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**IN THE YOUTH COURT
AT WELLINGTON**

**I TE KŌTI TAIOHI
KI TE WHANGANUI-A-TARA**

**CRI-2022-296-000029
[2023] NZYC 753**

**NEW ZEALAND POLICE
Prosecutor**

v

**[CL]
Young Person**

Counsel: S Bishop and A Brosnan for the Prosecutor
L Sziranyi and T Gulland for the Young Person

Judgment: 13 November 2023

**DECISION OF JUDGE J M KELLY
[Application to transfer sentencing]**

Application to transfer sentencing to the High Court

[1] [CL], you appear following a judge-alone trial before me where I found the charge of attempted murder proved beyond reasonable doubt. The maximum penalty for this offence is 14 years' imprisonment.

[2] The police submit a group 7 response under s 283(o) of the Oranga Tamariki Act 1989 is appropriate and seek a transfer to the High Court for sentencing.

[3] This application is opposed. You and your whānau submit that sentencing should take place in the Youth Court and that a group 6 response is appropriate, namely an order for supervision with residence order for a period of six months pursuant to s 311, followed by a supervision order pursuant to s 283(k) for a period of twelve months.

[4] The s 334 and s 335 Social Worker Report and Plan (as amended) recommends sentencing remain in the Youth Court by way of an order for supervision with residence order for a period of six months pursuant to s 311, followed by a supervision order pursuant to s 283(k) for a period of twelve months. The report notes this is the highest level and maximum length of sentence available in the Youth Court.

Factual background

[5] Following the judge-alone trial, I issued a decision on 4 April 2023 which sets out the full factual background. For the purposes of this application, I summarise the factual background as follows.

[6] You were [under 16] years old at the time of the offending and living in [location A].

[7] After the breakup of your relationship with [BA], aged [under 16], she started a relationship with [the victim], aged [under 16].

[8] You devised a plan to kill [the victim], which you recorded on your phone.

[9] Your first attempt to carry out your plan at school on 13 May 2022 was thwarted.

[10] You subsequently amended your plan and on 15 May 2022, you went to [the victim]'s house armed with a 61-centimetre machete and used the machete against [the victim], who was unarmed, causing the following injuries:

- (a) A 10-centimetre cut to his left lower lateral chest wall that splintered off a five-centimetre shard of a rib, injured the left inter costal artery in two places and punctured [the victim]'s left lung, causing a pneumothorax.
- (b) A 20-centimetre cut to his right forearm, exposing and injuring several of the muscles and tendons of the forearm; and
- (c) Three minor cuts to his forehead.

[11] [The victim] required emergency surgery to the deep slashes on his torso and he required plastic surgery on the deep slash on his right arm.

Events after your offending

[12] You were arrested in Palmerston North on 16 May 2022 and charged with wounding with intent to cause grievous bodily harm. You had never previously appeared in the Youth Court.

[13] You were remanded on strict bail conditions, including a 24-hour curfew to reside with your mother in the [location B] area.

[14] On 1 July 2022, you breached your curfew and, as a result, you were remanded in the custody of Oranga Tamariki.

[15] The police then elected to file a charge of attempted murder as an alternative charge. As a result of this, there was a reclassification of you by Oranga Tamariki and

on 15 July 2022, you were transferred from the Oranga Tamariki placement in [location C] to a youth justice residence in [location D].

[16] You remained in the residence until 15 February 2023 (total remand in custody seven months and 14 days) when you were granted electronically monitored bail. To your credit, you have been on electronically bail without incident since February 2023.

[17] Two s 333 reports were sought in 2022, prior to you entering pleas.

[18] One report was prepared by registered psychologist, [report writer 1], dated 8 July 2022 and one was completed by forensic psychiatrist, [report writer 2], dated 14 September 2022. Both reports concluded that you were fit to stand trial and a defence of insanity was not available.

[19] On 12 October 2022, you entered a not denial plea to the charge of wounding with intent to cause grievous bodily harm and a denial plea to the charge of attempted murder.

[20] The police elected to proceed with the charge of attempted murder, which was heard before me and, as I say, I found the charge proved beyond reasonable doubt.

Events after the JAT decision

[21] I released my JAT decision on 4 April 2023.

[22] On 7 June 2023, you appeared before Judge Mika in a judge-alone trial in respect of one charge of male assaults female and one charge of strangulation. Those charges alleged that on 12 February 2022, when you were [under 15] years old, you assaulted and strangled [BA], your girlfriend at the time, who subsequently broke up with you and entered into a relationship with [the victim in the attempted murder charge].

[23] After hearing all the evidence, including evidence from you in cross-examination that you put your hand on [BA]'s throat, applied pressure and squeezed pretty hard for five seconds, Judge Mika found the charge of strangulation

proved beyond reasonable doubt. The charge of male assaults female was not proved and, accordingly, was dismissed.

[24] A direction was then made for a family group conference to be held in respect of the charges of attempted murder and strangulation.

[25] The family group conference was held on 13 June 2023. A plan was proposed for the strangulation charge, but agreement was unable to be reached as to disposition of the attempted murder charge.

[26] The family group conference plan for the strangulation charge was subsequently accepted in the Youth Court, but the issue of disposition of the charge on completion of the plan was reserved.

[27] I understand that the plan includes you writing an apology to the victim of your offending and the following therapeutic interventions:

- (a) Daily attendance at [a rehabilitative program] from Monday to Friday for monitoring of wellbeing and exercise;
- (b) Continuation of studies towards NCEA Level 1 at Te Kura and supported by your paternal grandmother; and
- (c) A psychologist assessment to recommend therapeutic treatment interventions.

[28] I understand that on completion of the plan you will seek a discharge under s 282, which effectively means there is no record of the charge ever having been laid. I understand, however, the police are opposing a s 282 discharge and will seek an admonishment order under s 283(b).

[29] In relation to the attempted murder charge, Ms Sziranyi, on your behalf, then sought a further report pursuant to s 333 for the purposes of disposition. Forensic psychiatrist, [report writer 2], has accordingly prepared an updated report dated 30 August 2023.

[30] A social work report and plan was also directed pursuant to ss 334 and 335. The report, dated 21 September 2023 (as amended), recommends disposition by way of an order under s 311 (supervision with residence order), placing you in the custody of the Chief Executive of Oranga Tamariki for a period of six months followed by a s 283(k) supervision order for a period of 12 months. The s 335 plan sets out a proposal for implementation of the proposed orders.

[31] The s 334 report strongly recommends your matters remain in the Youth Court for sentencing, essentially on the basis that it would keep you being supported within your whānau and community environment, which you have shown you can do and is best suited to your needs. The report says it is known that a prison sentence for youth in an adult facility is not supportive of their emotional wellbeing and development and does not provide an environment that would deter them from further offending.

[32] The rationale for this recommendation is that you have done extremely well with your EM bail conditions and attending the necessary programmes recommended in the FGC plan without any concerns expressed from those working with you. It is said you will benefit from continuing to receive support and being able to engage in a course or educational programme that allows you to attend. The report acknowledges that, given the severity of the charge, the highest sentence available in the Youth Court is appropriate.

[33] Your whānau have also made a submission for consideration in relation to the application to transfer sentencing to the High Court in the form of an affidavit, sworn by your paternal grandmother, [TL]. That affidavit is extremely insightful and provides considerable detail about your background, particularly about the traumatic events that occurred in your childhood and early teen years.

[34] Your whānau accept that you must be held accountable, as you do, but ask that the Court does not transfer your sentencing to an adult court for an offence you committed as a distressed rangatahi.

[35] Your whānau state that they feel a deep personal responsibility to the victim and to you. They hope that the trauma of these events does not follow either of you into your adult lives.

[36] You are now [under 17] years old.

[37] I understand that on 8 November 2023 disposition of the strangulation charge was dealt with in the Youth Court by Judge Mika making an admonishment order pursuant to s283(b).

Police submissions

[38] The police submit that the relevant factors and considerations in the Oranga Tamariki Act, including those relating to the interests of [CL] himself, weigh in favour of transfer to the High Court for sentencing.

[39] The police submit that there are many similarities between this case and *Police v AD*.¹

[40] In *Police v AD*, at the time of offending AD was 16 years old. He had not denied the charge of attempted murder of his stepmother. The police sought transfer to the High Court for sentencing.

[41] The application was not opposed by the young person and the social workers report recommended that sentencing be transferred to the High Court. Judge Eivers, having regard to the legal principles and the exceptionally serious and unique circumstances of the case, convicted and transferred AD to the High Court for sentencing.

[42] The police draw the following comparisons:

¹ *Police v AD* [2018] NZYC 230.

AD	[CL]
AD made Google searches, including “ <i>best place to stab and kill</i> ”, “ <i>best serial killer movies</i> ”, “ <i>Ted Bundy</i> ”, “ <i>most flammable household items</i> ”, and “ <i>stabbing and raping</i> ”.	[CL] made multiple Google searches, including how to make a molotov cocktail and for equipment he needed, such as balaclavas, gloves and knives to carry out his kill plan.
AD entertained homicidal fantasies with respect to his family.	After breaking up with his girlfriend, [BA], [CL] had a strong urge to kill her at the start of 2022 ² and remarked to his friend, [JJ]: "If I kill her she can't cheat on me, she'll be mine forever." ³
Section 333 reports noted that AD met the criteria for conduct disorder and possibly of a diagnosis of borderline personality disorder, that he showed little remorse and that he was at high risk of reoffending.	[Report writer 1], the writer of one of the s 333 reports, concluded that [CL] engages in violent fantasies, acts without remorse, and is at high risk of violent offending. ⁴
AD's attack on his stepmother was less planned - he had followed her around the house all morning, thinking about killing her.	[CL]'s attempt to murder [the victim] was thoroughly planned and pre-meditated. [CL] had devised a kill plan and twice took steps to execute it.
The judge was concerned of the risk AD posed to the public.	[Report writer 1] concluded that [CL] is at high risk of violent offending: ⁵
	[CL] showed little empathy or concern for his victim or his family after the offending. ⁶ [CL] regretted getting caught. ⁷ Just over a year after the offending [CL] was downplaying his attempt to murder [the victim], saying he only intended to intimidate him. ⁸

² Disclosed in an interview with [report writer 1] and contained in the s 333 report of 8 July 2022 at [33].

³ NOE from Police v [CL] JAT on 6 June 2023 at p 37, line 26.

⁴ Section 333 report dated 8 July 2022 at [68].

⁵ Ibid.

⁶ At [16].

⁷ At [18].

⁸ Section 333 report dated 30 August 2023 at p 11.

Defence submissions

[43] Ms Sziranyi makes the point that you have effectively already served more than the maximum sentence of a supervision with residence order in that you spent seven months and 14 days in residence, whereas the maximum sentence is six months in residence. Should you be sentenced to a further six months in residence, you will in total spend 13 months and 14 days in custody because in the Youth Court, there is no credit for time spent in residence on remand. That is equivalent to a sentence of 27 months' imprisonment in adult terms.

[44] In addition, the time you have spent on EM bail, which will be more than eight months, will in adult sentencing terms amount to a credit in the vicinity of four months' imprisonment which would take the overall sentence to 31 months' imprisonment in adult sentencing terms.

[45] Ms Sziranyi submits that the time in custody and the time on electronically monitored bail is significant, coming in the middle of your very important adolescent years. This has been aggravated by you being removed from [location A] and uprooted from your daily life, school and friends. As a result, you have been relatively socially isolated from any adolescent friendships that you had in [location A] during your time in residence, and during your time on electronically monitored bail with your mother and [details deleted] in [location B].

[46] Ms Sziranyi emphasises the remorse you have expressed for your offending, and that you entered a not denied plea to the charge of wounding with intent to cause grievous bodily harm, but denied the alternative charge of attempted murder.

[47] Ms Sziranyi submits that the accountability for your offending committed by you when you were aged [under 16], with a documented prior mental health history, will be adequately dealt with by remaining in the Youth Court and the imposition of a group 6 response.

[48] Ms Sziranyi emphasises that the Youth Court jurisdiction exists to hold young people accountable for their offending, but at the same time to rehabilitate them ahead of their adult years.

[49] Ms Sziranyi submits it is in the interests of the victim and the community that you remain in the Youth Court jurisdiction and be subject to Youth Court orders. Ms Sziranyi submits this will ensure not only accountability but the greatest chance at rehabilitation, particularly given that the supervision order following the time in residence will be overseen by an Oranga Tamariki social worker who has already formed a strong relationship with you and your whānau in the [location B] area.

[50] Ms Sziranyi submits that, should you be transferred to the High Court for sentencing and a sentence of imprisonment is imposed, there is a memorandum of understanding between Corrections and Oranga Tamariki that you will be held in a youth justice facility until you turn 18 (with access to specialist adolescent psychiatrists and psychologists), but with no work being undertaken by a dedicated Oranga Tamariki social worker on a supported transition plan from residence back into the community.

The law

[51] Section 4(1) of the Oranga Tamariki Act 1989 states the Act's purposes and relevantly provides:

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) ...

- (ii) prevent offending or reoffending or respond to offending or reoffending:
- (c) assisting families, whānau, hapū, iwi, and family groups to—
 - (i) ...
 - (ii) prevent their children or young persons from offending or reoffending or respond to offending or reoffending:
- (d) ...
- (e) ...
- (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) ...
- (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:

[52] On 1 July 2019, the Oranga Tamariki Act was amended. Section 6 (Welfare and interests of child or young person paramount) was repealed and s 4A was added. With this amendment, the primacy of the wellbeing and interests of the young person (previous s 6 and currently s 4A (1)) is now qualified by the addition of s 4A(2) for all matters dealt with under part 4 of the Oranga Tamariki Act.

[53] Under s 4A(2) the four primary considerations for administration or application of the Oranga Tamariki Act when a young person is subject to youth justice proceedings are:

- (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.

[54] The authors of *Adams on Criminal Law* note that with the addition of s 4A “There is now an explicit focus on recidivism and the rights and interests of victims.”⁹

[55] Section 5 sets out the general principles that the Court must be guided by.

[56] Section 208 provides that a court exercising powers under part 4 of the Act relating to youth justice must be guided by, in addition to the principles in s 5, the principles that are set out in s 208(2).

[57] Section 283 contains the hierarchy of courts’ responses if a charge against a young person is proved.

[58] Section 283(o) provides for transfer of sentencing to the District Court or to the High Court in certain circumstances. In this case the relevant provision is s 283(o)(ii) which states:

- (ii) the court may, in the case of a young person charged with a category 4 offence or an offence for which the maximum penalty available is or includes imprisonment for life and if the court considers that a sentence of imprisonment for life may be appropriate, order that the young person be brought before the High Court for sentence or decision and may enter a conviction before doing so; and the Sentencing Act 2002 applies accordingly if the young person is of or over the age of 14 years.

⁹ *Adams on Criminal Law* (online edition, Thomson Reuters) at [CY 5.02]

[59] It is now settled that s 283(o)(ii) provides for two situations where sentencing of a young person may be transferred to the High Court, noting that the issue of transfer is discretionary, and it will not always be the case that these cases will be transferred:

- (a) If the young person is charged with a category 4 offence: or
- (b) If the young person is charged with an offence for which the maximum penalty available is, or includes, imprisonment for life and if the Court considers that a sentence of imprisonment for life may be appropriate.

[60] If the young person is transferred to the High Court for sentencing:

- (a) The Court ordering the transfer may enter a conviction before doing so; and
- (b) The Sentencing Act 2002 applies accordingly if the young person is of, or over, the age of 14 years.

[61] An order under s 283 is subject to ss 284 to 290.

[62] Section 284 lists the factors to be considered on sentencing and/or transfer.

[63] Section 289 requires that the Court must impose the least restrictive outcome in the circumstances, having regard to the principles in s 208 (Youth Justice Principles) and the factors in s 284 (factors to be taken into account on sentencing).

[64] The Court of Appeal in *Pouwhare v R* reinforced that the restrictiveness of the outcome must be assessed in accordance with the s 283 hierarchy and the Court must not impose that outcome unless satisfied that a less restrictive outcome would, in the circumstances and having regard to the principles in s 208 and factors in s 284, be clearly inadequate.¹⁰

¹⁰ *Pouwhare v R* [2010] NZCA 268.

[65] As a matter of procedure, the Court shall not make any order under s 283 unless a family group conference has had an opportunity to consider the ways in which the Court might deal with the young person in relation to the charge.

[66] The police have referred to a number of cases on transfer which they submit may be of assistance to the Court, including *R v DV*, *Police v AD*, *Police v H*, *Police v AN*¹¹.

[67] The police have also referred to cases regarding the likely sentence that could be imposed in the High Court, including *R v Wheble*, *Police v AD*, *R v Taipari* and *Police v EGO*¹². Essentially, those cases state that there is no guideline judgement for attempted murder, but the starting point is usually set by reference to the *Taueki* bands and aggravating factors. Although attempted murder and grievous bodily harm have the same maximum penalty of 14 years' imprisonment, in general slightly longer sentences are imposed for attempted murder, given the murderous intent required.

[68] Ms Sziranyi submits the only cases of assistance in relation to the issue of transfer of sentencing are those that post-date the 2019 amendments to the Oranga Tamariki Act, namely *R v DV*¹³ and *Police v AN*¹⁴ referred to by the police, and *Police v MQ*.¹⁵ In all those cases the application to transfer to the District Court was refused and disposition was dealt with in the Youth Court, although I note that none of these case involved a charge of attempted murder.

Section 333 reports

[69] The most recent s 333 report prepared by [report writer 2], dated 30 August 2023, for the purposes of disposition, comments on the type and duration of any orders that might be imposed and the nature of any requirement that may be imposed as part of, or as a condition of, any sentence or order.

¹¹ *R v DV* [2020] NZYC 249; *Police v AD* above n 1; *Police v H* YC Tauranga, CRI-2007-270-000125, 31 August 2007; *Police v AN* [2020] NZYC 609.

¹² *R v Wheble* [2019] NZHC 1301; *Police v AD* above n 1; *R v Taipari* [2014] NZHC 577; *Police v EGO* DC Whanganui CRI-2005-283-000075, 15 May 2006.

¹³ *R v DV* above n 11.

¹⁴ *Police v AN* above n 11.

¹⁵ *Police v MQ* [2019] NZYC 456.

[70] Under the heading “Developmental Immaturity and the Law” [report writer 2] states:

[CL] is only [under 17] years old, and developmentally he is in mid-adolescence.

It is my opinion that an average [under 17]-year-old defendant should be considered developmentally immature for the purposes of criminal justice proceedings.

Viewed within the perspective of human psychological development, it makes sense that we have a separate jurisdiction in Aotearoa (Te Kooti Rangatahi) for adolescent defendants.

[71] [Report writer 2] then goes on to refer to the Court of Appeal judgments regarding young offenders, namely *Churchward v R* and *Dickey v R*.¹⁶

[72] Under the heading “[CL]’s Moral Agency”, [report writer 2] states as follows:

It is my opinion that at the time of his offence of attempts to murder, [CL] was developmentally immature and did not have full capacity for moral agency. I make this statement primarily on the basis of what is known about adolescent psychological development in the general case.

In addition, [CL] has experienced some difficulty in regulating his emotions and managing emotional attachments. These factors serve to heighten [CL]’s developmental immaturity at the time of his offence.

For this reason, it would be appropriate for [CL]’s sentencing to remain within the Youth Court jurisdiction.

In my opinion, transferring [CL]’s case to the High Court jurisdiction would not be appropriate to [CL]’s stage of psychological and moral development.

...

In my opinion, imposing a harsh sentence on [CL], such as a custodial sentence, would not have the effect of enhancing [CL]’s moral agency and would not encourage him to behave in a pro-social manner.

Imposing a harsh sentence on [CL] would not have the effect of deterring [CL] or other persons from committing the same or a similar offence; and would not assist in [CL]’s rehabilitation and reintegration.

In my opinion, it would not be necessary to impose a custodial sentence on [CL] to protect the community from him, as I have **assumed** that [CL]’s offence represents poor judgment on the part of a developmentally immature offender, rather than [CL] having some innate predisposition toward behaving in a violent manner.

¹⁶ *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446; *Dickey v R* [2023] NZCA 2.

The Court will note that my comments regarding issues of jurisdiction and sentencing in [CL]'s case have mostly been made **with reference to the notion of a generic adolescent defendant. I do not have any recommendations to make regarding issues of jurisdiction and sentencing that are highly specific to [CL] as an individual.**

[CL]'s mental health (by his self-report) is relatively good at the moment. I therefore have no specific recommendations to make regarding the type and duration of any orders that might be imposed on [CL] and no specific recommendations to make regarding any requirement the Court may impose on [CL] as part of, or as a condition of, any sentence or order.

(Emphasis added)

[73] With all due respect to [report writer 2], his report can be contrasted with the report of [report writer 1], Registered Psychologist, dated 8 July 2022, which specifically evaluates [CL]'s risk of further violent offending.

[74] Under the heading "Offending", [report writer 1] states as follows:

According to the summary of facts, [CL] broke up with his ex-partner after which the victim, who was a male friend, became friends with her. [CL] told another friend at school on Thursday, 12 May 2022, that he intended to cause harm to the victim the following day. He arrived at school with a knife on the Friday and when this was discovered, he was suspended from school and left the premises. On that Sunday, [CL] contacted the victim via Instagram to arrange a meeting to fight. The victim declined, stating that he does not want to fight with [CL].

Later that evening, at around 9.50 pm, [CL] travelled to the victim's home address in [location deleted]. He was armed with a machete. He called the victim to come out of his house, confronting him when he did so. [CL] swung the machete at the victim several times, causing deep lacerations to the victim's chest, arm, and head. The victim's parents rushed to intervene, with the assault coming to an end when the victim's father managed to take the machete off [CL]. [CL] fled the scene and could not be located by the police that evening.

[75] When [CL] was asked for his view of the summary of facts, [report writer 1] states [CL]'s view was as follows:

During the current assessment, [CL] was able to provide a coherent version of events. He described his perspective in detail, with no indication that he was not in a rational state of mind at the time being evident. He described how his ex-partner broke up with him and how she was spending time with a mutual friend. [CL] decided that "I don't want him to be alive" as he interpreted his involvement as being disrespectful. He described a series of events whereby he planned to cause harm to the victim, with him planning to go to a hunting

goods shop in another part of the city to purchase gloves, a mask and a machete. He stayed at a friend's house that evening and spoke about how he had to pretend as if everything was normal, otherwise they might have intervened and stopped him from progressing with his plan.

[76] [Report writer 1] interviewed [CL]'s parents separately. [Report writer 1] says, according to [CL]'s father, in the time leading up to the offending [CL] became obsessed with watching violent films and listening to music with aggressive themes. He would listen to these songs all the time, streaming the music to his hearing aid or headphones to a point of excluding the world around him. He was influenced by the American gangster culture where the use of violence for the sake of retribution was normalised, with his father suspecting that he was susceptible to this influence and wanted to become notorious by building a reputation for himself.

[77] [CL]'s parents both shared their concern with [report writer 1] that [CL] did not appear to show any empathy or concern for the impact of his behaviour on others – the victim and his family, but also for [CL]'s own family.

[78] [Report writer 1] also notes that:

[CL] disclosed to Dr Gudex at the Voyagers Outpatient Clinic in Whakatāne in May 2022 that he planned this assault for some time before being able to act on his intentions. He said at the time he purchased the machete for self-defence purposes, although he initially intended to kill the victim, but was unsure how he could do this without getting caught. He said that he was thinking clearly and acted being aware of the consequences of his actions. He was also noted in this conversation not to be empathetic or remorseful when describing his actions.

[79] [Report writer 1] says that when he asked [CL] about his regrets, [CL] stated that his only regret is getting himself into the situation where he must be on a 24-hour curfew. He was not able to evidence remorse or regret for how his actions impacted on others.

[80] In relation to [CL]'s intimate relationship, [report writer 1] states as follows:

[CL]'s relationship with his ex-partner was described as obsessional by his parents.

...

[CL] described having “very strong feelings” for her and how last year she was “my world ... my everything”. He considered himself to have a relaxed personality that does not usually get angry but described how he would experience intense anger when he felt someone insulted or wanted to cause harm to his ex-partner. He experienced distress when his ex-partner wanted to end the relationship due to her potentially moving to a different part of the country. He [details deleted] in 2021 as he could not bear the thought of living without her. Her move did not eventuate in the end.

During the current interview, [CL] disclosed matter-of-factly that he had a strong urge to kill his ex-partner at the beginning of the year. He has fears that she might leave him or cheat on him, with him deciding that “if I can’t have her, then no-one can”. According to him, this was not an angry emotionally driven process, rather a calm decision that he made. He described getting access to a knife, having it “all planned out” with her “right there”, but then not going through with it at the last minute. He also planned to kill himself afterwards.

[81] Under the heading “Mental Health History”, [report writer 1] states as follows:

[CL] struggled with his mental health when he was between 12 and 13 years old according to his mother. At this time, he engaged in some superficial cutting on his arm. His father struggled to manage his behaviour at that time, contributing to him coming to live with his mother. His mother recalled him telling her that last year he ripped the head off a duckling, telling her that he did it because he was bored.

According to [CL]’s mother, he has in the past struggled to emotionally regulate, in spite of him presenting well when he speaks to other people and being able to hide some of the strong emotions he experienced. She has known him to get into a negative frame of mind very quickly, with a tendency to ruminate and struggle to accept when things did not go his way. He told her that he does not have any empathy for those that were affected by his actions, rather blaming the victim for what occurred.

[CL]’s difficulty with managing his mood appears to have been magnified in the context of his relationship with his ex-partner. He tried to overdose using paracetamol late in 2021, prior to resorting to the more externalised aggressive behaviours.

[CL] disclosed to [an employee] at [a rehabilitation facility] that he was planning to kill others, and potentially himself, using a firearm, with his victim featuring predominantly in this plan. He described handing over money to a contact in Auckland to buy a gun, but that he never received the weapon. [Report writer 1] says this suggests that [CL] has engaged in violent fantasies involving causing harm and death in the recent past, with his actions described in the summary of facts evidencing a capacity to execute such a plan.

[82] In relation to goals, [CL] described his future as wanting to be a professional actor. [Report writer 1] says he was not able to expand on his sense of future self to

include more realistic and grounded goals, rather stating that “he needs to be famous and wants to be rich”.

[83] In his assessment of [CL]’s mental status, [report writer 1] says:

[CL] was noted to describe past violent rumination and intent to cause harm to others in an off-handed and conversational manner without any indication that he interpreted these as distressful or problematic. His insight in terms of these pathological and antisocial patterns of thinking was limited, and he described past actions and fantasies in a manner that was devoid of empathy or compassion for the impact of these on others. No signs of distress were evident as he described his decision-making and actions, with him rather appearing pleased as he narrated events of recent months.

[84] In relation to psychometrics, [report writer 1] conducted the *Personality Assessment Inventory – Adolescent (PAI-A)* test with [CL]. This is a self-report measure used to assess psychopathology, interpersonal styles and treatment related issues.

[85] [Report writer 1] said [CL]’s responses on the *PAI-A* are marked by significant elevations across a number of different scales and suggest a person who is angry, resentful, impulsive and emotionally labile. His responses reflect a tendency to be extremely sensitive in social interactions and very quick to perceive rejection (real or imagined) by others. He likely feels that he has been betrayed by those close to him.

[86] [Report writer 1] concludes [CL]’s responses suggest that he has a history of antisocial behaviour and may be manifesting behaviours consistent with a conduct disorder, as well as borderline personality disorder.

[87] [Report writer 1] set out his formulation of [CL]’s offending behaviour based on the information available at the time of the assessment, including consideration of [CL]’s clinical profile on the *PAI-A* as follows:

[CL]’s early development was generally unremarkable, but he was exposed to early and ongoing parental conflict. He experienced an unpredictable environment growing up due to ongoing conflict and disagreement between his parents, resulting in [details deleted]. [CL]’s mother struggled with her mental health and substance addiction, which potentially resulted in her being less emotionally available to [CL]. Due to her difficulties, he went to live with his father at the age of eight, which was a significant change that [CL] likely did not have the maturity to fully understand.

Residing with his father and stepmother, [CL] was again exposed to an environment where verbal aggression occurred between adults in the home, potentially contributing to him not feeling safe and rather retreating into his own internal world. He progressively isolated himself from his family, spending more and more time being influenced by music with violent themes and watching violent films without appropriate adult supervision. Struggling with peer acceptance and feeling socially isolated, he developed mental fantasies of using violence and aggression to gain respect and acceptance from others, potentially to compensate for his own lack of self-worth, which at times presented in terms of suicidal ideation.

The relationship with his ex-partner provided [CL] with a sense of acceptance and wellbeing, which was sharply contrasted with how he experienced other areas of his life. His engagement with her became obsessional, with him caring little for anything or anyone else. He struggled to individuate himself, defining himself as part of her life to a point where she became overwhelmed and needed some space from him. When her feelings for him did not match the same intensity as he had for her, he experienced a crisis of identity, with violent thoughts of causing harm to her and [details deleted] emerging as a mechanism to try and retain control of his emotions.

...

His negative affect was further strengthened when he interpreted the victim's friendship with his ex-partner as a betrayal of trust, with him developing and mentally rehearsing a plan to seek retribution. [CL] was not influenced by self-doubt or empathy as he followed the steps of his plan, with him placing himself in a high risk situation where significant harm occurred to the victim based on his actions and decisions.

[CL] does not have an extensive history of acting on his violent fantasies, with evidence of significant aggression and harm towards others only being present in recent months and exacerbated by the specific circumstances presented by the relationship breakdown with his ex-partner. His behaviour is suggestive of traits of conduct disorder, but not pervasive and persistent enough to consider a full diagnosis based on available information. Of concern are the expression of aggression towards others and animals, as well as use of a weapon to cause harm. He exhibited limited prosocial emotions in relation to his behaviour, as noted by lack of remorse or guilt, lack of empathy, callousness and shallow affect.

[88] In terms of the risk of re-offending, [report writer 1] conducted the *Structured Assessment of Violence Risk in Youth (SAVRY)*. [Report writer 1] said:

In summary, when considering all sources of information available, [CL]'s risk of further violent offending is considered to be high. He engages in violent fantasies and ruminations and has evidenced a capacity to plan and act on these thoughts without remorse or consideration for the impact of his behaviour on others. His risk would most likely be preceded by a relationship

breakdown, or if he interprets others as having betrayed or abandoned him. [CL] has shown a capacity to conceal his intentions, as a result of which it may not always be easy for observers to be aware of his intentions. His risk of harm is considered to be significant, due to the likelihood that he would purchase and utilise weapons with the intention of causing physical harm to others.

[89] In terms of recommendations, [report writer 1] states:

It is recommended that [CL]'s risk of reoffending and elevated risk of harm to others be managed by strict external monitoring and oversight until such a time as he can evidence insight into his behaviour and actively engage in a process to identify and mitigate risk factors. [CL] should ideally engage in intensive treatment with a psychologist to explore the dynamics explored in this report in more detail. ... He would also benefit from dialectical behaviour therapy (DBT) to provide him with the psychological skills to manage extreme emotions and learn how to become more effective in interpersonal relationships.

[90] Because of the contrasting assessments between the reports of [report writer 2] and [report writer 1], I have carefully considered whether an updated report should be sought from [report writer 1].

[91] On reflection, I do not consider there is anything to be gained by directing an updated report from [report writer 1]. I acknowledge that [CL] is more than a year older than when the report was written (which is significant in terms of adolescent development), there has been no further alleged offending and no issues with EM Bail, but, crucially, in my view, [CL] has not had the benefit of any treatment as that has not been available pre-sentencing and, as I understand it, such treatment is not available in [location B] where [CL] has been living on EM Bail. Therefore, I am satisfied it is appropriate to rely on the risk assessment in the existing report from [report writer 1] for the purposes of this decision.

Discussion

[92] Having regard to all the matters discussed, I now turn to consider the purposes and principles of the Oranga Tamariki Act generally, and the particular principles relating to youth justice.

[93] By way of background, it has been held that the amendments to the Oranga Tamariki Act that came into force on 1 July 2019 require a far more

comprehensive approach to sentencing in a case like this than was previously necessary, involving not just consideration of the relevant provisions of the Oranga Tamariki Act, but also respecting and upholding rights under the United Nations Convention on the Rights of the Child (“the CRC”) and providing a practical commitment to the principles of the Treaty of Waitangi (te Tiriti o Waitangi).¹⁷

[94] Section 4 provides that the purposes of the act are to promote the wellbeing of young persons and their whānau by establishing, promoting or coordinating services, supporting and protecting young persons, assisting whānau, maintaining and strengthening the relationship between young persons and their whānau and responding to offending by young persons.

[95] Section 5 provides that any court that exercises any power under the Act must be guided by a long list of principles, including that a young person must be encouraged or assisted to express their views and their views should be taken into account, the wellbeing of the young person must be at the centre of decision making that affects the young person, a holistic approach should be taken that sees the young person as a whole person, including their developmental potential, education and health needs and age, and that a young person’s place within their whānau and community should be recognised.

[96] With those general provisions in mind, I now turn to consider the particular principles of youth justice applicable to this case.

Section 208

[97] Section 208 provides that a court exercising powers under part 4 of the Act relating to youth justice, must be guided by, in addition to the principles in s 5, the principles that are set out in s 208(2).

[98] I will now consider the principles set out in s 208(2) relevant to the transfer decision, having regard to the police and defence submissions.

¹⁷*Police v AN* above n 11.

- (a) *That a young person who commits 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.*

The s 333 report prepared by [report writer 1] identified [CL] as having a high risk of reoffending. [Report writer 1] is of the opinion that this risk is likely to be preceded by a further relationship breakdown or, if he interprets others as having betrayed or abandoned him, [report writer 1] notes [CL] has shown a capacity to plan and act on his violent thoughts and emotions, to purchase and utilise weapons, all while concealing his intentions. I am satisfied these are significant risk factors that point towards the need to ensure the safety of the public. I note however, that it would be open to the High Court to impose a sentence of Home Detention with a maximum term of 12 months or a combination sentence of Community Detention with a maximum term of 6 months together with a sentence of Intensive Supervision with a maximum term of two years, both of which sentences would be longer than the maximum available sentence in the Youth Court but would enable [CL] to be kept in the community with electronic monitoring which may be consonant with the need to ensure the safety of the public given [CL]’s exemplary performance on EM Bail.

- (b) *That a young person’s age is a mitigating factor in determining whether to impose sanctions and the nature of any such sanctions.*

I have considered that [CL] was [under 16] at the time of the offending. This is a mitigating factor in determining the nature of any sanctions to be imposed, whether sentencing takes place in the Youth Court or in the High Court in accordance with the well-established principles in *Churchward v R* and *Dickey v R*.¹⁸

- (c) *That any sanctions imposed on a young person who commits an offence should take the form most likely to maintain and promote the*

¹⁸ *Churchward v R* and *Dickey v R* above at n 16.

development of the young person within their whānau and it should take the least restrictive form that is appropriate in the circumstances.

The maintenance and development of [CL] within his whānau must be weighed against the seriousness of the offending. Both the Youth Court and the High Court are required to consider the least restrictive order or sentence that is appropriate in the circumstances. As discussed above, I note that it would be open to the High Court to impose a sentence of Home Detention with a maximum term of 12 months or a combination sentence of Community Detention with a maximum term of 6 months together with a sentence of Intensive Supervision with a maximum term of two years, both of which would be longer than the maximum available sentence in the Youth Court but may promote the development of [CL] within his whānau and be the least restrictive in the circumstances.

- (d) *That any measures for dealing with offending by a young person should, so far as it is practicable to do so, address the causes underlying the young person's offending.*

In the s 333 report, Dr Louw recommended that [CL] undergo intensive psychological treatment to address the underlying causes of his offending, gain insight into his behaviour and reduce his likelihood of reoffending. This can be incorporated as a component of residence with supervision followed by supervision order in the Youth Court, or in a sentence in the High Court.

- (e) *That in the determination of measures for dealing with offending by young persons, consideration should be given to the interests and views of any victims of the offending, and that any measures should have proper regard for the interests of any victims of the offending and the impact of the offending on them.*

The victim and his whānau did not wish to participate in the family group conference. No victim impact statement has been received from the victim. Fortunately, the victim has made a good recovery from the significant physical injuries he suffered following emergency surgery for his punctured lung, and plastic surgery to repair his arm. Undoubtedly, however, the emotional and psychological harm caused to the victim can be expected to have lasting effects.

- (f) *That reasonable and practical measures or assistance should be taken or provided to support the young person to prevent or reduce offending or re-offending.*

Although it is accepted that a s 283(n) order would be more tailored towards providing [CL] with practical measures or assistance to support him to prevent or reduce reoffending, that must be weighed against the seriousness of his offending and the risk to the safety of the public and the need for intensive psychological treatment which can be provided for in a sentence imposed by the High Court.

Section 284

[99] I now turn to the factors set out in s 284 which the Court must have regard to in deciding whether to make any order under s 283, having regard to the police and defence submissions.

- (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:*

The nature and circumstances of the offending is serious. [CL] was the sole perpetrator. He planned the attack, bought clothes and borrowed a knife with which to carry out the attack. When his first plan failed, he revised his plan, bought a machete and attempted to murder the victim.

(b) *The personal history, social circumstances and personal characteristics of the young person:*

I have considered [CL]'s personal history, social circumstances and personal characteristics as set out in the s 333 reports and in the whānau submission in the form of an affidavit from [CL]'s grandmother, [TL].

[CL] experienced instability and [details deleted] as a result of his parent's separation when he was [less than a year] old. [CL] and was exposed to emotional and psychological abuse from his parents' conflict at a young age. Despite this, his family have clearly done their best to try and raise him.

[CL] is of Māori descent ([iwi deleted]); New Zealand pakeha ([details deleted]).

[Details deleted].

Following his parent's separation, [CL] spent time living with his mother during 2007-2015 and for a period in 2020, and his father from 2016-2019 when his mother was hospitalised with [details deleted] when he was eight years old.

In 2020, [CL] experienced trouble at school and was suspended multiple times during the year. He then moved back to live with his father until his offending in May 2022.

A child psychologist who reported [details deleted] that [CL] exhibited early childhood attachment issues, particularly with his mother.

Both [CL]'s mother and father have noted that he struggles with emotional issues and when relationships are threatened to end. [CL]'s mother described his relationship with [BA] as obsessive, and [CL] disclosed to [report writer 1] a strong urge to kill her at one point.

There are also reports of [CL] self-harming, aged 11, and [details deleted] in [2021].

[CL]'s grandmother says while on EM bail, the whānau have observed in [CL] a rediscovery of his own self-worth and self-confidence, and a sense of positive purpose and hope for the future.

While on EM bail, [CL] experienced the loss of his maternal grandmother and his mother's best friend who were consistent and important people in his life.

[CL]'s grandmother also says, while on EM bail [CL] and whānau have received support from the agencies involved and [CL] has grown in his respect and appreciation for these people and other troubled youth that he has met on this journey.

[CL]'s grandmother believes [CL] has matured significantly since his offending and is now motivated in his schoolwork. While on remand, [CL] has engaged with distance study with Te Kura and has earned 12 NCEA credits to complete the requirements for NCEA Level 1. She says [CL] has expressed enthusiasm for future NCEA study in Japanese, English, art, science and history/social studies. [CL]'s grandmother says in terms of his future, [CL] hopes to someday teach English in Japan. [CL]'s grandmother says [CL] is a talented, self-taught artist and illustrator. He is also a promising young creative writer.

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

[CL] has written a letter of apology to the victim. However, [CL]'s level of remorse must be considered in light of the s 333 report by [report writer 1] which reported that [CL] lacks remorse and empathy for his offending and referred to an interview [CL] had with the doctor at the [rehabilitation facility] in [location B] where it is reported that

[CL] said he was unsure how to kill [the victim] without being caught. When [report writer 1] asked [CL] if he had any regrets regarding the offending, [CL] stated that his only regret was getting himself into the situation where he must be on a 24-hour curfew. Furthermore, I note that [CL] appeared to downplay the seriousness of his offending against [the victim] in the most recent s 333 report by [report writer 2]. In my view, these factors weigh in favour of a s 283(o) order to protect the public.

- (d) *The response of the young person's whānau to the causes underlying the young person's offending and measures available for addressing those causes and their attitude to the young person as a result of the offending:*

[CL]'s grandmother says that [CL]'s whānau all love [CL] dearly and they have all tried their best during these traumatic two years. In their review of the years and months and events of his childhood, [CL]'s grandmother says it has become starkly clear how those circumstances have caused his sensitivity to perceived rejection and fear of abandonment, as pointed out in his mental health clinical notes.

[CL]'s grandmother says that they have also learned about teen mental health, social media and the justice system alongside [CL], and have become better co-parents and grandparents for it.

Notwithstanding the best intentions of [CL]'s whānau, based on the content of [report writer 1]'s report, I am of the view that it is beyond the capability of [CL]'s whānau to deal with the underlying causes of his offending and that his rehabilitative needs cannot be met in the community, consonant with the safety of the public.

- (e) *Measures taken by [CL] and his family to make reparation or apologise to the victim:*

As discussed above, neither the victim nor anyone from his whānau attended the family group conference and, therefore, there has not been any opportunity for [CL] or his whānau to apologise or make reparation to the victim or his whānau. As also discussed above, [CL] has written a letter of apology to the victim but there are concerns about the genuineness of that apology and the level of insight and remorse [CL] has into his offending.

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

As discussed above, the victim and his whānau did not wish to participate in the family group conference. No victim impact statement has been received from the victim.

[CL]'s grandmother says the whānau are aware of the need for reparation to the victim. She says the whānau realise this is a delicate subject – one that needs to be informed by tikanga and offered with aroha. She says [CL]'s whānau are hoping that [CL]'s victim will respond to [CL]'s apology or to the Court with his thoughts on this matter.

- (g) *Any previous offence proved to have been committed by the young person:*

At the time of the attempted murder on 15 May 2022, [CL] had committed the offence of strangulation on 12 February 2022 in relation to a different victim. This charge has now been disposed of by way of a notation in the Youth Court. On 8 November 2023 Judge Mika admonished [CL] pursuant to s 283(b).

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

The family group conference on 13 June 2023 was unable to reach agreement on the charge of attempted murder.

- (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:*

I note the s 333 reports, particularly that of [report writer 1], indicate [CL] has deep-seated psychological issues that require intensive treatment.

Section 4A(2)

[100] Having considered the principles in s 208 and the factors in s 284, I now turn to the primary considerations set out in s 4A(2). Section 284(1A) provides that if the Court is considering whether to transfer a proceeding to another court for sentence, the Court must consider and give greater weight to the following factors:

- (a) *The seriousness of the offending:* Attempted murder is a category 4 offence with a *maximum* penalty of 14 years' imprisonment.

The criminal history of the young person: As I have discussed above, at the time of the attempted murder on 15 May 2022, [CL] had committed the offence of strangulation on 12 February 2022 in relation to a different victim. This charge has now been disposed of by way of a notation in the Youth Court. On 8 November 2023 Judge Mika admonished [CL] pursuant to s 283(b).

- (b) *The interests of the victim:* As I understand it, due to the threat posed to him by [CL], [the victim]'s parents have moved the family out of the Wellington region. It is in [the victim]'s interests that [CL] is sentenced

in a way that reduces his likelihood of reoffending and recognises the gravity of the offending.

- (c) *The risk posed by the young person to other people:* [report writer 1]'s assessment is that [CL] poses a high risk of reoffending because he engages in violent fantasies and ruminations and has evidenced a capacity to plan and act on those thoughts without remorse or consideration of the impact of his behaviour on others. [Report writer 1] is of the opinion that his risk would most likely be preceded by a relationship breakdown, or if he interprets others as having betrayed or abandoned him. [Report writer 1] says [CL] has shown a capacity to conceal his intentions and his risk of harm is considered to be significant due to the likelihood that he would purchase and utilise weapons with the intention of causing physical harm to others.

Section 289

[101] Turning now to s 289 which requires the Court to impose the least restrictive outcome adequate in the circumstances.

[102] Having considered all the matters discussed, including the seriousness of the offending, [CL]'s high risk of reoffending and [CL]'s rehabilitative needs, I am satisfied that the next least restrictive outcome (an order for supervision with residence order for a period of six months pursuant to s 311, followed by a supervision order pursuant to s 283(k) for a period of twelve months) is inadequate as a sentencing response to [CL]'s offending.

[103] I am satisfied the High Court is the appropriate sentencing court, given the seriousness of the offending and the risk posed by [CL] to other people.

Decision

[104] For the reasons given, the application to transfer sentencing to the High Court is granted.

[105] [CL] is convicted of attempted murder and further remanded on EM bail to appear in the High Court on a date to be arranged by the Youth Court in conjunction with the High Court.

[106] This has been a finely balanced and difficult decision which has been made after much careful consideration. I wish to sincerely thank counsel for their assistance. I also want to thank [CL] and his whānau for their careful submissions to the Court, and the respectful way they have engaged in what I acknowledge has been an extremely difficult process for them.

Judge J M Kelly

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 13/11/2023