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IN THE YOUTH COURT
AT TAURANGA

I TE KŌTI TAIOHI
KI TAURANGA MOANA

CRI-2021-270-000073
[2022] NZYC 223

NEW ZEALAND POLICE
Prosecutor

v

[LS]
Young Person

Hearing: 3 June 2022

Appearances: A Pollett for the Prosecutor
R Adams for the Young Person

Judgment: 3 June 2022

ORAL JUDGMENT OF JUDGE C J HARDING

Introduction – Facts

[1] [LS] was born on [date deleted] 2004 and face 10 charges alleging sexual violations, rapes and assaults against five different 15 year old girls. They are all present today in person or digitally. The offending was between [date 1] 2020 and [date 9] 2021.

[2] Eight charges were sexual violation; four of rape, and four of other sorts of sexual violation – oral sex, anal sex, and digital penetration. The remaining two charges were doing an indecent act.

[3] To a person those involved in the case were part of a wider group of friends. [LR] had dated him. [MB] had been a friend and his girlfriend for a time. [RM] had been dating him. [EH] and [DL] were within the extended group.

[4] [LS] sexually violated [MB] by rape and unlawful sexual connection. They had previously on that occasion had consensual sex at his home. He then had sex with her despite being told no and later forced her mouth onto his penis for some time over her clearly voiced refusal. There was no consent for either violation.

[5] He raped [RM] with whom he had previously had a relationship, including consensual sex, and also inserted his penis into her anus. He filmed part of what occurred. She had also made her lack of consent clear.

[6] He committed an indecent act on [EH] by taking her hand and forcing her to touch his penis and subsequently sexually violated her by way of rape over her clearly voiced objections in a number of ways. She was a virgin. She was having her period and he removed her tampon before raping her on the ground, under some shrubs in a park away from the party they had both attended. She protested to no avail.

[7] He committed an indecent act on [DL] in the back of a car placing her hand on or about his penis and pubic hair and digitally penetrated her. Neither action was consented and their activities earlier in the night could not have resulted in a reasonable belief in consent.

[8] He sexually violated [LR] in her bed digitally and then by way of rape. She was at all material times, asleep. There could have been no consent.

[9] The charges were all found proved after a defended hearing.

[10] [LS] has no prior Youth Court history.

First Family Group Conference

[11] A family group conference took place on 16 March 2022. Amongst those in attendance was one of the victims, [EH], her father, another of the victims, [LR], and the mother of another.

[12] [LS] and his mother apologised to those present and their parents. A safety plan was put in place and that conference endorsed the Court's decision to direct the preparation of a SAFE assessment and a psychological assessment.

Psychological Assessment

[13] A psychological assessment under s 333 was directed and completed dated 19 April. A number of points appear from that report:

(a) Neither of [LS]'s parents were aware that he was sexually active.

(b) When the police summary of facts was discussed with [LS] he responded saying that he could not believe the lies, that it was all totally untrue, and that he only ever had consensual sex with the females in question. He continued with his position at the defended hearing, that the girls were motivated to conspire against him because they were all unhappy with him having sex with them.

(c) During 20 sessions of psychological therapy with a registered psychologist starting from March 2021, the psychologist gained the impression that [LS] gained a lot of kudos from female attention, and that a core part of his identity was seeing himself as an attractive sexual

partner. He constructed a false reality that girls just wanted to have sex with him, but it was concluded that he was psychologically resilient.

(d) During that assessment he displayed an upbeat demeanour with a rather superficial level of rapport and limited expressions of difficult or unpleasant feelings. He reported few worries or problems.

(e) Formal testing revealed no marked elevations, including clinical psychopathology, but suggested he is quick to feel that he is being treated inequitably and believes there is a concerted effort among others to undermine his interests.

(f) His interest in and motivation for treatment was described as "somewhat lower than is typical of individuals being seen in treatment settings". His responses suggested that he was satisfied with himself, not experiencing any marked distress, and sees little need to change his behaviour. If treatment were to be considered, it said, [LS] may be somewhat defensive and reluctant to discuss personal problems and as such reluctant to participate or co-operate in treatment.

(g) He rated as "very true" that he was the target of a conspiracy.

(h) His mother reported that it was "pretty much true" that [LS] was perfect in every way, tells the truth, and does not even tell white lies but also acknowledged that he seeks pleasure without caring about what bad things could happen.

(i) He has no symptoms consistent with any mental health diagnosis.

(j) His parents were assessed as forthright and law-abiding, but at times very black and white and highly partisan towards believing [LS]'s recounted events without question.

(k) He presented as a mixed risk profile for sexual offending. The number of victims, the use of physical force on several occasions, and the

degree of intrusiveness and severity of the offending significantly add to his risk profile. His apparent lack of regard for the law only weeks after being interviewed by the police was reported to be of concern (allegations of indecent assault and attempting to coerce an intoxicated girl to have sex with him were not pursued as neither of the females wished to make any formal complaint).

(l) Protective factors were identified as the lack of wider antisocial elements in [LS] and his peer group and family as well as the absence of other obvious difficulties. Those factors are protective factors that reduce the risk profile and increase his chances of benefiting from therapy.

(m) In the absence of engaging in therapy, [LS]'s high functioning profile was said to have the potential to make him a more high-risk sex offender should he remain focused on using his abilities to entrap victims in a predatory and calculated fashion.

(n) The extent of denial in both of his parents, and his father's lack of support for him attending therapy at that time, were risk factors identified necessitating a wider family systems approach to treatment.

(o) [LS]'s denials were not assessed as a salient risk factor. It was concluded that [LS] is unlikely to admit his offending outside a safe and carefully managed therapeutic context. Some risk factors such as [LS]'s use of pornography and obsessive sexual interests, impulses and thoughts are less well-known risk factors, and there appear to be some suggestions that these may feature more than he is letting on.

(p) The report concludes that in order to reduce [LS]'s risk of offending, the most critical feature of a sentence needs to be him attending and engaging in comprehensive specialised treatment for sexually abusive behaviours, ideally with his parents involved. The Auckland SAFE programme was thought to be appropriate and the recommendation was

> that a feature of [LS]'s sentence should stipulate that he fulfils the SAFE criterial for engagement which needs to be operationalised and measurable by SAFE and all parties. From a treatment engagement perspective, it is suggested he would be more likely to benefit from a Youth Court disposition knowing that failing to meet that might trigger a re-sentencing in the District Court. A District Court sentence was said to risk him having little incentive to authentically engage in treatment. A rigorous safety plan was said to be needed.

SAFE Assessment

[14] [LS] was assessed by the SAFE organisation. Their report dated 21 April identified sexual matters as requiring immediate management. Disturbingly, [LS] still maintained he had consent for all events which occurred. My reading of the report was that it recommended a six month SAFE intervention. [LS]'s counsel suggests 12, but clearly weekly counselling for [LS] is involved, monthly for the family, and three month reviews.

Second Family Group Conference – 22 April

[15] A second family group conference occurred. There was no agreed outcome as to disposition, but all parties agreed counselling would be helpful as recommended in both the psychological report and the SAFE assessment.

Social Worker's Report and Plan

[16] A social worker's report and plan followed, dated 22 April 2022. The social worker's report recommended supervision with activity for six months followed by a supervision order for six months to be made at the conclusion of the supervision with activity.

[17] The social worker reported that [LS] was remorseful that the victims and their families have had to engage in the FGC process. The report tellingly does not record remorse for the victims or for what had happened. It observed that since the

allegations came to light, [LS] was targeted by associates and family members of the victims, bullied and threatened to the point that he was relocated to an address in the Greater Auckland area. After his new school was notified of the charges and the community became aware of the position, he was again targeted and threatened and has since been completing correspondence school. The stress caused him to develop [condition deleted] requiring hospital treatment.

[18] The report noted that in September 2021 a stringent safety plan was developed and that since that time [LS] has been complying with that.

[19] The social worker reports that [LS] now accepts guilt, in contradistinction with the SAFE report. Also, that the charges are serious, and warrant appropriate consequences. That view as reported by the social worker is also in contradistinction to that reported in the s 333 report. [LS]'s parents are recorded as both supporting [LS]'s assertion of innocence but accepting that [LS] needs to be held accountable and complete a treatment programme. That appears to be a distinctly ambivalent position.

[20] The social worker concludes that on all of the information it is clear [LS] requires a therapeutic pathway to address his offending for a period of 12 months. She recommends this is best served within the youth justice jurisdiction as opposed to the District Court and recommends supervision with activity for six months to be followed by a supervision order for six months.

[21] The terms proposed for those orders are entirely rehabilitative. Other accountability measures are notably absent.

Plan for Proposed Orders

[22] The proposal is that he resides primarily with his mother in [location F] and complete the SAFE programme. It is also proposed that his parents support him, supervise the harmful sexual behaviour safety plan, will report concerns or non-compliance and engage with the SAFE network in support of his treatment.

[23] The social worker is to maintain weekly contact with [LS] and monitor the plan and support additional referrals as and where necessary.

Sentencing Principles:

Duration of orders

[24] Section 296 of the Oranga Tamariki Act 1989 provides Youth Court sentencing orders, if they do not expire sooner, expire when the young person in respect of whom they are made, attains the age of 19 years. [LS] will turn 19 on [date deleted] 2023 – a little over one year or 13 months.

Principles to be applied in exercise of powers under this Act

[25] The purposes and principles set out in ss 4, 4A, 5, 208 and 284 of the Oranga Tamariki Act 1989 ("the Act") need to be considered when determining the appropriate sentence and whether or not to transfer a young person to the District Court for sentence. They provide:

> **4 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:
>
> (b) supporting and protecting children and young persons to—
>
> (i) prevent them from suffering harm (including harm to their development and well-being), abuse, neglect, ill treatment, or deprivation or by responding to those things; or

(ii) prevent offending or reoffending or respond to offending or reoffending:

(c) assisting families, whānau, hapū, iwi, and family groups to—

(i) prevent their children and young persons from suffering harm, abuse, neglect, ill treatment, or deprivation or by responding to those things; or

(ii) prevent their children or young persons from offending or reoffending or respond to offending or reoffending:

(d) assisting families and whānau, hapū, iwi, and family groups, at the earliest opportunity, to fulfil their responsibility to meet the needs of their children and young persons (including their developmental needs, and the need for a safe, stable, and loving home):

(e) ensuring that, where children and young persons require care under the Act, they have—

(i) a safe, stable, and loving home from the earliest opportunity; and

(ii) support to address their needs:

(f) providing a practical commitment to the principles of the Treaty of Waitangi (te Tiriti o Waitangi) in the way described in this Act:

(g) recognising mana tamaiti (tamariki), whakapapa, and the practice of whanaungatanga for children and young persons who come to the attention of the department:

(h) maintaining and strengthening the relationship between children and young persons who come to the attention of the department and their—

(i) family, whānau, hapū, iwi, and family group; and

(ii) siblings:

(i) responding to alleged offending and offending by children and young persons in a way that—

(i) promotes their rights and best interests and acknowledges their needs; and

(ii) prevents or reduces offending or future offending; and

(iii) recognises the rights and interests of victims; and

(iv) holds the children and young persons accountable and encourages them to accept responsibility for their behaviour:

(j) assisting young persons who are or have been in care or custody under the Act to successfully transition to adulthood in the ways provided in the Act.

(2) In subsection (1)(c) and (d), assisting, in relation to any person or groups of persons, includes developing the capability of those persons or groups to themselves do the things for which assistance is being provided.

4A Well-being and best interests of child or young person

(1) In all matters relating to the administration or application of this Act (other than Parts 4 and 5 and sections 351 to 360), the well-being and best interests of the child or young person are the first and paramount consideration, having regard to the principles set out in sections 5 and 13.

(2) In all matters relating to the administration or application of Parts 4 and 5 and sections 351 to 360, the 4 primary considerations, having regard to the principles set out in sections 5 and 208, are—

(a) the well-being and best interests of the child or young person; and

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

(c) the interests of any victim; and

(d) the accountability of the child or young person for their behaviour.

5 Principles to be applied in exercise of powers under this Act

(1) Any court that, or person who, exercises any power under this Act must be guided by the following principles:

(a) a child or young person 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:

(b) the well-being of a child or young person must be at the centre of decision making that affects that child or young person, and, in particular,—

(i) the child's or young person's rights (including those rights set out in UNCROC and the United Nations Convention on the Rights of Persons with Disabilities) must be respected and upheld, and the child or young person must be—

(A) treated with dignity and respect at all times:

(B) protected from harm:

(ii) the impact of harm on the child or young person and the steps to be taken to enable their recovery should be addressed:

(iii) the child's or young person's need for a safe, stable, and loving home should be addressed:

(iv) mana tamaiti (tamariki) and the child's or young person's well-being should be protected by recognising their whakapapa and the whanaungatanga responsibilities of their family, whānau, hapū, iwi, and family group:

(v) decisions should be made and implemented promptly and in a time frame appropriate to the age and development of the child or young person:

(vi) a holistic approach should be taken that sees the child or young person as a whole person which includes, but is not limited to, the child's or young person's—

(A) developmental potential; and

(B) educational and health needs; and

(C) whakapapa; and

(D) cultural identity; and

(E) gender identity; and

(F) sexual orientation; and

(G) disability (if any); and

(H) age:

(vii) endeavours should be made to obtain, to the extent consistent with the age and development of the child or young person, the support of that child or young person for the exercise or proposed exercise, in relation to that child or young person, of any power conferred by or under this Act:

(viii) decisions about a child or young person with a disability—

(A) should be made having particular regard to the child's or young person's experience of disability and any difficulties or discrimination that may be encountered by

the child or young person because of that disability; and

(B) should support the child's or young person's full and effective participation in society:

(c) the child's or young person's place within their family, whānau, hapū, iwi, and family group should be recognised, and, in particular, it should be recognised that—

(i) the primary responsibility for caring for and nurturing the well-being and development of the child or young person lies with their family, whānau, hapū, iwi, and family group:

(ii) the effect of any decision on the child's or young person's relationship with their family, whānau, hapū, iwi, and family group and their links to whakapapa should be considered:

(iii) the child's or young person's sense of belonging, whakapapa, and the whanaungatanga responsibilities of their family, whānau, hapū, iwi, and family group should be recognised and respected:

(iv) wherever possible, the relationship between the child or young person and their family, whānau, hapū, iwi, and family group should be maintained and strengthened:

(v) wherever possible, a child's or young person's family, whānau, hapū, iwi, and family group should participate in decisions, and regard should be had to their views:

(vi) endeavours should be made to obtain the support of the parents, guardians, or other persons having the care of the child or young person for the exercise or proposed exercise, in relation to that child or young person, of any power conferred by or under this Act:

(d) the child's or young person's place within their community should be recognised, and, in particular,—

(i) how a decision affects the stability of a child or young person (including the stability of their education and the stability of their connections to community and other contacts), and the impact of disruption on this stability should be considered:

(ii) networks of, and supports for, the child or young person and their family, whānau, hapū, iwi, and family group that are in place before the power is to be exercised should be acknowledged and, where practicable, utilised.

(2) Subsection (1) is subject to section 4A.

208 Principles – (relevantly)

(1) A court or person exercising powers under this Part, Part 5, or sections 351 to 360 must weigh the 4 primary considerations described in section 4A(2).

…

(c) that any measures for dealing with offending by children or young persons should be designed—

(i) to strengthen the family, whanau, hapu, iwi, and family group of the child or young person concerned; and

(ii) to foster the ability of families, whanau, hapu, iwi, and family groups to develop their own means of dealing with offending by their children and young persons:

(d) that a child or young person who commits an offence or is alleged to have committed an offence should be kept in the community so far as that is practicable and consonant with the need to ensure the safety of the public:

(e) that a child's or young person's age is a mitigating factor in determining—

(i) whether or not to impose sanctions in respect of offending by a child or young person; and

(ii) the nature of any such sanctions:

(f) that any sanctions imposed on a child or young person who commits an offence should—

(i) take the form most likely to maintain and promote the development of the child or young person within their family, whanau, hapu, and family group; and

(ii) take the least restrictive form that is appropriate in the circumstances:

(fa) that any measures for dealing with offending by a child or young person should so far as it is practicable to do so address the causes underlying the child's or young person's offending:

(g) that—

(i) in the determination of measures for dealing with offending by children or young persons, consideration should be given to the interests and views of any victims of the offending (for example,

by encouraging the victims to participate in the processes under this Part for dealing with offending); and

(ii) any measures should have proper regard for the interests of any victims of the offending and the impact of the offending on them:

(h) that the vulnerability of children and young persons entitles a child or young person to special protection during any investigation relating to the commission or possible commission of an offence by that child or young person.

(3) If a court or person is exercising a power for the purpose of resolving alleged offending or offending by a child or young person, the court or person must be guided by, in addition to the principles listed in subsection (2) and section 5, the following principles:

(a) the principle that reasonable and practical measures or assistance should be taken or provided to support the child or young person to prevent or reduce offending or reoffending; and

(b) the principle that the child or young person should be referred to care, protection, or well-being services under this Act, if those services would be of benefit to them.

(4) Subsection (3) does not apply to a Police employee unless the employee is employed as a specialist in resolving offending by children and young persons.

284 Factors to be taken into account on sentencing

(1) In deciding whether to make any order under section 283 in respect of any young person, the court shall have regard to the following matters:

(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:

(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:

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

(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:

(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:

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

(g) any previous offence proved to have been committed by the young person (not being an offence in respect of which an order has been made under section 282 or section 35 of the Children and Young Persons Act 1974), any penalty imposed or order made in relation to that offence, and the effect on the young person of the penalty or order:

(h) any decision, recommendation, or plan made or formulated by a family group conference:

(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.

(1A) If the court is considering whether to transfer a proceeding to another court for sentence or decision under section 283(o), in addition to the factors in subsection (1), the court must consider and give greater weight to all of the following:

(a) the seriousness of the offending:

(b) the criminal history of the young person:

(c) the interests of the victim:

(d) the risk posed by the young person to other people.

(2) The court shall not make an order under any of paragraphs (k) to (o) of section 283 merely because the court considers that the young person is in need of care or protection (as defined in section 14).

289 Court must impose least restrictive outcome adequate in circumstances

(1) A court making a response or a permitted combination of responses under section 283 (including, without limitation, under section 297(a) or (b)) must—

(a) assess the restrictiveness of that outcome in accordance with the hierarchy set out in section 283; and

(b) not impose that outcome unless satisfied that a less restrictive outcome would, in the circumstances and having regard to the

> principles in section 208 and factors in section 284, be clearly inadequate.

[26] Effectively, all Youth Court possibilities must be considered and determined to be inadequate before making a s 283(o) order.

Submissions from the Crown

[27] The Crown submits that a conviction and transfer to the District Court for sentence is the least restrictive outcome when balanced with the gravity of the offending and the need for an intensive therapeutic intervention over a period of time. It submits that [LS] continues to deny his offending and significantly lacks insight and also, that his parents doubt the validity of the Court's verdict.

[28] In connection with the s 284 factors the Crown submits that the gravity of the offending is high with five complainants and aggravating features. In relation to [MB] the Crown submits there was a level of violence outside that inherent in the charges with him forcing the complainant's head over his penis making her gag together with an element of detention.

[29] The Crown points to [RM]'s evidence that [LS] was "so aggressive" again indicating a level of violence beyond that inherently involved. The victim, the Crown says, was vulnerable being alone with him in his bedroom.

[30] In relation to [EH] the Crown submits that this offending occurred in a park near a party after the complainant clearly said no. She told him she had her period. She was a virgin. He forcefully removed her tampon and raped her, having taken her into the bushes. As a result she was very sore inside and had blood running down her legs.

[31] In relation to [DL], the Crown submits that the victim was intoxicated and that that was known to [LS], who digitally penetrated her and put her hand down his pants.

[32] In relation to [LR], the Crown submits that [LS] sexually violated her in her own home and in her own bed, being a significant breach of trust – with others present – by digital penetration and rape.

[33] The Crown submits that [LS] had previously been in a relationship or dating with four of the five victims and that the offending lacked significant planning or premeditation, but that the aggravating features include the scale and degree of the violations, the level of violence, the elements of vulnerability for victims and overall [LS]'s offending is at the very serious end of sexual offending.

[34] Following his parents' separation [LS] lived between his parents' houses. The Crown submits that his father at least must have had knowledge of if not encouraged what [LS] was doing with girls in his bedroom.

[35] The Crown submits that there is clearly a lack of insight and acceptance on behalf of both [LS] and his parents noting the contents in the s 333 report. Noting that [LS]'s attitude as reflected in that report was that it was "all totally untrue" and that he "can't believe the lies". He maintained he had only ever had consensual sex and that the girls had conspired against him due to them all being unhappy with [LS] having had sex with them.

[36] The Crown submits that both [LS]'s parents do not believe the offending occurred but accepts that from the s 333 report there may be some change in attitude from his mother.

[37] The Crown noted that the report recorded [LS] as presenting with some understanding of sexual consent but being adamant that he had consent in all events.

[38] The Crown strongly disagrees with the SAFE report suggesting that what made this harmful could have been a lack of awareness of the limitations of consent.

[39] The Crown submits that alcohol was almost without exception not a factor, except for the intoxication of his victims.

[40] The Crown submits that [LS]'s acceptance of the Court's finding is inconsistent with his continuing to maintain consent existed and points to the incongruity of [LS]'s sudden change in attitude if indeed there is one.

[41] The Crown submits that to date [LS] has blamed the victims and despite his purported apology to some at the FGC acceptance of responsibility is limited to the prospect of a mistake in understanding.

[42] The Crown submits that underlying this offending is a lack of understanding, insight and perception of harmful sexual behaviours and that [LS]'s continued denial and thoughts, supported by his parents, are of concern. He is satisfied with himself and sees little need to change.

[43] The Crown submits that the offending is categorised by violence against some, by vulnerability of his victims, by the harm to the victims being present in a high degree, by the scale and degree of offending being present to a high degree, and that his attitude of mistaken belief and consent is simply not made out.

[44] [LS]'s actions are not mitigated by consensual sexual activity before the offending on some occasions. The Crown refers to the Court of Appeal in *R v AM* at paragraph [54].[1] Similarly, a prior relationship does not reduce culpability – *AM* paragraph [61].

[45] The Crown submits that the offending against each victim individually would fall within band 1 or the lower end of band 2 in a District Court context, attracting a starting point of between six to eight years for each complainant which would then require a totality adjustment.

[46] The Crown submits that ultimately the victims want [LS] to get help, but that there needs to be some punitive aspect to any sentence imposed to hold him accountable for the harm to them.

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1 *R v AM (CA27/2009)* [2010] NZCA 114.

[47] The Crown emphasises the risk profile identified by the s 333 report writer and submits that in the absence of [LS] engaging in therapy, his high-functioning profile has the potential to make him a more high risk sexual offender should he remain focused on using his abilities (his intelligence, social position and social skills) to entrap victims in a predatory and calculated fashion.

[48] The Crown submits that District Court sentencing options would provide more robust options than the Youth Court and could include judicial monitoring to ensure strict compliance and efficacy in any treatment programme. The Youth Court options, it is said, do not provide the necessary sanctions to meet the seriousness of [LS]'s offending and the harm to the victims. Nothing short of supervision with residence would be sufficient the Crown says, but that has not been recommended by the social worker.

[49] The Crown submits that within the District Court regime the Court could impose home detention with special conditions and judicial monitoring or community detention combined with intensive supervision and judicial monitoring. I observe that intensive supervision could last for up to two years, almost twice the time during which a Youth Court sentence could apply.

Submissions for [LS]

[50] Ms Adams emphasises the statutory provisions set out in ss 4 and 208. She emphasises the age-related neurological differences between young people and adults and the potentially greater capacity for rehabilitation. She supports what she describes as a careful and comprehensive s 333 report and the SAFE network conclusion and like the Crown submits it is common ground that the SAFE programme incorporating both adolescent and adult therapy options would be, as she puts it, the best measure to address [LS]'s offending and future public safety. She submits the core issue for the Court is under which sentence structure this should be delivered and managed. She submits that a six month supervision with activity order followed by six months' supervision would be adequate.

[51] She submits the consequences of a transfer to the District Court would be lifelong and far-reaching, and would irreparably and permanently damage his educational, employment and social opportunities in the future for a young man with significant ability and talents, highly motivated and goal-directed, whose dream is to become a doctor. She submits the District Court regime provides a greater emphasis on denunciation and deterrence rather than rehabilitation. I do not accept that submission. Those sentencing purposes are not superior to those mandating rehabilitation.

[52] She submits that a transfer to the District Court would require the Court to be satisfied that a less restrictive option would in the circumstances be clearly inadequate – a high threshold she says and deliberately so. She submits that the seriousness of the offending is not the sole determinator of the question. She submits that there is over a year available and that a Youth Court sentence can and has been crafted to adequately provide the level of intervention recommended by SAFE to enable the completion of the programme. She submits that placement of [LS] with his mother in [location F] would provide access to the SAFE programme, and a comprehensive safety plan, which would be monitored by his responsible parent, by SAFE clinicians and a social worker. [The s 333 report writer] suggests that criteria should include that [LS] fulfils the criteria for engagement, and that if that was not the case he could be breached and re-sentenced in which case Ms Adams accepts there would be few remaining options other than transfer to the District Court.

[53] Ms Adams submits that [LS] has been meticulous in his compliance with bail and safety plan, demonstrating an ability to comply with restrictions while remaining in the community. A positive factor, she says, in terms of his likely response to conditions and a sentence of supervision. The programme, Ms Adams says, is available within the Youth Court and does not need a transfer to be imposed. She emphasises the principles in s 208 and the factors remunerated in s 284.

[54] In submitting that the retention of [LS] within the Youth Court and a sentence of supervision with activity, followed by supervision, is the appropriate outcome. Ms Adams accepts the aggravating features include the number of complainants, the exploitation of friendships and vulnerabilities, and the undeniably harmful effects on

the victims. She says however that the proposed outcome is an adequate, appropriate and sufficient option and would be rigorous and restrictive and will significantly impact upon [LS]'s social and personal freedoms for the period of the sentence. She submits there is an inherent punitive element.

[55] She says it is inarguably in [LS]'s best interests that rehabilitation be given priority and his future not impaired by the devasting consequences of a conviction. She submits there is every prospect that he can learn and reform and should be given that chance and have that time available within the Youth Court jurisdiction. She emphasises his high functioning, intelligence, capability and protective factors.

[56] She rightly anticipates [LS]'s continuing denials will be of concern but refers to the comments in the s 333 report submitting that the continued denials neither justify concern that escalation of risk nor indicate that he would not fully engage and benefit from the SAFE programme.

[57] She acknowledges the considerable criticism implicit within the continual denials by [LS]'s parents but reflects [the report writer]'s observation that [LS]'s mother is nevertheless a strong, stable and emotionally resilient person and submits that she is developing a perceptible shift in what has been previously a strongly defensive "mother lioness" approach before the allegations were found proven. She is now able to consider that [LS] "may have been forceful in his sexual interactions and would benefit from therapy" and is committed to supporting that. She acknowledges that the victims have been significantly harmed and submits that the greatest public interest is [LS]'s rehabilitation into a prosocial, contributing member of the community where any risk of re-offending is comprehensively addressed.

[58] She submits there is minimal, if any, value in endeavouring to find comparable cases and accepts that in a number of cases, a transfer has been refused and in a number of cases there have been transfers. In conclusion she submits supervision with activity followed by supervision with the stringent conditions accepted is the outcome most in accordance with the principles and purposes of the Act and the least restrictive option for [LS] giving him the best chance of a future not forever defined and blighted by his acts as a 16 year old.

[59] [LS]'s father in his supporting letter says in part:

> Over the past 14 months he has shown incredible amounts of growth and development in everything he does. He is maturing – he says – into a fine young kid – and he says – I am relieved to see him pushing through this hurdle early in his life. [LS] was a very popular person around females and males and always asks me for permission to have friends over and they would have a ride home organised before they arrived…

[60] He says that he will support [LS] in every way through the process and asks that he not be sentenced in the District Court.

[61] [LS]'s mother has written a lengthy and impassioned letter emphasising his school successes as [details deleted]; his popularity, his achieving [sporting successes]. She describes his life changing after the charges against him with bullying, and [LS] becoming apprehensive and withdrawn resulting in the decision to move him to a different city. There were panic attacks. He wanted to continue his studies. She described the difficulties of the last year for [LS] and the family and like his father, asks that the Court sentence him in the Youth Court and to the SAFE programme. She pledges 100 per cent support for him as might be expected.

The victim impact statements

[62] I turn to the victim impact statements.

[63] [DL] says the pain caused to her will never be forgotten and that she will never forgive you, [LS], for what you did to the others.

[64] [LR]'s mother describes the last 16 months as the most difficult she has faced and a shattered world. She describes you as breaching the sanctity of her home when you raped her daughter while she slept to the point where it is difficult for her to function. Her take on the family group conference was that you had absolutely no remorse and would not take any sort of responsibility for what you have done. She believes there has been no acknowledgement from your parents that you had done anything wrong and that there has been a pattern of repetitive sexual offending that neither you nor your parents are prepared to acknowledge.

[65] [LR] describes the agony, pain and distress which will never be forgotten and feelings of violation in a place that she once felt safe and at peace. She describes feeling beyond disbelief when you did not acknowledge and own up to your actions. She hopes that you come to realise the extent of the damage that you have inflicted.

[66] [RM]'s mother does not think that she will ever be able to forgive you. She describes struggling to keep a roof over their heads while funding the professional help that was needed. She expresses concern over your behaviour being influenced by your parents, social experiences and culture and hopes that you are sentenced according to a serious crime recognising that you will need intensive counselling.

[67] [RM] stopped going to school, lost self-confidence and self-worth and started to cut herself. She is greatly anxious that you could repeat the process to more girls or women in the future and is very concerned that you have not acknowledged fault.

[68] [EH] described you destroying her trust in boys and feeling unsafe and insecure. She does not understand how you can do such horrible things to another and still believe that you are innocent, and she wants you to know that no means no.

[69] Her father describes raw indescribable pain, and severe damage and impact to those involved.

Analysis

[70] Your offending was predatory serial raping of 15 year old girls. You either ignored express refusals of consent or proceeded with your sexual activity in circumstances where consent was simply not possible. There was a degree of force involved in some of your offending – force to achieve the necessary degree of acquiescence. The victims were vulnerable. This was large scale offending where you repeatedly ignored protests and continued to gratify your own sexual urges.

[71] Your interest and the public interest converge in the need for you to receive significant therapy in an effort to prevent future offending. It is clear that absent significant therapy, that is a real possibility.

[72] Your attitude at this point is concerning. At best you accept the findings of the Court are binding on you, but it is clear that you continue to maintain that you had consent, and that in effect there was a conspiracy against you. You are satisfied with yourself as you are, you do not experience marked distress as a result of what has happened and see little need for changes in your behaviour. That is a disturbing position for you to adopt.

[73] Your parents' position is also ambivalent at best – they clearly wish to and will continue to support you, but not in my considered view, as a result of an acceptance of the wrongness of your behaviour.

[74] Any therapeutic outcome will obviously assist the family in their ability to deal with the offending.

[75] Reasonable measures must be taken to prevent re-offending, and to address the underlying causes of your offending in the least restrictive form that is appropriate.

[76] The proposed Youth Court disposition reflected in the social worker's report and plan is entirely therapeutic and amounts to 12 months of supervision with activity and supervision, concentrating entirely on rehabilitative courses and programmes.

[77] Such a proposal is significantly lacking in provisions to hold you accountable, and arguably to reflect the public interest other than in rehabilitation.

The well-being and best interests of the young person

[78] It is in the best interests of you, your victims and the public that you refrain from any further offending. To achieve this your offending must be addressed in both a rehabilitative way and one which holds you accountable and has the regard to the need for public safety.

[79] The psychologist's report, in suggesting that this is best achieved in the Youth Court does not materially address the significant question of accountability.

[80] Section 289 provides that the Court must impose the least restrictive outcome appropriate in the circumstance.

The public interest, including public safety

[81] The interests of the victims are much the same as the interests of the public generally in that the public have an interest in offenders being rehabilitated, being held accountable for their offending and in preventing reoffending.

The accountability of the young person for their behaviour

[82] Accountability seems to be an area where you struggle. You denied the charges but now accept they have been found proved and that you require treatment to address the offending. But the psychologist noted that you seem to have a lower than typical interest in treatment and that your responses indicated that you are satisfied with yourself as you are. You are not experiencing marked distress and you see little need to change your behaviour.

[83] If your offending is not addressed and you do not successfully complete treatment, there is a real risk that further members of the public, likely young women of a similar age to you, will be victimised by similar offending. Holding you accountable in a meaningful manner in addition to providing rehabilitation is likely to reduce that risk.

Section 284 – the greater weight factors

[84] I turn to the greater weight factors in s 284.

[85] Section 284(1A) provides that when the Court is considering transferring the proceeding to another Court for sentence (i.e. under s 283(o)), then the Court *must* take into account and give greater weight to four factors.

[86] Firstly, the seriousness of the offending. Your offending is serious sexual offending against five victims aged 15 over an eight month period; four charges of rape; four charges if sexual violation involving digital and anal penetration and two

charges of doing indecent acts. Other Youth Court cases of serious sexual offending in which disposition has been retained in the Youth Court are not to this scale and tend to involve a one-off incident. I have been unable to locate a case of this seriousness retained in the Youth Court and nor have counsel referred me to any.

[87] The seriousness is underlined if a District Court analysis is applied. In a District Court analysis, applying *R v AM* this offending would sit collectively at the higher end of band 2 or the lower end of band 3 in my view, having three or more aggravating features present to a moderate degree. A starting point in the order of eight years' imprisonment would arguably be required, significantly uplifted for totality.

[LS]'s offending history

[88] You have no offending history, and that is a factor towards retaining you in the Youth Court.

Victims' interests

[89] All of the victims have generally expressed a wish that you are held accountable for your offending. There is a general wish that you are convicted and transferred to the District Court, but if that does not occur there is a clear wish for you to get treatment to avoid the offending happening again. They are concerned about what happened to others and the possibility of it happening again, as reported in the social worker's report dated 22 April 2022 and the victim impact statements. Addressing the causes of your offending will provide for the interests of victims.

The risk

[90] The psychological report indicates that without treatment you could become a high-risk sexual offender. The number of victims, the use of physical force, the intrusiveness of the offending all adds to your risk. Additionally, you had been interviewed by the police only weeks before and then allegedly offended again.

[91] There are other possible risk factors, including your use of pornography, and possibly obsessive sexual interests, impulses and thoughts. There is some evidence according to the report that these risk factors are present to a greater extent than you are reporting. The psychologist suggests that your risk factors can be addressed through therapeutic interventions, including the attendance at an adolescent SAFE programme. The psychologist is also of the view that the best way the ensure proper engagement of you and your parents in treatment is through the rehabilitative settings of the Youth Court and not on sentence from the District Court, positing the District Court prospect hanging over you on a Youth Court sentence. That is a misapprehension given that breaches in either Court can attract sanctions and re-sentence.

[92] Despite the comments in the psychological report, your attitude in relation to the offending remains of high concern. Your acceptance of responsibility in my view is very limited. You continue to maintain that you had consent when you plainly did not, and to maintain that you were conspired against when you were not. You seem distinctly unwilling to accept the complete absence of consent for what you did. You see no particular reason to change.

[93] But there are positives. You have agreed to a clear safety plan, there have been no reported departures from that, and you have a supportive and generally prosocial family, despite the disturbing denial of your offending by both of your parents.

[94] I have previously addressed the nature and circumstances of the offences proved to have been committed by you and your involvement. I have referred to your personal history, social circumstances and personal characteristics. Those have also been referred to by the psychologist, the social worker and by your parents in their letters of support.

[95] Your parents, while clearly supportive of you, and at least superficially accepting the Court's findings, demonstrate clear reservations. Your father was less than effusive in his support for the SAFE programme, and your mother's eventual concession that you were perhaps forceful in his sexual interactions, downplays the seriousness of your position by a large margin.

[96] You have suffered certain consequences already as a result of what has happened, in a social context. Those have resulted in psychological distress, now, fortunately, apparently resolved.

[97] There are no proposals from either you or your family to make reparation. Apologies made to date appear to be, in context, limited to involving the victims and their families in the processes of the Court rather than any genuine apology for what occurred.

[98] The family group conference, in the end, failed to reach a conclusion on disposal other than that a rehabilitative programme such as the SAFE programme was an essential component of any outcome.

[99] The underlying causes of your offending to the extent that they can be identified, were addressed in the psychological report insofar as it is practicable to do so.

Other Matters

[100] You have a little over 13 months for a Youth Court sentence. That is sufficient time for a six month SAFE programme but limits the time where other programmes might usefully be supplied. Supervision with activity as proposed is in my view inadequate to deal with the issues properly raised by the Crown. No community work, for example, can be ordered within that for accountability. No judicial monitoring is available.

[101] The victims' views that a therapeutic intervention is required could be accommodated, but there is insufficient accountability.

[102] Supervision with residence would in effect defer therapeutic interventions for six months which I do not consider at all to be useful.

[103] No Youth Court intervention can satisfy the views of the victims that these matters should be transferred.

[104] A conviction and transfer would still enable your place within your community and support network. The psychological report indicates that while you have experienced some issues in the [location F] community after word spread of your offending, you have made two loyal friends and have possible employment. Additionally, your mother lives there and is very keen on you both returning to [location F] for you to undergo sentence conditions.

[105] In this case the Court is faced with a choice between retaining you in the Youth Court for a maximum of 13 months, with a supervision and activity order, almost entirely designed around therapeutic purposes, with limited or no accountability despite Ms Adams' submissions and in circumstances where neither you nor your parents appear to be fully accepting of the facts of what has happened, the seriousness, and the consequences for the victims.

[106] The alternative, convicting and transferring you to the District Court will provide the same opportunity for therapeutic interventions, but potentially for two years under a sentence including intensive supervision. It also provides for the prospect of greater accountability, in the form of community work and/or community or home detention, more commensurate with the requirements of accountability and community protection. It would also enable judicial monitoring. Such a course will however undoubtedly have long-term effects for you.

[107] The key consideration in determining whether to transfer this matter for sentence is whether the responses available in the Youth Court are adequate in the circumstances to recognise the seriousness of the offending, to provide for the victims' views, to provide a therapeutic response aimed at preventing re-offending and to provide for your welfare and best interests.

[108] I conclude with some reluctance, that the District Court is the appropriate place for all matters to be considered, including the victims' interests, the public interests, your interests, the need to reduce the risk of offending and taking into account the seriousness of the offending, and the recognition of the large number of factors to which I have referred. No Youth Court sentence possible is adequate in the circumstances to recognise the seriousness of the offending, to provide for the victims'

views, to provide a therapeutic response aimed at preventing re-offending and to provide in the end for your best interests.

[109] A conviction and transfer is required.

[110] On each of the charges you are convicted and transferred to the District Court for sentence.

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Judge CJ Harding
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 08/06/2022