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**IN THE YOUTH COURT
AT AUCKLAND**

**I TE KŌTI TAIOHI
KI TĀMAKI MAKĀURAU**

**CRI-2020-204-000048
[2020] NZYC 609**

**NEW ZEALAND POLICE
Prosecutor**

v

**[AN]
Young Person**

Hearing: 30 November 2020

Appearances: H Clark for the Prosecutor
M Winterstein for the Young Person

Judgment: 30 November 2020

Reasons in full: 7 December 2020

REASONS FOR SENTENCING DECISION OF JUDGE A J FITZGERALD

DECISION

[1] [AN], now that I've heard what Ms Clark and Ms Winterstein have had to say, I have decided not to send you to the District Court so that you can be sent to prison. Instead I am going to make a supervision with residence order for 6 months today and that will be followed later by a supervision order for 12 months.

[2] I need to explain how I made that decision, but to do that with all the detail will take a long time. Far too long to sit here and do it now. In a moment I'll cover the main parts that others here will want to know about, but not with all the detail. In a few days time the full decision with all of my comments will be available to everyone in writing.

[3] You will get a copy of that and I want you to read it please. Well, maybe not all of it; it won't be so important to read all the legal parts, unless you want to, but the rest of it you should read, especially the part at the end which has some things I want you to know and to think about before we meet again in March next year.

[4] To help make sure you do understand the decision, know about all of your options, and have someone you trust to talk to about those things, Ms Winterstein will be allowed to visit you in the residence again at a suitable time.

[5] Clearly this courtroom today is not the right place to talk about things in any detail. I know that all you really wanted to know was whether you would be going to the District Court to then be sent to prison and you now know that won't happen. It's not realistic to expect that you can sit there now and concentrate on a whole lot of other things too. Also, it has been very clear throughout the hearing this morning that your mother keeps distracting you and has kept that up despite what I said to you earlier.

[6] Okay, so [AN] you can sit down again now while I go briefly through the reasons for my decision which begin by describing the events that led to the charge you have admitted of wounding [NV] with intent to cause her grievous bodily harm on 29 March 2020.

FACTS

[7] [AN] and [NV] knew each other before this offence occurred.

[8] In October 2019 [AN] was in a relationship with [MM] who is alleged to have committed firearms and violence offences [in late October] 2019, in relation to which [NV] is the complainant. He is yet to go to trial on those charges. [AN] was present when that alleged offending occurred. [NV] made a statement to police about the incident. In that she also mentioned, with concern, that [AN] was wearing bloodied clothes and had serious stab wounds to the back of her head and body.

[9] [In late March] 2020 [AN] was at an address in [suburb deleted]. Also present was her friend [KA]. [AN] knew [NV] was coming to the address and asked [KA] if she would “smash” [NV] for providing the statement to the police about [MM]. [KA] initially agreed, before deciding that she did not want to be involved.

[10] [NV] arrived at the address with a friend, [TT], who remained in the car she had driven there. As [NV] was about to enter the address [AN] came out with [KA]. [NV] tried to return to the car, but [AN] chased after her and said she would come with her. They both got into the car and [TT] drove off.

[11] [AN] raised the subject of [MM] and called [NV] “a nark”. When [NV] then told [AN] that they would drop her off at a petrol station, [AN] became angry and aggressive. Fearful of what would happen, [NV] told [TT] to stop the car immediately.

[12] Both [AN] and [NV] got out of the car. [AN] pulled out a knife, pushed [NV] up against the car holding her by her throat and began stabbing her. While doing so she was yelling at [NV] about being a nark and repeatedly tried to stab her in the throat from various angles. [NV] dropped her head down in an attempt to conceal her neck while [AN] stabbed her to the head several times. [NV] managed to fight [AN] off and get back into the car and [TT] took her directly to Hospital.

[13] [AN] returned to the address in [the suburb], washed [NV]’s blood off her hands and the knife and told [KA] “I got her”.

IMPACT ON [NV]

[14] [NV]'s victim impact statement is harrowing to read. She has suffered a great deal in many ways. That included multiple stab wounds to her head, a stab wound to her right forearm, her left hand and her right thigh. The wound to her head had the most stitches but [NV] says in her victim impact statement that the leg wound was probably the worst because it affected her walking for months. She still has times when she gets sharp pain in her head due to nerve damage caused by the stabbing.

[15] When she was being driven to the hospital [NV] thought she was going to die. Upon arrival she could not stand. When she put her hand up to touch the wound on her head her fingers went inside her head.

[16] It took [NV] a long time to build up the courage to leave the house. She was very scared for herself and her children. She describes being unable to move due to fear, to having trouble sleeping and looking over her shoulder all the time. It is still hard for her to understand what happened. [AN] was a friend she had looked after.

[17] Understandably [NV] is very angry with [AN] for messing up her life. However, as a remarkable sign of [NV]'s good character, she commented on [AN]'s potential, expressed concern for her and hope that she would get help and get out of the world she was living in.

SUBMISSIONS

[18] The police, for whom Ms Clark appeared, applied to have [AN] convicted and brought before the District Court for sentencing. It was suggested that in the District Court a starting point of 9 years imprisonment would be appropriate before credit was given for such things as [AN]'s guilty plea and her age. Such an outcome was said to be appropriate given the extremity of the offending and the significant public interest.

[19] [AN]'s social worker, Ms Harris, recommended the making of a supervision with residence order for the maximum period of six months' to be followed by a 12-

month supervision order, again being the maximum period, keeping in mind that [AN] has been in custody, on remand, for about 8 months now.

[20] If [AN] is granted early release from residence, two thirds of the way through the order, she will have spent about 12 months in custody before returning to the community and under supervision for 12 months.

[21] Ms Winterstein, for [AN], supported Ms Harris's recommendations which I will say more about soon.

[22] Before I could have convicted [AN] and transferred her to the District Court, I would need to have come to the conclusion that the alternative of supervision with residence followed by supervision was clearly inadequate. After very careful consideration of all available information I did not reach that conclusion. On the contrary, there would have been clear inadequacies sending her into the adult prison system as I will explain later.

LAW

[23] The amendments to the OT Act that came into force on 1 July 2019 require a far more comprehensive approach to sentencing in a case like this than was previously necessary, involving not just consideration of the relevant provisions of the OT Act, but also respecting and upholding rights under the United Nations Convention on the Rights of the Child ("the CRC").¹

[24] As well as that, the purposes of the OT Act, to which I will refer in slightly more detail shortly, include providing a practical commitment to the Treaty of Waitangi in the way described in the Act. That includes a specific duty on the Chief executive of OT to provide that commitment in ways that are spelt out in s 7AA.

¹ United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) ("the CRC"). The same must happen in relation to the UN Convention on the Rights of Persons with Disabilities but that Convention does not apply in [AN]'s case.

[25] The relevance of these new provisions of the OT Act was eloquently and succinctly described recently by His Honour Judge Davis in *New Zealand Police v JH* as follows²:

[49] [Te Tiriti], the [OT] Act and [CRC] are not identical in their terms, but in my view nor are they in conflict. What is clear is that each document sets minimum standards of conduct and benchmarks minimum standards that every young person is entitled to. These rights are not something that are optional, or something that may be aspired to as best practice by police, Oranga Tamariki, or Judges for that matter – they are mandatory provisions, rights and protections afforded to every young person.

[26] I begin my legal analysis with the OT Act.

The OT Act

[27] The purposes of the OT Act are to promote the wellbeing of tamariki and their whānau, hapū and iwi by complying with a detailed and carefully defined list of principles and duties imposed on decision makers. Importantly the Act must be interpreted and applied with a much more sophisticated and nuanced understanding of Te Ao Māori and, as mentioned already, the purposes include reference to the practical commitment to the Treaty of Waitangi that is now necessary.

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

- 1.) [AN]’s wellbeing and best interests;
- 2.) The public interest including public safety;
- 3.) [NV]’s interests; and,
- 4.) [AN]’s accountability for her behaviour.

[29] All people exercising any power under the Act must be guided by the long list of principles set out in s 5. They include respecting and upholding rights under the CRC, protecting mana tamaiti and well-being by recognising whakapapa and the

²*New Zealand Police v JH* [2020] NZYC 396.

whanaungatanga responsibilities of whānau, hapū and iwi, and taking a holistic approach which means seeing [AN] as a whole person including, but not limited to, her developmental potential, educational and health needs, whakapapa, cultural identity, and age. They also include making and implementing decisions promptly and in a time frame appropriate to [AN]’s age and development.

[30] General duties are imposed on the Chief Executive of OT as well as specific duties in relation to the Treaty of Waitangi. The latter include ensuring that OT’s policies and practices have the objective of reducing disparities for Māori children, improving outcomes for them and also have regard to mana tamaiti, the whakapapa of Māori children and the whanaungatanga responsibilities of their whānau, hapū and iwi.

[31] The youth justice principles in s 208 include imposing the least restrictive sanction possible in the circumstances, addressing causes underlying offending, giving consideration to [NV]’s views and interests and taking reasonable and practical measures to support [AN] to prevent or reduce further offending.

[32] Section 284 sets out the factors that must be taken into account on sentencing and I turn now to those aspects that have not already been addressed above.

Nature and circumstances of the offending

[33] I have already summarised what happened. This was extremely serious offending. At one point, [AN] was facing a charge of attempted murder before pleading guilty to the current charge in the High Court and returning to the Youth Court for sentencing.

[34] The aggravating features are the extreme violence causing significant harm to [NV], use of a weapon, pre-meditation, attacking the head and doing these things to at either punish [NV] for talking to the police or to prevent her from giving evidence, or both.

Personal history and characteristics and social circumstances

[35] [AN] was born [overseas] on [date deleted] 2003 and so is 17 years old now.

[36] Her father, who is of [European] heritage, still lives [overseas]. [AN] does not currently have a relationship with him and speaks negatively about him.

[37] [AN] has an older [sibling], who has lived [mostly overseas] and [two younger siblings].

[38] [AN]'s mother is of Māori descent, and although [AN] has not had a great deal to do with her Māori cultural heritage to date, that is starting to change. Her whānau are from [location deleted], her hapū is [deleted] and her iwi is [deleted]. When questioned by [RV], who wrote the very helpful cultural report, about what it means to her to be Māori, [AN] said "nothing; I just feel like it's a nationality." However, she has been engaging in cultural programmes at [a the Youth Justice residence in the North Island], while on remand, and achieving NCEA credits which she is justifiably proud of.

[39] A man known as "[nickname deleted]" was [AN]'s first stepfather. He was in a relationship with [AN]'s mother until he was imprisoned for methamphetamine dealing offences. [AN]'s second stepfather, whose name is [deleted], entered her life when she was about 7 years old. Her relationship with [her second stepfather] and his family seems to have been a good one.

[40] Early in her life [AN] lived mostly with members of her maternal whānau and those seem to have been happy years. In particular, [AN]'s maternal aunts and grandparents have played a very important part in her life. [AN]'s love for her grandparents in particular is very strong, and they for her.

[41] At about 6 or 7 years of age [AN] moved to live with her mother who has since then led her down a pathway that has resulted in where she is today. I know nothing about [AN]'s mother's own background that might help me understand why she has made the choices she has regarding [AN]'s exposure to things no child should ever experience.

[42] In her report, [RV] provides this list of factors which are a summary of some of the negative features of [AN]'s life over the past 10 years or so:

- (a) **Cultural disconnectedness** – disconnected from te ao Māori (the Māori world); limited engagement in cultural activities that would enhance her role and mana as a wāhine Māori (Māori woman); intergenerational impact of cultural deprivation resultant of colonisation;
- (b) **Whānau dysfunction** – parental separation; raised by sole parent mother before the presence of two stepfathers consecutively; raised by different family members at different times of her life; somewhat disconnected from biological father; parental addiction and transience (mother); mothers' occupation (prostitution); parental neglect (mother); mothers' affiliation to the criminal underworld;
- (c) **Transient and limited education pathway** – enrolled in multiple schools in [two cities in New Zealand] and [overseas]; expelled from school [overseas]; early exit without any formal qualifications; limited opportunities for work and diminished earning capacity;
- (d) **Youth gang affiliation** – negative influence of peer group, [name deleted] Youth/Street gang;
- (e) **Sexually active as a child** – became sexually active at 12 years old; experiences of sexual deviance at a young age;
- (f) **Alcohol and drugs** – early uptake of alcohol and drugs – cannabis at 12 years old; early uptake of methamphetamine at 13 years old; intravenous user on a few occasions; afflicted with methamphetamine addiction. (Later in the report it is mentioned that [AN] eventually ended up smoking methamphetamine with her mother on numerous occasions and had used meth intravenously about 5 times); and,

- (g) **Gang affiliation** – immersed in and deeply entrenched in the gang world; association with high profile figures of the criminal underworld.

[43] That list does not include the physical abuse and other trauma [AN] has suffered including exposure to family violence between her mother and step-fathers. In 2015, [AN] was the victim of a robbery by a stranger at a shopping mall. She was punched in the face, head and body and kicked in the stomach but did not complete an interview with the police and declined counselling. This toxic mix of traumatic experiences, exposure to the criminal underworld, and self-medicating with drugs her mother has encouraged her to use, ultimately resulted in care and protection proceedings being taken in the Family Court signifying that the concerns were at the extreme end of the scale.

[44] On 16 November 2017 a declaration was made by the Family Court that [AN] was in need of care and protection on the grounds that she was behaving in a manner that was likely to be harmful to her physical, mental and emotional wellbeing and her mother was unable or unwilling to control her.

[45] A custody order in favour of the Chief Executive of OT was eventually made on 18 October 2018. However, it was then discharged on 3 October 2019 because [AN] would not engage with her social worker or anyone else trying to help her and was steadfastly opposed to OT having any role in relation to her care or protection.

[46] That attitude of defiance, and refusal to cooperate with anyone trying to help, is a prominent feature throughout the reports on both the Youth Court and Family Court files. A psychological report and some forensic screens were done back in 2017 when [AN] was aged 13 and making her first appearance before the Youth Court. Diagnoses made at the time were Oppositional Defiant Disorder, Conduct Disorder, and Substance Abuse Disorder. Some other reports refer to a diagnosis at one stage of ADHD. [AN] has refused to engage in the process since then to enable any updated reports or assessments to be obtained.

[47] In her submissions for the police, Ms Clark refers to concerning contents from the psychological report and forensic screens done in 2017, such as [AN]'s lack of

empathy, callousness, her presentation and anti-social thinking, pattern of substance abuse, association with anti-social peers and disengagement from schooling, all of which were identified as likely to increase her risk of further offending. In a forensic screen report provided to the court in November 2017, [AN] is recorded as stating that her goal was to eventually kill somebody which [AN] now says was bluster and false bravado and trying to sound tough without any foundation in truth.

[48] In the build up to this hearing [AN] has engaged minimally with her social worker, Ms Harris, who has still managed to do an excellent job of putting together a detailed report and a plan setting out the various age-appropriate programmes and supports during the term of the supervision with residence order, which I refer to later.

[49] I think care is needed before making a judgment about [AN]'s often uncooperative, challenging attitude and behaviour. Given the way she has been treated over the past ten years or so, and her mother's influence on her, it does not surprise me that she trusts no one, feels like she has to fight "the system" and all those in it all the time, and suspects the motives of anyone who offers help or support.

[50] For example, in an extraordinary gesture of manaakitanga (kindness, generosity, support), [RV] has offered to take [AN] into her home to live when she leaves residence and returns to the community. Ms Winterstein explains that [AN] has expressed some apprehension about that and is having to work through her emotions and process the fact that someone is prepared to support her without any thought of benefit for themselves. It is a selflessness that [AN] has not experienced to any great degree and she has been learning how to accept it with grace and gratitude.

[51] Another reason not to rush to judgment about [AN]'s attitude and character without knowing more about her, is the information from people who do know her and have seen her qualities and potential. Although there are reports that in one sentence refer to her as having "no filter" and being often disrespectful, brazen and fiery, they go on to describe a young woman who is intelligent, respectful and thoughtful. Other descriptions of [AN] include "very clever with an ability to pick things up very quickly", "amazing," "a beautiful kid" with "a great heart"; "a cool kid, really cool" who is really good with younger children.

[52] In reports, both old and new, from the residence where [AN] is currently (and where she served a previous sentence) are very positive comments describing her as “a joy and a pleasure to work with” and “a very capable young woman who, with the right support and structure, can achieve her hopes and dreams for a bright future.”

[53] What is very troubling however, is that secure residences have ended up being one of the few places where these qualities have had a chance to shine through in recent years. [AN] is already over-institutionalised having spent about 22 months locked up in a secure residence since her first contact with the youth justice system in 2017 at age 13.

[54] When out in the real world, and back in or near her mother’s influence, [AN] returns to a life of gang associations, methamphetamine use, neglect, ill-treatment and multiple abuses at the hands of people who have absolutely no interest in her well-being at all.

[55] Importantly, in terms of what the future can hold for [AN], she has options if she starts making good choices and starts to see in herself the special qualities others see in her. In addition to those qualities mentioned above, [AN] has a remarkable talent. During her childhood, in the period when her mother and [her second stepfather] were together, she had the opportunity to work with [animal deleted]; to care for, handle and [activity deleted]. The family were living on a lifestyle block where they kept [these animals] and [AN] belonged to a [club type deleted] where she developed her [skills] and taught others to [activity deleted].

[56] When [AN] was serving her supervision with residence sentence at [the youth justice residence] in early 2019, she took part in a pre-employment programme working at [details deleted]. Reports from her first week working [at the programme] were so positive, and those observing her were so impressed, that she was offered full time employment and an apprenticeship [at another institution]. She is described as having special [abilities in that field], a great work ethic and a very positive relationship with her co-workers. [AN] spent some time during her first week with the [team leader] who informed management that [AN] is an absolute natural with the [work]. The [supervisor] put [AN] through her paces and decided that she should

move into the big house with the trainer in order to begin her training the following week.

[57] Although [AN] agreed to that plan, when a group of her friends arrived from [the city] she made the choice to leave with them and ended up going back down a pathway into further offending, drug use and gang involvement.

[AN]'s attitude to the offending

[58] In the record of the family group conference held on 24 August 2020 there is mention of [AN]'s polite participation and her remorse as well as the letter she wrote to the court in September this year in which she expressed some regret regarding what she did to [NV] but also about the consequences for herself and her family. I think that expressing genuine remorse is not something that comes naturally or easily to [AN] and I expect that this is a consequence of her life experience.

Response of [AN]'s parents

[59] [AN]'s father has expressed concern about [AN]'s behaviour, her safety and the path her life has been on.

[60] [AN]'s mother minimised the offending, questioned the charge and expressed the view that the process has been unfair towards [AN] and that the police are out to get her. She has also minimised the impact of the offending on [NV] and has expressed no concern at all for her well-being.

Previous offending

[61] [AN] has six notations for previous offending in the Youth Court;

- (1) The first of those was an aggravated robbery committed in March 2017 when [AN] was aged 13. For that she was eventually sentenced to six months' supervision with residence in December 2018 followed by six months' supervision; and,

- (2) The others are for supplying cannabis, attempting to unlawfully take a car and two of unlawfully getting into cars for which she received notations in 2018 and then another notation for dangerous driving in 2019.

The underlying causes of [AN]'s offending

[62] These will be apparent from what I have set out already.

[63] In a situation such as this, when I had to consider convicting [AN] and transferring her to the District Court, I was required to consider and give greater weight to the following four factors about which I will say more later:

- (1) The seriousness of the offending;
- (2) [AN]'s criminal history;
- (3) The interests of [NV]; and
- (4) The risk posed by [AN] to other people.

The CRC and other UN instruments

The CRC generally

[64] As already mentioned, the OT Act requires that [AN]'s rights under the CRC must be respected and upheld. Articles of the CRC that are of general relevance here include:

- (1) Article 3: which requires that her best interests be a primary consideration;
- (2) Article 37(b); which requires that custody be used only as a measure of last resort and for the shortest appropriate period of time;

- (3) Article 37(c); requires that young people in custody be treated with humanity and respect and be separated from adult prisoners in custodial settings; and,
- (4) Article 40 (1) which provides that sanctions and outcomes should be consistent with the promotion of a young person's sense of dignity and worth and the desirability of promoting reintegration and assuming a constructive role in society.

The UN General Comments

[65] Every now and then the UN issues a General Comment (“UNGC”) to guide member nations such as ours by setting out minimum standards as to how we should be interpreting and applying the CRC. The most recent of those, UNGC No. 24 (2019), was issued on 18 September 2019 and is therefore current and highly relevant.³

[66] It is important to emphasise that by ratifying the CRC in 1993, New Zealand thereby guaranteed that all children and young people are entitled to all of the rights and protections the CRC affords them all of the time. So, when it comes to knowing how best to respect and uphold [AN]’s rights under the CRC, the UNGC is very instructive. Just some of the relevant portions of the 2019 UNGC are worth setting out because of their relevance in [AN]’s case:

Introduction

2. Children differ from adults in their physical and psychological development. Such differences constitute the basis for the recognition of lesser culpability, and for a separate system with a differentiated, individualised approach. Exposure to the criminal justice system has been demonstrated to cause harm to children, limiting their chances of becoming responsible adults.

3. The Committee acknowledges that preservation of public safety is a

³ Committee on the Rights of the Child *General comment No. 24 (2019) on children’s rights in the child justice system* UN Doc CRC/C/GC/24 (18 September 2019).

legitimate aim of the justice system, including the child justice system. However, States parties should serve this aim subject to their obligations to respect and implement the principles of child justice as enshrined in the Convention on the Rights of the Child. As the Convention clearly states in article 40, every child alleged as, accused of or recognised as having infringed criminal law should always be treated in a manner consistent with the promotion of the child's sense of dignity and worth. Evidence shows that the prevalence of crime committed by children tends to decrease after the adoption of systems in line with these principles.

Interventions in the context of judicial proceedings (disposition)

19. ...States parties should have in place a probation service or similar agency with well-trained staff to ensure the maximum and effective use of measures such as guidance and supervision orders, probation, community monitoring or day reporting centres, and the possibility of early release from detention.

Guarantees for a fair trial:

38. ...It should be noted that these are minimum standards. States parties can and should try to establish and observe higher standards.

39. The Committee emphasises that continuous and systematic training of professionals in the child justice system is crucial to uphold those guarantees. Such professionals should be able to work in interdisciplinary teams, and should be well informed about the physical, psychological, mental and social development of children and adolescents, as well as about the special needs of the most marginalized children.

40. Safeguards against discrimination are needed from the earliest contact with the criminal justice system and throughout the trial, and discrimination against any group of children requires active redress. In particular, gender-

sensitive attention should be paid to girls and to children who are discriminated against on the basis of sexual orientation or gender identity...

Dispositions by the child justice court:

73. "...ensure that deprivation of liberty is used only as a measure of last resort and for the shortest period of time.

76. The Committee emphasizes that the reaction to an offence should always be proportionate not only to the circumstances and the gravity of the offence, but also to the personal circumstances (age, lesser culpability, circumstances and needs, including, if appropriate, the mental health needs of the child), as well as to the various and particularly long-term needs of the society. A strictly punitive approach is not in accordance with the principles of child justice spelled out in article 40 (1) of the Convention. Where serious offences are committed by children, measures proportionate to the circumstances of the offender and to the gravity of the offence may be considered, including considerations of the need for public safety and sanctions. Weight should be given to the child's best interests as a primary consideration as well as to the need to promote the child's reintegration into society.

77. Recognising the harm caused to children and adolescents by deprivation of liberty, and its negative effects on their prospects for successful reintegration, the Committee recommends that reflects the principle of the "shortest appropriate period of time."

Treatment and conditions

92. "...States parties should establish separate facilities for children deprived of their liberty that are staffed by appropriately trained personnel and that operate according to child-friendly policies and practices.

93. The above rule does not mean that a child placed in a facility for children should be moved to a facility for adults immediately after he or she

reaches the age of 18. The continuation of his or her stay in the facility for children should be possible if that is in his or her best interests and not contrary to the best interests of the children in the facility.

95. (b) Children should be provided with a physical environment and accommodation conducive to the reintegrative aims of residential placement and the right to education suited to his or her needs and abilities, including with regard to undertaking exams, and designed to prepare him or her for return to society; in addition, every child should, when appropriate, receive vocational training in occupations likely to prepare him or her for future employment;

Organisation of the child justice system

108. Specialized services such as probation, counselling or supervision should be established together with specialized facilities, for example day treatment centres and, where necessary, small-scale facilities for residential care and treatment of children referred by the child justice system. Effective inter-agency coordination of the activities of all these specialized units, services and facilities should be continuously promoted.

Rights specific to [AN]'s situation

[67] The above references all address general rights and protections that [AN] is entitled to. However, her status as a kōhine (a young Māori woman) requires special mention.

[68] Young women facing sentencing on very serious charges, are in a significantly more disadvantaged position than young men, here and elsewhere, which is a concern noted in the CRC and associated UN instruments. There is mention of the need to pay gender-sensitive attention to girls in the 2019 UNGC referred to above.⁴

[69] The previous UNGC, No. 10 (2007) was more explicit:⁵

⁴ At 40.

⁵ Committee on the Rights of the Child *General comment No. 10 (2017) children's rights in juvenile justice* UN Doc CRC/C/GC/10 (25 April 2007).

“Since girls in the juvenile justice system may be easily overlooked because they represent only a small group, special attention must be paid to the particular needs of the girl child, eg in relation to prior abuse and special health needs.”

[70] Rule 26.4 of the Beijing Rules provides that:⁶

“Young female offenders placed in an institution deserve special attention as to their personal needs and problems. They shall by no means receive less care, protection, assistance, treatment and training than young male offenders. Their fair treatment shall be ensured.”

[71] The commentary to those Rules states that r 26.4 addresses the fact that female offenders normally receive less attention than their male counterparts, and that the sixth Congress of the UN had called for special attention to the particular problems and needs of female offenders while in custody.

[72] Other important themes in the Beijing Rules as well as other relevant UN instruments, the Riyadh Guidelines and the Havana Rules, include such things as the protection of young people from discrimination on account of race and gender and an emphasis on the need for age appropriate programmes of various types to be provided by appropriately trained staff.⁷

[73] While these instruments do not have binding force under international law, they do set out recommended guidelines on minimum standards for child justice systems such as ours. Again, they are therefore relevant to help inform what it must mean to respect and uphold [AN]’s rights under the CRC.

[74] Also relevant in [AN]’s case is the UN Declaration on the Rights of Indigenous People, (“the Indigenous People’s Declaration”),⁸ ratified by New Zealand in April

⁶ *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* A/RES/40/33 (1985).

⁷ *United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)* GA RES 45/112/Res/45/112 (1990); *United Nations Rules for the Protection of Juveniles Deprived of their liberty* GA Res 45/113 (1990) (“Havana Rules”).

⁸ *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, LXIA/RES/61/295 (2007).

2010. For example, Article 2 of that Declaration provides for freedom from any kind of discrimination, and Article 7 includes the right to liberty. The disproportionate overrepresentation of young Māori at every stage of the youth justice processes, from arrest through to detention, raises serious concern in this regard. In this respect it is important to note the criticism of New Zealand's disproportionate incarceration of Māori by the UN Committee against Torture, in its sixth periodic report:⁹

[New Zealand] should increase its efforts to address the overrepresentation of indigenous people in prisons and to reduce recidivism, in particular its underlying causes, by fully implementing the Turning of the Tide Prevention Strategy through the overall judicial system and by intensifying and strengthening community-based approaches with the involvement of all relevant stakeholders and increased participation of Māori civil society organisations.

[75] After setting out the extent of [AN]'s disconnectedness from te ao Māori (the Māori world), [RV] describes her as being, "...the epitome of the intergenerational impact of cultural deprivation resultant of colonisation." A strong purpose of the OT Act is to see that deprivation, that has contributed to the disparity, addressed. To that end the Chief Executive's duties include ensuring that the policies and practices of OT applied here have an impact on [AN] in a way that will reduce the risk of her becoming part of an ongoing disparity.

[76] Of particular importance, is the need for the policies and practices to have regard to [AN]'s mana, her whakapapa and the whanaungatanga responsibilities of her whanau, hapū and iwi. My job includes assessing whether the policies and practices being applied by OT here are capable of seeing those objectives met for [AN] by, for example, ensuring that the plans provided in support of proposed orders are adequate.

The Treaty of Waitangi

[77] Perhaps the most important principle of the Treaty of Waitangi in the context of [AN]'s case is that of active protection that requires recognising that she is a taonga

⁹ Committee against torture *Concluding observations on the sixth periodic report of New Zealand* CAT/C/NZL/6 (6 May 2015).

(treasure). The purposes, principles and duties under the Act must be applied with that in mind and in doing so recognise that her place in the world is with her whānau, hapū and iwi who must be included in decision-making regarding [AN]'s well-being and best interests and the implementation of how that is achieved.

ADULT v YOUTH COURT OPTIONS

The situation for [AN] if she had been sentenced in the District Court to prison

[78] At a pre-trial conference on 15 October, after discussing the matter with counsel, I issued a minute seeking information from Corrections regarding the following:

What programmes, supports and services are available if [AN] is sentenced in the District Court to imprisonment, both during her time in prison and upon release? In particular what if any age appropriate and gender specific programmes are available to someone her age?

[79] The response from Corrections included this advice:

There have been no females under the age of 18 placed in Corrections custody since July 2019. Therefore, the three Corrections women's custodial facilities do not provide dedicated units to females under 18 years, or provide services dedicated to their age and stage of development.

If a female under 18 years is placed in a Corrections' custodial facility, every effort is made to limit her mixing with adult women in prison as required. The women's prison directors decide who the young women can safely mix with in order to prevent their isolation and to better enable access to education, employment, cultural, rehabilitation and reintegration services available at the site. These services are primarily suited to adult females. The mixing restrictions can limit young people's access to services and interventions. This means that most of their interventions are conducted one-on-one with staff.

There are no rehabilitation programmes specifically tailored to female young persons' age or stage of development, either in prison or in the community following their release. Some young females under 18 years' may be considered suitable to participate in group-based women's medium intensity rehabilitation programme as there is no specific age criteria for these programmes.

If [AN] is sentenced in the District Court to imprisonment would she be able to serve such a sentence in a youth justice facility?

Yes. All persons under the age of 18 years sentenced to imprisonment are considered for a placement in an Oranga Tamariki Youth Justice residence under s 34 (A) under the Corrections Act 2004. This placement is jointly determined and agreed by Oranga Tamariki and Corrections for both males and females.

Would [AN] be able to be detained in the residence where she is currently and have the ongoing benefit of age appropriate and gender specific programmes in support?

Currently, only the Korowai Manaaki Youth Justice residence in Auckland can typically accommodate young female persons sentence to imprisonment. Therefore, any female young person remanded in custody at [the youth justice residence] would be transferred to Korowai Manaaki if sentenced to imprisonment and placed in a youth justice facility.

The situation by comparison being sentenced in the Youth Court

[80] By being sentenced to supervision with residence [AN] will be able to remain in the residence where she has been for most of the past eight months. She had initially been remanded to Korowai Manaaki in Auckland but due to behavioural problems there she was transferred to [the youth justice residence] where she had been before and done well under her previous sentence of supervision with residence.

[81] Reports about [AN]'s progress in [the youth justice residence] have been consistently positive for some time now. There she would continue under the care and responsibility of staff who are trained to deal with young people and dedicated to doing so. The programmes available for her there are age appropriate.

[82] Having said that, the situation for girls even in the youth justice system is unsatisfactory compared to boys, again due to the low numbers. The number of young women who are subject to supervision with residence orders at any one time is low. Currently there are only two. That of course presents similar challenges to those in the adult Corrections system in terms of designing and delivering programmes and interventions that are suitably crafted to meet the particular needs of young women. This is concerning given that those who are subject to such orders, like [AN], typically have many complex needs, requiring specialised, targeted responses.

[83] However, the position in that regard is still significantly better in the Youth Justice system. During her time in the residence [AN] has engaged well in the education programmes available there and achieved a number of credits in a variety of subjects. [AN] is reported to be highly engaged in learning at [the youth justice residence], the education programme provided is clearly a good fit for her. She speaks with pride about her achievements, particularly in her knowledge of tikanga and Māoritanga. She has been engaging with youth forensic mental health support at [the youth justice residence] on a monthly basis. This is something new as [AN] has previously declined to engage.

[84] The importance of maintaining [AN]'s abstinence from methamphetamine and enabling her long-term recovery from use of that and other illegal drugs is an obvious focus for now and the future. With that in mind [AN] has been assessed for the Odyssey House residential treatment programme which is one of the options being considered for when the time comes for her to leave residence.

[85] As mentioned earlier, [RV] has said she would like to give [AN] the opportunity to come and live with her whanau and so that is another option. She realises that [AN] needs somewhere safe and free from drugs where she can be cared for and nurtured and [RV] believes she can provide that for [AN].

ANALYSIS

Extremity of offending

[86] The first of the grounds relied on by the police for conviction and transfer to the District Court for sentencing was the extremity of this offending. Although I agree about the offence being extreme, I do not accept that issue alone is a valid reason for such a transfer, especially given the statutory requirement to respect and uphold rights under the CRC.

[87] Under the law that applied before the amendments to the OT Act on 1 July 2019, the Court of Appeal had said in relation to the Act's application,

“It is not, and does not purport to be, an exclusive code for the administration of youth justice. It caters for the young offender whose offending is not of the most serious order, which may be attributable to a lack of family support, or immaturity, and may also be impulsive or the result of peer pressure. It does not cater for young offenders, especially those approaching the age of 17, whose offending is alleged or is accepted to be so serious that it is tantamount to adult offending.”

[88] In several respects those comments do not take account of the work now being done in the Youth Court in 2020. For example:

- (1) Almost by definition the Youth Court only deals with serious offending given that about 80% of young people who come to police attention are dealt with in the community by alternative action.
- (2) The presenting issues of most of the young people who appear in the Youth Court now go well beyond simply a lack of family support, immaturity, impulsiveness and peer pressure. The underlying causes of offending of young people who come before the Youth Court facing serious charges are far more complex and multi-layered than that.

- (3) The Youth Court now caters for most young people up to the age of 18¹⁰.
- (4) The notion that a young person should be treated like an adult when the offending becomes extreme enough is flawed and contrary to their rights under the CRC. A young person does not cease to be so just because he or she commits a serious offence. Given that most who commit serious offences have multiple complex needs, it is all the more important that they should have the benefit of specialist supports, services and programmes suited to their age, gender and needs so as to reduce the risk of reoffending.
- (5) This is one of the important issues that the 2019 UNGC addresses specifically. Paragraphs 2 and 3 in the introduction, first make the point that children differ in various ways from adults which requires a differentiated, individualised approach.¹¹ Exposing them to the criminal justice system has been shown to cause them harm and limit their chances of becoming a responsible adult. Secondly, that the evidence shows that the prevalence of crime committed by children decreases after adopting systems that promote their sense of dignity and worth; and,
- (6) Also, at paragraph 76 of the 2019 UNGC, it is pointed out that a strictly punitive approach is not in accordance with article 40 of the CRC and that weight should be given to best interests as a primary consideration as well as the need to promote the child's reintegration into society.

The four primary considerations

[AN]'s well-being and best interests

¹⁰ Except for those charged with murder, manslaughter, those transferred to the District Court in relation to Schedule 1A offences (plus 3 other minor exceptions of no significance in this context).

¹¹ Set out above at [66].

[89] Wellbeing is of overarching importance in both the youth justice and care and protection systems. Promoting it for [AN] and her whānau, hapū and iwi is the purpose of the OT Act. It is also a dominant theme running through the articles of the CRC and the contents of the associated UN instruments.

[90] How well-being is to be promoted is spelt out in some detail with a very strong emphasis on cultural connection and involvement and a holistic, all-embracing approach that must be tailored to the needs of each particular case and circumstance.

[91] In [AN]’s case the affirmation of her mana could not possibly be achieved sending her off into the adult prison system. That would also be in breach of her rights, contrary to her well-being and best interests and would set back long-term health, educational, social, economic and cultural outcomes for her. Until she turns 18 [AN] would have had to leave the residence where she is doing well and return to one where she was not. After she turned 18 [AN] would have been moved to an adult prison despite the advice in the 2019 UNGC, that she should be able to remain in a youth justice residence, after turning 18, if that is in her best interests.¹²

[92] In the adult prison system there would be no unit, nor any services or programmes designed for someone [AN]’s age and gender. That would be contrary to the very strong emphasis in the CRC and UNGC on the obligation to operate child-friendly policies and practices delivered by appropriately trained staff, in multi-disciplinary teams, in specialised units. The absence of any such things in the adult system would apply whilst in custody and upon release back into the community. That time will be an especially important one for [AN] when she will be vulnerable and in need of a very robust wrap-around package of support. As Ms Winterstein points out, the concerns raised regarding [AN]’s gang involvement would be elevated if she was sent to the adult prison system, even for a short time, given the risk of her being prospected.

[93] By contrast, what the Youth Court can offer, by virtue of the orders available, comes much closer to promoting [AN]’s well-being and best interests in the various ways described in the OT Act that I referred to earlier. A lot of that work is already

¹² At 93.

well underway at [the youth justice residence] and [AN] is responding well to it. Programmes that [AN] is already participating in are “Standing Tall” for self-confidence and stress-coping strategies; “Mates and Dates” which is a sexual and dating violence-prevention programme; BASOC (Breakaway Adolescent Stopping Offending Course); “Smashed and stoned” alcohol and other drug harm prevention; vocational opportunities; Tikanga Māori at [the youth justice residence].

[94] As mentioned above, there will need to be a robust, comprehensive, individualised wrap-around plan in place when the supervision order is made next year to support [AN] as she transitions back to the community and for the 12 months afterwards. That plan needs to be prepared with the purposes and principles of the Act firmly in mind and the policies and practices applied by the Chief Executive in the preparation of the plan must have the objectives in s 7AA clearly in mind.

[95] Of significant importance, [AN]’s active involvement in the preparation of that plan is essential and my hope is that she will be willing, if not enthusiastic, to do so. It will not be an option for her to live with her mother during the term of the Supervision order. Aside from that, and the need for involvement of whanau, hapū and iwi to the maximum extent possible in the preparation of the plan and beyond, I am not making any other stipulations regarding what I think should be in the plan at this stage.

The public interest including public safety

[96] The second of the grounds relied on by the police for [AN]’s transfer to the District Court is the significant public interest. Although I agree about there being a significant public interest here, especially the public safety aspect of that, I do not believe that is well-served by sending [AN] into the adult prison system for reasons that will be obvious from what I have said already.

[97] In that system, both during her time in custody and after return to the community, the complete lack of access to appropriate programmes delivered by suitably qualified staff would mean that little or nothing would be done to reduce [AN]’s risk of reoffending; in all likelihood it would increase, and [AN] would receive

little or no supervision of the type she needs after release from prison. These are issues of great importance given the requirement in this case to give greater weight to the seriousness of the offending, [AN]'s criminal history and the resulting risk she would pose to other people. With those things in mind it is essential to maximise the opportunities to address risk factors by the most effective means possible; the Youth Court provides that option, the District Court does not.

[98] The only thing that the District Court does offer is a longer period of time in custody but that would not necessarily be a great deal longer than the 12 to 14 months [AN] will serve in the Youth Court. The total discounts off starting points for people as young as [AN] are often in the region of 50 percent. If the starting point is nine years and the end sentence is in the region of four and a half, she would be eligible for parole after about one and a half years having received little or no adequate access to programmes to manage risk issues, with little or nothing available upon release. I do not believe that is in the public interest in any sense.

[NV]'s interests

[99] It is not possible for me to do anything that will adequately address [NV]'s interests nor, probably to do justice from her point of view. No sentence I impose, or order I make, can heal her wounds or ease her pain. There is probably little more I can do than express my sympathy to her on behalf of the community the court serves and wish her well for the future. I do hope that with the sentencing now out of the way [NV] will feel some sense of closure and therefore able to move forward with her life.

Accountability

[100] I am satisfied that the orders made, and all of the processes [AN] she has been through over the past 8 months, are sufficient to hold her accountable for her offending especially given the time she has already served on remand. In my view it is not as simple as saying that the time spent in custody is the only way to measure or address accountability, especially for a child or young person. As the OT Act and the CRC recognise, a child or young person's sense of time is quite different to that of an adult.

Therefore, measuring accountability by reference to penalties adults face for similar offending is of little value. As well as that, as the 2019 UNGC instructs that a strictly punitive approach is not in accordance with article 40 of the CRC.¹³

ORDERS and DIRECTIONS

[101] These are the orders and directions in court on 30 November 2020:

- (1) [AN] was sentenced to six months supervision with residence, with that sentence to be served at [the Youth Justice residence]. The social work plan dated 3 November 2020, prepared by Ms Harris, was approved.
- (2) I explained to [AN] her entitlement to be released from residence two-thirds of the way through that sentence as long as the grounds in s 314 of the OT Act are satisfied.
- (3) The date when [AN] will be eligible for early release is [in late March] 2021. A hearing has therefore been allocated before me on that date at 10.00 am.
- (4) There will be a conference [in mid-March] 2021 at 10.00 am to consider the 12-month supervision order that will then follow the Residence Order and to ensure that everything is on track for the early release hearing.
- (5) A social work report and plan to support the supervision order were ordered.

EXPLANATIONS, ENCOURAGEMENT and PARTICIPATION

[102] For reasons I touched on at the very start of this decision, and mentioned to [AN] in court, it was not possible to discuss important things with her then. The explanations and encouragement regarding her participation and other matters were not able to be given at that time. Instead, the most immediate things I want [AN] to

¹³ At 76.

know and to think about are set out in the attachment to this decision. Others can wait until we meet next year.

A J FitzGerald
Youth Court Judge

For [AN]

Tēnā koe [AN],

Before deciding what to do at the sentencing I needed to try and learn as much about you as I could by reading everything on your files. Although that does not mean I really know you, it was a start and it helped me decide what to do so far.

I cannot imagine how hard it has been for you to go through the things you have in your life, but I am sure that if I had gone through what you have, I would have made mistakes and bad choices too.

The truth is we all make mistakes, every single one of us. People are more likely to do that at your age especially if they are not being looked after or treated properly.

One thing you have heard people talk about a lot is the risk that you will keep making mistakes and bad choices in the future. None of us actually know for sure what will happen in the future and so the best we can do is look at what has happened in the past and decide how likely it is that it will keep happening. That is what we call risk.

An important lesson I have learnt as a judge is that just because someone is at risk of making more mistakes does not mean they will actually do that. Risk is not the same thing as destiny. Just because someone has made bad choices in the past it does not mean they keep doing that in future. People change. I have seen that happen so many times before. With the right help and support anyone can change the pathway they have been on. It can happen for you and I believe it will as long as you are willing to work at it.

The sentence I gave you is for what you did, not who you are. What you did to [NV] was a terrible thing but it does not define you or describe who you are as a person. The people who know you talk about someone who has many good qualities; they know you to be clever, thoughtful, cool and talented and many other good things. Your special talent for [activity deleted] means that you have at least one pathway you can take to a better, brighter future.

Learning to trust people will probably not be easy at first. You have some really good people wanting to help you and I think you need to start working with at least some of them a bit more. In relation to your next court hearing, I hope that you will at least trust your social worker Katie Harris who has been doing a great job for you.

Before your next court hearing a plan will be prepared by Katie for the supervision order I must make in March next year. That plan will be about what will happen in your life for a year. I want you to be involved in putting that plan together so that it is not just something made up by people who do not know you.

This could be the most important plan ever made in your life so far because it should support you on a good pathway forward to help you achieve your hopes and dreams for the future. Every part of your life needs to be covered by the plan. Your true identity, your relationship with your whānau, hapū and iwi, where you will live, your physical, mental and emotional health, the type of work or education you want to do, supporting your interests and talents and anything else needed to make the plan complete for you.

What I want you to start thinking about [AN] are your goals for the next year, and beyond that as well, so that they can be included in the plan. Although I cannot promise that all your wishes for the plan will come true, the realistic and affordable ones should. You could write them down and discuss them with Katie and Maggie Winterstein and I will be talking to you about them in March next year when we meet again.

Thank you for taking the time to read this.

Noho ora mai,

Judge FitzGerald