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IN THE YOUTH COURT
AT PALMERSTON NORTH

I TE KŌTI TAIOHI
KI TE PAPAIOEA

CRI-2020-244-000053
[2021] NZYC 82

CHIEF EXECUTIVE OF ORANGA TAMARIKI-MINISTRY FOR CHILDREN
Applicant

v

[GS]
Young Person

Hearing: 4 March 2021

Appearances: Mr Lyne for Oranga Tamariki
Mr Kronast for the Young Person

Judgment: 5 March 2021

RESERVED JUDGMENT OF JUDGE J F MOSS
SECURE CARE EXTENSION APPLICATION

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[1] [GS] is currently in the secure care unit of [the youth justice residence].

[2] He has been remanded in custody since being arrested on 10 January. He had been resident in [the first location] and was on bail. On 20 December he cut off his electronically monitored bracelet and travelled over succeeding days to [the second location].

[3] [GS] committed 13 offences between [dates deleted – a three week period]. They all relate to driving and interfering with vehicles and burglary. He was currently on bail on similar charges in the North Shore Court, the most serious of which was a resentencing application in relation to an assault with intent to rob. He had been sentenced on that in July 2020 to supervision with activity. That sentence had faltered. He was meant to be at [another youth residence], but that had not gone well. I do not know the detail of that.

[4] When he was arrested on 10 January a Remand Options Information form was completed (ROIT), which showed him to be an absconding risk. It listed a number of attempts to abscond, while in the care of state between 2018 and 2020.

[5] [GS] is also under the care of the state pursuant to a custody order (s 101 Oranga Tamariki Act) in the care and protection jurisdiction. When the application to extend his secure care came before me, I did not have any details about his status in the custody of the State, although his lawyer, in the Family Court, had been involved in the FGC related to his custody status.

[6] [GS] was in secure care as a result of a problem which erupted at bedtime in [his unit] in the youth residence on [date 1]. Ten young people were congregated together in preparation for going to bed. Three of them, sequentially, attacked three others. Five staff were present. When the first attack occurred two staff took the first boy to secure care, and one staff member attended to the victim. At the point when two staff were escorting the first assailant out, staff from other units arrived. In total four additional staff arrived, but at the beginning, only two arrived to replace the three who were occupied. A second attack on a separate boy then occurred. Staff were fully

occupied restraining him and attending to the victim. A third attack occurred, which was a kick to the head of a third boy from behind. At the time the attack occurred both of the boys, assailant and victim, were seated on the same sofa.

[7] [GS] was not in the middle of any of this. The shift leader, [name deleted], observed him at the beginning of the three assaults watching, at a distance of some meters. He was relaxed. The [shift leader] referred to [GS] as being unfazed.

[8] It is unclear, and there was no evidence, about how long it took from the first assault when [GS]'s demeanour was relatively calm, to the point at which staff decided his behaviour had reached a point where he needed to be removed to secure care. [The shift leader] said that he heard and saw [GS] say words like "shut up little bitch". This was addressed to the third victim. In another account and other staff member recorded the words were "shut the fuck up little pussy". [GS] said, and staff agreed, that the remark was made to the victim who was complaining about being kicked, saying words to the effect of "what did I do to deserve that".

[9] [The shift leader] gave evidence that the boy who was kicked, and the second victim were both cowering, and that that was their demeanour when [GS] addressed [the third victim].

[10] In deciding to remove [GS] to secure care [the shift leader] relied on advice from colleagues that they had asked [GS] to desist a couple of times. [GS] confirmed this. However, there was no suggestion that he did anything other than say the words above. He agreed that he was angry. He said that having watched that fighting, he just wanted to have a go. He said that he thought he had done well by not getting into the confrontation.

[11] By contrast, the staff view was that [GS]'s comment was inciting a reaction from the victim which [GS] would then use as a justification for physical confrontation. The fact that the confrontation did not occur when [GS] said these word three times supports the proposition of Counsel for [GS], that the reaction which staff thought he was looking for did not come.

[12] Whatever the most likely interpretation, no physical confrontation occurred. [GS] was not closer than about 5 meters from [the third victim], the boy who had been kicked, who was on a sofa. Staff stood between [GS] and [the third victim]. Staff moved [GS] without incident down to the secure care unit. At that stage, the boy who had attacked [the third victim] was still so aggressive that it was not safe to move him.

[13] Since Sunday night, [date 1], [GS] has been in secure care. On Tuesday [date 2] the staff applied to extend the detention, and the first 72-hour detention extension was confirmed by the court registrar.

[14] The written application and affidavit rely on s 368(1)(b) of the Oranga Tamariki Act 1989. That section enables detention in secure care as follows:

> **368 Grounds for placement in secure care**
>
> (1) A child or young person may be placed in secure care in a residence if, and only if, such placement is necessary—
>
> (a) to prevent the child or young person absconding from the residence where any 2 of the conditions specified in subsection (2) apply; or
>
> (b) to prevent the child or young person from behaving in a manner likely to cause physical harm to that child or young person or to any other person.
>
> (2) The conditions referred to in subsection (1)(a) are—
>
> (a) the child or young person has, on 1 or more occasions within the preceding 6 months, absconded from a residence or from Police custody:
>
> (b) there is a real likelihood that the child or young person will abscond from the residence:
>
> (c) the physical, mental, or emotional well-being of the child or young person is likely to be harmed if the child or young person absconds from the residence.

[15] In support of the conclusion that the detention was necessary to ensure the safety of other young people, Mr Peni deposed that there were two other incidents which contributed to the staff decision about the degree of risk which [GS] posed. The first incident occurred on [date 3]. [GS] spent three days in secure care after he hit another young person. He agreed in evidence before me that that was fair enough.

The second event occurred on 24 February. He was at [the remand home] which is technically a placement under s 238(1)(d) but has a less secure and less detained set of rules than the residence. In the morning of 24 February [GS] took a call from his mother, who told him that his [family member] had passed away. He then went on to complete an athletic activity and returned later home. He was tired and bored. He described becoming angry. He said he just wanted to run. In evidence he said he wanted to see his baby. His baby lives with the mother in [the first location]. He has not seen his baby since he left [the first location] in December. He was at the home with one staff member. The other resident and staff member had gone to shop for groceries.

[16] [GS] became more tense and aroused. He was pacing and did not calm when approached by the staff member on duty. [GS] recorded in later program information, completed while in secure at [the youth justice residence] that he stopped running.[1] When asked why he reacted the way he did, he said "no, I didn't want to leave that's why I stopped for [a staff member] when he pulled up". [The staff member] was an off-duty staff member who saw [GS] on the street. Although this event was characterised by staff as absconding from the home, [GS]'s explanation was more consistent with his behaviour which has previously been observed over the past three years.

[17] However, in addition to running away, [GS] also hit the attending staff member with his fist in the mouth. [GS] denies doing this. I have heard the evidence of [the attending staff member], who was hurt, and of [GS]. I conclude, on the balance of probabilities, that [GS] did hit [the attending staff member]. I conclude that [GS] was extremely escalated, and desperate to leave. He was distressed, and that was unknown to [the attending staff member]. The information about the earlier phone call and news of the passing of [a family member] had either not been passed on or was unknown to morning staff members. [GS] was not with a staff member whom he knew well or trusted. He later reflected that he could have asked to talk to a staff member at the residence whom he knew and trusted. [The attending staff member] gave oral evidence in this hearing, and with great humility and tolerance agreed that [GS] did

[1] Secure Care Unit programming information 25 February, page 5.

not mean to hit him, and that he had not been hurt. Most of all, [the attending staff member] was concerned that, in running, [GS] might get hurt.

[18] The result of this event was another few days in secure care. The residence is entitled to hold a young person in secure care where there is a risk of absconding. It appears that, taken from the standpoint of the residence, there is a risk of absconding. However, taken from the point of view of [GS], running away from distress and conflict is self-protective.

[19] In favour of the extension to secure care for a further five days, the residence argued that the two events ([date 3] and [date 4]) provide a context and persuasive evidence that [GS] poses a risk to the safety and order which other young people are entitled to.

[20] Mr Lyne for Oranga Tamariki, argued that the Court's role is to decide in line with the principles of the Act, particularly emphasising the need for a child centred focus for decision-making. There was no evidence during the hearing that the residence had taken steps to moderate [GS]'s behaviour, or that the residence had a plan, therapeutically, to assist him to manage himself in terms of the absconding behaviour. Nor was there evidence that the therapeutic plan for amending [GS]'s behaviour, in terms of anger, had been considered in the context of the confrontation on [date 1]. Mr Lyne asked for further time to provide written documentation which would provide that evidence. Although the 150 pages (approximately) which the court received after business hours, and outside of the required time, provide information about the work which [GS] has done, the information provides no evidence of the therapeutic work which was occurring prior to admission to secure care, or during admission in secure care. Further, there is no evidence that there is a program of adversity reduction for [GS].

[21] It goes without saying that any resident, who is remanded pursuant to s 238(1)(d), brings adversity, dysregulated behaviour, volitional problems, attitudinal problems, and (based on statistical likelihood) multiple adverse childhood experiences, insufficient education, and inadequate social training. In order for the Court to give meaning to the test for continued secure care, it is important that it is

acknowledged that the cohort of young people to whom this test will be applied is a depleted, underdeveloped, and antisocial cohort. In order for the Court to take a child-focused decision-making stance, it is necessary to realistically consider the cohort of young people to whom this test must apply. I do not consider that it is proper to apply a standard of behaviour to residents in a youth justice centre which is similar to a standard of behaviour expected of young people who are competently engaging in the developmental tasks of adolescence. If the Court applies that standard, no minor infraction in the residence which might irritate another young person could be considered other than as justifying detention in secure care.

[22] The Human Rights Commission, in the report by Dr Sharon Shalev, emphasised again the adverse consequences for young people being detained in secure care.[2] I consider it is essential that the residence measures a young person's behaviour against their own attentive and individual therapeutic plan for the young person which is designed to address known challenges.

[23] In seeking to extend secure care, the Court will require evidence either that the risk of physical harm to the young person or another remains so high that release cannot be safely countenanced, or that the delivery of a targeted individualised therapeutic plan for harm reduction is so finely balanced that the best interests of the young person requires that moderation of residual risk of harm is realistically achievable in the course of planned intervention during the extension sought. Put another way, an extension to secure care cannot be considered in terms of punishment. Section 368 requires the Court to be satisfied that the protection of the young person (construed broadly) and others requires the detention.

[24] For [GS], running away is a known challenge. It is recorded as a risk in ROIT. The Court has no information to assist it to consider whether that risk was being reduced in residence. Running away may pose a risk of physical harm to a young person. The ROIT records anger as compromising [GS]'s capacity to make sensible choices.

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[2] Dr Sharon Shalev *Seclusion and Restraint: Time for a Paradigm Shift* (Human Rights Commission, July 2020).

[25] A careful reading of [GS]'s own responses to the anger control questionnaires which have been administered most days, and which form part of the late filed documentation, shows that his attitudes and capacity to consider and implement the strategies he has for managing his anger sensibly are deteriorating, and not improving.

[26] [GS]'s own evidence portrays that he feels he has been dealt with unjustly. I agree. [GS] is entitled, within the care of Oranga Tamariki to expect that intervention in relation to the personal and reactive behaviours which lead him to qualify for remand in residence are considered and acted upon therapeutically in a consistent way. There is no evidence before me that that has occurred.

[27] I accept [GS]'s evidence that he did well on [date 1] not to enter the fray, which was created by three other lads. I do not consider that his evidence that he just wanted to fight, because he had watched so much fighting, was evidence that he is a risk to others. I consider he was being honest. Fighting does activate [GS]. If anything, he is entitled to protection from the effect of that context, because it is a known trigger.

[28] The application for extension of detention is dismissed.

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Judge JF Moss
Youth Court Judge

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