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**IN THE YOUTH COURT
AT PUKEKOHE**

**CRI-2015-257-000051
[2016] NZYC 168**

NEW ZEALAND POLICE
Informant

v

HJ
Young Person

Hearing: 9 March 2016

Appearances: Sergeant G Reid for Informant
M E Jenkins for Young Person

Judgment: 1 April 2016

RESERVED JUDGMENT OF JUDGE I M MALOSI
[Fitness to stand trial]

Introduction

[1] HJ is a 16 year old who is before the Youth Court facing 20 charges in respect of which the provisions of the Criminal Procedure (Mentally Impaired Persons) Act 2003 have been triggered.

[2] The Police allege that between 1 April 2015 and 21 August 2015 he committed offences including burglaries, unlawfully interfering with and getting into motor vehicles, arson, wilful damage, graffiti, unlawfully in an enclosed yard and escaping custody.

[3] A hearing pursuant to s.9 of CP(MIP) was held on 9 December 2015 to establish HJ's involvement in each of the alleged offences.

[4] The Court was greatly assisted by comprehensive Memoranda filed by the Police which clearly identified the evidence in support of each charge. As it transpired, Ms Jenkins on behalf of HJ conceded that the Police were able to establish, to the requisite standard of proof, HJ's involvement. Accordingly, she did not require any of the Police witnesses for cross-examination.

[5] Having been satisfied on the balance of probabilities as to HJ's involvement in all of the alleged offending, the Court is now obliged to determine if he is unfit to stand trial.

[6] Section 14 of CP(MIP) provides as follows:

- (1) If the court records a finding of the kind specified in section 13(4), the court must receive the evidence of 2 health assessors as to whether the defendant is mentally impaired.*
- (2) If the court is satisfied on the evidence given under subsection (1) that the defendant is mentally impaired, the court must record a finding to that effect and –*
 - (a) give each party an opportunity to be heard to be present evidence as to whether the defendant is unfit to stand trial; and*
 - (b) find whether or not the defendant is unfit to stand trial; and*
 - (c) record the finding made under paragraph (b).*
- (3) The standard or proof required for a finding under subsection (2) is the balance of probabilities.*
- (4) If the court records a finding under subsection (2) that the defendant is fit to stand trial, the court must continue the proceedings.'*

[7] 'Unfit to stand trial' is defined in s.4 of CP(MIP) in the following way:

- (a) means a defendant who is unable, due to mental impairment, to conduct a defence or to instruct counsel to do so; and*
- (b) includes a defendant who, due to mental impairment, is unable –*
 - (i) to plead;*
 - (ii) to adequately understand the nature or purpose or possible consequences of the proceedings;*
 - (iii) to communicate adequately with counsel for the purposes of conducting a defence'.*

Health Assessor Reports

[8] As mandated by s.14(1), reports from two 'Health Assessors' were obtained; from Dr Karmyn Billing, Regional Youth Forensic Service, Kari Centre dated 2 October 2015 and Dr Jon Nuth dated 22 February 2016. Both are Clinical Psychologists with impressive credentials. I note that Dr Nuth is also a Specialist Assessor under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.

[9] Having confirmed in each of their reports that they agreed to comply with the High Court Code of Conduct for Expert Witnesses, Drs Billing and Nuth met to discuss and produce a Memorandum for this Court as to their points of agreement and issues upon which they reached different conclusions.

[10] At the s.14 hearing they were 'hot-tubbed', and had numerous questions put to them by Ms Jenkins, Sergeant Reid and the Court.

[11] In relation to the issue of intellectual disability the Health Assessors agree that:

- (i) HJ has a degree of cognitive and intellectual impairment (evidenced partly by his IQ being in the range of 61-73 and significant deficits in four skill areas of adaptive functioning);
- (ii) They have concerns however, about the validity of those recent test results, raising the possibility that he might test higher in the future and outside the range of intellectual disability.

[12] Whilst Dr Billing formed the opinion that HJ meets the criteria for intellectual disability, Dr Nuth is of the view that such a diagnosis at this time is ‘uncertain’.

[13] The Psychologists correctly identify that the term ‘mental impairment’ is not defined in CP(MIP). Notwithstanding, they agree that given HJ’s cognitive impairment, impulsivity, difficulty processing information and poor communication skills, he ‘likely has a mental impairment’.

[14] Where they part ways however, is on the issue of the degree to which that mental impairment impacts on his fitness to stand trial. Dr Billing’s opinion is that his mental impairment would shape his thought processes, ability to understand and meaningfully participate in the legal process, whereas Dr Nuth is of the opinion that HJ’s mental impairment is not of sufficient magnitude to render him unfit to stand trial in the current circumstances.

[15] Dr Nuth quite properly refers the Court to the distinction drawn in *R v Komene*¹ between fitness to enter a plea to the charges and fitness to stand trial ie to make an informed decision around ‘not denying’ or denying the charge, and being able to adequately instruct Counsel if any charge is denied.

[16] Significantly, the Psychologists do concur in their joint Memorandum that HJ ‘is fit to plead in as much as he is able to understand the charges well enough to be able to recount factual information and his participation in the events that form the basis of the charges.’

[17] They also agreed that HJ would be able to adequately follow Court proceedings in a ‘general sense’ if there were provision for more regular breaks and checking of his understanding (including drawing clear distinctions between each charge), use of simple language, and additional time allowed for him to speak with his Youth Advocate.

¹ [2013] NZHC 1347

[18] The following points about the Health Assessors evidence at the s.14 hearing warrant special mention:

- (i) Between Dr Billing's report and Dr Nuth's there was a gap of some 3 months, during which HJ was in the structured environment of [name of youth justice residency deleted] and for part of that time administered fluoxetine and quetiapine for his low moods – factors which the Health Assessors agreed might have accounted for his improved presentation with Dr Nuth;
- (ii) Furthermore, as the first Health Assessor, Dr Billing's report was by necessity more focussed on history gathering (for want of a better description) relieving Dr Nuth of that task and allowing him to spend more time with HJ in respect of assessing his understanding of the issues before the Court;
- (iii) At the time of her assessment of HJ, Dr Billing had not viewed his DVD interviews with the Police. During her evidence she specifically noted the occasion when HJ corrected certain information put to him by the Police Officer that he did not agree with. That was consistent with Dr Nuth's experience of propositions put to HJ by him that were patently incorrect. HJ did not simply acquiesce in either situation;
- (iv) When it was suggested by Sergeant Reid that the individual charges were of a relatively straightforward nature, Dr Billing's view about HJ's fitness to stand trial softened somewhat, although to be fair that was premised on the special provisions/protections proposed by Dr Nuth being put in place.

Discussion

[19] I readily concur with the view expressed by Dr Nuth that the issue of HJ's fitness to stand trial is a finely balanced one.

[20] Both Psychologists agree that his presentation is complex and aspects of it are still not well understood despite him having endured multiple assessments, particularly in recent years. In addition to the issues identified in paragraph [12] above, questions have been raised as to whether HJ also meets the criteria for Foetal Alcohol Spectrum Disorder. There are also potentially ongoing issues in respect of his mental health and psychological trauma (related to a history of serious bullying).

[21] Given the divergence of opinion between the Health Assessors as to whether HJ suffers from an intellectual disability (as that is defined in the ID(CCR) Act)), I am not able to make a finding in respect of that issue. To do so at this stage, without HJ having the opportunity to undergo further testing, has the potential to do more harm than good when one has regard to the downstream consequences for him in having the intellectual disability label incorrectly attached to him. This is clearly an issue however, which requires further inquiry as do the other matters referred to in paragraph [20] above.

[22] Having regard to the complexity of HJ's presentation and the questions that remain unanswered, I find no cause to depart from the Health Assessors' agreed position that he is mentally impaired.

[23] I do not consider however, that his mental impairment is such that he would be unable to conduct a defence or instruct his Youth Advocate to do so. I hasten to add that view is premised on the Youth Court putting in place certain safeguards for HJ, as suggested by Dr Nuth, which this jurisdiction is well able to do.

[24] Whilst there will always be concerns about a young person's ability to 'understand the nature or purpose or possible consequences of the proceedings', it is incumbent on Counsel and the Court to fulfil their duties under s10 and 11 of the Children, Young Persons and Their Families Act 1989 to explain the proceedings to HJ and encourage and assist his participation in them.

[25] I take into account HJ has a very experienced Youth Advocate acting for him, who is well versed in acting for young people with challenges such as the ones he faces.

[26] Ms Jenkins has indicated that in the event HJ is found fit to plea, it is likely he will 'not deny' all of the charges and the matters can then proceed to family group conference.

[27] I note HJ also has some good support from whanau, particularly his maternal grandparents with whom he is currently living.

Conclusion

[28] Having regard to all of the relevant considerations in s.14 CP(MIP), I find on the balance of probabilities that HJ is fit to stand trial, and these proceedings must therefore continue.

[29] It is important to stress that had these charges been of a more complex nature, and/or an indication given that HJ would likely defend them (or a majority of them) the finding as to his fitness to stand trial might well have been different.

[30] In order to facilitate HJ's participation in these Court proceedings, and at any family group conferences, a Communication Assistant is appointed for him pursuant to s.80 of the Evidence Act 2006.

[31] The Communication Assistant should make recommendations, taking into account those made by Dr Nuth, as to how the Youth Court can best explain proceedings to HJ and ensure his participation to the fullest extent possible in the circumstances.

[32] A copy of this judgment should be provided by the Registry to Dr Billing and Dr Nuth. Their assistance has been invaluable.

I M Malosi
Youth Court Judge