

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN
[SQUARE BRACKETS].

**This judgment cannot be republished without permission of the Court. Publication
of this judgment on the Youth Court website is NOT permission to publish or
report. See: Districtcourts.govt.nz**

**NOTE: NO PUBLICATION OF A REPORT OF THIS PROCEEDING IS
PERMITTED UNDER S 438 OF THE ORANGA TAMARIKI ACT 1989,
EXCEPT WITH THE LEAVE OF THE COURT THAT HEARD THE
PROCEEDINGS, AND WITH THE EXCEPTION OF PUBLICATIONS OF A
BONA FIDE PROFESSIONAL OR TECHNICAL NATURE THAT DO NOT
INCLUDE THE NAME(S) OR IDENTIFYING PARTICULARS OF ANY
CHILD OR YOUNG PERSON, OR THE PARENTS OR GUARDIANS OR ANY
PERSON HAVING THE CARE OF THE CHILD OR YOUNG PERSON, OR
THE SCHOOL THAT THE CHILD OR YOUNG PERSON WAS OR IS
ATTENDING. SEE**

<http://www.legislation.govt.nz/act/public/1989/0024/latest/DLM155054.html>

**IN THE YOUTH COURT
AT NORTH SHORE**

**I TE KŌTI TAIOHI
KI ŌKAHUKURA**

**CRI-2019-244-000083
[2019] NZYC 548**

NEW ZEALAND POLICE
Prosecutor

v

[HX]
Young Person

Hearing:	16 October 2019
Appearances:	Sergeant K Evans for the Prosecutor G Anderson for the Young Person
Judgment:	16 October 2019

MINUTE OF JUDGE A J FITZGERALD

[1] [HX] is here today at the North Shore Youth Court and I have both his Youth Court and his Family Court care and protection files before me. First in relation to the Youth Court proceedings I have decided not to sentence [HX] today. Instead I will adjourn sentencing to give him an opportunity to carry out the plan dated 9 October 2019 that his social worker, Emily Henderson has prepared.

[2] That plan is almost identical to the plan that would have applied if I had sentenced [HX] to supervision today which is what the police wanted. They were seeking a six month supervision order. The plan Ms Henderson has provided she recommends should run for four months which I will approve but will say more about that shortly.

[3] Because I have decided not to sentence [HX] it is not strictly necessary to fully consider and record all the factors in s 284 of the Act but I have turned my mind to them as well as a variety of other things.

[4] I acknowledge that the aggravated robbery charges in particular are very serious which is a matter that has weighed heavily in my decision-making. So too is the information regarding [HX]'s personal history and characteristics and social circumstances. He is a young man of Māori and Nuiean descent. He and his whānau have an extensive history with Oranga Tamariki for care and protection concerns with [HX] being described as having experienced a lifetime of neglect, emotional and physical abuse, poor and inconsistent parenting and exposure to family violence and parental drug use. As a result, he has the current care and protection proceedings before the Family Court that I have mentioned.

[5] As well as all that trauma, [HX] suffered a severe traumatic brain injury as a result of an accident in [month deleted] 2016 and there is mixed reporting of the ongoing impact that has on his behaviour and functioning. There are also mixed views as to whether he might have FASD and possibly ADHD but no further assessments are sought at this time.

[6] So there are a complex range of factors that underlie [HX]'s offending that need to be addressed in a well-co-ordinated, robust plan involving various agencies

and professionals, providing supports and services to help address the things that have contributed to [HX] being here, as well as assisting his whanau, and his mother in particular, to care for and support him properly in the future and prevent him from further offending.

[7] When [HX] was before me on 4 September 2019, I was not satisfied that the plan provided complied adequately with the new provisions of the Oranga Tamariki Act 1989. What I have today does and I acknowledge Emily Henderson and others concerned for the hard work that has obviously gone into putting this new plan together.

[8] Before turning to the plan, I make these brief comments about the Act's new provisions. First, it is clear the Act must now be interpreted and applied with a much more sophisticated and nuanced understanding of Te Ao Māori. Compliance with the relevant provisions is not optional, it must happen.

[9] Second, the objects of the Act have been replaced by the purposes of the Act which are to promote the wellbeing of children, young people, and their families, whānau, hapu, iwi by complying with detailed and clearly defined general principles and specific care and protection and youth justice principles which place numerous and significant duties and obligations on all those who make decisions under the Act. I will not set out those purposes and principles today because they are long and reciting all of the relevant ones is not necessary as sentencing is being deferred at this stage.

[10] One significant advantage of deferring sentencing, to monitor [HX]'s progress on the plan, is that monitoring can occur at Te Kooti Rangatahi at Hoani Waititi Marae. [HX] has told me today that he is willing to go and see what happens at the Rangatahi Court and then make a decision as to whether he will continue with the monitoring there. In addition to the cultural provisions of the new plan, including in particular the Ranga Tu programme, participating in the protocols of the marae in that positive environment go a long way towards satisfying the Act's cultural requirements and expectations.

[11] [HX] also identifies strongly and proudly with his Niuean heritage and so potentially he could have been, and could still be, considered for involvement at the Pasifika Court. Both options are far better than monitoring here at the mainstream Court and either option is much better than not being involved at all which would have been the position if I had gone ahead with sentencing today.

[12] It is important to say too that the general principles of the Act also require that those of us exercising powers under the Act must be guided by the wellbeing of the young person as being at the centre of decision-making. One of the things required, in particular, is that [HX]'s rights under the United Nations Convention on the Rights of the Child and possibly for him under the United Nations Convention on the Rights of Persons with Disabilities must be respected and upheld.

[13] Again, because I am not sentencing [HX] today, I will not go through the various articles in the Rights Convention that are especially relevant in the sentencing context. However, for today's purposes it is relevant to mention that very recently the United Nations issued a new General Comment on Child Justice, number 24, 2019, which was issued on 18 September 2019.

[14] The general comments provide helpful guidance to all member states such as New Zealand. Some provisions of real significance here, are in the context of opting to divert [HX] from progressing directly to sentencing at this time. For example;

- (a) Paragraph 6(c)(ii) states, "The objectives and scope of the general comment are to promote key strategies for reducing the especially harmful effect of contact with the criminal justice system in line with increased knowledge about children's development, in particular scaling up the diversion of children away from formal justice processes to effective programmes."
- (b) Paragraph 8 provides that measures for referring children away from the judicial system should be considered at any time prior to or during the relevant proceedings.

- (c) Paragraph 15 says, “Diversion involves the referral of matters away from the formal criminal justice system usually to programmes or activities. In addition to avoiding stigmatisation and criminal records, this approach yields good results for children, is congruent with public safety and has proved to be cost effective.”
- (d) Then and importantly, paragraph 16 says this, “Diversion should be the preferred manner of dealing with the children in the majority of cases. State parties should continually extend the range of offences for which diversion is possible including serious offences where appropriate.”

[15] One thing I must make clear is that I am not suggesting that by adopting this approach a s 282 order would necessarily follow as the outcome for satisfactory completion of a plan by [HX]. Indeed, it would be unusual with such serious offending for there to be such an outcome, but I accept it is not unheard of. That will be a matter for the sentencing Judge to decide, taking everything into account at the appropriate time.

[16] However, I accept that at least a lower tariff order from the hierarchy in s 283 will probably result if [HX] completes the plan well and stays out of trouble. In that regard it must be understood that sentencing in the Youth Court is necessarily different, very different to the formulaic, mathematical, tariff and precedent driven approach of the District Court. The UN General Comment mentions that too and refers to the need to take a differentiated individualised approach for young people because they are different from adults in their physical and psychological development.

[17] In [HX]’s case, things that are significant in deciding to give him this opportunity aside from what I have mentioned so far include;

- (a) This is his first offending he has had before the Youth Court. He was aged 14 in relation to some charges and 15 for the others.
- (b) He has spent 17 days on remand in custody in a residence as well as 98 days on EM bail conditions with I am told only one very minor breach.

- (c) There are some very positive reports about how he has been progressing since he has been back in the community. A report from [details deleted] was especially positive about [HX]'s attitude and behaviour on the camp he attended recently. He adhered to all boundaries and rules set for him over and above expectations. He was respectful towards staff, responded to instructions, got along well with other students and showed natural leadership abilities.
- (d) The various sentencing options remain available in the event [HX] does not make satisfactory progress and of course there are plenty of checks and balances in place to monitor his progress.
- (e) Finally, it is not at all unusual for young people showing such positive signs of engagement to be given the opportunity to advance on a social worker's plan with sentencing deferred especially in those cases where it enables monitoring to occur in the Rangatahi and Pasifika Courts. The approach I have adopted is consistent with decisions Judges are often making at least across all of the Courts in the Northern Region in which I sit regularly.

[18] Under s 4 Oranga Tamariki Act, the four primary considerations in relation to youth justice issues are the wellbeing and best interests of [HX], the public interest including public safety, the interests of victims and [HX] being accountable for his behaviour.

[19] I am satisfied that all of those considerations are adequately met by adopting the approach I have today. As I have mentioned the plan [HX] must carry out now is the same as the plan that was provided in support of a proposed supervision order but with the advantage of monitoring being at the Rangatahi Court with the Pasifika Court option also there. As the UN guidelines mention, the diversion options not only yield good results for young people and are therefore in their best interests, but they are congruent with public safety as well.

[20] So it is for those reasons that the social work plan is approved. That includes the proposed duration of four months and [HX] is further remanded on bail to the Rangatahi Court at Hoani Waititi Marae in Waitakere for his first monitoring appearance on [date deleted] 2019 and 9.30 am is the time to be at the marae that day and Ms Henderson will provide a verbal progress report for the Judge that day.

[21] In accepting the recommended duration of four months for that plan I take into account the time [HX] has been before the Youth Court already but also that I am able to continue monitoring his progress after the four months because he has the Family Court care and protection proceedings in relation to which plans will continue to be made to address ongoing issues.

[22] I now turn to the current care and protection plan for [HX] dated 4 October 2019. It is especially important that this plan not only be co-ordinated with the plan I have just approved in the Youth Court but also that it include adequate provisions to address the primary care and protection concerns which I mentioned earlier.

[23] Those have much to do with [HX]'s mother, [MX], who must be given the help and support she needs to provide adequate care for [HX]. Helpfully today there has been some discussion in the courtroom about the plan that is being provided. In particular I am grateful to [the RYOP therapist]. The RYOP involvement will continue for a period of 21 weeks and during that time I am told it will be possible to identify the various supports and services needed to ensure that [MX] is supported to address the issues and concerns that have been raised in the plan and so the position in that regard should be clear when the next review takes place.

[24] Because of the importance of coordinating what is happening with the plan, the plan which is now approved will continue as will the s 101 custody order and the review of plan is to be in four months as well. With that in mind, I am setting the Family Court matter down in the North Shore Youth Court crossover list on [date deleted] 2020 when I will be presiding.

[25] [HX], I will just get you to stand up now please. I had to spend all that time saying those things because I wanted it to be really clear why I made the decision I did

today and everything I said is going to be typed back so everyone interested can understand the decision.

[26] Now is the time for you to concentrate and I just want to explain here what is happening. As I have told you, I am giving you this chance to do all of the things that your social worker, Emily, has set out in the plan and you really need to step up here and make sure that you do a really good job of that.

[27] I know you can do that because the reports I have about how well you have been doing for a few months show what you are capable of. So I do not think there should be any problem in you finishing that plan well in that four month period. It is important that you know that if you do not, if you are not making a good effort, and things are not progressing like they should, it is still possible to make the supervision order the police were seeking so that has not disappeared as an option.

[28] As I said before, I think it is a really good call on your part to go and see what happens at the Rangatahi Court at Hoani Waititi Marae and I think that might be one of the best decisions you have made in your life so far for reasons that I expect you will understand when you get there. It is a far better place to keep an eye on how you are doing than this building and in fact if this plan works as well as I hope it does, my hope is you will never come back to this building again.

[29] I have also approved the plan that has been prepared in the Family Court for your care and protection and that includes help and support that both you and your mum will get over the next four months. In four months' time my hope is that you will be finishing your Youth Court plan and the Judge can decide then what order to make about that and I will have another look at your care and protection plan to work out what needs to be in that for you and your mum from that point forward and then I can keep an eye on how that plan is going.

[30] So bail, I have been wondering what to do about that. You have done very well on the electronic monitoring, there have not been any significant breaches so it seems to me worth giving you a chance to show that you can stick to normal bail conditions. That is going to put some responsibility on your shoulders to see how you handle not

having the electronic monitoring and make sure you manage that well. Are you up to that? [Yes, Your Honour].

[31] Okay, so [HX], I will change your bail but the only change I am making today is removing the electronic monitoring so there is still the 24-hour curfew but you are able to leave home to go and do the things you have been doing for the last few months. If you carry on doing well, we will all be pleased and the conditions including the curfew can be further relaxed as a reward for good behaviour in the future. So, I hope that motivates you to keep doing well.

A J FitzGerald
Youth Court Judge