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

NOTE: PURSUANT TO S 130 OF THE INTELLECTUAL DISABILITY (COMPULSORY CARE AND REHABILITATION) ACT 2003, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/

IN THE DISTRICT COURT
AT PORIRUA

I TE KŌTI-Ā-ROHE
KI PORIRUA

CRI-2021-091-001848
[2022] NZDC 7447

NEW ZEALAND POLICE
Prosecutor

v

[LUKE FRENCH]
Defendant

Hearing:	28 April 2022
Appearances:	Sergeant Macky for Police Mr Crosse for Defendant
Judgment:	29 April 2022

RESERVED JUDGMENT OF JUDGE JOHN WALKER (APPLICATION FOR STAY AND FITNESS TO STAND TRIAL PROCESS)

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[1] Mr [French] faces two charges alleging assaults on his Grandfather. He is charged that on 9 November 2021 he assaulted him and then assaulted him again with intent to injure him. Mr [French] had recently been discharged from a psychiatric ward and his Grandfather asked him if he had taken his medication. This, it is alleged, resulted in Mr [French] attacking him.

[2] Mr [French] applies for an order staying the proceedings on the grounds that there has been undue delay in his case and I need to consider what is to be done in relation to much delayed assessments directed under the Criminal Procedure (Mentally Impaired Persons) Act 2003 ("the Act").

Background

[3] On 3 December 2021 the issues of fitness to stand trial and the availability of an insanity defence were raised in court and the procedures under the Act were commenced. Two psychiatric reports were directed under section 38 of the Act which requires two reports to be taken into account when any findings are made under the Act in relation to fitness. At that stage Mr [French] had been granted bail to live at an address in Dunedin.

[4] On 10 January 2022 Mr [French] allegedly breached his bail by threatening violence and no longer had a bail address available to him. He was arrested and appeared in court in Dunedin and was remanded in custody to the Otago Prison.

[5] The Community Forensic Psychiatry Service at Wakari Hospital in Dunedin took over the responsibility for the assessments of Mr [French] which had been directed in the Porirua Court.

[6] On 14 January 2022 [name deleted], a consultant psychiatrist with the Forensic Service, wrote to the court requesting an extension of time to complete the reports because the order from the court had not been received by the Southern Regional Forensic Service until 10 January 2022. The extension requested was for at least eight weeks.

[7] There is no record on the court file of that request being considered and when the matter came before me on 19 January 2022 there appears to have been no reference to the section 38 report delay and I adjourned the case for a week for counsel to take instructions in a general way.

[8] On 25 January 2022 the matter was back before the court and the court was then informed that reports were underway. The Judge adjourned the case to 24 March 2022, which was the eight week period earlier requested, and Mr [French] was further remanded in custody.

[9] No reason was given in the request from the Forensic Service for the lengthy delay requested but by inference it was a matter of availability of Psychiatrists to carry out the assessment and write the reports.

[10] On 25 February 2022 [the consultant psychiatrist] attempted to assess Mr [French] by AVL and she reported "during this assessment Mr [French] presented as psychotic and was unable to adequately engage in the interview. He has a pre-existing diagnosis of schizophrenia".
[The consultant psychiatrist] further reported

"Mr [French] has been receiving care from the Forensic Mental Health Service whilst in custody at Otago Corrections Facility. Following my assessment I spoke with [Mr French's treating clinician] who agreed that Mr [French] is currently suffering an acute exacerbation of his mental illness. She advised that Mr [French] has been declining medication in custody and has been placed on the waiting list for admission to [Ward number deleted], Medium Secure Forensic Unit, Wakari Hospital, for the purposeof assessment and treatment of his mental illness".

[11] As a result of those difficulties [the consultant psychiatrist] requested a deferral of the court matters for 6-8 weeks

"for appropriate assessment and treatment of his mental health in hospital".

[12] When the matter came back to court on 24 March 2022, faced with the situation reported by [the consultant psychiatrist], the Judge adjourned the case until 7 April 2022 for a further attempt to be made to assess Mr [French]. The possibility of a stay application being filed on behalf of the Defendant was signalled at that time.

[13] On 30 March 2022 [the treating clinician], the visiting psychiatrist at the Otago Prison, wrote to the court reporting as follows:

> 1 That there was acute exacerbation of Mr [French]'s mental illness
>
> 2 That he remained on the waiting list for admission to hospital
>
> 3 Mr [French] was declining medication
>
> 4 That she had attempted to visit Mr [French] in prison on 13 March 2022 but that "was unable to be accommodated" (it is unclear what was meant by this).
>
> 5 [The treating clinician] sought a further six to eight week adjournment "to allow for his assessment and treatment in hospital".

[14] It is clear from the correspondence from the psychiatrists, and from the fact that Mr [French] is on a waiting list for admission to hospital, that the professional assessment is that Mr [French] requires hospital treatment. It is also clear that without admission to hospital, with treatment and stabilisation, there is no prospect of the ordered assessments being carried out. It is the inability to have Mr [French] in hospital that is causing the ongoing delays in this court process.

[15] On 7 April 2022 the Forensic Liaison Nurse at Porirua court reported that the psychiatrists in Dunedin were still unable to assess Mr [French] in prison. On 6 April 2022 he was assessed as being acutely unwell. A further adjournment was requested "to allow the Southern DHB the opportunity to move Mr [French] to the forensic hospital to recommence his treatment and stabilise his mental state. In response to this advice the Judge adjourned the proceedings, including the now filed stay application, to the 28th of April 2022 when the matter came before me.

[16] By 28 April 2022 Mr [French] had been in custody since the 10th of January 2022 during which time, his mental health had been regarded as requiring hospital treatment, yet he remains in prison acutely unwell.

Discussion

[17] The continuing remand in custody has its origins, not in the making of orders under the Criminal Procedure Mentally Impaired Person Act 2003, but as a result of a breach of bail and the absence of any proposed address for renewed bail. I can see no record on the court file of any bail application having ever being advanced. His ongoing mental health issues and unavailability of an address for bail would explain that situation.

[18] On 26 April 2022, a few days before the last hearing, I issued a minute in the following terms

> 1. I have read the letter from [the consultant psychiatrist] and it appears that Mr [French] is in need of hospital treatment, as he has been for some weeks. I am told that he is on a waiting list for transfer from prison to hospital.
>
> 2. I am considering making any further remand, should that occur, to be under s 38(2)(c). Before I can do that I need to have a certificate from [the consultant psychiatrist] that such a placement is desirable. I assume that it is desirable as Mr [French] is on a waiting list to go to hospital, and it may be that I can draw the inference from the letter that the opinion is that such a transfer is desirable.
>
> 3. However, I am seeking that opinion from [the consultant psychiatrist] in a direct way.
>
> 4. Without hearing argument on the point, it is a live issue whether availability of a bed or otherwise can affect the question of whether being in hospital for the assessment is desirable.
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> 5. I request that [the consultant psychiatrist] express her opinion prior to the hearing on Thursday.
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> 6. I invite [the consultant psychiatrist] to join the hearing by AVL on Thursday to address this issue should she wish to do so.

[19] In response to that Minute the Clinical Director of the Community Forensic Psychiatry Service at Dunedin responded as follows:

> "I respectfully advise the Court that there is currently no acute bed available for Mr [French] in [Ward number deleted] Medium Secure Unit. As Mr [French] was a client of Capital & Coast DHB mental health services I also liaised with Te Korowai Whāriki Regional Forensic Service who advised that there is also no acute bed availablewithin the Capital & Coat region.
>
> I therefore respectfully advise that a remand to hospital pursuant to s38(2)(c), Criminal Procedure (Mentally Impaired Persons) Act 2003 is not supported for Mr [French]".

[20] It seems clear that the reason such a hospital based remand is not "supported" is because of the absence of a bed rather than that hospital admission was not required for treatment and assessment. It is clear from all of the correspondence from the psychiatrists that hospital admission is required from a treatment and assessment point of view.

[21] In the minute I invited [the consultant psychiatrist] to join the hearing by AVL in order to address the question whether admission to hospital for the purposes of an assessment and report would be "desirable".

[22] The response from [doctor's name deleted], responding on behalf of [the consultant psychiatrist], to that invitation was in the following terms

> "I note the Court offered the opportunity for [the consultant psychiatrist] to speak directly to the Court with regards to her opinion on Mr [French]'s remand. I respectfully advise that the Southern Regional Forensic Psychiatric Service only has 40% of their Consultant Forensic Psychiatrists able to attend work at present. Clinical care is therefore being prioritised and [the consultant psychiatrist] is unable to appear in Court to discuss this matter. I respectfully request this letter is accepted as written evidence with regards to the minute".

[23] This is a disappointing and somewhat surprising response to the invitation to assist the court in making a decision in this case. At the hearing I was left in the position of having to explore the questions I had with the Forensic Liaison Nurse attached to the Porirua court. Not surprisingly she could not express any clinical opinion or address the options that might be available.

[24] The question I am left with is how can it be that an acutely mentally unwell person has to remain in a remand cell in a prison for months while he remains on a waiting list for admission to hospital. I am told that his treatment in Prison is limited to him being visited at least weekly, and I know from the correspondence that visits from a psychiatrist cannot always be accommodated. A particular consequence of this, for this defendant, is that the determination of whether he is even fit to stand trial cannot be made while he remains in prison.

[25] The Act is intended to provide a process for prompt determination of fitness and where there is unfitness prompt determination of outcome which will often result in a compulsory treatment order.

[26] On the basis of what is before me if Mr [French] was found to be unfit to stand trial, an order that he be detained under an inpatient compulsory treatment order in hospital would be likely. That is precisely what the psychiatrists say is required now.

[27] There can be no guarantee that if I further adjourn this case for yet another period of six to eight weeks as requested anything will change.

The Stay Application

[28] The application for a stay is based on delay the proceedings themselves, in the sense of the progress of the charges, but absent the mental health procedures, it could not be said that there has delay to the extent necessary to justify a stay. It is the delay under the Act which can properly be characterised as undue if not inordinate. However, the result of a stay would be the immediate release of an acutely unwell person into the community from the prison gate – a person who is on the waiting list for an acute bed at hospital would be left to his own devices, acutely unwell and unmedicated. The chances of him being supported and treated in those circumstances appear slim I am not prepared to grant a stay in those circumstances.

What is to be done?

[29] What I am prepared to do is to make orders to provide for Mr [French]'s prompt entry into hospital and to achieve that I intend to make the order I foreshadowed in my Minute, under section 38(2)(c) of the Act.

[30] That section provides as follows

> **38 Power of court to require assessment report**
>
> (2) If a court orders that an assessment report on a person be prepared under subsection (1), the court may—
>
> **(a)** make it a condition of a grant of bail that the person go to a place approved by the court for the purpose of the assessment; or
>
> **(b)** order that the person be detained in a prison for the purpose of the assessment for any period not exceeding 14 days as the court thinks fit; or
>
> **(c)** order that the person be detained in a hospital or secure facility for the purpose of the assessment for any period not exceeding 14 days as the court thinks fit, if—
>
> > **(i)** a remand to a prison for that purpose would be inappropriate for any reason; and
> >
> > **(ii)** a health assessor has expressed the opinion, in a certificate or in evidence, that it would be desirable if an assessment, or a further assessment, take place in a hospital or in a secure facility.

[31] On the evidence before me contained within the various letters from the psychiatrists which I have referred to, [the consultant psychiatrist] and others consider that Mr [French]'s admission to hospital is necessary for his treatment and to enable the assessments ordered by the court to take place. The history shows that a remand in prison is inappropriate.

[32] The term "desirable" in its common definition means that it is a worthwhile thing beneficial or expeditious. In the context of an assessment under the Act it must mean that hospital is the better place for the assessment to be carried out and that being placed in hospital will be conducive to the completion of an assessment. That is a low threshold. Even if the test was more stringent such as being "necessary" or "required" such a higher test would be satisfied in this case.

[33] I do not consider that the availability or non-availability of a bed in a particular hospital, suitable for the containment of the defendant, can be relevant to consideration of desirability of placement for the purpose of carrying out an assessment. If the Act intended that to be a consideration I would expect it to have added the words "and provided the facilities are available for such an assessment in hospital" or words to that effect. The fact that a hospital remand is not "supported" by reason of physical resource cannot affect my consideration.

[34] I consider that I have a common and expressed opinion from the psychiatrists who have written to the Court that it is desirable that the assessment take place in a hospital. Each of the preconditions to my making an order under section 38(2)(c) are satisfied.

[35] I now make that order effective from 5 May 2022 in order to provide time to enable the psychiatric service to make the necessary arrangements. It may well be that other hospitals elsewhere in New Zealand need to be considered to give effect to this order.

[36] If it transpires that there are no beds available anywhere in New Zealand to accommodate this situation then that will obviously highlight a widespread and serious issue. For that reason I am directing that a copy of this judgment be sent to the Director General of Health.

[37] The course that I am taking appears to be the only option available to allow for the assessments which the court has directed and to avoid an acutely unwell person being held in prison under a warrant issued by this court. A continuation of that situation, simply put, cannot be justified.

John Walker
District Court Judge