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IN THE YOUTH COURT
AT WHANGAREI

I TE KŌTI TAIOHI
KI WHANGĀREI-TERENGA-PARĀOA

CRI-2022-288-000011
[2023] NZYC 900

THE KING
ORANGA TAMARIKI—MINISTRY FOR CHILDREN
Prosecutors

v

[SB]
Young Person

Hearing: 8 November 2023

Appearances: T Needham for the Crown
A Lusk for the Chief Executive
S Russell for the Young Person
N Groot as Social Worker

Judgment: 8 November 2023

NOTES OF JUDGE H B SHORTLAND ON SENTENCING

[1] I have before me [SB] who is here today for sentencing. From the outset I have welcomed all parties, victims, their families who have been at almost every appearance since the start of these proceedings, and also [SB]'s dad and step-mum who have been the backbone of his appearances as well. I acknowledge both counsel; Ms Needham, Mr Russell, and the submissions provided by the Crown, and by Mr Russell respectively. That included the equivalent of a book for his earlier submissions.

[2] I acknowledge Mr Groot who is one of our most experienced social workers and I am grateful for his report, the update. I also acknowledge Ms Brown from Korowai Tumanako who is one of the experts, if I may say, has provided the latest update from all the work that has been done over this time.

[3] Sentencing requires the Court to look at the summary of facts in relation to the charges, and then work through the process taking into consideration the principles of sentencing. Can I say from the outset, the Courts are bound by laws and there is nothing that the Court can do other than what the law states. I acknowledge it is never going to be an adequate compensation for what has taken place and I think that is a general acknowledgement for all those involved.

[4] [SB], you are charged with eight charges; four indecent assault, two unlawful sexual connection and there were two male rapes female charges which are the most serious of all eight of them. They have stemmed from 2021 and here we are now in November 2023 at the end of the matter in one respect.

[5] The summary of facts are not nice reading, they are sensitive, I was mindful this morning in checking with Ms Needham to make sure that the victims and their families were happy for me to do that. One of the options considered was I include the summary of facts in my final draft of the sentencing notes. I am grateful to Ms Needham, for that clear direction the summary facts should be read today. For those who have not heard the summary of facts, it might be hard listening.

[6] There are three victims involved here as we have heard today. The first offending was against [ED] which relates to an occasion on 13 February 2021 and 28 February 2021. After [SB]'s request for a cuddle and a kiss was rebuffed by [ED], [SB] later in the evening entered [ED]'s bedroom when she was in bed, climbed into the bed with her and in a spooning position, and made the comment: "For the boys," to which [ED] said: "No."

[7] [SB] then put his hand inside [ED]'s pyjama top and moved his hand inside her bra, touching her breast, with his other hand shaking her bottom over the top of her shorts. [SB] then put his hand inside [ED]'s shorts and underwear and touched her genitalia including inside her genitalia and again [ED] told [SB] to stop otherwise she would call out to her mother. [SB] then left the room and of course was charged with two indecent assaults and sexual violation by unlawful sexual connection, that being a digital unlawful sexual connection.

[8] The offending against [FR] occurred on 19 April 2021 at [SB]'s address. [SB] had asked [FR] if she wanted sexual intercourse to which [FR] replied NO. [SB] then suggested that [FR] should give him oral sex after she explained that she was on her period. She again declined and [SB] agreed to sleep in another room.

[9] [FR] went to sleep and at approximately 2 am [FR] awoke with [SB] behind her having sexual intercourse with her. She got out of bed and went to the bathroom crying. She noticed blood coming from her vaginal area and in her urine. [FR] went back to the bedroom, got back into bed and told [SB] not to touch her. [SB] then asked her to give him a blow job, she said no and in response [SB] grabbed a bunch of [FR]'s hair from behind her head and forced her face and mouth onto his penis.

[10] [FR] was able to push [SB] away eventually and said she had a migraine and asked [SB] to get some water and Panadol. [SB] did so and returned to the bedroom, he got back into bed and touched [FR]'s backside stating that she was thicker than his current girlfriend. [FR] then told [SB] to stop.

[11] Lastly, and this is the offending against [DM], and this occurred on a day between 1 June 2021 and 31 July 2021. In summary, [DM] was at [SB]'s house and

early one morning she was in [SB]'s room. She was friends with [SB] at the time and [SB] lay behind [DM] in a spooning position. He put his hand on [DM]'s breast. [DM] moved away and [SB] asked [DM] if she wanted sex. She said no at least twice. [SB] grabbed [DM]'s hand and put it on his penis and started to rub her hand on his penis.

[12] [DM] pulled her hand away. [SB] removed his pants and pulled [DM]'s pants down, pulled her underwear to the side, and put his penis inside her genitalia. His penis not fully penetrating notwithstanding [SB]'s numerous attempts. [DM] got up out of the bed and left. Her genitalia felt sore and she had a small amount of blood on her underwear, she had never had sex before. Those are just very basic facts.

[13] Whilst this is subject to the Oranga Tamariki Act 1989, the sentencing principles are always part and parcel and intertwined with each other and it is about accountability. As you will recall when it came before the Court on 17 August 2023, before me, I made the decision this should not go up to the District Court and that it should remain here in the Youth Court for sentencing.

[14] I indicated to you that I was looking for something more than a s 282 discharge and I can say from the outset, a s 282 discharge is not considered as part of the sentencing option today. I do not consider that the least restrictive outcome. I wanted to make that clear from the beginning and I continue that position.

[15] With all sentencing, it is about the principles and the guiding principles contained in the Oranga Tamariki Act ("the Act"). Section 4 of that Act which covers the purpose of the act for both youth justice and care and protection, but we are more interested in youth justice, it talks about the general principles to promote the overall wellbeing of the young person, to address their needs, to provide input for families, hapu, iwi, for the earliest opportunity of intervening.

[16] Section 4A of that Act talks about the wellbeing of the young person, and acting in the best interests of the young person with the paramount concern being always the young person when dealing with matters like this. They also outline four primary considerations which the Court must consider when sentencing and having regard to s 5 and I will go through that in a minute. The wellbeing or the best interests of the

young person first and foremost. Secondly, the public interest and public safety and that has an automatic impact for this offending. The interests of the victims and the accountability of the young person's behaviour.

[17] When I look at what s 5 talks about, wellbeing is the central focus for any decision for a young person, it is done with dignity, one must be looking at the impact of harm on young people, and the decisions must be applied in a timely and appropriate way. So, again, these are guiding principles, they are loose in some ways, but they interact with each other.

[18] I turn more specifically s 208, and I do not want to bamboozle you with legislation, but it is the youth justice principles and applying those principles, I must take into consideration s 4A and s 5 that I have just talked about.

[19] It also includes what whānau think and whānau involvement. Public interest demands it, trying to keep matters out of proceedings where possible. Looking at the age of the young person and where possible try and keep the young person in the community. They are the driving principles when you look at sentencing.

[20] The Court must take into consideration the following factors; what was the nature and the circumstances of the offending? what were the social circumstances of the young person and the characteristics at the time? what is the attitude of the young person? what about the young person's whānau, are there are signs of remorse? what is the impact of the offending on any of the victims? does this young person have any previous history? and what measures are taken to address the offending?

[21] While much of the social circumstances have already been talked about from 2021 through to now, and it is not about laying blame on anybody, but certainly at the time when [SB] came to the attention of the Court, it was not the best of situations, this is not a reflection on his mother at the time but certainly it was not happening for him if I can put it that way.

[22] Things changed when he came to live with his father and his step-mum and certainly the social circumstances have all changed. I know there has been signs

of remorse, there has clearly been illustrated at different times, this has not been an easy case. The family group conference was a very raw experience and I know that the attitude has changed, and I welcome the words from Mr Russell where he has been "re-programmed", if I can use that term, I consider that is probably the most appropriate term.

[23] The impact of your offending has been clear right through this whole process but again today and the reality is that it will continue on for each young victim. Who knows how long each young person will have to wear it. You have no previous history, you have never been in trouble before, you were [under 16] years at the time and I know that things have been ongoing in terms of rehabilitation for at least the last 18 months.

[24] Lastly, s 289 of this Act requires the Court to look at the least restrictive outcome and I have made it clear that the s 282 in my view is not the least restrictive outcome here, but the least restrictive outcome must be considered in the circumstances of what is adequate based on the circumstances of the offending, so all those technical principles and factors must be considered when sentencing.

[25] So given the sensitivities of this matter and what has been heard today, if you summarise the eight serious charges, all the families have been involved in this. The offending took place in 2021. The impact of the offending as we have heard today has been read out and I appreciate the views of our victims will be ongoing and no one knows how long that will be but certainly at a young age now, the impacts are clear for [name removed], the anger, the nightmares, a breach of trust, the change of life, the depression for [FR], the physical impact and let alone the emotional scars, but more importantly from her as I read and heard today, she considers a breach of trust and a violation of being harmed by a friend, she thought was a friend and that betrayal is probably just as harmful as the physical things that came with that.

[26] She is not clear about her future but certainly the impact of your offending on her has caused an immeasurable loss in terms of friends and other things that were important to her, and I consider that is important. Ultimately, I have indicated here that I do not think a s 282 is appropriate. By the finest of margins, this did not go

upstairs to the District Court where it could have been and you will recall I said at the time it was probably because of the fact you were [under 16] years of age at the time, in my words a boy and that probably saved you. It is adult offending for a young person and that is probably where things are at.

[27] So, I take all those multiple principles that I have talked about into consideration. Your wellbeing is paramount, as we look at that, I also must take into consideration the victims and what happened to them, that has been clear. I considered it was in the public's interest this matter stay in this Court and it should be dealt with in an appropriate way.

[28] I have talked about the harm, and I have talked about the breach of trust. I have talked about the social circumstances, and they have all been reflected in the updated reports. I am grateful to Mr Groot who probably summarised it perfectly.

[29] I know there has been signs of remorse, you have expressed that, and you have engaged with programmes as required. It is always very difficult in deciding where you draw the line about rehabilitation and when it should stop. Then at some stage you have to get up and use those tools you have been taught. I welcome the fact that Korowai Tumanako have left the door open to come back in and talk if you need to, or if ever there was an opportunity where reconciliation or a restorative justice conference would be considered, that offer was also made at the time.

[30] You completed the SAFE programme as required and, as I say, you completed the Korowai Tumanako programme. You have done that satisfactorily and you are now considered a low risk. Much of the case law that has been provided by the Crown and by your youth advocate has talked about various ways that the Courts can look at dealing with this, and some of the case law actually says that often risk is measured in a time fashion, maybe for four or five years and it might be different in 20 years but certainly right now you are considered a low risk and that is because I used the word, re-programmed, and it is a credit to the professionals.

[31] You certainly have a better and a healthy understanding of a relationship with young women than previously and that has now been clearly outlined

in the information before me. You have far better support than you enjoyed before and whilst you are now living with your employer, that support from your dad and your step-mum has made the difference for two reasons. One, you are now in a healthier situation, but it probably saved you from going to the District Court.

[32] So last time as I recall, you had an apprenticeship with [name of employer removed] as a [details deleted] and I asked you briefly when you came in today how that was going, and you replied it was going well and enjoying it. So, certainly despite this offending, there are people that know you, they are good people, who are prepared to support you and support your future that they see as well and so I acknowledge that.

[33] So, I consider that we look at a s 283 discharge of some sort and as I indicated earlier, we have had discussion now about an emotional harm payment. I consider for these reasons why a s 283 is more appropriate. You are certainly remorseful, you were [under 16] years at the time as I said, and you have done all you can to rehabilitate. You have done at least 18 months. You have taken in all the interventions that have been provided. You have not been in trouble before, and you have not been in trouble since. It is not uncommon for young people to go on and offend after they have offended earlier.

[34] At the time of the offending your family support was not in the best shape. With the current support of your step-mum and dad, things are going well, but the real issue comes down to this, I consider the sexual offending of three victims very serious in the circumstances. You too will never forget what has happened, but they will wear lifelong scars both emotionally and, in some cases, potentially physically. Despite all the case law that has been referred to me, I consider the case most closest to my view of how this should be dealt with is *R v SQ*.[1]

[35] In that case there was only one victim at the time, and it was significant offending. There was clear breaches of trust and the judge said this and I simply echo what was said. He said:

> I simply cannot condone a result that is suggestive that this offending effectively never happened, if a s 282 discharge was granted. That would be

[1] *R v SQ* [2019] NZYC 627.

> an insult to the victims, and I consider that is the position here and for that reason alone, a s 282 discharge in my view is not the least restrictive outcome.

[36] The judge also went on to say:

> This type of offending just cannot disappear, and it should be marked.

[37] So, I consider that really is the point I draw as a comparison and where I finish this sentencing, [SB], whilst rehabilitation has been tremendous, I do not consider a supervision with activity order would add any value to what has been accomplished. I think you have pretty much done what you need to do, and the door is still open if required. I do not consider another six months is going to do anything for you on that basis and therefore I do not accept that submission.

[38] Whilst it may be seen as a stain on your record, or a note on your record, we live in a far more tolerant world than we used to and the fact that people who know you already and know what you have done and what has transpired through the system, continue to support you. You have got this apprenticeship. You have got a career and you have people that remain supportive of you, so I consider they are all positive things.

[39] So, the good things do not stop there, and, at the end of the day, you will have to live with your actions and I think you have done what you can within this jurisdiction to be accountable for that.

[40] So, I now turn to the fact that it will be a s 283 discharge. It will be adjourned briefly because I recall early in the piece when emotions were pretty high then that on a principled basis, the families were not going to accept any money or emotional harm payment, they did not think that was appropriate but as [FR] says, things have changed, and I think we have to roll with the times. The offer of an emotional harm payment is going to be accepted and I note that you have already saved $1,500. I intend to make an emotional harm payment of $1,000 each. It does not matter what number we put on it, it is never going to be right but at least that is something and it is within reason.

[41] You have $1,500 now and so I would suggest that $500 for each of the victims now and arrangements can be made to pay the other $500 to do that. What we heard today was life reality for them too and their prospects of education, money and jobs and it is all difficult. It is not compensation for what happened, but it is a gesture of goodwill of some sort, to try and help the person out and that is what I see it.

[42] I am going to make the order under s 283(f), it is an emotional harm payment, not a reparation payment. In my view, [SB], that is the end of the Youth Court process. I just want to check one thing. There is no provision under s 283(f) for non-association orders, I do not think that we can do that. That is something which I would imagine no one is going to be contacting each other, I do not have the power to make that order. Simple common sense would suggest that no one is going to be talking to each other and, of course, actions can be taken by the law if it goes beyond that.

[43] So, in the end, [SB], the matter will be now disposed of under s 283(f). There is no further intervention from the Court. You have effectively been on bail conditions for two and a half years that will come to an end. There will be an emotional harm payment order of $1,000 each, to each of the victims with the initial $500 within seven days and the remainder, arrangements can be made through the registry to pay that off.

[44] That concludes matter now. The Courts come and go in people's lives, it is how people deal with things after that is the test. I thank everyone for their dignity and the way they have carried themselves through this very difficult and emotional case.

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Judge H B Shortland
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 16/11/2023