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

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 WELLINGTON

I TE KŌTI TAIOHI
KI TE WHANGANUI-A-TARA

CRI-2020-285-000065
[2022] NZYC 45

NEW ZEALAND POLICE
Prosecutor

v

[YL]
Young Person

Hearing: 4 February 2022

Appearances: Senior Constable Starr for Police
L Sziranyi for Young Person

Date of Decision: 4 February 2022

DISPOSITION DECISION OF PRINCIPAL YOUTH COURT JUDGE JOHN WALKER

Background

[1] On 25 November 2020 [YL], who was sixteen at the time, posted on his Instagram account an image of a rifle. He also posted an image of three small calibre rounds of ammunition held in the palm of a hand. Shortly after this post [YL] posted an image of his face on the same account which was deleted a short time later.

[2] The Police obtained from Instagram details of communications between [YL] and another which involved discussion about conducting a mass shooting at a school during a school assembly. This information resulted in a lockdown of the school identified.

[3] On 26 November 2020 [YL], on the basis of those posts, was arrested for unlawful possession of a firearm.

[4] On the same day, with the assistance of [YL], Police found the firearm and five rounds of ammunition.

[5] [YL] has explained that his online conversations which alerted the Police to his behaviour were a result of what he saw as bullying behaviour against him by some students at the school. This response by those students arose out of a threat made by [YL] to sexually assault a female student at that school. He says that his actions were intended to stop the behaviour towards him and that he had no intention of carrying out any shooting.

[6] On 26 October 2020 [YL] had downloaded a video of the terrorist attack on the Al Noor Mosque in Christchurch.

The charges

[7] As a result of these circumstances [YL] was charged with the following offences:

1. Unlawful possession of a firearm

2. Unlawful possession of ammunition

3. Possession of an objectional publication

[8] Each of these charges was admitted at the Family Group Conference held on the 24th of February 2021 and those admissions were confirmed in Court and the charges recorded as having been proved.

[9] The online conversations involving what was assessed by police as a credible threat to the school are not reflected in any charge. It is the possession offences only that I need to consider.

History of the Court proceedings

[10] It is necessary to recount the previous Youth Court appearances by [YL] which arose out of similar behaviour because that history is necessary to explain the manner in which the Youth Court has approached this offending and to explain the position taken by the Police on the appropriate disposition.

[11] On 28 October 2019 [YL] was charged with offences of possession and copying an objectionable publication and unlawful possession of a firearm. He had possession then of the live stream video of the Al Noor Mosque attack and he had copied that video. The Youth Court approved a Family Group Conference Plan and closely monitored compliance by [YL] until the charges were finalised on 16 September 2020. On that day [YL] was discharged under s 242 of the Oranga Tamariki Act 1989 (the Act). The effect of such a discharge is that those charges are deemed never to have been laid. I am conscious that such a discharge is not a relevant matter to be taken into account in considering whether to make an order or not under s 283 in these current proceedings. However, the circumstances surrounding the earlier charges, and [YL]'s situation following the discharge are highly relevant to the question of how these current charges are to be dealt with.

[12] It has been a matter of considerable concern that following the earlier discharge and the departure of the Youth Court processes and multi- agency team from [YL]'s life, his ability to access specialist support also ended. The whānau identified the need for urgent mental health intervention but were turned away when they made approaches for help. In the end they were able to access psychiatrist on a private basis but only a matter of days before these current offences arose. All the professionals involved in this case are conscious of this history and everyone is anxious to avoid a repeat.

[13] As a result, [YL] has been the subject of intensive monitoring in the Youth Court since his first appearance on 26 November 2020. Since that time this case has been the subject of no less than 20 monitoring appearances, and Dr Delmage, a psychiatrist with expertise in the conduct exhibited by [YL], has been consistently involved in his care and the provision of advice to the Court and to the professionals involved. I take this opportunity to express my gratitude for the contribution of Dr Delmage which has been critical to the decisions which have had to be made in this case.

[14] At the beginning of the process [YL] was remanded in custody until he was granted electronically monitored bail from the 16th of December 2020. [YL] was subject to a 24-hour curfew and placed in a residence with full time minders. On the 17th of May 2021 the electronically monitored part of the conditions was removed, but he remained confined to a supported address unless in the company of the staff of that supported address. [YL] has been subject to intense restrictions on his movements for over a year. Having regard to a young person's sense of time, that is a very considerable consequence already in place following this offending.

[15] The issue before me today is the disposition of these charges. The agreement reached at the Family Group Conference left open the question of final disposition.

The Police position

[16] The Police position is that [YL] should be subject to an order under section 283(c) of the Act - that he be ordered to come before the Court, if called upon within

12 months, so that the Court may take further action under section 283. The Police therefore seek that this case not be finally dealt but that the Court retain the ability to act if there is further offending, a change in [YL]'s behaviour or risk assessment, or if there is a reduction in the level of support which he is receiving. The Police do not seek any actual penalty, recognising the very great progress and changes which have occurred, and the substantial restrictions on [YL]'s liberty which have already occurred. The Police concern is about enabling prompt action to be taken if circumstances change without having to wait for any further offending to occur. The Police consider that it is the ongoing involvement of the Youth Court and its processes which have enabled the improvements in [YL]'s behaviour to happen and for him to be assured of the support which he needs.

[17] It must be noted that if any order is made under s 283 then this results in the creation of a formal record which will appear on a formal Criminal Record. If there was to be no reoffending, and no other need for the court to recall [YL] under s 295, then an order under s 283(c) would only have served to create a formal record for [YL] which he would have to carry with him into the future.

[18] It should be noted that on any recall the Youth Court is limited to simply considering what other order under s 283 is then appropriate. It is not intended that a recall would enable ongoing monitoring or the provision of interventions except under an order.

[19] It must also be noted that should [YL] be charged with further offending after 18 June when he turns 18, then he would be appearing in the District Court. If it were such offending that triggered a recall there would then be proceedings in the District Court and in this Court. That would give rise to considerable difficulty with the prospect of Youth Court orders being imposed on a person subject to District Court proceedings.

Youth Advocate's position

[20] [YL] seeks to be discharged under section 282 of the Act with the effect that he would not carry a record of this offending. In the alternative Ms Sziranyi submits that a discharge under s 283(a) would be the most that should be imposed.

Statutory matters to be taken into account

[21] I must take into account in this consideration the purposes of the Act as set out in section 4. In particular section 4(1)(i) which provides:

> **Purposes**
>
> (1) The purposes of this Act are to promote the well-being of children, young persons, and their families, whānau, hapū, iwi, and family groups by—
>
> (a) establishing, promoting, or co-ordinating services that—
>
> (i) are designed to affirm mana tamaiti (tamariki), are centred on children's and young persons' rights, promote their best interests, advance their well-being, address their needs, and provide for their participation in decision making that affects them:
>
> (ii) advance positive long-term health, educational, social, economic, or other outcomes for children and young persons:
>
> (iii) are culturally appropriate and competently provided:

[22] Under section 4A there are four primary considerations in all matters relating to youth justice and they are:

a) The well-being and best interests of the young person; and

b) The public interest (which includes public safety); and

c) The interest of any victim; and

d) The accountability of the young person for their behaviour

[23] In addition to these general considerations, section 284 of the Act sets out the mandatory considerations when the court is deciding whether to make an order under section 283 of the Act.

[24] I turn to consider each of those considerations in turn –

a) The nature and circumstances of the offence proved to have been committed by the young person and the young person's involvement in that offence:

[25] I have detailed this in paragraphs 1 to 9 above.

b) The personal history, social circumstances, and personal characteristics of the young person, so far as those matters are relevant to the offence and any order that the court is empowered to make in respect of it:

[26] [YL] comes from a highly complex and challenging background with a childhood characterised by neglect, violence and anti-social influences. He was uplifted from his family by Oranga Tamariki under Care and Protection provisions when he was seven years of age and placed with non-family caregivers. [YL] was subjected to abuse while in that care.

[27] From the age of 10 [YL] was placed in the care of a [relative] but did not receive the high level of support and control which [YL] required.

[28] The high level of support and control was required because of [YL]'s low level intellectual functioning, the effect of childhood trauma, autism and emerging mental health issues.

[29] [YL] was able to access the internet while in his [relative]'s care, without control, and eventually he accessed the "dark web" with exposure to the very negative influences to be found in that domain including a video of the Christchurch Mosque attack.

[30] There has been the emergence of mental health issues and poly-substance abuse. He has been diagnosed with auditory and sensory processing disorders. He suffers from anxiety.

[31] All of these challenges have resulted in him being excluded from mainstream education which he has not attended since 2017.

[32] As a result of the many challenges faced by [YL] he has found it difficult to establish and maintain relationships with people his own age. He has become socially isolated as a result. People he has become most connected with are those who have the responsibility of providing care and supervision for him and he has grown close to those social workers at his current placement. He therefore remains socially isolated from his peers.

[33] I need to also take into account that in addition to the specific mental health issues described [YL] will, in common with other young people of his age, not have a fully developed brain and his executive functioning, his appreciation of consequences and risk, will be still have been limited at the time of the offending. It will still be limited.

[34] [YL] continues to be subject to the Care and Protection jurisdiction of the Family Court.

[35] [YL] is also receiving the support of Oranga Tamariki and the Ministry of Health under a high and complex needs interagency plan which has been placed before me.

c) The attitude of the young person towards the offence:

[36] [YL] has accepted his responsibility for the offences and it was with his cooperation that the firearm was located by the police. He has fully engaged in all aspects of his plan and general interventions and has not breached any of his bail conditions over an extended period of time.

d) The response of the young person's family, whanau, or family group to—

(i) the causes underlying the young person's offending, and the measures available for addressing those causes, so far as it is practicable to do so.

(ii) the young person themselves as a result of that offending:

[37] The reality is that [YL]'s family have not been in a position to respond effectively to the multiple underlying causes of his offending behaviour. [YL]'s mother and wider family continue to be supportive of [YL] in his engagement in interventions but this is not a case where the family can be expected to do more.

e) Any measures taken or proposed to be taken by the young person, or the family, whanau, or family group of the young person, to make reparation or apologise to any victim of the offending:

[38] [YL] has been open to apologising to the Muslim community for his possession of the objectionable video when the time is right for this to happen. [YL] disavows any antagonism to this community or the harbouring of any racist views.

f) the effect of the offence on any victim of the offence, and the need for reparation to be made to that victim:

[39] The possession charges themselves do not create direct victims but the wider context caused serious distress to the community of the school which had to be evacuated and locked down. This occurred at examination time and the disruption and distress can be expected to have had a significant impact of many students.

The effect of creating a formal record

[40] I have raised the issue whether the creation of a formal record, with [YL]'s history and his social isolation, will create any elevation of risk. I have sought Dr Delmage's opinion on this issue.

[41] In his opinion a formal record will adversely affect [YL]'s progress. He says that [YL] has made considerable efforts to change and that it is preferable for [YL] to be able to distance himself from his past "without the sense that he has a formal record reflective of his past behaviour from which he cannot effectively distance himself".

[42] Dr Delmage is also of the view that the presence of a formal record may make [YL] less likely to trust and engage with others as a result of his desire to hide this information from them at all costs.

[43] Dr Delmage also states

> 4.9 As children progress through adolescence, they face the task of acquiring identity and there is an evidence base suggesting that exposure to antisocial identity and reinforcement of this identity can affect the likelihood of reoffending in later life. Perhaps paradoxically then, the presence of a formal record may actually increase his risk of committing further offences as he struggles to free himself of his previous antisocial behaviour, and recreate himself as a positive citizen of New Zealand.

Balancing the factors and the way forward

[44] Balancing all of the considerations I do not consider that an order under s 283 is necessary or appropriate. However, I consider there is substantial weight in the concern which drives the Police to seek the order allowing for recall of [YL]. In effect that submission is that it is too soon for the Youth Court to end its involvement.

[45] In addition, the Police have a concern that the Care and Protection Plan coming out of the recent Care and Protection Family Group Conference is not detailed enough to give the Police comfort that the transition when [YL] reaches 18 will be adequately supported. It will be for the Family Court to assess the quality of the plan from a Care and Protection view point, but the Police look at the plan through a Police lens informed by what has happened in the past when support has been less than adequate.

[46] I consider that there is an option which will accommodate the Police concerns yet avoid the creation of a formal record.

[47] I propose to defer final disposition until at least 4 November 2022. It may be appropriate to defer until 12 months from today. This will be on the basis that bail conditions will end today (as they would if an order or discharge were to be made today). I am conscious that ongoing bail conditions would continue intense restrictions

for too long and be counter-productive. It has to be able to be assessed whether [YL] can continue his progress without the Court being so directly involved in his daily life.

[48] In the absence of some reason to bring [YL] back to Court earlier his attendance on the deferral date will be excused.

[49] I also indicate clearly today that in the absence of any further offending [YL] will at that time be discharged under s 282.

[50] Leave will be reserved to Police, Youth Advocate, and Oranga Tamariki to have the case brought on earlier for directions or for assistance in the provision of ongoing support of any kind for [YL].

[51] The Youth Court will now stand back but also stand ready to assist should the need arise.

John Walker
Principal Youth Court Judge