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

ORDER PROHIBITING PUBLICATION OF NAME(S), ADDRESS(ES), OCCUPATION(S) OR IDENTIFYING PARTICULARS OF APPELLANT(S)/RESPONDENT(S)/ACCUSED/DEFENDANT(S) PURSUANT TO S 200 CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360346.html

IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2021-204-000126
[2022] NZDC 13461

NEW ZEALAND POLICE
Prosecutor

v

[KAINANO TILO]
Defendant

Hearing:	20 July 2022
Appearances:	G Young for the prosecutor S Mandeno for the defendant
Judgment:	20 July 2022
Reasons:	2 August 2022

JUDGMENT OF JUDGE A J FITZGERALD

Introduction

[1] [Kainano Tilo] committed an aggravated robbery when he was 17 years old. He is now 18. The hearing on 20 July 2022 was arranged to determine his applications for a discharge without conviction for that charge and final suppression of his name.

[2] However, when the matter was called, I was told that neither application was being pursued. Instead, Ms Mandeno submitted that I should convict and discharge [Kainano] to bring matters to an end that day and not suppress his name. For the Police, Mr Young submitted that in terms of s 109 of the Sentencing Act 2002, I could not be satisfied a conviction was sufficient penalty in itself for a charge so serious. Instead I should adjourn the proceeding to obtain the PAC[1] report I had ordered previously to help inform the type of sentence I should impose.

[3] Apparently, the change of mind about disposition came about because [Kainano] had recently breached the curfew condition of his bail, is facing a charge of wilful damage in the Manukau District Court and has not been engaging well with those who are supporting him in the community.

[4] Although I indicated that I was still open to hearing his applications, that was not wanted. I asked whether [Kainano] was willing to pay the victim back for the victim's losses as a result of the offending once he had a job. That was rejected, as was the opportunity to discuss the possibility with [Kainano]. Although [Kainano]'s affidavit evidence was that his goal was to get a job, and that he has been working with others to achieve that goal, his position has apparently changed and I was told he has no means to pay anything toward reparation now or in the foreseeable future.

[5] After hearing the submissions, I convicted and discharged [Kainano] but made a final order for the suppression of his name. There was insufficient time in court to give my reasons for making those decisions in full and so I am providing them now. Because I had anticipated the hearing was to determine the application for discharge without conviction, I had prepared on that basis. However, the methodology I followed is still relevant to explain the decisions I have made.

Gravity

[6] The first thing I did was assess the gravity of the offending. A convenient way to do that was by following the sentencing methodology in counsel's helpful

[1] Provision of Advice to Courts report from Corrections.

submissions. That provided a starting point by reference to the charge itself and then ended with an overall gravity assessment after taking into account all relevant factors.

Facts

[7] At about 4.30 pm on [date deleted] 2021, [Kainano] was the front seat passenger in a car driving through a car park on [location deleted]. His older brother was the driver. [The victim] was walking through the car park when [Kainano] got out of the car, pointed a toy gun at [the victim] and told him to hand over the bag he was carrying, or he would be shot. Believing the gun was real, [the victim] gave [Kainano] the bag which contained a wallet, bank cards, driver's licence, prescription glasses in a case and some other items. [Kainano] got back in the car and he and his brother drove away but were located a short time later by police.

[8] Aggravated robbery is a serious offence as reflected by the maximum penalty of 14 years' imprisonment assigned to it by Parliament. *R v Mako*[2] provides guidance for judges sentencing someone for aggravated robbery. [Kainano]'s case comes within the least serious category described in that case, being a street robbery with a starting point of between 18 months and three years' imprisonment.

[9] This was a brief, unsophisticated incident but with some premeditation given that [Kainano] had armed himself with the toy gun. There was no physical violence. Those features would place it in the middle of the range I have mentioned and so I adopted an initial starting point of two years and three months' imprisonment. The starting point for the gravity assessment was therefore in the middle of the low range for aggravated robbery.

Victim impact

[10] Describing the offence as being in the least serious category in no way minimises it or the impact it had on [the victim] who got a real fright. The impact of it hit him hard about a week later. He struggled to sleep, was somewhat irritable and lacked concentration for weeks. Being self-employed, that made for a very difficult

[2] *R v Mako* [2000] 2 NZLR 170, (2000) 17 CRNZ 272.

time. To make matters worse, [the victim] and his wife had each suffered serious health problems in the period before this and so the incident added much stress to the great strain they were already under.

[11] In his victim impact statement, [the victim] goes on to say that [Kainano] was clearly troubled and appeared to be on something when he looked into his eyes that day. As a sign of [the victim]'s kindness and forgiving nature, he wishes [Kainano] and his family the best going forward and hopes that [Kainano] gets some help because, he says, it is a long road when you are such a young person on the wrong track. The costs to [the victim] financially were $66 on his card and a couple of very non-productive weeks, losing about $1000 of income when he was absent from work.

[12] It is very disappointing that a restorative justice meeting could not be organised between [Kainano] and [the victim]. [Kainano] wanted the opportunity to apologise in person to [the victim] and the impression I have is that [the victim] might have been willing to attend such a meeting too. Both I think would have benefited from the opportunity to meet and for peace to be made between them. For reasons the restorative justice facilitator has not explained, despite enquiry, she did not action the request I made on 20 June 2022 to contact [Kainano] and make another attempt to arrange the meeting.

[Kainano]'s behavioural history

[13] [Kainano] has no previous convictions, but he has had charges before the Manukau Youth Court discharged under s 282 of the Oranga Tamariki Act 1989. That order deems those charges never to have been filed in court.

[14] However, the Police say that those charges relate to [Kainano]'s past conduct and are therefore relevant to the gravity assessment. In support of that they point to two recent decisions of the High Court.

[15] The first is a decision of Downs J who mentions the defendant having had a charge in the Youth Court discharged under s 282.[3] He makes the comment in the context of referring to factors that were relevant to the overall gravity assessment.

[3] *Hughes-Watford v NZ Police* [2021] NZHC 2373.

He said that although the defendant did not have a "formal criminal record," he was discharged under s 282 in the Youth Court for wounding with intent to cause grievous bodily harm. Although Downs J does not expressly say what if any weight he attached to that, the impression is that he considered it to be a matter he could take into account as part of the behavioural history of that defendant who was aged 18 at the time of his offending.

[16] In the second decision, Fitzgerald J took into account a person's previous discharge without conviction.[4] She considered it an aggravating factor in the overall gravity assessment when that person was applying for a second discharge without conviction in the District Court. The Police say that situation is directly analogous to the position in this case and the s 282 discharge [Kainano] has had in the Youth Court.

[17] I disagree. A s 282 order in the Youth Court is very different to a discharge without conviction in the District Court. The effect of a s 282 order is to make it seem as if that young person did not appear in the Youth Court facing charges because it deems the charges not to have been filed in court. By contrast, a discharge without conviction does not deem a charge to not have been filed in court and it is therefore something a Judge can properly have regard to later if the person concerned is applying for a second discharge without conviction.

[18] Having said that, I acknowledge that deeming the charge never to have been filed in court is not the same as deeming the offending not to have happened. What [Kainano] did previously forms part of his behavioural history. I accept that there might be some situations where it would be appropriate to have regard to behaviour that fits within this category. For example, when deciding a bail application where assessing risk and considering public safety issues are primary considerations. That, I think, is different to the current context. There are many things to consider at sentencing that go beyond risk and immediate public safety concerns, including the long term implications of a conviction in the adult court for someone of [Kainano]'s age. Parliament clearly intended the s 282 order to be more than merely a discharge without a notation. It is a discharge that essentially deems the proceedings not to have existed because there cannot be proceedings if charges are not filed in court.

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[4] *Tsyan v NZ Police* [2021] NZHC 1264.

[19] It is important to consider the legislative and practice contexts in the Youth Court where s 282 orders are made. The law that applies in the Youth Court is qualitatively different to the law in the District Court for adults in many important respects. This includes a strong emphasis on not charging children and young people and on keeping them out of court wherever possible. As a result, about 80 percent of those who come to police attention are not charged and brought to court but instead are dealt with by alternative action in the community. For those who do come to court, there is an emphasis on avoiding stigmatisation and criminal records wherever possible. This is reflected by the number of cases where s 282 orders are made in the Youth Court. In the year ending December 2021, 51 percent of all cases in the Youth Court in New Zealand were dealt with by making a s 282 order.[5]

[20] In this case, her Honour Judge Malosi made the s 282 order in relation to the charges [Kainano] faced in the Youth Court, and Ms Mandeno managed to obtain the transcript of that hearing at the Pasifika Court on 18 May 2021.[6] It was an outcome agreed to by everyone involved including the police who were especially impressed with the amount of community work [Kainano] had done and the reparation he paid. The s 282 order was also the outcome agreed to at the Family Group Conference ("FGC") if [Kainano] completed his plan without further offending.

[21] Therefore, [Kainano] appeared before me in the District Court without any record of offending in court proceedings because of the deeming effect of the s 282 order made in relation to his Youth Court charges. It is different to the position he would have been in if an order under s 283 of the Oranga Tamariki Act had been made in the Youth Court. In *Kohere v Police*,[7] Anderson J said that matters dealt with in the Youth Court do not constitute convictions for offences. To that extent the Youth Court is not a court of criminal record, but that is not to say that matters dealt with in the Youth Court must be totally ignored by the District Court. He went on to say that a young person's behavioural history, as indicated by proceedings in the Youth Court, can be taken into account by a sentencing judge in the District Court.

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[5] Ministry of Justice "Children and young people in court: Data notes and trends for 2021" at 3.
[6] The charges were 3 for burglary, 2 assaults, one aggravated robbery, 1 unlawful taking of a car, 2 for unlawfully interfering with cars and 1 for having tools for the purpose of taking cars.
[7] *Kohere v Police* (1994) CRNZ 442.

[22] It is important to note however that in that case, orders had been made in the Youth Court under s 283 of the Oranga Tamariki Act for offending by that young person. The important words to note in Anderson J's decision about a Judge in the District Court being able to take into account a young person's behavioural history are "…as indicated by proceedings in the Youth Court…" In that case, the s 283 orders did indicate that there were proceedings in the Youth Court. In this case, the s 282 order specifically did not indicate that there were such proceedings. Again, there cannot be proceedings if charges are not filed in court. [Kainano] therefore has no criminal record or behavioural history indicated by proceedings in the Youth Court. In the analysis I have done he did not get a "good character" credit, but the matters for which he came before the Youth Court were not taken into account as a factor counting against him in the gravity assessment.

Factors counting in [Kainano]'s favour

Guilty plea

[23] [Kainano] was entitled to a 25 percent discount for pleading guilty to the charge shortly after being found fit to plead and to stand trial for it.

Age

[24] [Kainano] had his 17th birthday seven weeks before committing the offence.

[25] Until 1 July 2019, all 17-year-olds entering the justice system in New Zealand were in an unfortunate and disadvantaged position. Since 1 July 2019, some 17-year-olds such as [Kainano] still are. That is, those who face a charge listed in schedule 1A to the Oranga Tamariki Act who appear once in the Youth Court and then go into the District Court to be dealt with as an adult. Aggravated robbery is one of the charges in schedule 1A.

[26] The reason I say unfortunate and disadvantaged is that in 1993, New Zealand ratified the UN Convention on the Rights of the Child ("the Convention") which defines a child as a person under 18 years of age. For consistency, from now on, I will simply refer to children when talking about people under 18 years of age.

[27] The preamble to the Convention refers to States parties, like New Zealand, proclaiming and agreeing that everyone is entitled to all of the rights and freedoms in Human Rights Instruments they have ratified without discrimination of any sort. This would therefore include age.

[28] Article 2 of the Convention records the agreement that every child in the country will have every one of the rights in the Convention respected and ensured. In other words, it is a guarantee. Despite that guarantee, the Convention rights of all 17-year-olds entering the justice system were not respected or ensured at all until 1 July 2019.

[29] One significant amendment to the Oranga Tamariki Act that came into force on 1 July 2019 is the requirement to respect and uphold the rights of children under the Convention. On the face of it, that significantly increased the status of the Convention under our national law. Until then, the higher courts had said on a number of occasions that the Convention was an interpretive tool and provided helpful guidance in the application of our legislation. However, the new requirement that Convention rights must now be respected and upheld, would seem to give them much higher status than simply being a helpful guide or interpretative tool.

[30] Another significant change that also came into force on 1 July 2019 was to include some 17-year olds in the Youth Court jurisdiction but not those facing a charge in schedule 1A to the Act. Convention rights for those children are still not respected, ensured or upheld. Similarly, the guarantee given to them under s 25(i) of the New Zealand Bill of Rights Act 1990 that, as a child charged with an offence, they will be dealt with in a manner that takes into account their age, is not respected or upheld. Once they are in the District Court, they are not able to be dealt with as children. They are dealt with instead as adults, albeit young adults who get a discount for their age. Otherwise they are dealt with under legislation with purposes and principles which are utterly different to those that apply to children. It is also in direct conflict with the most recent UN guidance on how the Convention should be applied for children.[8]

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[8] UN. Committee on the Rights of the Child *General comment No. 24 (2019) on children's rights in the child justice system* UN Doc CRC/C/GC/24 (18 September 2019).

[31] The problems in this respect remain despite guidance from the higher courts on the issue although I acknowledge that the leading cases do pre-date the 1 July 2019 amendments to the Oranga Tamariki Act. For example, the Court of Appeal said this in 2015:[9]

> [11] …When interpreting the s 25(i) NZBORA right, UNCROC's articles should be adopted in a way that advances Parliament's purpose. As noted, that purpose is shared by both instruments. Courts can be expected to interpret legislation consistently with international treaties ratified by New Zealand. Moreover, Parliament is not to be assumed to have intentionally legislated contrary to New Zealand's international obligations.

[32] Discerning Parliament's purpose in the present context is difficult. On the one hand, New Zealand ratified the Convention, essentially guaranteeing every right in it to every child in the country. On the other hand, Parliament then excludes some children from a process that enables that to happen. It is impossible to interpret the Sentencing Act consistently with the Convention. When a child is excluded from the law and the processes designed for them and sent to the adult system instead, their Convention rights cannot be respected or upheld in anything but a very tokenistic way. They can get a discount off the starting point for their age, but they still get an adult sentence that is made and measured by reference to purposes and principles that are completely different to those that apply for children. If Parliament is assumed to have not intentionally legislated contrary to our obligations under the Convention for 17-year old children facing a schedule 1A offence, then how does the court reconcile the differences in a principled and just way?

[33] The impossibility of reconciling those differences, especially since 1 July 2019, can be illustrated by reference to the sort of guidance the Court of Appeal has provided for situations such as this. For example, in *Pouwhare v R*:[10]

> [70] The youth justice regime created by the [Oranga Tamariki] Act is a carefully weighted and circumscribed amalgam of objects, principles, rights, processes, remedies and sanctions. It is not, and does not purport to be, an exclusive code for the administration of youth justice. It caters for the young offender whose offending is not of the most serious order, which might be attributable to a lack of family support, or immaturity, and may be impulsive or the result of peer pressure. It does not cater for young offenders, especially

[9] *DP v R* [2015] NZCA 476.
[10] *Pouwhare v R* [2010] NZCA 268, (2010) 24 CRNZ 868.

> those approaching the age of 17, whose offending is alleged or accepted to be so serious that it is tantamount to adult offending.
>
> …
>
> [82] …When sentencing a young person, therefore, a Judge should, to the extent that this is consistent with the letter of the Sentencing Act, act in accordance with the convention and, in particular, should treat the young persons "best interests" as "a primary consideration". The Judge must treat the young person in a way that promotes his or her "sense of dignity and worth"; must reinforce, the young persons "respect for the human rights and fundamental freedoms of others"; and must, as the Sentencing Act also expressly calls for, impose a sentence which "takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society".

[34] Most of paragraph [82] above is taken directly from article 40(1) of the Convention but the comments there and in paragraph [70] above need to be reality tested. For example;

(a) The 20 percent or so of children who come to police attention who are charged and brought before the Youth Court are usually facing serious charges. In the year ending December 2021, 48 percent of all of those appearing in the Youth Court were facing charges for either serious violence, robbery (which includes aggravated robbery at 16 percent) or burglary (including aggravated burglary).[11] These children present with a very complex range of concerns underlying their behaviour that go far beyond a lack of family support, immaturity, impulsiveness or peer pressure. Children presenting with simply those sorts of issues would not usually even get to court.

(b) Just because a child commits a serious offence, it does not stop him or her from being a child. To suggest that they should go to the adult court if their offending is "tantamount to adult offending" or, in other words, that they should "do adult time for adult crime" is completely contrary to their Convention rights and disregards their best interests. It is the children committing the most serious offences, who almost always have the most complex issues underlying their offending, who most need the

[11] Ministry of Justice "Charges for children and young people finalised in court" (15 March 2022).

age-appropriate, evidence-based programmes and processes that are available in the Youth Court.

(c) The purposes and principles of the Sentencing Act are completely different to those in the Oranga Tamariki Act and to the relevant articles of the Convention in profoundly important, qualitative ways. For example, the Sentencing Act:

(i) holds children individually accountable for their behaviour instead of having their wellbeing at the centre of all decision making in the inextricable context of their immediate family and wider family group.

(ii) focuses on such things as denunciation and deterrence as key purposes which are concepts and words that do not appear anywhere in the Oranga Tamariki Act.

(iii) does not require the type of differentiated, individualised approach that the Oranga Tamariki Act and the Convention do. By comparison, the Sentencing Act, with its emphasis on consistency between cases, requires a formulaic, mathematical approach and offers a relatively short list of available sanctions. Although guideline cases refer to the need for individualised assessments, the reality of that is just tinkering with the numbers when calculating the discount given for such things as age. The end result is still the same type of sentence as an adult gets; prison, home detention, community work, supervision and so on but just a bit shorter.

[35] It is impossible to sentence a child in an adult court under the Sentencing Act "in accordance with the Convention" and to do so is contrary to their best interests. The fundamental essence of a child's Convention rights is the recognition that they are a child to whom the various rights and protections under the Convention apply without qualification or compromise. Once that recognition is taken away, together with

access to the law and the processes designed for children, their Convention rights have been disrespected and renounced.

[36] It is impossible to treat a child being sentenced in an adult court in a way that promotes his or her "sense of dignity and worth". You can use simple and polite language, call them by their first name and give them a big discount for being so young, but there is no escaping the fact that they are otherwise being treated just like an adult offender, standing in a dock in an adult courtroom. What happens in a conventional sentencing list in the District Court does not promote anyone's sense dignity and worth and it is not intended to. For a child especially, it is a frightening, stressful experience that strips away dignity and creates a sense of worthlessness.

[37] You cannot reinforce a child's respect for the human rights and fundamental freedoms of others when their own human rights and fundamental freedoms have not been respected. That is likely to reinforce disrespect for a system that would apply such a double standard.

[38] A sentence imposed on a child in an adult court cannot "promote [their] reintegration and enable them to assume a constructive role in society" because, as the evidence shows overwhelmingly, sending children into the adult system only increases their risk of future offending and other adverse life outcomes. It is the most destructive thing you can do to a child who comes before the court and to the community they will return to live in.

[39] Every so often, the UN issues General Comments to provide guidance to States parties on how to interpret and apply the Convention. The latest General Comment on Child Justice was issued on 18 September 2019.[12] It points out that children differ from adults in their physical and psychological development and such differences constitute the basis for the recognition of lesser culpability and for a separate system with a differentiated, individualised approach. It goes on to say that exposure to the criminal justice system has been demonstrated to cause harm to children, limiting their chances of becoming responsible adults[13] and that evidence shows that the prevalence

[12] *UN General comment No. 24 (2019)* above n 7.
[13] At 2.

of crime committed by children tends to decrease after treating them in a manner that is consistent with the promotion of the child's sense of dignity and worth.[14]

[40] The General Comment also emphasises the need for States parties to be scaling up the diversion of children away from formal justice processes at any time prior to or during proceedings.[15] It says that diversion should be the preferred manner of dealing with children in the majority of cases and that States parties should continually extend the range of offences for which diversion is possible including serious offences where appropriate. In addition to avoiding stigmatisation and criminal records, this approach yields good results for children, is congruent with public safety and has proved to be cost effective.[16] These comments are borne out by the New Zealand Youth Court experience where approaches like the ones recommended by the UN under the Convention have seen the number of children and young people charged with offending drop dramatically. Between 2010 and 2021, the rate of young people appearing in court reduced by 69 percent.[17]

[41] These are just a few examples of the ways in which the situation for children in the Youth Court, under the Oranga Tamariki Act and under the Convention, is so qualitatively different altogether to their situation in the adult court. The two systems are utterly different in terms of their governing purposes, principles, philosophy, processes and personnel.

[42] So, should a 17-year-old child be compensated for having his or her status as a child disregarded despite the guarantee made to them under the Convention and the New Zealand Bill of Rights Act? Should the loss of the rights and protections they had been ensured of when the Convention was ratified be reflected in the discounts made by the court when they are sentenced as an adult? I think so. At least it is one way in which the Sentencing Act can be interpreted consistently with the Convention, albeit a tokenistic one.

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[14] At 3.
[15] At 15-18.
[16] At 15.
[17] Youth Justice Indicators Summary Report December 2021 (Ministry of Justice, December 2020) at 5.

[43] In *Diaz v R*[18] the Court of Appeal allowed a 30 percent discount for the various youth-related matters for a young man who was aged 18 at the time of sentencing but 17 at the time of the offence. The Court pointed out that setting the discount is always an individualised, contextual exercise. It commented that youth discounts can be provided to recognise the age-related neurological differences between young people and adults, to acknowledge that an offence may be an act of immaturity or youthful indiscretion, or because young people can be more vulnerable or susceptible to negative influences.

[44] However, the Court did not refer to these issues I have mentioned, about 17-year-old children having the right to be treated as children, which was guaranteed to them under the Convention, taken away. Seventeen-year-old children who are being sentenced in an adult court, should be entitled to have an added discount in an attempt compensate for this loss of their Convention rights. Following *Diaz*, and allowing for the factors I have mentioned, I adopted a discount of 40 percent for all of the age-related factors.

Other vulnerabilities

[45] These issues regarding discounts for age, as referred to by the Court of Appeal in *R v Diaz* and other cases such as the often-cited *R v Churchward,*[19] are in recognition of the vulnerability of children by virtue of their age alone. However, a large proportion of the children who come before the Youth Court, including those like [Kainano] who are being sent into the District Court, present with another layer of vulnerability as well as their age and that is their often serious and complex mental health concerns. In [Kainano]'s case there are two dimensions to this.

Traumatic Brain Injuries

[46] The first concerns the numerous traumatic brain injuries he has suffered which are referred to in reports the health assessors provided for the fitness hearing. For example, the clinical psychologist [name deleted] mentions [Kainano]'s history of concussions. It is estimated that [Kainano] has been knocked out between 10 and 20

[18] *Diaz v R* [2021] NZCA 426.
[19] *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446.

times playing sports. He is an outstanding rugby league player and is especially talented at tag rugby [details deleted].

[47] As a result of these brain injuries, [Kainano] is slow at processing information and has impaired cognitive functioning, especially in the context of language and comprehension. It is the reason he required the help of a communication assistant to participate in these proceedings in a meaningful way.

[48] Unfortunately, the exact pattern of concussion severity, frequency and amount could not be established for [Kainano]. A full neuropsychological assessment was ordered but could not be completed at the time because he had yet another head injury after being hit in the head with a bottle during a fight just before the assessment was due to happen in 2020.

[49] So, detailed information about [Kainano]'s cognitive impairment is not available but it is well known that such injuries impact various domains including executive function and therefore such things as self-control, problem solving, learning, memory, attention, processing speed and language function.[20] Such issues would be even more pronounced when someone has experienced multiple concussions, especially from a young age when the brain is more immature.

Mental illness

[50] The other and more prominent mental health concern recently is [Kainano]'s mental illness. On 16 September 2021, [Kainano] was assessed as appearing to have a psychotic disorder. He was initially remanded to [a youth justice residence] before being transferred to [the inpatient treatment unit for young people] in Porirua, .

[51] A report from his [responsible clinician] at [the inpatient treatment unit], includes this diagnosis:

> … "[Kainano Tilo] has suffered from a psychotic illness and there are elements of conduct disorder present too. His psychotic illness featured

[20] Ian Lambie *What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand* (Office of the Prime Minister's Chief Science Advisor, 29 January 2020) at 51.

> tangential ideas, perplexity, delusions relating to puzzles he had to solve and responding to false external stimulae. He has responded well to medication in hospital but will need a graded transition to a community setting in the future".

[52] In relation to the offending [the responsible clinician] noted:

> "The incident of aggravated robbery took place approximately two months prior to his reception to [a youth justice residence] and involved a toy gun and a laundromat. [Kainano] had poor recall about the event but has talked in the past about being with his brother at the time and feeling that his actions were part of a wider puzzle he had to solve. The details as reflected by the police were outlined in the summary of facts document – his mother indicated that [Kainano] had said that voices had told him to "finish the job or something" and that he thought that there was perhaps a mission that he needed to complete".

[53] It is not known how long [Kainano] had been in the grip of the psychotic illness. It is thought that the psychosis appeared in late July or August and so the question of his possible insanity defence was not pursued. I acknowledge the conscientious efforts of Ms Mandeno to explore these issues. There are certainly some indications that [Kainano] might have at least been in the early stages of his psychosis, such as [the victim]'s comments regarding [Kainano]'s presentation at the time of the offending and the doctor's comments I have just mentioned. However, the evidence was not believed to be strong enough to pursue that issue.

[54] [Kainano] spent approximately three months at [the inpatient treatment unit] being treated as an inpatient, before being released back to his family in Auckland in early 2022. Since his return, he has been supported in the community by the Early Psychosis Intervention ("EPI") team.

[55] In February 2022, [Kainano's keyworker], reported that he appeared motivated to engage meaningfully in his cares (*sic*). In June 2022, [the keyworker] reported that she continued to see [Kainano] weekly or fortnightly, depending on his schedule. [The keyworker] noted that he was engaging well through his endeavours to obtain and maintain employment but that he struggled in areas of transport, motivation and concentration which are common, negative psychotic symptoms. She comments that no risk concerns existed at that time because [Kainano] appeared stable in his mental state and engaged regularly with the EPI team. It is therefore disappointing that

[Kainano] has not been engaging as well in recent times, but he is clearly capable of doing so and maintained good progress for many months without fault.

Fitness

[56] As a result of [Kainano]'s state of mental health upon admission to [the inpatient treatment unit], the question of his fitness to stand trial for the charge was raised and the process under the Criminal Procedure (Mentally Impaired Persons) Act 2003 triggered. At a hearing to determine fitness on 16 February 2022, I found that [Kainano] had a mental impairment (as described by [the responsible clinician]) but that he was fit to plead and to stand trial. He pleaded guilty to the charge at his next court appearance on 24 March 2022.

Trauma

[57] In her report for the fitness hearing, [the clinical psychologist] includes a paragraph entitled "History with Oranga Tamariki" which mentions that there were multiple notifications regarding family violence in [Kainano]'s family home 2009 and 2013, including verbal arguments between the parents plus verbal and physical violence from his mother's partner against some of the children. In 2014, the partner was convicted of assaulting one of [Kainano]'s siblings. There are also documented concerns about substance use and unmet medical needs regarding [Kainano]'s younger brother.

[58] It would seem that the issues were ongoing. When Judge Malosi discharged [Kainano]'s charges in the Youth Court in 2020, she made a referral to a care and protection FGC co-ordinator in relation to [Kainano] being in need of care and protection. The care and protection case has since been closed but no reports are available explaining why.

[59] In the conclusion to her report, [the clinical psychologist] also makes the following comments:

> "[Kainano]'s current difficulties are predisposed by a number of early vulnerability factors including health related issues during his early development (a heart murmur, cyanotic episodes, right eye ptosis, and residual ptosis following surgery, bullying at school about his eye, numerous injuries

> to his head in the context of contact sports and violence with peers). It is possible that he was also exposed to parental discord and family violence and may have experienced neglect however the sources of information are conflicting. [Kainano] appears to have experienced learning difficulties and bullying which he responded to with violence. These difficulties likely caused him to feel alienated from mainstream peers and he was unable to continue with mainstream schooling. [Kainano] appears to have gravitated towards antisocial peers and alternative education where he likely felt a sense of acceptance and belonging.

[60] [A report writer], who wrote the s 27 report, also mentions [Kainano] being mocked and bullied at school because of [a physical attribute] and him fighting back against that. Eventually he was "let go" from school because of that behaviour. His mother did not want him going to alternative education for fear he would then mix with an anti-social group but that is exactly what happened.

Current situation

[61] [Kainano] is living at home with his mother and stepfather. His father lives [overseas].

[62] [Kainano] is of Samoan and Tongan heritage. He and his family regularly attend the [name of church deleted]. He is trying to restore balance to his well-being by engagement with his family, his faith and his culture.

[63] Since his return to Auckland in January this year, [Kainano] had been doing very well and was working well with those supporting him. In addition to those I have mentioned already, he continues to be supported by [name deleted] who is the social worker he had when he was in the Youth Court previously. [The social worker] is providing that support voluntarily because she believes in [Kainano] and has made an admirable commitment to continue helping him. It had been intended that [the social worker] would provide an affidavit setting out the things she had been helping [Kainano] do, but for reasons unknown that did not happen.

[64] In his affidavit, [Kainano] had deposed that he wants to be able to look after himself, work hard and prove himself to be a good son and a good employee. He had met with an employment consultant on one occasion with a plan to further engage but, for reasons unknown to me, that had changed by 20 July 2022. He also said he wants to travel to see his father [overseas] and to play tag rugby overseas. [Kainano] has a

passion for rugby and is exceptionally talented at tag rugby [details deleted]. [Details deleted].

The overall gravity assessment

[65] Applying the sentencing approach used in the submissions, I assessed the credits [Kainano] was entitled to. These were not arrived at randomly. With one exception, they are all based on what the higher courts have said are within the available range for the particular issue. The only exception to that is the 10 percent I added to the youth discount for a 17-year-old child whose Convention rights have effectively been disregarded.

[66] These are the discounts:

(a) 25 percent for the guilty plea.

(b) 40 percent for all of the age-related factors for the reasons explained.

(c) Five percent for remorse, willingness to attend a restorative justice meeting and for the apology letter he wrote. Whata J commented in *Solicitor General v Heta,*[21] that a discount of up to 20 percent can be available for this issue. If [Kainano] had been willing to pay reparation when he got a job, the discount would obviously have been higher.

(d) 15 percent for [Kainano]'s complex and serious mental health concerns and the steps he has taken this year with his rehabilitation and his efforts to find work. For more than six months he worked very hard at that without any problems I am aware of.

(e) 10 percent for the time he was detained at [the youth justice residence] and then at [the inpatient treatment unit], as well as the time he was subject to bail conditions (more than six months). He had not breached bail at all until recently.

[21] *Solicitor General v Heta* [2018] NZHC 2453.

(f) Five percent for trauma-related issues. Although I agree with Mr Young that some aspects of the evidence about trauma are equivocal, and the s 27 report does not disclose anything of a serious nature, I believe a small discount is justified for the various issues I have referred to.[22]

[67] [Kainano] was therefore entitled to a 100 percent discount off the starting point of two years and three months' imprisonment and so he would not have been facing imprisonment or an electronically monitored sentence if he was sentenced.

[68] Equally, the overall gravity assessment was at the bottom end of the low range for an aggravated robbery, all things considered.

Consequences

[69] The second thing I did was consider the direct and indirect consequences of a conviction for aggravated robbery on [Kainano] who recently turned 18.

[70] A conviction will be a major impediment to him getting a job and to travelling overseas which he will want to do to see his father [overseas] and to play tag rugby internationally. There is a real and appreciable risk of him finding it extremely difficult to get a job and to travel easily to other countries. It could also be an impediment to other things he will probably want to do in future such as finding suitable housing. Further, it might impede his rehabilitation and his reintegration in society.

Proportionality

[71] The third thing I did was consider whether those consequences were out of all proportion to the gravity of the offending and, if so, whether I should exercise my discretion in favour of granting the application for a discharge without conviction.

[72] In doing this I reflected on what would happen if [Kainano]'s Convention rights were respected and upheld. In that regard, the latest General Comment provides

[22] Above at [57] to [60].

helpful guidance. I have already set out some of the relevant parts of the latest UN General Comment.[23]

[73] If [Kainano] had the charge dealt with in the Youth Court, where such advice would be one of the factors considered, there was a remote possibility of him receiving another s 282 order for this charge if he did well enough on an FGC plan. It is likely that he would have been given an opportunity to complete an FGC plan rather than proceeding directly to sentencing and having an order made under s 283 of the Oranga Tamariki Act. Even if [Kainano] got a notation under s 283, that would not have the same status as a conviction in the adult court, as Anderson J noted in the *Kohere* case mentioned earlier.[24]

[74] I then went on to consider the purposes in s 7 of the Sentencing Act as is required when dealing with the matter in the District Court. In that regard, [Kainano] has been adequately held accountable given the time he spent in custody, detained in the mental health unit and on bail for nearly seven months without any breach until recently, and even then, a relatively minor breach.

[75] There is a danger with attempting to "promote a sense of responsibility" in a child who is in the adult system where the effectiveness of processes and outcomes are measured by reference to our expectations of adults. That is likely to count heavily against those children who have not had concepts like responsibility explained to them or properly modelled. Children often act impulsively and with a lack consequential thinking. However, when their actions are measured by adult standards, they can mistakenly be interpreted as indicating ongoing deliberate irresponsibility. This is especially problematic for those, like [Kainano], with neuro-disabilities, whose ability to understand and process abstract concepts like "a sense of responsibility," or to link cause and effect, or to learn from their mistakes, and so on, is severely compromised.

[76] Until the hearing on 20 July 2022, it had seemed as though [Kainano] was willing to do all that he could to put things right with [the victim]. It is very disappointing that the restorative justice meeting could not be arranged, but that was not due to fault on [Kainano]'s part. It was very disappointing that at the hearing there

[23] Above at [39] and [40].
[24] Above n 7.

was no willingness to even consider the reparation issue. That is not to say that [Kainano] had to consent or agree before I could make a reparation order. My concern was that making an order in the face of such intransigence would likely result in nothing being paid in anything close to a reasonable time frame. I did not want to create false hope for [the victim] to make him believe he would receive anything within the foreseeable future, thereby further victimising him. The unwillingness to pay reparation was a significant factor in deciding a conviction was appropriate rather than a discharge without conviction.

[77] Denunciation is met by the many appearances and processes to which [Kainano] has been subjected over the past seven months, especially those in open adult courtrooms. The conviction was an additional way of denouncing [Kainano]'s conduct.

[78] Little if any weight can be assigned to general or specific deterrence for someone with the mental impairments that [Kainano] has.

[79] In deciding whether there was anything else that needed to be addressed before the proceeding ended, such as assisting with [Kainano]'s rehabilitation or for any other reason, I needed to be mindful of the time frame within which decisions must be made and implemented for children which is very different to the times frames that apply to adults.

[80] Under Article 40(2)(b)(iii) of the Convention, as explained in paragraph 54 of the General Comment, the time between the commission of the offence and the conclusion of proceedings should be as short as possible for children. The General Comment explains that the longer this period, the more likely it is that the response loses its desired outcome. Paragraph 55 explains that the time limits should be much shorter than those set for adults.

[81] To illustrate that, the time frames for the key processes that apply in the Youth Court, including convening and holding FGCs and the sentences available, are measured in weeks and a few months rather than in many months or in years. For example, the longest sentence available within the Youth Court is six months

supervision with residence,[25] with a right to early release at the two thirds point, essentially if behaviour is satisfactory.[26] That sentence must be followed by supervision of not less than six and not more than 12 months.[27]

[82] There was no need for ongoing court involvement to ensure [Kainano]'s rehabilitative needs were met; he has all the support he needs, and the issue now will be his willingness to re-engage.

[83] It will be apparent from the foregoing that I have had regard to the purposes of sentencing in s 8 of the Sentencing Act. I do not need to repeat what I have said and simply add that I opted for the least restrictive outcome I considered appropriate in the circumstances.

[84] For completeness, I note that the conviction might not be a life-long barrier because the clean slate law should apply, meaning that after 7 years, [Kainano] could be deemed to have no criminal record for the purposes of any question asked of him about his criminal record. The requirements under s 7 of the Criminal Records (Clean Slate) Act 2004 are that he complete a rehabilitation period of at least 7 years, that no custodial sentence is imposed on him, he has not been convicted of a specified offence (which aggravated robbery is not), and any reparation is paid in full.

Name suppression

[85] Article 16(1) of the Convention provides that no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family home, or correspondence, nor to unlawful attacks on his or her honour or reputation. Article 40(2)(b)(vii) provides that every child alleged as or accused of having infringed the penal law has the guarantee of having his or her privacy fully respected at all stages of the proceedings.

[86] In relation to these articles, the General Comment provides the following guidance:

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[25] Section 311.
[26] Section 314.
[27] Section 311(2A)(b).

> 66. The right of a child to have his or her privacy fully respected during all stages of the proceedings, set out in article 40(2)(b)(vii), should be read with articles 16 and 40(1).
>
> 67. States parties should respect the rule that child justice hearings are to be conducted behind closed doors. Exceptions should be very limited and clearly stated in the law. If the verdict and/or sentence is pronounced in public at a court session, the identity of the child should not be revealed. Furthermore, the right to privacy should also mean that the court files and records of children should be kept strictly confidential and closed to third parties except for those directly involved in the investigation and adjudication of, and ruling on, the case.
>
> 68. Case-law reports relating to children should be anonymous, and such reports placed online should adhere to this rule.
>
> …
>
> 70. In the Committee's view, there should be life-long protection from publication regarding crimes committed by children. The rationale for the non-publication rule, and for its continuation after the child reaches the age of 18, is that publication causes ongoing stigmatization, which is likely to have a negative impact on access to education, work, housing or safety. This impedes the child's reintegration and assumption of a constructive role in society. States parties should thus ensure that the general rule is lifelong privacy protection pertaining to all types of media, including social media.

[87] Helpful guidance can also be found in other UN instruments such as the Beijing Rules.[28] On a number of occasions, the higher courts have endorsed using such instruments as aids to interpret our national law in relation to various issues including name suppression.

[88] Rule 8 of the Beijing Rules (which are recommended guidelines on minimum standards for youth justice systems) concerns the protection of privacy. It provides:

> 8.1 The juveniles right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling.
>
> 8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published.

[28] United Nations Standard Minimum Rules for the Administration of Juvenile Justice adopted by GA Res 40/33 (1985).

[89] In *TV3 v R*[29] Winkelmann J, then in the High Court, faced the issue of whether or not to suppress details in a trial where a young person was convicted of manslaughter. Against the need for open justice enunciated in *Lewis v Wilson & Horton Ltd,*[30] Winkelmann J noted:

> [11] However, against this must be balanced those matters I identified in my judgment of 30 June 2006 in relation to the State's particular obligations to young offenders, and in particular article 8 of [the Beijing Rules]…
>
> [12] Also relevant are the provisions of Article 40 of [the Convention]…
>
> [13] Considerations of the privacy and dignity of a child, and the need to facilitate his rehabilitation are properly matters a court can take into account when considering the interests of justice.

[90] In *Derrick-Hardie v Police*,[31] Priestly J cited the *TV3 v R* decision and noted:

> [11] These Beijing Rules arguably amplify but are certainly consistent with article 40(2)(b)(vii) of [the Convention] which sets as minimum rights for children charged with crimes, the right to have their privacy fully respected at all stages of the proceedings. Indeed, article 40(2)(b) expresses this right as a guarantee.

[91] In *R v K*,[32] Asher J, said that the Beijing Rules are relevant when dealing with the issue of the privacy of a child "as an elaboration of the principles set out in Article 14(4) of the International Covenant of Civil and Political Rights."

[92] *R v Rawiri*[33] also dealt with the privacy rights of a child. Amongst other things, Fisher J noted that, although the Beijing Rules are not binding, they are still significant. He also commented that unlike the Beijing Rules, the Convention has binding force on contracting states such as New Zealand under international law.

[93] In all four cases the High Court made an order for suppression of the child's name.

[94] Also of relevance, in *R v Durham Constabulary*[34] Baroness Hale said:

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[29] *TV3 v R* HC Auckland CRI 2005-92-14652, 7 July 2006.
[30] *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 at 566.
[31] *Derrick-Hardie v Police* HC Auckland, CRI 2011-404-000286 15 September 2011.
[32] *R v K* HC Whangarei, CRI 2008 027-2728, 27 January 2010.
[33] *R v Rawiri* HC Auckland T014047, 3 July 2002.
[34] *R v Durham Constabulary* [2005] UKHL 21, [2005] 2 All ER 369.

> The Beijing Rules are not binding on Member States, but the same principle is reflected in the United Nations Convention on the Rights of the Child 1989 ("UNCRC") which has been ratified by all but two of the member States of the United Nations. This is not only binding in international law; it is reflected in the interpretation and application by the European Court of Human Rights of the Rights guaranteed by the European Convention: see, for example, *V v United Kingdom* [1999] 30 EHRR 121; to that extent at least, therefore, it must be taken into account in the interpretation and application of those rights in our national law."

[95] In this case the Police say that the principle of open justice is pre-eminent for suppression. The presumption in favour of open reporting may only be rebutted where the following two stage test is satisfied:

(a) Stage one: are any of the threshold tests in s 200(2) of the Criminal Procedure Act established? The answer is yes. Reporting [Kainano]'s name would cause extreme hardship in the ways mentioned in the UN General Comment; ongoing stigmatisation and a negative impact on access to education, work, housing, travel and safety as well as impeding his reintegration and assumption of a constructive role in society.

(b) Stage two: I weighed the competing interests of [Kainano] on the one hand, and the public's right to know on the other. In the exercise of my discretion, I had regard to the seriousness of the offending and public interest factors in knowing [Kainano]'s character. I also had regard to our obligations to children under the Beijing Rules and the Convention just as Winkelmann J (as she then was) did in the *TV3* case and as Baroness Hale said we must in *R v Durham Constabulary*.

[96] I do not believe that the obvious disappointment everyone feels about [Kainano]'s recent bail breach, alleged offending and non-engagement, disentitles him to the protections guaranteed to him under the Convention in relation to his privacy.

[97] A child's right to privacy (and other things) in article 40 of the Convention is described as a guarantee. It is unconditional and is given to every child without exception. That specifically includes children who have infringed the criminal law. Therefore, offending does not disentitle a child to the guaranteed right to privacy.

[98] The Convention also requires that children must be treated with dignity and respect at all times and that their sense of dignity and worth is promoted. It is disrespectful to children, not in their best interests, and contrary to the promotion of their sense of dignity and worth, to guarantee them their privacy but then dishonour that guarantee when their behaviour does not live up to expectations. It also sends a very poor message to children that those in authority consider it acceptable to give an unconditional guarantee about something important, but then dishonour it.

[99] For the reasons I have given, I considered the conviction to be a sufficient penalty for [Kainano]'s offending in the unique circumstances of his case, and that the balance tipped in favour of granting final name suppression after weighing the competing interests.

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Judge AJ FitzGerald
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 02/08/2022