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IN THE YOUTH COURT
AT MANUKAU

I TE KŌTI TAIOHI
KI MANUKAU

CRI-2018-292-000691
[2020] NZYC 329

THE QUEEN

v

[VK]

Hearing: 25 June 2020

Appearances: S Norrie/Y Olsen for the Crown
V Letele for the Young Person
R Bava – for Chief Executive
K Leys (on instructions from S Alofivae) – Lawyer for Child

Judgment: 25 June 2020

ORAL JUDGMENT OF JUDGE I M MALOSI
[Application for transfer to District Court]

Introduction

[1] [VK] is before the Youth Court in respect of 17 charges arising out of offending committed between [date deleted – date 1] 2018 and 26 February 2020. He appears today for re-disposition on 16 of those charges, and disposition for the first time on the 17th charge which is one of common assault.

[2] On 1 October 2019, [VK] was made subject to a six month supervision with residence order on all charges except for the common assault charge which arose subsequently. He was granted early release on 29 January 2020, when the mandatory supervision order was imposed, on the basis that for the next 12 months he would undertake a residential rehabilitative programme at [a youth residence], ('[the residence]') in [location A], focusing on his harmful sexual behaviours.

[3] On 1 April 2020, [VK]'s Oranga Tamariki Social Worker, Ms Kaua filed a breach application in respect of that supervision order. Then on 15 April 2020, an order was made suspending that order. There was subsequently a family group conference which took place on 2 June 2020, which resulted in non-agreement.

Opposing views

[4] In terms of the respective positions of the parties, Ms Kaua filed a s 334 Social worker's report, along with her s 335 plan on 2 June 2020. She recommends that [VK] be made subject to another six month term of supervision with residence, followed by concurrent orders of 12 months' supervision and mentoring. If that recommendation is not adopted by the Court, Ms Kaua appears to concede that the only alternative is a conviction and transfer to the District Court for sentencing.

[5] To be fair, Ms Kaua does not shy away from what she describes as offences that are of a 'very violent and serious nature' but continues to hold out hope that [VK] will engage with [the residence] while undertaking supervision with residence and

eventually be deemed suitable to re-enter their residential programme once he commences his post supervision with residence, supervision order.

[6] [VK] is subject to a s 101 custody order in favour of the Chief Executive which is due for a review. A s 135 review of plan by the Care and Protection Social Worker, Mr Matangi is before the Court today, as well as a report from Lawyer for Child, Ms Alofivae. A continuation of that order is sought. Significantly, Mr Matangi notes the following in relation to [the residence]:

> *'On 29 April 2020, [the residence] advised that if [VK] was to remain in [a second Youth Justice Residence], they would engage with him weekly for four to six months. During this time, [VK] would be able to show true commitment, engagement and motivation to engage with the programme. If he was unable to show this motivation and engagement due to his violence, aggression and behavioural concerns, [the residence] would be unable to allow [VK] to return.*
>
> *The placement with [the residence] is currently only provisional and dependent on [VK]'s engagement with therapy whilst in residence. If [VK] is still assessed as being unsuitable and a risk to [the residence]'s staff and peers, the Ministry will be unable to provide an intervention that could keep [VK] and the community safe. [VK] is assessed as high risk and concerns are currently held if [VK] was to return to the community.*
>
> *At this stage, Oranga Tamariki have no specialist placement available within the community that have capacity to manage and cope with [VK]'s behaviour, apart from [the residence]. Oranga Tamariki will continue to liaise with [the residence] and explore placement options for [VK] if he gets released to the community.'*[1]

[7] In Ms Kaua's affidavit in support of the breach application, she summarised [VK]'s time at [the residence] in this way:

> *'Though [VK] has engaged in the initial stages of his therapy, he has 'targeted' a female teacher and continued to use derogatory and threatening language towards female staff, which resulted in an assault to a female staff member on 26 February 2020. Concerns have also been raised by [the residence] regarding [VK]'s behaviour in education and 'targeting' a female teacher.*
>
> *[VK] has also refused to return to [the residence] to continue his supervision order, resulting in him remaining on remand under s 238(1)(d) Oranga Tamariki Act 1989.'*[2]

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[1] Social Worker's report, 16 June 2020 page 5.
[2] Social Worker's affidavit, 1 April 2020 paragraphs 30-31.

[8] In a similar vein, the Police highlight in their submissions that although [VK] was initially settled at [the residence], the concerns regarding his behaviour escalated. Indeed, [the residence] reported 28 non-serious incidents involving [VK] ranging from swearing, threatening staff or other youths, generally being aggressive and not following rules. There were also at least four serious incident reports involving threats of violence, actual physical violence and verbal abuse.

[9] As the Police quite rightly point out, in the event that [the residence] are not of a mind to re-admit [VK] to their programme, there is then the possibility that the Court's response to his non-compliance with the supervision order and further offending will be less comprehensive than the original orders imposed.

[10] I am bound to observe that I am not optimistic about the prospect of [VK] being accepted back onto the [the residence] programme or if he is, his ability to be able to successfully complete it.

[11] The Police view as to re-disposition will not have come as a surprise to anyone. They maintain the stance they took at the original disposition hearing in September 2019. That is, any outcome less restrictive than a conviction and transfer to the District Court for sentencing would be clearly inadequate in the present case.

[12] It is accepted by the Prosecution and Defence that the original decision for [VK] to remain in the Youth Court was made by the slimmest of margins. As Ms Norrie submits today, it is only a very small number of young people who are convicted and transferred to the District Court for sentencing. As we all know, that very small number involves young people before the Youth Court on the most serious of offences.

[13] The Prosecution submit that a further supervision with residence order, even one followed by supervision, which is mandatory, will not address the seriousness of [VK]'s Youth Court charges, the requirement to hold him accountable for his behaviour (including his failure to comply with the supervision order) and the causes underlying his offending.

[14] Ms Letele, on behalf of [VK], has made an impassioned plea for this young man to be given another chance to turn his life around. She submits that there is still time, given [VK]'s age, for the Youth Court to effectively intervene. She acknowledges the decision of Judge Wharepouri and the important opportunity that presented for her client, but similarly to Ms Kaua holds hope that effective interventions can still make a difference for [VK].

[15] One option she has submitted today is that disposition could be deferred, [VK] continued to be remanded under s 238(1)(d) at [the second residence], and further time allowed for therapeutic interventions to be delivered to him in that specialist (Youth Justice) residential space.

The offending

[16] [VK]'s charges relate to:

(i) Burglary (x6);
(ii) Unlawfully taking a motor vehicle (x2);
(iii) Unlawfully getting into a motor vehicle (x2);
(iv) Unlawfully in an enclosed yard;
(v) Sexual violation by unlawful sexual connection;
(vi) Attempted sexual violation by unlawful sexual connection;
(vii) Injuring with intent to injure;
(viii) Strangulation
(ix) Threatening to kill; and
(x) Common assault.

[17] The lead offences arise out of offending on [date deleted – date 2] 2018, which include burglary, strangulation, sexual violation and attempted sexual violation by unlawful sexual connection plus injuring with intent to injure.

[18] I adopt the following summary as outlined in the Police submissions dated 12 June 2020: [3]

(i) At about 5.45 pm, [VK] walked into [a Day Care Centre] in [location deleted], where the victim was finishing up her duties and preparing to leave.

[3] Police submissions, 12 June 2020 paragraph 2.25

(ii) The victim asked if she could help [VK]. He grabbed her and said she was pretty and asked her if she wanted to have sex. He blocked her from leaving through the child-proof gate at the front of the building and attempted to kiss her.

(iii) A brutal, 16 minute sexual attack followed. In summary, [VK]:

a. Repeatedly blocked the victim from leaving.

b. Grabbed the victim by the throat and squeezed her windpipe, causing her breathing difficulty.

c. Masturbated in front of the victim.

d. Dragged her around the childcare centre, to continue the attack in a more secluded area.

e. Punched her repeatedly to the head and face (approximately eight times).

f. Kneed the victim in the head and face three times, causing her to become dazed.

g. Kicked her in the back.

h. Grabbed the victim in a headlock on two occasions causing her difficulty breathing.

i. Licked and sucked the victim's breasts.

j. Attempted to insert his penis into her anus. He did this on two separate occasions during the incident and slapped the victim's buttocks while trying to do so.

k. Forced his penis into her mouth on two occasions during the incident (one before the attempted anal violation, one after).

l. In between the attempts to insert his penis into her anus, [VK] licked the victim's anus area.

m. Pulled the victim's pants down to her knees and tried to spread her legs.

[19] I note that at the initial disposition hearing, the Prosecution filed very detailed submissions as to the nature and seriousness of this offending and the likely starting point. Suffice to say, they submitted a starting point in the vicinity of 13 years' imprisonment would be appropriate.

[20] Judge Wharepouri considered a starting point of at least 10 years' imprisonment would be in the range. After discounts, he was of the view that the end sentence might be somewhere close to five years' imprisonment, with the imposition of a minimum period of imprisonment of 50%, appropriate to reflect the seriousness of the offending.

[21] The only other charge that needs explanation at this time is the common assault charge from 26 February 2020. Significantly, this was also offending against a female, namely a shift team leader at [the residence]. [VK] had been told that morning that he would not be going to school because he had to attend a pre-arranged meeting. He challenged the victim as she walked away and she heard him kicking a door behind her. She called 'code red' and when she turned around, [VK] was directly in front of her. He pushed her with both hands on her shoulder area, causing her to land on her elbows and backside. As a result of the assault, the victim did not receive any physical injuries but was badly shaken.

Relevant law

[22] The legal framework for conviction and transfer to the District Court for sentence is to be found in ss 283(o) and 289 Oranga Tamariki Act. The Court must consider the need to impose the least restrictive outcome and be satisfied that in imposing such a sanction, any less restrictive outcome is clearly inadequate.

[23] The following principles of the Act are also relevant to a transfer decision:

(i) The need to ensure that the young person is held accountable and encouraged to accept responsibility, for his or her behaviour; [4] and

(ii) The need to consider the interests and views of any victims and have regard for their interests. [5]

[24] The Court must also have regard to nine factors to be taken into account on sentencing as set out in s 284(1).

[25] The purpose of a transfer has been held by the Court of Appeal in *R v P,* [6] to be:

> *'To make available a wider and more punitive range of sanctions than those a Youth Court could impose.'*

[26] In addition, that Court has recognised the seriousness of the offending may be a reason by itself to transfer the charges from the Youth Court to the District Court. In *Pouwhare v R*, [7] the Court of Appeal observed:

> *'As s 283(o) recognises, the orders that are within [the Youth Court] powers to make will not always serve. Some young persons will always have to be served in a Court of general criminal jurisdiction. Their offences may be too serious for the Youth Justice regime to cater for.'*

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[4] Section 4(f)(i) Oranga Tamariki Act 1989.
[5] Section 208(g) Oranga Tamariki Act 1989.
[6] *R v P* [2003] BCL 977.
[7] *Pouwhare v R* [2010] NZCA 268.

[27] Whilst the Prosecution has helpfully referred to a number of cases where the Youth Court has determined applications under s 283(o), and Ms Letele has sought to distinguish [VK]'s situation from those cases, the reality is each case will turn on its own particular circumstances, which invariably involve tragic narratives of young people's lives and grim predictions about their futures.

Application of the law

[28] In applying the law to the particular circumstance of [VK]'s case, I start by acknowledging that the offending by him at the [Day Care Centre] on [date 2] 2018 was a depraved, frenzied 16 minute sexual attack involving various types of violation and violence.

[29] [VK] is now 16 years and seven months old. At the date of the first set of offending on [date 1] 2018, he was aged just 14 years two months. The offending on [date 2] 2018, later that year, occurred when he was 15 years two months. Significantly, he was on bail at the time.

[30] [VK] is [one] of [multiple] children born to [CK] and [NK]. All of the children have been removed from their care and are subject to care and protection orders which I have reviewed from time to time over the years.

[31] [VK] has one brother, also before the Youth Court, who has been equally challenging to turn around. There are many more family members across the generations who are well known to the criminal justice system. Sadly, this is an ainga, on his paternal side at least, who are very familiar to the Family, Youth and District Court. It goes without saying then that much is already known about [VK].

[32] Notwithstanding, and to ensure that I have retained an open mind when exercising my discretion on this occasion, I record that I have once again read the:

(i) Section 333 psychological report as to preliminary fitness, dated 20 February 2019, completed by Clinical Psychologist, Penelope Sander, and Social Worker, Tumanako Tomo;

(ii) The section 333 psychological report dated 11 June 2019, completed by Clinical Psychologist, Dr Clare Calvert with the assistance of Samoan Cultural Adviser, Emma Lutui; and

(iii) The section 336 cultural report dated 1 July 2019, completed by Dr Ioane, who also happens to be a Clinical Psychologist.

[33] The following extracts from Dr Ioane's report are instructive: [8]

> *[VK] is a 15 year old New Zealand born Samoan with ancestral links to [a village in] Samoa. His childhood has been characterised with exposure to interparental violence, parental criminality and imprisonment, parental abuse and neglect. It appears that [VK] is a child of intergenerational transmission, of unresolved maternal childhood trauma and abandonment, parental gang membership; his parents' own history of victimisation, violence and abuse. Furthermore, the loss of Samoan culture and identity is prevalent not only in [VK]'s generation but also in his parents' generation. It is likely that his parents' own childhood led to their conscious (or unconscious) resistance of the Samoan culture that was subsequently replaced by (at the very least) his father's association with the gang culture.*
>
> *Coupled alongside ongoing traumatic experiences in his childhood and the loss of the Samoan principles that include respect, humility and love; [VK]'s identity was replaced with principles of power and control over others, violence and a sense of pride in hurting others. This is in direct contrast with the Samoan principles; however it may also be interpreted as being part of the Samoan culture given the experience of his parents.*
>
> *The loss of culture and identity from a Samoan perspective (provided it is understood in its original context), created a sense of grief and loss among [VK]'s parents that appears to have a flow on effect to their children.*

[34] These childhood experiences endured by [VK] have no doubt impacted on his apparent inability (which one would hope is only temporary) to express remorse in relation to his offending or demonstrate true insight into the devastating impact of his actions upon his victims. Whilst the focus of this hearing has been on the victim of his lead offences, I am equally mindful of the havoc [VK] has wreaked in his other victims' lives.

[35] [VK] cannot look to his parents for the kind of support he needs at this critical point in his life. In reality, and this is harsh to say in the presence of his mother who

[8] Section 336 report, 1 July 2019, paragraphs 50-51.

I acknowledge, he has never really been able to count on them to nurture and guide him and that is unlikely to change in the future.

[36] In relation to the effect on the victim of [VK]'s sexual offending, the impact upon her and her whole family has been sadly predictable. I acknowledge the challenges she has been unable to navigate in terms of fully participating in this process, but her voice is heard loud and clear on this occasion.

[37] I note she has been seeing a counsellor and her bravery in engaging in that process is acknowledged. She feels scared when she is alone and felt sad, understandably, when she returned to work at the Day Care Centre. She has now changed her place of employment, and no longer works alone. She was unable to meet some rent payments as a result of having to take about a week and a half off work due to her physical injuries. She has recently taken up a second job. She is concerned about [VK] hurting others. That is clearly a concern shared by the Prosecution.

[38] The orders imposed in September 2019 were the first Youth Court orders [VK] has been subjected to. Prior to that, some of these charges were initially dealt with by way of a family group conference plan which was being monitored by the Pasifika Youth Court in September 2018. It is fair to say that his compliance with that plan was poor.

[39] Dr Calvert and Ms Chong's s 333 report on the issue of risk summarise the underlying causes of [VK]'s offending as follows:

> *'[VK]'s offending appears to be motivated by a number of factors. His high level of anger coupled with a lack of appropriate coping strategies, lead [VK] to engage in high risk behaviours, often while intoxicated. His limited attention span and impulsivity are also likely to lead him to seek out activities that are thrilling and exciting.*
>
> *[VK]'s more recent sexual offending appears to have occurred in the context of a reasonably normal sexual development, as far as the writer can determine. However, as it has not been possible to interview [VK]'s parents, it is not possible to fully assess this area.'* [9]

[9] Section 333 report dated 11 June 2019, paragraph 70.

[40] It is hoped therefore, that an assessment by SAFE could more fully assess [VK]'s risk of sexual harm to others. The SAFE treatment plan prepared for disposition in 2019 notes one of [VK]'s risk factors as his deviant sexual interest, for example: sexual violence; physical violence/pain and threats of death.

Discussion

[41] The orders imposed by Judge Wharepouri in September 2019 were carefully crafted to address [VK]'s significant and complex rehabilitative needs. Notwithstanding the extremely serious nature of his offending and the major challenges posed by his longstanding care and protection history, [VK] was literally thrown a lifeline. He could not catch it, let alone hold onto it.

[42] Indeed, after disposition last year, [VK] continued to display concerning attitudes and some generally high risk behaviours, particularly in relation to women. As Ms Norrie submits his dominance, violence and sexual aggression against women is a serious cause for concern.

[43] I consider that [VK] has also displayed a sense of arrogance and entitlement which is also particularly worrying. His changing stance in relation to [the residence] is an example of that in my view. So too, what occurred as recently as 4 June 2020 when he came to this Court and insisted on being taken to Korowai Manaaki rather than being returned to [the second residence]. It was only after some considerable negotiation with his Social Worker that he persuaded to go back to [location A].

[44] With the greatest of respect, Judge Wharepouri made a courageous decision in applying the objects and principles of the Act to afford [VK] the opportunity of remaining in the Youth Court. In my view, that tipped the scales of justice in favour of a young man who had had so very little go his way in life up until then. If [VK] had gone the distance at [the residence] that might well have been the turning point for him.

[45] Sadly, as it transpires, [VK] has now reached the tipping point. Given the breach of the supervision order (and implicitly the concerns which led to that) plus the

further offending, I cannot be persuaded that another term of supervision with residence followed by the mandatory supervision order, even if bolstered by a concurrent mentoring order, is an appropriate response in the circumstances.

[46] [VK]'s initial offending, extremely serious reoffending whilst on bail, offending against a female [residence] staff member while subject to a supervision order, exit from [the residence] and the breach application, is all now too serious to be dealt with in the Youth Court. There is nothing left in our toolbox to fix this situation.

[47] [VK] was given a chance but the risk he poses to others, and arguably to himself, is simply to great to tempt fate.

[48] There must now be clear and robust consequences for [VK] in respect of the breach of the supervision order and further offending. To do otherwise would offend against the principles of holding him accountable and having due regard to the interests of the victims, not to mention the interests of the public.

Outcome

[49] Accordingly, the supervision order is cancelled.

[50] On all 17 charges, [VK] is convicted and transferred to the District Court for sentencing, pursuant to s 283(o) of the Oranga Tamariki Act.

[51] A PAC report is directed, along with an updated victim impact statement, should the victim wish to provide one.

[52] Copies of both s 333 psychological reports and the s 336 cultural report are to be released to the Probation Service.

[53] Given that all of these charges have been referred to a family group conference, and therefore the victims will have had the opportunity of a restorative process, I make no direction for restorative justice conferences at this time but am open to revisiting that issue.

[54] [VK] is further remanded under s 238(1)(d) in the meantime.

[55] In relation to his Family Court proceedings, I note that the review of plan was prepared on the basis of [VK] remaining in the Youth Court. The Care and Protection Social Worker will now need to submit a fresh plan premised upon the likely outcome in the District Court. That should be filed and served within 21 days.

[56] What I propose to do is bring this matter back before the Crossover Court as soon as possible to have an update from Probation as to where they are at in respect of their report, and to set a sentencing date.

[57] This matter is to come back before me on 2 July at 10.00 am for mention only. [VK]'s attendance is excused. I want to ensure by that date that the request has been received by Probation for the PAC report, they have all the reports from the Youth Court and can give an indication to the Court as to how long it will be before their report is available. Next time, I also intend to set the actual sentencing date and to make directions in relation to the filing of submissions.

[58] [VK], this is a new beginning. You will come before the District Court for sentencing. I cannot see how it is going to be anything other than a term of imprisonment, but that imprisonment will one day end and you will get to start living your life again in the real world once it ends. What is really, really important [VK], is that you keep the hope alive and you think about what your life is going to look like when you get to start all over. This is the beginning.

[59] I do not need to see you next week. Next week is about getting things ready for your sentencing. That is all that is going to happen today. [VK], you have stood there for well over half an hour, respectfully, and I thank you for that.

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Judge I M Malosi
District Court Judge

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