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

IN THE YOUTH COURT
AT WAITAKERE

I TE KŌTI TAIOHI
KI WAITĀKERE

CRI-2019-290-000019
[2021] NZYC 583

NEW ZEALAND POLICE
Prosecutor

v

[HH]
Young Person

Hearing:	21 December 2021
Appearances:	Senior Constable S Wanden for the Prosecutor J Verry for the Young Person
Judgment:	21 December 2021
Reasons:	6 January 2022

REASONS FOR SENTENCING DECISION OF JUDGE A J FITZGERALD

Introduction

[1] When [HH] was [under 15] years old, he committed two offences of unlawful sexual connection against his [under 10]-year-old cousin [TS] and one of indecently assaulting his [under 10]-year-old cousin [NS].

[2] The police caption summary describing the offending is brief. It simply says:

> Between the [date deleted] 2018 and the [date deleted] 2019 [TS] and [NS] stayed with [HH] and his family at their Auckland address.
>
> [HH] asked [TS] to perform oral sex on him, which she did.
>
> [HH] performed oral sex on [TS].
>
> [HH] approached [NS] and showed her his penis. He asked her to suck his penis, but she refused. [NS] briefly touched his penis.
>
> On [date deleted] 2019 both [TS] and [NS] disclosed the sexual offending to their parents.
>
> [HH] agreed to a DVD interview and admitted the facts stated above.

[3] There is very little information about the impact of the offending on [TS] and [NS] whose views have not been provided, making a proper assessment of their interests difficult. There is only passing mention of them in the victim impact statements from their parents, [VS] and [WS]. [HH]'s mother, [JH], is the sister of [VS].

[4] [HH] is now [under 18] years old. On 21 December 2021 I discharged the three charges he had admitted under s 282 of the Oranga Tamariki Act 1989 ("the Act"). The effect of that order is to deem the charges never to have been filed in court.

[5] Only brief reasons for my decision were given in the courtroom because of other work that needed to be done that day. Understanding the decision properly requires explaining in detail how it was made and so I said I would set out my reasons in full in writing later, which I now do.

Submissions

[6] [HH]'s social worker, [name deleted – the social worker], recommended that the s 282 order be made and that was the outcome advocated for by Mrs Verry who is [HH]'s youth advocate. Both supported their submissions by reference to relevant provisions of the Act and also the UN Convention on the Rights of the Child ("the CRC").[1]

[7] The police sought an order under s 283(a) of the Act which would have been a notation that [HH] appeared in the Youth Court for the charges but without further order or penalty. The two factors they relied upon to justify that outcome were the seriousness of the offending and the effects of it on the victims. They placed reliance on ss 284(1)(a) and (f) of the Act.

[8] It could be said that either outcome is very lenient for offending so serious. However, because the Act does not provide an order of sufficient duration to cater for most young people facing charges for sexual offending, the approach taken in this case is common to most that come before the Youth Court. That is, usually with the agreement of all concerned, sentencing is deferred to enable the young person to carry out a Family Group Conference ("FGC") plan, a component of which is to engage in a therapeutic programme such as SAFE, which often takes about two years to complete. Upon successful completion of the FGC plan, the sentencing submissions in most cases are the same as here; either an order under s 282 of the Act, or an order under s 283(a).

[9] My decision was arrived at by reference to the Act, the CRC and the UN Convention on the Rights of Persons with Disabilities ("the CRPD")[2] given [HH]'s disability and the statutory requirement to respect and uphold the rights of children and young people under both Conventions. For reasons I will explain later, I believe some of the principles I was required to apply in making my decision, including the duty to respect and uphold children's rights under the CRC, were not only relevant in

[1] United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) [CRC].

[2] United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2006, entered into force 3 May 2008 [CRPD].

relation to [HH], but also [TS] and [NS]. They too have rights under the CRC that should have been respected and upheld in this process.

The Act

[10] The purposes of the Act are to promote the well-being and best interests of children, young persons, and their families, whānau, hapū, iwi and family groups by complying with the detailed list of obligations set out in s 4 of the Act. There is a strong emphasis on applying the Act in cases concerning tamaiti and taiohi Māori with proper regard for Te Ao Māori. This should always include recognising mana tamaiti, whakapapa, and the practice of whanaungatanga amongst other things.

[11] Applying those important cultural provisions have not been a strong feature in this case because the focus has been more on [HH]'s well-being generally, catering for his disability, meeting his needs and ensuring that the underlying causes of his offending were addressed so as to prevent the risk of further offending.

[12] Section 4A of the Act sets out four primary considerations that apply in Youth Court proceedings, having regard to the general and the Youth Justice principles. They are:

(a) [HH]'s well-being and best interests;

(b) the public interest, including public safety;

(c) the interests of the victims;

(d) [HH]'s accountability for his behaviour.

[13] I will address each of those considerations in detail later.

[14] Section 5 sets out the general principles to be applied in the exercise of powers under the Act. It begins by requiring that any court or person exercising powers under the Act, must be guided by the long list of principles that are set out in that section.

[15] The first of those is that **a** child or young person (emphasis added) must be encouraged and assisted, wherever practicable, to participate in and express their views about any proceeding, process or decision affecting them and their views should be taken into account.

[16] The second is that the well-being of **a** child or young person (emphasis added) must be at the centre of decision making that affects that child or young person, and in particular, that the child or young person's rights under the CRC and the CRPD must be respected and upheld and they must be treated with dignity and respect at all times and protected from harm.

[17] Article 19 of the CRC specifically provides rights that should be respected and upheld for children who are the victims of crime. As I will explain later, that includes the right to be heard, to have views given due weight, to be treated with dignity and respect at all times, to have their best interests as a primary consideration, and more.

[18] Respecting and upholding such rights under the CRC would be consistent with applying the principles in s 5 of the Act that require the same things, not only to a child or young person who is the subject of proceedings but also to children who are the victims of offending who can also be affected by the courts processes and its decisions. Use of the word "a" as opposed to "the" in s 5(1)(a) and (b), when referring to children and young people, suggests that may have been Parliament's intention. I will return to this issue later.

[19] Other important principles include the need for decisions to be made and implemented promptly and in a time frame appropriate to the age and development of the child or young person.

[20] A holistic approach should be taken, so that in this case [HH] is seen as a whole person which includes taking into account his developmental potential, educational and health needs, whakapapa, cultural identity, disability, and age amongst other things.

[21] Decisions about [HH] should be made having particular regard to his experience of his disability and the difficulties and discrimination he has encountered because of it. His full and effective participation in society should be supported.

[22] The effect of any decision on [HH]'s relationship with his family, whānau, hapū, iwi, and family group and links to whakapapa should be considered.

[23] Relevant Youth Justice principles in s 208 of the Act include [HH]'s age being a mitigating factor in determining whether or not to impose sanctions for his offending as well as taking the least restrictive option appropriate in the circumstances.

[24] Consideration should be given to the interests and views of all of the victims, and the impact of the offending on all of them, and any measures should have proper regard to their interests and the impact of the offending on all of them.

[25] Reasonable and practical measures and assistance were taken to support [HH] so as to prevent or reduce reoffending, as I will explain soon.

[26] Section 284 of the Act sets out the factors that must be taken into account on sentencing which are set out below.

Nature and circumstances of the offending

[27] The charges themselves are serious. However, there is no evidence provided to suggest that there was any offending beyond that described in the agreed summary of facts set out at [2] above. The three charges were not laid as representative ones, indicating that there was not more than one instance during the specified period when offending occurred.

[28] Although he was young at the time, [HH] was a lot older than his victims who should have been safe with him. He therefore breached the trust [TS] and [NS] should have been able to have in him. However, on the information available, it appears to have been an isolated incident involving no planning or preparation. [The social worker] described it in her report as being "opportunistic".

Personal history, social circumstances and personal characteristics

[29] [HH]'s parents separated when he was three years old and have remained apart since. His father, with whom he does not have a relationship, belongs to the [iwi name deleted] from the [region deleted]. [HH]'s mother is of [iwi name deleted] descent as well as having aboriginal Australian and pākehā New Zealand ancestry. Ms Griffiths, who was [HH]'s lay advocate, reported that although [HH] identifies as Māori, he does not speak Te Reo and has little knowledge of tikanga. He and his mother preferred to have the progress he made with his FGC plan monitored in the mainstream Youth Court rather than at Te Kōti Rangatahi on the Marae.

[30] Because [HH] does not have contact with his father he also has no contact with his siblings on his father's side. He has a close relationship with his mother and maternal siblings and also with his mother's partner, [PR], who he trusts and sees as a father figure.

[31] [HH] and his siblings have some history with Oranga Tamariki for care and protection concerns dating back to 2011 when he was aged 7. Several reports were received for incidents of physical and emotional abuse of the children by [JH] and there were also concerns about her mental health.

[32] When [HH] was 8 years old, Oranga Tamariki removed all of the children from their mother. However, she then accepted therapeutic supports and worked hard to satisfy Oranga Tamariki that she had addressed their concerns and the children were returned to her care.

[33] When [HH] was ten years old, he was the victim of sexual abuse by an older female cousin which he did not talk about until recently. That abuse has caused feelings of confusion and shame for him.

[34] [JH] and her siblings also had history with Oranga Tamariki dating back to 1993 for issues including family violence, mental health concerns, suicide, substance abuse and sexual assault. This is something that [VS] mentions in her Victim Impact Statement:

> "My sister and I who is [HH]'s mother worked hard to develop a support system between us. We are part of a large and somewhat dysfunctional whānau that grew up separated and all of us had seen our fair share of abuse and bad decisions. We wanted to develop a better mindset and future for our children.
>
> …
>
> There are so many stories of this kind of abuse throughout our whānau history. Almost every cousin I have spoken to tells a sexual abuse story from their childhood. How do we break the cycle?"

[35] In [the social worker]'s report, she explains that [HH]'s mother has tried to distance herself from this history by striving to build a better future for herself and her children.

[36] [HH] has an Intellectual Disability. As a result, he was bullied at school and felt singled out and hated by his peers. He struggled academically and required additional teaching support and was teased because of that and the trouble he had with spelling and other subjects that were difficult for him. The trauma he suffered from these experiences went largely unresolved until recently when they were addressed as part of the therapeutic work [HH] did on the SAFE programme.

[37] As a result of those traumatic experiences, [HH] became very timid, finding solace in lone pursuits such as watching TV, playing video games and learning about ancient history. His social skills were adversely affected as a result and he has had to work hard to address that.

[38] Despite these issues and challenges, [HH] did not have behavioural problems at school or at home when growing up. In every report I have read, he is referred to in positive ways such as being personable, polite and very helpful.

[39] [HH] first appeared in court for the charges on 26 February 2019. Over the course of the proceedings, he has undergone several mental health assessments and his fitness to stand trial was raised and the process under the Criminal Procedure (Mentally

Impaired Persons) Act 2003 was triggered on 7 May 2019. The decision to do so was largely informed by a forensic report dated 15 April 2019 that included mention of various potential mental impairments.

[40] First, it was noted that [HH] had been assessed for Attention Deficit Hyperactivity Disorder ("ADHD") in 2014. Although he was very elevated on various scales including inattention, hyperactivity, impulsivity, learning problems and peer relations, he did not meet all of the criteria for a formal diagnosis of ADHD.

[41] Given [HH]'s history of traumatic experiences, he was assessed for Post-Traumatic Stress Disorder ("PTSD") and scored in the clinical range for anxiety, depression, post-traumatic stress, dissociation, overt dissociation and sexual concerns (both sexual distress and pre-occupation). In the assessment for depression, [HH] was found to endorse five out of six critical items namely loneliness, social withdrawal, self-reproach, self-deprecation and helplessness.

[42] Although it had been mentioned that [HH] might have Autism Spectrum Disorder ("ASD") he did not meet the diagnostic criteria for that. One report described him as "straddling the diagnostic threshold" of ASD.

[43] The difficulties [HH] was having, that were thought to indicate a possible diagnosis of ASD, were found to be more related to his Intellectual Disability. In that regard, [HH] scored in the very low range in relation to the cognitive assessment measures with a full-scale IQ of 71 (in a range from 67 to 78). His scores in the adaptive functioning assessment were in the extremely low range on all measures. The impairments became apparent during [HH]'s developmental period and so he meets the diagnostic criteria for Intellectual Disability as defined in s 7 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.

[44] [HH] had also developed significant anxiety and occasional low mood due to the angry response to his offending from the extended whānau and as a result he met the diagnostic criteria for Adjustment Disorder with anxiety.

[45] One of the report writers noted the intergenerational and transgenerational sexual abuse within the whānau and that [HH] himself has been the victim of sexual abuse. He was described as being unassertive and compliant with others when paired with a strong-willed or authoritative figure. It was said this may lead to constant repression of his own psychodynamic needs which in turn would make him prone to acting out in the way he did against his cousins. Given his poor judgment and lack of independent thinking, he may not have been fully aware of the wrongfulness of his actions and not able to anticipate the effect this offending would have on the victims.

[46] By the time he was interviewed for the fitness reports, it was clear that [HH] recognised the moral wrongfulness of his actions but one of the health assessors commented that it is possible his understanding of the issues around sexual consent was impaired at the time of the offending due to his disability.

[47] Although [HH] was found to have a mental impairment, primarily on the basis of his Intellectual Disability and Adjustment Disorder, he was found fit to stand trial for the charges on 22 October 2019. However, it was a finely balanced matter.

[48] A significant factor in the finding of fitness was the extent to which the impacts of [HH]'s impairments on his understanding and engagement were able to be mitigated by the involvement of his communication assistant, Ms Wright from "Talking Trouble". That involvement has been very significant throughout these proceedings in two respects:

(a) First, the immediate assistance Ms Wright provided to [HH] in the Courtroom and in important parts of the Youth Justice processes, such as the FGC.

(b) Secondly, and no less important, the extent to which the professionals involved, my-self included, have benefited by adopting recommendations made by Ms Wright in her assessment report dated 18 June 2019. Changes that professionals made to the language and processes normally used, to ones capable of being understood and managed by [HH], enabled his meaningful participation. For example,

> [HH]'s therapist at SAFE, [the therapist], comments in his report that [HH]'s engagement during the sessions was assisted by delivering therapy in keeping with the recommendations in Ms Wright's report.

[HH]'s attitude towards the offending

[49] [HH] is very remorseful for his offending. That is something commented on by various people and I have no doubt at all about the depth of his remorse and the sincerity of his apologies. As a result of completing the SAFE programme he has come to understand the impacts his actions are likely to have had on [TS] and [NS] as well as on wider whānau relationships, especially that between his mother and her sister.

[50] [The therapist] explains in his final report that [HH]'s cognitive functioning limited his capacity to produce written apology letters of an appropriately legible and sensitive quality. Time and care were taken to ensure [HH] was truly able to understand what he had to apologise for and to express that in a genuine, sincere way. For those reasons the completion of the letters to the victims was the final activity before his graduation from the SAFE programme after more than two years participation.

[51] Although [WS], in his victim impact statement, was extremely critical of the letters, both the delay in providing them and the content, his criticisms are not justified. The timing was dictated by what professionals' thought was most appropriate and the contents are genuine, sincere and of remarkably good especially considering [HH]'s disability.

The response of [HH]'s whānau to the causes underlying the offending

[52] There has been a strong and determined commitment from [HH], his mother and [her partner, PR] to address the underlying causes of the offending through participation in the SAFE programme over more than two years. Although [HH]'s father does not have any contact with [HH], he and a paternal Aunt were at the FGC that formulated the agreed plan I will refer to soon.

Measures taken by [HH] and his whānau to apologise

[53] As mentioned above, it was part of [HH]'s FGC plan that he would make an apology to the victims at the appropriate time and he did so to a high standard.

The effect of the offending on the victims and the need for reparation

[54] There is no information about the actual effect of the offending on [TS] and [NS]. Their voices have not been heard in the proceeding. I am sure they will have suffered emotional and psychological injuries as a result of the offending and will most likely continue to be adversely affected for the rest of their lives. However, information about the impact on them and what has been or is being done to address that has not been provided. The brief references to them in their parent's victim impact statements are of a generic nature, with nothing specific about what is happening for [TS] and [NS] in their lives or what their views are about the offending.

[55] I was told in court that the girls' parents did not want to provide such information to the court, but no reason was given for that. I accept that the reasons could include such things as respect for the privacy of [TS] and [NS] and perhaps to protect them from a process that could be stressful and even re-traumatising. There could be other reasons I am unaware of, but the lack of information makes having proper regard to their interests, and assessing the impact of the offending on them, difficult.

[56] The two victim impact statements provided were from the girls' parents who are of course victims too. The relevant provisions of the Act regarding victims are:

(a) Sections 4 and 4A which require that the rights and interests of victims are recognised, and regard is had to them;

(b) Section 208(2)(g)(i) and (ii) which requires that consideration be given to the interests and views of victims (for example, by encouraging them to participate in the Youth Justice processes) and that any measures

should have proper regard for the interests of victims and the impact of offending on them.

[57] Section 17AB of the Victims' Rights Act 2002, provides that the purpose of a victim impact statement is to –

(a) Enable a victim to provide information to the court about the effects of the offending; and

(b) Assist the court in understanding the victim's views about the offending; and

(c) Inform the offender about the impact of the offending from the victim's perspective.

[58] It is the prosecutor's job to make all reasonable efforts to ensure that the following information is ascertained from the victim:

(a) Any physical injury or emotional harm suffered by the victim; and

(b) Any loss of, or damage to property; and

(c) Any other effects of the offence on the victim; and

(d) Any other matter consistent with the purposes referred at [57] above.

[59] For present purposes, the relevant parts of the meaning of "victim" in the Act and the Victim's Rights Act are the same.

[60] [VS], who is the mother of [TS] and [NS], describes there being much heart-ache and pain caused by the offending which she refers to as being "another stain upon our family name to join the many that past generations had left us all to bear." The offending makes her feel broken, dirty, used and worthless and she says it breaks her to imagine what her daughters feel and that it will be carved into their childhood memories. Those are the only references to the impact on [TS] and [NS] in their mother's victim impact statement.

[61] The statement also records that the families no longer speak to each other, that happy memories made over the years are no more, and that photos of special moments are now looked upon with heart ache and sorrow. However, [the social worker] in her report advises that [HH]'s mother told her that she had recently phoned her sister, [VS]. It was the first time they had spoken since the time of [HH]'s offending. The phone call is said to have gone very well and some healing has taken place. The plan is to reconnect once lockdown restrictions have been lifted.

[62] The contents of much of [WS]'s victim impact statement fall outside the matters provided for in the Victims' Rights Act and the inappropriate parts were therefore disregarded. For example, there were allegations that went well beyond what [HH] was accused of doing in the agreed summary of facts, criticisms of the justice system and vitriolic comments aimed at [HH]. The relevant parts of his statement include the toll the offending took on his relationship with [VS] and that there has been "a huge financial and mental cost to the victim's family". Reparation was not sought. The only mention of the impact on [TS] and [NS] is;

> "I fell (*sic*) [they] are far more susceptible to mental health issues and suicide and will have to carry the scares (*sic*) for the rest of their lives."

Any previous offending

[63] There has been no offending by [HH] before these charges or since.

The FGC plan

[64] At an FGC held on 25 November 2019, the following plan was agreed upon. Amongst those who attended was [WS], the victims' father. [HH] was required to:

(a) Attend High School with support from a teacher aide.

(b) Participate in and complete the SAFE programme.

(c) Engage in mentoring.

(d) Take part in recreational activities;

(i) Wing Chun martial arts.

(ii) Play a game of chess with Senior Constable Wanden.

(e) In time, write apology letters with help from [the therapist].

(f) Make two $75.00 charitable donations.

[65] The duration of the plan would be the time it took to complete the SAFE programme. Monitoring of [HH]'s progress would take place at the Waitakere Youth Court. Disposition would be decided at the end by the judge.

Causes underlying the offending

[66] These are apparent from what I have recorded already.

[HH]'s compliance with the FGC plan

[67] A remarkable feature of this case is the exceptional quality of [HH]'s engagement with his FGC plan, the standard to which he completed all parts of it and his perfect compliance over nearly three years with bail conditions.

The SAFE programme

[68] [HH]'s participation in the SAFE programme ran from 3 August 2019 to 15 November 2021; more than two years and three months. In that time, he took part in 53 individual therapy sessions including 19 remote telephone or MS Teams sessions during COVID 19 lockdown periods. He also took part in 20 group therapy sessions in which he became an active member, gained a leadership role and was consistently polite and considerate.

[69] Given [HH]'s disability, a gentle pace to therapy was adopted by [the therapist] particularly in the early stages. Repetition of content to reinforce and confirm learning was a feature of the sessions especially during the periods of disruption due to COVID

19 lockdowns. As mentioned earlier, the way the sessions were structured and approached was in keeping with recommendations in the report from Talking Trouble.

[70] The programme was very comprehensive and addressed a variety of issues in addition to the content that focussed on harmful sexual behaviours. For example the issues referred to above about social isolation were addressed and by the end of therapy [HH] was involved in significantly more interactions with peers outside school hours and he was experiencing enjoyment in his social life compared to the situation when he started. The therapy also included processing trauma-related emotional and interpersonal difficulties. As a result, there was a marked reduction in [HH]'s attention deficit and hyperactivity problems at the end of therapy. He was also placed in the normal range for social skills and competence.

[71] A letter from [the therapist] to [the social worker] dated 27 July 2021 includes the following comment:

> [HH] has completed relevant therapy at Safe Network and presents as a very low risk of committing further Harmful Sexual Behaviour (HSB). He has completed an End of Therapy Support and Safety Plan (EOT SSP) outlining his understanding of risks that contributed to the HSB and identifying protective factors that countervail historical risks. Completing such work has been important prior to attempting to complete apology letters.

[72] The conclusion to the final report from SAFE, dated 7 December 2021 says:

> [HH] has successfully completed therapy to help address safety concerns regarding his engagement in HSB between [date deleted] 2018 and [date deleted] 2019. [HH] has consistently taken full responsibility for the HSB and is deeply remorseful for its harmful impacts on whānau. [HH] engaged well in efforts to identify factors that likely contributed to the HSB and he has developed strengths to avert its continuation. [HH] has matured considerably during his engagement in therapy at Safe, developing an appropriate understanding of consent and sexual boundaries and control over callous impulses that influenced his engagement in HSB as a 14-year-old. No further incidents of HSB have occurred since [date deleted] 2019 and [HH] is determined and capable of desisting from further incidents, due to the harm that they risk causing both to others and to himself.

Other aspects of the FGC plan

[73] [HH]'s completion of every other aspect of his FGC plan was to an equally exceptional standard. Comments [the social worker] made in her report about that include the following:

(a) [HH] was very engaged with every aspect of his FGC plan and every professional that worked with him commented on his high level of commitment, dedication, and willingness to reflect, understand, and grow, regardless of how difficult this could be at times due to his intellectual disability.

(b) [HH] completed his plan with the utmost diligence regardless of how hard and confronting some things were along the way. In addition to this, some restrictions took place along the way such as COVID-19 lockdowns, but this did not stop [HH] from completing his plan conscientiously.

(c) The mentoring aspect of [HH]'s plan supported him with working on his social skills and building healthy relationships with other young people. The mentor, [name deleted], was very impressed with [HH]'s progress and the fact that he was able to achieve his goals including completing his CV and obtaining his learner's driver's licence. (He would have had his Restricted Driver's Licence by now if it was not for the COVID-19 lockdown restrictions).

(d) [HH] attended weekly sessions of Wing Chun martial arts except during lockdown periods. He played a game of chess with Senior Constable Wanden who said [HH] played a good game (but Senior Constable Wanden won).

(e) A $150.00 donation was paid by [HH] to WellStop, an organisation working in the community to prevent sexual abuse and to support victims of sexual harm.

(f) At times [HH] felt that his plan was challenging but he has been able to see how capable he is and has grown in confidence. As well as competing his plan, he has engaged in some other supports, continued with his part time job, attained NCEA level 1 and is now working on level 2 at High school.

(g) [The social worker] observed [HH] make changes in his thinking and behaviour over the course of the plan and saw him mature significantly.

The CRC

As it applies to [HH]

[74] The Act requires that the rights of children and young people under the CRC must be respected and upheld. Every so often, the UN issues General Comments to provide States parties, such as New Zealand, with guidance on how to apply the CRC. The latest UN general comment on Child Justice was issued on 18 September 2019 ("the UNGC") and it provides especially helpful guidance in this case.

[75] The introduction to the UNGC includes the following:[3]

…

> 2. Children differ from adults in their physical and psychological development. Such differences constitute the basis for the recognition of lesser culpability, and for a separate system with a differentiated, individualized approach. Exposure to the criminal justice system has been demonstrated to cause harm to children, limiting their chances of becoming responsible adults.
>
> 3. The committee acknowledges that the preservation of public safety is a legitimate aim of the justice system, including the child justice system. However, States parties should serve this aim subject to their obligations to respect and implement the principles of child justice as enshrined in the

[3] *Committee on the Rights of the Child General comment No. 24 (2019) on children's rights in the child justice system* UN Doc CRC/C/GC/24 (18 September 2019).

> Convention on the rights of the child. As the Convention clearly states in Article 40, every child alleged as, accused of or recognised as having infringed criminal law should always be treated in a manner consistent with the promotion of the child's sense of dignity and worth. Evidence shows that the prevalence of crime committed by children tends to decrease after the adoption of systems in line with these principles.

[76] A strong theme in the UNGC is for States parties to be scaling up the diversion of children away from formal justice processes at any time prior to or during proceedings. In relation to that it says:

> 15. Diversion involves the referral of matters away from the formal criminal justice system usually to programmes or activities. In addition to avoiding stigmatisation and criminal records, this approach yields good results for children, is congruent with public safety and has proved to be cost effective.
>
> 16. Diversion should be the preferred manner of dealing with the children in the majority of cases. State parties should continually extend the range of offences for which diversion is possible including serious offences where appropriate.

[77] The UNGC is also instructive in relation to how to approach the issue of imposing sanctions on the one hand versus safeguarding the well-being and best interests of a child on the other.

> 76. The Committee emphasizes that the reaction to an offence should always be proportionate not only to the circumstances and the gravity of the offence, but also to the personal circumstances (age, lesser culpability, circumstances and needs, including, if appropriate, the mental health needs of the child), as well as to the various and particularly long-term needs of the society. A strictly punitive approach is not in accordance with the principles of child justice spelled out in article 40 (1) of the Convention. Where serious offences are committed by children, measures proportionate to the circumstances of the offender and to the gravity of the offence may be considered, including considerations of the need for public safety and sanctions. Weight should be given to the child's best interests as a primary

consideration as well as to the need to promote the child's reintegration into society.

[78] On this topic, the 2007 UNGC on child justice stated that considerations such as the need of public safety and sanctions must always be outweighed by the need to safeguard the well-being and the best interests of the child and to promote his/her reintegration.[4]

The CRC

As it applies to [TS] and [NS]

[79] Article 19 of the CRC provides:

> 1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
>
> 2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

[80] The latest UN General Comment on article 19 of the CRC is dated 17 February 2011 and begins with an overview explaining that it is based on the following fundamental assumptions:

- "No violence against children is justifiable; all violence against children is preventable";
- A child rights-based approach to child caregiving and protection requires a paradigm shift towards respecting and promoting the human dignity and the

[4] *Committee on the Rights of the Child General comment No. 10 (2007) Children's rights in juvenile justice* UN Doc CRC/C/GC/10 (25 April 2007). [At 71]

physical and psychological integrity of children as rights-bearing individuals rather than perceiving them primarily as "victims";

- The concept of dignity requires that every child is recognized, respected and protected as a rights holder and as a unique and valuable human being with an individual personality, distinct needs, interests and privacy;
- The principle of the rule of law should apply fully to children as it does to adults;
- Children's rights to be heard and to have their views given due weight must be respected systematically in all decision-making processes, and their empowerment and participation should be central to child caregiving and protection strategies and programmes;
- The right of children to have their best interests be a primary consideration in all matters involving or affecting them must be respected, especially when they are victims of violence, as well as in all measures of prevention;
- Primary prevention, through public health, education, social services and other approaches, of all forms of violence is of paramount importance.[5]

[81] The total absence of [TS]'s and [NS]'s views, and minimal, generic information about the impact of the offending on them via their parents' victim impact statements, suggests that their rights in relation to such matters have not been recognised, respected and protected.

The CRPD

[82] Respecting and upholding [HH]'s rights under the CRPD required, amongst other things, making such adjustments as were necessary to the processes he was required to participate in, to enable his full participation. Instead of viewing his disability as a problem, the burden is on the system, and everyone in it, to adjust and adapt to ensure his meaningful engagement in the same way a young person without a disability would be able to engage.

[83] Although all the professionals involved in this case have done that to some extent and must be acknowledged, there are two who deserve special praise. One is

[5] *Committee on the Rights of the Child General comment No. 13 (2011) The right of the child to freedom from all forms of violence* UN Doc CRC/C/GC/13 (17 February 2011).

Ms Wright for her role as [HH]'s communication assistant, whose contribution I have commented on already.

[84] The other is [the therapist] for the way he carried out his role as [HH]'s therapist. It is clear he gave a great deal of thought to how best to do that work, including accommodating [HH]'s disability which required a carefully managed and individualised approach. As a result, a high level of trust was established between the two which I am sure contributed to [HH] feeling safe and secure in the therapeutic relationship which endured for a long time and produced a great result.

[85] As well as being in conformity with the CRPD, the approach taken here was in keeping with the principle in the Act that regard be paid to [HH]'s experience of his disability and the difficulties and discrimination he has encountered because of it. Helping him work through those issues as part of the therapy will help support his full and effective participation in society in future.

Primary considerations

[86] I return now to the four primary considerations in s 4A of the Act.

[HH]'s well-being and best interests

[87] When [HH] first came before the court at the age of 14 he presented with a range of concerning issues. He was the victim of sexual abuse himself. In addition to diagnoses of Intellectual Disability and Adjustment Disorder with anxiety, he satisfied many of the diagnostic criteria for ADHD, PTSD, and ASD as well. He had experienced a lot of trauma during his childhood. Assessments obtained in the early stages of the proceedings refer to concerns such as [HH]'s sexual distress and pre-occupation. He was timid, unconfident and socially isolated. As well as the guilt and shame he felt for what he did to [TS] and [NS], he faced the fury of extended whānau members and has lived with the knowledge of the damage his actions caused to others' relationships.

[88] As a result of the focus on [HH]'s well-being and best interests as part of the FGC plan, he is now assessed as being very low risk of committing further HSB. He has matured considerably and become socially engaged and more confident. There has been a marked reduction in his ADHD-related problems, and he is now in the normal range for social skills and confidence. He has gained NCEA level 1 qualifications at school and will pursue more. It has taken nearly three years to complete the Youth Justice processes and during that time he has worked to a consistently high standard to bring about those changes and to do what he can to try and put things right with his victims.

[89] On 21 December 2021, [HH] left the court as a [under 18]-year-old with the confidence and the tools he needs to continue now being a valuable, contributing, law-abiding member of the community who poses a very low risk of further similar offending. There are obvious benefits in that outcome for [HH] in terms of his well-being and best interests, but there are obvious benefits for the community too.

The public interest including public safety

[90] There is a public interest in the purposes of the Act being fulfilled, the principles applied properly and the rights of children and young people under the CRC (and, where relevant, the CRPD) being respected and upheld.

[91] As the UNGC points out, evidence shows that treating children and young people who offend in a manner consistent with the promotion of their sense of dignity and worth tends to decrease the prevalence of crime they commit whereas exposure to the criminal justice system has been demonstrated to cause them harm, limiting their chances of becoming responsible adults.

[92] There is also a public interest in diverting children and young people away from formal criminal justice processes before, and at any stage during, court proceedings because as well as avoiding stigmatisation and criminal records, this approach yields good results for children, is congruent with public safety and has proved to be cost effective.

[93] There is a public interest, including public safety, in enabling an approach that will reduce, if not remove, the risk of further offending by a young person as has happened here with [HH].

Victims interests

[94] Having proper regard to the interests and views of all victims, and taking them into account when deciding what measures should be taken for offending, is essential for achieving a just outcome.

[95] As pointed out earlier, s 5 of the Act requires that a child must be encouraged and assisted, wherever practicable, to participate in and express their views about any proceeding, process or decision affecting them so that their views can be taken into account. That, I believe includes children who are victims because they are, or can be, affected by the proceedings, processes and decisions of the court, perhaps just as much as a child who is the subject of proceedings. The sentencing decision of a court can potentially have a profound effect on a child victim, including an impact on their sense of dignity and worth, just as much as a decision about the child or young person who offends.

[96] Under article 19 of the CRC, children who are victims must be seen as rights-bearing individuals rather than perceiving them primarily as "victims". They must be recognized, respected and protected as a holder of rights and as a unique, valuable human being with an individual personality, distinct needs, interests and privacy. Their views should be made known, respected and given due weight in all decision-making processes.

[97] I regret not knowing what [TS] and [NS]'s views were relevant to the sentencing, and what impact the offending has had and is still having on them so that I could have proper regard to it. It is possible that they did not wish to be heard and did not want the court to have information about the impact the offending has had on them. If that is the case, and it was a properly informed wish, it would have been helpful to have received that information from the police so it could be acknowledged and the girls' right to make that choice could be respected.

[98] If that was not their wish, then the failure to have their voices heard, their views given due weight and the impact of the offending on them taken into account properly in the sentencing process is contrary to their best interests and disrespectful of their entitlement to be treated with dignity. They may one day want to know what thought I gave to them, their views and the impact of the offending and will be justifiably disappointed that such important information was not provided.

[99] There would have been much more substance to the police submissions about the effect of the offending on the victims if such information in relation to [TS] and [NS] had been provided.

[100] Obviously, the means by which a child victim's views are obtained and communicated to the court must be managed with great care and sensitivity. In some cases it may need to be carried out by skilled professionals so as to avoid re-traumatising the child. Similarly, the means by which a description of the impact of the offending on them is obtained and communicated should be managed with great care and sensitivity. But it should always be done unless a child of sufficient age and maturity makes an informed choice not to provide it.

[101] In relation to their mother, [VS], I doubt there was any decision I could make that would ease the heartache and pain she has suffered. My hope is that with the sentencing now out of the way, she will feel some sense of closure. In her victim impact statement, [VS] asked the question, "how do we break the cycle?" I hope she will see that an answer to that question is provided in what has happened here for [HH]. There are programmes available to help reduce or remove the risk of such offending occurring, thereby stopping it from continuing down the generations. My sincere hope now is for the reunion between [VS] and [JH] and their whānau to go well and that the time ahead will be one of healing for them all.

[102] [WS]'s anger is evident from his victim impact statement but I hope he too will feel a sense of closure now that the sentencing has taken place and that he will be able to move on.

Accountability

[103] [HH] has been held accountable for his offending sufficiently. He had been before the court for nearly three years which is a very substantial period given his age and disability. In that time, he has stayed out of trouble altogether, completed his FGC plan, including the SAFE programme in a most impressive fashion and complied with his bail conditions without ever breaching. Those achievements in themselves are extremely rare for any young person who is before the court for that long, let alone one with the challenges [HH] has.

[104] His young age at the time of the offending was a mitigating factor in determining whether or not to impose a sanction, as was his disability and the influence of that and his traumatic childhood on his offending. It was also highly relevant that the offending was an isolated incident and not part of a continuing pattern of abusive behaviour.

[105] In choosing the least restrictive option as being appropriate in the circumstances, I found the guidance in the UNGC very instructive. That includes:

(a) We should continually extend the range of offences for which diversion is possible including serious offences where appropriate. Seriousness alone cannot be a reason to impose a sanction as sought by the police because, almost by definition, the Youth Court only deals with children and young people facing serious charges. About 80% of all young people who come to the attention of the police are not charged and brought to court but are dealt with instead in the community by alternative action. Therefore, those who are charged and brought to court tend to be facing serious charges. Approximately half of all the young people who come before the Youth Court in New Zealand have their charges discharged under s 282. It is therefore not a rare outcome even for serious offending in appropriate cases such as this.

(b) Reaction to offending should be proportionate not only to the gravity of it but also to personal circumstances such as age, lesser culpability,

needs, including, if appropriate, mental health needs all of which are relevant issues in this case.

(c) A strictly punitive approach is not in accordance with article 40 of the CRC and weight was given to [HH]'s best interests as a primary consideration as well as the need to promote his re-integration into society. To stigmatise him now as a sex-offender for the rest of his life, when he is at a very low risk of being one, would have been a severe sanction to impose.

(d) In deciding the outcome in such a finely balanced case, considerations such as sanctions were outweighed by the need to safeguard the well-being and the best interests of [HH] to promote his reintegration. This was a very finely balanced decision and it was that guidance from the UNGC that tipped the balance.

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Judge AJ Fitzgerald
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 06/01/2022