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**IN THE YOUTH COURT
AT LEVIN**

**CRI-2016-231-000015
[2016] NZYC 504**

THE QUEEN

v

JN

Hearing: 16 August 2016

Appearances: B Vanderkolk for the Crown
D O'Neill for the Young Person

Judgment: 16 August 2016

**SENTENCING NOTES OF JUDGE G M LYNCH
[Application to transfer to the District Court for sentencing declined
with reasons]**

Introduction

[1] JN is 16 years and six months old and for sentence this afternoon on the following charges:

00054 Possession of an offensive weapon a hammer 12 January 2016

0011 Receiving a pair of gloves 18 February 2016

0025 Wounding with intent to cause grievous bodily harm (as a party)
27 February 2016

0053 Wounding with intent to cause grievous bodily harm 27 February
2016

0035 Possession of cannabis seeds 14 April 2016

[2] The Crown contends that the wounding charges are just so serious, being tantamount to adult offending, that JN ought to be convicted and transferred to the District Court for sentencing.

[3] I need to summarise the facts so that there is a clear foundation for this application for transfer.

Possession of an offensive weapon charge 0054

[4] At about 2.30 pm 12 January 2016 you were a passenger in a car travelling south on the Desert Road. The traffic was busy. Someone in your car threw rubbish out of the window. The driver of the car following sounded the car's horn to indicate his displeasure at that. You put a blue bandanna over your face and leaned out of the window and waved a hammer at the driver in a threatening manner. The police were called as a result.

Receiving 0011

[5] On 18 February 2016 you and a friend went to The Warehouse in Levin. Your friend stole two pairs of gloves. In the carpark he was seen to hand a pair of

the gloves to you. The two of you then put on the gloves and then were seen looking into cars as you walked away. Not the brightest of moves as this was seen by someone over at the police station.

Wounding with Intent to cause grievous bodily harm 0025 and 0053

[6] You and three others, TZ, MD and CB, are members of a youth gang. On the evening of 26 February 2016 you were with this group at the Levin skate park drinking spirits. After midnight you were in the nearby mall carpark. The victim was walking through the carpark with his girlfriend and became involved in an argument, culminating with him hitting one of your friends. You and TZ and MD rushed in. You and MD threw punches while TZ was swinging a scooter in an attempt to hit him. CB and the one struck initially by the victim hung back, but CB came up shouting gang slogans in an attempt to hype you and your friends up to attack the victim.

[7] The victim ran towards the cinema end of the mall carpark, followed by you and the group. Outside the cinema TZ threw the scooter at the victim, but missing him. However, he retrieved it and in either throwing it again at the victim or by swinging it, struck the victim in the back of the head causing him to fall to the ground unconscious.

[8] You and TZ and MD then cowardly and despicably stomped and kicked the victim's head and body. CB joined the attack and the kicked the victim's unconscious body. At some stage, and while the victim was on the ground and not at all contemplated by the others, you stabbed the victim in his right side, narrowly missing his liver. The knife is described as a small paring knife. The victim's girlfriend tried to pull the attackers away and one of your group also tried to stop the attack. You and the group then left, yelling gang slogans as you did.

Victim Impact

[9] The updated victim impact statement, 11 August 2016, describes the victim's injuries and the effects of this offending on him. The victim spent three days in hospital, the back of his head having received two deep gashes which needed 13

staples to close them. The stab wound only narrowly missed his kidney. After the stab wound scarred over it became infected and that held up the healing process.

[10] There are other physical effects, some of which have not gone away. The victim had to endure dizzy spells and continuous headaches. On bad days he was unable to walk straight, could not tolerate bright lights or loud noises as they brought on severe migraines. On one of those bad days he was rushed to hospital as he was displaying symptoms akin to a stroke. He still gets headaches and is easily fatigued.

[11] The victim is a father of two, who at the time of this violence was working as an apprentice builder. He was close to finishing his apprenticeship to become a fully qualified builder. He enjoyed an active life, enjoyed playing sport and involved in other things. He was on ACC because he was unable to get clearance back to work. He felt he was letting down his boss and when he finally was cleared to return to work on 28 July, so some time after this assault, he was given the bad news that he was redundant because there was not enough work for him. While on ACC he was earning about \$300 less a week than he was earning previously.

[12] The victim avoided going out for about six weeks or so after the assault and still does not like going out by himself. He suffered some depression which is often a consequence of head knocks and violence like this. He feels guilty about how this has affected his seven year old daughter. She came and saw him in hospital when he was all banged up and that affected her as well.

The Social Worker's Report

[13] The social worker, Ms Collins, has filed a helpful report. Ms Collins observes that you have now admitted to all of your known offending and have now started to understand the seriousness of what has occurred. You know that you are going to be held accountable for what you have done. You have shown remorse in how your actions have impacted on your victims.

[14] Ms Collins describes you as a young person who has been raised with a lack of consistent rules and boundaries within the home environment since about the age of eight or so. Ms Collins describes the family upbringing and the failure to put in

place strategies to address your behaviours. Ms Collins observes that you like to associate yourself with the Crips gang and some of your anti-social behaviours support that. It is observed that you have had many opportunities through interventions within the home and education environment with little or no improvement made.

[15] The report from residence put a more positive glow on where you are at. However, as the Crown Solicitor Mr Vanderkolk observed, some care is needed in these types of reports which are provided on the eve of sentencing, because they can be, as Mr Vanderkolk observed, a statement of hope. There can also be pre-sentence remorse, that is, the offender almost currying the favour of the Court by pre-sentence conduct. However, for you, you have been in residence for quite some time, about four months. So the team at residence has had a longer period of time to observe and gauge your behaviour. So while a letter written just before Court can often be taken with a grain or two of salt, the team at residence has had the ability to assess you over some months.

[16] What the case leader observes in the report for today is that you have shown over a period of time, and as seen by various care team staff, that you are capable of dealing with issues and concerns in an improved manner. You have sometimes asked for time away from the group or a meeting to re-gather your thoughts before returning to address any issues. The old JN might have sparked up. What they are saying is you are reflecting and adjusting your behaviour. You still require some re-direction in relation to minor misbehaviour, particular in relation to gang related behaviour, inappropriate conversations and some negative comments. That said, you are described as being proactive within your current unit, assisting and showing leadership. You volunteer for duties and wider activities. You have completed the residential service's life skills assessment and identified some areas of further personal development.

[17] You are described as a very quick learner; you pick up a lot of complex concepts very quickly. You have worked hard within the school environment within residence which is shown in your results. In terms of your school engagement within residence, you are described as a pleasure to have in the class; you are mature

with a good sense of work ethic. So it was not that young man that the victim came across in the mall carpark in February.

[18] Your letter says that amongst other things that you would like to get the chance to prove to everyone you are not a bad person by putting your effort into something that will benefit the community. You appreciate and know that your actions have caused a lot of people a lot of grief and you want to change that. You say in terms of the time you have spent in residence that you have achieved things that you thought that you would never achieve. You have nailed your 10 credits for numeracy and literacy which of course opens up future courses to you.

[19] You have completed a forklift course, so you have got your forklift licence, a low-level scaffolding certificate, road safety certificate, site safety certificate and undertaken a teen parenting course. You observe that when you were working you stayed out of trouble and you were settled and things were going well, however, when work stopped you had too much spare time hanging around with the wrong people and then things started to go downhill quite quickly. While you might have been hanging around with the wrong people, at that moment in time you were also a member of that “wrong people”. Your goal is to complete your [details deleted] course which was something that you were enjoying up until the time that you went back into residence.

[20] A psychological report was prepared earlier in these proceedings and Mr O’Neil has referred to that and I will come back to that report.

The Crown submissions – a summary

[21] In careful and considered written submissions, Mr Blaschke for the Crown contended that an outcome short of transfer to the District Court for sentencing would be clearly an inadequate response to the serious offending; JN’s role in it; and the harm caused. Mr Blaschke reviewed the relevant principles under the Children, Young Persons and Their Families Act 1989 and the s 284 factors which must be considered before making any order under s 283, and emphasised in particular:

- 1) Time in a lower security prison environment with intensive training and programmes before a supported release back into the community may well be of benefit to JN.
- 2) The victim views the offending as an adult crime, committed against him, justifying an adult sentence. The victim does not believe the offending can be adequately met by sentences available to the Youth Court.
- 3) The offending could easily have had a graver outcome and accountability is required despite the mitigating factor of youth.
- 4) While JN has had a lack of support and structure, and therapeutic intervention is needed, a Youth Court response is not the only way those needs can be addressed, and indeed that was a point Mr Vanderkolk made in his oral submissions this afternoon.
- 5) The likely sentence of imprisonment JN would receive in the District Court. In relation to that point, the Crown solicitor introduced a bit of balance to that discussion. Mr Vanderkolk observed that a transfer and sentence in the District Court would not be the “stark response” as it could be seen at first blush. The young person, as JN is on transfer, would receive as Mr Vanderkolk described it, “a massive discount” for youth and other credits. The point Mr Vanderkolk was making is that the sorts of start points counsel were discussing in their written submissions, would not necessarily end in the sort of end sentence that an adult would be facing. I did not find the discussions both by Mr Blaschke and Mr O’Neill regarding what might occur in the District Court on sentencing particularly helpful as those considerations cut across the statutory factors which must be considered.

[22] So that is a mere thumbnail sketch of the Crown’s 76 paragraph argument, which Mr Vanderkolk spoke to this afternoon. Additionally, Mr Vanderkolk spoke of the support JN has had and continues to enjoy. The concern Mr Vanderkolk had

about that is, that this is a young man who can behave when he wants to but on this occasion elected not to. This is a young man who has had plenty of support, but at times has not taken that support and at times has acted in a polar opposite to it.

[23] Mr Vanderkolk said that this is a young man who needs removal from his associates and attitudes. Mr Vanderkolk expanded on “attitudes”, emphasising that this is a young man rich with attitude which unfortunately has led to him departing from his supports and departing from the skill set that the young man has and as was illustrated sadly in this assault on the victim.

[24] Mr Vanderkolk did acknowledge that there is a degree of remorse, plain from the letter from JN filed today, and indeed, progress has been seen within residence as illustrated in the letter from the residential team leader.

The defence submissions – a summary

[25] Mr O’Neill submits that JN should remain in the Youth Court for sentence. Mr O’Neill also discussed the applicable s 208 principles and the s 284 factors. Mr O’Neill in particular emphasised:

- 1) The s 289 direction that the Court assess the restrictiveness of the response under s 283, and must not impose that outcome unless satisfied that a less restrictive outcome would be clearly inadequate, means the fact that an adult would be jailed for the offending the youth faces does not create a presumption for transfer.
- 2) JN’s prompt admission of his offending and taking responsibility.
- 3) JN’s personal history including the suggestion from the social worker and psychologist that much of JN’s behavioural difficulties stem from an emotional absence and lack of boundaries from his parent.
- 4) The time spent in residence – about four months.
- 5) JN is not a hopeless case where the therapeutic interventions of the Youth Court can assist him.

- 6) There is sufficient time left in the Youth Court jurisdiction for that therapeutic work to occur and that a transfer would be a blunt and inappropriate response to what is accepted was serious offending.

[26] Mr O'Neill spoke briefly to those written submissions this afternoon. He emphasised that the focus here should be on whether all options in the Youth Court are exhausted for this young man – Mr O'Neill contends that they are not.

[27] Mr O'Neill also emphasised three factors which were at play in relation to this offending. Those factors are the young man's impulsivity, immaturity and peer pressure. Mr O'Neill described what occurred on 27 February 2016 as, essentially, a hot event which was a product of this impulsivity, immaturity and peer pressure.

Discussion

[28] One of the fundamental objects of the Children, Young Persons and Their Families Act is to ensure that where young persons commit offences, they are held accountable and encouraged to accept responsibility for their behaviour, yet are dealt with in a way that acknowledges their needs and will give them the opportunity to develop in responsible, beneficial and socially acceptable ways. Sentencing in the Youth Court promotes this purpose in a way that sentencing in the District Court cannot. Youth Court is indeed about the youth that is the young offender before it.

[29] I do not overlook the s 208 principles – the DNA of the youth justice system. Principles (d), (e) and (f) are particularly critical, so much so that I am going to set them out now:

- (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:
- (e) The principle that a child's or young person's age is a mitigating factor in determining –
 - (i) Whether or not to impose sanctions in respect of offending by a child or young person; and
 - (ii) The nature of any such sanctions:

- (f) The principle that any sanctions imposed on a child or young person who commits an offence should—
 - (i) Take the form most likely to maintain and promote the development of the child or young person within his or her family, whānau, hapu, and family group; and
 - (ii) Take the least restrictive form that is appropriate in the circumstances:

[30] Before the Court could decline to sentence, bearing in mind the need to impose the least-restrictive outcome and that in imposing a sanction, any less-restrictive outcome must be clearly inadequate, (s 289(1)(b)), it must have regard to the s 284(1) considerations to which I now turn.

The nature and circumstances of the offence proven to have been committed by the young person and the young person's involvement in that offence (s 284(1)(a))

[31] The offending was plainly serious. As the Crown observed, JN was a full participant in the first wounding (the group phase) where he joined in the stomping and kicking of the unconscious victim. JN was then solely responsible for the stabbing. While I accept Mr O'Neill's submission that the attack was not prolonged, I do not accept that it was not gratuitous as he contends. Of course it was. The group acted as a pack and with a pack mentality in hounding the victim and not stopping when he hit the ground.

[32] Could the charges have been filed less than as s 188(1) charges? I believe they properly could have been laid less than s 188(1). That is not to say that the ingredients or the elements of these charges have not been made out – they absolutely have.

The personal history, social circumstances and personal characteristics of the young person so far as those matters are relevant to the offence and any order that the Court is empowered to make in respect of it (s 284(1)(b)).

[33] The theme that comes through both the social worker's report and the psychological report is that JN is not a write-off. He has a moderate risk of recidivism. He has a number of strengths and while unsuccessful within the conventional school system, he has made some positive gains particularly in [details

of vocation deleted], outside the schooling system. When focussed he can apply himself and work hard and an illustration of that has been seen in the report from residents today.

[34] As Ms Patterson, the clinical psychologist, observed, JN is likely to have been predisposed to the current criminal and other problematic behaviour by several factors including:

1) *Difficulties in his family circumstances*

JN's parents both failed to adequately and consistently discipline and support him. To put it another way, they let him give them the run around to the point where it was just too hard to put their foot down and impose structure. Out of dysfunction, JN emerged.

2) *Difficult relationships with the adults and peers whom he interacted*

JN socialised with more delinquent friends than positive ones. He struggled at school and then acted badly. His poor attitude with adults and in particular teachers contributed to poor academic outcomes and then reinforced his belief of being a failure and also reinforced his negative interpersonal style when interacting with others.

3) *Personality factors and behaviours conducive to criminal behaviour*

Here, Ms Patterson referred to physical and verbal aggression, poor frustration control and poor judgement. JN was seen as having a sense of entitlement and loyalty to his friends and the shared antisocial behaviour overriding common sense.

4) *Attitudes and orientation*

Defiance of authority figures, resistance to seeking help and expressions of antisocial and pro-criminal attitudes make up this young man and have resulted in him reaching this point.

[35] This is a young man, however, who has had some advantages. It might seem as if I have been critical of JN's parents. I do not mean to be critical. If they could wind back the clock, they would do a lot of things differently, but this is a young man who has had advantages that many young men have not had. He has a loving and supporting whānau, so they should not think that I am being disrespectful of them; this is a young man who has made some critical choices along the road.

[36] The upshot is JN is not as broken and abused as sadly many are who find their way to this Court. That was one of the points Mr Vanderkolk was making in his submissions. This is a young man who has demonstrated that he can be quite self-sufficient and can be his own man.

The attitude of the young person towards the offence (s 284(1)(c))

[37] JN has taken responsibility for his offending and as the social worker observed, is remorseful.

The response of the young person's family, whānau or family group to –

- (i) The offending by that young person, and**
 - (ii) The young person himself or herself as a result of that offending**
- (s 284(1)(d))**

[38] JN's family have been unwavering in their support for him, which it is hoped he appreciates. JN enjoys a better relationship now with his father, who believes the remand in residence has matured his son to a degree. I accept what Mr Blaschke observed in his submissions for the Crown that the family are focussed on the end goal of JN's release from residence and do not have a clear plan at present, how to keep him from returning to the bad old ways and the poor influences on him, however they do not need to have that plan in place right now.

Any measures taken or proposed to be taken by the young person or the family, whānau or family group of the young person to make reparation or apologise to any victim of the offending (s 284(1)(e)).

[39] There is nothing to add under this heading.

The effect of the offence on any victim of the offence and the need for reparation to be made to that victim, (s 284(1)(f)).

[40] There is a need for reparation, particularly emotional harm reparation, but little prospect of it being paid in the short term. I have already set out the significant effect of the offending on the victim.

Any previous offence proved to have been committed by the young person (not being an offence in respect of which an order has been made under s 282 of this Act, s 35 Children, Young Persons Act 1974), any penalty imposed or order made in relation to that offence and the effect on the young person of the penalty or order (s 284(1)(g))

[41] As the Crown properly observes, this does not strictly apply to JN. Ordinarily on transfer applications there is a history of offending to consider. It is not to say the absence of relevant history is a bar to transfer for serious cases – it is not. The Crown was however wrong to weave in under this factor the other offending JN faces. That is not what the (1)(g) factor is about.

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 (s 284(1)(i)).

[42] As the various reports illustrate, there is a degree of complexity to this young man. He took himself out of the school system and away from structure and support. He had inconsistent parenting and a lack of boundaries. It is no surprise that he got himself into trouble. It is, however, a surprise at the seriousness of that trouble which has been absolutely devastating for JN's family.

Conclusion

[43] A transfer decision involves weighing and assessing numerous principles and factors, and also the objects of the Children, Young Persons, and Their Families Act 1989 of which the most important object is s 4(f) which is:

- (f) ensuring that where children or young persons commit offences,
 - (i) they are held accountable and encouraged to accept responsibility for their behaviour;

- (ii) they are dealt with in a way that acknowledges their needs and that will give them the opportunity to develop in responsible, beneficial and socially acceptable ways.

[44] I perfectly understand the victim's assessment that JN has committed an adult offence. Not only has JN participated in a brutal pack or gang-like beating, he has stepped outside the pack and deliberately used a knife and stabbed the victim. The Crown acknowledges that the knife was small, but it nonetheless has potential lethality. So I understand how the victim rationalises that having committed an adult offence, JN ought to face adult consequences and in this case, a jail sentence.

[45] Having reached that point, do we dare contemplate what might emerge from jail after a sentence of imprisonment? For the sake of being punitive does a monster walk out of the gates of the jail? At the end of the day, the young man would have to be released, a young man inevitably fully fledged to a gang and full of attitude and entitlement.

[46] There is still time to work with JN in the Youth Court. He has already been in residence for some time. A sentence of supervision with residence of six months, the maximum, is available. Section 289 creates a high threshold before the Court can transfer a young person to the District Court for sentence. The least restrictive outcome short of transfer must not only be inadequate but "clearly inadequate." This is finely balanced, it could go either way. But if it is finely balanced which is how I assess it, JN, it cannot be said supervision with residence is clearly inadequate.

[47] Accordingly, I decline to transfer JN. I sentence JN to six months supervision with residence. The residence is [name of youth justice facility deleted]. I approve the plan provided by the social worker. An early release hearing is scheduled for [time and date deleted] in the Palmerston North Youth Court. However, prior to that, the supervision sentence will need to be imposed which can be considered by me on [time and date deleted] in the Levin Youth Court.

[48] Rather unusually, I am going to invite the social worker as part of the supervision order to consider electronic monitoring. It seems to me that unless working and in particular, in the evenings, you need to be monitored for a time

following release from residence. It is not usual to have a young person electronically monitored following a release from residence. However, it is only by the skin of your teeth that you are not going to District Court and facing a full-time sentence of imprisonment. I am not entirely sure JN, if I transferred you to the District Court for sentence, whether I could have got to an end sentence of two years imprisonment, which would have made open, at least, for consideration of home detention.

[49] Finally, I make an emotional harm reparation order of \$3000. JN will be working full-time soon. I appreciate that no sum can compensate the victim for the harm done or the lost opportunities and the figure is not trying to achieve that. I also appreciate that payment inevitably is going to be over a longer period of time, but it is right that JN pays something part of putting matters right.

G M Lynch
Youth Court Judge

ADDENDUM:

[50] The six months supervision with residence order is imposed on the two wounding charges. In relation to the possession of the hammer and receiving charges, JN is sentenced to six weeks supervision with residence but obviously concurrent with the six months imposed on the wounding charges. On the remaining charge of possession of the cannabis seeds, JN is discharged under s 283(a). I make an order for the destruction of the hammer, the knife if it was seized by the police and the cannabis seeds.