November, being a period of six months. There will be an early release hearing in four months which will be Wednesday 16 September. The time of that will be advised later. I will deal with the nature of the supervision order at that early release date but it is for 12 months.

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Judge DG Matheson
District Court Judge

Date of authentication: 27/05/2020
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.