EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

IN THE YOUTH COURT
AT KAIKOHE

I TE KŌTI TAIOHI
KI KAIKOHE

CRI–2018–263–000089
[2020] NZYC 395

NEW ZEALAND POLICE
Prosecutor

v

[IK]
Young Person

Hearing: 8 June 2020

Appearances: S Barnaart for the Crown
C Cull for the Young Person

Judgment: 12 August 2020

RESERVED DECISION OF JUDGE K B de RIDDER

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[1] In a decision given on 14 June 2019 I found that charges against [IK] of rape, and of being a party to charges of rape, unlawful sexual connection, and indecent assault by [YV] were proved.

[2] In a disposition hearing on 8 June 2020 I approved a Court monitored plan for [IK], and indicated that I would give my reasons later. These are now my reasons.

Background

[3] The background to the charges is set out in my decision of 14 June 2019 but can be briefly summarised. The complainant and [YV] and [IK] were attending a [social event] at [location deleted] on [date of offending deleted] 2017. During the course of the evening the complainant became intoxicated. [IK] and [YV] lured her away from the [event location] to a nearby bus shelter where the offending occurred.

[4] Between 26 October 2017 and 14 June 2018 ESR carried out DNA testing. As a result of that a decision was made to progress charges against both young persons. [IK] was interviewed by the police on 13 August and arrested and charged.

[5] [IK] first appeared in Court on these charges on 14 August 2018, now nearly two years ago.

[6] On 9 November 2018 the Youth Court dismissed an application for the charges against [IK] and [YV] to be dismissed.

[7] The hearing of the charges took place 27 – 30 May 2019.

[8] For the purposes of determining the Court's response to [IK]'s offending, the following documentation has been made available:

(a) 10 July 2019 – the FGC plan (characterised by the Court as an interim plan)

(b) 22 September 2019 – a report for a proposed Hohourongo Kaupapa.

(c) 26 September 2019 – Social Work report.

(d) 21 October 2019 – psychological report from D J Keightley-Phillipps.

(e) 20 November 2019 – report of Hohourongo Hui.

(f) 31 January 2020 – record of FGC.

(g) 10 February 2020 – Social Work Report and Plan.

(h) 29 April 2020 – Safe Network Youth Service assessment report.

(i) 13 May 2020 – Social Work report.

(j) 4 June 2020 – Social Work plan and report.

(k) 18 March 2020 – Crown submissions.

(l) 5 June 2020 – updating memorandum from Crown.

(m) 15 March 2020 – submissions of defence counsel.

(n) 4 June 20 – updating memorandum of defence counsel.

Summary of Crown submissions

[9] The Crown submits that the matters should be transferred to the District Court for sentencing pursuant to s 283(o) Oranga Tamariki Act 1989 ("the Act").

[10] The Crown points to the guideline Court of Appeal judgement of *R v AM* as discussed in *R v LH*.[1] In terms of those cases the Crown notes that the culpability assessment factors in this case are planning and premeditation, multiple offenders,

[1] *R v AM* [2010] NZCA 114, *R v LH* [2018] NZYC 470.

vulnerability of the victim, harm to the victim, the scale of offending, and the degree of violation.

[11] After noting the factors identified in Mr Keightley-Phillipps report, and the recommendations made by the social worker the Crown identifies the following factors that should be taken into account pursuant to s 284 of the Act, namely:

(a) This was extremely serious offending.

(b) [IK]'s attitude shows little insight and a reluctance to take responsibility for his offending.

(c) [IK]'s attitude does not appear to have changed over time.

(d) [IK] has gone on to offend further although not in a similar way.

(e) Although [IK] has supportive whānau he appeared to be reluctant and resentful of the need for a Safe plan.

(f) [IK]'s motivation to engage appears to be centred around staying in the Youth Court rather than demonstrating any substantial insight into his offending.

(g) The social worker has expressed concerns about [IK]'s ability to manage his anger for a sustained period which would be required as part of the Safe program.

(h) The impact of the offending on the victim.

[12] In conclusion, the Crown submits that the available length of orders in the Youth Court will not be of sufficient duration to address the concerns of the psychologist, and the issues raised by the social worker as well as adequately addressing the serious nature of the offending.

Summary of defence counsel submissions

[13] Ms Cull for [IK] submits that of the options available to the Court, the Court should adopt a Court monitored plan and defer determination of disposition until either the Court monitored plan is finalised or breached. Ms Cull points to the provisions of ss 4, 5, 208, 284, and 289 of the Act in support of this submission.

[14] In the alternative Ms Cull submits that the appropriate order would be a supervision with activity order.

[15] Ms Cull points out that [IK] was only two months past the age of 14 when the offending occurred, and if it had occurred two months earlier then [IK] could only have been dealt with in the Youth Court.

[16] She also points to the recommendations of the psychological report, and submits that therapeutic intervention should be prioritised over punishment to address the issues raised in that report and to confirm with the overriding principles of the Act.

[17] Ms Cull further submits that [IK] does not turn 19 until [date deleted] 2022 thus providing ample time for a Court monitored plan to be adopted, and a final determination to be made within the Youth Court. A Court monitored plan and deferral of final disposition will enable all options available to the Youth Court to be considered at a later date.

Social work report and plan

[18] The most recent reports and plans are dated 10 February and 4 June 2020.

[19] The report and plan of 10 February 2020 is very detailed and comprehensive. It notes that [IK] and his whānau have an extensive history with Oranga Tamariki dating back to 1994. Since April 2003 there have been 14 notifications to Oranga Tamariki with the majority of those involving family violence. On 23 November 2012 police uplifted [IK] and four of his siblings and placed him in the care of their paternal aunt Ms [TK]. Of significance the report notes that [IK]'s relationship with his parents is not good. He harbours anger towards his mother and a loss of respect for her. Also

his father has exposed him and his siblings to domestic violence, parental alcohol, drug, and other substances abuse, neglect, and emotional trauma. That background goes some way to explaining where [IK]'s anger comes from, and his attitude towards his mother and other females.

[20] Contrasting with that is the warm, safe, stable, supportive and loving home environment provided to [IK] by his caregiver aunt.

[21] The report notes that [IK] had other Youth Justice matters dealt with in the Youth Court in 2017 – 2019.

[22] The social workers conclusion is that [IK] should remain in the Youth Court jurisdiction based on the following factors:

(a) [IK]'s social circumstances and early childhood have had a profound and negative impact on him.

(b) [IK] was only 14 years of age at the time of the offending.

(c) [IK] has suffered grief and loss when he and his siblings were separated from his parents.

(d) The Youth Court offers a more rehabilitative and a therapeutic approach that would address the issues identified in the report.

(e) [IK] could be supported to complete this while remaining in the community.

(f) Although [IK] has reoffended since [the date of offending in] 2017 he has not committed any offences of the same nature of seriousness.

(g) [IK] is now more motivated towards making things right than he has been in the past.

[23] In a report dated 13 May 2020 the social worker notes that a Safe assessment had been carried out and the report recommended that [IK] participate in the Safe Network Youth Service. Arrangements had been put in place to enable that to occur.

[24] In the Social Work report dated 4 June engagement with the Safe program was confirmed, and the recommendation was that [IK] be made subject to a Court monitored plan, but in the event that the Court considered an order would be more appropriate then the recommendation was for an order for supervision with activity. The conditions recommended for such an order were that [IK] continue to reside with his caregiver aunt, he attend the Safe programme, he undergo any specified counselling, psychiatric or psychological interventions as directed by his social worker, he attend [a trade course], and meet with his youth justice social worker once a week.

Psychological report

[25] The key three passages from Mr Keightley–Phillipps report are as follows:

> In my view [IK] displayed a somewhat immature and superficial appreciation of the gravity and severity of his offending with little evidence of any personal responsibility, accountability or victim empathy.
>
> I am of the view that [IK's] initial denial of his offending to the police and his objection to the "safety plan" may suggest an attitude of "what's wrong is wrong and what's right is not getting caught' and that he has compartmentalised or disassociated himself from his offending. I consider that [IK's] past and current offending may well have an element of poor role modelling in addition to "being easily lead" ("people pleasing") which may reflect a need for approval and belonging from his peers.
>
> In view of the above, I consider [IK] generally appeared to lack personal insight/self–awareness and acceptance of personal responsibility or accountability regarding his offending, potentially placing him at risk for further offending.

[26] Mr Keightley–Phillipps identified areas on which [IK] needs to focus on, and recommends he attend the SAFE programme.

FGC

[27] The most recent FGC was held on 31 January 2020 and resulted in a non-agreement due to the Crown's view that the matter should be transferred to the District Court.

Discussion

[28] The provisions of the Act to be taken into consideration when determining the appropriate response to [IK]'s offending are ss 4A, 5, 7AA, 208, 284, and 289. It is not necessary to set out verbatim those provisions. They are at the core of the Act in relation to youth justice, and of course in respect of some of them, amount to significant changes which came into force on 1 July 2019. It is fair to say that, when summarised, in particular ss 4A and 5, that the wellbeing and best interests of the young person are clearly to the fore, but not to the exclusion of other considerations, particularly the public interest, the interests of any victim, and accountability. Important principles to be applied include imposing the least restrictive sanction possible, and addressing the underlying causes of the offending.

[29] Of those provisions, of significance is s 284, which sets out the factors to be taken into account in deciding whether or not to make an order under s 283 of the Act. In relation to those matters the following is relevant:

(a) The offending is clearly serious. If committed by an adult then the combined effect of the Court of Appeal decision of *R v AM* and s 128B of the Crimes Act would make prison inevitable.

(b) The personal history, social circumstances, and personal characteristics of [IK] are that he had only just turned 14 at the time, and was very immature. To some extent he appears to have been following the lead of his older cousin [YV] whom he respects. The detail in the psychological report and the social worker reports indicate that he has a limited understanding of the seriousness of the offending and initially was somewhat dismissive of the need for him to engage in the Safe

programme. However, that attitude seems to have shifted considerably. Although he had a childhood marred by domestic violence, neglect, and emotional abuse, he seems to have found stability with his caregiver aunty who has stood by him steadfastly throughout the long, drawn-out process.

(c) His attitude toward the offence is one of immaturity in regards to the issue of consent, but the response of [IK]'s aunty in particular has been crucial in firstly making [IK] accept that the offending is serious and that he needs to undertake the programme, and also in providing stability for him. His attitude has clearly shifted.

(d) With the passage of time [IK] now shows greater insight into his offending and the seriousness of it. Of considerable significance is the hohourongo hui at which [IK] appropriately apologised which seems to have been accepted by at least some of the victim's family. Significantly, this took place at a marae to which both [IK]'s whānau and the complainant's whānau whakapapa, and therefore takes into account the relevant principles in ss 5 and 7AA of the Act.

(e) Whilst initially traumatic for the complainant it appears that she has moved on and that the hohourongo hui has been relevant and of assistance in that regard.

(f) There has been no previous offending of this nature by [IK].

[30] The following factors persuade me that it is appropriate that [IK] be subject to a Court monitored plan for the time being prior to determining final disposition:

(a) [IK]'s age at the time of the offending, and now.

(b) The fact that there is still ample time for [IK] to complete a Court monitored plan and still be subject to a Youth Court order for disposition.

(c) Regard has to be given to [IK]'s background out of which he was clearly significantly disadvantaged and which has impacted very adversely on him, [IK]'s change of attitude as time has progressed and he has matured.

(d) Attendance at the SAFE programme is clearly required and can be delivered through a Court monitored plan and does not require a Youth Court order to provide that. Such an approach accords with the operative provisions of the Act referred to above.

(e) Attendance at the SAFE programme clearly has regard to the interests of the victim and to society.

(f) The Court is required to impose the least restrictive sanction appropriate to the offending.

(g) A Court monitored plan still leaves open the possibility of a Youth Court order.

[31] For all of the above reasons [IK] is to be subject to the Court monitored plan as imposed on 8 June 2020, with regular judicial monitoring.

K B de Ridder
Youth Court Judge