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IN THE YOUTH COURT
AT NELSON

I TE KŌTI TAIOHI
KI WHAKATŪ

CRI-2019-242-000008
[2021] NZYC 2

NEW ZEALAND POLICE
Prosecutor

v

[WP]
Young Person

Hearing: 6 January 2021

Appearances: Sergeant K Parfitt for the Prosecutor
J Sandston for the Young Person

Judgment: 6 January 2021

NOTES OF JUDGE R J RUSSELL ON SENTENCING
[as to s 282 discharge]

Introduction

[1] [WP] appears facing two charges of sexual violation by unlawful sexual connection. The charges are laid under s 128(1)(b) of the Crimes Act 1961. [WP] was at the age of 16 years at the time of the offending.

Facts

[2] Briefly what has happened is in [early] 2019 [WP] was at a friend's house with the first complainant and was consuming alcohol and cannabis. They eventually ended up at his home address, got through a window and into his bedroom and he tried to hug her while she was on his bed. He was rebuffed and she then fell asleep. She awoke later to find herself naked from the waist down. [WP] admitted having had sexual intercourse with her. He then sent her a Facebook message the following day saying he had made a mistake and he should not have taken advantage of her. When interviewed by the police he denied the allegations.

[3] Three weeks later on [date deleted] 2019 the second complainant and her boyfriend were at a friend's address in [location deleted]. [WP] was there. They all consumed alcohol. The complainant and her boyfriend went to bed and [WP] was offered a place on the floor next to them. After indicating that he was not happy with these sleeping arrangements the complainant suggested he share the bed with them. She went to sleep and later woke to find that [WP] had inserted his fingers into her vagina and was masturbating himself beside her. [WP] again denied these allegations.

[4] Denials were entered to the charges which [WP] initially faced and a defended hearing was arranged. The Crown were engaged. The form of the charges changed to the two offences which I have outlined. [WP] then entered non-denials and was referred to a family group conference.

Section 333 report

[5] A s 333 psychological report was commissioned and I need to refer briefly to this. The report shows [WP] had longstanding behavioural difficulties and was diagnosed with ADHD and a specific learning disorder and there were concerns about his compliance with the taking of medication. He was assessed as having a low-average to average cognitive function, and difficulties in reading and comprehension. Instability in his family life was noted where he had moved between the household of his separated parents into several towns.

[6] Earlier behavioural issues were noted, including inappropriate touching and watching of pornography, and [WP] was then referred to a STOP programme, but it appears did not retain much of the information. [WP] was then drinking once or twice a week and smoking cannabis. He also was shown pornography by a neighbour and developed an unhealthy interest in that.

FGC plan and STOP programme

[7] As part of the family group's conference plan, [WP] was referred to the STOP programme and has now completed at least 36 sessions of that programme. There is one further session to finalise which is scheduled towards the end of this month. His attendance at the programme is described as being excellent from all of the reports I have received, and this is confirmed by the social worker, Ms Crisp from Oranga Tamariki.

[8] [WP] now accepts there was no victim consent given or that there was any possibility of consent during the two incidents. The STOP programme reports note that [WP] has expressed regret and empathy for betraying the victim's trust. In terms of [WP]'s future plans, it is noted he would like to travel overseas if that were possible, and he has an interest in music.

[9] The STOP assessment is that [WP] has ameliorated all significant dynamic risk factors identified during his assessment over the course of his intervention. This is confirmed by Ms Crisp today who has said, in her view, [WP]'s compliance with

the STOP programme plan has been outstanding, and he is the most compliant young person she has dealt with in cases of this type.

Remorse and apology letters

[10] The case was adjourned to today so that [WP] could complete his apology letters which were part of the original family group conference plan. I have viewed typewritten copies of the apology letters. A handwritten version is available and will be forwarded to the two complainants. Sergeant Parfitt's submission is that the apology letters are well written and appropriately worded, and I agree with his view.

[11] The tenor of these apology letters are [WP] apologises for his actions and he says he knows what he did was wrong and should never have done it. He acknowledges he has completely disrespected the victims. He said he has learnt new ways to create a safe environment for himself and is not asking for forgiveness, but makes the promise that he will continue to work hard to change, and will never harm either of the complainants again. He said he holds no resentment towards the complainants for going to the police.

[12] It needs to be recorded that [WP] has completed the family group conference plan over the past 18 month period without issue or difficulty. The police accept [WP]'s performance on the plan cannot be subject of any complaint or criticism. He has been on bail terms since his initial arrest and there has been only one minor bail breach. Wording of the bail terms were consequently tightened and there have been no breaches following. There has been no reoffending of any sort or type during the two years [WP] has been before the Youth Court.

Victims' views

[13] In terms of the victims' views, Sergeant Parfitt has said one of the complainant's mothers has been contacted, a significant change in [WP] has been acknowledged, and they have no strong views about the outcome of these proceedings.

Disposition - submissions

[14] The issue for decision today is whether [WP] should be discharged under s 282 of the Oranga Tamariki Act 1989, or should be sentenced under s 283(a) of the Act. The latter option means there will be a permanent record of this proved offending against [WP]'s name. Initially the police were neutral on this issue, but more recently the police say a Group 1 s 283(a) response should be imposed. This is because of the serious nature of the offending which happened on two separate occasions, on two different vulnerable young females within about 10 days of each other. The police say there is public interest in this case and the public is entitled to know of offending of this nature.

[15] Mr Sandston, who is [WP]'s youth advocate, applies to have [WP] discharged under s 282 of the Act. He points to the positive features about [WP] which I have summarised in this decision. He does not seek to mitigate the seriousness of the offending, but submits there is nothing [WP] could have done to make things right, that he has not done. The Ministry also supports [WP] being discharged under s 282 of the Act.

Disposition - analysis

[16] In assessing the sentencing outcome, I must have regard to the provisions of the Act itself, in particular s 4A which requires me to have regard to the wellbeing and best interests of the young person, the public interest, the interests of any victim, and the accountability of the young person for the behaviour. I must have regard to the principles in s 5 which are well known, and I must have regard to the youth justice principles in s 208.

[17] As to the s 282 discharge option, if I were to grant this outcome it would mean [WP] would be able to live his life without these two very big black marks of proven sexual offending being recorded against his name. The principles of promoting reintegration of [WP] into the community would not be enhanced by him having such a black mark against his name.

[18] On the other hand, a discharge under s 283(a) will mean a record will be kept of [WP]'s offending and while this is not a conviction, [WP] would still need to

disclose his offending to prospective employers if asked the question, or to immigration officials if he wanted to travel. I accept there is a further punitive effect if a s 283(a) discharge were to be given.

[19] This is a finely balanced decision I am required to make. I have taken time to look at the outcome of some earlier case with similar facts. In *M W v Police* the young person was charged with rape where the victim was held down and sexual intercourse occurred despite her protestations.[1] The young person was 14 and the victim 16. A s 283(a) discharge was ordered in that case. Similarly in *R v [NB]*, the young person faced three charges of unlawful sexual connection with a female under 12 and one of rape of a female under 12.[2] The young person was 13. The Court in that case found the least restrictive approach was a discharge under s 283(a). In *Police v [SA]* the young person was charged with unlawful sexual connection.[3] He was 15 and a s 283 discharge was ordered.

[20] In *Police v [HC]*, the young person there faced charges of unlawful sexual connection and indecent assault.[4] He was 14 at the time, and in the context of his family dynamics the offending occurred. A s 282 discharge was found to be appropriate. Regard was had to the young person's age, their engagement with the plan and the consequences a s 283 discharge would have for the young person.

[21] In *Police v [F]*, the young person there faced nine charges of unlawful sexual connection against two victims.[5] He was 16. He admitted responsibility for the offending and completed successfully the SAFE programme and received an excellent report. He received a s 282 discharge, and the Court in that case was influenced by the positive SAFE report it had received.

[22] In *Police v [OD]*, the young person was charged with four charges of unlawful sexual connection[6]. The young person was 16 at the time. There a s 282 discharge was granted. Finally, in *Police v [RF]*, the young person was charged with unlawful

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[1] *MW v Police* [2017] NZHC 3084.
[2] *R v [NB]* [2019] NZYC 225.
[3] *Police v [SA]* [2020] NZYC 437.
[4] *Police v [HC]* [2016] NZYC 218.
[5] *Police v [F]* [2016] NZDC 788.
[6] *Police v [OD]* [2018] NZYC 310.

sexual connection.[7] A s 282 discharge was granted. The person there had successfully attended and engaged in the STOP programme, abided by his bail conditions and did not reoffend and had no previous proven offending.

[23] It is apparent from my review of these authorities that decisions on this issue have gone both ways, and I consider the issue in this case to be finely balanced.

[24] There can be no issue taken about the seriousness of the offending which occurred against these two young vulnerable complainants, in quick succession. In the adult court each offence has a maximum sentence of 20 years' imprisonment. There is a gross breach of trust involved and obviously there has been a significant impact on these young victims. It can be said that beyond the act of sexual violation itself, which is unacceptable sexual violence which should not be underestimated in any way, there is no accompanying other physical violence which occurred.

[25] To be balanced against this, however, there is [WP]'s background, his learning disabilities, early exposure to pornography, family dysfunction, all of which could point to a failure for him to properly understand consent. Many of these factors are not his fault.

[26] The key for me, however, is the particularly favourable report which has been received from the STOP programme. Thirty-six sessions have been completed. Each and every session [WP] has been required to attend, has been attended, and glowing reports have been received from the STOP programme providers. There have been no problems with the bail conditions of any note. They have lasted for a significant length of time which is a consequence in itself. There has been no further reoffending of any type.

[27] I accept a s 283(a) discharge would have some long-term consequences for [WP]. I have spoken to him about his future plans. He is now 18 years of age. He is looking for employment, hopefully in the [industry deleted]. He has an interest in music [details deleted]. He continues to live with his father who has been in attendance for most of the court review hearings which I have presided over in this

[7] *Police v [RF]* [2020] NZYC 41.

long running family group conference plan. [WP] tells me he does not have a current girlfriend. He does not consume much in the way of alcohol. At a recent concert in [town] which he attended, and I make no criticism of him doing this, he tells me he drank light beer. Finally, he tells me that he has learnt from what he has been through. He has assured me he will not offend in this way again.

[28] The Act requires that I impose the least restrictive outcome, commensurate with the seriousness of the offending. There can be no doubt about the seriousness of the offending itself. In an adult court it would have attracted a lengthy term of imprisonment and nothing in this decision should be read in any way to minimise the impact of this offending on these young and vulnerable victims. Young people, such as [WP], do make mistakes and errors of judgement and [WP] committed two serious errors of judgement when this offending took place. Having said this, he has rehabilitated himself from these early, very dark, times, as best as anyone could have possibly expected.

[29] A key focus of the Act is on rehabilitation and reintegration of young people who offend back into their community so that they can become productive adults in society. [WP] has assured me that he will not offend in this way ever again.

Conclusion

[30] I have reached the view that I can, in the circumstances of this case, having regard to the facts and the various issues that I have recorded, and after considering the judgments I have referred to, discharge [WP] under s 282 of the Act on both of the charges that he faces.

[31] [WP], you are accordingly now discharged on both charges under s 282 of the Act. I do expect you to attend the last STOP programme session later this month which you have assured me you will, and you then are free and clear of the requirements of the Youth Court process. I hope all goes well for you in the future.

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Judge RJ Russell
District Court Judge

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