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**IN THE YOUTH COURT
AT WHANGAREI**

**I TE KŌTI TAIOHI
KI WHANGĀREI-TERENGA-PARĀOA**

**CRI-2018-263-000089
[2021] NZYC 333**

QUEEN

v

[IK] & [YV]
Young Persons

Hearing: 28 April 2021

Appearances: M Smith for the Crown
D Owen-Tana for Young Person [YV]
C Cull for Young Person [IK]

Judgment: 6 August 2021

RESERVE JUDGMENT OF JUDGE K B de RIDDER

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[1] On 28 April 2021 I dismissed the Crown application that [IK] & [YV] be transferred to the District Court for sentencing, and I discharged both pursuant to s 282 of the Oranga Tamariki Act 1989 ("the Act").

[2] I indicated that I would give my reasons later for these decisions. These are now my reasons.

Offending

[3] In a decision delivered on 14 June 2019 I found that charges against [IK] of rape, and of being a party to charges of rape, unlawful sexual connection, and indecent assault by [YV] were proved. Similarly, I found that charges against [YV] of rape, unlawful sexual connection, indecent assault, and being party to a charge of rape by [IK] were proved.

[4] On 8 June 2020 I approved court monitored plans for both [IK] and [YV] with reasons given on 12 August 2020.

[5] The decisions of 12 August 2020 giving the reasons for approving the court monitored plans are attached to this decision as they track the history of the proceedings for both [IK] and [YV] through the Youth Court and record the various reports that have been prepared in respect of both [EDITORIAL NOTE: REASONS NOT ATTACHED TO THIS DECISION].

Progress subsequent to 8 June 2020

[6] The following further reports have been obtained:

[IK]

(a) 5 August 2020 – updated social workers report

(b) 8 October 2020 – further updated social workers report including report from SAFE

(c) 17 December 2020 – further updated report from youth justice social worker including progress report from SAFE

(d) 21 April 2021 – further updated youth justice social workers report together with SAFE end of intervention report

[YV]

(a) 9 October 2020 – report from lay advocate

(b) 18 December 2020 – Korowai Tumunako report

(c) 17 August 2020 – youth justice social worker progress report

(d) 8 October 2020 – youth justice social worker progress report

(e) 17 December 2020 – youth justice social worker progress report

(f) 23 April 2021 – youth justice social worker report

(g) 27 April 2021 – Lay Advocate report

(h) 27 April 2021 – Korowai Tumunako report

Law

[7] Significant changes to the Act came into force on 1 July 2019. The effect and scope of those changes has been discussed in previous decisions, notably:

(a) *R v MQ*[1]

(b) *New Zealand Police v JH*[2]

(c) *New Zealand Police v AN*[3]

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1 *R v MQ* [2019] NZYC 456
2 *New Zealand Police v JH* [2020] NZYC 396
3 *New Zealand Police v AN* [2020] NZYC 609

[8] I respectively adopt and apply the comments of the respective Judges in those decisions as to the scope and effect of the amendments to the Act.

Discussion

[9] At the hearing on 8 June 2020 the Crown advanced its argument for transfer of the proceedings to the District Court. No decision was made at that point on the application. Rather both [IK] and [YV] were placed on their respective plans.

[10] At this hearing on 28 April 2021 the Crown re-advanced the argument that both [IK] and [YV] should be transferred to the District Court. Their respective youth advocates argued that both should remain in the Youth Court, and further that they should be discharged pursuant to s 282 of the Act.

[11] Therefore, two issues arose:

(a) Should [IK] & [YV] be transferred to the District Court pursuant to s 283(o) of the Act?

(b) If not, how are these proceedings to be disposed of in the Youth Court?

Transfer to the District Court

[12] The first point to note is that the fact that [IK] and [YV] were placed on plans at the hearing on 8 June did not preclude the Crown arguing that they should now be transferred to the District Court. If there were to be such a transfer, no doubt the content of their respective plans, and their response to them would need to be taken into account in determining what sentence should be imposed in the District Court under the Sentencing Act 2002.

[13] In approaching the issue of whether or not there should be a transfer to the District Court it is relevant to note that since being placed on their respective plans on 8 June 2020 both [IK] and [YV] have continued to engage fully in their respective plans. They had effectively completed those plans. All the material referred to at [6] above records a continued and positive engagement in their respective plans by both.

By that stage both had been subject to the oversight of the Youth Court for two years eight months.

[14] The respective plans for [IK] and [YV] took into account ss 5 and 208 of the Act. The issue then was whether, on the application of the four primary considerations set out in s 4A of the Act that [IK] and [YV] should be transferred to the District Court for sentence. In that regard the following matters are relevant:

(a) The well-being and best interests of [IK] and [YV] do not require them to be transferred to the District Court for sentence. If they were then the combined effect of s 128B(2) of the Crimes Act 1961, and the decision of Court of Appeal in *R v AM* would result in a sentence of imprisonment being imposed.[4] That, at a time when both [IK] and [YV] are in their teens and still maturing into adult men. A prison sentence on them at this stage of their lives would have a crushing effect.

(b) The public interest, including public safety, does not require transfer of the proceedings. Both [IK] and [YV] have embarked on appropriate programmes to address the underlying causes of their offending and have had the benefit of strong whānau support to assist them. This offending was one isolated incident, albeit a very serious one. It is not a case where there is some repeat sexual offending which points to imprisonment as the only available sanction.

(c) The interests of the victim have been met by a hohouronga hui attended by the victims whānau.

(d) As to the accountability of [IK] and [YV] for their behaviour they have been before the Youth Court for two years eight months, and they have now been subject to restrictive bail conditions for that time. They have also been subject to respective plans to address the underlying causes of their offending and to provide appropriate support for them to develop as maturing teens into pro social adults. The accountability has

[4] *R v AM* [2010] NZCA 114

been proximate to their offending. There is no need for any further accountability by a way of transfer to the District Court for sentence.

[15] For the above reasons, the Crown application to transfer the proceedings to the District Court for sentence was dismissed.

Disposition in the Youth Court

[16] That then, required consideration of how these proceedings are to be disposed of in the Youth Court. That again requires the application of the primary considerations prescribed in s 4A of the Act. The issue narrows down to one of whether or not [IK] & [YV] should be discharged without record under s 282, or the offending is such that it requires a record by some form of order under s 283.

[17] In considering a discharge under s 282 the factors prescribed in s 284 of the Act are to be applied. Those factors have been assessed in the decision of 12 August 2020. Nothing has altered those considerations.

[18] The Youth Court has repeatedly noted that the seriousness of the offence does not precluded a discharge under s 282 (see for example *New Zealand Police v SM.*[5]*)*

[19] The following matters are relevant pursuant to s 4A of the Act:

(a) The well-being and best interests of [IK] and [YV] will be severely impacted if a permanent record for sexual offending is made. It has the potential to affect their future development into young adults, their prospects for employment, and many other aspects of adult life.

(b) The public interest will not be further advanced by the making of a Youth Court order. Public interest has already been addressed through [IK] and [YV] being subject to their respective plans.

[5] *New Zealand Police v SM* [2015] NZYC 239

(c) The interests of their victim will not in any way be advanced by the making of a Youth Court order.

(d) Creating a record for [IK] and [YV] by way of making an order under s 283 will not in any way further address accountability which has already been addressed under their respective plans.

[20] In short, nothing would be achieved by making an order, and very significant harm would in all likelihood result if an order was made.

[21] For the above reasons, both [IK] and [YV] were discharged pursuant to s 282 of the Act.

K B de Ridder
Youth Court Judge