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

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IN THE YOUTH COURT
AT MANUKAU

CRI-2016-204-000459
[2017] NZYC 942

NEW ZEALAND POLICE
Prosecutor

v

[ZW]
Young Person

Hearing	19 December 2017
Appearances:	E Mok for the Prosecutor C Bennett for the Young Person G Earley as Counsel to Assist
Judgment:	19 December 2017

ORAL JUDGMENT OF JUDGE G F HIKAKA

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[1] [ZW] born [date deleted] 2002, faces a number of charges dating back to [date deleted] 2016. It has been necessary to consider the charges pursuant to the Criminal Procedure (Mentally Impaired Persons) Act 2003. A s 9 hearing has been held. A number of charges were withdrawn by the prosecution. This is a s 14 CPMIP hearing and because of directions that will be made, it is important to remember some of the facts relating to the charges. There are serious charges; two for aggravated robbery, one for assault with intent to rob and one for aggravated wounding. Driving related charges appear less serious in the overall scheme of things but the consequences for the victim of the offending have been severe.

[2] The aggravated wounding charge from [date deleted] 2016 involved a [over 60 year old] female complainant who was in her car when approached by [ZW]. He was armed with a knife. He pulled her from the car, she tried to get back into the car. [ZW] punched her, she fell to the ground unconscious and was left there. She suffered a brain bleed and was hospitalized.

[3] Later there was a period of reckless and dangerous driving including a time when [ZW] drove through a red light and collided with the complainant's vehicle. The complainant suffered a fractured sternum, three broken ribs. [ZW] drove off.

[4] There were concerning aspects of what has been described as the [details deleted] situation that were before the Court but that the police chose not to pursue. Those charges were withdrawn. The general picture of [ZW]'s behaviour is able to be ascertained from those brief comments. There are eleven charges for consideration under s 14 CPMIP.

[5] Section 14 requires me to consider the evidence of two health assessors and determine whether or not [ZW] is mentally impaired and if mentally impaired, whether he is unfit to stand trial.

[6] I have been greatly assisted by the expertise of the health assessors and their reports. [Doctor 1] and [Doctor 2]. Their expertise has not been challenged.

[7] Mr Earley has assisted the Court, Ms Bennett is [ZW]'s youth advocate, Ms Mok appears on behalf of the police and Mr Weeks has attended [ZW]'s appearances throughout as lawyer for [ZW] on account of his care and protection status in the Family Court. [Name deleted] has assisted as a communication assistant and has been with [ZW] through the course of this hearing.

[8] [Doctor 1] provided two reports dated 20 June and 28 August 2017. The first report was completed when there were two charges before the Court. The second report considered additional charges that arose since the first report. [Doctor 2]'s report of 30 August 2017 considered all the charges that have been before the Court. Both health assessors confirmed that their conclusions have not changed even though, as I have indicated, some charges have been withdrawn since their last reports in August.

[9] They provided a very helpful joint memorandum dated 14 December 2017. Within that they confirm that they agree about mental impairment and they also agree on fitness to stand trial.

[10] There is no dispute with respect to mental impairment.

[11] Their opinions regarding fitness to stand trial led to expansion of the views they referred to in their reports. Regarding a compartmentalized approach to proceedings moving forward, they were asked about whether [ZW] would be fit if trial processes were managed in a particular way.

[12] The first matter I must determine is whether or not [ZW] is mentally impaired. Mental impairment is not defined in law which leaves scope as to what could be included. In [ZW]'s case, as a result of the expert evidence I have heard, I am satisfied that there is no doubt that [ZW] has a mental impairment. He has been diagnosed with foetal alcohol spectrum disorder and a mild intellectual disability. In addition to that, is a language disorder and attention deficit hyperactivity disorder.

[13] I am satisfied that [ZW] is mentally impaired.

[14] The next question is whether or not, from the evidence I have read and heard, [ZW] is fit to stand trial. The conclusion of [Doctor 1] and [Doctor 2] is that [ZW] is not fit to stand trial as he would be unable to instruct counsel or actively participate in the legal processes, even with the assistance of a communication assistant.

[15] With respect to the fitness issue, factors such as confabulation and suggestibility and stress, were all traversed in the evidence that has been heard today. How [ZW] might respond if a discrete, limited number of charges were presented for hearing with appropriate breaks in the course of the hearing and with the assistance of a communication assistant, was covered in the evidence. Whether that would enhance [ZW]'s ability to communicate adequately, to instruct counsel and participate in the proceedings, was considered. Presentation of a summary of facts to [ZW] featured in the course of evidence heard on those points. I am satisfied as a result of the answers, that [ZW]'s confabulation and his suggestibility are such that even if he had the aid of a communication assistant, and that "scaffold" as [Doctor 1] described it, was in place, it would help with [ZW]'s communication but not with his reasoning, abstract thinking and problem-solving.

[16] [Doctor 1] noted [ZW]'s low tolerance and ease to anger. Both report-writers referred to a point that [ZW] reaches when he will simply agree with whatever is put to him in order to get to the end of whatever process he is involved with. Confabulation is essentially making things up to fill gaps in a narrative, suggestibility is providing answers that are not necessarily from the person's own life or real life experience but as a result of what has been heard, seen or read.

[17] [ZW] is vulnerable in both areas which goes to the point of [Doctor 1's] and [Doctor 2's] concerns about adequacy of participation and instructions to counsel.

[18] I am satisfied that even if appropriate precautions and hearing process were adopted, [ZW] would still face those challenges to his understanding the process and ability to adequately instruct counsel. I am satisfied that [ZW] is unfit to stand trial.

[19] I have been greatly assisted by Mr Earley's submissions with respect to detailing processes recommended by the appellant Courts. There is no dispute with

respect to the solid foundation Mr Earley's submissions provide for the legal processes leading to a determination under s 14.

[20] Perhaps by way of summary the Court of Appeal in *Nonu v R* [1] as quoted by Mr Earley at para 31:

> …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...

[21] That is effectively what I have done. I have been greatly assisted by the expertise of [Doctor 1 and Doctor 2] and their evidence. I am grateful for the assistance of counsel who, notwithstanding the agreement both health assessors reached with respect to the primary purpose of a s 14, nonetheless, explored possibilities around presentation of criminal behaviour in this context and due process. That is an appropriate consideration given the basic presumption of sanity and the basic presumption of ignorance of the law being no excuse. It is helpful to ensure that the issues are properly explored and put before the Court for the determination that must be made.

[22] There are a number of points that Mr Earley has extracted from the appellate Courts' decisions - all relevant and of great assistance.

[23] One submission he made concerned Youth Court processes and their underlying complexity, as opposed to guilty or not guilty pleas in the adult District Court jurisdiction.

[24] There are aspects of the Youth Court process which cause a number of adults to pause before deciding what is required of them. For example, the term "not denied". It is not an admission. It is not an indication of acceptance of the criminal offending that is alleged. It is simply that a charge is not denied and it triggers a direction for a family group conference.

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[1] *Nonu v R* [2017] NZCA 170

[25] A family group conference is a creature of statute with its own privacy and confidentiality rules. It is a process left in the hands of those appointed by statute. The youth advocate is the only role that provides balance in getting to the justice of a matter. A youth advocate is a lawyer appointed by reason of specialised skills and knowledge, to advocate for a young person, including ensuring due process and evidential sufficiency supports the allegations that have been put before the family group conference. Having established that foundation, youth advocates provide advice to young people about admitting charges or not.

[26] In addition, paragraphs 17 and 18 of Mr Earley's memorandum refers to the duty of the Court and counsel to ensure a young person understands the proceedings. There are other duties under s 7 that the Chief Executive is obliged to observe.

[27] Those duties place a particular emphasis on due process, and, a greater expectation of involvement by professionals involved with the young people and their families to ensure that the overall and long-term goal of rehabilitation is advanced. Ensuring young people have the opportunity to appreciate that they have done wrong and move forward to a better position into the future, all before they turn 17 or 18 years of age (depending on the circumstances).

[28] Having said that I refer back to the circumstances of some of the offending and the nature of some of the charges against [ZW]. The evidence of [Doctor 1] referred to a period of time before her last report that [ZW] was not in secure care within the Ministry's residence. It appeared that that was on the basis of an understanding by the caregivers, of the nature of FASD, understanding the challenges to those caring for the people with that disorder, and how input is intensive and well informed, over a long period of time. The chances of optimizing positive movement forward are greatly enhanced if that approach is adopted.

[29] I mention that because for those six weeks or so prior to [Doctor 1 and Doctor 2's] reports at the end of August 2017, there must have been a period of greater stability for [ZW]. For whatever reason, and it is not clear to me today, that greater level of stability has been lost. [ZW] has spent lengthy periods of time in secure care, often at his own request, often in appreciation of the risk that he presents to himself and others

in the open unit. Again I mention those points because the final part of today's process is to direct that enquiries be made under s 23 CPMIP Act and a report filed thereafter. Given the findings and the evidence upon which the findings have been made, the enquiries are to be made under Part 3 Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.

[30] [ZW] will remain under s 238(1)(d) until [date deleted] at 10.30 am in the Crossover list.

[31] I direct that at least an interim updated social worker report and the outline of a plan, hopefully informed by the s 23 CPMIP report, be filed for that hearing.

[32] I direct that the s 23 CPMIP report be released to counsel and the Ministry as soon as it is filed.

[33] I am disappointed to be told that [Doctor 1] has not been involved on an ongoing basis with respect to management of [ZW]'s care, protection and behavioural issues. It is agreed that [Doctor 1's] involvement will be invaluable moving matters forward in a positive fashion. I expect the Ministry to ensure that happens.

[34] Mr Earley and [the communications assistance] are to continue their roles.

G F Hikaka
Youth Court Judge

Addendum: It was necessary to amend the above decision to correct errors. However the decisions and directions and the reasons for them are unchanged.