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

IN THE YOUTH COURT
AT HASTINGS

I TE KŌTI TAIOHI
KI HERETAUNGA

CRI-2018-220-000021
[2018] NZYC 529

THE QUEEN

v

[CC]

Hearing: 13 September 2018

Appearances: C R Walker for the Crown
K G Monk for the Young Person

Judgment: 13 September 2018

NOTES OF JUDGE P J CALLINICOS ON SENTENCING

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[1] This is the outcome of a sentencing in the Youth Court of a young man, [CC], who is now 17 years of age. He faces sentencing on two separate sets of offences. The first being that on [date 1 deleted] 2018 he stole a cellphone and also injured a person, [victim 1 name deleted] with intention to cause grievous bodily harm and then on [date 2 deleted – 15 days later] 2018 caused grievous bodily harm to [victim 2] with an associated burglary of a yard at [Business name deleted]

[2] With regard to that first set of proceedings, [CC] appeared in the Hastings Youth Court on those charges and he received bail including the following two conditions:

(a) The first was that he was not to associate with another youth, [VY], who I understand [relationship details deleted].

(b) Secondly, he was not to go within 200 metres of the [banned location deleted].

[3] The second set, sadly occurred while he was on bail for the first two charges and in breach of those two conditions I just have outlined. He was with four other youths including [VY] when they went to the [Business] with the purpose of stealing alcohol, that [Business] being within the [banned location].

[4] With those youths, he then caused grievous bodily harm to [victim 2] with intent to cause grievous bodily harm to him. While [victim 2] sadly died during that attack, [CC] was not charged in relation to that cause of death and that point requires to be emphasised. In terms of the process required at law, a family group conference was held on 25 June 2018. He admitted the grievous bodily harm on [victim 2], but at that stage did not indicate any plea on the other three charges. Those charges have all now been admitted.

[5] No agreement was reached at the family group conference as to an outcome and for that reason a plan and report were directed. They have been obtained and the report recommends two options. The first is that he be sentenced to the maximum available six months' supervision with residence under s 283M or that under s 283O

he is convicted within this Court and then transferred to the District Court for the sentencing component.

[6] In assessing which of those two options is appropriate, the Court must consider specific factors under s 284, which I will address and also be guided by the Youth Justice Principles in s 208.

[7] In presenting my analysis of these matters I have taken into account the extensive written submissions of the Crown and [CC]'s counsel, Ms Monk. I heard them through Mr Walker for the Crown and Ms Monk today speak briefly to the extensive written submissions. Ms Monk has presented detailed submissions on behalf of her young client. I have also read the social work reports, the forensic screen reports, a report of the residence in which [CC] has been detained. I have read a report from the lay advocate, Mr Hukianga, and I have read a letter in the nature of a character reference from a person who was a former primary school teacher aide for [CC].

[8] Starting with the s 284 factors. The first is the nature and circumstances of the offence and the young person's involvement. [CC] was [under 17] years of age at the time of the first offence. As indicated he was with [VY]. They were both on horseback. They saw a young person wearing a blue shirt and there had been some form of gang-type rivalry occurring. It is significant to note that component because as will be noted these gang-type cultural matters have a lot to do with what has occurred for [CC]. Put another way, if he was not inspired by gang rivalry the first offence probably would never have happened.

[9] The victim walked away from the rivalry after which [VY] rode his horse into the victim knocking him over. The victim was still lying on the ground whereupon the two youths, being [CC] and another, began kicking and stomping the victim around the head and body. He was kicked at least 10 times, property was stolen from him, but the victim ran off for assistance.

[10] The social work report I must say is somewhat disturbing regarding [CC]'s outlook on these matters. He is reported as saying that he feels his actions were justified, that the victim deserved the assault because he had wronged [CC] the day

before. It is only after he was charged that he felt that his actions may have been wrong, but it is also significant that at the time of the extensive report he certainly did not want to apologise for his actions or pay the reparation. It is reported he held something akin to "an eye for an eye" mentality and he believes that retaliation and actions through violence is a justified way of living.

[11] Turning to the second attack. Despite being on bail with the conditions I have referred, [CC] breached those conditions. Conditions which were specifically designed to prevent further offending. Put another way, if he had complied with those conditions he would not be here with regard to the charges on these matters. He is reported to having accepted the summary of facts and I have received the final amended version.

[12] It was late at night when he was with his [relative] roaming the [banned location]. They met co-offenders. They discussed the burglary of the [Business]. They then encountered [victim 2] and an altercation soon ensued, noting there was five in this pack and one victim. What occurred was nothing short of a brutal cowardly pack attack of extreme level of violence. The report notes that [CC] believed the assault on the victim was somehow justified because he had allegedly started assaulting them. Whatever started the matter, nothing justified the extensive violence which ensued.

[13] The summary of facts which has been accepted describes the brutality of these accused on this single victim and involved being hit with bottles, lumps of concrete, fence paling, being punched and then kicked and stomped around the head and body while he lay defenceless on the ground. There are some similar dynamics to the first assault of knocking that victim to the ground and kicking him around the body and head as well.

[14] I ask [CC] to consider and to think about what abject terror [victim 2] must have suffered during his last moments alive. Would this young person want his last moments or those of people he loves to be like this, as I will discuss he has not demonstrated any capacity to reflect upon this brutal attack and the actions and any expression of remorse has been at the thinnest level possible.

[15] In terms of his personal history, sadly, [CC] has endured an upbringing all too common in our Courts. He has had significant involvement with attempts to change his thinking, he has been subjected to significant negative culture which is often associated with gangs where use of drugs and propensity for violence is common. Delay advocates report describes that while he has some interest in aspects of his Māori culture and tikanga, by and large he is quite distanced from it.

[16] Like many young people in these Courts he has been exposed to family violence throughout his upbringing. The report notes that he has an aspiration to follow a gang life and it is a focal point in the way he thinks. It reports that he believes that his pathway in life is to become involved in the gangs and that all his friends are on that path and it is a concerning and sad dynamic when there are so many other positive things people could be pursuing. Like other young people in these Courts his pathway through education has been problematic although he said he liked school, he has struggled to focus within it which is perhaps unsurprising.

[17] The social work report notes that he has potential to be a leader and that if he had had the right opportunities he could be a contributing member of a community. He would like to have a full-time job. Against that both the social work report and the later report of the residence refer to the fact that those positive matters are overshadowed by his goal of being involved in the gang culture and beliefs.

[18] I have referred to his attitude towards the offending, it has not displayed anything approaching genuine remorse or empathy for the victims despite him now being 17. He does have a good sense of right and wrong, but he has an entrenched sense of entitlement. His counsel tendered a letter from him which purports to be an apology. It does not make great reference to the actual dynamics of his offending, at best describing his actions as being stupid decisions which would be a considerable understatement for what were brutal attacks. He states that he feels very remorseful, but against the full opportunity he has had throughout this process to display and demonstrate true remorse, these words do appear to me to be somewhat contrived and hollow in tone. They appear instead to be last-grasp attempt to achieve the best outcome for him. The letter talks at some length about the consequences that are befalling him with little display of the actions he committed.

[19] That is highlighted too from the youth justice residence report. It refers to his struggle in dealing with his anger. There has been a reluctance to agree to any form of intervention to help himself manage his anger. Aspects of his attitude to the offending is reported to have improved, but only in recent times. But, against the positive comments the report of the youth justice residence states, "Unfortunately [CC] is fully immersed in the gang culture and this is supported by his father who he looks up to." [CC] states that he believes he can be involved in the gang for support, for identity, protection and belonging without committing crime and being involved in antisocial behaviour.

[20] The report comments that this is a discrepancy in his thinking that residence staff have attempted to challenge him about. That report also states that he excels in the classroom situation which shows that in the right environment and of sufficient duration he might have some promise.

[21] In terms of the response of the whānau. His mother is reported as holding genuine regret for the environment in which [CC] grew up, for the violence, the lack of positive male role models and exposure to alcohol and drugs. She finds it sad indeed that her son believes that violence is acceptable behaviour.

[22] The social work report said that attempts to interview the father were unsuccessful.

[23] There have been no measures of reparation of any kind with regard to either offence, although the latest letter from [CC] says he would pay reparation.

[24] In terms of the effect upon the victims, I have little information on the first attack. With regard to the second attack involving [victim 2], the deceased's whānau are traumatised by what occurred to their loved one, for the terror that their loved whānau suffered in his last moments.

[25] [CC] has no previous proven offences. The social work report, unsurprisingly identifies cause of the factors as being primarily the strong gang culture and influence within his upbringing which form part of his core values. They also believe that use

of cannabis is perhaps a contributing factor and report that he has been using cannabis apparently daily since a young age. To date he has indicated at residence that he is not interested in addressing cannabis use while in residence. The social work report refers to the availability of programmes in the youth offender's units at adult prisons along with motivational programmes.

[26] The social work report talks about why they recommend the two options. With regard to supervision with residence they say this is the first time that this young person has been sentenced in Youth Court and that it is arguable that it is the least restrictive option for him. They also say that his ability to think consequentially has not yet fully developed and that if he is sentenced to imprisonment then his likely to re-offending would be higher than supervision with residence.

[27] I do not entirely agree with that because as Ms Monk has correctly observed, there is a problematic timing issue for [CC] in that the opportunity for any intensive involvement is very short-lived within the youth justice timeframe before he turns 18 [details deleted].

[28] In terms of why transfer to the District Court is viewed as an option, the social worker refers to the serious and violent nature of the offending. [CC]'s poor attitude, his strong pattern of offending behaviours, the fact that he was already on bail for serious offending, and that s 283O sentencing in the District Court would hold him accountable and be in the best interest of public safety. They also refer to the longer opportunity of intervention.

[29] The Crown too submit that the matter should be dealt with by transfer to the District Court because of the fact of the two serious incidents, while on bail, the fact that previous interventions to turn him round have not been successful. The reports of the residential case leader of his struggle with aspects of residence and that there is the longer opportunity of rehabilitative approaches within imprisonment. I am required to consider what would occur if in the District Court.

[30] In terms of the leading cases of *R v Taueki* and *Nuku v R* there could well be a start point for consideration of imprisonment between five and 10 years with a possible

end point, the Crown say, between three and four years' imprisonment.[12] There would of course be parole matters which would run ancillary to any release from prison.

[31] The principles in s 208 of the Act must be considered and they can be summarised as be that as any sentencing outcome should be desired to strengthen any family or whānau to address the young person's offending. That is problematic in this particular case because of the, in particular, gang culture within it. There is also the principle that a young person should be kept in the community so far as that is practicable and consonant with the need to ensure public safety and I have highlighted the risk that has actually to the public. In the present case including that arising with the breach of bail.

[32] His age is clearly a mitigating factor. There are other principles which aim at trying to give a young person developing within that whānau and of course the important principle that any sentence should take the least restrictive form appropriate in the circumstances. Sentencing must also address the causes of offending.

[33] A key provision in this case is that arising s 289. When sentencing the Court must consider the restrictiveness of any outcome being considered and must not impose an outcome unless it is satisfied that the least restrictive outcome would, in the circumstances, having regard to s 208 and s 284 be clearly inadequate. So in the present case for a transfer to occur to the District Court I would have to be satisfied that supervision with residence would be clearly inadequate.

[34] That approach has been endorsed by Kos J in the case of *K v R.*[3] In the present case the following are the key factors. [CC] has been sentenced on various charges, two of which are category 3 carrying 14 years and 10 years' imprisonment. Secondly, while on bail and merely two weeks after receiving bail he committed the more serious of those two attacks. The seriousness of the offending cannot be ignored and neither can the propensity to act violently.

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[1] *R v Taueki* [2005] 3 NZLR 372 (CA)
[2] *Nuku v R* [2012] NZCA 584, [2013] 2 NZLR 39
[3] *K v R* [2012] NZHC 2950

[35] I am concerned by the significant lack of any true remorse and as indicated any comment or statement of remorse has been very late in coming and very generalised in its terms. An important factor is that which Ms Monk refers to. That is the duration of time to address the causes. At best, if I retain matters in Youth Court, the youth justice system would have [less than a year], that is manifestly insufficient time to have any realistic opportunity to turn around the depth of [CC]'s entrenched thinking.

[36] I do note that the option of imprisonment in District Court carries with it great negatives. The positives are the duration of the sentence and the number of interventions which could be available over a long period of time. If anything is going to change with [CC] it would require an intensive involvement.

[37] Another matter must be a consideration of parity with co-offenders. As indicated by the Crown I sentenced two [other young people] for the second of these assaults. They were sentenced to six months' supervision with residence which is exactly what Ms Monk argues for [CC] today. In that particular sentencing it was agreed by all concerned, the Crown, the youth advocate and Oranga Tamariki that the least restrictive outcome for those two youths was six months' supervision with residence.

[38] But there are significant differences between their situation and [CC]'s. The first is that those offenders were [under 16] years of age at the time of the offence. [CC] was [over 16] and at a teenage age and stage, that is a reasonably significant age difference. The second is that their response to the offending was manifestly more positive than [CC]'s. They voluntarily approached the police and admitted their involvement. There has been nothing similar evident in [CC]. No acceptance of responsibility in any real sense. It is reported in the summary of facts that when approached, although he made no comment as he is entitled to do, he actually denied involvement when clearly he was involved.

[39] That approach to matters has continued throughout. It is relevant in terms of how a person responds to their offending in terms of assessing the least restrictive outcome. These are key differences and in addition, of course, the [two others] I sentenced were only facing one serious charge, [CC] was on bail for another.

[40] Against that background, and having regard to the factors I am required to have regard to, I am led to the conclusion, I regret to say by a substantial margin that a sentence of supervision with residence would be clearly inadequate in this situation. The only available Youth Court sentence appropriate in the circumstances is that under s 283O, I therefore enter a conviction against [CC] for the four offences and he is transferred to the District Court for sentence.

[41] A pre-sentence report will be required, so that is directed. The probation officer preparing that report will be entitled to receive all reports and information from the Youth Court file as they will need to see that for the purposes of their report.

[42] The remand will be in custody.

P J Callinicos
Youth Court Judge