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IN THE YOUTH COURT
AT NEW PLYMOUTH

CRI-2016-243-000126

[2017] NZYC 337

NEW ZEALAND POLICE
Prosecutor

v

CP
Young Person

Hearing	28 April 2017
Appearances:	Sergeant G McGrath for the Prosecutor J C Hannam for the Young Person K Orpin-Dowell for NIDCA and Compulsory Care Co-ordinator
Judgment:	28 April 2017

ORAL JUDGMENT OF PRINCIPAL YOUTH COURT JUDGE JOHN WALKER

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[1] The hearing today is to consider disposition following my finding of unfitness to stand trial. The alternative decisions able to be made are those set out in ss 24 and 25 Criminal Procedure (Mentally Impaired Persons) Act 2003.

[2] Mrs F and CP, I have got to go through a whole lot of law, a lot of sections of the Act. I hopefully, at the end, will be able to explain to you the outcome. I am aware that it will be a bit dense for those that are not conversant with this.

[3] Consideration of those alternatives has, in this case, become complicated by the intervention of a further mental health assessment carried out after my finding, and in the course of the inquiries being made about CP and to enable me to determine the most suitable method of dealing with him.

[4] The background to that is set out in my minute of 4 April 2017 which I incorporate into this decision and attach as an appendix. I have heard today from Ms Orpin-Dowell on behalf of the National Intellectual Disability Care Agency, and the Compulsory Care Co-ordinator. Those two entities sought leave to appear and be heard, and I granted that leave.

[5] The argument on behalf of the NIDCA and the Compulsory Care Co-ordinator is that I can no longer be satisfied that CP has an intellectual disability because of the report provided by Ms Breen. I made my fitness decision on the basis of the reports before me as evidence at the hearing under s 14 of the Act. I made a finding of unfitness based on that evidence. Intellectual disability was the basis of my finding. I do not consider that it is right for me to revisit the very basis of a finding made under s 14 at the stage of disposition.

[6] The further assessment of intellectual functioning was not carried out under any direction of the Court. The time for that had passed. It was carried out when what had to be directed, once an intellectual disability finding had been made, was a needs assessment, and a care and rehabilitation plan under Part 3 Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003. The purpose of such an assessment of needs is set out in s 16 of that Act, and does not include a psychological assessment to determine intellectual disability.

[7] The assessment of needs is predicated on the assessment being required under s 23(5) Criminal Procedure (Mentally Impaired Persons) Act. That requirement arises only when intellectual disability has been established in the fitness hearing. So it needs to be recognised that when an assessment under Part 3 is directed, there must already have been a finding of intellectual disability, and such a direction for assessment is not an invitation to revisit that issue.

[8] For those reasons, and the reasons set out in my minute, and for the reasons set out in the judgment of Ellis J, I do not revisit my earlier finding, and my finding that I am satisfied that CP has intellectual disability must remain for all purposes.

[9] I turn to consider the appropriate disposition decision. First, I am not satisfied, on the facts of the case and on the expert reports, that an order for special care recipient status is necessary. When I come to that conclusion, I then need to consider the alternative decisions which can be made.

[10] The applicable alternatives under s 25 of the Act are:

(a) Making an order that CP be cared for as a care recipient under the Intellectual Disability (Compulsory Care and Rehabilitation) Act.

(b) Ordering CP's immediate release.

[11] The submission on behalf to the NIDCA is that I should order CP's immediate release because of the view advanced that he does not suffer from an intellectual disability. Additionally it is argued that CP's needs can be adequately addressed with the support of Oranga Tamariki under this care and protection status, and the least restrictive outcome should occur.

[12] The evidence establishes that CP poses a moderately high risk of sexual offending against others unless supports and controls are put in place. I take that assessment from the expert reports.

[13] I have been very much assisted in this case by the report from Mr Renau on behalf of Oranga Tamariki. It is clear that Oranga Tamariki would do all it could to

support CP and to put in place appropriate interventions. However, his history has shown that compliance with boundaries, compliance with medication and regimes is unlikely. This is not CP's fault. It is more likely to be a consequence of the level of intellectual functioning. The report makes it clear that Oranga Tamariki would do its best, but that successful control is unlikely.

[14] A release into the community, in those circumstances, is likely to create an unsafe situation for CP and for those around him. An order that CP be a care recipient is, in my assessment, the only appropriate outcome. I am satisfied that the three pre-conditions under s 25(3) are satisfied, and that such an order can be made. I make that order, and CP is now subject to a compulsory care order.

[15] I need to decide two further matters:

(a) Whether CP is to be detained in a secure care facility.

(b) The term of the order.

[16] CP has a history of absconding from placements. Breaches of bail for absconding have resulted in his custodial remand. His level of compliance can be expected to be low. He has been subject to the security and structured environment of the youth justice residence at [location deleted] where he has been for some months. Immediate release from such control will carry with it a risk of absconding. Suddenly he would not be contained. It is the police view that a secure care order should be made. Mr Hannam quite properly points out the risks to CP of being free to go where he wants.

[17] I consider that there must be detention in a secure facility. I recognise that such an order may, in the future, be the subject of review in the Family Court, but I need to deal with the situation as it is here and now.

[18] As to the term, I consider that a term of three years is appropriate. I do not know for how long the risk of offending against others will remain. In the absence of effective interventions, the risk may be a very long term one. In those

circumstances, I consider that I must steer by the maximum available. Again, as matters develop, the Family Court will be well placed to consider the ongoing needs.

[19] In the result therefore I am making an order that CP be cared for as a care recipient in a secure facility, and that that term be for three years.

[20] I do not make any orders for stay of the proceedings, having regard to the degree of uncertainty around all of what might occur here.

ADDENDUM:

[21] I need to say, in conclusion, that it seems to me to be well past time when the processes under these two Acts should have been settled. In 2010 Ellis J dealt with the same situation that has confronted me now, seven years later, and she made it clear that further assessments were inappropriate and probably unlawful.

[22] Since that time it is clear that other Judges have been confronted by this same situation. I express the hope that this case today will again bring focus to the need to avoid these repeated difficulties. It is not for me to draft legislation, but from the circumstances of this case I should at least say that a statutory requirement that a finding of intellectual disability can only be made on the basis of a specialist assessor's evidence may be one way of avoiding the problem that has confronted us all today.

John Walker
Principal Youth Court Judge

APPENDIX

Minute of Principal Youth Court Judge John Walker

Date: 4 April 2017

[1] On 1 March 2017, I made a finding that CP was unfit to stand trial. The basis of that finding was that he had a mental impairment. It was common ground at that hearing that the nature of the mental impairment was a long established intellectual disability.

[2] In the course of carrying out an assessment under Part 3 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, for the purposes of my considering disposition, a clinical psychologist has expressed the opinion that CP does not have an intellectual disability because his IQ is 3 points higher than that which is indicative of such a disability. The issue which has arisen is whether that opinion can have any effect on the decision which has already been made as to fitness to stand trial and the basis of that finding.

[3] The evidence put before me at the fitness hearing which established intellectual disability, was a psychological report from Ms Flood, a clinical psychologist and a psychiatric report from Dr Lehman.

[4] Ms Flood's report dated 20 December 2016 referred to an earlier assessment by another clinical psychologist, Ms Person. That assessment was in 2015. There was also reference to an earlier assessment in 2009 by a senior clinical psychologist, Ms Towsey.

[5] The conclusion reached by Ms Flood was:

> "CP meets the criteria for mental impairment as he has a long standing diagnosis of an intellectual disability that is compounded by his ADHD, reactive attachment disorder and language delays."

[6] The psychiatric assessment by Dr Lehman noted the earlier intelligence testing and recorded that his presentation was consistent with his measured IQ being in the intellectual disability range. His opinion was that CP had a "mental impairment namely, intellectual disability".

[7] It was on the basis of those opinions that the Police and the Youth Advocate supported a finding of mental impairment by reason of intellectual disability. Those opinions formed was the basis of my decision.

[8] It is for that reason, when ordering the inquiry to be made for the purposes of disposition that I also directed assessment under Part 3 of the Intellectual Disabilities (Compulsory Care and Rehabilitation) Act 2003. Such a direction must be made "when a person has an intellectual disability".[1] It is that direction that resulted in the co-ordinator instituting the process under Part 3.

[9] An assessment under Part 3 is a needs assessment not an assessment of whether the subject person has an intellectual disability. The assessment is triggered by a finding that a person is unfit to stand trial by reason of intellectual disability. Nothing in Part 3 authorises a specialist assessor to determine whether intellectual disability exists.

[10] When I came to decide on disposition under sections 23 and 24 of the Criminal Procedure (Mentally Impaired Persons) Act 2003, I was presented with a psychological report from Ms Breen, who had been engaged by the co-ordinator as an assessor. Ms Breen is a Specialist Assessor which reflects her specialised expertise in the field of intellectual disability and her designation as such by the Director-General of Health. Ms Breen's opinion was that CP did not fit the criteria for intellectual disability because she had measured his IQ at 73.

[11] Ms Breen referred to the criteria for an intellectual disability as being defined by section 7 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003. I do not consider that section 7 goes as far as creating a definition when it talks about an IQ level being indicative, but I accept that psychologists and psychiatrists use this criteria for diagnostic purposes.

[12] If I were to regard Ms Breen's opinion as determinative of the issue, then I would be precluded from making an order for CP be a care recipient. The only other option that would be open to me would be to order CP's immediate release. This is

[1] See section 23(5).

against the background of the risk assessment by Ms Breen and Dr Lehman that CP presents a moderately high risk of sexual offending against others unless controls and supports are put in place. If he were to be released from his current custodial status in a Youth Justice Residence then no controls would be in place and very limited support would be available to CP under his status in the Care and Protection jurisdiction of the Family Court under the Children, Young Persons and Their Families Act. In any event, that status will expire, at the latest, when he reaches 18.

[13] I consider that the basis of my finding of unfitness to stand trial, that is mental impairment by way of intellectual disability, must remain. It is not appropriate for this finding to be a subject of further opinion after that decision has been made.

[14] This is the very situation which was considered by the High Court in Police *v N J Born in June 1994*. In that case, Ellis J said at [23]-[24]:

> [23] What the Ministry's practice means in practical terms, however, is that a Court may have determined unfitness to plead on the basis of evidence from two health assessors under s 14 as to the existence of intellectual disability, only to have that diagnosis contradicted by a specialist assessor at the Part 3 assessment stage.
>
> [24] Such an outcome is not only for obvious reasons undesirable in the sense that it potentially calls into questions the determination of unfitness to plead but also because it curtails the disposition options available to the Court. More particularly, once there is no diagnosis of intellectual disability the ss 24 and 25 disposition options involving care and treatment previously open to the Court disappear and it is likely to have no choice but simply to discharge the offender into the community.

[15] At [27] the learned judge said:

> [27] Once that point is reached, the diagnostic involvement of a specialist assessor at the inquiry/Part 3 stage seems to me to be not only highly undesirable but also inconsistent with the statutory scheme. Part 3 assessments are predicated, in my view, on the person to whom the assessment relates falling within one of the specified categories which in turn presuppose a pre-existing determination of the person's mental status. And as I have said a further and potentially conflicting diagnosis by a specialist assessor at the Part 3

> stage has the capacity to undermine the s 14 process in what I consider to be an unacceptable, and possibly unlawful, way.

[16] During argument on 3 April 2017, it was suggested that a further psychological assessment be carried out to see if there was support for Ms Flood's opinion or for Ms Breen's opinion. Initially, I was attracted to this, but on further reflection and having considered was Ellis J has said, I consider it would be wrong to do that. It would amount to allowing re-litigation of the issue I have already decided.

[17] I consider that I need to proceed to decide on the alternative dispositions under ss 24 and 25 on the basis that intellectual disability is established. `

[18] At the hearing on 3 April 2017, the representatives of Oranga Tamariki indicated that they were in the process of considering what assistance and support could be given under the care and protection orders they have. I consider that what assistance can be put in place under care and protection will be relevant to my consideration of disposition. Those arrangements could be an adjunct to any compulsory care order.

[19] I will proceed to consider disposition on 28 April 2017.