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IN THE YOUTH COURT
AT MANUKAU

CRI-2017-292-000495
[2018] NZYC 368

NEW ZEALAND POLICE
Prosecutor

v

[AZ]
Young Person

Hearing:	22 June 2018
Appearances:	Ms A Heaslip for the Police Mr C Merrick as Counsel to Assist Ms C Bennett for the Young Person Doctor K Billing a Clinical Psychologist Ms A Person a Health Assessor
Judgment:	10 July 2018

RESERVED DECISION OF JUDGE S MOALA

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[1] [AZ] is charged with aggravated robbery and wounding with intent to cause grievous bodily harm.

[2] This is a s14 hearing under the Criminal Procedure (Mentally Impaired Persons) Act 2003 ("the Act").

[3] After hearing from the two health assessors, I was satisfied on the balance of probabilities, that [AZ] was not mentally impaired. He was therefore fit to stand trial. I reserved my reasons.

Legal principles

[4] If the Court finds the act(s) or omission(s) have been proven on the balance of probabilities (s9 hearing), the Court is required to proceed to s 14 of the Act. There are six steps to follow for the s 14 hearing.[1]

(i) **Step 1** – Obtain two health assessors' reports (s 14(1));

(ii) **Step 2** – Make reports available to counsel, defendant and prosecution (s 14(2));

(iii) **Step 3** – Allow each side to present evidence and make submissions (s 14(3));

(iv) **Steps 4 and 5** – Make and record findings. The Court must determine two questions on the balance of probabilities:

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[1] 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 continue the proceedings.

1. Is the defendant mentally impaired?

2. If the defendant is mentally impaired, does this impairment render the defendant unfit to stand trial?

(vi) **Step 6** – Make directions as to how the case is to proceed

Mental impairment

[5] Mental impairment is a precondition for an unfitness finding. The term "mental impairment"is not defined in the Act. Because it is not defined, it allows for judicial interpretation. The cause of mental impairment is irrelevant. A broad interpretation has been adopted by the courts. The focus of the undefined term should be on whether the defendant has a condition that impairs mental function to the extent that it may seriously affect the defendant's ability to comprehend charges, consider options and consequences, plead, and mount a defence.

[6] Mental impairment can include:

- Mental disorder
- Intellectual disability
- Mental impairment caused by a degenerative condition
- Cognitive disorders and disabilities
- Acquired brain injury
- Personality disorder (although rare)
- Physical disabilities, such as deafness or a physical condition which impact on a person's mental functioning.

[7] If the Court finds the defendant does not have a mental impairment, then he will be fit to stand trial and will proceed to a trial in the normal way.

[8] If the Court finds a defendant does have a mental impairment then the Court must determine whether, because of that mental impairment, the defendant is unfit to stand trial.

Unfit to stand trial

[9] The term "unfit to stand trial" is defined in s 4 of the CP (MIP) Act.[2] Although the term is defined, the precise degree of mental impairment which renders a defendant unfit to stand trial cannot be easily or clearly defined. It must be considered in the context of the particular charge(s).

[10] The latest leading decision from the Court of Appeal *Solicitor General v Dougherty* has clarified that "decisional competence" or a "best interests enquiry" and the ability to present a "rational" defence are not part of the s 14(2) enquiry into whether a mentally impaired person is fit or unfit to stand trial. The Court has stated that a high threshold of fitness, including a best interests component, derogates from the fundamental principle of an accused person's right to present their own defence as they wish.

"Presser" criteria

[11] A broad list of capacities, also known as the "Presser" criteria, frequently referred to by health assessors in their s 38 reports, is useful in assessing a defendant's fitness to stand trial. These are, whether the defendant is capable of:

1. Understanding the charge.
2. Pleading to the charge and exercising a right to challenge.
3. Understanding the proceedings.
4. Following the course of proceedings.
5. Understanding the substantial effect of the prosecution evidence.
6. Taking a defence or answering the charge.
7. Deciding what defence to rely on.
8. Giving instructions to counsel.
9. Making his version of the facts known to the Court and counsel.

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[2] unfit to stand trial, in relation to a defendant,—
[6] (a) means a defendant who is unable, due to mental impairment, to conduct a defence or to instruct counsel to do so; and

[12] The Court of Appeal has said that these provide a useful non-exhaustive set of sundry principles, although they are not the test itself. The Court should always focus its attention on the s 4 definition when considering whether a defendant is fit/unfit to stand trial.

[13] If a finding of fitness is made, the defendant proceeds to trial. If a finding of unfitness is made, the case proceeds in accordance with Subpart 3 of the CP (MIP) Act (disposition).

[14] Where the Court has found a defendant fit to stand trial, but the health assessors (and Court) have identified areas of difficulty for a defendant in the trial setting, it may be useful to make special arrangements to assist the defendant during the trial – for example, ordering extra breaks over and above the usual Court sitting times, making a direction for amicus to be appointed, making provision for a support person to accompany the defendant, arranging for monitoring of the defendant by a forensic liaison nurse, assistance with communication, and limits on cross examination (eg requiring open ended questions to be asked).

[15] *R v Barton*,[3] referred to in *Dougherty* is an example of a contextual approach to the CP(MIP) process. Barton was found fit to plead on some charges but not so where a greater level of complexity was required (consent, and reasonable belief in consent). However, relevant to the Court's consideration in the context of youth justice proceedings, are the Court's comments about special measures for trial.

[16] The Court of Appeal outlined the special measures envisaged by the first instance Judge:[4]

> [19] The Judge set out the following types of assistance Mr Barton will require to manage the trial process and ensure a fair trial:
>
> (a) the assistance of experienced sign language interpreters (one for the usual and one for individual signing);
>
> (b) information will need to be broken down into small and discrete blocks for Mr Barton to assimilate and to enable him to reciprocate and provide instructions and/or responses;

[3] *R v Barton* [2012] NZCA 295.
[4] Ibid at [19].

(c) questioning will need to be very specific and simple for Mr Barton to understand; and

(d) adequate time and care will need to be taken to ensure Mr Barton understands the information/evidence presented and to be able to respond if and when required.

[17] The Court of Appeal then went on to discuss other possible measures:

> [32] We agree with Judge Garland's comments as to the special measures that would be required to ensure Mr Barton has a fair trial. In our view, other measures may also be necessary. For example, we consider it likely to be beneficial for Mr Barton to have met the court interpreters before any trial so that he can get accustomed to their method of communication (and vice versa). It may also be that, as well as interpreters, some specialist communication assistance may be necessary. The involvement of Mr Barton's hearing friend could also be helpful.
>
> [33] Further, if Mr Barton were to wish to give evidence, an order may be needed for that to be done in an alternative manner (for example through pre-recorded evidence). In addition, given that Mr Barton may have a tendency to agree to things he does not understand, leading questions, even in cross-examination, should be avoided. We also note that Mr Barton is likely to have a "somewhat jumbled recall" as to sequence of events, arising out of the denial of the early opportunity to sign. If issues arise where sequencing is important, measures may need to be taken to deal with this (and possibly even expert evidence led on this point).
>
> [34] It would also need to be ensured that Mr Barton understood the questions put to him, the evidence given by other witnesses and any other matters arising during the trial. Ms Nichols-Marcy has suggested that Mr Barton's understanding would need to be tested at each point. The only way to do this would be to "ask him to put in his own words everything said in Court". Proper breaks would need to be taken to allow the assimilation of information. Repetition of information previously given would also likely be necessary.
>
> [35] The reasons for the measures taken would also need to be carefully explained to the jury at the outset.

[18] On this issue of effective trial participation, the Court of Appeal in *R v Nonu*.[5] observed:

> [29] An inquiry into a defendant's fitness to stand trial, however, involves more than an assessment of whether or not the defendant can participate in his or her trial by simply performing relevant trial functions. A defendant must also have the capacity to

[5] *R v Nonu* [2017] NZCA 170.

participate effectively in his or her trial. This involves an assessment of the defendant's intellectual capacity to carry out relevant trial functions. The reason for the need to inquire into the defendant's capacity to participate effectively in his or her trial is that the principles we have explained above [14] are not honoured in cases where, for example, a defendant superficially appears to participate in his or her trial but in reality is, because of intellectual disability, nothing more than a bystander.

[30] The evidence of Drs Pillai and Seth was particularly helpful in explaining how an assessment of Mr Nonu's fitness to stand trial involves an inquiry into his capacity to have effectively participated in this trial. In the present case, this inquiry involved an examination of four different types of intellectual capacity:

(a) Understanding: this related to Mr Nonu's capacity to understand relevant information including the elements of the charge, the trial process, the role of participants in the trial, evidence, and the purpose and possible outcomes of the trial.

(b) Evaluation: this concerned Mr Nonu's capacity to process information, particularly evidence and directions and to evaluate the impact of that information on the defence.

(c) Decision-making: this concerned Mr Nonu's capacity to make decision normally required of the defendant during the course of a trial, including how to plead, and whether to give evidence or put forward a particular defence.

(d) Communication: this concerned Mr Nonu's capacity to communicate his instructions to his lawyer and to give evidence if he elected to do so.

These functions need to be carried out rationally by Mr Nonu and in real time.

[31] The effective participation enquiry is a contextual enquiry that recognises a defendant may have the capacity to participate effectively in a simple criminal proceeding in which, for example, they plead guilty to shoplifting, but cannot participate effectively in more complex proceedings in which they need to process information in real time and communicate effectively in order to advance their defence. The ultimate assessment of a defendant's ability to effectively participate in his or her trial is a judicial decision informed by expert evidence. This approach is consistent with modern jurisprudence governing the fitness of a defendant to stand trial and reflects the Crown's approach in the present case where Mr Murray suggested our enquiry should be into whether or not Mr Nonu could participate meaningfully in his trial.

Discussion

[19] Prior to the hearing, it was agreed that the experts' reports be produced by consent given their agreement on impairment and fitness. Mr Merrick, counsel to assist, filed affidavits from each expert attaching their reports. Oral evidence was then given by "hot tubbing" the experts.

[20] Angela Person, clinical psychologist, prepared a s38 report dated, 2 February 2018. She came to the following conclusions:

i. [AZ] does not currently meet the criteria for mental disorder under the Mental Health (Compulsory Assessment Treatment) Act 1992.

ii. He does not impress as having an abnormal state of mind characterised by delusions, or by disorders of mood or perception or volition or cognition to such a degree that it is a serious danger to the health/safety of himself/others, or seriously diminishes his self-care capacity.

iii. [AZ] does not meet the diagnostic criteria for an intellectual disability as outlined in s 7 of the IDDCR Act 2003 (Intellectual Disability Compulsory Care and Rehabilitation Act 2003).

iv. Although there are indications of development delay, his achievement was not considered as being significantly below by educational providers, his overall adaptive functioning (GAC) was in the low range (no individual skills in the extremely low range), and his overall FSIQ was in the borderline range (with scores suggesting varying abilities).

v. It is her opinion that [AZ] would likely be found fit to stand trial.

vi. [AZ]'s currently personal weaknesses appear to be with verbal skills and slowed processing speed relative to age-related peers. [AZ] sometimes required a little more time to process and respond to oral questions, but impressed as understanding the authors questions. He demonstrated an appreciation of his charges, and the seriousness of them. He impressed

as having an adequate understanding of the nature, purpose, processes and consequences of Court proceedings, participants roles in Court, plea options, and the concept such as admitted/denying.

vii. [AZ] impressed as understanding the substantial effect of evidence, demonstrated logical thinking with his decision processes when he was considering his plea, and explained the core role of his youth advocate to help represent his rights. He demonstrated knowledge that he has a right to change any information that he disagrees with. Furthermore, it is seen from the previous assessments, that [AZ] appears to have improved his knowledge since first assessed last year (could more easily defined admit and deny). This supports the RBANS results that [AZ] can learn information when he listens to auditory verbal information more than once (repeated presentations).

[21] Dr Karmyn Billing, clinical psychologist, prepared a s 38 report dated, 2 February 2018, and another s 38 report dated, 15 June 2018. She came to the following conclusions:

a) [AZ] does not meet the criteria for an intellectual disability as defined by s 7 of the ID(CCR) Act.

b) [AZ] does not currently meet the criteria for mental disorder under the Mental Health (Compulsory Assessment Treatment) Act 1992.

c) In the writer's opinion although [AZ] has deficits and verbal comprehension and processing speed, he does not meet the criteria for mental impairment.

d) It is her opinion that [AZ] would likely be found fit to stand trial.

e) [AZ] has verbal deficits in verbal comprehension and processing speed. However, he also has described being able to understand verbal information, but being less able to express himself verbally. There are

also concerns about his attention problems, although it appears he does not consistently present with problems in this area.

f) [AZ] has a basic understanding of his charges and plea options. He has a reasonable idea of the processes and consequences of legal proceedings. He has reported a willingness to work with his youth advocate and his confidence and trust in her. He has an adequate understanding of possible consequences for his current charges.

g) The assessment did highlight some problems with communication, particularly expressing himself. He was generally able to express himself with encouragement and may need additional time to work with his youth advocate prior to Court hearings and important legal processes such as Family Group Conferences. He would require additional support if he were to go through a defended hearing particularly if he were required to give evidence. However, he appears amenable to receiving support including repetition of verbal information, extra explanations and checking his understanding.

[22] In her report dated, 15 June 2018 she was still of the opinion that [AZ] is fit to stand trial.

[23] From their oral evidence, it was apparent that the experts were generally in agreement on all issues put to them.

[24] Ms Bennett questioned them in relation to Foetal Alcohol Spectrum Disorder ("FASD"). Both agreed that there is little formal research on the impact of alcohol on a father's sperm. They did not know if the father consuming alcohol before conception would have an impact on a diagnosis of FASD. This is a factor which is not included in the Canadian criteria for diagnosing FASD. It is only the mother's pre-natal alcohol exposure which is a criterion. When asked whether the results they have for [AZ] are indicative of FASD, both agreed that it was difficult to answer this question. A diagnosis for FASD would involve a battery of tests. They noted that FASD had diverse effects and it was difficult to say whether his current results indicated FASD.

[25] The experts were asked about his ability to deal with a court hearing effectively. Both agreed that in terms of causes for his challenges, it was hard to differentiate between the disruption to his educational background as opposed to a deficiency. When questioned about how [AZ] would cope if giving evidence and being cross-examined Dr Billing agreed that he may find the process difficult. Ms Person agreed that he would find it more challenging, but she was confident that if he did not understand that he would say so and ask for clarification.

[26] Both Ms Person and Dr Billing concluded that [AZ] would be fit to stand trial without the assistance of the communication assistant. However, both agreed that he would find it helpful to have a communication assistant.

[27] [AZ]'s full IQ score was 73 with a 95% confidence interval of 68-80 and was below 96% of his peers. The experts gave evidence about the confidence interval. They both agreed that he was fit despite his low IQ score.

[28] They agreed that even though he has a reading level of a year 6 to 7, he can understand information if it is read to him and he is given time and assistance to understand.

[29] It was accepted by both that his processing speed is very low. Both agreed that it would be helpful to him if the information was given at a slower pace, and for him to be given time to think and process the information before answering.

[30] The experts were asked about how [AZ] would cope at the Family Group Conference ("FGC") with a victim who has English as a second language. Would he be able to cope with the fast pace of the process? Both talked about giving him a lot of time and having good preparation before the FGC. The FGC would have to be well organised and well run. It would be helpful for him to pre-record what he wants to say to the victim. It may be of assistance for him to bullet-point the things that he wants to say to the victim. Both agreed that it would be of assistance to have directions about the way questions are put to [AZ] to ensure that they were understandable to him given his disrupted education.

[31] I am satisfied based on the written and oral evidence of Dr Billing and Ms Person, that [AZ] does not have a mental impairment. [AZ] does not have a condition that impairs mental function to the extent that it may seriously affect his ability to comprehend charges, consider options and consequences, plead, and mount a defence. Although I do have concerns about his deficits in verbal comprehension and processing speed, I agree with the experts that he does not meet the criteria for mental impairment. Both experts interviewed [AZ] without a communication assistant and could asses him for their reports. Given that he has only a basic understanding of the legal process, and that he struggles with expressing himself, it is critical that he have a communication assistant while in the criminal justice system.

[32] [AZ] does not have a mental impairment so he is therefore fit to stand trial.

[33] Once I made that finding and recorded it, [AZ] "not denied" the two charges. I therefore make the following directions for the FGC:

a) The youth justice co-ordinator needs to read the communication assistant report and the psychologist's reports before the FGC.

b) The communication assistant is to be consulted, provide advice and be involved in the preparation for any FGC.

c) The communication assistant should take an active leadership role in the FGC to ensure that language used is appropriate and that the process is slow enough for [AZ] to follow.

d) The communication assistant and the youth advocate are to consult with [AZ] as to how he wants to present his views at the FGC. All options are to be made available to him. He may want to make notes to use during the FGC, or have assistance to prepare a written statement. He may want to make a video recording of what he wants to say.

e) [AZ] is to have the communication assistant with him at any FGC.

f) Before the FGC, the co-ordinator is to arrange a meeting with the victim to explain [AZ]'s difficulties. The communication assistant can attend this meeting or provide advice to the co-ordinator to ensure that the victim understands the challenges faced by [AZ].

g) All information at the FGC to be broken down into small and discrete blocks so that it is simple for [AZ] to assimilate.

h) [AZ] is to be given adequate time to ensure he understands the information and to be able to respond when required.

i) Regular breaks during the FGC are important to ensure that [AZ] has time to ask questions or seek clarification from the communication assistant.

S Moala
Youth Court Judge