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IN THE YOUTH COURT
AT PALMERSTON NORTH

CRI-2018-254-000034
[2018] NZYC 455

NEW ZEALAND POLICE
Prosecutor

v

[FP]
Young Person

Hearing: 1 August 2018

Appearances: J J Harvey and Sergeant M Rix for the Prosecutor
M R Woods for the Young Person

Judgment: 1 August 2018

ORAL JUDGMENT OF JUDGE G M LYNCH

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[1] [FP] is now [over 15 years] old, facing charges of unlawfully in a building, ill-treating a cat and committing an indecency with a cat. An issue has arisen as to [FP]'s fitness to plead and stand trial on these charges.

[2] The first part of the hearing today is to determine [FP]'s involvement in these offences under s 9 of the Criminal Procedure (Mentally Impaired Persons) Act 2003 (the CP(MIP) Act). Section 9 requires me to be satisfied on the balance of probabilities that the evidence against [FP] is sufficient to establish he has caused the acts or omissions that form the basis of the offences for which he is charged. In order to make this determination I have considered the prosecution evidence which is admitted unopposed by way of formal written statements.

[3] The unlawfully in a building charge (0088) is the first in time and the evidence the police rely on is by way of the formal written statements of [RS] and [Constable 1]. [RS]'s [age deleted] year old [grandchild] lives with her at her address which is in the same street which [FP] was living at the time. At about 7.00 am on [date deleted] , [RS] went into her [grandchild]'s room to wake [the grandchild] up for school. On opening the curtains [RS] noticed that the window was open with the latch sitting on the stay and not hooked on it. [RS]'s [grandchild] said [they] had not opened the window.

[4] Later when leaving to drop her [grandchild] at school, [RS] noticed a glass recycling bin upside down outside the kitchen window. [RS] spoke to [FP]'s [relative] and caregiver, [AP], who confirmed that her bin was missing.

[5] [Constable 1] was tasked to speak to [FP] about all of this, which she did on [date deleted] in the presence of [FP]'s [relative] and caregiver [AP]. [FP] told the constable that he would go to [RS]'s address, sometimes once a week, sometimes once a month, and either remain outside or go in and play on the [grandchild's game console] while the [grandchild] was asleep. [FP] said that he would go there at three, four or 5.00 am but would never wake [RS]'s [grandchild]. [FP] said he got inside through a window and sometimes "grabbed a recycling glass bin" to do so.

[6] It is plain from the interview that [FP] has gone to [RS]'s home a number of times, not just on this occasion, [date deleted]. On an early occasion, [FP] had been caught because he fell asleep on the [grandchild]'s bed. The [grandchild] had obviously woken up to find [FP] there. There was also another occasion when he had been discovered in the room as [FP] told the constable that the [the grandchild] had woken up and that [the grandchild] told [FP] that he would open the window for him. [FP] had also at some stage used a ladder to get access to the house.

[7] While going into [RS]'s home at night and going into her [grandchild]'s room while he is asleep is worrying enough. It is obviously the ill-treatment and indecency charges that are the more serious charges.

[8] The charges of ill-treatment of the cat (0087) and indecency with the cat (0086) relate to events just after [FP] returned home from visiting [RS]'s home that morning [date deleted]. The evidence the police rely on is provided by way of the formal written statements of [NM] and [Constable 1] and [Constable 2].

[9] [NM] woke up around 5.45 am to the sound of a cat making "a really weird noise". It was not like a meow or a fight. [NM]'s bedroom is upstairs and looks down into [FP]'s backyard. [NM] observed [FP] pick the cat up and slam it against the concrete near the back door twice, before seeing [FP] pull his pants down and put his penis into the cat. [NM] turned his light on in an intent to stop [FP] from what he was doing and ran downstairs, turned the kitchen light on and then went out and looked over the fence. [FP] and the cat had gone. [NM] later told [AP] – [FP]'s caregiver and [relative] – what he had seen.

[10] [Constables 1 and 2] were tasked to investigate the complaint received by the police. The constables first spoke to [NM]. [Constable 2] established that [NM] observed [FP] from no more than 10-12 metres away. When the constables went to [FP]'s home, the door was opened by [AP], who was holding a cat. [AP] immediately stated: "Look, there is semen on my cat." In the presence of [AP], [Constable 2] asked [FP] what had happened. [FP] said: "You know." When the constable asked whether everything he had been told was true, [FP] said it was and when asked why he did it, [FP] said he "wasn't thinking".

[11] While it is plain to me what they were talking about, if there was any ambiguity, that is remedied in the formal written statement of [Constable 1]. [Constable 1] asked [FP] if he had raped the cat. [FP] nodded his head and began to cry. They discussed if [FP] had hurt the cat before and [FP] said he had hurt it before when he was mad. [AP] stated that [FP] had broken the cat's tail.

[12] As I said, the statements from the neighbours [RS], [NM] and [Constables 1 and 2] are admitted on an uncontested basis. Counsel for [FP], Ms Woods, does not seek to challenge the evidence as to [FP]'s involvement in the charges of unlawfully in a building (going into Ms [RS]'s [grandchild]'s bedroom early [date deleted]) and ill-treating the cat by slamming it into the concrete and then committing an indecency on it.

[13] Whether I could be sure whether [FP] "raped" the cat is not critical. I am satisfied that he at least placed his exposed penis on the cat. He may or may not have ejaculated on it, he probably did, but placing his penis on the cat is plainly an act of indecency and as I observe there is no challenge to that.

[14] Accordingly, I am satisfied on the balance of probabilities that the evidence is sufficient to establish [FP] caused the acts which form the basis of each of these offences. I am not required for the purposes of a s 9 hearing to be satisfied as to the mens rea or intention elements of the offences.

[15] I turn now to the s 14 issue. Two health assessors' reports have been obtained for the next part of this hearing which is to determine under s 14 whether [FP] is unfit to stand trial. There is a report from Kristy Wilson, senior clinical psychologist, dated 26 April 2018, and a report from Dr Enys Delmage, Consultant in Adolescent Forensic Psychiatry, dated 17 April 2018.

[16] The two reports are before me as evidence, having been provided to me in sworn affidavits. Neither the police or Ms Woods, on behalf of [FP], challenged the findings of the report writers, or required them here today for cross-examination.

[17] My first task at a s 14 hearing is to determine, on the evidence before me, whether [FP] is mentally impaired. This is a pre-condition for an unfitness finding. The term "mental impairment" is not defined in the CP(MIP) Act. It is to be interpreted broadly to include both mental disorder and intellectual disability and impairment from other causes such as acquired brain injury. Cognitive defects and functional disorders may also amount to mental impairment.

[18] The Court of Appeal in the case of *SR v R*[1] approved Dobson J's statement in the High Court about the meaning of impairment. He said:

> A mental impairment is a disorder or condition affecting the rationality of an accused to an extent that may compromise his or her fitness to stand trial.

[19] I commence with the report from the very experienced clinical psychologist Ms Wilson. Ms Wilson discusses [FP]'s cognitive assessment, completed in October 2016, which Ms Wilson observed, highlighted that:

> [FP]'s full scale IQ falling into the very low range and greater than two percent of younger people his age. An assessment of his adaptive functioning also highlights [FP]'s overall adaptive functioning falling in the extremely low range and greater than two percent of young people his age. He was subsequently diagnosed with mild intellectual disability.

[20] Ms Wilson also referred to a recent psychological assessment dated March 2018 which:

> … highlights elevated scores on the Trauma Symptom Checklist for children (TSCC) for the following areas: anxiety, depression, post-traumatic stress, disassociation, overt disassociation, fantasy and sexual distress. Of note the sexual distress scale was significantly elevated above the other highly elevated scales, nearly three standard deviations above the cut-off range for clinical relevance. Elevated dissociative symptomatology included reduced responsivity to external environment, emotional detachment and experience avoidance. It is also documented by [a Counselling Pychologist] towards the end of 2016 that in order to cope "[FP] has disassociated into two distinct personalities: one kind and caring and the other aggressive, defiant and hurtful towards others."

[21] Ms Wilson concluded that [FP] is a vulnerable young man with an intellectual disability and significant psychological and behavioural difficulties and that [FP] has significantly limited ability to cope with the psychological and behavioural impact of

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[1] *SR v R* [2011] NZCA 409, [2011] 3 NZLR 638.

his childhood trauma (including sexual abuse on [FP] by his father) is further hindered by the mild intellectual disability.

[22] Dr Delmage is a Consultant in Adolescent Forensic Psychiatry and an Assistant Professor at the University of Nottingham currently working at Nga Taiohi and Hikitia Secure Adolescent Inpatient Services, Kenepuru Hospital. Dr Delmage, like Ms Wilson, set out the significant family background here, including pertinently, that [FP] commenced displaying sexualised behaviour from the age of seven when he would expose himself to children and watch them when he was naked, deliberately walking into bathrooms for this purpose. He also stole underwear belonging to girls which was found in his bedroom. The report has also established that [FP] set fires and deliberately engaged with young children despite plans to stop this from happening. Reports also established that [FP] had exposed his genitals to siblings and had apparently taken his female siblings' underwear and hidden it under his mattress. Dr Delmage also referred to [FP]'s physical and psychological abuse.

[23] Dr Delmage discussed the WellStop 16 March 2018 report, observing that the report concluded that [FP]'s immediate risk of engaging in further harmful sexual behaviour was in the high/moderate range. Dr Delmage observed that this assessment was based not only on a clinical assessment, but also on the use of the internationally-recognised ERASOR tool for assessing sexually harmful behaviour.

[24] In relation to [FP]'s mental impairment, this is perhaps best summarised where Dr Delmage concludes that [FP] is unfit to stand trial, where Dr Delmage states at 4.1 of the report:

> I make this assertion based on his mental disorders which are not likely to have changed by the time he appears in Court, namely his intellectual disability (F70 of the International Classification of Diseases), which has been previously established, and his behavioural and emotional disturbance which is in all likelihood attributable to a mixed disorder of conduct and emotions (F91 of the International Classification of Diseases).

[25] I am satisfied on the basis of the expert opinion evidence of the health assessors that [FP] is mentally impaired and I record my finding to that effect.

[26] The second stage of the s 14 inquiry is to determine whether this mental impairment makes [FP] unfit to stand trial. Unfitness is defined in the CP(MIP) Act as meaning a defendant who is unable, due to mental impairment, to conduct a defence or to instruct counsel. It includes a defendant who is unable to plead, to adequately understand the nature or purpose or possible consequences of the proceedings or to communicate adequately with counsel for the purposes of conducting a defence.

[27] Both health assessors are of the opinion that [FP] is unfit to stand trial.

[28] Ms Wilson has described [FP] as a vulnerable young man with an intellectual disability and significant psychological and behavioural difficulties. [FP] provided Ms Wilson with minimal detail about his offending, the reasons for his actions and did not appear to understand the seriousness of the charges. Importantly, [FP] did not demonstrate an understanding of the concepts of "guilty" and "not guilty", and his answers gave the impression of "rote learning or repeating what he has heard from adults". The conclusion that Dr Wilson reached was that at this point in time, [FP] is assessed as being unfit to enter a plea to the charges in the Youth Court.

[29] Dr Delmage observed that [FP]'s:

> …intellectual disability and emotional dysregulation has, in my opinion, combined with the level of developmental immaturity and impulsivity, to the extent that his ability to make decisions in his own best interests and to manage himself capably in a formal Court setting a seriously diminished."

[30] Further, Dr Delmage did not believe that any practicable measures could be introduced to a hearing to assist [FP] engage to the extent required for true, effective participation. Dr Delmage accordingly also concluded that [FP], due to his mental impairment, is unfit at this stage to stand trial.

[31] There is no evidence or information before me to the contrary and the opportunity to be heard and present such evidence has been given to [FP]'s youth advocate and to the prosecution.

[32] Accordingly, I am satisfied on the balance of probabilities that [FP] is unfit to stand trial and I now formally record that finding.

[33] The next stage of the process is to order that inquiries be made under s 23 of the Act to determine the most suitable method of dealing with [FP] under ss 24 or 25. The timeframe for that assessment is 30 days. I direct those inquiries be made and a report available to the Court by 4.00 pm on 31 August 2018. Copies of the report are to be forwarded to Ms Woods, the Police and Oranga Tamariki on receipt. [FP] is to be assessed at [support services name deleted], , [details deleted]. While it is not a youth-specific service, I have been told that [FP] will be staffed one on one and that [FP] will have his own bed and bathroom facilities.

[34] The remand is under s 23(2)(b) of the CP(MIP) Act, given the placement is a secure facility. A nominal date for disposition will be 7 September 2018 at 11.00 am, but for reasons which will be explained, it is unlikely that there will be disposition that day.

[35] In relation to disposition, what Oranga Tamariki is considering most appropriate is a placement at [details deleted] which will offer support and therapy for [FP]. That, of course, is getting ahead of the curve as first there needs to be the assessment under s 23.

[36] Finally, the elephant in the room is what happened recently which has sharpened the focus on getting the help to [FP] that he desperately needs to keep himself and young children he might come into contact with safe. Respite care had been arranged for [FP] commencing [date deleted], and [FP]'s electronically-monitored bail had varied to permit that. For reasons which are not currently apparent, the respite care did not occur.

[37] [details deleted] [AP] then found a girl aged about seven years old in [FP]'s bedroom in an upset state. [AP] returned the child to her home. [FP] had touched the girl on the outside of her clothes and apparently told the police that he had noticed the girl across the road and formulated a plan to get her to come across by asking her to help him look for his pet rabbit (later [FP] was said to have told the police that he had killed this rabbit by beating it to death some months earlier). [FP] was said to have admitted he lured the girl into his bedroom to rape her and would have done so had he not been interrupted.

[38] This latest incident has not yet resulted in charges and is accordingly not part of the process being considered today. While it of course bears on [FP]'s risk profile, it does not impact on the fitness issue I have been determining.

[discussion with counsel]

[39] Given that [FP] might be required to travel [details deleted], leave is granted to bring the matter back earlier for any such directions.

G M Lynch
Youth Court Judge