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IN THE YOUTH COURT
AT KAITAIA

CRI-2015-229-000048
[2016] NZYC 218

NEW ZEALAND POLICE
Prosecutor

v

HC
Young Person

Hearing	12 April 2016
Appearances:	C A Anderson for the Prosecutor K C Bailey for the Defendant
Judgment:	12 April 2016

NOTES OF JUDGE G L DAVIS ON SENTENCING

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[1] HC, you appear before the Youth Court today for sentencing in respect of a number of charges, which I will loosely describe as a series of either indecent assaults or unlawful sexual connection against members of your wider family. Those charges, if they were laid in the adult Court, carry with them maximum terms of imprisonment of either 10 or 14 years respectively.

[2] I also comment purely for the sake of completeness that had these offences been committed when you were aged 17 years or more they would each have attracted strikes, as it is called, under the Three Strikes of serious violence offences legislation. I make those comments purely to put in context the seriousness with which they are viewed by the Court and society in general. However, these offences did not occur when you were aged 17 years or more. They occurred when you were aged 14 years and slightly over that period.

[3] The background to the offending in a general sense is that over the course of a longer weekend this offending took place by virtue of the description of the charges, namely unlawful sexual connection and indecent assault. It involved you engaging in what would otherwise be described as inappropriate sexual practices. It also involved members of your broader family. It appears, significantly, to have taken place in the context of what I understand to be a broader family environment which involved widespread sexual dysfunction.

[4] Mr Bailey has talked to the Court today about what appears to be accepted, open displays of sexual behaviour by your mother in particular involving members of the same sex and members of the opposite sex. I describe these as open sexual displays because it appears the acts of sexual intercourse that your mother engaged in were on open display for all members of your family. Mr Bailey has gone further than this, however, and said that not only was there sexual dysfunction but also incidents of significant violence, and that was on display for you and for your siblings to see.

[5] This offending came to light because of complaints from various members of your family against what turned out to be another young offender within the family,

and a broader investigation brought this offending to light. As a consequence of the offending charges were laid in the Youth Court.

[6] It is important to note that as a result of this offending a number of assessments, including s 333 reports and entry into the SAFE programme were undertaken, both on a voluntary basis by you and with compulsion following family group conferences. I use the word "compulsion" because that is not to cast doubt at your commitment to the SAFE programme but rather that it was Court-directed. It is against that backdrop that you appear for sentence today.

[7] Because you have now turned 18 the Court must consider whether this offending should be transferred to the District Court for sentence. Helpfully, the Crown say that this is not one of those situations where the Court ought to transfer this matter for sentence to the District Court and, not unsurprisingly, Mr Bailey adopts the same response. The reason that it is of such significance to the Court, however, needs to be explained. Should this matter be transferred to the District Court it is inevitable that a conviction would be entered and a range of sentencing options would be available to the Court, including among other things terms of imprisonment but equally lesser sentences. If, however, these matters remain in the Youth Court a term of imprisonment is not open to the Court to consider today, and there are a range of specific sentencing responses that the Court must consider. They are set out generally in s 208 Children, Young Persons, and Their Families Act 1989.

[8] I will, simply for the sake of completeness, go through those sentencing principles for you very, very quickly. The first significant principle is that unless the public interest requires otherwise criminal proceedings should not be instituted against a child or young person if there is an alternate means of dealing with the matter. Secondly, the principle that criminal proceedings should not be initiated against a young person solely to provide any assistance or services needed to advance the welfare or best interests of the children. There is the third principle that any measures for dealing with offending by children should be designed to strengthen the family, whānau, hapū of the young person concerned, to foster the ability of the family or whānau to develop their own means of dealing with the

offending by the young person. There is another principle that a child or young person who commits an offence should be kept in the community as far as that is practical and consonant with the need to ensure public safety.

[9] There is another principle that age is a mitigating feature in determining whether or not to impose sanctions on the young person, and the nature of those sanctions. The next principle is that any sanctions imposed should take the form most likely to maintain and promote the development of the child or young person and be the least restrictive form that is appropriate in the circumstances. There are other principles. I will pause for the moment because, in my view, it is the principle that any sanctions should take the least restrictive form that is something the Court must bear in mind. I do not say that that is greater than any of the other principles that I have touched on. I simply want to make the point that the least restrictive outcome is what the Court must consider.

[10] The Crown have filed very helpful submissions which say should this Court be minded to keep the matters in the Youth Court for disposition, it really only presents two options to the Court: an order being made under s 283(a) Children, Young Persons, and Their Families Act which in loose terms would be described as a conviction and discharge. I hesitate to use the word "conviction" because that is not what is used in the Youth Court jurisdiction but it is probably the language you would be more familiar with.

[11] The alternative is that the Court responds by way of what is called a s 282 discharge. A s 282 discharge is significant because if it is granted it has the effect as though these charges had never been laid in the first place. In other words, there is no formal record kept of a s 282 discharge being granted. That has significant consequences for any young person. In particular, if a record is kept it may well restrict your ability to travel in the future. If a record is kept it may require you to disclose that to any employer or potential employer. Equally, a number of job applications these days require a person not only to disclose any convictions they may have, if I use that word again loosely, but it equally requires you to disclose whether any charges have ever been laid against you. So, while for the moment

there may be charges in the Youth Court jurisdiction, if a s 282 discharge is granted it would have the effect as though these charges were never laid in the first place.

[12] Before the Court can consider whether a s 282 discharge should be granted or whether a s 283 discharge should be granted, one of the factors that the Court would need to consider is what or how these charges have been responded to by you, and the steps that you have taken to address the drivers of your offending. In that regard, I am mindful of two things. Firstly, the context in which this offending occurred. It occurred when you were about 14 and a half years of age and did not come to light for two or perhaps three years, or close to three years, after the offending itself occurred. When the offending occurred you readily admitted your involvement in it, or explained what you understood your involvement to have been, and despite there being a number of other charges laid, some of which could not or should not have been laid jurisdictionally in the first place, when those charges were tidied up in the broader sense of the word your involvement was very quickly admitted.

[13] A plan was formulated and it appears, once adopted by the Court, it has involved long-term counselling for you among other components. Each of those components have, in my view, been dealt with in a timeframe and in a manner that one would expect of a young person who has acknowledged their offending and sought to make that offending right, to use the general description. When one looks at all of those factors it appears to me the question as to whether or not a record should be kept of this offending, in the form of a discharge under s 283 of the Act, or whether or not no record should be kept bears very little, in my view, on how I perceive you are likely to move forward in the future. I see, rather, a record being kept as being something that is likely to hinder your development later in life, recognising that this offending occurred when you were a very, very young person.

[14] Having considered all of those factors, HC, I am of the view these charges should be disposed of today. It should be dealt with by way of a s 282 discharge pursuant to the Children, Young Persons, and Their Families Act. Like the Crown, I take the very firm view that this is not a matter that ought to be sent to the District Court for sentencing, for the reasons that I have touched on. I am of the view that, when one keeps in mind the principle in s 208(f)(ii) of the Act that any

sanction must take the least restrictive form that is appropriate in the circumstances of the case, that a s 282 discharge in respect of each of these matters is appropriate.

[15] You have responded to the SAFE programme well. I do, however, note the concern in the recent email about the need for further counselling to be undertaken. I rely on the assurance from the whānau or family here in Court today that that counselling will be ongoing. With that in mind, I take the view that the s 282 discharge will be granted today.

[16] Having granted the s 282 discharge, HC, as I emphasise, it has the effect as though these charges were never laid in the first place. That is significant because if you ever get a job application that says, "Have you been convicted of an offence?" you can quite honestly say "No." Equally, if the job application says, "Have you ever been charged with an offence?" you can quite honestly say "No" to that. If you ever go to Australia or to any other country and the immigration card says, "Have you ever been convicted of an offence or charged with an offence?" again you can quite honest say "No" to that. Do you understand the "sentence," in inverted commas, that has been imposed today? [Yes, Sir.]

G L Davis
Youth Court Judge