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IN THE YOUTH COURT
AT MANUKAU

CRI-2014-255-000034
[2016] NZYC 172

NEW ZEALAND POLICE
Prosecutor

v

OR
Young Person

Hearing	23 March 2016
Appearances:	Sergeant O'Donoghue for the Prosecutor C Leys for Young Person S Earley as Counsel to Assist
Judgment:	1 April 2016

ORAL JUDGMENT OF JUDGE J H LOVELL-SMITH

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[1] OR ("OR") faces three charges in the Youth Court:

(a) Unlawfully taking a motor vehicle on 16 March 2014 a charged laid under s 226 (1) of the Crimes Act 1961;

(b) Dangerous driving dated 16 March 2014 a charge laid under s 35(1)(b) of the Land Transport Act 1998;

(c) Possession of a knife in a public place dated 24 June 2014 laid under s 202A(4)(a) of the Crimes Act 1961.

[2] Having made findings of involvement in respect of these charges the issue is whether OR is unfit to stand trial pursuant to s 14 of the Criminal Procedure (Mentally Impaired Persons) Act 2003 ("CP(MIP) Act").

[3] OR's date of birth is [date deleted] 1998. He is aged 17 years and [age details deleted].

[4] Section 14 of the CP(MIP) Act states:

> 14 Determining if defendant unfit to stand trial
>
> (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 and to 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 of 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 commence or continue the hearing or trial, or commit the defendant for trial, as the case may require.

[5] Mr Earley, Counsel assisting provided me with very helpful submissions. He referred me to decision in *R v McKay* [2009] NZCA 378 in which the Court of Appeal held that s 14 of the CP(MIP) Act involves a six step process.

> Step 1 - It will be rare, at this stage of the process, for the court already to have two health assessors' reports. So the first step is to obtain them. If the defendant is on bail, he or she will probably usually be willing to undergo assessment as to whether he or she is mentally impaired. If so willing, no court order is required. If the defendant is in custody, then the court can order reports from two health assessors under ss 38 and 39 of the Act. That will normally be the first step. If the defendant is on bail and will not agree voluntarily to be assessed, then there is a problem. A court is not entitled to refuse bail just so an assessment can be undertaken: see s 38(3). What the court should do in these circumstances must await another day; we have not had argument on the point and, in any event, this is likely to be a rare situation.
>
> Step 2 - If, as will normally be the case, the reports have been ordered under s 38 and/or s 39, those reports must be made available to the defendant's counsel and (generally) the defendant (s 45) and to the prosecutor (s 46(1)(a)).
>
> Step 3 - The court must give each side the opportunity to present evidence as to whether the defendant is mentally impaired (s 45(5)) and/or as to whether he or she is unfit to stand trial (s 14(2)(a)).
>
> Step 4 - The court must give each side the opportunity to make submissions (s 14(2)(a)).
>
> Step 5 - The court must make and record findings (on the balance of probabilities: s 14(3)).
>
> Step 6 - If findings (a) or (b) are made, s 14(4) applies. The case will proceed to trial. If finding (c) is made, then the court will proceed in accordance with Subpart 3.

[6] The definition of "unfit to stand trial" as outlined in s 4 (1) of the CP(MIP) Act 2003 refers to a defendant who, due to mental impairment is unable to:

(a) Plead.

(b) Understand the nature or purpose or possible consequences of the proceedings.

(c) Communicate adequately with counsel for the purposes of conducting a defence.

[7] Whether OR is mentally impaired must be determined on the balance of probabilities and this phrase is not defined within the Act. Adams on Criminal law comments:

> The omission of a definition of mental impairment eliminates the risk of creating an unintended gap in the legislation that would permit the Courts to interpret the expression in a manner consistent with procedural fairness (CM4.17.01).

[8] Section 4 of the Act was considered by the Court of Appeal in *The Solicitor General v Michael John Dougherty* [2012] NZCA 405. The Court of Appeal confirmed that s 4(b) of the CP(MIP) Act identifies some of the capacities an accused person must have before he or she can be said to be able to conduct a defence and instruct counsel, although the Court noted it was not an exhaustive list.

[9] The Court of Appeal accepted the decision of Baragwanath J in *P v Police* (Auckland High Court 14 September 2006) and in particular categories set out in s 4(b) of the Act (the ability to plead, to understand adequately the nature and purpose of proceedings and the consequences, and to communicate adequately with counsel) as examples of what capacity an accused must have before a Court could be satisfied that he or she was fit to stand trial. The Court of Appeal then approved an expanded list of factors identified by Baragwanath J as follows:

(i) Understanding what it is that an accused has been charged with;
(ii) Pleading to the charge and exercising the right of challenge;
(iii) Understanding that the proceedings are enquiries as to whether or not an accused did that which he or she is charged with;
(iv) Following, in general terms, the course of the proceeding before the Court;
(v) Understanding the substantive effect of evidence against an accused;
(vi) Making a defence to or answering the charge;
(vii) Deciding what defence would be relied upon;
(viii) Giving instructions to counsel; and
(ix) Making the accused's version of facts known to the Court and counsel.

[10] The Court of Appeal cautioned that although this list of factors provides useful guidance as to the types of decisions that may arise in the trial process the nine factors are not, in themselves, the test. The test is set out in s 4 of the Act.

[11] The Court of Appeal also considers where, in determining the issue of fitness, a Court should have regard to "decisional competence". The Court confirms that the issue of fitness to plead does not include an enquiry as to whether the accused will act in his or her best interest. The Court states: *"there is no statutory support for a change in relation to decisional competence and we do not consider that the Court should implement one."*

[12] At paragraph 6 the Court also states:

> We accept that the issue of fitness to stand trial is a case specific contextual assessment. There must be regard to the nature of the impairment, how it manifests itself and the complexity and nature of the charges being faced. And perhaps, also to the number of charges, because that can affect not only complexity but also the length of the trial, and therefore increased stress. Stress can in turn affect the severity and impact of the mental impairment.

[13] The Court of Appeal in *Britz v The Queen* [2012] NZCA 606 confirm that the assessment is a contextual one:

> In the present case, it is necessary to consider the matters such as the nature and complexity of the allegations the appellant is facing; the experience and competence of his legal advisor; the assistance available to him to aid in his understanding of the legal process; and the matters requiring his decision.

[14] The Court of Appeal continues at para 113:

> . . . the entering of guilty pleas does not require an ability to give adequate instructions to counsel during a trial, nor is there any need to process information and arrange one's thoughts as would be necessary in the more stressful context of a trial. Our assessment is consistent with that reached by experienced counsel and the other medical experts that provided matters were explained to him in simple terms, the appellant was capable of adequately understanding the charges he faced and the defences available to him; conveying his version of events to his counsel; and understanding the implications of a guilty plea as well as counsel's advice. We accept he may have struggled with more complex or abstract concepts but that was not required in the context of the 2007/2008 offending and his decision to accept counsel's advice to plead guilty. Given the strength of the case against him, the decision to plead guilty cannot be said to unwise or aberrant.

[15] Mr Earley submitted that the process of admitting a charge before the Youth Court is somewhat more complex than the process of pleading guilty before a District Court. An admission before a Youth Court requires the active involvement of a young person in ensuing Family Group Conference process, potentially meeting

the victims of offences and taking an active role in the formulation and completion of a plan. An admission in the Youth Court may require a higher standard of fitness than a plea of guilty before a Court in the adult jurisdiction.

[16] Mr Earley submitted that there are four outcomes available, namely:

(a) A finding that OR is not mentally impaired;

(b) A finding that OR is mentally impaired but fit to stand trial;

(c) OR is mentally impaired and unfit to stand trial;

(d) OR is mentally impaired and fit to stand trial on some matter but not all.

[17] I have considered the four Health Assessors Reports obtained under s 38 of the Act which include two reports from Dr Jensen, Dr Billing and Dr Patrick Mendes dated 18 August 2014 and 7 July 2015 and from Dr McGinn dated 5 November 2015 and 22 March 2016. Whilst the health assessors reports assist the Court in conducting the enquiry pursuant to s 14 of the CP(MIP) Act, the decision as to fitness remains a judicial determination.

[18] Ms Jensen and Dr Karmyn Billing are both clinical psychologists. Patrick Mendes is employed as the Regional Youth Forensic Service Cultural Advisor and Cultural Coordinator for Maori and Pasifika cultural advisors for the Kari Centre Child and Adolescent Mental health Service at the Auckland District Health Board. In their s 38 assessment report dated 18 August 2014 their conclusion is that their assessment suggested that at that date the Court was likely to find OR unfit to stand trial following the elements of competency to stand trial outlined in s 4(1) of the CP(MIP) Act. OR appeared to have a basic understanding of his most recent charges although he required prompting in both interviews to describe them. He had little recall of his other earlier charges. He has a rudimentary understanding of the concepts of guilty and not guilty and was able to apply them to his own situation. Based on the current assessment, OR appears to understand some aspects of the

Court process and was able to identify some key participants. However, his understanding of their roles appeared superficial. Based on the current assessment, OR lacks a reasonable overall understanding of the Court process. Despite being provided with some education, these difficulties were still evident and this lack of overall comprehension would requires his Youth Advocate to provide on-going explanation and checking of his understanding. With regards to his most recent charges, OR appeared to have a basic understanding of the potential evidence; however, he demonstrated little ability to consider the quality of that evidence or his right to challenge.

[19] With regards to communicating with his Youth Advocate, OR's ability to communicate meaningfully and instruct counsel is likely to be negatively impacted by his limited cognitive abilities, and in particular his poor verbal abilities (expression and comprehension) and reasoning. OR is likely to struggle to generate alternative courses of action as the Court process unfolds although this may be alleviated to some extent with additional explanation and support from his counsel. It is the writers' opinion that OR would struggle to cope with cross-examination. He may also struggle to attend to, and comprehend information in Court.

[20] However, in Dr Jensen's and Dr Billing's s 38 assessment dated 7 July 2015 their conclusion was that the Court is likely to find OR fit to stand trial. Their recommendation was that if OR were to face more serious, complex or large number of charges or if he were to defend charges it is recommended that his fitness to stand trial be reassessed. Their conclusions were based on the following factors:

(a) OR appears to have a basic understanding of his charges before the Court although he required prompting to recall them in the first interview. He has a rudimentary understanding of the concepts of guilty and not guilty and was able to apply them to his own situation. OR appears to be basing a lot of his understanding of Court processes and the roles of key participants on his experience of the section 9 hearing. This is understandable given his lack of previous experience but also suggests that he will require ongoing explanation and

checking of his understanding. OR appears to have a basic understanding of the potential evidence and his right to challenge.

(b) With regards to communicating with his Youth Advocate, OR's ability to communicate meaningfully and instruct counsel is likely to be negatively impacted by his limited cognitive abilities. However, the rapport Ms Leys has developed with OR will likely mitigate some of these cognitive difficulties. Overall, OR would be able to follow more straightforward Court and FGC processes with the support of his Youth Advocate. However, if he were to have a defended hearing OR would require significant support to remain engaged, understand the process and what was being communicated in Court. He would also struggle with cross-examination due to his poor verbal skills and low cognitive functioning. It is however suggested that the Youth Court is able to adjust and accommodate the particular needs of individuals with presentations such as OR's.

(c) It is important to note that OR did appear to struggle when interviewed with regards to his previous, more serious charges. In particular he appeared to struggle with the complexity of the potential evidence. It is possible that OR would not be considered to fit to stand trial if he was again to face similar charges.

[21] Dr McGinn provided two neuropsychological assessments dated 5 November 2015 and 22 March 2016. In her assessment dated 5 November 2015, Dr McGinn noted that although the RYFS assessors considered OR not fit to stand trial for the more serious charges, they considered him fit to stand trial for the remaining charges, although they considered that the Youth Court would have to provide considerable support and make accommodations should a defended hearing proceed. OR indicated to Dr McGinn that he was likely to deny two of the four charges and would therefore be required "to mount a defence or instruct his counsel to mount one on his behalf".

[22] Dr McGinn previously assessed OR for Child Youth and Family in 2013 and diagnosed him with Partial Fetal Alcohol Syndrome and a Mild Intellectual Disability resulting from his mother's heavy drinking during the pregnancy. She noted that OR himself lacked any insight into his condition and brain based limitations. His partner moved the family away from [location deleted] to [location deleted] to try and keep OR away from bad influences. This seems to have been successful in that he has not offended further since the after school brawl in June 2014.

[23] Dr McGinn's conclusion is that OR has significant brain impairment from prenatal alcohol exposure that has result in a mild level of intellectual disability, memory impairment, limited communication skills, as well as deficits in higher thought processes including his reasoning, organisational skills, problem solving, decision making and regulatory control. His thinking is literal and he cannot take the perspective of others or well appreciate the consequences of his actions on others. He is likely to be suggestible and prone to be easily led. All of the above factors would be expected to negatively impact on his capacity to participate in any legal proceedings he may face.

[24] In Dr McGinn's opinion, OR has a mental impairment, Partial Fetal Alcohol Syndrome and Mild Intellectual Disability, pursuant to s 4 of the Criminal Procedure (Mentally Impaired Persons) Act 2003. He has an intellectual disability as defined by s 7 of the Intellectual Disability Compulsory Care and Rehabilitation Act, 2003. Section 7 defines intellectual disability as an IQ that is expressed as 70 or less and with a confidence level of not less than 95%. OR's obtained IQ is 70 and within this range making him potentially eligible to become a Care Recipient under the IDCCR Act should the Court consider this measure warranted. One would hope that should this happen, efforts could be made to adapt his care and rehabilitation to his PFAS disability. In terms of adaptive function OR was moderately impaired two years ago and in her opinion remains impaired. He requires direct family support and has not been able to gain employment, support himself financially or go into the community unaccompanied by family without running into trouble.

[25] Considering fitness to stand trial, the issue is a case specific contextual assessment that must have regard to the nature of the impairment, how it manifests itself, the complexity and nature of the charges and what might be required of the defendant (*Q v Dougherty*). It is established that a defendant may be found fit to stand trial for some charges but unfit for others depending on the complexity and nature of the legal process likely to be faced (*Q v Britz*). In this case OR was clearly able to recall and discuss the possession of an offensive weapon charge, was aware of the evidence against him and showed adequate understanding of the likely consequences of entering a guilty plea which he indicated he intended to do. Dr McGinn considered that the Court would likely consider OR fit to stand trial for this alleged offence that was fresher in his memory due to the more recent s 9 hearing. OR could not demonstrate that he had understood those proceedings although he was aware that he no longer faced the more serious charges.

[26] Dr McGinn found OR to be markedly confused about his other charges even after he had been read the simplified Summary of Facts. He did seem to recall some of the events and was able to challenge some facts and indicated it likely that he would deny at least two of the charges. This would require him to have the capacity to defend himself in Court or instruct his Counsel to do so on his behalf. These charges are less than simple due to there being multiple participants. It also seemed to her that OR may have made a false statement and he seemed to not have clear factual recall of the all of the events around this time. People with FASD are at risk of falsely implicating themselves when confused at interview and may become agreeable and suggestible. They may also say what they think is needed to end the interview without realising the implications.

[27] Even after Dr McGinn's attempts at remediation over two appointments, OR could not, in her opinion, adequately demonstrate that he understands the nature or purpose or possible consequences of legal proceedings should he deny a charge and be required to participate in a defended hearing. He could not explain to me even in the most basic terms what the purpose of a trial or hearing was. He could name some of the participants but not their roles after she had explained these to him but he showed no awareness that he would be required to participate in his own defence. He did not know how his lawyer could assist him and used vague statements like he

would "wait and see". OR has exceptionally limited language skills and she found it almost impossible to communicate with him about legal matters. He did appear, after a lot of explaining, aware of what he is charged with. He could also explain the pleas available to him with help. However, she was not convinced that he could retain this information over a period of time given his impaired memory and poor comprehension.

[28] In Dr McGinn's opinion, OR's language skills are not adequate to communicate with Counsel for the purpose of conducting a defence and she would imagine that she would be in a position of having to act on his behalf without adequate instructions. In her opinion, OR would not be able to follow the proceedings in a Court room even with every effort to simplify and accommodate his disability. She considers that he would be extremely limited in being able to follow and challenge evidence or to give evidence himself should he be required to. People with FASD tend to grasp some information, miss the rest and think they understand when they don't. She noticed this when trying to explain legal matters to him. OR has no insight into his disability so would not understand that he needs assistance. He might act as if he is able to follow and comprehend the proceedings but in her opinion he could not. He did not seem to have grasped the purpose of the s 9 hearing and did not understand her simple explanation. This indicates to her that he will also not be able to adequately comprehend and participate in other legal proceedings.

[29] She concluded that OR due to his mental impairment would be likely considered fit to stand trial to the charge of possession of an offensive weapon but unfit to stand trial to the charges of unlawfully takes motor vehicle, unlawfully gets into motor vehicle (subsequently withdrawn) and drove a motor vehicle in a dangerous manner.

[30] Dr McGinn provided a further neuropsychological updated opinion on 22 March 2016. She concluded:

> After my further investigations I am now of the opinion that on the balance of probabilities OR is likely to be considered fit to stand trial. This is in agreement with the opinion of RYFS psychologists Ms Jensen and Dr Billing. OR continues to be significantly limited by FASD and Mild Intellectual Disability and both remain significant mental impairments.

> However, I consider that OR can adequately understand his charges, their seriousness and likely penalties for such charges. He could make his version of the facts known to me and indicated a possible defence. I consider that he could now communicate adequately to conduct a defence or instruct his counsel to do so on his behalf if this is his wish. I continue to recommend that the Youth Court will need to proceed slowly with simplified wording and some repetition for OR to be able to follow proceedings. The issue of his capacity to adequately comprehend should remain under review by asking him to explain what is happening in his own words. He will need extra time with Counsel to prepare a defence should be choose to mount one.

[31] Dr McGinn went on to say:

> In my opinion the veracity of statements OR might have made to the police could not be relied on as evidence. Because his FASD, OR is likely to be suggestible and easily confused in situations of complex questioning. Should OR face more complex or serious charges in the District Court his capacity to stand trial will need to be reconsidered in light of the demands required of him at that time. He continues to be eligible to become a care recipient under IDCCR should the Court consider this warranted in the future.

[32] Dr McGinn was of the view that OR appears to have a basic understanding of his charges before the Court although he required prompting to recall them in the first interview. He has a rudimentary understanding of the concepts of guilty and not guilty and was able to apply them to his own situation. OR appeared to be basing a lot of his understanding of court processes and the roles of key participants on his experience of the s 9 hearing. Dr McGinn said that this is understandable given his lack of previous experience but also suggests that he will require ongoing explanation and checking of his understanding. OR appears to have a basic understanding of the potential evidence and his right to challenge.

[33] With regards to communicating with his Youth Advocate, OR's ability to communicate meaningfully and instruct counsel is likely to be negatively impacted by his limited cognitive abilities. However, the rapport Ms Leys has developed with OR will likely mitigate some of these cognitive difficulties. Overall, OR would be able to follow more straight forward Court and FGC processes with the support of his Youth Advocate. However, if he were to have a defended hearing OR would require significant support to remain engaged, understand the process and what was being communicated in Court. He would also struggle with cross examination due to his poor verbal skills and low cognitive functioning. It is however suggested that

the Youth Court is able to adjust and accommodate the particular needs of individuals with presentations such as OR's.

[34] Dr McGinn said that it is important to note that OR did appear to struggle when interviewed with regards to his previous, more serious charges. In particular, he appeared to struggle with the complexity of the potential evidence. It is possible that OR would not be considered fit to stand trial if he was again to face similar charges.

[35] Overall, on the basis of this assessment Dr McGinn suggests that currently the Court is likely to find that OR fit to stand trial following the elements of competency to stand trial outlined in s 4(1) of the CP(MIP) Act 2003.

[36] Dr McGinn, Dr Jensen together with Dr Billing gave evidence. It was agreed that all three should provide their expert opinion together. All agreed that OR would have difficulty with cross-examination and that despite the steady improvement he has made due to his current environment there remain deficits. He continues to have poor insight and both Dr McGinn and Dr Jensen acknowledged that it is a risk that the evidence he will give may not in fact be the truth. They agreed that there was a real danger of confabulation. Whilst the psychologists agreed that OR would be able to give "his side of the story" there would still need to be "safeguards" in the Court. However, a communication assistant would not necessarily provide him with sufficient safeguards.

[37] The psychologists were in agreement that another important risk factor is the age of these charges which relate to separate events in 2014. When initially interviewed, OR had very little memory of those. In subsequent interviews OR appears to have a better recall, but this could be due to the information that would have been given to him since 2014. In her 5 November 2015 report, Dr McGinn found OR to be "markedly confused about his other three charges even after he had been read the simplified Summary of Facts. He was not aware that the Summary of Facts was not his statement and he seemed to not have clear factual recall of the all of the events around this time." She reiterated that people with FASD are at risk of falsely implicating themselves when confused at interview and may become

agreeable and suggestible. They may also say what they think is needed to end the interview without realising the implications.

[38] Dr McGinn accepted that this risk applied to OR if he gave evidence, and there would have to be limitations and safeguards placed on the type of questions asked of him. In 2013 he did make things up.

[39] All the psychologists acknowledge the danger of confabulation should the charges proceed in the Youth Court. Further, if OR was unable to understand a question he would not be able to communicate that as he has such poor insight. He would not be able to tell if he himself was not telling the truth. They were in agreement that he has a degree of memory impairment.

[40] The psychologists agreed OR would struggle with cross-examination as they accept he has poor verbal and cognitive skills. His memory is affected by his susceptibility to suggestion.

[41] Both Dr McGinn and Dr Jensen are of the opinion OR meets the criteria for intellectual disability. Both agree on a diagnosis of Partial Fetal Alcohol Syndrome. I am therefore satisfied on the balance of probabilities OR is mentally impaired.

[42] In my view, suggested guidelines as to the conduct of the hearing for someone such as OR are not appropriate. There is no evidence that such guidelines will mitigate the recognised risk of confabulation which is aggravated by the age of the charges. Further, I agree with Mr Earley's submission that the process of admitting a charge before the Youth Court is more complex than the process of pleading guilty before a District Court.

[43] For these reasons, I am satisfied on the balance of probabilities that the Young Person is mentally impaired and unfit to stand trial.

J H Lovell-Smith
Youth Court Judge