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IN THE YOUTH COURT
AT MASTERTON

I TE KŌTI TAIOHI
KI WHAKAORIORI

CRI-2018-235-000027
[2020] NZYC 362

THE QUEEN
Prosecutor

v

[SF]
Young Person

Hearing: 9 July 2020

Appearances: D Moore for the Crown
S Taylor for the Young Person

Judgment: 9 July 2020

NOTES OF JUDGE J M KELLY ON SENTENCING

The charges

[1] [SF] appears for disposition today, having not denied the following charges:

(a) Two charges of sexual connection with a child under s 132(1) Crimes Act 1961 which has a maximum penalty of 14 years' imprisonment; and

(b) Two charges of sexual connection with a young person under s 134(1) Crimes Act 1961 which has a maximum penalty of 10 years' imprisonment.

Factual Background

[2] The facts are that at the time of this offending [SF] was 16 years old. He is now 18. [SF] is [a relative] of the victim.

[3] At the time of the offending the victim was [under 16] years old. [SF] and the victim were living in a family home with the victim's grandmother, her mother, her [sibling] and [several other relatives], including [SF].

[4] At the time the victim's mother worked late shifts and nightshifts at [place of work deleted]. The victim shared a room with her mother and [sibling] but had her own bed. [SF] had his own bedroom but at the time preferred to sleep in the lounge so he could play computer games.

[5] Between 2015 and 2018 [SF], on a regular basis, went into the victim's bedroom while her mother was at work. [SF] removed his clothing and had full sexual

intercourse with the victim in her bed. The victim was between [under 12] and [under 16] years of age during this offending.

[6] On some occasions the victim would pretend to be asleep but mostly just lay on her bed waiting for [SF] to finish. [SF] did not wear protection and would ejaculate into the victim and once finished would return to his room.

[7] During the same period [SF] had the victim perform oral sex on him a number of times and paid her for it, using cash or cigarettes.

[8] [SF] was stoned on a number of occasions while this offending took place.

[9] At one time the offending was witnessed by a family member and other family members were told but nothing was done to stop the offending or protect the victim. The offending was only addressed after the victim sought help from a medical professional because she thought she was pregnant.

Previous Youth Court matters

[10] [SF] has previously appeared in the Youth Court. On 30 July 2018 two charges were proved in the Youth Court. First, aggravated robbery. Second, unlawfully getting into a motor vehicle. In each case [SF] was sentenced to six months' supervision with activity and a reparation order was made.

Victim Impact Statement

[11] I do not have a victim impact statement however, it is inevitable that the victim will have been severely impacted by this offending.

FGC Plan

[12] I have read the Oranga Tamariki family group conference completion report dated 9 July 2020. That report states that a family group conference was held on 10 May 2019. On 17 May 2019 the Youth Court approved the plan formulated at the conference. That plan addressed a number of matters.

[13] In relation to education, [SF] completed year 12 at [a secondary school] in [location A] and gained NCEA level 2.

[14] [SF] returned to [school] this year, however, in March of this year [SF] decided he wants to pursue a course that relates to his interest in [deleted]. [SF] intends to enrol in [a programme] at [an education provider] in [location A]. [SF] will be supported by his youth justice social worker to complete this with the intention of beginning this course in term 3.

[15] In terms of drugs and alcohol, [SF] attended the Youth One Stop Shop alcohol and drug assessment and counselling. Initially [SF] did not engage, but re-engaged in 2020. However, since the COVID restrictions ended, [SF] has not re-engaged with counselling but his mother has advised that [SF] has quit using cannabis. [SF] was offered the opportunity to complete a drug test prior to his Court appearance but that has not been able to occur.

[16] With regard to WellStop, [SF] agreed to fully participate in the WellStop assessment and any further counselling sessions recommended by WellStop.

[17] I have the report from WellStop dated 1 May 2020 which confirms [SF] completed his community youth programme at WellStop. That report says, "[SF] engaged to the best of his ability but there was room for improvement for him to make in psychoeducation and relation social skills." WellStop recommends, "[SF] engage in further work in the community if he feels ready to do this."

[18] The completion report from Oranga Tamariki recommends that [SF] be discharged by way of s 282(a) due to the positive completion of his plan, ongoing compliance with bail conditions, and as a reflection of his current positive attitude and engagement.

[19] I have read the memorandum filed by Mr Taylor which attaches your school report for term 3 of 2019, a copy of your driver's licence and forklift skills licence. Also, a copy of the certificate of completion of a life and financial skills course and a physical education course.

[20] I acknowledge the presence of your mother in Court in support of you today.

Submissions on disposition

[21] I have read the Crown submissions on disposition. The Crown opposes a discharge under s 282. The Crown submits that your offending is too serious to be dealt with in that way. The Crown submits the most appropriate outcome is for an admonishment under s 283(b). The Crown submits that the circumstances and seriousness of your offending mean that any sentence, short of an order, under s 283 would be inadequate.

[22] I have read the submissions filed on your behalf by Mr Taylor. He submits that a discharge under s 282 is appropriate and is supported by Oranga Tamariki. Mr Taylor emphasises your personal history and social circumstances and submits a discharge under s 282 is available for serious offending and is the least restrictive outcome in the circumstances.

Applicable Principles

[23] Both counsel for the Crown and Mr Taylor agree that the starting point, when considering the appropriate disposition, are the primary considerations set out in s 4A(2) Oranga Tamariki Act 1989. Specifically, the wellbeing and best interests of the young person, the public interest, which includes public safety, the interests of any victim and the accountability of the young person for their behaviour.

[24] Sections 4, 5 and 208 of the Act also provide purposes and principles that should be given due regard when making decisions under the Act.

[25] I accept that the following purposes and principles are particularly relevant in this case.

[26] First, under ss 4(1)(b)(ii) and (c)(ii), promoting the wellbeing of children, young persons, families, whānau, hapu, iwi and family groups by supporting and protecting young persons to prevent re-offending or respond to offending and assisting

families, whānau, hapu, iwi and family groups to prevent the young persons from re-offending or respond to offending.

[27] Secondly, under s 4(1)(i) regarding promoting wellbeing by responding to offending by young persons in a way that promotes their rights and bests interests and acknowledges their needs, prevents or reduces offending or future offending, recognises the rights and interests of victims and holds the young person accountable and encourages them to accept responsibility for their behaviour.

[28] I also take into account the principles set out under s 5(1)(a), 5(1)(b), 5(1)(c), 208(2)(d), 208(2)(f) and 208(2)(fa).

Relevant Cases

[29] The Crown has referred to a number of cases which it says are comparable and may assist in sentencing.

[30] In *R v SQ* the young person appeared for disposition on two charges of sexual violation.[1] The offending was carried out against SQ's younger relative over a one year period when SQ was 14 years old. He completed a plan developed at the FGC though some issues arose regarding his conduct during this.

[31] At disposition, the Court considered whether SQ should be discharged under s 282 or s 283(a). In making an order under s 283(a), the Court recognised engagement with the youth justice team and its work arising from the FGC plan but in the end decided to make an order under s 283(a) having regard to the interests of the victim.

[32] In *R v ND* the young person appeared for disposition on charges of sexual violation as a party and making an intimate visual recording, both arising from the same incident.[2] ND had good compliance with the plan put in place. At disposition the Court found it would be inappropriate to discharge ND under s 282 and an order under s 283(a) was made.

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[1] *R v SQ* [2019] NZYC 627.
[2] *R v ND* [2018] NZYC 602.

[33] The Crown also refers to *Police v JT* where the young person appeared for disposition on a charge of sexual violation by rape.[3] JT was 14 years old and at the time of the offending he had not previously come to the attention of the Court or police. JT had spent approximately 18 months successfully completing components of the plan, including a safe programme.

[34] Ultimately Judge Davis found that the offending was serious, and JT was ordered to come up for sentence if called upon within 12 months, pursuant to s 283(c) of the Act. On appeal the High Court dismissed the appeal on the basis that the Judge had not erred by not discharging JT pursuant to s 282.

[35] Finally, in *Police v Alex** the young person appeared for disposition on seven charges arising from sexual contact with four victims.[4] The young person was 14 at the time of the offending and had successfully completed the plan. Ultimately, the Judge was satisfied that a s 282 discharge was the appropriate outcome but also noted her remaining unease, based entirely on the seriousness of the offending.

Discussion

[36] Turning now to the factors the Court must have regard to in making an order under s 283 of the Act.

[37] First, the nature and circumstances of the offences. I agree with the Crown submission that the lead charges are the two charges of sexual connection with a child, each of which carry a maximum penalty of 14 years' imprisonment. These charges are serious. The aggravating features of the offending are as follows:

> (a) A breach of trust. The victim is the younger [relative] of [SF] and they had been living in the same house over a number of years. The offending was carried out when the victim's mother was away;

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[3] *Police v JT* [2017] NZYC 462.
[4] *Police v Alex** YC Nelson CRI-2011-242-000016, 24 May 2012.

(b) The nature and scale of the offending. The offending occurred over a three year period; and

(c) The vulnerability of the victim. The victim was aged between [under 12] and [under 16] years old at the time of the offending and the offending continued, even after it came to the attention of family members.

[38] In relation to the personal history, social circumstances and personal characteristics of [SF], I accept the submission made by Mr Taylor that [SF] is a very different young man today than when he first appeared in the Youth Court. He is now 18 and has made significant progress in terms of his education and behaviour as I have already mentioned.

[39] With regard to the attitude of [SF] towards the offence, [SF] admitted the offending. I accept that when spoken to by the police the comments that [SF] are said to have made at the time suggests that [SF] had a level of understanding that his actions were wrong.

[40] In relation to any measures taken or proposed to be taken by [SF] or his family whānau or family group to apologise to the victim of the offending, at the family group conference [SF] provided a letter of apology which was provided to the victim via a family member.

[41] In relation to the effect of the offence on the victim. as I have said earlier, I do not have a victim impact statement, but I accept that the effect of offending such as this can be lifelong. It is inherently traumatic and in this case the offending has impacted the wider whānau as [SF] and the victim are related.

[42] In terms of previous offences proved to have been committed by [SF], I have already referred to the fact that [SF] has previously appeared in the Youth Court and the orders that were made.

[43] In relation to any decision, recommendation or plan formulated by a family group conference, I acknowledge that [SF] has made positive progress in completing the plan that was developed.

[44] Having regard to the cases I have been referred to, and all the matters I have referred to, I find that this was very serious offending against a vulnerable family member, carried out over an extended period of time.

[45] I am of the view that [SF]'s offending and all the other matters I have referred to are comparable to the facts in the cases of *R v SQ*, *R v ND* and *Police v JT* and can be distinguished from the approach taken by the Judge in *Police v Alex**.

[46] Balancing all the youth justice principles that I have referred to, I am of the view that a s 282 discharge is not appropriate as it would not recognise, in my view, the seriousness of the offending and the interests of the victim.

[47] Having considered all matters, I find the appropriate disposition is an admonishment under s 283(b) of the Act.

Disposition

[48] Therefore [SF] on charges 1, 2, 3 and 4 in the Crown charge notice dated 2 April 2019, I make an order under s 283(b) which will in effect a notation on your record that you have been admonished in respect of each of these charges.

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Judge J M Kelly
Youth Court Judge

Date of authentication: 20/07/2020
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.