NOTE: NO PUBLICATION OF A REPORT OF THIS PROCEEDING IS PERMITTED UNDER S 438 OF THE CHILDREN, YOUNG PERSONS, AND THEIR FAMILIES ACT 1989, EXCEPT WITH THE LEAVE OF THE COURT THAT HEARD THE PROCEEDINGS, AND WITH THE EXCEPTION OF PUBLICATIONS OF A BONA FIDE PROFESSIONAL OR TECHNICAL NATURE THAT DO NOT INCLUDE THE NAME(S) OR IDENTIFYING PARTICULARS OF ANY CHILD OR YOUNG PERSON, OR THE PARENTS OR GUARDIANS OR ANY PERSON HAVING THE CARE OF THE CHILD OR YOUNG PERSON, OR THE SCHOOL THAT THE CHILD OR YOUNG PERSON WAS OR IS ATTENDING.

IN THE YOUTH COURT
AT NEW PLYMOUTH

CRI-2016-243-000126
[2017] NZYC 243

NEW ZEALAND POLICE
Prosecutor

v

CP
Young Person

Date of Minute: 4 April 2017

MINUTE OF PRINCIPAL YOUTH COURT JUDGE JOHN WALKER

---

[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 CPdoes 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 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.

John Walker
Principal Youth Court Judge