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

IN THE YOUTH COURT
AT MANUKAU

CRI-2017-292-000459
[2018] NZYC 286

NEW ZEALAND POLICE
Prosecutor

v

[HJ]
Young Person

Hearing: 26 January 2018

Appearances: G Earley Youth Advocate
S Norrie for Crown

Judgment: 14 May 2018

ORAL JUDGMENT OF JUDGE P RECORDON

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[1] [HJ] was born [date deleted] 2004. He faces one charge of aggravated burglary, pursuant to section 232(1)(a) of the Crimes Act 1961. The alleged offending arises from an incident on [date deleted] 2017 at approximately 1:30am, in which three offenders broke into [a petrol station], stole a number of cigarette trays and cash tills, then fled in a stolen car. In the course of the three offenders fleeing, the car crashed into a tree on Te Irirangi Drive and all three young people sustained injuries. [HJ] was apprehended by police fleeing from the crashed car shortly thereafter.

[2] The issue of [HJ]'s fitness to stand trial has been raised and the Criminal Procedure (Mentally Impaired Persons) Act 2003 (CPMIP) process triggered. He appeared before me on 26 January 2018 for a hearing pursuant to s 9 CPMIP. The purpose of the s 9 inquiry is to determine, on the balance of probabilities, whether the accused caused the act or omission that forms the basis of the offence. Ms Norrie for the Crown provided a memorandum setting out the detail of the alleged offending and the evidence upon which the prosecution seeks to rely.

[3] Before turning to the evidence, however, [HJ]'s young age raises another issue which calls for attention. At the time of the alleged offending, [HJ] was 13 years and 8 months old, so was a child for the purposes of the law. Doli incapax, the principle that children under a certain age are "incapable of evil" and should not therefore be criminally liable, is codified in ss 21 and 22 of the Crimes Act 1961. Section 22 which deals with offenders between the age of 10 and 14 is applicable to the case at hand:

> **22 Children between 10 and 14**
> (1) No person shall be convicted of an offence by reason of any act done or omitted by him when of the age of 10 but under the age of 14 years, unless he knew either that the act or omission was wrong or that it was contrary to law.
> (2) The fact that by virtue of this section any person has not been or is not liable to be convicted of an offence shall not affect the question whether any other person who is alleged to be a party to that offence is guilty of that offence.

[4] Effectively, s 22 sets out a presumption that a child aged between 10 and 14 years is incapable of committing an offence, rebuttable only upon proof that he or she

knew the act or omission was wrong or contrary to law. The doli incapax protection is also preserved in the Oranga Tamariki Act 1989. Section 272A(1)(d) provides:

> **272A Modifications and procedure for child aged 12 or 13 years charged with offence in section 272(1)(b) or (c)**
>
> (1) The modifications referred to in section 272(2A)(b) in respect of a child aged 12 or 13 years charged with an offence specified in section 272(1)(b) or (c) are as follows:
>
> …
>
> (d) a reference in this Act or regulations under it to the charge against the child being proved before the Youth Court must be treated as including a requirement that the Youth Court is satisfied that the child knew either—
>
> (i) that the act or omission constituting the offence charged was wrong; or
>
> (ii) that it was contrary to law.

[5] The articulation of this area of law in the Australian case of *R v JA* helpfully collates English, Australian and New Zealand authorities.[1] This position was adopted by this Court in *R v NM* as follows:[2]

(a) There is a strong presumption against criminal capacity in children aged 10-14.

(b) A finding of guilt may be made only if the Crown has displaced that strong presumption by "strong and pregnant evidence" to the contrary.

(c) It is insufficient to displace the presumption to prove that the child voluntarily and intentionally did the acts constituting the offence.

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[1] *R v JA* [2007] ACTSC 51 at [82].
[2] *R v NM* [2016] NZYC 14 at [42].

The child must have known the act was wrong by reference to the ordinary standards of reasonable men and women in society generally, going beyond mere disapproval or the imposition of disciplinary sanctions.

(d) The Crown must establish, beyond reasonable doubt, the same degree of knowledge or wrongfulness as an accused must negative on the balance of probabilities to attract an acquittal on the grounds of insanity. The knowledge of wrongfulness must relate to the offence in question in particular and not merely a general knowledge about right and wrong.

[6] In *R v NM,* this Court further set out the following as permissible evidence which may be relied upon to displace the doli incapax presumption:[3]

(a) Statements / admissions made by the child;

(b) the type and seriousness of the offences, and the circumstances surrounding its commission;

(c) the behaviour of the child before and after the act;

(d) the child's criminal history / previous dealings with police;

(e) evidence of parents / home background;

(f) evidence from lay persons (for example, teachers, principals, Youth Aid officers and sports coaches); and

(g) evidence of psychologists / psychiatrists (for example a report ordered pursuant to s 333 of the Children, Young Persons and their Families Act).

[3] *R v NM,* above n 2, at [42].

[7] As Ms Norrie has highlighted in her extensive submissions, doli incapax in the context of CPMIP proceedings is an area of somewhat unchartered territory, in the sense that it does not yet appear to be the subject of readily available judicial or academic comment. The interplay between these two areas therefore calls for some discussion, specifically, whether rebuttal of the doli incapax presumption is to be addressed within s 9 proceedings and, if so, to what standard must the prosecution be put to proof in that context.

[8] Attention must naturally turn to what the Court needs to consider in s 9 proceedings when determining involvement in the alleged offending, or lack thereof. Section 9 provides:

> **9 Court must be satisfied of defendant's involvement in offence**
> A court may not make a finding as to 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.

[9] There is no definitive ruling as to what constitutes the "act or omission" in a s 9 hearing. On the face of it, s 9 focuses exclusively on the actus reus component of the offence, apparently rendering questions of mental elements irrelevant in all cases. This was the position reached by Wylie J in *R v Lyttleton.*[4] In *R v Cumming,* however, French J took the approach that mental elements may sometimes be relevant.[5] To that end, the Court found that for the charge of sexual violation by rape, there needed to be proof not only that sexual intercourse took place, but also that it occurred in the absence of consent. In reaching that conclusion, the Court held that a strict reading of s 9 cannot occur where the mens rea is a "composite element of the actus reus" in which case "finding the act or omission may of necessity include some element of mens rea".[6]

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[4] *R v Lyttleton (No 1)* HC Auckland CRI-2008-044-9466, 4 November 2009 at [43].
[5] *R v Cumming* HC Christchurch CRI-2001-009-835552, 17 July 2009.
[6] *R v Cumming,* above n 5, at [89].

[10] In *Te Moni,* the Court of Appeal did not expressly reconcile these divergent High Court approaches, but did show inclination towards *Cumming* by concluding that in cases of sexual violation by rape, consent is to be considered for s 9 purposes.[7] It was noted that looking beyond merely the physical act which forms the basis of the charge was necessary for the act to amount to a criminal act.[8]

[11] Professor Brookbanks, in his article "Special Hearings under CPMIPA" considers the elements to be established at an involvement hearing for a charge of burglary.[9] Similar to the authority that consent forms part of the actus reus in cases of sexual offending, Professor Brookbanks supports a finding that knowledge or awareness of the unlawfulness of the alleged entry is a "mental element of the actus reus". This analysis goes further by highlighting that the physical act of a burglary – unlawful entry or remaining in a building – is the same as the physical act necessary to establish the summary offence of being found on property without reasonable excuse, pursuant to s 29(1)(a) of the Summary Offences Act 1981. On that basis, the proposition is advanced that all ingredients of a charge of burglary are to be proven for s 9 purposes; to disregard the mental elements would merely result in a finding of the accused's involvement in the act of a much lesser charge.

[12] Accordingly, whilst the wording of s 9 appears to limit the inquiry to the actus reus, relevant authorities show that consideration of mental elements sometimes becomes necessary. This approach seems a fitting reflection of the purpose of a s 9 inquiry "to avoid the possibility of a person who is found unfit to stand trial being subjected to detention or similar measures in circumstances where he or she has not, in fact, committed an offence".[10]

[13] Along similar lines and with comparable account for fairness, counsel for the police submits and counsel for the young person accepts that the prosecution must rebut the presumption of doli incapax at a s 9 hearing. In advancing this proposal, Ms Norrie refers to the case of *Police v TMW* to highlight that a s 9 involvement hearing may be the only chance that a child has to challenge the evidence against him or her,

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[7] *R v Te Moni* [2009] NZCA 560.
[8] *R v Te Moni*, above n 7, at [81].
[9] Brookbanks "Special Hearings Under CPMIPA" [2009] NZLJ 30 at 34.
[10] *R v Te Moni*, above n 7, at [68].

including any evidence against the statutory presumption that he or she is not criminally culpable due to infancy.[11] With that in mind, along with the fact that a finding of involvement has potential to significantly confine a young person's liberty, should a therapeutic disposition be imposed under the Act, I agree that doli incapax is to be addressed at this stage.

[14] The next issue arising is the standard to which the prosecution must prove, in the context of a s 9 hearing, that a child knew their offending was wrong or contrary to law. There is longstanding authority that rebuttal of the presumption becomes a "necessary ingredient of the charge" which the prosecution must prove beyond reasonable doubt alongside the other elements to the offence.[12] Section 9 however dictates the balance of probabilities as the requisite standard of proof in that context. It must be noted that in other s 9 proceedings where consideration of knowledge or mental elements has been deemed necessary, the standard considered to be appropriate in that setting has been the balance of probabilities, as expressly set out in the Act. It has correspondingly been submitted that the correct standard to rebut the presumption of doli incapax within an involvement hearing is the balance of probabilities and the appropriate forum for the criminal standard to apply would be at a later trial, if applicable. I find that to be a logical and suitable approach.

[15] It has been accordingly agreed by counsel that the following must be proved on the balance of probabilities:

(a) [HJ] entered the [petrol station];

(b) he did so without authority;

(c) he intended to commit an offence inside;

(d) he was carrying a weapon and;

(e) he knew what he was doing was wrong or contrary to law.

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[11] *Police v TMW* [2013] NZYC 298.
[12] *R v Brooks* [1945] NZLR 584 (CA) at 595.

[16] Ms Norrie provided a comprehensive walkthrough of the prosecution evidence comprising a range of witness statements, photographs and still images taken from CCTV footage captured at the scene.

[17] Reliance is firstly placed on the statement of, [the registered owner] of the silver [make and model deleted] car (registration [number deleted]) which was stolen on [date deleted] 2017, found crashed on Te Irirangi Drive in the early hours of [date deleted – the next day] 2017 and allegedly used in the aggravated burglary.

[18] Turning to the evidence of those present at the scene, the statement of, [theservice station attendant] at [the petrol station] at the time of the alleged offending, provides that he was in the kitchen when he heard the glass door smash at around 1.35am, which prompted him to engage the panic alarm and flee from the building through the back door without seeing any of the offenders.

[19] The statement of [the first delivery driver] who was parked at [the petrol station] at the time of the offending, begins with his observation of a car – described as a four-door light blue or grey [vehicle type deleted], maybe a Toyota or Nissan – driving into the forecourt and parking at the front left-hand corner of the building. He saw two males approach the front door, one of whom was armed with a car jack which he threw at the glass door before entering the store and returning with a black till and cigarette trays. [The first delivery driver] details an altercation, initiated by the third male threatening him with the screwdriver. He describes the third male, who the prosecution submit was [HJ], as [description details deleted]]. He further provides that he was shirtless with a white singlet wrapped around his face and a flathead screwdriver of about 15cm in his hand. [The first delivery driver] recalls hearing the male with the screwdriver shout "the cops are coming, the cops are coming" to his associates. He also recounts subsequently telling the three males to "pick up their stuff and leave because the cops were on their way." The male with the screwdriver then reportedly jumped into the back seat of the stolen car which took off at speed the wrong way down Te Irirangi Drive towards Ormiston Road.

[20] The evidence of, [another delivery driver] who was parked separately from [the first delivery driver] at [the petrol station] at the time of the offending, is that he

noticed a light coloured vehicle and observed three males who looked like they were trying to attack [the first delivery driver]. By way of an attempt to intervene, [the second delivery driver] moved his vehicle closer and beeped his horn. He then saw two males go into the petrol station and return with items, while the other male initially remained on the forecourt approaching [the first delivery driver] in what appeared to be an attempted attack. He describes the male who initially remained on the forecourt – again, who the prosecution contend was [HJ] – as [description details deleted], shirtless, having something wrapped around his face and something not very big in his hand as a weapon. [the second delivery driver] then observed all three males enter the petrol station, return with items, get into a vehicle and drive away on the wrong side of the road.

[21] The statement of [the Detective Constable] relates to [HJ]'s apprehension shortly after the stolen car had crashed along Te Irirangi Drive. The Detective Constable observed two males fleeing the crashed car. She arrested one of the males who identified himself as [HJ]. Given a number of apparent injuries, she called an ambulance and accompanied him to [the hospital – name deleted]. She took a number of photographs of [HJ] in the ambulance and seized several clothing items from him at hospital: a plain white long-sleeved t-shirt, black Nike sneakers, white socks, a black belt with no buckle and black pants which had a screwdriver with an orange plastic handle and two unopened packets of cigarettes in the front right pocket. While at hospital the Detective Constable received some still images obtained from the CCTV footage at the scene. Her evidence is that she was able to identify [HJ] in those images as the topless male with the white garment around his face, wearing black pants with a belt tied up. After making enquiries with the police, she was informed that [HJ] was the subject of a s 101 custody order and had been reported missing after absconding.

[22] A number of further statements in relation to the investigation and obtaining of evidence are relied upon. [Constable 1] carried out a vehicle scene examination of the crashed silver [vehicle – make and model deleted], exhibiting items of interest. His evidence is that a large number of cigarettes, tobacco, cigarette trays and a till containing cash and coins were located therein.

[23] The statement of [Scene of Crime officer 1], details her examination of the vehicle for the purposes of obtaining forensic evidence. She uplifted a range of fingerprints in the vehicle; one print taken from underneath a cigarette tray subsequently matched to [HJ].

[24] A statement was provided by, [Scene of Crime Officer 2] who conducted a similar examination at the petrol station. Several fingerprints were uplifted from the scene and four further matches to [HJ] were obtained from various cigarette trays found therein.

[25] The final statement is that of [Constable 2] who reviewed CCTV footage obtained from the service station. The footage was downloaded and several still images subsequently captured.

[26] The images taken from the CCTV footage from [the petrol station] form part of the documentary evidence. It is the prosecution case that [HJ] is the shirtless offender in the stills, wearing black pants with a black belt that appears to be tied, a white shirt wrapped around his face, and carrying a screwdriver. The stills, which are notably clear, show the shirtless offender entering the service station, going over the counter, taking a number of cigarette trays and going back out with various items. A screwdriver is visible in his left hand initially as he approaches the cigarette trays. Later, there is a series of images in the shop area of the service station which show the male putting the screwdriver into his right pocket.

[27] The final piece of evidence upon which the prosecution seeks to rely is the collection of photographs taken by the arresting officer. The images show [HJ] in the ambulance shortly after he was apprehended and the clothing items that were seized from him and exhibited.

[28] Ms Norrie has invited me to draw a link between the CCTV stills and the images of the corresponding clothing seized from [HJ] following his apprehension. Mr Earley, youth advocate for [HJ], has not sought to cross-examine any witnesses nor make submissions against a finding of involvement. Given particularly the fingerprint evidence, the marrying of [HJ]'s clothing items seized shortly after the

incident and those of the shirtless offender in the CCTV, I am satisfied on the balance of probabilities that the evidence against [HJ] is sufficient to establish the first four elements of the charge that he faces.

[29] Turning to the fifth and final element, that [HJ] knew what he was doing was wrong or contrary to the law. By way of starting point for a finding of displacement of the doli incapax presumption, Ms Norrie has highlighted that [HJ] was 13 years and 8 months at the time of the offending, close to 14 years, the age of criminal culpability. In *C v DPP* the House of Lords considered that the older the child, the easier it is to rebut the presumption.[13]

[30] Thereafter, the prosecution seeks to draw on the facts surrounding the offence and the behaviour of young [HJ] around that time to support the inference that he knew what he was doing was wrong or contrary to law. In advancing this proposition, reliance is placed on the witness statements and exhibits discussed.

[31] Circumstances surrounding the commission of an offence which may go towards establishing that a child had guilty knowledge include the accused's clear concern surrounding his or her detection or any apparent display of resistance from a victim.[14]

[32] In Ms Norrie's submission, the furtive nature of [HJ]'s offending with a shirt wrapped around his head shows an attempt to conceal his identity, suggesting he had knowledge of the wrongfulness of his behaviour. Similarly, [the first delivery driver's] evidence that he heard [HJ] saying "the cops are coming, the cops are coming" before fleeing with his associates, suggests that [HJ] knew his actions were wrong, given his apparent foresight that it would invite a response from the police should he be detected.

[33] [HJ] was armed with a screwdriver which he used to threaten bystander, [delivery driver 1], while his associates initially entered the petrol station. The Police seek to rely on this fact to suggest that [HJ] had some degree of anticipation or knowledge that his actions may be met with resistance. Alternatively, it is suggested

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[13] *C (a minor) v DPP* (H.L.(E.)) [1995] 2 WLR 383, (1996) 1 AC 1 at 38.
[14] *BP v Regina; SW v Regina* [2006] NSW CCA 172 (Hodgson JA, Adams and Johnson JJ) at [29].

that he may have foreseen the potential for the screwdriver to become necessary as a tool to gain access to the cigarette trays or tills.

[34] What a child says or does before or after offending may be sufficient to rebut the presumption of doli incapax, for example, if a child runs away when caught, the evidence of a flight attempt supports the inference that he or she had guilty knowledge.[15] [HJ] was apprehended after having fled the crashed [vehicle – make and model deleted], despite having sustained serious injuries. It is submitted that his choice to flee the scene in order to avoid detection by police supports the inference that he knew the aggravated burglary was wrong or contrary to law.

[35] Finally, reference is made to the fact that [HJ] was the subject of a s 101 custody order and had been reported as missing at the time of the offending. Counsel for the police argues that, having absconded, [HJ] would have known that he was not allowed to be out in the middle of the night, unsupervised, driving around with his associates. It is further argued that the simple fact that he offended while unsupervised by his appointed guardian indicates knowledge that this type of behaviour would not have been condoned by a supervising adult and was therefore wrong.

[36] Mr Earley has confirmed that he does not wish to make submissions against a finding of displacement of the presumption of doli incapax. Looking at all the factors raised in the prosecution evidence in the round, I am satisfied on the balance of probabilities that [HJ] knew what he was doing was wrong or contrary to law. I therefore find [HJ] involved in the alleged offending for s 9 purposes.

P Recordon
Youth Court Judge

[15] *JM (A Minor) v Reneckles* (1984) 79 Cr App R 255.