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**IN THE YOUTH COURT
AT NEW PLYMOUTH**

**CRI-2015-270-000089
[2016] NZYC 227**

THE QUEEN

v

BT
Young Person

Hearing	19 April 2016
Appearances:	J Marinovich for the Crown H Raumati for the Young Person
Judgment:	19 April 2016

ORAL JUDGMENT OF JUDGE G F HIKAKA

[1] BT, born [date deleted] 2000, is before the Court today for a Criminal Procedure (Mentally Impaired Persons) Act section 9 hearing. At the start of the day the Crown sought to adjourn the hearing because of difficulties around one of the files in particular, being split amongst different police offices and the paucity of information in support of the charge that that split file related to.

[2] I declined the opposed application. First, I turned my mind to the purposes and principles behind the youth justice provisions and in particular s 5(f) Children, Young Persons, and Their Families Act 1989 (CYPF Act) and the requirement that decisions affecting young people are made within a time frame appropriate to the child or young person's sense of time.

[3] I did not overlook the serious nature of the charges, the victim's interests and indeed the public interest. I took into account a social work report that had been filed on 11 April 2016 that detailed BT's behaviour while in residence and concluded with the social work case leader's concern about him associating (**inaudible 12:55:32**) over the last more than six months, indeed since 22 September 2015, and that meant that the opportunity for him to associate with family and community supports will delay his development and I quote "of empathy and moral development during his formative years of his life".

[4] I declined the application for an adjournment because BT needs to have matters move forward without any further delay.

[5] There are three matters for consideration. Two aggravated robbery charges that BT was sentenced to supervision with activity for six months on 24 April 2015 and which were subsequently cancelled. The Crown are not pursuing those charges today.

[6] The third charge is another aggravated robbery with two other named alleged offenders, the three of them, it was alleged, were armed with a knife and robbed a taxi driver on 20 September 2015. When BT appeared on the third charge he was remanded in custody and the supervision with activity order referred to above was cancelled.

[7] In October last year a non-denial was entered to the third charge and as time went on psychological reports were called for. The first is dated 11 December 2015 from Ms Flood and made reference to Fetal Alcohol Syndrome, problems identified as far back as BT's primary school years with respect to his intellect and a significant issue with comprehension and retention of information, processing speed and linguistic expressiveness. His current social worker was the social worker at the

time that report was written. That social worker referred to concerns about the potential for a Fetal Alcohol Syndrome diagnosis.

[8] The second 333 report dated 20 February 2016 is from Dr Valerie McGinn. It confirmed the issues outlined by Ms Flood in her report provided some very sound information as to not only what Fetal Alcohol Syndrome entails and the impaired intellectual development as a result of such a condition but the further consequences of difficulty comprehending, particularly abstract issues. That was the case for BT and Dr McGinn referred to this extraordinarily limited understanding of legal processes in general and his extreme low to borderline intellectual functioning and in particular her concerns about his adaptive functioning including, that he cannot function independently in daily living activities.

[9] BT did have some involvement with CYFS at a younger age. I understand he no longer has a formal status with CYFS but it is obvious from the detail of the reports that have been provided - I refer in particular to Dr McGinn who is not only recognised in this country but also internationally, as a specialist in matters involving Fetal Alcohol Syndrome. She was one of two New Zealand practitioners who gave evidence in the Privy Council in recent times for a very high profile case where the person had spent a lengthy period of time in custody. That is mentioned so that those who need to consider BT's future situation are aware of the level of expertise that has been applied in BT's case and the guidance that expertise provides.

[10] I now turn to the evidence that has been provided and there are four statements, a detective's interview notes and 12 photographs. Those photographs were taken from a CCTV camera inside the victim's taxi on 20 September at around 11.00 pm. It is very hard to identify who is in those photographs. The quality is not such as to be clear about who features in the photographs. There are, as I said, 12 photographs. There are from one to four individuals in those photographs but they certainly do tie the complaint to a time and date and location.

[11] Next was the victim's statement which referred to picking up a fare in his taxi. He said there were at least three that he collected on Main Road and he went on to as best he could, describe the people that he picked up. Again the physical descriptions are not clear enough to link to the photographs. The clearer descriptions

were with respect to clothing, but even then they were not so clear as to provide a level of certainty about matching an individual to clothing and even less certainty when it came to physical description of any individual.

[12] The next statement was from a Ms Pickard whose statement concerned three boys including BT who had absconded from [name of facility deleted]. That person provided a description of clothing and when attempting to match that description to those who were caught on the CCTV and then observed by the complainant, the clothing matches and indeed the physical description matches are not sufficiently clear to provide any level of certainty.

[13] The final statement was from a Constable Walsh who pursued the victim's taxi on the night in question and ended up speaking to two people who ran off from that taxi. BT was not one of those people that Constable Walsh spoke to.

[14] The next item tendered in support of evidence of involvement was the notes of interview from Detective Dunn. Those notes do not identify the interviewee. They do not identify the support person or nominated person present during the interview but do describe small bits of information connecting the interviewee with what the victim alleged happened to him.

[15] The difficulty about this statement even if I was prepared to accept that the interviewed person was BT and the interview was conducted in accordance with the law, is what is obvious from the specialists' input about BT's limited comprehension and extremely limited understanding of legal processes in general. Now the reason for concern about that is it is necessary for any interviewing officer to ensure that young people they interview understand what their rights are so even if the rights were given to the person Detective Dunn interviewed, and if that person was BT, it is not clear from what I have in front of me, whether he understood those rights. Given the expert information that has been provided, it is highly likely that he did not. Whatever weight could have been placed on the statement even in its best form presented, which is certainly not the form it is being presented in today, it would be highly unlikely it could be admitted.

[16] That is the extent of the evidence I have been provided with.

[17] Under s 9 the Court may not make a finding whether a defendant is unfit to stand trial unless the Court is satisfied, on the balance of probabilities, that the evidence against the defendant is sufficient to establish that the defendant caused the act or omission that forms the basis of the offence with which the defendant is charged.

[18] I am not satisfied that the evidence is sufficient to establish BT caused the act or omission that formed the basis of the offence and as will be clear from s 13 CP(MIP) Act, if I am not satisfied of the matter specified in s 9 I must dismiss the charge against the defendant under s 147 Criminal Procedure Act.

[19] Having reached the conclusion I have with respect to the 20 September 2015 charge it is clear that charge must be dismissed.

[20] With respect to the other charges that form the basis upon which a sentence was imposed and cancelled on 22 September 2015 and formed part of today's enquiry, they were not pursued by the prosecution and so they are likewise dismissed.

[21] That means these three matters that are before the Court are no longer before the Court. I refer back to the Flood and McGinn reports and note that it is important for the Chief Executive of Child, Youth and Family services to be cognisant of the way forward and work on how they are going to assist BT and his family with that path forward. Because to not take seriously the cautions within those two reports, particularly that of Dr McGinn, would in my view, potentially place the community at risk. There needs to be significant assistance provided to BT and family. They are so well-known to the Child, Youth and Family services that I suspect that what have said is a repetition of no more than what they are already well aware of.

[22] The charges are dismissed.

G F Hikaka
Youth Court Judge