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IN THE YOUTH COURT
AT KAIKOHE

I TE KŌTI TAIOHI
KI KAIKOHE

CRI-2018-263-000089
[2020] NZYC 397

NEW ZEALAND POLICE
Prosecutor

v

[YV]
Young Person

Hearing: 8 June 2020

Appearances: S Barnaart for the Prosecutor
D Owen-Tana for the Young Person

Judgment: 12 August 2020

RESERVED JUDGMENT OF JUDGE K B de RIDDER

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

[2] In a disposition hearing on 8 June 2020 I approved a Court-monitored plan for [YV] 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 [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. [YV] was interviewed by the police on 20 August 2018.

[5] [YV] first appeared in Court on these charges on 3 October 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 these charges took place on 27–30 May 2019.

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

(a) 20 September 2018 record of intention to charge FGC,

(b) 10 July 2019 FGC record,

(c) 22 September 2019 report for proposed hohouronga kaupapa,

(d) 19 November 2019 FGC record,

(e) 21 November 2019 psychological assessment from T Wakeford,

(f) 21 November 2019 social work progress report,

(g) 21 November 2019 lay advocate report,

(h) 3 February 2020 record of FGC,

(i) 18 February 2020 FGC record,

(j) 18 February 2020 social work report and plan

(k) 19 March 2020 social work report,

(l) 19 March 2020 FGC record,

(m) 19 March 2020 social work report and plans,

(n) 20 March 2020 lay advocate report,

(o) 19 March 2020 Korowai Tumanako therapeutic treatment outline,

(p) 29 May 2020 FGC record,

(q) 27 May 2020 cognitive assessment report by T Wakeford,

(r) 18 March 2020 social work report,

(s) 5 June 2020 social work report and plans,

(t) 18 March Crown submissions,

(u) 5 June 2020 updating memorandum from Crown,

(v) 13 March 2020 defence counsel submissions, and

(w) 4 June 2020 further submissions 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"). The Crown points to the guideline Court of Appeal judgment 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, vulnerability of the victim, harm to the victim, the scale of offending, and the degree of violation.

[10] After noting the factors identified in the psychological and cognitive reports, and noting 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) The impact the offending had on the victim.

(c) [YV] does not appear to have insight into his offending given his comments that he had done nothing wrong.

(d) [YV] had not engaged in any further offending since the incident, and has a supportive whānau.

[11] The Crown notes that [YV] is soon to turn 18 years of age and submits that the available length of orders in the Youth Court will not be of sufficient duration to address the serious nature of [YV]'s offending and to deal with the risk factors identified by the psychologist. If [YV] were not to complete a treatment plan or

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

engage meaningfully in that plan then there would be little that could be done to hold him accountable or to reduce the risk he currently poses.

Summary of defence counsel submissions

[12] Ms Owen-Tana for [YV] submits that the proceedings should remain in the Youth Court for disposition.

[13] She points to the significant amendments to the Act that came into force on 1 July 2019 including s 7AA, and ss 4 and 5 relating to purposes and principles. She also points to the provisions of ss 208, 284, and 289 of the Act. She submits that transfer of proceedings to the District Court is clearly intended to be a course of last resort.

[14] She notes that [YV] turns 18 on [date deleted] 2020 and therefore has at least 15 months until he turns 19. He was only 15 years of age at the time of his offending.

[15] Ms Owen-Tana referred in detail to cases where proceedings have been transferred to the District Court and also cases where proceedings have not been transferred. She submitted that the most common reason for sending a young person to the District Court for sentence used to be that the nature, frequency, or seriousness of the young person's offending indicated that a period of imprisonment was merited, but noted that broader powers are now available in the Youth Court and are likely to have the effect that few young people will be transferred to the District Court for sentencing. She further noted that s 208(2)(d) provides that young offenders should be kept in the community so far as is consonant with the safety of the public. Where cases have transferred to the District Court there has been a clear risk to public safety and Youth Court orders were insufficient to achieve reformation. It is well-established that young offenders who are institutionalised have a high rate of reoffending, and there is little provision for youth-specific programmes in adult prison.

[16] Ms Owen-Tana noted the following factors as relevant to the consideration of dealing with [YV]'s offending:

(a) He has limited previous history for which he was granted a s 282 discharge.

(b) He has been on bail conditions since his first appearance on 3 October 2018 and has not breached any of his bail conditions and has not reoffended.

(c) Whilst the offending is extremely serious and the part [YV] played in the offending is extremely serious, at the time of the offending he was 15 years of age.

(d) [YV] has made an apology at the houhoronga hui and is genuinely remorseful for his offending.

(e) [YV] has strong whānau support and his whānau have fully engaged with the Youth Court process.

(f) He has been involved in full-time employment.

(g) A rehabilitative programme is available together with alcohol and drug counselling.

[17] It is in the interests of the public and public safety that [YV] addresses the underlying causes of his offending to reduce his future risk to the community, and that this can be achieved without transferring the proceedings to the District Court. In the event the proceedings are not transferred Ms Owen-Tana accepts that orders for supervision with residence, supervision with activity or a judicially-monitored Court plan are available. In all the circumstances she submits that [YV] should be subject to a Court-monitored plan which will then leave open the issue of disposition at the completion of the plan.

Social work report and plans

[18] The most recent social work report and plan of 5 June 2020 puts forward four options for the Court to consider, namely, a Court-monitored plan, supervision with activity, supervision with residence, and transfer to the District Court. The social work report prefers a Court-monitored plan. In support of that the report points to the cognitive assessment report, and notes that [YV] and his whānau have expressed a willingness to engage in and participate in all components of the options put forward for consideration. The report notes that [YV] has been accepted onto the Korowai Tumanako programme which will also offer alcohol and drug education and intervention strategies for [YV]. In addition, Ngapuhi Iwi Social Services have agreed to work with [YV] by offering four hours per week of mentoring for an initial 12 weeks, and that can be reviewed and continued.

[19] The report notes that engagement with Korowai Tumanako is paramount to dealing with [YV]'s offending, and providing intervention strategies aimed to reduce any further harmful sexual behaviours together with education and support for alcohol and drug issues.

Psychological reports

[20] In her assessment dated 30 October 2019 Ms Wakeford provided the following summary:

> During the assessment of his current offending and his sexual history, it became clear that there is a degree of naivety in this area. [YV] did not fully understand consent or socially accepted norms relating to sex. He did not appear to have much experience in this area and there was no sense that he had predatory behaviours and no evidence of obsessive or deviant sexual behaviours. There was evidence of some impulsivity and this is likely a risk factor that needs to be monitored as it can contribute to further antisocial behaviours when coupled with antisocial peers and related peer pressure.

[21] As a result of her assessment, Ms Wakeford recommended that [YV] participate in some sex education, particularly around consent, respect, and social norms. Ms Wakeford also recommended cognitive testing to rule out the presence of intellectual disability or cognitive deficits that may contribute to his behaviour.

[22] Ms Wakeford carried out that assessment on 15 February 2020 and provided her report on 27 May 2020. The summary of findings from her assessment were that [YV] may have difficulty expressing himself verbally, may experience difficulty making use of, or understanding information given to him by others, would likely have difficulty with problem solving and planning, tends to be concrete and literal in his thinking and responses and may become easily overwhelmed by information if too much is provided at one time. Accordingly, she made various recommendations to take into account his cognitive difficulties.

FGC

[23] The most recent FGC was held on 19 March 2020, and it was agreed that the social worker complete plans for a Court-monitored plan, supervision with activity, supervision with residence, and a transfer to the District Court.

Lay advocate's report

[24] Ms Vetti filed her most recent report on 20 March 2020. She is of the view that it is paramount for [YV] and his whānau to develop a Māori model of practice or way forward, noting that [YV]'s life is steeped in Te Ao Māori and Māori models of practice. With respect to addressing the wellbeing of the victim she points to the hohouronga hui which had taken place. She notes that there are a number of interventions proposed to address the offending and in particular points to the Korowai Tumanako programme specifically designed for [YV] that would also be supported by a mentoring to deal with alcohol and drug issues. She supports [YV] remaining in the Youth Court pointing to the following matters:

(a) [YV] has not reoffended for over two and a half years even in a minor way.

(b) He has obtained employment in the [industry deleted] industry.

(c) He is whakamā for the offending.

(d) He has attended the hohouronga whānau hui.

(e) He is supported by a strong whānau.

Discussion

[25] The provisions of the Act to be taken into consideration when determining the appropriate response to [YV]'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.

[26] 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) It appears that [YV] has been raised in a pro-social and supportive whānau. He achieved positions of significance at school being [in two leadership positions]. He attended [secondary school] up to year 10 after which he commenced paid employment. At the time of the offending he was 15 years of age. The psychologist's assessment notes that he appears to be somewhat naive and has some cognitive difficulties.

(c) [YV] has clearly accepted that the offending is serious and that he needs to work extremely hard to address the underlying issues.

(d) The response of [YV]'s whānau has been entirely supportive throughout the long time he has been before the Youth Court.

(e) [YV] has taken part in the hohouronga hui. This took place at a marae to which both [YV]'s whānau and the complainant's whānau whakapapa and therefore takes into account the relevant principles in ss 5 and 7AA of the Act.

(f) While initially traumatic for the complainant it appears that she has moved on and that the hohouronga hui has been relevant and of assistance in that regard.

(g) There has been only minor previous offending by [YV], and none since his first appearance.

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

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

(b) The fact that there will still be time for [YV] to complete a Court-monitored plan which will address the underlying causes of his offending. There is a very strong supportive whānau to ensure that [YV] adheres to the plan.

(c) Attendance at the Korowai Tumanako programme together with support from Ngapuhi Iwi Social Services will provide a strong and protective environment for [YV] to work on his issues.

(d) Attendance at the Korowai Tumanako programme clearly takes into account the interests of the victim and society.

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

[28] For all of the above reasons [YV] 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