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IN THE YOUTH COURT
AT MANUKAU

I TE KŌTI TAIOHI
KI MANUKAU

CRI-2020-292-000150
[2021] NZYC 72

NEW ZEALAND POLICE
Prosecutor

v

[KW]
Young Person

Hearing:	19 February 2021
Appearances:	S Norrie and M Djurich for the Prosecutor G Earley for the Young Person T Weeks as Lawyer for the Child
Judgment:	19 February 2021

ORAL JUDGMENT OF JUDGE S D OTENE

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[1] [KW] is aged 16 years and one month. The crucial decision for today has been whether [KW] should be convicted of offences currently before the Youth Court and then sentenced in the District Court. My decision is that the transfer should be declined and that [KW] be sentenced here in the Youth Court. I now give my reasons for that decision.

[2] In detailing the material events and the reasons for this decision, the distinction that Ms Norrie and Mr Djurich for the police have made between what they describe as the redisposition and the disposition charges is helpful.

Redisposition charges

[3] On 31 January 2020 a six month supervision order was made on 28 charges for offending between [mid 2018] and [late 2019]. The order was imposed for driving and vehicle offences, theft, escaping custody, burglary and, most seriously, three aggravated robberies. I will come back to those robberies in more detail.

[4] [KW] was, through the period of the order, to live with his [maternal uncle], and his [uncle's partner], and was subject to a 24 hour curfew. Four months into the supervision period, that is [in May], [KW] offended, this time by committing a burglary and getting into a vehicle unlawfully. He was returned to his aunty and uncle but the next day left, was found by police, and appeared in court. At that point bail was opposed and, in any case, [KW]'s aunt and uncle were not prepared to have him return to their home so [KW] was remanded to the Chief Executive's custody and placed at a community remand home. He left two days later and [in May] committed five more offences involving driving and unlawfully taking a vehicle. He was also charged with escaping custody for leaving the remand home.

[5] The supervision order was cancelled. On 22 July 2020 a six month supervision with activity order was made for the 28 charges that were encompassed in the supervision order and the eight charges for the subsequent offending. The order was to be completed with [KW] residing at [a youth programme facility] in [location deleted]. [KW] left [the facility] without permission after two days and committed

further offences that comprise the disposition charges. The supervision with activity order has been cancelled.

Disposition charges

[6] The disposition charges are for 25 offences between [dates deleted – a two-week period] 2020. They encompass taking, using and getting into vehicles unlawfully, theft, burglary, and most seriously, three aggravated robberies and one assault with intent to injure. [KW] was arrested on 14 August 2020 and remanded to the Chief Executive's custody. He was placed at [a Youth Justice Residence] where, for the six months until now, he has remained.

Positions taken

[7] In terms of the positions that everyone takes, the police submit that the proper outcome is to convict [KW] and transfer the following charges to the District Court for sentencing:

(a) All 25 disposition charges.

(b) The three aggravated robberies that were first disposed of under the supervision and then again under the supervision with activities order. The police do not seek to transfer the balance of the charges dealt with by the first supervision order because of [KW]'s compliance for four months with that order.

(c) The eight charges for offences that occurred while [KW] was subject to the supervision order.

[8] The essence of the police submission is that this offending by nature, by volume and by frequency is so serious and the response available in the Youth Court is so inadequate that the only proper outcome is to transfer the charges.

[9] If these charges are transferred to the District Court, the police accept that by operation of s 15B and 18 of the Sentencing Act 2002, a conviction and discharge is

the appropriate outcome for all charges other than aggravated robberies and the assault with intent to injure. That is because by those provisions, a person under the age of 18 years at the time of offending can only be sentenced to home detention or imprisonment on a category 3 or 4 offence if the maximum penalty is three years or more. Only the aggravated robberies and the assault with intent to rob, which each carry a maximum penalty of 14 years' imprisonment, fall into that category.

[10] [KW]'s social worker, Ms Shiwangi and youth justice supervisor Mr Cribb recommended in a report dated 23 December 2020 that [KW] be made subject to a three month supervision with residence order. They amended that recommendation in a report dated 10 February 2020 inviting now the imposition of a six month supervision with residence order to be followed by a six month supervision order. Aside from the extended length of the proposed residence, the substantial variation from the first recommendation is that a structured and managed course from residence to the community and then to whānau or independent living is now identified. That is to be by the engagement of [a Charitable Trust] and the delivery of the trust's Kaitiaki programme.

[11] By that programme two tāne Māori mentors will attend upon [KW] for two to three days a week through the course of the order. That engagement will commence within four weeks of the order being made with the intent that upon completion of the residence period, [KW] will move to the Trust's community home for the period of the supervision order.

[12] During that period there will be a supported pathway for [KW] to either independent living or returning to live with whānau at the conclusion of supervision. The proposed plan carries with it educational and therapeutic components. They build on the work and continue the therapeutic relationships already established during [KW]'s period in residence and they are youth specific services.

[13] It has become apparent today that [KW] now admits that much, if not all, of the recent offending occurred while he was under the influence of methamphetamine. [KW]'s social worker, by way of oral update to her written report, explains that throughout [KW]'s current period in residence, he has engaged in a drug programme

delivered by Odyssey House (subject to interruption during the school holidays and COVID-19 lockdown). That engagement consists of a one-on-one weekly session with a therapist, directed to matters such as triggers, cravings and safety plans and it also includes a weekly programme delivered as part of the residence school curriculum.

[14] Mr Earley, for [KW], submits that the Court should adopt the social worker's recommendation as the least restrictive outcome for its compliance with the purposes of principles of the Act and its accord with the United Nation Convention on the Rights of the Child. Mr Weeks, [KW]'s lawyer in Family Court proceedings endorses Mr Earley's position.

[15] Obviously, given these varying positions, no agreement was reached at the family group conference held on 12 January 2021 to consider disposition. The conference record notes the police position as I have outlined that [KW]'s mother, [RW], is not ready for him to be returned to her home and she favoured a supervision with residence plan. [KW] told the conference he wanted to gain employment.

The legal framework

[16] Conviction and transfer of a young person to the District Court for sentence is the highest response available to the Youth Court.[1] The decision making exercise on the imposition of a response requires the following:

(a) Assessment of the restrictiveness of the outcome and imposing it only if satisfied than any lesser outcome would be "clearly inadequate.[2]

(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

[1] Section 283(o).
[2] Section 289(1)(a) and (b).

provision and the general principles in s 5. Those primary considerations are the well-being and best interests of the young person, the public interest (which includes public safety), the interests of victims and accountability of the young person.[3]

(d) That said, when considering ordering transfer to the District Court, greater weight must be given to the seriousness of the offending, the young person's criminal history, the interests of victims and the risk posed by the young person to other people.[4]

The offending and effect on victims

[17] In terms of the mandatory factors in s 284 that I must have regard to I deal first and conveniently together with the offending and the effect on victims. I take the circumstances of the offending as set out in the summary and the social worker's report. I do not reproduce the detail of all of that, but it does not diminish the significance of [KW]'s actions nor the effect of his actions upon the victims. However, I do detail some of the serious offending because, as the police submit, they would likely have been the lead charges attracting a starting point of imprisonment if [KW] were to be sentenced in the District Court. I adopt in large part the police's summary in their submissions for its helpful narrative style.

Aggravated robbery – [date 1] 2019

[18] At around 1 pm on [date 1] 2019, [KW] and three associates arrived at a [service station] on [road and suburb deleted] in a stolen vehicle. [KW] who was armed with a hammer, kicked, punched and hit the glass doors of the service station with the hammer, causing the doors to smash. The store attendant locked himself in the rear office out of fear for his safety. [KW] and two associates then jumped over the counter, removed two cash drawers and unsuccessfully attempted to pen the cigarette cabinets before fleeing from the service station.

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[3] Section 4A(2).
[4] Section 284(1)(a).

Aggravated robbery – [date 2] 2019

[19] At around 7:40pm on [date 2] 2019, [KW] and his associate, [name deleted – the first associate] (a young person), arrived at [a Liquor Centre] on [road and suburb deleted] in a stolen vehicle. [KW] was armed with a kitchen knife while both he and [the first associate] had their faces concealed. [KW] entered the store and confronted the store attendance with the knife, thrusting it at him and demanding cigarettes. While [KW] did this, [the first associate] ripped the cash register out from underneath the counter and fled from the store. [KW] then took three trays of cigarettes from underneath the counter before also fleeing from the store. The total value of property taken was estimated be in the thousands of dollars.

Aggravated robbery – [date 3] 2019

[20] On [date 3] 2019, [KW] and [name deleted – the second associate] (a young person) were driving from [a suburb] in a stolen vehicle, having earlier in the day filled up the car with petrol at a service station in [that suburb] and fled without paying. During this drive, [KW] and [the second associate] made a plan to rob a store in order to obtain cigarettes. At around 1pm that day, [KW] and [the second associate] identified a [liquor store] in [another location] as a suitable target. After undertaking limited investigation for security measure as the rear of the store, [KW] and [the second associate] entered the store. [The second associate] was armed with a screwdriver.

[21] [KW] entered the store first, ran up to the sole store attendance and pushed past her. He was followed by [the second associate] who confronted the store attendant with the screwdriver and demanded case and cigarettes from her. The store attendance managed to grab [the second associate]'s arm, preventing him from stabbing her with the screwdriver. During this time, [KW] removed a substantial amount of cigarettes from the cigarette casing, as well as one of the two case registers.

[22] [KW] then left the store via the rear, taking further packets of cigarettes as he left. [KW] and [the second associate] then fled from [that location], emptying the case register and the cigarette trays of their contents. Overall, it was estimated that [KW]

and [the second associate] took over $5,000 worth of cigarettes, and approximately $600 in cash.

[23] While the store attendant was physically unharmed, she was emotionally traumatised.

Aggravated robbery – [date 4] 2020

[24] At around 7:10pm on [date 4] 2020, [KW] and three associates arrived at [a liquor store] in a stolen vehicle. All four offenders were heavily disguised and one of [KW]'s associates was armed with a metal rod.

[25] All four offenders rushed into the store. [KW]'s associate who was armed with the metal rod swung it aggressively at the store attendant, who consequently ran to the rear of the store to get away before activating security fog cannons. During this time, [KW] pulled out three drawers full of cigarettes from under the counter while his associates took various bottled of alcohol from the shelves. The four offenders then fled from the store.

Aggravated robbery – [date 5] 2020

[26] At around 8 pm on [date 5] 2020, [KW] and three associates arrived at [another Liquor Store] on [road and suburb deleted], in a stolen vehicle. All four offenders had their faces concealed and [KW] was armed with a builder's hammer. [KW] ran into the store swinging the hammer, hitting a number of glass bottles and causing them to smash. He was followed by his three associates. [KW] advanced towards one of the store attendants, holding the hammer above his head in a threatening manner. [KW] chased the store attendant out the front door.

[27] As this occurred, one of [KW]'s associates jumped over the counter and grabbed the cash register. She successfully managed to pull the cash register from its binding. [KW] then ran behind the counter and grabbed several bottles of alcohol from the shelf. The four offenders then fled from the store.

Assault with intent to rob – [date 6] 2020

[28] At around 7 pm on [date 6] 2020, [KW] and two associates arrived at [a store] on [road and suburb deleted] in a stolen vehicle. [KW] was armed with a tyre iron.

[29] [KW] entered the store and ran towards one of two store attendants, yelling: "get out of the fucking way" while wielding a tyre iron. [KW] then lunged at the store attendant and swung the tyre iron at him but missed. While this occurred, [KW]'s associates threw items from the counter top at the other store attendant who was standing behind the counter. That store attendant removed a hammer from beneath the counter and held it up, prompting [KW] and his associates to flee from the store.

[30] One of those victims was physically injured, suffering a cut near the eye and on his head.

Aggravated robbery – [date 6] 2020

[31] At around 7:20pm on [date 6] 2020,[KW] and the same two associates from the assault with intent to rob offending above arrived at [a store] on [road and suburb deleted] in the same stolen vehicle. [KW] entered the store and ran towards the store attendant waving a tyre iron around in a threatening manner. The store attendant pleaded with [KW] not to hit her and to leave her alone.

[32] [KW]'s associates then ran in and jumped over the counter and started to load a black coloured bag with cigarettes from behind the counter. As they did this, [KW] moved to behind the counter and took cash from the cash register. [KW] and his associates took a significant amount of cigarettes and an unconfirmed amount of cash before fleeing from the store.

Victims

[33] I have read the available victim impact statements and those victims' views that have been conveyed to me by the social worker. Some themes emerge.

(a) For those victims of the robberies and the assault, not only did you make them deeply scared for their safety in those moments when you confronted them, but they keep the thoughts of what you did, and they

still experience those feelings as they go about their lives and their work. That has rippled through to some of their family members, who now live with fear for what might happen when the person they care about goes off to work.

(b) Even for those offences that did not involve the aspect of violence or intimidation, you have caused victims not just inconvenience and financial loss, but a feeling of violation, a feeling like they have been abused, because you interfered with their property, so you have disrupted their lives. They did you no harm and they did not have any bad feeling towards you, but you treated them shamefully.

(c) Some victims want you punished, and harshly. All of them want you to know what you have made them feel by the unwanted and the uncontrolled way you have entered into their lives.

(d) But this is something very special too, and it often happens. Some of the victims have a generous heart for you. They wish you well and they want you to lead a good life, so you have a responsibility to them to do that.

[34] In addition to all of this there has been a financial loss. The estimate for the most recent offending alone is around $115,000. The financial interests of these victims cannot be met because, as the police accept, neither you nor your whānau are in a position to make reparation.

[35] I assess the seriousness of the aggravated robberies and assault with intent to rob by reference to the factors identified in *R v Mako*.[5] I acknowledge that if [KW] is sentenced in this Court, the guidance of that case may be less relevant, but it gives an objective measure of seriousness. I agree with the police submission that the aggravating features of the offending are premeditation (planning), multiple participants, weapons (being variously a hammer, knife, tyre iron and metal rod) which were presented to victims in a threatening and intimidating way, compounded by using

[5] *R v Mako* [2000] 2 NZLR 170 (CA).

them on occasion to damage property. Also aggravating is the use of disguises on occasions, which increases intimidation, the use of actual violence on one occasion, and the high value of the property taken. All that said, it is very fortunate that serious injury did not result to any of the victims, and I take that into account also.

[36] If the offences were taken individually, I assess a starting point in the region of five years' imprisonment might be applied. When taking all the offences together, there is a divergence between the police and Mr Earley about what the starting point might be. I think, however, it is common ground, and I accept that it is right, that even with significant discounts and mitigation, if these matters were dealt with in the District Court, it is likely that a term of imprisonment would be imposed and that in itself illustrates that this offending is serious.

[KW]

[37] The next matters, grouped together logically, are related to [KW] and his whānau, that is: the causes underlying the offending and measures available to address those causes, [KW]'s attitude to the offending and the whānau response.

[38] There is much information about [KW] and his whānau in the number of reports provided to the Court. They include reports of social workers, a psychologist, a cultural advisor and education officers. Most recent is a psychiatric report provided by Dr Immelman and Dr Restivo. Amongst other things, that report confirms an earlier diagnosis of attention deficit hyperactivity disorder.

[39] [KW] is uri of [iwi and other ethnicity deleted] whānau, the son of [RW] and [AT]. He is the oldest of [RW]'s five children. [LA] is the father of the four younger children and for much of [KW]'s life he, rather than [AT], has been the predominant father figure to [KW].

[40] On 13 September 2017, when aged 12, the Family Court placed [KW] in the interim custody of the Chief Executive. Shortly after, the Family Court declared that [KW] was in need of care and protection and he was placed in the, for want of a better term, the "permanent" custody of the Chief Executive and that status remains.

[41] As for almost all children for whom the state intervenes in their care and protection, their lives and their vulnerabilities are complex and so too what is needed to assist and protect them. The complexity is often true for their whānau also.

[42] For [KW] and his whānau, those complexities have been well-described by psychologist Dr Kevin Austin who prepared a report for the Court in 2018. I refer to the following from Dr Austin's report:

> [KW] has a long care and protection history that centres on exposure to family violence, parental substance abuse, supervisory neglect, neglect of basic needs and inability to manage the children's behavioural difficulties. There appears also to be a paternal family history of possible ADHD and criminal behaviour including violence but little more is known about his paternal family. [KW] displayed challenging behaviours from an early age and it would appear that [RW] struggled to maintain rules. Further, it was likely that [KW] was exposed to a chaotic somewhat party-driven lifestyle during his first three years of life. His subsequent three years in the care of his maternal uncle was likely somewhat more settled but he returned to the care of his mother and stepfather from six years of age. Again, he was exposed to family violence and his own emotional needs were left neglected. This would have inhibited [KW]'s ability to develop the neuropsychological basis for adaptive emotional regulation skills. A lack of warm and responsive parenting would have exacerbated his early difficulties with managing emotions.
>
> The use of aggressive behaviour to solve interpersonal problems was also modelled for [KW]. Further, due to lack of enforced rules, [KW] was largely able to act without consistent consequences. When attempts were made to enforce rules, he acted with impudence and the expectations of him were withdrawn. This reinforced the notion that he could successfully evade the rules with sufficiently defiant and oppositional behaviour.
>
> [KW] has demonstrated difficulties interacting with others and coping with change from a young age. He also evidenced a developing antisocial attitude towards peers and authority figures during primary and intermediate school. These negative experiences of school likely left him feeling inadequate and incompetent. He was unfortunately excluded from school in 2016 and before too long, he was roaming the streets and interacting more frequently with delinquent peers. I suspect that prosocial peers found [KW] difficult to tolerate and therefore, subtly rejected him, where he was likely accepted by delinquent peers.
>
> He quickly learnt by associating with antisocial peers how to proficiently break into cars. He achieved notoriety among his peers and a sense of being appreciated and competent at something, which he had not experienced at school. This positively reinforced his offending behaviour and this was also spurred on by competition between [KW] and other youth offenders. [KW]'s skills in stealing cars and the adulation he received from his peers likely left him feeling valued. I understand that his skills in stealing cars has provided him with further social reinforcement as he graduates to the one teaching others.

> In contrast, he was being left unattended with adult responsibilities in the home which only added to the attractiveness of absconding to associate with his friends. [KW] now reports that he does not wish to continue to offend but the excitement he experiences and the social reinforcement from his peers make offending very attractive.
>
> Further, his difficulties adhering to a structured routine make it difficult for him to achieve a sense of accomplishment from other prosocial activities. However, I suspect that his ability to remain engaged in a structured activity might be significantly improved with the provision of stimulant medication.
>
> He has also shown reasonable cognitive abilities, a talent for mathematics and an interest in being a mechanic. He has unfortunately stated that he does not want to return to school or engage in vocational training. Instead, [KW] has become accustomed to his lack of engagement and structured activities and looks to antisocial peers and offending for stimulation.

[43] Dr Austin's assessment in 2018 was that living in the community, [KW] was at very high risk of re-offending by way of theft and burglary, that in the absence of focused rehabilitation, he could be expected to offend violently in the future and that he was most likely to offend in the company of same-age peers. That assessment has clearly been borne out.

[44] Dr Austin made a number of recommendations which I summarise broadly as placement in an environment with caregivers skilled in enforcing behavioural boundaries, delivery of therapy that addressed the way in which [KW] and his whānau, if he was with them, or if his caregivers if he was with caregivers, functioned. He recommended establishment of a relationship with a mentor to assist [KW] to build positive values and skills and to help him regulate his emotions. Psychological assistance was also recommended in light of [KW]'s difficult experience over many years. Those recommendations are largely repeated by Dr Immelman and Dr Restivo now.

[45] [KW]'s circumstances also engage positive factors. As noted, he was for four months last year compliant with his supervision order. I do not draw the inference suggested by the police that, because [KW] offended [less than two weeks] after the region moved from level 3 COVID-19 restrictions, that compliance was likely due to the higher level of restriction that applied for two months. It might equally be speculated that the higher level restriction with the pressures it can place on households and their dynamics make compliance more commendable.

[46] [KW] has a demonstrated intellectual capacity, particularly in the domains of literacy and mathematics, and he has leadership capacity. His leadership is shown negatively in his offending, but it is shown positively in his participation in events at residence and also as tuakuna to his siblings, taking on responsibilities sometimes for their care. [KW] has shown a commitment to engage in the therapeutic programme during his current period in residence.

[47] Though I have traversed vulnerabilities within [KW]'s whānau, they have also provided him with meaningful practical, and emotional support. I have already noted the home provided to him by [two relatives] last year. For several years when [KW] was younger he lived with his [uncle] in [location deleted] and it seems that was the most stable period for [KW]. And I do not ignore that there are other whānau (here today included) who have been and remain supportive of [KW].

[48] [KW]'s discussions with his social worker indicate a developing degree of insight into his impulsive decision-making that results in his offending, that he needs to take responsibility for those decisions, and that his path is to imprisonment if he does not. He acknowledges the damage his offending causes his whānau and there is some developing expression of his remorse towards his victims.

[49] Before I move on from factors specific to [KW], I record that whilst in residence he has been the subject of five incident reports and had four secure care admissions. He has been verbally abusive and physically aggressive in ways that demonstrate his reduced ability sometimes to regulate emotions and so the risks that he does pose. That said, in the two most recent incidents, reflection was apparent and on the last occasion [KW] exercised significant self-control in not responding when assaulted by another resident. Those reports serve to emphasise [KW]'s rehabilitative needs but also that he has capacity for rehabilitation.

[50] I have earlier addressed the remaining mandatory factors in s 284 being [KW]'s high prior offending and the non-agreement at the family group conference.

Analysis

[51] I have assessed that the outcome of ordering [KW] to be sentenced before the District Court will likely be a period of imprisonment. To make that order I must be satisfied that any lesser outcome is clearly inadequate.

[52] I have observed before that well-being requires a multifaceted evaluation, particularly in light of amendments to the Act that took effect on 1 July 2019. Notably, a young person's rights under the United Nations Convention on the Rights of the Child and the Convention on Rights of Persons with Disabilities are matters by which the Court must now be expressly guided, not impliedly guided. So, too, notions of mana and the holistic needs of a young person are to inform well-being.

[53] Ms Norrie points out that at the same time those amendments were made, Parliament also made matters of accountability, public interest and safety and victim interests equally important, and told this Court when considering transfer that it must give greater weight to the seriousness of offending, offending history, victims and risk.

[54] That is indeed so, but when I turn to the primary considerations, although four discrete factors are identified, they do not necessarily stand in tension with each other.

[55] There has in this Court been a developing body of jurisprudence in decisions such as that of Judge Fitzgerald in *Police v MQ*[6] and subsequently from his Honour and other judges articulating the effects of [the 2019] amendments. I do a disservice to those judgments by my brevity but what I draw from them and what I take from the statutory guidance is that well-being demands the exercise of powers with a strong emphasis on repair and rehabilitation for young people who offend.

[56] If careful attention is paid to the constituent elements of well-being, as identified particularly in s 5, it is easily appreciated that a young person who enjoys those elements, a young person who is well, is unlikely to be offending. That brings into play the public interest.

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[6] *Police v MQ* [2019] NZYC 456.

[57] If a young person receives his rights as set out in the United Nations Conventions, is treated with dignity, is protected from harm, and has his mana enhanced so as to live well and productively, then public interest is enhanced. Where that young person has not enjoyed those advantages, and so has offended violently, public safety is enhanced if well-being is tended to.

[58] That is not to say that the public interest and public safety will not require a response that does take away a young person's liberty and removes him from the community, and at times to the restrictions of an adult jail, but that is by and large an immediate assurance of safety. If it is not delivered alongside robust and effective rehabilitative intervention, the public interest and safety is unlikely to be any better advanced when the young person re-enters the community.

[59] At worst, it is diminished if the young person re-enters the community if he is further damaged by his experience in custody. Courts have recognised the risk that young persons, who are inherently vulnerable by their age but increasingly vulnerable if they have suffered trauma and harm, may well and sometimes do emerge from adult prisons more criminalised and a greater danger to the public.

[60] The interests of victims are in part the same as those of the public, but they are also specific to the crime committed against them. Financial interests are compromised when property is destroyed. Often, particularly when offenders are young persons with no means, those interests cannot be satisfied. But what often emerges, listening to victims, is that they have a real interest in knowing that the person who has harmed them, whether physically, psychologically or financially, understands what that has meant for them and changes their life for the better so that they do not do that to anyone else.

[61] In terms of accountability, there must be a consequence for offending, but it must be proportional. Nor does accountability happen only by punishment. Accountability is also acceptance that you have caused harm. It is behaving with a purpose not to cause more harm. Assistance, guidance and support that promotes that understanding and attitude, and that promotes that behaviour, goes to accountability.

[62] Finally, I remind myself that I have to give the most weight to the seriousness of the offending, criminal history, victim interests and risks posed to others. They in many respects are also advanced by rehabilitation. Whilst seriousness of offending, with the inevitability of imprisonment, has been taken to tip the balance towards transfer, I consider that it could equally and logically be said that the more serious the offending and the risk, the more entrenched the criminal behaviour, the more necessary and the more protective it is of the community to respond in a way that changes that behaviour.

[63] Against those broad observations, I hold the following matters material to my decision:

(a) Having not long turned 16, there remains almost two years during which rehabilitation measures can be applied in the youth justice jurisdiction. A plan is available for adoption that encompasses those rehabilitation measures. They appear to me to be the very type of measures that Dr Austin recommended in 2018 to reduce the risk of [KW]'s offending. They are specific to [KW] and his needs.

(b) Whilst if [KW] was sentenced to prison, he might, as has happened with other [young] people, be sent to reside in a youth justice facility perhaps up until the age of 18, the police responsibly accept that is an unknown.

(c) If [KW] was sentenced to prison, he might receive rehabilitative intervention, but I have nothing to indicate what that intervention might be nor when or how it might be delivered. I think it reasonable to infer that the Department of Corrections are less equipped to offer the type of youth-focused intervention that can be delivered through the youth justice system. Perhaps they would make some arrangement for that to be delivered by Oranga Tamariki but again, that is an unknown before me today.

(d) Against those last two factors I mentioned, there is the certainty that if [KW] is dealt with in the Youth Court, he will return to a youth justice

facility where he has established relationships and there is certainly that those relationships can continue.

(e) There has been a punitive consequence for [KW]'s offending by the periods he has spend in custody. He has spent, as I said, the last six months in residence. Before that, he has spent, on my calculation, just a few days under a year in residence and that does not include other periods of time in custody short of a youth justice residence.

(f) [KW] has never before been the subject of the highest order that the Youth Court can impose.

[64] When I weigh all these matters, I determine that imposing an order in the Youth Court for [KW] to serve a further 12 months in residence, subject to early release, is a proper way to make him accountable. That restriction on his freedom accompanied by the rehabilitation aspects and a managed move back to the community is an appropriate way to support [KW]'s well-being while protecting the public. It is the best that can be done for victim interests. It is not an inadequate response. I am satisfied that it is entirely adequate. To transfer the matter to the District Court for sentencing with a probable outcome of imprisonment is more restrictive than all the circumstances warrant.

[65] I should add that I also factor into that conclusion that not only will I be imposing a six month residence order. As I have discussed with all present today, I will also be imposing a 12 month supervision order to take effect at the conclusion of the residence order and a six month mentoring and a six month alcohol and drug order to take effect at the end of the supervision period. That means that [KW] will, in effect, be subject to the monitoring of the Youth Court for almost another two years.

[66] Finally, before I impose orders, I record that the prosecution has referred me to a number of cases to assist my decision. I refer in particular to the decision in *P v Police*[7] in which Downs J upheld Judge Moala's decision transferring a matter to the District Court for sentencing. The prosecution submits that the offending in this

[7] *P v Police* [2017] NZHC 2445.

case is more serious, [KW] having committed three further aggravated robberies and assault with intent to rob, [KW] being the principal offender, compared to the young person P, who played a secondary role and was not involved in any violence, and [KW] having prior Youth Court notations whilst the young person in *P v Police* had none. The prosecution says that there is no principled basis upon which that decision can be distinguished from this.

[67] Judge Moala and I each engaged in an accounting and weighting exercise of the applicable statutory principles and considerations relative to the circumstances at hand. Our respective evaluations result in different outcomes, but it does not follow that because I differ from Judge Moala, the outcome I impose is not available. That the nature of a discretion - there can be a range of outcomes. In any case, as I have referenced, since the decisions of Judge Moala and Downs J, there have been changes to some of the relevant statutory principles by which I am obliged to be guided.

Result

[68] I decline to order [KW] to be brought before the District Court for sentencing. He will remain in the Youth Court.

[69] On all charges, I make a supervision with residence order for a period of six months in accordance with the plan dated 10 February 2021, subject to the additions that I have made with respect to drug and alcohol programmes.

[70] I make also orders that [KW] attend a drug and alcohol programme and a mentoring programme, both to be provided by the Chief Executive. Both these orders are to be for a period of six months to commence at the expiry of the supervision order.

[71] I must, and I will also make an order for supervision. Given the extent of [KW]'s rehabilitative needs and the seriousness of offending, and hence the public interest in ensuring close monitoring and support, I intend to make an order for 12 months. I will not do so now but will do so when [KW] is due for release from residence so that the supervision plan can take into account any developments between now and then.

[72] [KW] will be eligible for early release on 14 June 2021. I adjourn matters to a hearing before me on that date to consider release.

[73] I direct a judicial conference before me on 4 June 2021 at 10 am to consider the plan for the supervision order to ensure that everything is in place for the early release hearing.

[74] I direct a social work plan and report for the supervision order to be provided for that conference.

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Judge SD Otene
Youth Court Judge

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