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IN THE YOUTH COURT
AT MASTERTON

I TE KŌTI TAIOHI
KI WHAKAORIORI

CRI-2018-235-000002
[2018] NZYC 602

THE QUEEN

v

[ND]

Hearing: 10 October 2018

Appearances: E Light for the Crown
S Taylor for the Young Person

Judgment: 10 October 2018

NOTES OF JUDGE A P WALSH ON SENTENCING

The Charges

[1] [ND] has been charged with two offences. The first offence relates to sexual violation by unlawful sexual connection occasioned by penetration of the victim's vagina by digital penetration. He has been charged as a party under s 66(1)(d) Crimes Act 1961. The offence is under s 128(1)(b) Crimes Act 1961 and has a maximum penalty of 20 years' imprisonment. The second offence relates to intentionally making an intimate visual recording of the victim involved in the sexual violation, being an offence under s 216H Crimes Act 1961.

[2] The issue to be determined today is whether [ND] be discharged under s 282 or an order is made under s 283(a) for his discharge.

The Facts

[3] The victim is [age deleted] years. She was friends with [CA], [ND], [TL] and [QP]. On the evening of [date deleted]the victim together with [ND] and the other young people were at a party at [CA]'s home. The victim and the young people had been consuming alcohol. All had become extremely intoxicated.

[4] During the evening the victim and [QP] went into a tent erected in the backyard. Sometime later [CA], [TL] and [ND] entered the tent. The victim ended up on her stomach with her lower clothing and underwear pulled down. [CA] and [TL] then began digitally penetrating the victim's vagina using their fingers. They took turns, sometimes putting multiple fingers inside her. On at least one occasion both placed their fingers inside the victim's vagina at the same time as she lay face down on a camping mattress.

[5] On at least one occasion [CA] slapped the victim's buttocks as if playing the drums while [TL] continued to digitally penetrate her vagina. While this was occurring [ND] recorded the events on his cellphone. During the recording the young people can be heard encouraging each other.

[6] Over subsequent weeks there were Facebook conversations between the young people and the victim. They apologised to her for their behaviour saying they were

very drunk. [CA] visited the victim and apologised. He subsequently downloaded a copy of the video footage of the sexual violation from his cellphone to the victim's laptop. The police later seized the laptop and were able to identify the young people. The victim made a formal complaint in August 2017.

[7] [ND] has not previously appeared before the Court. He confirmed he had been in the tent and admitted what he had done by way of visual recording. He later shared the video with his friends.

Social Worker's Report 27 September 2018

[8] A family group conference was held on 27 July 2018. To his credit [ND] admitted the offending. Agreement was reached at the family group conference about community work being done by [ND] which involved baking donations, paying a donation of $100 to Rape Crisis and completing an apology. There was a focus on his education. It was agreed he would complete a WellStop programme and engage in an alcohol and other drug assessment. No agreement was reached as to disposition although it is clear it was intended this matter remain in the Youth Court jurisdiction.

[9] A social worker's report of 27 September 2018 has been produced to the Court. In respect of community work it was noted [ND] had completed the six community work projects, he had [details deleted]. Photographs were attached to the report confirming [ND] would [details deleted] over 12 weeks. He has done this.

[10] He has paid the $100 donation to Rape Crisis. The apology letter will require the support of WellStop and will be a formal part of [ND]'s treatment while he is on that programme. He continues to attend a local college every day. It is noted he recently received three certificates from a secondary school [details deleted] competition in 2018. [Details deleted].

[11] [ND] is now attending a WellStop programme. The report noted he is still in the assessment phase with WellStop. Feedback on 18 September 2018 was very positive from WellStop. It noted [ND] and his parents were actively engaging in assessment appointments. It is anticipated a report would be available in November 2018.

[12] [ND] has continued to work part-time [details deleted]. He is described as being a "great hard worker". [ND] underwent an alcohol and drug assessment. That assessment showed no risk with alcohol or drugs. The recommendation was for [ND] to participate in one education session around alcohol consumption and [ND] was happy to attend.

[13] Overall the social worker considered [ND] had made a considerable amount of effort in completing tasks agreed in the family group conference with strong support from his parents. I acknowledge [ND]'s mother is in Court today to support him. In the past he has been supported by both his parents. Mr Taylor explained [ND]'s father was unable to attend today but it is clear he has been very supportive throughout.

[14] It was recommended all matters pertaining to [ND] be adjourned for a period of eight weeks to allow [ND] to participate in the WellStop assessment. Today Mr Taylor has indicated irrespective of the outcome as to disposition [ND] intends completing the WellStop programme.

Statutory Provisions

[15] In preparing for the sentencing I took account of the observations made by the Court of Appeal in *Churchward v R* relating to youth factors in sentencing.[1] The Court noted there are age-related neurological differences between young people and adults. Young people may be more vulnerable or susceptible to negative influences and outside pressure. They may be more impulsive. Young people have great capacity for rehabilitation. The character of a young person is not as well-formed as that of an adult.

[16] There are a number of statutory provisions I must take into account. Copies of the relevant statutory provisions will be annexed to these sentencing notes. Under s 4 I have regard particularly to s 4(f)(i) and (ii). Under s 5 I have had regard to the principles particularly in s 5(c), (f) and (g). I then had regard to the principles of s 208 and in particular 208(a), (c), (e), (f) and (fa). In preparing for sentencing I have also taken into account those factors under s 284.

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[1] *Churchward v R* [2011] BCL 791.

Section 284 Factors

[17] Under s 284 when I had regard to the nature and circumstances of the offending I consider the offending is serious. The sexual violation involved allegedly four young people, three of whom have admitted the offending. [ND] has admitted the visual recording which has compounded the seriousness of the offending and the impact of the offending on the victim in this matter.

[18] It is unclear from viewing the video as to how long the sexual violation occurred. It is evident, however, the incident was harrowing and traumatic for the victim. There is no doubt alcohol was a significant factor. It is clear there is a marked impact on the victim which will no doubt stay with her possibly for the rest of her life.

[19] When I have regard to [ND]'s personal history, social circumstances and personal characteristics I note the comments I have made after reviewing the social worker's report. [ND] has demonstrated a proper and responsible attitude to his offending. As I have noted to his credit he admitted the offending. He is remorseful for his actions. It is clear he has given consideration to what has occurred. He has carried out those tasks he indicated he would undertake at the family group conference.

[20] [ND]'s parents have been supportive throughout the whole process. They have engaged in the WellStop programme with him. Although it is early days [ND] has indicated an open-mindedness in participating in that programme. The assessment to date from WellStop is positive.

[21] When I have regard to measures taken I note the efforts made by [ND] to carry out the community work. He has made a donation to Rape Crisis out of his own money. What I think stands out in that context is his commitment to undertake the tasks he agreed to at the family group conference.

[22] When it comes to the underlying causes of offending I consider the factors which appear to be significant are the abuse of alcohol, elements of peer pressure, poor judgement and elements of bravado.

Submissions

[23] I acknowledge Mr Taylor's submission that it could be suggested there is something more sinister but he submitted, having regard to the circumstances, this is an event that happened through impaired judgement because of alcohol. I am satisfied on the information before me that appears to be the position.

[24] As to disposition, Mr Taylor submitted the Court should make a distinction between [ND] and his role in the offending compared to the roles of [CA] and [TL]. When I view [ND]'s role in the sexual violation incident it is clear he had no direct physical contact with the victim.

[25] In considering this aspect, in preparation for the sentencing I had regard to observations made by Judge Walker when he delivered a judgment on 18 June 2018 dismissing an application that had been made on behalf of [ND] and [QP] seeking dismissal of the charges. At paragraphs 23 to 25 Judge Walker made the following observations:

> [23] Holding of the lighting and the commentary for the recording goes beyond mere presence. The evidence would be sufficient to support a finding that the violation and filming of it were intended by all to be part of the one event and that the filming was not some incidental part initiated by [ND] for his own purposes. It would be apparent to those violating the complainant that lighting was being used and that there was a commentary, and that a video recording was being made. Everyone was at very close quarters in this small tent.
>
> [24] The sustained filming of the sexual violation shows that this was the focus of [ND]'s attention. It had gone beyond the slapping on the bottom of the complainant which he says in his statement was funny and worth filming.
>
> [25] The evidence is sufficient to support a finding that the filming was part of the sexual violation and that there was an expectation on the part of the primary parties that it would be filmed and they knew it was being filmed. The drumming on the complainant's bottom has the appearance of a performance for the camera.

[26] Mr Taylor highlighted the fact that [ND] did not regularly drink alcohol. It is understood at the time of the offending this was the second occasion on which he had drunk alcohol. Mr Taylor stressed the filming did not initiate the sexual violation and I accept that submission. Having regard to the positive factors identified by the social worker Mr Taylor submitted the Court should discharge [ND] under s 282.

[27] The Crown has submitted the offending is too serious. In her submissions Ms Light emphasised that while [ND] had been charged as a party to the sexual violation he had undertaken the intimate visual recording and this had compounded the seriousness of the offending and in particular the consequent harm suffered by the victim in this matter.

[28] Under s 284 I am required to have regard to the views of the victim. She has filed an extensive victim impact statement. She has identified in that statement how she has been affected by the offending. As I observed, this incident no doubt was very harrowing and traumatic for the victim. She has emphasised the emotional impact on her, how it has undermined her confidence and her feeling of self-worth. She has experienced and continues to experience periods of depression and has referred to incidents of self-harming.

[29] The victim impact statement is quite emotive in parts but that emotional aspect is understandable, given the victim's age and the impact of the offending on her. What comes through in the victim's impact statement is a sense of betrayal of trust as a result of what happened to her. I acknowledge Mr Taylor has made no attempt to minimise in any way the impact of the offending on the victim. She will continue to suffer trauma and ongoing psychological issues as a result of this offending.

[30] Having regard to those factors the Crown has emphasised the seriousness of the offending and has argued in the circumstances it would be inadequate to discharge [ND] under s 282. Given the serious nature of the offending an order should be made under s 283(a).

Sentencing Factors and Analysis

[31] There are numerous cases in the Youth Court jurisdiction where the Court has been confronted with the decision to either discharge under s 282 or make an order under s 283. This can be a very difficult and problematic exercise in sentencing and this case highlights that difficulty.

[32] I note observations made by Downs J in *MW v Police*.[2] In reviewing factors relating whether to discharge under s 282 or make an order under s 283 he highlighted five matters which do have relevance:

1. While the case dealt with by the High Court exhibited significant mitigating factors including the young person's age, his acknowledgement of responsibility and successful completion of a Safe programme there were powerful countervailing features. The charge of rape carried 20 years' imprisonment. The offence of intimate recording carries a maximum penalty of three years.

   I note the charge of sexual violation in this case also has a maximum penalty of 20 years' imprisonment. The High Court noted in that case the complainant and young person were known to each other. They had friends in common. It followed the offending involved an element of breach of trust. The offending itself had a pronounced impact on the victim who continued to feel violated. The High Court noted if the matter had been transferred to the District Court the young person may well have faced a term of imprisonment.

2. While the offence of rape and by implication sexual violation as in this case, is amenable to a discharge under s 282 and recognising the legislative preference for quarantining only the gravest charges from this form of youth justice resolution, the High Court considered in the particular case the rape offending was a bad instance of its kind.

   I consider in this case the sexual violation is a bad instance of its kind having regard to the circumstances involving young people and the intimate visual recording that was undertaken.

3. The Court of Appeal in *Pouwhare v R*[3] had recognised the seriousness of offending may by itself require proceedings to be transferred from

[2] *MW v Police* [2017] NZHC 3084.
[3] *Pouwhare v R* [2010] NZCA 68; (2010) 24 CRNZ 868.

the Youth Court to the District Court as some offences may be too serious for the youth justice regime to cater for. The High Court observed this reasoning was equally applicable to a discharge under s 282 which is the least restrictive outcome available to the Youth Court.

As I noted when reviewing the family group conference recommendations it was agreed matters would stay in the Youth Court jurisdiction. That was a significant factor. If [ND] had been convicted under s 283(o) and transferred to the District Court he may well have been sentenced to a term of imprisonment.

4. Assessments of risk of reoffending have a short lifespan. At this stage I am not in a position to assess the degree of risk but it does appear on the information before me, having regard to [ND]'s background and the favourable comments, it is probable any assessment will confirm there is likely to be low risk of sexual re-offending.

The High Court observed because of its absolutist nature a s 282 discharge would presumably preclude curial reference to the offending in the event of future offending however unlikely that may currently seem. In that case the young person had the benefit of no penalty beyond the fact of a Youth Court notation.

5. While it was correct the notation remained something of a stain that may affect future opportunities care must be taken not to assume employers, immigration officials and others with an interest in a young person's past will necessarily be unreasonable or unfair in their treatment of the notation, particularly if it is considered in the context of the rehabilitative progress made by a young person and his age at the time of the offence. The High Court made the following observation:

> Put another way a worst case scenario should not constitute the operative frame of reference for the assessment of likely future impact of the fact of a notation.

In that case the young person had been discharged under s 283(a) and given the factors set out by the High Court it did not consider the sentence had been manifestly excessive.

[33] In weighing the various factors I have set out relating to [ND] I note the positive factors as summarised in the social worker's report and the submissions made by Mr Taylor. Against that I have to weigh the views of the victim and the impact of the offending on her coupled with the seriousness of the offending.

[34] I was conscious in approaching this sentencing to keep in mind the difference between [ND] and the two other young people charged with sexual violation. He had been charged as noted as a party to that offence. I accept, however, the submission made by the Crown that [ND]'s decision to record the sexual violation did add to the seriousness overall of his offending and his role in the incident. There is no doubt the actual filming compounded the distress of the victim when she found out this had occurred.

[35] When I weighed all these factors I have come to the decision that the seriousness of the offending is such it would be inappropriate to discharge [ND] under s 282. Accordingly I have determined that [ND] is to be discharged under s 283(a) and I make an order accordingly.

[36] I would finally say to [ND] that what happened on this night has been a tragedy not only for the victim but for himself. We all make mistakes in life and the mistake [ND] made that night was to drink far too much alcohol which impaired his judgement. This has had major consequences for him as well as the victim.

[37] There are positive strengths to [ND] which I have highlighted. I hope he can now put this incident behind him. It is important he completes the WellStop programme.

He has potential and I hope he is able to get on and develop his potential and achieve the goals he wants to with his career.

A P Walsh
Youth Court Judge