EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].



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**IN THE YOUTH COURT**
**AT PORIRUA**

**I TE KŌTI TAIOHI**
**KI PORIRUA**

**CRI-2019-291-000018**
**[2021] NZYC 91**

**THE QUEEN**

v

**[CD]**

Hearing: 4 March 2021

Appearances: R de Silva for the Crown
C Smith for the Young Person

Judgment: 4 March 2021

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**RULING OF JUDGE J A R JOHNSTON ON S 282 APPLICATION**

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[1] [CD], you are now 19 years old and you appear before me today in the Youth Court. You have been before this Court for over two years, since 21 February 2019, when you were initially charged.

**Charges | Ngā taihara**

[2] You have not denied charges of sexual connection with a young person under 16, pursuant to s 134(1) of the Crimes Act 1961 and doing an indecent Act on a young person under 16, pursuant to s 134(2) of the Crimes Act. These charges carry with them maximum penalties of 10 years and seven years' imprisonment respectively, had you been appearing in the District Court as an adult.

[3] They both involve inappropriate sexual conduct between you and your victim [name deleted], who was aged [under 16] at the time of this offending. You were aged 16 at the time.

[4] From the outset I wish to acknowledge the presence of [the victim] and her mother in court today.

[5] I also acknowledge the presence of your stepmother, who is supporting you.

[6] This offending happened some nearly three years ago. There have been delays. The matters before the Youth Court will be concluded today. I acknowledge the delay. It is an unfortunate reality of our justice system that justice is not always fast. It frequently occurs in cases such as this where there is sexual offending, and cases are put off for discussions to occur, including any resolution about the appropriate charges and/or so that someone like [CD] is able to attend a course or programme like Well Stop so that everyone can see and monitor any progress made. This is what has occurred here, and I do not think it would be fair to blame anyone for that.

[7] It is unfortunate that occurs, but it is also a good way to see whether or not someone is genuinely remorseful, and the longer it can take can also give the Court an indication about the young person's compliance with bail rules, with attending

programmes like Well Stop and other counselling, and ensuring that there is no further offending.

**Background | Whakataunga horopaki**

[8] On [date deleted] 2018, [the victim], was on [road and location deleted]. She had just been in a fight with her mother and was crying on the street. As I said, she was [under 16] years old at the time. It was about 4.30 pm. You were in the passenger seat of a vehicle driving along [the road]. You were 16 and seeing [the victim] in a distressed and vulnerable state, the vehicle that you were a passenger in stopped and you asked her if she would like to get in. She recognised you and decided to get into the car. She sat in the back seat; you were in the front passenger seat.

[9] The car drove around the [nearby area]. Whilst driving you repeatedly reached around the back seat and placed your hand on [the victim]'s thigh. Later when the car stopped in a layby, and despite being told that she did not want you to be in the backseat with her, you had climbed into the backseat and tried to put your arm around her. Each time you did so, she asked you to stop but you continued to pull her closer to you.

[10] The driver of the vehicle, it appears from the summary, fell asleep in the front seat. You then put your hand back on her thigh and pulled the elastic of her underwear to the side and inserted your finger into her vagina. She told you to stop and tried to pull your hand away. She asked you to take her home. You took hold of her underwear and ripped it off to fully expose her. She yelled at you, asking why you had done that and in response, you laughed. You used one hand to restrain her and again, placed your fingers inside her.

[11] You then took your penis out of your trousers; you took her hand and made her touch it. You told her that you would take her home if she masturbated you. When she refused, you pushed your fingers in and out of her vagina aggressively. She yelled at you to stop and tried to pull you away from her. She could not pull you away due to your size and strength.

[12] The noise of the incident awoke the driver who yelled at you to stop. You laughed and continued. The driver shouted again at you to stop and it was then that you stopped and climbed back into the front seat of the car and the driver took [the victim] home.

**The Plan | Te Rautaki**

[13] You not denied the two charges that are before the Court on 27 January 2020, after having earlier denied another more serious charge.

[14] An FGC was held on 22 May 2020. You have completed all components of your plan. You have apologised to [the victim]'s mother at the conference. You have also apologised to [the victim] in person and by writing her a letter of apology.

[15] You have completed the Well Stop programme over a period of six months. You were also supported to deal with your drug dependency and completed drug education sessions with [the local] Youth Support. Mentoring was provided for you. The reports show that you did very well completing the programmes.

[16] You and your family have agreed to pay $2,000 to [the victim] to address the psychological harm that has been caused by your offending. The money is to be paid regardless of the disposition outcome today. No agreement has been reached on how to discharge the case.

**Views of the victim | Ngā hiahia o te Pārurenga**

[17] [The victim], her mother and her [sibling] have provided statements to the Court. [Judge speaking to the victim:] there is no doubt that you are very brave and that you are a courageous person. This incident has greatly affected you and your close-knit single parent family. You have struggled at school. You have left your school and scholarship behind. You struggle to attend school and engage in a class environment. You suffer from anxiety; PTSD and you have had trouble with eating. You have been withdrawn and suicidal. Seeing these changes to you has affected your [sibling] and your mother considerably.

[18] Your family was already in a vulnerable position. Your [sibling] suffers from [a medical condition] and the effects of the offending on you have been felt by your whole family who, already, have so much to deal with. You feel unsafe around [CD]. You were particularly distressed when you saw him at your work. You are concerned that he will offend against you again or others.

[19] In listening to you and your mother today I particularly found the comments insightful. I agree with what your mother said that you both have shown grace, that you both have shown forgiveness and it is not unreasonable that you would like to feel safe.

[20] Despite the apology and other matters that [CD] has completed from the FGC plan, [the victim] and her family wish for there to be a record of the offending by way of a s 283 note. They do not support a discharge under s 282 of the Act.

[21] I also add that it is very clear that [the victim] is loved by, and has the support and unconditional love of, her family and that is certainly very clear to me from the information that is before me.

[22] I also commend her for coming forward and making the complaint that she has made and for having the courage to continue and see it through. As a result, and regardless of the outcome today, [CD] has been held to account and has had to undertake and complete a lot of things including appearing in Court and at the family group conferences held.

**Submissions of the Crown | Ngā tāpaetanga a te Karauna**

[23] The Crown say that, given the seriousness of the offending and in order to recognise the interests and rights of [the victim], that a discharge and admonishment pursuant to s 283(b) of the Act is justified. They refer specifically to the breach of trust, the vulnerability of [the victim] and the clear impact of the offending on her.

[24] The Crown have highlighted some cases where the Court has chosen to discharge the young person under s 283(a) of the Act, to permit the keeping of a record

of the offending in order to recognise the seriousness of the offending and the impact that the offending has had on the respective victims.

**Submissions of the Young Person | Ngā tāpaetanga a te Rangatahi**

[25] Today your youth advocate, Mr Smith, seeks that you be discharged under s 282 of the Oranga Tamariki Act 1989. This is the equivalent of the charges never having been laid in court; however, that does not mean that there is any suggestion by the Court that if it does grant a s 282 discharge that the Court would form a view that this offending did not happen. It is very clear that this offending happened and that you, [CD], have acknowledged that and have accepted responsibility for this offending.

[26] Mr Smith advocates strongly for you to receive a s 282 discharge. He reminds the Court that this offending occurred nearly three years ago and that it is unusual for someone such as yourself, [CD], to be in the Youth Court for such a long time.

[27] Given the opportunity to comply with the Well Stop programme undertaken by you and the drug counselling and mentoring, Mr Smith submits that a s 282 discharge is the appropriate outcome.

[28] He also refers to many of the provisions of the Oranga Tamariki Act and I have brought a copy of it here today. That Act sets out the purposes and principles that the Court must consider in determining this case and I will go through them shortly.

[29] Mr Smith highlights the differences between the cases referred to by the Crown and the present offending. He notes that you have successfully finished all components of your plan and, he says, including with commendation, from the Well Stop programme and from your AOD counsellor. In his submission, a record of the offending, which would essentially be there for life, would seriously impair your employment and future prospects.

[30] Mr Smith also notes that you also suffer from suicidal ideation and that you have attempted suicide. He says that the impact of a record of this offending will also

affect your mental health. Mr Smith says that you are remorseful, and that you have admitted the serious charges before the court. You have owned up to what you have done, and he says you have made significant changes.

[31] He also says that you are a different person today from that person who committed the offending.

[32] I note that you are of New Zealand European and Cook Island Māori descent.

**The Law | Te Ture**

[33] The Oranga Tamariki Act sets out several purposes and that is at s 4. Those purposes include promoting the mana of the tamaiti, supporting and protecting a young person from any suffering or harm, assisting families, whānau, hapū and iwi at the earliest opportunity to fulfil their responsibilities to the young person, providing a practical commitment to the Treaty of Waitangi (te Tiriti o Waitangi), and recognising mana tamaiti, whakapapa and the practice of whanaungatanga of young people who come to the attention of Oranga Tamariki.

[34] Purpose (1)(i) applies specifically to young people in the youth justice arena and in particular:

> **4 Purposes**
>
> (1)…
>
> (i) responding to alleged offending and offending by children and young persons in a way that—
>
> (i) promotes their rights and best interests and acknowledges their needs; and
>
> (ii) prevents or reduces offending or future offending; and
>
> (iii) recognises the rights and interests of victims; and
>
> (iv) holds the children and young persons accountable and encourages them to accept responsibility for their behaviour.

[35] When exercising powers set out under part 5 of the Act, the Court also must weigh the four primary considerations that are set out in s 4A(2) of the Act.

[36] Those refer to the wellbeing and best interests of children or young persons and, in particular:

> **4A Well-being and best interests of child or young person**
>
> **…**
>
> (2) …
>
> (a) the well-being and best interests of the child or young person; and
>
> (b) the public interest (which includes public safety); and
>
> (c) the interests of any victim; and
>
> (d) the accountability of the child or young person for their behaviour.

[37] The Court is also directed to consider the general principles in s 5 of the Act.

> **5 Principles to be applied in exercise of powers under this Act**
>
> (1) …
>
> (a) a child or young person must be encouraged and assisted, wherever practicable, to participate in and express their views about any proceeding, process, or decision affecting them, and their views should be taken into account:
>
> (b) the well-being of a child or young person must be at the centre of decision making that affects that child or young person, and, in particular,—
>
> (i) the child's or young person's rights (including those rights set out in UNCROC and the United Nations Convention on the Rights of Persons with Disabilities) must be respected and upheld, and the child or young person must be—
>
> (A) treated with dignity and respect at all times:
>
> (B) protected from harm:
>
> (ii) the impact of harm on the child or young person and the steps to be taken to enable their recovery should be addressed:

(iii) the child's or young person's need for a safe, stable, and loving home should be addressed:

(iv) mana tamaiti (tamariki) and the child's or young person's well-being should be protected by recognising their whakapapa and the whanaungatanga responsibilities of their family, whānau, hapū, iwi, and family group:

(v) decisions should be made and implemented promptly and in a time frame appropriate to the age and development of the child or young person:

(vi) a holistic approach should be taken that sees the child or young person as a whole person which includes, but is not limited to, the child's or young person's—

(A) developmental potential; and

(B) educational and health needs; and

(C) whakapapa; and

(D) cultural identity; and

…

(H) age:

(vii) endeavours should be made to obtain, to the extent consistent with the age and development of the child or young person, the support of that child or young person for the exercise or proposed exercise, in relation to that child or young person, of any power conferred by or under this Act:

…

(c) The child's or young person's place within their family, whānau, hapū, iwi, and family group should be recognised, and, in particular, it should be recognised that—

…

(ii) the effect of any decision on the child's or young person's relationship with their family, whānau, hapū, iwi, and family group and their links to whakapapa should be considered:

(iii) the child's or young person's sense of belonging, whakapapa, and the whanaungatanga responsibilities of their family, whānau, hapū, iwi, and family group should be recognised and respected:

(iv) wherever possible, the relationship between the child or young person and their family, whānau, hapū, iwi, and family group should be maintained and strengthened:

(v) wherever possible, a child's or young person's family, whānau, hapū, iwi, and family group should participate in decisions, and regard should be had to their views:

...

(d) the child's or young person's place within their community should be recognised, and, in particular,—

(i) how a decision affects the stability of a child or young person (including the stability of their education and the stability of their connections to community and other contacts), and the impact of disruption on this stability should be considered:

(ii) networks of, and supports for, the child or young person and their family, whānau, hapū, iwi, and family group that are in place before the power is to be exercised should be acknowledged and, where practicable, utilised.

[38] The key relevant principles to you are set out at paragraphs (a), (b), (c) and (d). Those include the views of the young person being considered, treating young persons with dignity and respect always and protecting them from harm. It also includes a young person's wellbeing being protected by recognising their whakapapa and the whanaungatanga responsibilities of their family, whānau, hapū, iwi and family group and that decisions should be implemented and made promptly and, in a timeframe, appropriate to the age and development of the child or young person. There are also holistic approaches set out including development potential, education and health needs, whakapapa, cultural identity and age.

[39] In addition to those matters that I have already spelled out, the Court must also have regard to the Youth Justice principles in s 208(2). When weighing the four primary considerations that I have referred to already in s 4A, the Court must be guided in addition to the principles in s 5 to s 208(2).

> **208 Principles**
> …
> (2) …
>
> (c) that any measures for dealing with offending by children or young persons should be designed—
>
> (i) to strengthen the family, whanau, hapu, iwi, and family group of the child or young person concerned; and
>
> (ii) to foster the ability of families, whanau, hapu, iwi, and family groups to develop their own means of dealing with offending by their children and young persons:
>
> (d) that a child or young person who commits an offence or is alleged to have committed an offence should be kept in the community so far as that is practicable and consonant with the need to ensure the safety of the public:
>
> (e) that a child's or young person's age is a mitigating factor in determining—
>
> (i) whether or not to impose sanctions in respect of offending by a child or young person; and
>
> (ii) the nature of any such sanctions:
>
> (f) that any sanctions imposed on a child or young person who commits an offence should—
>
> (i) take the form most likely to maintain and promote the development of the child or young person within their family, whanau, hapu, and family group; and
>
> (ii) take the least restrictive form that is appropriate in the circumstances:
>
> (fa) that any measures for dealing with offending by a child or young person should so far as it is practicable to do so address the causes underlying the child's or young person's offending:
>
> (g) that—

(i) in the determination of measures for dealing with offending by children or young persons, consideration should be given to the interests and views of any victims of the offending (for example, by encouraging the victims to participate in the processes under this Part for dealing with offending); and

(ii) any measures should have proper regard for the interests of any victims of the offending and the impact of the offending on them:

[40] I refer especially to the Youth Justice principles set out at s 208(2) at paragraphs (c), (d), (e), (f), (fa) and (g). Those include measures for dealing with offending by young persons that should be designed to strengthen families, to foster the abilities of families and family groups to develop their own means of dealing with offending by young persons; where at all possible keeping offenders in the community so far as that is practicable, taking into account a young person's age as a mitigating factor in determining whether or not to impose sanctions and, of course, the nature of any such sanctions. In determining any sanctions, the Court is directed to consider taking the least restrictive form that is appropriate in the circumstances. Such measures, so far as practicable, need to address the causes underlying the offending.

[41] I also note again the importance of the interests and views of victims of the offending but it is clear, hopefully from what I have set out, that that is one of the many factors that a Judge needs to consider when sentencing a young person in the Youth Court.

[42] In addition, when the Court is considering imposing sentences or orders pursuant to s 283. The Court is further directed to impose the least restrictive outcome adequate in the circumstances as set out in s 289 of the Act.

[43] The Court also needs to consider reasonable and practicable measures or assistance to prevent or reduce offending or re-offending.

[44] In disposing of these proceedings there are several responses available to the Court. The Court may dispose of the offending by discharging [CD] under either s 282

or s 283(a) of the Act. As I have said, the Crown seeks that [CD] be discharged with an admonishment under s 283(b) of the Act.

[45] A s 282 discharge is a unique order. It has the effect of rendering the situation as if the charges against the young person were never laid. This enables a young person to continue with their life without a "black mark" against their record. A s 282 discharge particularly gives effect to the principle of restorative justice by promoting the re-integration of the young person.

[46] In discharging a young person under s 282, if the Court is satisfied that the charges against the young person are proven, the Court may also make additional orders and that includes the emotional harm reparation as offered today by [CD].

[47] In contrast, a s 283(a) discharge requires a record to be kept of the young person's offending. Such a discharge is a group 1 response and thus one of the least restrictive responses under s 283 of the Act, for a young person against whom charges are found to be proven. Although Youth Court charges are not "convictions", a young person who receives a s 283(a) discharge is still required to disclose their offending when asked by an employer or immigration officials.

[48] The availability of a s 283 discharge as a separate option for the Court, acknowledges the distinctive punitive effect of the retaining of a record of offending. This option indicates a parliamentary intent that, in some cases, presumably those where there is a higher risk of re-offending, there is a public interest in the Ministry of Justice retaining a record of the offending. It is unclear whether any additional order can be made when discharging a young person under s 283(a) as a discharge under s 283(a) is phrased as being "without further penalty."

[49] If the Court considers a s 283(a) discharge to be appropriate, the Court is required to also take into consideration the factors listed in 284(1) of the Act on sentencing. That is also the case if the Court is considering admonishment under s 283(b) of the Act, a rarely used disposition option that involves discharging a young person with a reprimand, including maintaining a record similar to that under s 283(a).

**Discussion | Tātari**

[50] I have carefully considered the cases that have been referred to by the parties. Ms De Silva concedes that there are no cases directly on point and, further, she also concedes that there are cases involving more serious offending than the present situation where s 282 discharges have been granted.

[51] There are also cases referred to where the Courts have been of the view that the offending needs to be marked by way of Court order. The cases of *Police v [OD]*[1], *Police v [HC]*[2] and *Police v [F]*[3] all involved instances where there was more serious offending and the Court granted a s 282 discharge for the young person. As indicated, no comparable cases where a s 283(b) admonishment was given have been drawn to the Court's attention.

[52] This, in my view, appears to be a harsh disposition option for this offending. Significantly more serious cases, such as *R v [NB]*[4], *Police v [SA]*[5] and *MW v Police*[6] have been dealt with by way of a discharge under s 283(a) of the Act which is a less serious group 1 disposition option than a s 283(b) admonishment.

[53] I have not been referred to any Well Stop report, therefore am unaware of the assessment of any risk [CD] has of re-offending. Having successfully completed the programme, however, and not sexually re-offended in the interim, I consider that the risk of such re-offending posed by [CD] is likely low.

[54] It is important that [the victim] and her family feel heard and acknowledged in the Court process. However, as I have said, whilst [the victim] and her rights are important, they are one of many considerations the Court is required to take into account when determining whether a young person should be discharged.As the Court noted in *Police v [OD]*:

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

> [33] Part of the Youth Justice process is to ensure that the victim's views are heard and recognised at the family group conference part of the process, and while they are relevant to the final disposition, they are not necessarily determinative.[7]

[55] It is important that the Court proceeds in line with authority in order to ensure similar cases are dealt with in a similar manner. This ensures proportionate and fair outcomes. It is ultimately [CD]'s future that is at stake as a result of the Court's decision and his interests that the Court must pay close attention to.

[56] When looking carefully at the s 4(1)(i) primary considerations I note the following:

*s 4(1)(i) Promoting rights and best interests and acknowledging the needs of the young person.*

(a) [CD], you are a vulnerable young person of both New Zealand European and Cook Island Maori descent. You suffer from mental health issues and you, too, have been affected by the Court process. A record of the offending will no doubt have an impact on your ability to gain future employment and travel overseas.

(b) It appears to be in your best interests that no notation is recorded for this offending.

*s 4 (1)(ii) preventing or reducing offending or future offending.*

(c) You have completed the difficult Well Stop programme successfully. You complied wholeheartedly with the programme, with commendation.

(d) I understand [the victim] has concerns that you will re-offend again. There is limited evidence to support recording of this offending by a notation will reduce your risk of re-offending in any way.

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[7] *Police v [OD]* at para [33].

(e) You have expressed remorse for this offending and the offer of $2,000 of emotional harm reparation to the family, regardless of the disposition outcome, suggests that you understand the gravity of the impact of what you have done, on them.

(f) I note that sexual offending has the lowest rate of recidivism of any offence type dealt with by the Youth Court and there is research that supports this. Research also supports that if young people who have committed a sexual offence go on to re-offend, it is more likely to be non-sexually. Further studies show that re-offending rates are decreased substantially by specialist programme completion such as Well Stop.

*s 4 (1)(iii) recognising the rights and interests of victims.*

(g) [The victim] and her family strongly oppose a s 282 discharge being given. It is their position that this offending needs to be recorded in order to acknowledge the impact it has had on [the victim] and her family and in order to reduce any risks of re-offending.

(h) The rights and interests of [the victim] may be met short of admonishment by an adequate safety plan.

*s 4 (1)(iv) holding the young person accountable and encouraging them to accept responsibility for their behaviour.*

(i) [CD], you have not denied the offending and you have apologised to [the victim] and her family at the family group conferences and by letter. This is not a case where admonishment or a s 283(a) discharge is necessary for you to take responsibility for the offending. You have already done so by not denying the charges.

(j) The process has not been easy at all for [the victim] or her family; nor has it been for you. You have had to complete several steps in this plan,

and you have done so over the better part of a year. It is a long time for a person of your age. You have acknowledged what you have done, apologised, and offered reparation to the family. This shows that you have some remorse for your actions and recognise the impacts of those actions.

(k) [CD], you have put in some considerable effort into your rehabilitation by attending and engaging with the Well Stop programme for a significant period along with the alcohol and drug counselling and with distinction and whilst employed full-time.

(l) It could be said that despite accepted science that youth brain development is not completed until a person is well into their twenties, that you have completed the Well Stop programme in a way that I suspect many adult offenders may have struggled to do.

[57] You have had a challenging upbringing and the adults in your life did not always treat you as you should have been treated. You struggled with your parents' separation and the way this occurred. This included disappointment, betrayal and abandonment and this led to your use of cannabis.

[58] I do not want my comments today to be taken by [the victim] and her family as not acknowledging the pain and distress that you have caused to them, but it is unusual for someone to be before the courts as you have, [CD], for such a long period of time without having numerous breaches of bail and further offending.

**Decision │Kupu whakatau**

[59] In my experience in the Youth and Rangatahi Courts and having read other cases, it is not unusual for a s 282 discharge to be granted for serious offending, including sexual offending.

[60] I consider that [the victim]'s concerns can still be met, short of a record for this offending. [CD] cannot undo what he has done, but he will have to live with what he has done and the knowledge that the police still have a record of his sex offending.

[61] Having weighed up all the matters that I am required to under the Oranga Tamariki Act and the cases referred to, and for the reasons that I have set out, in all the circumstances, [CD], I consider that a discharge under s 282 is appropriate in this case.

[62] You are discharged under s 282. That will be without a record.

[63] I also order emotional harm reparation of $2,000. That is to be paid for the purposes of psychological counselling to assist [the victim].

[64] [CD], you are now being given the opportunity to move forward with your life in a way that [the victim] and her family may not feel that they are able to do just yet.

[65] You need to take advantage of the opportunity that you have received today. You also need to ensure that you will not re-offend because I can assure you that if you offend in this way again, you will not be given such an opportunity again. You are now an adult in terms of the law that relates to criminal offending. You would appear in the District Court and you would likely be imprisoned for this type of offending. I am sure that Mr Smith has made that point very clearly to you.

J A R Johnston
Youth Court Judge