EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].
This judgment cannot be republished without permission of the Court. Publication of this judgment on the Youth Court website is NOT permission to publish or report. See: Districtcourts.govt.nz

NOTE: NO PUBLICATION OF A REPORT OF THIS PROCEEDING IS PERMITTED UNDER S 438 OF THE ORANGA TAMARIKI ACT 1989, EXCEPT WITH THE LEAVE OF THE COURT THAT HEARD THE PROCEEDINGS, AND WITH THE EXCEPTION OF PUBLICATIONS OF A BONA FIDE PROFESSIONAL OR TECHNICAL NATURE THAT DO NOT INCLUDE THE NAME(S) OR IDENTIFYING PARTICULARS OF ANY CHILD OR YOUNG PERSON, OR THE PARENTS OR GUARDIANS OR ANY PERSON HAVING THE CARE OF THE CHILD OR YOUNG PERSON, OR THE SCHOOL THAT THE CHILD OR YOUNG PERSON WAS OR IS ATTENDING. SEE http://www.legislation.govt.nz/act/public/1989/0024/latest/DLM155054.html

IN THE YOUTH COURT
AT MANUKAU

I TE KŌTI TAIOHI
KI MANUKAU

CRI-2019-292-000377
[2021] NZYC 92

NEW ZEALAND POLICE
Prosecutor

v

[BT]
Young Person

Hearing:	4 March 2021
Appearances:	S Norrie for the Prosecutor (via video link) G Earley for the Young Person L Matthias as Social Worker G Fulton for the Chief Executive (via video link) T Weeks as Lawyer for the Child
Judgment:	4 March 2021

ORAL JUDGMENT OF JUDGE S D OTENE

---

[1] [BT] is aged [18 years]. He is charged with an offence of sexual violation by rape, three of sexual violation by unlawful sexual connection and one of doing an indecent act. The offences charged have been admitted by [BT] at family group conferences - the first in August 2019 upon the police intention to commence this proceeding.[1] Charges were then laid in the Youth Court in September 2019.[2] The admissions have been confirmed at subsequent family group conferences.

[2] The prosecution does not contend that the circumstances of this matter require a response any greater than notation of the offending pursuant to s 283(a) of the Oranga Tamariki Act 1989. I accept that is so and that the acute issue is whether that, or rather discharge of the charges pursuant to s 282, is the least restrictive outcome. The immediate consequence for [BT] and his family are the same regardless of which outcome is applied in that [BT] is released from these proceedings without further sanction. However, a notation will remain on the record and the facts underpinning the offending can be disclosed to the Court in the event of further offending. If, however the charge is discharged, it is deemed never to have been filed and would not be brought, on the face of it, to the Court's attention if there were further offending. That said, there is acceptance that if there is further offending, the police can bring notice of prior discharges to the Court's attention, but that offending will not sound in any penalty.

[3] I have decided that all charges will be discharged pursuant to s 282 of the Act. I now give my reasons for that decision.

The offending

[4] The offences were against [BT]'s [sister] [name deleted – "the victim"]. The sexual violations occurred during the course of one week in 2016. Through that year [BT] was 12 or 13, and [the victim] aged [under 13] years. [BT] has maintained that the offending occurred whilst he was aged 12. The indecent act took place in [early]

[1] Pursuant to s 247(b).
[2] A fifth charge of sexual violation by rape was laid but withdrawn.

2019. At that time [BT] was almost, or had just turned 16 years. [The victim] was aged [under 16] years.

[5] The sexual violations in 2016 all occurred in the family home, specifically in [the victim]'s bedroom, in [BT]'s bedroom and twice in their parent's bedroom. [BT] was directive and in control, instructing [the victim] to remove her lower clothing and to lie down, or otherwise position herself as to be physically vulnerable. [The victim] felt pressured and she complied. One violation was by way of [BT] inserting his penis into [the victim]'s vagina. The others were by way of him inserting his penis into her anus, and on one such occasion repeatedly for five minutes.

[6] The indecency in 2019 occurred when [BT] pulled [the victim] into the bathroom at [a local shop], pulled down his pants, told her to give him a hand job, and on [the victim] saying she did not want to, he put her hand onto his penis. That followed with him sending numerous texts to her of a sexual nature.

[7] The offending came to light in [month deleted] 2019. At that point Oranga Tamariki became involved. A plan was agreed between the social worker and [BT] and [the victim]'s parents for [the victim] to live at home and [BT] to live separately and not to have contact with her. [BT] was allowed into the home in breach of that agreement with result that [the victim] was placed in the care of Oranga Tamariki, initially by agreement with her parents and then by a Family Court order. Such was the impact on her that she threatened suicide in [month deleted] 2019. She was placed with non-kin caregivers until returning home in 2020. She remains in the Chief Executive's custody and therefore subject to the oversight of the Family Court.

[8] When [the victim] was removed from the family home [BT] returned until, by his parents' agreement, in [late] 2019, he was placed in Oranga Tamariki care. That was in part to provide some structure for his residential placement at the Barnados harmful sexual behaviours group home. That placement was to complement [BT]'s ongoing participation, which had commenced in [month deleted] 2019, in the Safe Network youth services programme to address his harmful sexual behaviour. The Chief Executive's care responsibility for [BT] continued by a custody order made by the Family Court in [early] 2020, which order lapsed upon [BT] turning 18 [recently].

[BT] remained in the residential home until December last year upon his completion of the Safe programme, and his move to live independently, which continues. He intends to commence tertiary study later this year.

[9] That description demonstrates the level of disruption to the day-to-day organisation of the [family] as a result of the offending, but of course there is a deep emotional and psychological impact. The nature for this type of offending is that for some people those impacts can sound for life and in unexpected ways.

[10] From [the victim]'s statement in [mid] 2019 it was clear that she experienced not only terrible abuse and violation inflicted by someone in whom she should have been able to trust without reservation, and at the home where she should have felt most safe, but she also felt unsupported by her parents, incurring their blame for what had occurred and for bringing shame upon the whole family. The comments to her social worker in [late] 2019 demonstrate [the victim]'s sense of hopelessness and her impeded concentration as to affect her performance at school. She nevertheless desired to return home.

[11] [The victim], her parents and [BT] attended a reconciliation meeting in January facilitated by [the Safe clinician] that worked with [BT]. [The victim] indicated to [the social worker], that the meeting went better than she had anticipated though she felt an awkwardness about it and was unsure about the genuineness of [BT]'s apology. That ambivalence is understandable given the gross breach of trust that had occurred.

[12] She then provided a statement soon after that meeting indicating that she now has a sense of support and love from her parents, safety and ease at home. She also feels safe at school, is achieving well and is developing plans for her future study and independence. She remains deeply troubled by her experience but has competence and knowledge of how to gain assistance, most particularly via her school counsellor and Ms Clegg. She said she had reached a point where she wants her family unified and spending more time together.

[13] That statement to which I have just referred was, I am told, given by a [the victim] in the presence of her parents. She gave a statement two days ago to a Youth

Aid officer without the presence of family. That statement makes more clear that her trauma is deep and her emotional and mental distress remains palpably close to the surface for her. Her easily understood preference is to have no contact with [BT]. She affirms, and fortunately so, her sense of safety with her parents at home and that she does trust her mother.

[14] There have been significant consequences for [BT] too. He has been removed from his home to live at the group home whilst engaged in the Safe programme and changed school from [one school] to [another school]. That enabled a measure of continuity for [the victim] because she is a student at [the first school], and so could remain there without the burden of [BT]'s proximity. [BT] experienced anxiety and very low mood last year, entertaining thoughts of harm to himself, which Ms Clegg attributes in part to lack of connection with family and friends.

[15] The Safe programme has been the crucial foundation by which to understand the reason for [BT]'s offending, and so the necessary responses to it. That response has been most intensively with [BT] but encompassed his parents and [the victim] also.

[16] An assessment report by Media Ali at the commencement of involvement with [BT] contextualised his offending within his exposure to pornography, particularly sibling pornography, which behaviour he normalised and which was not balanced by appropriate education or restriction upon access to inappropriate material.[3] Underlying that is the [young person's] cultural norm whereby matters of sexual development and intimate relationships are not discussed by parents with children, and also [BT]'s parents' occupation that left the children alone without adult oversight for extended periods.

[17] [BT]'s progress through the Safe programme has been monitored by way of reports from his social worker and from Ms Clegg and by his regular attendances at court. His advocate Mr Earley, submits, and I agree, that his progress has been uniformly excellent. Ms Norrie, for the prosecution similarly acknowledges his excellent progress. That excellence is by reason of his attendance, but most

[3] Safe Youth Service Assessment Report, Media Ali (Clinician) Safe Network, 19 September 2019.

importantly by his sustained motivation and committed, open and honest engagement including when challenged by the content. He is described by Ms Clegg as having achieved his therapeutic goals exceptionally, with demonstrated insight into and remorse for his harmful sexual behaviour and thought of how to develop and maintain peer relationships in the future.

[18] The specifics of the programme have been as follows:

(a) Weekly hour long individual therapeutic sessions for [BT] with Ms Clegg delivered over 15 months.

(b) Two family sessions led by Ms Clegg with [BT] and his parents, the reconciliation meeting to which I have referred and regular communication otherwise with [BT]'s parents.

(c) [BT]'s mother completing a further six session with Safe clinician Ms Naryan.

I comment here that there was concern, at least at the time when the proceedings were brought to the Family Court, about the willingness or ability of [BT]'s parents to acknowledge the offending and where the responsibilities for it properly lay. Ms Clegg's opinion is that [BT]'s parents have been motivated to support [BT] and [the victim] throughout her intervention and open in their engagement especially when undertaken in [their language] and that they took a critical approach to how they could ensure the support the safety of both their children.

[19] The Safe intervention has ended. Ms Clegg has provided an end of intervention report.[4] I have referred already to some of her conclusions. I further note broadly that on the psychometric measures applied[5] there are no areas pertinent to harmful sexual behaviour requiring immediate risk management. In the sexual domain there is need for medium or long-term management though that is more a function of the nature of

[4] Safe Network End of Intervention Report, Emily Clegg (Clinician), 5 February 2021.
[5] Th AIM3 Model of Assessment.

the offending and less reflective of progress made through intervention. In respect of that domain I note as follows:

(a) [BT] has gained a strong understanding of external and internal factors which affect his behaviour, thoughts and feelings.

(b) He has demonstrated awareness into why the behaviour was harmful and successfully demonstrated appropriate and safe ways to engage in healthy relationships in the future.

(c) He showed a genuine desire to gain understanding into his harmful sexual behaviour, and the effects on other young people and children.

(d) He demonstrated appropriate sexual knowledge, attitudes and interests.

[20] Finally, for completeness I record that [BT] has been described as a role model resident to other young people in the Barnados home. The staff observations of his personal and social development resonate with Ms Clegg's conclusions. Furthermore, [BT] has, notwithstanding the fundamental reorganisation of his life, maintained his school attendance and developed the skills to now manage an independent life.

Positions taken

[21] The police submit that notation is the proper outcome because discharge would be an insufficient recognition of the seriousness of the offending and of [the victim]'s interests.

[22] [BT]'s [social worker], recommends in a report dated 16 February 2021 that the charges be discharged. Though [BT] is no longer in the Chief Executive's custody, mentoring support remains in place and other post-care support to which young people are entitled to the age of 25 years is available to him. I summarise the foundation for [BT's social worker] recommendation as [BT]'s age at the time of the offending, the positive response of [BT] and his family in addressing the offending and the measures in place to assure [the victim]'s Safety.

[23] Mr Earley for [BT], supports the social worker's recommendation. He submits that the statutory principles most relevant are those in enjoining responses to offending that strengthen the young person's family,[6] that will most likely maintain and promote the development of the young person within this family,[7] that address underlying causes of offending[8] with proper regard for victim interests and impact[9] and which are the least restrictive appropriate.[10]

[24] Mr Earley refers also to the principle that age is to be treated as a mitigating factor.[11] He extends this submission by reference to the United Nation Convention on the Rights of the Child. The Court is guided that the upholding and respect for those rights must be a feature of decisions that affect young people.[12] Emphasis is placed on Article 40(3) of the Convention requiring state parties to establish minimum ages for criminal responsibility, though not specifying the age and general comment of the United Nations Committee,[13] in light of neuroscientific evidence, commending an age of 15 or 16 years but not less than 14 years. Mr Earley refers also to comment that in responding to serious offending, weight should be given to the child's best interests as a primary consideration and to the need to promote reintegration.[14] My observation at this point is that the Act is not expressed in those terms, though evaluation of the principles of the Act in some circumstances may weigh those matters more heavily than others.

[25] Finally, there have been three family group conferences without agreement as to how the charges should be disposed of.

The legal framework

[26] The decision making exercise on imposition of a response requires the following:

---

[6] Section 208(2)(c)(i).
[7] Section 208(2)(f)(i).
[8] Section 208(2)(fa).
[9] Section 208(2)(g).
[10] Section 208(2)(f)(ii).
[11] Section 208(2)(e).
[12] Section 5(1)(b)(i).
[13] United Nations Committee on the Rights of the Child, General comment No. 24 (2019) or children's rights in the child justice system, at [21] and [22].
[14] At [76].

(a) Assessment of the restrictiveness of the outcome and imposing it only if satisfied that any lesser outcome would be "clearly inadequate." [15]

(b) In determining the adequacy of the outcome, account must be taken of the Youth Justice principles in s 208 and the nine factors in s 284.

(c) The youth justice principles in s 208 require four primary considerations to be weighed, guided by the factors specified in that provision and the general principles in s 5. Those primary considerations are the wellbeing and best interests of the young person, the public interest, which includes public safety, the interest of victims and accountability of the young person.

[27] More particularly with regard to sexual offending, the prosecution has referred me to a number of decisions where the binary of discharge as against notation or other order was squarely before this court and in one instance before the High Court. I refer most particularly to the decision of Downs J in *MW v Police*, an unsuccessful appeal of the imposition of an order that a young person who admitted a charge of sexual violation by rape, come before the Court if called upon within 12 months.[16] The nature of the offending in that case is not on all fours with what occurred here but I take more broadly from Downs J judgment the following:

(a) First, the legislation makes a discharge an available response to such offending but His Honour's comment that the offence at hand was a band instance of its kind indicates that the seriousness of offending is a most pertinent consideration in evaluating the appropriateness of that response.

(b) Extending the reasoning of the Court of Appeal in *Powhare v R* that some offences may be too serious to be catered for in the youth justice system, so too some offences may be too serious to have a discharge

[15] Section 289(1)(a) and (b).
[16] *MW v Police* [2017] NZHC 3084.

applied.[17] With respect to His Honour, that seems to be a variation on the theme of his first point.

(c) Assessments of risk of re-offending have a short lifespan in part due to rapid developmental changes during adolescence. Related to that a discharge would preclude reference to the offending if future offending occurred however unlikely future offending may be. I perceive this factor as engaging the public interest and safety considerations because if offending does recur responses at that time to it, and to risk mitigation decisions, bail for instance, are best informed if the nature of past offending is known. That a court can access information about past offending does not provide any particular benefit in that regard before the recurrence of offending.

(d) The stain of a notification may affect future opportunities, but care must be taken not to assume employers and officials with an interest in a young person's past will be unreasonable or unfair in their treatment of the notation, particularly if considered in the context of rehabilitative progress and a young person's age at the time of the offending.

Mandatory considerations

[28] I have addressed the mandatory factors I am required by s 284 to consider, save to add that there is no previous offending. But in summary:

(a) First, the offending is most serious for its repetition, for [the victim]'s vulnerability by age, and it occurring within what should have been protective refuge, that being the refuge of home and the refuge of family and hence the breach of trust that occurred.

(b) The detriment to [the victim] has been immense, is ongoing and may not be fully known for years, if ever. I am careful however, not to

[17] *Powhare v R* [2010] BCL 515; (2010) 24 CRNZ 868; [2010] NZCA 268; BC201063012.

unduly attribute to [BT] the distress to [the victim] that arose from the initial reactions of her parents, as distinct from [BT]'s behaviour.

(c) [BT]'s acceptance of responsibility for the offending when it was revealed, and through the course of this proceeding, and through the course of the Safe programme has been entirely as it should be and is commendable.

(d) The initial response of [BT]'s parents was not sufficiently protective of [the victim], with result that the trauma of having been offended against was compounded by their initial reactions and her removal from home. That said, the steps they have taken since to examine the way in which their family functions so as to provide some repair for [the victim] and to diminish the risk of this occurring again, have been appropriate and commendable.

Primary considerations

[29] [BT]'s wellbeing, appreciated in the holistic way as guided by s 5, is now in much better balance than when he committed the offences. His thoughts and beliefs and those of his family are now very different to their earlier sensibilities. So too, there has been a change to the way in which [BT]'s parents structure their family life as to be more physically and emotionally available for their children. These changed beliefs and family function have contributed to reduction of [BT]'s risk of offending and hence to his wellbeing.

[30] An outcome that carries the mark of very serious offending does not enhance [BT]'s wellbeing. I am mindful of Downs J point that the worst case scenario should not constitute the operative frame of reference for assessment of the likely future impact of a notation. But a notation in the first instance stands alone, and the mark is potent for the criminality it conveys. It does not communicate the context of the offending, the rehabilitation effort and the risk reduction that has followed.

[31] [The victim]'s interest in respect of her immediate safety and potential vulnerability to further such offending are well guarded. Her family who most needed to acknowledge the offending, have done so, though I accept she has reservation yet about the degree of [BT]'s remorse. There is ongoing therapeutic assistance available to her as she may require. She is subject to the custodial obligations of the Chief Executive of Oranga Tamariki and the mandatory supervision of the Family Court. I do not understand that [the victim] is seeking or needs now to have a punitive result imposed on [BT] as to assist repair of her injury.

[32] [BT] has been held accountable for his offending in several and far-reaching ways. First, by removal from his home and school. The more typical experience of a young person receiving the care and support of his family within their home until a natural transition to independence, ended for him prematurely as a consequence of his actions. Secondly, he has been made accountable and to take responsibility for this behaviour by the intense and deeply personal challenge to which he has been put therapeutically.

[33] Given my assessment that [BT]'s accountability and [the victim]'s interests have been attended to, the decision fulcrum is the public interest and safety and the wellbeing considerations.

[34] There are two public interest and safety aspects. First as I take Downs J to have identified, the public interest in having full information to inform responses to offending if it recurs. Secondly, the public interest in knowing that [BT] has offended in this way, as to be able to put measures in place to protect against this type of offending if engaging with him.

[35] Against these observations I hold the following further matters material to my decision:

(a) The mark by a notation of what [BT] did as a 12 or 13 year old will attach to him for life, even if that life is conducted impeccably.

(b) Whilst it should be optimistically contemplated that those with interest in [BT]'s character will step past the notation to apprise themselves of context and perhaps consider less prejudicially the youthful as opposed to adult commission of these offences, it is a significant step to take in the face of a mark of such serious offending. It requires a willingness and wherewithal to enquire further.

(c) [BT]'s risk of engaging in harmful sexual behaviour and hence risk to the public has significantly reduced. Whilst a risk assessment is time limited, the nature of the intervention bespoke to the dynamic risk factors identified on assessment by Ms Ali in June 2019, and the nature of [BT]'s willing and open participation entitles the public to some confidence that the reduction in risk has reasonable prospect of sustaining.

(d) I return also to the circumstance underlying the offending, namely [BT]'s normalisation of harmful sexual behaviour by exposure to it in his pre and early adolescence without the education and guidance necessary to counter that perception. That education and guidance has been delivered so that [BT] does now understand the behaviour to be harmful, and so that he has developed capacity to self-regulate his behaviour. This is a critical underlying cause of the offending internal to [BT] that has been addressed. I observe also that it is five years since the most serious offending without suggestion that such behaviour has recurred.

[36] I am satisfied that the public interest in a notation has diminished as the risk of future offending has reduced, to a point where it sits in approximate balance with [BT]'s wellbeing interest in discharge of the charges.

[37] As to how that balance should fall, the police submit that as a matter of principle, an absolute discharge should not be available in cases of sexual violence. I treat that submission cautiously. It is not an express principle in the legislation. I acknowledge again that Downs J in *MQ v Police*, reasoned that some offending is too

serious for the application of a discharge, but I do not read that as to establish a principle to be objectively applied to a species of offending. I think a permissible reading is that some offending, and this will very often be in the case of sexual offending, is so serious that in the particular circumstances of the case the victim or public interest, accountability and perhaps wellbeing if that is enhanced by a more restrictive measure, cannot be met by discharge.

[38] I turn to consider the cases provided for my assistance by the police. All cases involved sexual offending in which discharges were declined. In many the judges considered the decisions finely balanced. They might be distinguished from each other and from this matter on the varied circumstances but that is not particularly helpful. All the offending was serious, and all harm was immense for reasons unique to each case. Rather, I look to these cases to identify, to the extent possible, the way in which judges may have treated the seriousness of the offending within the framework of the primary considerations.

[39] It is apparent in Judge Davis' first instance comments in *Police v JT*, which was the matter dealt with by Downs J on appeal in *MQ v R*, that weight was placed on the pronounced effect on the victim and the need to mark the offending.[18] Judge Davis' decision read as a whole, suggests that he was concerned that there be a mark for accountability reasons rather than safety. In *R v ND*, Judge Walsh determined the balance against a discharge by weight of the victim's interest linking that to the seriousness of the offending.[19] In *Police v OV,* Judge Fitzgerald, in undertaking the ultimate balancing exercise, referred to the seriousness of the offending in declining the discharge.[20] It is not immediately apparent which of the primary considerations that engaged but his decision again read as a whole, and in particular his acceptance of the young person's remorse and successful rehabilitative efforts, suggested accountability and public interest was of lesser concern. His comments about the effect on two victims suggest their interests were to the fore. In *R v SQ*, Judge Matheson considered that a discharge would be an insult to "frail victim" and that she should not be left with a lifetime scar, and that the young person should not walk away

[18] *Police v JT* [2017] NZYC 462.
[19] *R v ND* [2018] NZYC 602.
[20] *Police v OV* [2018] NZYC 490.

free as though the offending never happened.[21] It seems to me those views tend towards victim interests and accountability considerations. In a very brief decision, Judge Raumati in *R v NB* observed that the offending on the victim could not be overstated.[22] Finally in *Police v [SA]*, Judge Patel applied the public interest consideration, in light of the time limited nature of risk assessments.[23]

[40] What I take from this analysis is the predominant care afforded to victim interests in these finely balanced decisions. That is understandable. Immediate and ongoing harm of offending is to the victim, and the more serious the offending the greater the harm is. It is not entirely clear why the mark of the offending is considered important in some of these cases, but the tenor upon my reading is for reasons of accountability rather than public interest. Against that analysis, I do not consider that a discharge would be an unprincipled or arbitrary departure from the cases to which I have referred in circumstances where victim interests and accountability have been met, or at least are no further advanced by a more restrictive response.

[41] I remain then at the point of [BT]'s wellbeing and the public interest in approximate balance. I therefore look to the purposes of the Act specific to offending they being, to respond in a manner that promotes a young person's rights and best interests and acknowledge their needs, that prevents offending, present and future, that recognises victim interests and that holds the young person accountable and encourages their acceptance of responsibility.[24] What has already occurred has achieved the latter three purposes. A discharge with a notation that marks [BT] for life with serious criminality committed at a very young age, is in all the circumstances an unreasonable potential impediment to his participation in society and not in his best interest.

[42] I determine therefore, that the least restrictive outcome is to discharge the charges.

Result

---

[21] *R v SQ* [2019] NZYC 627.
[22] *R v NB* [2019] NZYC 225.
[23] *Police v [SA]* [2020] NZYC 675.
[24] Section 4(1)(i).

[43] All five charges are therefore discharged pursuant to s 282.

_____
Judge SD Otene
Youth Court Judge

Date of authentication: 09/03/2021
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.