IN THE YOUTH COURT
AT AUCKLAND

CRI-2017-204-000231
[2018] NZYC 169

NEW ZEALAND POLICE
Prosecutor

v

[S D]
Young Person

Hearing: 8 March 2018

Appearances: B Mugisho for the Police
M Winterstein for the Young Person

Judgment: 12 March 2018

RESERVED JUDGMENT OF PRINCIPAL YOUTH COURT JUDGE JOHN WALKER

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[1] In this case [SD] has faced charges of aggravated robbery occurring on 18 September 2017, an aggravated robbery and an associated kidnapping by confining the victim on 26 September, an aggravated injuring with intent to commit crime of theft, associated car conversion on 30 September. Each of these charges has been proved in the Youth Court by [SD]'s admissions at the family group conference and confirmation in Court.

[2] The issue for me to decide today is whether these cases remain in the Youth Court for Youth Court disposition or whether [SD] is convicted in this Court and transferred to the District Court for sentence under s 283(o).

[3] The Crown solicitor acting for the police argued for a transfer. In determining this question, I must be guided by the Youth Court principles set out in s 208 Oranga Tamariki Act 1989. In particular:

> **208 Principles**
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> **…**
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> (c) the principle that any measures for dealing with offending by children or young persons should be designed—
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> (i) to strengthen the family, whanau, hapu, iwi, and family group of the child or young person concerned; and
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> (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:
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> (d) the principle that a child or 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:
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> (e) the principle that a child's or young person's age is a mitigating factor in determining—
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> (i) whether or not to impose sanctions in respect of offending by a child or young person; and
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> (ii) the nature of any such sanctions:
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> (f) the principle that any sanctions imposed on a child or young person who commits an offence should—
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> (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) the principle 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) the principle 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:

[4] These particular principles applicable to Youth Justice are subject to the more general principles in s 5 of the Act.

[5] I also need to take into account Article 37(b) of the United Nations Convention on the Rights of the Child: detention or imprisonment shall be used only as a measure of last resort and for the shortest appropriate period of time. I also bear in mind Rule 19 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, otherwise known as "the Beijing Rules":

> "The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period".

The commentary in the Beijing rules relating to that principle is as follows:

> Commentary
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> Progressive criminology advocates the use of non-institutional over institutional treatment. Little or no difference has been found in terms of the success of institutionalization as compared to non-institutionalization. The many adverse influences on an individual that seem unavoidable within any institutional setting evidently cannot be outbalanced by treatment efforts. This is especially the case for juveniles, who are vulnerable to negative influences. Moreover, the negative effects, not only of loss of liberty but also of separation from the usual social environment, are certainly more acute for juveniles than for adults because of their early stage of development.
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> Rule 19 aims at restricting institutionalization in two regards: in quantity ("last resort") and in time ("minimum necessary period"). Rule 19 reflects one of the basic guiding principles of resolution 4 of the Sixth United Nations Congress: a juvenile offender should not be incarcerated unless there is no

> other appropriate response. The rule, therefore, makes the appeal that if a juvenile must be institutionalized, the loss of liberty should be restricted to the least possible degree, with special institutional arrangements for confinement and bearing in mind the difference in kinds of offenders, offences and institutions. In fact, priority should be given to "open" over "closed" institutions. Furthermore, any facility should be of correctional or educational rather than of a prison type.

[6] Against the background of those principles and guidance, I turn to the mandatory considerations set out in s 284 of the Act. The factors to be taken into account in deciding whether to make an order under s 283.

[7] First, I consider the nature and circumstances of the offending. I turn first to the aggravated robbery on 18 September 2017. [SD] and three others wearing balaclavas entered the victim's superette at 8.30 pm. S D was holding a toy gun that looked to the victim to be a black revolver. One of the others was armed with a knife and another with a handsaw. [SD] pointed the toy gun at the victim's face demanding that he open the till. The victim was threatened with the handsaw. He was also struck in a slapping motion with the knife and threatened with it.

[8] A large number of cigarettes were taken, lighters and sweets. The victim was 21 years of age. He feared for his life thinking the gun was real. He did not receive any physical injuries but there can be no doubt that this would have been a terrifying experience for him, outnumbered by people wearing balaclavas and armed with weapons including what he thought was a gun.

[9] Turning to the aggravated robbery on 26 September. [SD] and one of the others from the earlier robbery went to another superette in the early afternoon, again disguised. The victim came to the counter where she was grabbed around the neck and pulled to the ground. [SD] held a large knife out towards her questioning her and forcing her at knife point upstairs looking for other persons. The accomplice was removing cigarettes. [SD] forced the victim at knife point to open the till and the accomplice took the cash. The victim was then detained in the back room. [SD] and the accomplice tied her hands together using a towel and then she was tied to a chair. A bicycle was taken to aid in their escape. Six hundred dollars in cash and $10,000 worth of cigarettes were taken. This ordeal for the victim lasted 15 minutes. She was

terrified. She thought she was going to be raped. She could not work for several weeks and continues to feel unsafe at work.

[10] There has been a dispute as to why [the victim] thought that she would be raped. The summary of facts does not elaborate. I proceed on the basis that she was rightly terrified by what happened. She suffered bruising to her wrists from being tied up. The detention in the room, the tying up, is the basis of the kidnapping charge.

[11] I turn to the third set of offending, the aggravated injuring and car conversion. On 30 September 2017, [SD] and an unknown accomplice approached a man who had just parked his car, engaged in conversation and then the accomplice suddenly punched him and [SD] and the accomplice together punched him in the head until he fell to the ground. When he was on the ground, curled up with arms covering his head [SD] and the other male stomped on his head. [SD] then took the car keys from him and the two drove off in his car. The victim suffered bruising and swelling to his forehead.

[12] Each of the aggravated robberies is a serious example of the offence. A sole person in a shop, forced with numbers, use of weapons and actual violence. The second aggravated robbery had the additional element of tying up the victim. The aggravated injury also has the elements of two people involved, repeated attacks to the head, stomping on the head with all of the risks that such an attack involves.

[13] To put the offending in an adult context, if these offences were being considered in the District Court the lead offence would be the aggravated robbery and kidnapping. The starting point under the guideline judgment in *R v Mako*[1] would be five years and possibly six years' imprisonment, to take into account the actual violence.

[14] The first aggravated robbery would justify an uplift in the region of two years and the aggravated injury offence would justify a further uplift of at least a year. On that assessment, the overall starting point in the adult Court would be in the region of eight years' imprisonment.

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[1] *R v Mako* [2000] 2 NZLR 170

[15] I recognise that just because offending would likely result in imprisonment in the District Court does not mean that a transfer to that Court is appropriate. The principles applicable to a young person must, nevertheless, be considered and applied. I need to be vigilant to ensure that concentration on the seriousness of the offending, which the Crown describe as tantamount to adult offending, does not dilute the Youth Justice principles applicable to a young person.

[16] The catch phrase "adult crime adult time", often heard, overlooks that I am not dealing with an adult, but rather with what the United Nations Convention would describe as a child. I, nevertheless, consider the adult characterisation and assessment of the seriousness of the offending as an important indicator of seriousness.

[17] I turn to consider the personal history and social circumstances and personal characteristics of [SD] so far as they are relevant to the offence and any order that the Court is empowered to make in respect of. [SD] was 16 and a half years of age at the time of the offending. He had not previously come to the notice of police. In the space of two weeks he becomes engaged with others in a spate of serious offending. It may of significance that he does not offend by himself but as part of a group or with another. There is reference in the material before me to [SD] not being the instigator but nevertheless he was a full participant.

[18] I have the benefit of social worker's report, lay advocate's reports as to [SD]'s circumstances and background and cultural context. I also have a psychological report. There are two social worker's reports, one dated 30 January and the other 21 February this year. Those reports detail difficulty that [SD] had in engaging in education with resultant truancy and behavioural issues at school including threatening behaviour.

[19] The social worker says that due to lack of prosocial activity and truancy he has gravitated towards antisocial peer groups and offending with them. Records suggest that [SD] was exposed to some degree of violence while in the care of his paternal family and father. His experiences there resulted in him self-harming and running away from home when he was aged 14 and being away from home for one to two months. He was living in a park and between the houses of friends. He only went

home when by chance he ran into his mother at a shopping centre. He experienced suicidal thoughts at the age of nine years.

[20] The social worker's report indicates that if in Residence he would be provided with dialectical behaviour therapy and psychological counselling on a one-to-one basis on a weekly basis and vocational training together with what other programmes would be available in the Youth Justice residence.

[21] I have two reports from the lay advocate appointed in this case. [SD] is of [details deleted] descent. His parents are separated. Before this offending [SD] attended his church [religious details deleted]. He was engaged in playing [sport deleted] and is described as a talented musician.

[22] During the time that he has been before the Court he has become fully engaged during the remand period in community work, distributing fruit and vegetables to homeless people in [details deleted]. He is described as being respectful to others. Over the period of four to five months while on bail there has been no breach of bail or other offending. The lay advocate reports, " [SD] has consistently respected, listened to every aspect of his Youth Court rules, maintained his courage and integrity despite challenges, temptations from antisocial peers trying to engage with him." This then is the other side of [SD].

[23] The second report from the lay advocate strays into submissions as to outcome which is the province of the youth advocate but I treat those submissions as expressing the views of the family that supervision with residence is what they seek.

[24] I also have the benefit of a psychological report. That details, [SD]'s relationship with his father, paragraph 22 tells me:

> [SD] reported a difficult relationship with his father describing him as the "hard one". Growing up [SD] "hardly spoke to him" as it was difficult to have a conversation with him. He stated that his father did not take an interest in his schooling or general life and overall he did not feel "appreciated" by his father. Furthermore he reported that his father would not sit next to him, would laugh at him during his asthma attacks and when he was intoxicated would make statements that [SD] was not his son due to having [details deleted] skin than his siblings. [SD] thought that his siblings were treated more affectionately, although he could not describe how. [His mother]

> corroborated [SD]'s experience of his father and stated that he had grown up resenting him. She reported that [SD's father] had a "bad temper" which was exacerbated by alcohol use and that he did not like noise in the house so [SD] had to be quiet around him and was scared of making his father angry. [SD] continued to have regular contact with his mother on weekends and special occasions. He described his mother as "caring". During these visits [his mother] reported that [SD] would make statements such as "Dad hates me". [SD] informed her of his difficult relationship with his father but according to [SD] his mother said that he had to remain with his paternal family.

[25] In summary, the relationship between [SD] and his father was a distant one, with [SD]'s father taking little interest in him, hardly speaking to him and exhibiting bad temper exacerbated by drinking. In place of his father, [SD]'s grandfather was the main caregiver and [SD] was close to him. He died of a [medical event and date deleted], an event witnessed by [SD]. The psychological report records that [SD] felt lost after that.

[26] The psychologist assesses the risk of re-offending as moderate, with that risk increasing when [SD] is in the company of antisocial peers and when using alcohol. The risk level is regarded as capable of being reduced by addressing the risk factors and building protective factors.

[27] The psychologist's report concludes with this opinion and formulation:

> [SD] has grown up with his paternal family and been witness to verbal and physical aggression and alcohol abuse. Despite living in the same home as his father, he took little to no role in [SD]'s upbringing, and instead he was subject to emotional and physical abuse by his father. Growing up in such an environment has likely led to the normalisation of violence and its use as an accepted method of problem solving. Being in a violent environment from birth could have also altered his brain development and increased his risk of violent reactions through social learnings. [SD] has also experienced bullying around his cultural identity at primary school. These experiences are likely to have caused the early development of feelings of being unloved and unaccepted and led to [SD] lacking a sense of belonging and acceptance. [SD] has also experienced the loss of his grandfather who was his main caregiver. It is also likely that [SD] may have felt disconnected from his siblings and maternal family. These experiences have likely led to the development of [SD]'s easily influenced nature in an attempt to gain a sense of belonging and purpose.
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> [SD] has no history of Police involvement until his current offending. There are however reports of aggressive and threatening behaviour towards students and peers at school and he has been exposed to violence at home. At the time of the offending, [SD] was not in education or employment, had stopped attending church, and begun associating with antisocial peers from [his] area. It is likely that [SD] sought a sense of belonging from these peers. He was

> living with his father who he was disconnected from and there appears to have been inconsistent rules and boundaries. He was also using alcohol to the point of becoming intoxicated. Whilst he did not instigate the offending he chose to follow his associates and his involvement in the offending was significant. Overall, [SD]'s risk of reoffending is considered to be at the top end of the moderate category and while recent involvement in the youth justice system may have had a positive impact on him, these changes are recent and will need to be maintained for this to have a positive effect on this rating. He has made some changes to his life following the offending including returning to church, starting a course and is no longer using alcohol. [SD] reports that the relationship with his father has improved and he has a good relationship with his mother.

[28] From all of that material and what is contained in the psychological report, it seems to me likely that [SD] being placed with other young people who are sentenced to imprisonment will only serve to ensure that antisocial influences are a daily occurrence. Unless there were youth specific interventions to counter this influence, the risk of re-offending would remain high and be increased.

[29] I next consider [SD]'s attitude to the offending. I take his attitude from what I read in the social worker's reports and the lay advocate's reports. Since this offending he has kept away from his peers, has been expressing remorse and understanding of the hurt which he has caused and has been expressing a determination to change. The three apology letters written by [SD] showed genuine remorse and understanding.

[30] The next mandatory consideration is the response of [SD]'s family to the offending. It is recorded that [SD]'s father, since [SD] has been charged with this offending has engaged to some extent although I note that his father has shifted [SD] to his mother's care because of the inconvenience of curfew checks. It is clear that [SD]'s mother has supported him during the remand period. In regard to the background it cannot be presumed that either parent currently has the skills to change [SD]'s behaviour.

[31] I have already considered the measures taken by [SD] to apologise and I have already detailed the serious effect of the offending on the victims.

[32] The next mandatory consideration is whether there has been any previous offending. There has been none. It is of real significance that that is so. This spate of

serious offending emerged over a period of two weeks with no background suggesting that sort of behaviour was likely.

[33] The next mandatory consideration is to take into account any decision, recommendation or plan formulated by the family group conference. On 7 December 2017, a family group conference was convened to consider these charges. That resulted in a non-agreement and the matter was returned to Court on that basis. When that occurred, a Judge directed a psychological report under s 333 and a family group conference was redirected by the Judge to consider the outcome of that report and also to allow an opportunity for the victim of the aggravated robbery and kidnapping to be canvassed.

[34] A further family group conference was convened on 21 February this year with the benefit of the victim's views and the report. The family group conference which included representatives of the police agreed that the disposition of all charges should be an order for Supervision with Residence.

[35] The police had engaged the Crown solicitor to represent the police in these proceedings. This was signalled to the Court in November 2017. Two youth aid police officers attended the second family group conference and agreed with the outcome of Supervision with Residence. It is not clear whether the police changed their view after the family group conference or whether the Crown solicitor has taken a different view.

[36] The Crown has not taken over the conduct of the case in the sense of filing a Crown notice. The submissions made to me are made on behalf of the police by the Crown solicitor. In answer to my enquiry of Mr Mugisho, who appeared for the Crown Solicitor, as to how this change has come about, I was advised that the Crown solicitor has taken a different view.

[37] A family group conference is often described as a cornerstone of the New Zealand Youth Justice system. The Oranga Tamariki Act 1989 establishes its centrality in the process. No Court can make a decision without a family group conference being held and its decision must be taken into account on sentencing. There is nothing to say that the police cannot resile from an agreement made at the

family group conference, nor is there anything to say that a Judge must give effect to the family group conference recommendation.

[38] In the case *Police v P & T*[2] Judge McElrea faced a similar situation. He said:

> Provided it does not happen regularly, there is nothing wrong with a prosecutor, for good reason, expressing a different view to the youth aid officer. The prosecutor's view is to be taken into account but the Court must give heavy weight to the recommendations of the conference although it is free to depart from them where appropriate.

[39] I respectfully agree with that summary of the position.

[40] The next mandatory consideration is 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. For the purposes of this case, I issued a minute requesting the Department of Corrections to advise what youth specific interventions would be available if the sentence were to be managed by Corrections, either in prison or in the community. The response I have received is as follows:

> In the space of youth (17 to 25 years) within the Department of Corrections there are unfortunately limited services available. If sentenced to a custodial term, he may be eligible for the Young Offenders Programme. This is a specific programme/unit targeted to those under 20 in a custodial space. This is offered in Christchurch and Hawke's Bay Prisons. If sentenced to a community-based rehabilitative sentence, there are again limited resources. The only programme available in Auckland is a Mauri Toa Rangatahi (Power of Youth) Programme which is offered once per financial year per district. The current programme is running in South Auckland. I apologise I do not have a forecast roster as of yet. There are multiple agencies in the community in which we can encourage the youth to engage with. However, it has proven difficult once they reconnect with antisocial associates and the like as I am well aware you would know.

[41] I take from that response the chances of [SD] having access to youth specific programmes, remembering that he falls at the bottom of an age range of 17 to 25, with significant differences and interventions for such a wide age range, are slim. He would have to be imprisoned in Hawke's Bay or Christchurch for a start. If he is detained in a Youth Justice residence the programmes available are specific to his age. Those who deliver the interventions are specialists in adolescence, daily programmes would be in

[2] *Police v P & T* (1991) 8 FRNZ 642

place, following residence the supervision component would be intensive and youth specific.

[42] If [SD] were to be sentenced to imprisonment, which is the most likely outcome in the District Court, he would very likely spend his time with all of the tensions and violence that go with prison environment. If he is open to being influenced by others, as seems to be the case, he will likely emerge an older and more hardened person. He will likely have no assistance to be anything else. His risk of re-offending will at best be unchanged but more likely be increased. Public safety would not be enhanced by any of that happening.

[43] If I just look at the seriousness of the offending and look only to a punitive response, then transfer to the District Court would be the right response, but that would fail to take into account all of the other mandatory factors which in this case weigh heavily against transfer. A solely punitive response would fail to take into account the Convention and the Beijing Rules. The long-term interests of the community and its safety would also be overlooked.

[44] Concentration on the punitive outcome would be to overlook the restrictions in s 289 which provide that the Court making an order under s 283, which includes conviction and transfer, must assess the restrictiveness of that outcome in accordance with the hierarchy of responses, transfers would be the highest level of response, and not impose, the order unless satisfied that a less restrictive outcome, here supervision with residence, would in the circumstances and having regard to the principles in s 208 and the factors in s 284 be "clearly inadequate".

[45] To take a solely punitive response would fail to take into account the family group conference outcome. It would fail to take into account the other side of [SD] described by his lay advocate. It would be to overlook the early emotional trauma suffered by [SD]. It would be to overlook that [SD], notwithstanding his very serious offending, has the potential to improve his life with the specialist assistance of others for his benefit and, importantly, for the benefit of the community.

[46] It is a strength of the Youth Justice system that I am required to look beyond the seriousness of the offending and I do so. I conclude that an order for detention in a Youth Justice residence for the maximum term followed by the maximum term of supervision available until he turns 18 is the proper response.

[47] Balancing all of the matters to which I have referred, I am not satisfied that such a response is clearly inadequate. Detention in a Youth Justice residence for the maximum period permitted, for a first-time offender and a person just 17 years of age is a very significant time to be deprived of liberty.

[48] I, therefore, make an order that [SD] be subject to Supervision with the Residence, the period being six months and the basis of that residence is the plan prepared by the social worker but is amended by me in the following way.

[49] Under the nature of any programmes to be provided [SD] is to participate and engage in the residential education training programme [time details deleted] Mondays to Fridays, which is to include a psychological assessment and counselling, dialectical behaviour therapy, Taiohi tu Taiohi ora and alcohol and other drug counselling.

[50] In addition, under the obligations of whānau, whānau is to continue to maintain regular telephone contact and personal visits. Likewise, the Oranga Tamariki social worker who must continue to be engaged with [SD] in order to ensure that residence is something which can form the basis of transition to the community, is to provide support for [SD] by way of regular telephone contact with the residential case leader and [SD] and to visit [SD] in person.

[51] The imposition of the supervision component is deferred until the early release hearing date.

[52] On each of the charges which have been proved in the Youth Court, those orders are made.

[53] I decline to make any reparation order in this case having regard to the orders which I have made and the inability of [SD] to pay any reparation.

John Walker
Principal Youth Court Judge