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

IN THE YOUTH COURT
AT WHANGANUI

I TE KŌTI TAIOHI
KI WHANGANUI

CRI-2018-267-000002
[2021] NZYC 171

NEW ZEALAND POLICE
Prosecutor

v

[WH]
Young Person

Hearing:	23 April 2021
Appearances:	C B Wilkinson-Smith for the Crown S Jefferson for the Young Person
Judgment:	23 April 2021

NOTES OF JUDGE J D LARGE ON SENTENCING

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[1] [WH], you were found guilty of rape in the Youth Court following a judge-alone trial. I was the presiding judge and at the initial trial I acquitted you because I was not satisfied the legal test had been met.

[2] I should say, at the outset, that I am conscious of [the victim]'s comments and I should say that any publication of my report will be anonymised, so while I refer to you [WH] and to the victim as [the victim], that will not be published anywhere but I am conscious of [the victim]'s comments in her victim impact statement that following that finding she considered that the [location deleted] community thought she was a liar and now the Judge agreed.

[3] I want to correct that because in my judgment I did not say that [the victim] was a liar. I said the legal test had not been met. As it transpired, the test I applied was the wrong one and that was corrected on appeal and on applying the appropriate test the charge was proved and the matter proceeded from there.

[4] So to [the victim], I say I did not think she is a liar, and I do not think she is a liar, but there are, on occasions, where witnesses' evidence is not sufficient to meet the legal test and that is what essentially the position I was in at that time.

[5] The background to the offending was that you and [the victim] were at a [occasion deleted] party. She became extremely intoxicated and was vomiting and sometimes in the presence of others and subsequently privately. She went to bed but later awoke.

[6] After her friend [name deleted] had gone to bed, she went to bed again. She was awoken by someone going into the room. They were told to leave. She was woken again when you went into her room and she awoke to you on top of her having sexual intercourse with her. She objected but you continued.

[7] The effects on [the victim] are far-reaching. I do not doubt for a moment they have had an effect on both you and your family as well.

[8] I am obliged in terms of the legislation to take into account [the victim]'s views. Her life changed markedly from that point to this. She does not want you to go to prison today but she wants you to take responsibility and to get counselling and to learn what consent is and she wants you not to do this to any other person in the future.

[9] She finds it difficult to socialise now because people she thinks avoid her or check themselves when they are making jokes in case they offend her. She does not want to be seen as a victim and she has found this whole process stressful. I completely understand that. She had planned to go on to study but that, sadly, did not come to pass and one hopes that at some point in the future she will be able to get some closure and move on to that potential for her.

[10] She wants her old life back because she misses having her friends and she misses being accepted, being part of a friendship group.

[11] I have just summarised the four pages, but a lot of that is very deep-seated and it will take [the victim] some time and she will need some help to get through that. I hope the outcome and closure today will enable her to start the next chapter of her life rather than remain within this one.

[12] Subsequent to the charge, you went to a family group conference. The plan was agreed upon.

[13] It was accepted by the Court, by Judge Rowe and it was then completed, effectively, by you. You have completed the 100 hours' community work and when I read the worksheets or the hourly record sheets, you did not just complete it, you did it very well and obviously you are a hardworking young man who impressed the people you were working for. That is to your credit.

[14] I have seen the receipt for the emotional harm payment you made to [the victim] and I have read the WellStop reports showing that you have completed that programme, not just completed it, but completed it very well because you obviously showed a great deal of commitment to that whole process.

[15] Mr Jefferson seeks a discharge pursuant to s 282.

[16] The Crown seek a discharge pursuant to s 283. The Crown is not seeking a transfer through to the District Court for sentence.

[17] The issue of discharge was a live one at the family group conference and it was not agreed by the Crown that they would be seeking or agree to a 282 discharge if you completed the plan successfully but clearly indicated if you had not then they would be looking at a more serious outcome to the 283. So there is no surprise to you that the Crown are seeking a discharge pursuant to s 283.

[18] The Oranga Tamariki Act 1989 does not have a specific approach or legislative approach to sexual offending committed by young people. Rather, it sets out a hierarchy of sentences available or responses available for the Youth Court to consider.

[19] At the bottom of that spectrum is a discharge pursuant to s 282 which provides, as Mr Jefferson said for an absolute discharge and operates as though the charge had never been laid.

[20] A s 282 discharge is available for serious offending and including sexual offending and that is confirmed by the High Court in *MW v Police*.[1]

[21] Section 283(a) which is the next level in the hierarchy, also provides for a discharge but that has a notation on your record.

[22] I do not have to consider the other provisions of s 283 because the Crown is not seeking anything beyond the 283(a) outcome.

[23] It is quite common for the Youth Court to delay sentencing or determination of Youth Court matters until programmes are completed. Here, you have completed the WellStop programme and having completed that programme, as I said earlier, Mr Jefferson now seeks a discharge pursuant to s 282.

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[1] *MW v Police* [2017] NZHC 3084.

[24] I should say that each case turns on its own facts. There are essentially no two cases the same.

[25] Here, [the victim] was vulnerable. You knew that. But, also I have to factor in that you were [under 16 years] of age at the time.

[26] In considering whether I adopt a 282 outcome or a 283(a) outcome, I have to consider the purposes of the Act, principles of the Act which were expanded and enhanced by changes in July 2019.

[27] The updated purposes entail promoting the wellbeing and best interests of children, young people and their families as well as whānau, hapū and iwi by complying with a prescribed list of requirements and obligations.

[28] I have also got to remain mindful of the primary considerations set out in s 4(a)(ii) of the Act, namely, firstly, the wellbeing and best interests of the young person, public interest, the interests of any victim and accountability of you as a young person for your behaviour.

[29] When I am looking at those considerations or weighing them up, I have to be guided by the general principles contained in s 5 and the youth justice specific principles contained in s 208 of the Act.

[30] Section 5(1)(b) stipulates that the young person's wellbeing must be at the centre of decision-making.

[31] The youth justice principles contained in s 208 have a strong diversionary underpinning and specifically states that a young person's age is a relevant mitigating factor in determining whether to impose a sanction and the nature of the sanction to be imposed. That is s 208(2)(e).

[32] It further states in s 208(2)(f) that any sanction imposed must be the least-restrictive that is appropriate in the circumstances and must take the form that is most likely to maintain and promote the development of the young person within their family, hapū or group.

[33] Section 208 also includes reference to victim's views and requires the court to take the views of the victim into account when determining the appropriate measure for dealing with offending committed against them. And, of course, the victim's participation is encouraged.

[34] Here, while [the victim] is not present today, I have her victim impact statement. I have her mother present. And I have the input at the family group conference.

[35] Section 284 is also relevant here and I do not intend to list the sub-paras (a) through (i). In essence, it looks at the nature of the offending, personal characteristics, circumstances, the attitude of the person towards the offence, family response, effect on the victim – it is really repeating what I talked about earlier.

[36] The final matter I have got to consider in terms of legislation is s 280 of the Oranga Tamariki Act which provides the court must not impose an outcome unless satisfied that a least-restrictive outcome would, in the circumstances, be clearly inadequate having regard to ss 208 and 284.

[37] A recurring theme amongst some earlier cases is a view that a s 282 discharge does a disservice to victims of sexual offending given the significant lifelong effects they will suffer following offending of this nature.

[38] A rehabilitative approach, arguably, runs the risk of [the victim] and her family feeling a "soft" approach has been taken and possibly that a lot of time and effort has been put into [WH] and his family but not much put into [the victim] or her family.

[39] The Youth Court, in a case *Police v SH*, acknowledged that, but said victims' interests can be met short of imposing a notation.[2] It went on to say that in fact victims and public safety will often be best served by a rehabilitative and reintegrative focus.

[2] *Police v [OD]* [2018] NZYC 310.

[40] I do not want [the victim] to feel that she is subordinate to [WH] at all and I am hopeful that there will be supports made available to her subsequent to the conclusion of these proceedings.

[41] I acknowledge that [the victim] is not a passive observer in the process. I have heard her views and I respect and recognise those and I acknowledge immediately that they are relevant at this disposition today, but I should say they are relevant but they are not necessarily determinative of the outcome today.

[42] There are a number of cases where the Youth Court has considered sexual violation by a young person and, as I said no two cases are the same.

[43] The outcomes have ranged from 282 discharge to 283 discharges. Judge Russell, in *Police v SC*, where there were two victims and the incidents were three weeks apart.[3] Intercourse occurred on the first occasion and digital penetration on the second occasion. The Judge held there because part of the FGC was a referral to STOP and STOP assessment indicated the young person had ameliorated all significant dynamic risks over the course of the intervention and his compliance was outstanding.

[44] The Judge noted that the principle of promoting reintegration of a young man into the community would not be enhanced by him having a record if he was discharged under 283 rather than 282. He considered it to be finely balanced. There were other factors such as the young man's background, learning disabilities, family dysfunction. There the Judge held that all of those factors and other ones, pointed to a possible failure to understand consent.

[45] The key issue for the Judge on that occasion was the favourable report from STOP. In that case there were two events. In [WH]'s case we are dealing with one event.

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[3] *Police v [WP]* [2021] NZYC 2.

[46] Another case, *R v TG*.[4] The court indicated that had the young person been an adult, the likely sentence would be between six to eight years' imprisonment. But, the Court recognised that there was a well-established principle that criminal responsibility for youth is significantly reduced in recognition of incomplete brain develop and in that regard, the often cited case of *Churchward v R* is referred.[5]

[47] In that case the young person, who had completed the Safe programme and was supported by his mother and partner. The victim had moved on and the court gave the young person the opportunity to move on as well by discharging under s 282.

[48] At the other end of the spectrum, *R v NV* where the offending occurred against the young person's sister who was under six years, and the offending occurred over a two week period.[6] He was 15 at the time and involved licking his sister's genitalia and anus and having both vaginal and anal intercourse with her.

[49] In that case the young person had completed his FGC plan, including WellStop, mentoring and 100 hours' community work and his risk of re-offending had reduced significantly. In that case Judge Raumati held that s 283(a) was the least-restrictive approach that could appropriately take into account the impact on the victim.

[50] Another case, *R v Y*, the 16 year old victim was with the young person and others at a party.[7] They were extremely intoxicated. She entered a tent in the backyard with the young person and two others. She ended up on her stomach with her lower clothing and underwear pulled down. The young person's two associates took turns to digitally penetrate her and slap her buttocks and the young person recorded the events on his cellphone. During that recording the young people were heard encouraging each other.

[51] In that case, the court again noted the Court of Appeal observations in *Churchward v R* regarding the age-related neurological differences between youths and adults.

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[4] *R v [deleted]* [2020] NZYC 331.
[5] *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446.
[6] *R v NB* [2019] NZYC 225.
[7] *R v [ND]* [2018] NZYC 602.

[52] The court found there that the sexual violation and the making of an intimate visual recording was too serious to be recorded a s 282 discharge and a s 283(a) discharge was made. That was notwithstanding the positive engagement with WellStop but there the ongoing effects to the victim were ongoing periods of depression and self-harming behaviour and the court felt 282 would not be sufficient in the circumstances.

[53] In each of the cases that I have seen discharges pursuant to s 283(a), the offending has been more serious than that which occurred against [the victim].

[54] I do not for a moment minimise the behaviour that you occasioned on [the victim] and in no way should that be seen to be not serious.

[55] It is serious offending and as was said in an earlier case, if you had been an adult in the adult court, you would be facing imprisonment today.

[56] What I have to consider is your situation, the effects on you and what is the least-restrictive outcome.

[57] In addressing s 289 which provides the Court must not impose an outcome unless satisfied that a least-restrictive outcome would, in the circumstances be clearly inadequate having regard to s 208 and 284.

[58] In my view that, essentially requires me not to impose a 283(a) outcome because I am not satisfied that the least-restrictive outcome would, in the circumstances, be clearly inadequate.

[59] The events on the night were far reaching and it has been a long, tortuous journey for [the victim] and no doubt for [WH]'s parents and [the victim]'s parents and family. I am hopeful that today's outcome will at least give some closure.

[60] [WH] has complied with the family group conference plan and, as I said earlier, he has complied in a way that is seen by the WellStop report writer to be impressive.

[61] The report indicated that he met his obligations regularly and in a timely way, he was interested and well-motivated to address the identified issues and to learn. He engaged and discussed subject matter openly and honestly and, most importantly, did not shy away from the hard conversations and was open with his family in his discussions after the sessions.

[62] In addition, he completed the community work, he has made an emotional harm payment.

[63] The 282 outcome is supported by the Oranga Tamariki youth justice worker.

[64] I am mindful of [WH]'s work and his career aspirations in the [industry deleted] overseas. Initially I had thought that was potentially a red herring, however I am told that [WH] has undertaken [work] in Australia so the prospect of him travelling to the UK is, I accept, a real one.

[65] He is a young man who has, from the materials I have read, a good potential future. He needs to learn from his past so there are no recurrences, because if there is anything of this nature, he will end up in jail and it will be no one's fault but his.

[66] I am hopeful that [the victim] will get some assistance outside of the court system and get the counselling she will need to close this chapter and start a new one.

[67] The one remaining issue relates to the Crown application for the right for [the victim] and her family to correct impressions in the public arena in the small community of [location deleted].

[68] Clearly, my decision has the usual suppression orders relating to Youth Court outcomes and young offenders' names and victims' names.

[69] Mr Jefferson opposes the application sought by the Crown saying that any publication will be in, effectively, breach of the privacy of [WH] and the victim.

[70] But here, remembering the background, it is an unusual situation where there had been allegations in the [location deleted] community before any complaint had

been laid with the police and if I remember correctly it was [WH]'s mother who took him to the police station to have the matter raised and consequently police spoke with [the victim], rather than [the victim] making a formal complaint herself.

[71] From that and the other materials referred to in the Crown submissions, people in the community were made aware of the acquittal which occurred prior to the matter being revisited and the charge being found proved.

[72] This is an unusual situation and I do intend to make the order sought by the Crown in relation to the limited lifting of a prohibition for any publication.

[73] The order is that [the victim], or a member of her family, that is her immediate family being her mother, father or siblings, is not prohibited from correcting a person who approaches her or that family member who is aware of the identity of the parties involved and the acquittal and makes comments about the matter.

[74] [The victim] and her family members are, in those circumstances, allowed to correct the person as to the outcome only.

[75] There should be no written comments about the matter. There should be no publications on social media. [The victim], or her family, are not permitted to initiate the conversations. The purpose of that order is to correct the wrong impression rather than publish information.

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Judge J D Large
District Court Judge

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