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**IN THE YOUTH COURT
AT MANUKAU**

**CRI-2016-292-000029
CRI-2016-292-000179
[2016] NZYC 359**

NEW ZEALAND POLICE
Prosecutor

v

GK
Young Person

Hearing: 9 June 2016

Appearances: S Norrie for the Prosecutor
N Benner for the Young Person

Judgment: 9 June 2016

ORAL JUDGMENT OF JUDGE I M MALOSI

Introduction

[1] GK, when I last saw you on 16 May I heard arguments from Ms Norrie, on behalf of the Police and your Youth Advocate, Ms Benner about whether you should be sentenced in the Youth Court, which is what you want, or convicted and transferred to the District Court for sentencing, which is what the Police say should happen.

[2] Although at that time your Social Worker, Mr Dougal had filed a report and plan recommending six months supervision with residence, there was no plan for the supervision order which the law says must follow any sentence of supervision with residence. Now, it is not so unusual not to have a supervision plan when you are sentencing someone to supervision with residence because usually that plan is put together while the young person is in residence, but in your case a really robust or strong plan for a supervision order away from South Auckland and away from your immediate family might well have tipped the balance in your favour.

[3] To be fair to you then, I put your case off until today so that your Social Worker could look at the possible options after supervision with residence and file a plan for a supervision order. He has now done that along with a plan for a community work order but that second order is not possible in law.

The offending

[4] Through your lawyer you accept the Police summary of facts as they have been set out in Ms Norrie's submissions. At about 6.00 pm on 15 January this year you were with a group of others, including your brother SK who is older than you and sadly more experienced than you in criminal offending; I know that because I have dealt with SK.

[5] You were also with HC and a 13 year old when the three of you came upon the two victims, German tourists, Matthias Schwaiger and Maximilian Renner. They were sitting outside the Mangere Arts Centre drinking beer. One of your group commented on the beer and as you were walking past you talked about robbing them. So the three of you then approached them. SK and HC kicked them about the

head causing them to fall back into the garden and then SK set upon Mr Schwaiger and began punching and kicking him while he was on the ground. You then picked up a skate board, Mr Renner's skate board, raised it about your head and hit him on the head and then struck Mr Schwaiger with the skate board as well.

[6] HC picked up two glass beer bottles and threw them at Mr Renner while he was on the ground. He then ran and kicked Mr Schwaiger while he was trying to get up and SK took Mr Schwaiger's bag from him. Mr Schwaiger was not having any of that and he chased your group until his bag was dropped and actually managed to get his property back, which was his bag, phone, passport, driver's licence but his \$30 cash was gone.

[7] I will come back to the injuries which the victims suffered, but note for now both of them suffered injuries which set their travel plans back and left a really sour taste for them in terms of their experiences of our beautiful country and our beautiful people. What they will remember, sadly, is the terrible violence that was inflicted on them but hopefully they also saw another side of us and our country.

Relevant Law

[8] It is really important, GK that I try and explain to you some of the more important things that I have to look at when deciding what Court you should be sentenced in. Judges do not make the laws, we have to follow them like everyone else. What we also do though in our role as Judges is apply the law to the cases that we are dealing with.

[9] In your case, the law I have to follow is found mainly in The Children, Young Persons, and their Families Act. It has 469 separate sections. It is a big piece of law. It is under s 283(o) that the Police are asking for you to be convicted and sent to the District Court for sentencing. As you know, GK if that happens there is a high chance of you going to prison.

[10] The other sections that apply in your case are 4, 5, 208 and 284. They are important because they guide us all about how we should deal with children and young people who break the law, how we should support them and the whānau to

take responsibility for what has happened, and to get them back on the right track. I am going to come back to s 284 in a moment because that section sets out certain things that I have to consider when sentencing you today.

[11] The other thing that Judges look at are cases which are kind of the same, that have already been decided by a Court. Ms Norrie has given me some to look at which go both ways. Some young people were convicted and transferred to the District Court for sentencing, while others were allowed to stay in the Youth Court and were sentenced here.

[12] Although it comes down to the particular facts of each case, Ms Norrie has helpfully looked at the common themes of these cases which I adopt:

- (i) Firstly, age and time available in the Youth Court jurisdiction for intervention is highly relevant. There is a presumption against transfer unless the potential length of supervision with residence order before the young person turns 18 is clearly inadequate;
- (ii) Secondly the seriousness of the offending and the likely term of imprisonment in the District Court is highly relevant but not determinative;
- (iii) Thirdly, in most cases where a transfer to the District Court was ordered the young person had reoffended while already subject to a Group 6 order for a similar serious offence;
- (iv) Finally, the Youth Court provides greater prospects of reducing the risk of further offending than the District Court. This is an important public consideration.

Weighing the relevant factors

[13] So returning then to s 284, I start with the nature and circumstances of your offending and the part you played in it. You are in no doubt that this was serious offending. You have never tried to say that this was anything other than that. Your

part in it was significant. The offending involved violence with weapons and in terms of the skate board you used, a potentially deadly weapon. There were punches and kicks to the body and head of both victims. Beer bottles were thrown at Mr Schwaiger. You struck the victims with Mr Renner's skate board, which included striking him in the head.

[14] Although there were only two others actually involved in the aggravated robbery there were at least seven members of the Junior Lazy but Crazy Gang nearby and that had huge potential for even more violence against the victims. Even if the victims were not aware of that potential at the time, you should have been.

[15] Although I accept there was not a huge amount of planning involved, there was some.

[16] I am mindful that SK is your older brother and that he had a huge influence on you on that day and let you down badly by encouraging you to be part of something that he knew could only end up in no good. I note that he has pleaded not guilty to these charges and is on track for a Jury Trial.

[17] I agree with the Police view that based on adult cases involving aggravated robberies and other violent offending *R v Mako* [2000] 2 NZLR 170 and *R v Taueki* [2005] 3 NZLR 372, that it is likely that a starting point of around six years imprisonment would be appropriate. That is almost a third of your life.

[18] In terms of your personal history, social circumstances and personal characteristics, I note the following:

- (i) At the time of the offending you were 16 years [age details deleted];
- (ii) You are of Cook Islands descent [details deleted];
- (iii) Your family first came to the attention of Child Youth and Family in 1999 when you would have been just four months' old. The concerns were for your older sister, namely physical and emotional abuse by your father. Tragically that pattern

continued throughout her and your lives. None of your siblings were spared;

- (iv) On 6 April this year a s 333 psychological report was obtained from Paul Ryan, a Senior Psychologist with the Regional Youth Forensic Service. You were assessed as being at high risk of general reoffending and at very high risk of future violence. Paragraph 59 in that report gives us some insight into what you have suffered throughout your life.

Predisposing factors for GK's angry and violent presentations seem to centre on reported controlling and angry volatility of his father over many years and GK's exposure to harsh physical discipline and chronic domestic violence at the hands of his father and it would seem, his older brothers. It appears that the reported destructiveness of his father has had severe impact on all family members and continues to do so. Consequently GK has learned a generational pattern of behaviour expressed in a concerning and escalating level of anger and violence. This anger is often triggered by his misuse of alcohol in which he admitted he was passing on to his younger brother, TK in the way he stated his older brothers had picked on him.

- (v) You have a history of self-harm. [Details deleted]. We are all very worried about that GK;
- (vi) You also have an unhealthy relationship, a destructive relationship, with alcohol and possibly other drugs. I note that you were so drunk at the time of this offending that you were not able to really remember what happened;
- (vii) You obviously have gang affiliations and even though I accept that at some point you made a decision to turn your back on that, the pull of the street has been really hard for you to resist but I believe that you want to live a different life;
- (viii) I know that you are in a relationship with someone who is older than you and accept that has had a good influence on

you. Your partner is not here today but she was last time and you told me about the hopes and dreams that you have [details deleted];

- (ix) I accept GK that you are genuinely sorry about what you did to the victims and that if you could turn the clock back you would, but you know you cannot. You told me last time about being prepared to take whatever the consequences were for your offending but pleaded for a chance to be able to turn your life around. You spoke in a very powerful way, young man about that;
- (x) I see from the report from [name of youth justice facility deleted] that I received last time, that you were on Level 2 on the Behavioural Management System and I have learned today that you have managed to get to Level 3 where you had been at times but slipped back. To your credit you peaked when it mattered most and you are on Level 3 today;
- (xi) You have not had any admissions to secure care;
- (xii) You are taking part in a number of programmes at [name of youth justice facility deleted], including the drug and alcohol programme and another one which addresses the reason why you offend, including the violence and anger issues;
- (xiii) Although you have some immediate family support from your mother and your older sister (who I want to particularly acknowledge for her braveness in terms of what she was able to talk about with the psychologist, her braveness at times in standing up to your father, and her braveness always in standing up for you), even with all that love for you, GK the sad reality is that your immediate family is simply not in a position to give you what you need at this time;

(xiv) Since the last time I met you, your Social Worker has been able to make contact with an Aunty on your mother's side and her husband, Mr and Mrs T who live [location details deleted]. You have not met this Aunty. You have not been to [location deleted] but you are prepared to give both a go and I am sure that that is because you understand that the alternative is prison. You either go to [location deleted] and take up the opportunity of living with family, who I am sure live a different kind of life from yours, or you find a new family within the prison walls.

[19] You have already had a taste of gang life and you know enough about that scene to know that in prison you will need to be in a gang to survive. Sadly, you will probably survive really well because you will not have anything worthwhile to fight for if that happens. Right now you have the chance to engage in the fight of your life, to fight for your right to live a safe, happy, fulfilling life.

Victims

[20] If it was just about you GK, it would be an easy decision. I would have decided to keep you in the Youth Court last time, but of course it is not just about you, it is about the victims of your offending and it is about the public as well.

[21] Both of your victims sustained injuries from the attack. Mr Schwaiger received cuts and scratches to his back, a black eye and a cut lip. Mr Renner had numerous fractures to his skull and face, and cuts and bruises as well as a serious brain haemorrhage. He was in the High Dependency Unit at Middlemore Hospital and then was moved into a Rehabilitation Centre for a number of weeks. He then returned to Germany and Mr Schwaiger continued with his travels in New Zealand.

[22] They have both provided Victim Impact Statements. Mr Schwaiger talked about being angry when he saw what was happening to Mr Renner. He thought it was really unfair that they were just sitting there minding their own business and you came along and attacked them in the way that you did. He imagined New Zealand to be a safe country and was totally surprised that something like this could have

happened. He was not used to this kind of violence in the place where he lived. He did make the point of saying that other than this incident they had an awesome time in New Zealand. He hoped that this would not happen to anyone else.

[23] I see that they met a family in Mangere who helped them out. That family must have been complete strangers to them and they offered their home where he and Mr Renner were able to stay until he got better.

[24] Mr Renner does not remember much. He recalls being hit and the next minute he woke up in hospital. He realises that his injuries could have been much more serious. He felt bad for his mate; two friends travelling from Germany both feeling really sorry and guilty about what had happened and the impact on the others' travel.

[25] Mr Renner, who was the most seriously injured of the two, said he was not angry with you. He said he actually hoped that you would be able to get help to change so that no one else would get hurt like that.

Discussion

[26] I am mindful, GK that in terms of your history in the Youth Court you received a six months' supervision order under s 283(k) in November 2014 for around ten charges, two of which were aggravated robbery. You are said to have successfully completed that order, but obviously it was not that successful because you are back before the Court again on a very serious aggravated robbery.

[27] Frankly, you returning to the care of your violent father was like throwing you into a lions' den and hoping that you would survive.

[28] Not being able to re-engage you in education during your supervision order was a complete failure on our part. It was the best chance you had of being able to turn your life around and we let it slip away.

[29] I agree with the Police that that supervision order did not effectively address the underlying causes of your offending, especially your alcohol problem and the issues you have with anger and violence.

[30] I know that at your family group conference you all must have talked a lot about those issues, but I see you could not come up with agreement as to how to deal with them.

[31] Even with the supervision plan now, the Police maintain their position that you should be convicted and transferred to the District Court. They acknowledge the plan goes some way towards addressing the risk factors, but in the public interest they are not prepared to take that huge risk and support you being sentenced in the Youth Court.

[32] The big issue today is whether supervision with residence followed by supervision is a strong enough sentence to deal with the big risk that you present to yourself and the community. Is there enough time left in the Youth Court to do that? Any sentence in this jurisdiction can only run up until your 18th birthday which will be on [date deleted] 2017, so we have just over a year.

[33] Although the law says you are an adult now, at 17 years old we know enough about brain science to appreciate that you are still very much a child in terms of your brain development.

[34] There is not a person in this court today GK, not one person, who does not appreciate what a devastating effect imprisonment will have on you at this time in your life. Of course I must balance that against the seriousness of your offending and the risk that you pose to the community.

[35] Having regard to all of the principles in The Children Young Persons and Their Families Act, GK and in particular the public interest which I find is best served by guiding young offenders towards a law abiding path, I have decided you are to be sentenced in the Youth Court. One year in your life, at your age, is a significant period of time.

[36] The opportunity to live with family in [location deleted] and start over is the circuit breaker you have been praying for, and is too significant to ignore. It is important that you understand however, that the possibility of imprisonment hangs

over your head until the sentence in the Youth Court is finished, so the risk of imprisonment is still there for you.

[37] I am pleased that in the plan for the supervision with residence order there is a proposed condition for you to participate in the MAC programme which starts on your seventeenth birthday. There is something prophetic about that date. The MAC programme will then run through to 28 September 2016 and on either side of those dates you will serve a six month term of supervision with residence at [name of youth justice facility deleted]. Six months is the maximum term available.

[38] You are entitled to a hearing after you have served two-thirds of that sentence to decide whether or not you can be released at that point or have to serve the full six months. I anticipate GK that you will be released at the two-thirds date and once you are, the supervision order will come into play and continue until your eighteenth birthday on [date deleted] 2017.

[39] I imagine that most of your birthday celebrations up until now have not been happy ones. I imagine that some birthdays would have come and gone without anyone really remembering it was your birthday, or celebrating the fact of your life. Your 17th birthday and your 18th birthday are going to be so important for you. On your 17th you go into the MAC programme, and on your 18th birthday your sentence in the Youth Court is at an end.

[40] In terms of your supervision order I propose to impose that today and at the two-thirds hearing if there is a need for any of those conditions to be changed, then an application can be made accordingly.

[41] I believe it is important to lock in that supervision order so that all of the supports can be formally put into place for when you are released from supervision with residence.

[42] Now that we have the opportunity of this placement in [location deleted] it may be that after the MAC programme you serve the remainder of your supervision with residence in Christchurch which will allow the T's better opportunity to see you before you are released into their care. I appreciate that effects your opportunity to

have ongoing contact with your family and loved ones here in Auckland, but frankly I see that as a positive thing. The next year is about giving you as much physical and emotional space as possible from your immediate family so that you have the freedom to make choices about how you are going to live your adult life.

[43] I fully appreciate, GK your psychological need to have an ongoing relationship with your family but for the next year your focus must be on keeping yourself out of prison. You are still at risk of a term of imprisonment and I remind you that if that comes to be the Police are saying, on this aggravated robbery charge we look at a starting point of six years' imprisonment, which is a third of your life.

[44] On the supervision with residence order, it will be served at [name of youth justice facility deleted]. You will participate in the MAC programme and any programmes provided which include the TYLA programme, the **MODI 2 MODI** programme.

[45] In terms of the supervision order, that is made for nine months and will commence after you are released from [name of youth justice facility deleted]. The nine months is calculated on the basis of you being released after two-thirds, but if you serve six months of your supervision with residence order then it will be followed by a six month supervision order and the terms are that:

- (i) You are to living with your family in [location deleted] and must follow all of their house rules;
- (ii) There is going to be a mentoring programme put in place for you with **Ho Oro whānau**.
- (iii) Anger management counselling is to be arranged.
- (iv) Drug and alcohol counselling.
- (v) Your social worker is going to put in place either employment or a course to get you towards employment.

- (vi) You are not to have anything to do with SK or HC (and that includes social media, phone contact - nothing at all)
- (vii) You will be on a curfew from 7.00pm to 7.00am unless you are with your caregivers or someone approved by them.

[46] GK, once the orders have been done up and served on you you are free to go. You go back to Y J North, but you go back there knowing what the future holds for you now, or importantly what it does not hold for you. I pass the mana back to you now, GK. You are the one with full control over your life now. You said to me last time that you were prepared to take whatever consequences of your offending. I have believed that you are a man of your word, so show me. I might not be the Judge that deals with you at your two-thirds hearing but I will come to know how you have done. It is not going to be easy going to [location deleted], it is not going to be easy living with family you do not know or following the rules they set for you, but they are opening their heart and home to you and you would be a fool not to make the most of that opportunity.

I M Malosi
Youth Court Judge