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IN THE YOUTH COURT
AT WAITAKERE

CRI-2015-290-000207
[2016] NZYC 162

NEW ZEALAND POLICE
Prosecutor

v

BM
Young Person

Hearing	15 March 2016
Appearances	J Murdoch for the Police C Bennett for the Child
Decision:	15 March 2016
Reasons:	31 March 2016

REASONS FOR DECISION OF JUDGE A J FITZGERALD
["The Pushback"]

Introduction

[1] BM has admitted two charges of sexual violation by unlawful sexual connection; first a representative charge for offending between 1 April and 17 August 2015. Secondly, a specific charge for offending on 18 August 2015. The offending involved BM sucking AP's penis on a number of occasions.

[2] During most of the period covered by the representative charge BM was aged 12. He was 13 at the time of the second charge and still is now. The victim, AP, a child of family friends, was aged 7 at the time of the offending.

[3] When BM appeared before me at the Waitakere Youth Court on 15 March 2016 I decided to refer the matter back to the Police to consider making an application to the Family Court for a declaration under s 67 of the Children, Young Persons, and their Families Act 1989 ("the Act") that BM is in need of care and protection on the grounds in s 14(1)(e) of the Act which provides;

> **14 Definition of child or young person in need of care or protection**
>
> (1) A child or young person is in need of care or protection within the meaning of this Part if—
>
> …
>
> (e) in the case of a child of or over the age of 10 years and under 14 years, the child has committed an offence or offences the number, nature, or magnitude of which is such as to give serious concern for the well-being of the child.

[4] The ability to refer the matter back to the police, which is colloquially known as "the pushback", is contained in s 280A of the Act which provides;

> **S 280A Court may refer case to person who commenced proceeding to be dealt with as child offending care or protection proceeding under Part 2**
>
> (1) This section applies to proceedings under this Part in respect of a child aged 12 or 13 years who is charged with an offence of the kind specified in section 272(1)(b) or (c) if, at any stage of the proceedings before an order is made under section 282 or 283, it appears to the court that—
>
> (a) the child may be in need of care or protection on the ground specified in section 14(1)(e); and

(b) the making of an application for a declaration under section 67 on that ground in respect of the child and the offence would serve the public interest better than the continuation of the proceedings under this Part.

(2) The court—

(a) may refer the matter to the person who commenced the proceedings to consider whether to make an application for a declaration under section 67 on that ground in respect of the child and the offence or to deal with the matter in some other way; and

(b) must, on making a referral under paragraph (a), adjourn the proceedings pending the outcome of that referral.

(3) If the proceedings are in respect of a charging document filed against the child for an offence, and are adjourned under subsection (2),—

(a) the court may, at any time, discharge the charge under section 282; but

(b) if not discharged earlier, the charge is deemed to be discharged if, and when, an application for a declaration under section 67 on that ground in respect of the child and the offence first comes before a Family Court Judge.

(4) A person to whom a matter in respect of a child is referred under subsection (2) must—

(a) consider whether to make an application for a declaration under section 67 on that ground in respect of the child and offence or to deal with the matter in some other way; and

(b) give effect to his or her decision under paragraph (a), and ensure the Youth Court is advised promptly of the outcome of the referral.

(5) Before referring a matter to the person who commenced the proceedings under subsection (2), the court may—

(a) direct a youth justice co-ordinator to convene a family group conference for the purpose of considering whether the making of an application for a declaration under section 67 on that ground in respect of the child and the offence would serve the public interest better than the continuation of the proceedings under this Part (in which case sections 250 to 259 apply to the conference with all necessary modifications); and

(b) adjourn the proceedings until the conference has been held.

(6) Nothing in this section limits or affects the application to a child, in accordance with section 272(2A), of section 280, insofar as the child may be in need of care or protection on a ground other than that specified in section 14(1)(e).

[5] As there was insufficient time to explain the reasons why I decided to exercise the pushback on 15 March 2016 I said I would do so later. My reasons now

follow. First however, I set out the arguments presented for and against use of the pushback in this case.

Counsel's submissions

[6] For the police, Ms Murdoch had initially submitted that in terms of s14(1)(e), the behaviour of a child must be at a level that gives rise to such concerns for their welfare, that they are in need of care and protection. She said that, in those circumstances, the Family Court's response is required because the child's behaviour is viewed as symptomatic of family dysfunction and the Chief Executive, on behalf of the State, is considered to be justified in intervening in a family's autonomy where child care has fallen below standards acceptable to the community.

[7] In this case it was said to be unlikely that unresolved care and protection issues are the root of BM's offending on the basis of the material before the Court which includes the following:

(a) *Family situation;* there is nothing to indicate that BM's family situation is of any concern;

(b) *Developmental history;* BM has an unremarkable developmental history. He met his milestones within normal timeframes, but from a young age has been described as being relatively fiery, aggressive and competitive;

(c) *Medical history* – in 2012 BM was involved in a serious accident when he was run over by a car and incurred a number of injuries including a brain injury. BM described a prolonged period of amnesia, slow thinking and poor concentration after the accident;

(d) *Educational history* – when questioned about BM's cognitive ability the deputy assistant principal of his school stated:

> BM is an above average student who participates fully in all of the class activities the same as all the other students. We have no extra concerns about his learning.

[8] However, Ms Murdoch now accepts that the fact BM is facing such serious charges at his age is sufficient to give rise to serious concerns about his wellbeing and it is not necessary to also establish the presence of other care and protection concerns in order to satisfy the s 14(1)(e) criteria or to exercise the pushback.

[9] I believe that is a proper concession to make. Family dysfunction is not a prerequisite for the making of a declaration on s 14 (1)(e) grounds nor for the use of the pushback. As Ms Bennett (for BM) says, the other subsections of s 14 deal with welfare issues in the context of family dysfunction. Section 14(1)(e) is aimed at addressing the offending behaviour of the child. In this case, she says, it is not arguable that the offending meets the criteria set out in s 14(1)(e).

[10] Ms Murdoch went on to say;

> "… this is a case where the public interest is particularly relevant as BM's offending is serious, it took advantage of the victim's age and lack of understanding; and the repetitive nature of the offending suggests that it was premeditated.
>
> The public interest will ultimately be served by ensuring that BM is held accountable and does not reoffend. Therefore consideration of available options in the Youth Court and the Family Court is important.
>
> Where offending is serious, the public interest supports the child remaining in the Youth Court which allows a range of orders that require children to address the underlying causes of their offending. There is a focus on accountability and compliance as well as the welfare and best interests of the child as set out in s 6."

[11] In relation to those submissions it must be noted however that the Youth Court does not provide an order for children or young people facing serious sexual offending, in that there is no order that runs for the time it usually takes a child or young person to complete a programme at SAFE (or some similar programme). In most cases concerning children or young people who come before the Youth Court for serious sexual offending, disposition is withheld to allow them time to complete the SAFE (or similar) programme. That usually takes between six months and two years; in the majority of cases the time frame is generally closer to two years than six months.

[12] As well as that, it must be noted that s 6 of the Act does not apply to Parts 4 and 5 of the Act which contain the Youth Justice provisions. Therefore a child's

welfare and best interests is not the first and paramount consideration when proceedings are before the Youth Court. However, welfare considerations are prioritised in relation to children and young people involved in the Youth Justice system under the relevant international instruments to which New Zealand has acceded. More is said on this topic below.

[13] Ms Murdoch also says;

> "…the Family Court draws attention away from the offending and focuses on the family's ability to provide for the wellbeing of the child or young person. Orders made in the Family Court generally last longer than those in the Youth Court and are harder to discharge as the Court has to be satisfied that the child or young person is no longer in need of care or protection."

[14] I do not agree that Family Court orders are any harder to discharge than disposition is to achieve in the Youth Court when the appropriate time arrives to do either of those things; certainly not in the context of a case such as this. However, I do agree that Family Court interventions tend to be longer than Youth Court involvement, which has a much greater focus on accountability than welfare issues, and is usually for significantly shorter periods of duration.

[15] Everyone concerned in this case agrees that BM should complete the SAFE programme whether he remains in the Youth Court or is transferred to the Family Court. The reason the police oppose the matter being referred to the Family Court is that the victim's parents want BM to have a notation at the end of the process. That is the only reason for arguing against the exercise of the pushback. They believe the charges are too serious to be in the Family Court and also believe BM will be dealt with too leniently there, and they are opposed to that.

[16] The police acknowledge that if BM remains in the Youth Court and completes the SAFE programme it is possible he would be discharged under s 282 of the Act; that is without any notation, the effect of such order being to deem the charges never to have been filed.

[17] Essentially, Ms Murdoch submits that the nature and seriousness of BM's offending is such that the public interest is best served by taking a criminal justice

focussed approach and recording a notation to mark the offending and hold BM accountable.

[18] Ms Bennett submits that it is always in the public interest for measures aimed at rehabilitation and reintegration to be implemented so as to decrease the risk of re-offending. She points out that a large component of the SAFE programme is focussed towards accountability and submits that s 280A was likely enacted to provide a trapdoor back to the Family Court for children who had not previously had any kind of Family Court intervention and where that jurisdiction has the tools available to it to adequately deal with the matter; BM's case is said to fit well within the criteria and the Family Court is perfectly poised to oversee the matter.

[19] The following factors are said to be relevant to the exercise of the pushback:

(a) BM's age;

(b) His relative immaturity;

(c) The head injury he suffered in 2012;

(d) His supportive family;

(e) His stable home environment;

(f) BM and his family have been proactive in seeking therapeutic interventions thus making future compliance likely;

(g) Given BM's family circumstances, it is unlikely he will require rigid monitoring in terms of any plan or programme he undertakes.

[20] Negative aspects of the matter remaining in the Youth Court are said to include having BM mixing with youth offenders of all levels, ages and backgrounds on days he is required to attend at Court. BM is in his first year at secondary school and is an avid reader. Regular Court appearances would likely disrupt his schooling.

There is also a risk associated with introducing children to a criminal justice system at a young age.

[21] Ms Bennett acknowledges that the offending has had a marked effect on the victim and his family. Previously there had been a very long, close relationship between BM's parents and the victim's parents. That has been affected by BM's actions. The victim's parents are understandably extremely angry at BM and want a punitive outcome for him. That is said not to be a sufficient rationale for determining that the proper outcome is the Youth Court. It is also submitted that there is some support in the assessment prepared by SAFE upon which the Court may conclude BM's offending has a background related to developmental factors. Indeed, the writers of the report do comment:

> "An early adolescent interest in pornography and masturbation has led [BM] to consider how he might be able to act on sexual impulses with another person. It is still unsure the extent of cognitive and neurological difficulty that has been caused by the head injury however by all reports this has affected his mood and affect regulation. This is likely to be made further vulnerable as a result of normal hormonal changes and adolescent brain development at this time affecting BM's ability to make good behavioural choices and due consequential consideration…"

[22] Ms Bennett submits that while BM faces serious criminal offending, his age and brain development together with his medical history suggests the SAFE programme would be the right global response, taking into account the principles and purposes of the Act. Rehabilitation, addressing the underlying causes of offending, and holding BM accountable for his actions will be addressed by the SAFE programme. Additionally, BM's family will be strengthened and empowered by participating in the programme. It is clear the predominant focus of any outcome regardless of jurisdiction should be attendance at SAFE. It is submitted the Family Court is best placed to oversee this response.

Relevance of international instruments

[23] Helpful guidance to the interpretation of the relevant provisions of the Act in this case is found in international instruments to which New Zealand is a party; in

particular, the United Nations Convention on the rights of the Child ("the UNCROC"),[1] the Beijing Rules[2] and the Riyadh Guidelines.[3]

[24] Use of such instruments as an aid to interpretation of statutes here has been endorsed by the higher Courts on a number of occasions over a number of years now. For example, in *R v K*[4] Asher J noted that New Zealand Courts pay regard to internationally accepted human rights principles embodied in international instruments to which New Zealand is a party: see *Tavita v Ministry of Immigration* [1994] 2 NZLR 267(CA), at 265, 266; *New Zealand Airline Pilots Association Inc v Attorney-General* [1997] 3 NZLR 269; *R v Rawiri* (No 4) HC Auckland T014047, 3 July 2002 at [13]. Although Asher J noted that the Beijing Rules are not ratified in New Zealand, they are still relevant. Winkelmann J in *TV3 v R*[5] also considered the Beijing Rules relevant as well as the UNCROC. In *Pouwhare v R*[6] the Court of Appeal placed emphasis on the use of the UNCROC as an interpretive tool.

[25] Although the UNCROC has binding force under international law, neither the Beijing Rules, nor the Riyadh Guidelines are legally binding here. They are simply recommended guidelines on minimum standards for Youth Justice systems. However, the commonality between relevant provisions of the Act and provisions of the instruments in this case makes them particularly instructive.

[26] It is probably no coincidence that both s 14(1)(e) of the Act and the international instruments place importance on the wellbeing of a child offender. The Beijing Rules immediately preceded the Act coming into force. The UNCROC was adopted by the UN General Assembly in November 1989, the same month that the Act came into force. It was signed by New Zealand on 1 October 1990 and ratified on 6 April 1993. The Riyadh Guidelines were established in 1990. It is clear that, in many respects, the Act draws on themes contained in all three instruments. To begin with, there is the primacy of wellbeing.

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[1] United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990).
[2] United Nations Standard Minimum Rules for the Administration of Juvenile Justice A/RES/40/33 (1985).
[3] United Nations Guidelines for the Prevention of Juvenile delinquency (The Riyadh Guidelines) GA Res 45/112, /Res/45/112 (1990).
[4] High Court Whangarei, CRI 2008-027-2728, 27 January 2010.
[5] High Court Auckland CRI 2005 092 14652, 7 July 2006.
[6] [2010] NZCA 268 at [82].

[27] The overarching object of the Act is to promote the wellbeing of children, young people and their families.[7] Where young people commit offences, it is anticipated that this will be achieved by holding young people accountable, and by acknowledging their needs. While these dual practices may sometimes seem to be in conflict, it is important to bear in mind that they are posited as being a means of ensuring that the overall object of promoting wellbeing is achieved.

[28] In the present context, s 14(1)(e) provides that the offending be such as to give serious concern for the child's wellbeing in order to provide jurisdiction for the making of a declaration that the child is in need of care and protection. The making of a declaration is a prerequisite for the Family Court then taking a welfare-focussed approach to the offending.

[29] The primacy of wellbeing is reiterated in the international instruments. Article 3 of the UNCROC states:

> ***Article 3***
>
> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

[30] It is important to note that the wording of article 3 is for the child's best interests to be a primary consideration, not the primary consideration. So other factors, including the interests of others, in this case the victim, AP, should be considered.

[31] Article 40.4 of the UNCROC refers, in part, to State Parties providing:

> ***Article 40.4***
>
> A variety of dispositions … to ensure that children are dealt with in a manner appropriate to their well-being and proportionate to their circumstances and the offence.

[7] s 4 of the Act.

[32] Under the Beijing Rules, the aim of juvenile justice is construed as follows:

> 5.1 The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.

[33] Arguably the strongest statement of the importance of wellbeing is in General Comment No 10 of the Committee on the Rights of the Child, adopted in 2007. It makes it clear that when balancing the young person's wellbeing, and the need for public safety and sanctions, the scales should tip in favour of wellbeing:[8]

> 71. The Committee wishes to emphasize that the reaction to an offence should always be in proportion not only to the circumstances and the gravity of the offence, but also to the age, lesser culpability, circumstances and needs of the child, as well as to the various and particularly long-term needs of the society. A strictly punitive approach is not in accordance with the leading principles for juvenile justice spelled out in article 40 (1) of CRC (see paragraphs 5-14 above). The Committee reiterates that corporal punishment as a sanction is a violation of these principles as well as of article 37 which prohibits all forms of cruel, inhuman and degrading treatment or punishment (see also the Committee's general comment No. 8 (2006) (The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment)). In cases of severe offences by children, measures proportionate to the circumstances of the offender and to the gravity of the offence may be considered, including considerations of the need of public safety and sanctions. In the case of children, such considerations must always be outweighed by the need to safeguard the well-being and the best interests of the child and to promote his/her reintegration.

[34] On these issues, Alison Cleland has made the following apposite comments:

> Article 40 of the UNCROC sets out several considerations that should operate when dealing with children and young people who have committed, or who are alleged to have committed, offences. Most of art 40 deals with due process rights, but art 40.4 provides that young people should be "dealt with in a manner appropriate to their wellbeing and proportionate both to their circumstances and the offence." To comply with UNCROC, a Youth Justice system is not only required to consider the welfare of young people. It must also ensure that young people's rights to a fair trial are upheld and that

[8] The Committee on the Rights of the Child *Children's Rights in Juvenile Justice* (CRC/C/GC/10, 25 April 2007) at [71].

> society's expectations with regard to punishment and accountability are respected. Welfare is, however, a key consideration and one of the markers of a UNCROC-compliant system. General comment No 10 of the Committee on the rights of the child, adopted in 2007, makes it clear that when balancing welfare and punishment, the scales should tip in favour of welfare.
>
> The starting point for both the Beijing Rules and Riyadh Guidelines is the welfare of young people who offend. Both instruments identify the same responses that will promote welfare and that should be part of a country's youth justice system. These are: the provision of opportunities for personal and educational development; the avoidance of early criminalisation and labelling; and the provision of community programmes.[9]

[35] The importance of avoiding early criminalisation and labelling is based on the sociological labelling theory that regards crime as a social process. The theory focusses on individuals' perceptions of themselves and posits that the way a person is labelled by society creates a self-fulfilling prophecy.[10] Labelling theories have been influential in youth justice, since it is argued that those who are less experienced and more impressionable are more likely to respond to a given label.[11]

[36] 'Labelling theory' is part of the orthodoxy. The Riyadh Guidelines state that one of their fundamental principles is "The need for and importance of progressive delinquency prevention policies", and that such policies should include "Awareness that, in the predominant opinion of experts, labelling a young person as "deviant", "delinquent" or "pre-delinquent" often contributes to the development of a consistent pattern of undesirable behaviour by young persons."[12] Cleland and Quince state that labelling theory underpins the principle of diversion, as set out at s 208(a) of the Act.[13]

[37] The provisions of the UNCROC and the other international instruments do not override the provisions of the Act but they do offer helpful guidance on how to interpret and apply the statutory provisions particularly in a case such as this where

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[9] *Focus on Welfare: The Importance of Personal Information to Youth Justice Decisions in Aotearoa New Zealand* [2012] NZ L Rev, 573 at 575.

[10] Alison Cleland and Khylee Quince *Youth Justice in Aotearoa New Zealand* (LexisNexis, Wellington, 2014) at [2.7.1].

[11] Rob White and Fiona Haines, *Crime and Criminology* (3rd ed, Oxford University Press, Melbourne, 2004) ch 5.

[12] United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines), Adopted and proclaimed by General Assembly resolution 45/112 of 14 December 1990.

[13] Cleland and Quince, above n 10 at [5.4.2].

the tension is between taking a welfare focussed approach or a criminal justice focussed approach to BM's offending.

Conclusions

[38] It is a matter of agreement in this case that the public interest is best served by ensuring that BM is held accountable and does not reoffend. To that end there is also agreement he should complete the SAFE programme and have his progress monitored by a Court.

[39] In deciding which Court is best suited to provide that oversight, important principles gleaned from the international instruments include;

(a) The primacy of wellbeing and that, where there is serious offending by a child, considerations such as sanctions must always be outweighed by the need to safeguard the wellbeing and best interests of the child and to promote his/her reintegration.

(b) In doing so, where possible and appropriate, early criminalisation and labelling should be avoided.

[40] When viewed in light of the international instruments, s 280A can be seen to provide the option of taking the type of welfare focussed approach recommended by the international instruments (which in the Act is referred to as "Care and Protection") rather than continue with a criminal justice focussed approach (under the Youth Justice provisions of the Act).

[41] Although the paramountcy principle in s 6 of the Act does not apply to the Youth Justice provisions, the welfare and best interests of children is still an important consideration and that includes AP as well as BM. In deciding to exercise the pushback, AP's welfare and best interests are not ignored nor minimised. Rather, where matters are finely balanced, considerations such as BM having a notation are outweighed by the principles set out in the international instruments and choosing the jurisdiction best geared to provide long term therapeutic oversight.

[42] The ability to exercise the pushback exists at any stage of the proceedings and the timing of its use will depend on the circumstances of the case. For example, where charges are denied, it would usually be the case that keeping matters in the Youth Court, at least until the hearing of the charges, would best serve the public interest in having an earlier hearing than is likely to be possible in the Family Court.

[43] However, where charges are admitted or proved, and the focus of any plan made is largely or wholly therapeutic, it will often be the case that the Family Court is better geared to monitor a child's progress especially where the plan is likely to be of significant duration. That is certainly the case here where BM is likely to be involved in the SAFE programme for up to two years. As noted earlier, there are no orders available in the Youth Court that run for that long. The Youth Justice involvement, with its greater focus on accountability than welfare options, is less suited to such long term oversight.

[44] Section 208(b) of the Act provides the principle that criminal proceedings should not be instituted against a child solely in order to provide any assistance or services needed to advance the welfare of the child. By extension, where a plan made in response to a child's offending is almost entirely therapeutic in nature (and therefore welfare-focussed), it could be argued that criminal proceedings should not be continued when there is a viable alternative.

[45] Although the Family Court proceedings have a welfare focus, it is important to note the powers that Court has in relation to child offenders. Under s 83 of the Act, the Family Court has the power to order a child offender (or his/her parent or guardian) to come before the Court if called upon within 2 years of the making of such order. Under s 84 the Court can make various orders including admonishing the child and, where the Court is satisfied that any person has suffered any emotional harm, or loss of or damage to property, order the payment of reparation.

[46] In this case both the Youth Court and the Family Court are capable of adequately holding BM accountable for his offending, given the orders available to both Courts and the fact that the SAFE programme includes a large component focussed on accountability for his offending.

[47] The public have an interest in seeing the Court take an approach that not only holds BM accountable but maximises the chances of avoiding further offending by him. Attending the SAFE programme provides for that and also acknowledges BM's needs and gives him the opportunity to develop in appropriate, beneficial, socially acceptable ways. So too does taking guidance from the international instruments which recommend diverting children away from criminal justice responses wherever possible and appropriate so as to reduce the risk of them reoffending.

A J FitzGerald
Youth Court Judge