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IN THE YOUTH COURT
AT MANUKAU

I TE KŌTI TAIOHI
KI MANUKAU

CRI-2018-292-000278
[2020] NZYC 437

NEW ZEALAND POLICE
Prosecutor

v

[SA]
Young Person

Hearing:	25 August 2020
Appearances:	S Norrie for the Prosecutor K Leys for the Young Person
Judgment:	25 August 2020

ORAL JUDGMENT OF JUDGE S PATEL

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[1] This is a finely-balanced case. The reason that it is so finely-balanced is in part because of the considerable efforts that you have made in complying with the family group conference plan and the rehabilitative measures that you have taken. Despite that, my decision is that your offending ought to be marked with a notation that you will be dealt with by way of a discharge, under s 283(a) of the Oranga Tamariki Act 1989. It has been a difficult decision for me to make but on balance by a fine margin I consider that that is the appropriate outcome. I am now going to give the reasons for that.

[2] On [date deleted] 2018, you were aged 15 years and 11 months. The victim, who I will refer to as "[the victim]", is the younger sister of a friend of yours. At the time of this offending, she was [under 10 years old]. On the evening of [the date of offending] 2018, you were at [the victim]'s address. You were drinking alcohol and playing pool with [the victim]'s older brother and another person. At about 7 pm, you and your two friends left the address and went to a carpark in [location deleted – location A]. Later, you all separated.

[3] After separating from your friends, you decided to return to [the victim]'s address and that was to sexually assault her. At about 10.30 pm, you entered [the victim]'s address without permission. You went to her bedroom, while she was sleeping, and you pulled down her pyjama pants. You recorded a video and photos on your iPhone showing [the victim]'s naked bottom and her outer vagina. One video included you recording yourself spreading [the victim]'s buttocks and recording closeup images of her anus and her vagina. [The victim] woke up, she told you to stop what you were doing; this happened on several occasions. You told her to be quiet and to go back to sleep. You then inserted your finger into her anus, and this caused her pain. You turned [the victim] on to her back and then inserted your finger into her genitalia, again causing her pain. [The victim] again told you to stop, on several occasions, and she attempted to close her legs to prevent you from doing this; but you persisted. You stopped when [the victim]'s older sister came into the room.

[4] You admitted returning to the address to "get some pussy". You knew that [the victim] would be asleep, and it would be "an easy thing to do". You admitted to the

offending, other than the violation. You declined to comment about inserting your fingers into [the victim]'s anus and genitalia.

[5] The charges you face as a result of that incident are burglary (which carries a maximum penalty of 10 years' imprisonment), sexual violation by unlawful sexual connection (which carries with it a maximum penalty of 20 years' imprisonment), and making an intimate visual recording (that is laid under s 216H of the Crimes Act 1961, that carries with it a maximum penalty of three years' imprisonment). You did not deny the offending. In a family group conference which was held on 26 September 2018 it noted that disposition was to be reviewed later, so the family group conference made no recommendation as to disposition.

[6] The issue that I must decide is whether you ought to be discharged pursuant to s 282 or discharged pursuant to s 283(a) of the Oranga Tamariki Act. Both are discharges but of a different type. Section 282 operates as if the charges were never laid. A discharge under 283(a) means that a notation does appear on your Ministry of Justice record and it is able to be viewed if you came before the court again. A s 282 discharge is available for these charges, with the most serious being a category 3 offence. Such a discharge is not available for category 4 offending. Parliament has not expressly prohibited the offending that you have been charged with to be considered for a s 282 discharge.

[7] In determining the issue I need to consider the guiding principles as set out in s 4A(2) of the Oranga Tamariki Act. That includes consideration of your wellbeing and your best interests, the public interest as well as the issue of public safety, the victim's interests, and your accountability. When weighing those primary considerations, the court is to be guided by ss 5 and 208 of the Act. Section 284 of the Act is also relevant, that relates to the matters the court should have regard to in deciding whether to make any order under s 283. If an order under s 283 is not warranted, a discharge under s 282 remains available. Section 289 of the Act also needs to be considered. That provides the court must not impose an outcome unless satisfied that a less restrictive outcome would in the circumstances, having regard to ss 208 and 284, be clearly inadequate.

[8] I now consider the s 284 matters. Firstly, the nature and the circumstance of the offence. The offending, as has been acknowledged by you, is extremely serious. The aggravating features, the features that make it worse; this was planned, it involved a home invasion, there were two violations, there was a vulnerable victim, and there is an element of a breach of trust. Your lawyer, Ms Leys, took no issue with the starting point that one might have expected had the sentencing been in the District Court, that is, a starting point between seven and nine years' imprisonment. It would fall under band 2 of the guideline case of *R v AM*.[1] Even with generous discounts, a likely endpoint would have been one of imprisonment. The seriousness of this offending favours a s 283(a) discharge because a s 282 discharge would be less likely to hold you accountable given the seriousness of this offending.

[9] The next issue is your personal history, your social circumstances and your personal characteristics insofar as those matters are relevant to the offence and any order the court is empowered to make. In that regard I refer to the s 333 report by Dr Calvert dated 13 September 2018 and I refer to paragraphs [76] through to [79]. That refers to your background in terms of separation of your parents when you were [very young]. It documents behavioural issues at school and at home. It refers to you exhibiting sexualised behaviour into your early teens, and your resulting intervention from Whirinaki. The recommendations that Dr Calvert provided included a recommendation that you be referred to the SAFE Programme, Altered High and Community Alcohol & Drug Services, mentoring, and an assessment of ADHD and ASD.

[10] Reference to that background is also set out in the numerous lay advocate's reports that have been provided by Mr Jacobsen. I consider that personal history and social circumstances is a neutral factor in relation to the issue that I am required to decide.

[11] Next, your attitude towards the offence. In this regard I refer to Mr Jacobsen's report. You have profound regret for how your actions have affected [the victim]'s life and that you wanted to do everything in your power to make it right. I consider that

[1] *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750.

that remorse is genuine, and it is reflected in your completion of the FGC plan. I will go through the steps that you completed. On [date deleted] December 2019, you graduated from [a skills programme]; you completed a NCEA Level 1, Level 2 in [a trade]; and you have plans to attend [an education provider] to further your studies. You are currently employed by [company name deleted], and have been for the past [number of months deleted]. You completed drug and alcohol counselling with Tupu Services. You have completed vocational mentoring with a Reconnect Services mentor. You have undergone an assessment with Whirinaki for ADHD and ASD. Most significantly you have completed the Safe Network counselling programme that ran between 31 January 2019 and 15 July 2020, that consisted of 26 individual sessions and 14 individual sessions.

[12] I refer to the end of intervention report from the Safe Network dated 30 July 2020. Your therapy with the Safe course included interventions in relation to the development of rapport and therapeutic relationships, safety planning, exploring family relationship, exploring sexual boundaries, psychoeducation around sexual boundaries and unlawful sexual behaviours, emotional regulation strategies, disclosure of details of harmful sexual behaviour, taking responsibility, developing an understanding of factors that contribute to harmful sexual behaviour, future planning, goal setting and developing strengths.

[13] Your attendance at Safe was excellent and your engagement in individual therapy was positive and constructive. The report states that you were consistently incentive and thoughtful during the sessions and demonstrated a good capacity to reflect on emotional, cognitive and interpersonal experiences. It is said that you also consistently demonstrated a good capacity to articulate your thoughts and emotional experiences and that included you demonstrating a preparedness to discuss challenging situations of high relevance, to processing and addressing issues of harmful sexual behaviour. The report goes on to say that your therapy, your engagement, indicated that you have developed strategies to cope with emotional challenges and that you are developing supportive relationships and functional routines conducive to a pro-social life.

[14] During the therapy you took the opportunity to talk about difficulties you experience related to shame and guilt about your offending, and issues such as sexual preoccupation and accessing pornography that contributed to the offending. The report goes on to say that you have developed relationship with intimate partners with whom you could discuss sexual issues regarding consent, and that you have developed coping strategies for emotional distress that do not involve harmful actions such as accessing pornography which had previously contributed to your sexual preoccupation.

[15] A risk assessment was undertaken in the report. The report notes that the indications suggest that there is a low risk of you being sexually harmful in the future; that your risk had reduced from a moderate to high level, prior to you engaging in therapy at Safe; and that there is a low risk of you being sexually harmful in the future. I note, however, that the report also states that estimates of risk are strictly time-limited due to the retrospective nature of research supporting known risk factors and rapid developmental changes during adolescence.

[16] In conclusion the report notes the following:

> "[SA]'s level of progress through intervention over the duration of the therapy has been consistently positive. Therapeutic intervention is focussed on addressing the risk factors identified as elevated for [SA] across the wider system surrounding him in promoting strengths and factors as protective. [SA] holds many strengths which are likely to support and assist the development of a healthy future free of harmful sexual behaviour."

[17] Some aspects of the plan did not go smoothly; however, those aspects were at the commencement of the plan. Notably you were expelled from school following some damage to [school property]. However, for the past 18 months, your adherence with the plan has been beyond reproach.

[18] The rehabilitative measures that you have undertaken, including the SAFE programme and all the other features of the family group conference outcome, favours a less restrictive outcome. Those features favours a less restrictive outcome in the form of a s 282 discharge.

[19] The response of the whānau to the offending. The report refers to [SA]'s father and he was involved in the family sessions aspect of the SAFE programme. That work was limited by the lack of availability of [WA] to attend the family sessions, due to his work commitments, therefore that is a neutral factor in the assessment that I need to make.

[20] I turn now to the effect of the offence on [the victim]. It is important to have consideration of the views in the interests of [the victim]. It does not necessarily follow that the views of [the victim] and her family regarding disposition will follow. I also consider that at least in part the interests of the victim are in provided for by the undertaking of the rehabilitative measures, that [SA] has, and minimising his risk of future offending.

[21] In terms of the effect on [the victim], I have the victim impact statement dated 2 August 2020. The victim impact statement details the following; that [the victim] is now [age deleted] years old, she [medical details deleted], she lives with her mother [GL] and her siblings in [location A], and she knows [SA] as he was a friend of her older brother. At the time of the offences, [the victim] was [under 10] given that the offending happened back in 2018. [The victim]'s mother indicates that, because of the offending, [the victim] still locks her bedroom every night when she goes to bed. She goes on to say that the sound of police sirens or police helicopters wake [the victim] up from her sleep and the memories of the offending come back. [The victim]'s mother indicates that [the victim] has never slept soundly since this offending. She goes on to state that the last three months have been difficult for [the victim], she started [medical details deleted] and she is affected by them daily. The family believe that this is connected to post-traumatic stress disorder. [The victim] is concerned that [medical details deleted] affect her at school in front of her friends, which she dislikes. [The victim]'s mother goes on to say that she is glad to hear that you have followed your plan and completed what you needed to do, and that she hopes that you never put anyone else through what that family has been through. Then [the victim]'s mother makes a comment on how she considers that the disposition ought to be concluded.

[22] In terms of the submissions. Firstly, the prosecution submits that the disposition should be pursuant to s 283(a). The crown position is that a s 282 discharge

fails to properly reflect the purposes and principles of the Oranga Tamariki Act and a s 282 discharge also fails to address the issue of accountability for the offending, the interests of the victim, public interest including public safety, and that such a disposition fails to leave open the possibility that sectors of society with a valid interest in knowing about past proven sexual offending on a young child will not know about it. The prosecution cited case law, firstly, *MW v Police* [2017] NZHC 3084.[2] That was an appeal against a disposition in terms of a discharge under s 283A of the Oranga Tamariki Act. That appeal was declined. His Honour Downs J considered that, despite significant mitigating factors including the completion of a SAFE course, the offending in that case was the bad example of a serious offending. In that case there was a significant victim impact, that the seriousness of the offence itself was a valid factor in declining a s 282 discharge, that the risk assessment of future offending could have a limited timespan (as in this case), a s 282 discharge would in effect extinguish reference to the offending, and lastly that a notification might have a future impact on for example employment. However, his honour indicated that one could not assume that rehabilitative steps would not be considered by those viewing the notation either in an employment, immigration or other context.

[23] Another case referenced by the crown was *R v ND* [2018] NZYC 602, that case involved the young person there being charged with sexual violation by unlawful sexual connection as a party, and making an intimate visual recording.[3] Again, significant rehabilitative steps were taken by the young person. A reference was made by his Honour Judge Walsh to *MW v Police* for the same reasons including the seriousness, the impact on the victim, the risk assessment being a snapshot in time, and that the same favoured a discharge pursuant to s 283(a).

[24] The last case also involved sexual offending, that is, *R v SQ* [2019] NZYC 627.[4] That involved charges of sexual violation by rape, attempted sexual violation by unlawful sexual connection, and which included penetration of the victim's anus by the young person's penis. Ostensibly, based on the seriousness of the offending, the court there favoured a discharge pursuant to s 283(a).

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[2] *MW v Police* [2017] NZHC 3084.
[3] *R v ND* [2018] NZYC 602.
[4] *R v SQ* [2019] NZYC 627.

[25] On behalf of [SA], Ms Leys accepted the SAFE assessment is a snapshot of risk. However, given [SA]'s compliance with the FGC plan, his remorse and his acknowledgement of his behaviour; the court could be assured that [SA]'s risk of future offending is minimised. In that regard I note that the SAFE assessment took all those matters into consideration. As it stands, the risk assessment is very much time-limited. This factor favours the public interest in a notation being made that if there were to be future offending, however remote that possibility is, that the court could access the same.

[26] Ms Leys also submitted that in terms of the consequences of a notation, that Downs J's assessment that prospective employers or those in authority might not fairly consider a notation, is a benevolent view of how people might act. The submission is that, as with the assessment of previous convictions by District Court; it is the notation of the offending that is considered, not the background to the offending nor the rehabilitative steps that [SA] has taken.

[27] However, I am confident given that a s 283(a) is a Youth Court notation; that it carries less weight than a conviction from the District Court, it is less of a barrier to employment and other matters. Secondly, I am fortified in that view by the fact that [SA]'s employer has chosen to keep [SA] in employment despite the employer becoming aware of this proceeding.

[28] Ms Leys also submitted that the public interest lies in [SA]'s reintegration and that is best met by a discharge under s 282. However, I consider that a s 283 discharge does not preclude [SA]'s reintegration, and this is in part evidenced by his continued employment despite his employer knowing about these proceedings. Additionally, the recent case law as cited by the crown favours a s 283 notation. Less serious offences in some of those cases were dealt with by way of a s 283 discharge.

[29] On a principle basis I cannot distinguish the case of *MW v Police*. As I said, the case is a finely-balanced one. I acknowledge the excellent efforts made by [SA], and that is reflected in a discharge. However, I consider a notation is required as an acknowledgement of the seriousness of the offending and that a s 283 discharge is the least restrictive outcome that is appropriate in the circumstances.

[30] As it is an oral decision, I will make the necessary adjustments that I need to when my written decision comes out. [SA], those are the reasons why I consider that there ought to be a notation. But, again, I commend the excellent efforts that you have made during the Youth Court process.

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Judge S Patel
District Court Judge

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