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

IN THE YOUTH COURT
AT CHRISTCHURCH

I TE KŌTI TAIOHI
KI ŌTAUTAHI

CRI-2018-209-000209
[2019] NZYC 182

THE QUEEN

v

[ZF]
Young Person

Hearing: 18 April 2019

Appearances: D Elsmore for the Crown
T Greig for the Young Person

Judgment: 18 April 2019

ORAL JUDGMENT OF JUDGE B P CALLAGHAN

---

[1] [ZF] is now aged 17 and is charged in the Youth Court with the offence that, "On 27 August 2018 at Christchurch with intent to frighten [the victim], threatened to injure that person." [ZF] was aged 16 at the time of the alleged offence. Her capacity to stand trial is now in issue. [ZF] is alleged to have run at the complainant, a support worker, with a knife on 27 August.

[2] I conducted an involvement hearing pursuant to s 9 Criminal Procedure (Mentally Impaired Persons) Act 2003 on 25 September 2018 and found the facts existed for the actus reus of the alleged offence.

[3] The unfitness to stand trial issue commenced before the coming into force of the new s 8A (30 November 2018) and so the current proceedings continue under the now repealed provisions of s 14. That section provides:

> **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.

[4] [ZF], it is accepted, is mentally impaired. She is intellectually disabled. See exhibit 1 – Ms Webb's assessment of 30 March 2017 which establishes an IQ level of 60. She also suffers from autism spectrum disorder (ASD). Given that [ZF] has a mental impairment, the current hearing involved a consideration as to whether she is unfit to stand trial. Section 4 provides a non-inclusive definition of the phrase of unfit to stand trial.

Unfit to stand trial

(a) Means a defendant who is unable, due to mental impairment, to conduct a defence or to instruct counsel to do so; and

(b) Includes a defendant who, due to mental impairment, is unable—

(i) to plead;

(ii) to adequately understand the nature or purpose or possible consequences of the proceedings:

(iii) to communicate adequately with counsel for the purposes of conducting a defence.

[5] The matters set out in paragraph (b) of the definition are not exhaustive. In *Nonu v R*[1] the Court of Appeal referred to the *R v Presser*[2] criteria set out in the Supreme Court decision in Victoria in *R v Presser* and adopted by Baragwanath, J in *P v Police*[3]. In that latter decision, the Court referred to the *R v Presser* factors now codified in s 68(3) ACAT Mental Health (Treatment and Care) Act 1994.

[6] At [24] of that decision Baragwanath, J set out the provisions of s 68(3) and adopted those matters as being factors that a Court should consider:[4]

whether the accused was capable of:

(a) understanding what it is he has been charged with;

(b) pleading to the charge and exercising his right of challenge;

(c) understanding that the proceedings before the Supreme Court would be an inquiry as to whether or not he did what he was charged with;

(d) following, in general terms, the course of the proceeding before the Court;

(e) understanding the substantial effect of any evidence given against him;

(f) making a defence to, or answering, the charge;

(g) deciding what defence he would rely on;

(h) giving instructions to his legal representative (if any); and

---

[1] *Nonu v R* [2017] NZCA 170.
[2] *R v Presser* [1958] Victoria Reports 45.
[3] *P v Police* [2007] 2 NZLR 528 (HC) also (2006) 23 CRNZ 804.
[4] P v Police (2006) 23 CRNZ 804 at [24].

(i) making his version of the facts known to the Court and to his legal representative, if any.

[7] In *Nonu v R* the Court of Appeal commented on the inquiry having referred to *P v Police* and at [29] referred to what I would call an effective participation involvement. The Court of Appeal said there:

> 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. The defendant must also have the capacity to 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 enquire into the defendant's capacity and to participate effectively in his or her trial is that the principles we have referred to above 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 an intellectual disability, nothing more than a bystander.

[8] In *P v Police* above, Baragwanath J opined that the statutory onus in s 43 lies with the proponent seeking an unfitness ruling. Here, of course, that would be [ZF]. In any event, even if that were not the case, before making such a ruling, the Court has to consider if it is more likely than not that [ZF] is unfit at this point to stand trial.

The evidence

[9] The evidence I heard was from both of the s 38 health assessors who have provided their reports to the Court. Dr Strange provided a report dated 24 October where he considered that [ZF] had the capacity to understand the Court process and the capacity to plead. In a further report of 12 December 2018, Dr Strange, in effect, confirmed his conclusion – he is a child and adolescent psychiatrist with [a Youth Forensic Team]. Ms Alexandra Richards, clinical psychologist from the same youth forensic team, provided her assessment to the Court which was received on 20 November 2018. Her conclusion was [ZF] was unfit to stand trial.

[10] Both of the experts agreed that given the diagnoses of ASD and her intellectual disability, [ZF]'s mental impairment is static and would have not changed between the date of their reports and now. Neither had recently seen [ZF] nor was it suggested they should. In addition, both of the experts interviewed [ZF] together because of the apparent stresses on [ZF] and her mental impairment issues. The assessment interview took place with both of them present. I think the fact that [ZF] engaged in this process

that took up to two hours shows that in an environment tailored to meet her mental health deficits associated with the diagnoses, that she can cope. Indeed, Ms Richards expressed a view in her report (page seven):

> [ZF]'s difficulties with impulse control, poor frustration tolerance and troubles, communicating her thoughts and feelings might lend to difficulties in emotional and self-regulation in a stressful context such as that involved with a Court. When [ZF] feels anxious or confused her immediate response was to withdraw or shut down. Though it may be possible for her to answer if provided with adequate time and an unthreatening environment, I believe she will continue to hold a very basic and superficial understanding at best.

[11] There does not appear to have been any loss of control by [ZF] of her intellectual functioning during the course of the interview, largely I suspect because of the way in which both of the report writers approached their task making sure that the environment was a one that was amendable to making [ZF] feel more relaxed, and indeed, she had her mother present. Dr Strange did not report anything untoward occurring. He commented in his report at page four that, "As [ZF] became more comfortable she made connections and abstractions which showed her understanding of the Court process."

[12] My impression is that with careful planning in an environment designed to meet or cater for [ZF]'s needs as suggested by both of the health assessors, then she could cope with the Court hearing without it being overly stressful. The real concern echoed particularly by Ms Richards, is whether or not [ZF] can assimilate what she has been asked and give an informed answer to what she has actually been asked because of her cognitive limitations. As Dr Strange said in his report, [ZF] has issues with understanding what is being conveyed to her because she becomes overwhelmed and quickly jumps to conclusions. Ms Richards talks of [ZF] being likely to take longer to process information at speed and:

> "In light of her reactive responding and evident anxiety, this can prove more difficult if she feels overwhelmed."

[13] [ZF] has, according to Ms Webb's report (Exhibit 1) relatively higher verbal and perceptive skills that probably mislead people into thinking she is brighter than she really is. Both of the report writers were cognisant of this. Ms Webb said that this can mask her adaptive skills which are relatively low. Dr Strange felt with an

environment that was more relaxing and less threatening and if [ZF] was given time to understand what was going on, she could cope. Ms Richards was concerned that any apparent understanding by [ZF] was likely to be superficial. It was clear to me that Ms Richards accepted that if words or concepts were explained to [ZF] at a level she could understand she would be able to follow what was occurring. Both of the experts agreed that autism has its built-in rigidity and there is often an initial inability to become flexible.

[14] As to concepts to do with the Court process and the personnel involved, [ZF] was able to understand this more than at a rudimentary level. I do not think it matters that a lot of what she knew about the Court-room behaviour was gleaned from a TV show. Both experts refer to her knowledge of what happens in a Court-room. She also confirmed to both a confidence with talking with her lawyer and with the help of her mother who is a central support person for her. While Ms Richards was not confident that even if the Court process was modified, that [ZF] could meaningfully participate, Dr Strange thought the opposite, particularly given what had occurred in the assessment process.

[15] Dr Strange's recommendations were that [ZF] should be given help and time to think about things and he suggested a smaller and less formal setting; simple language being used while speaking with [ZF]; that [ZF] be prepped before and debriefed afterwards about Court proceedings; that there be sufficient breaks during the proceedings; and the process should be relatively short. His conclusion was that if a hearing was adapted along these types of lines which are not unfamiliar to the Court, then [ZF] could effectively participate.

Submissions

[16] I heard submissions yesterday morning from Mrs Elsmore for the Crown/Police and from Mr Greig as [ZF]'s youth advocate. Mr Greig advised the Court that he had not had extensive consultations with [ZF] largely because of this matter being triggered at an early stage. He was sceptical about [ZF] being able to effectively participate even with the use of the various strategies suggested by Dr Strange and made the comment that Dr Strange's view was really no more than a wing and a prayer that she might understand. Mr Greig submitted that even if communication assistance was given (s 80 Evidence Act 2006) then there can be no guarantee that via that process of interpretation and reframing, and so on, that [ZF]'s views could be accurately translated given her deficits.

[17] Mrs Elsmore submitted that the two-hour assessment that [ZF] underwent shows that with care and the steps adopted there that [ZF] does have the capacity to understand and participate. Mrs Elsmore submits that the use of communication assistance in this day and age is now more common with people who have expertise in that area and the Court could rely on a suitably qualified person to carry out that task and to convey evidential matters and indeed matters of process accurately to [ZF] and reconvey those to either the Court or her counsel. Of course, anybody involved in the communication assistance would have to assess [ZF]'s situation prior to becoming involved. It goes without saying that pursuant to s 80 Evidence Act that if a communication assistant was engaged then they would need to have adequate experience in the area of [ZF]'s mental impairment issues and Mrs Elsmore felt confident that that could be catered for.

Discussion

[18] I am satisfied that [ZF] has a reasonable knowledge of those involved in the Court process and the respective functions of the Judge, defence counsel and prosecutor. I am satisfied similarly that she has knowledge of the charge and the circumstances alleged even though she denies any threatening behaviour. She is aware that the case could result in the Judge finding her guilty or not (although I note that terminology is not used in the Youth Court, but it is the same outcome effectively) and she appears to understand these concepts. She appears to have knowledge of possible

outcomes even though she would not be in the peril of a custodial sentence, as she has mentioned. It appears she has a basic understanding of what the prosecutor referred to as the police in the assessment, and what the defence roles are.

[19] As to her understanding of issues/questions put to her, I am satisfied on balance that with her counsel's able assistance, her mother's input and any other person involved to assist with her, she could answer questions in her defence including cross-examination. The hearing is likely to be succinct given that the legal issues are narrow. The legal issues are, effectively:

- Did she have a knife? It appears she does not deny this.

- Did she intentionally threaten by conduct or words the complainant? She denies this, and this will be a matter of dispute.

- Did she intend the threat to be taken seriously?

[20] In respect of the last two issues, there may be a basis for defence of lack of mens rea given her mental health issues leading to a possible incapacity to form a requisite mens rea. That indeed would probably be the subject of some expert evidence. These are not difficult concepts for the defence here, such as a self-defence often is. There are not any other substantive defences that I am aware of other than [ZF] denying the aspects of the actus reus which could lead to a conclusion that she had the requisite mental intent, which may in itself be quite an issue in this case. It seems to me with the supports that are or can be put in place, [ZF] will have a hearing that she can effectively participate in. As mentioned above her mother (and counsel) will be important aids to her.

[21] During that hearing the idea of communication assistance was raised and I have talked about that. That could be a suitable adjunct to ensure that her participation is effective, and I would be happy to make that direction if that is requested. I see the involvement of a person appointed to provide that assistance as being one who can liaise between [ZF] and her counsel if need be noting that her mother seems to be an

appropriate conduit and also, to assist in the Court process to ensure that matters raised in the evidence are raised in a manner that she can understand.

[22] As to the informality of the Court, the Court hearing can be conducted in the more suitable confines of the Youth Court without [ZF] having, for example, to stand in the dock. The Youth Court is a relatively relaxed environment. She will be able to give evidence from where she sits. Only those persons permitted to be in the Youth Court will be present with the minimum being present for the purposes of this case. This I would see would be the prosecutor, defence counsel, [ZF], her support people, the Court registrar and the Judge.

[23] As I have alluded to above, the hearing will be short and focussed. Therefore, although this is a close-run case, I find on the balance of probabilities that [ZF] is not unfit to stand trial and the hearing will proceed accordingly.

[24] A tentative date for case review is [date and time deleted].

ADDENDUM:

[25] After discussing the matter with counsel, I direct there be communication assistance provided for [ZF] to participate in the hearing and within the parameters mentioned in my judgment above. That is pursuant to s 80 Evidence Act. The registrar is to appoint a suitably qualified person to act as a communication assistant and I would be grateful if that person would be able to make a preliminary assessment available to the Court of what, if any, recommendations may be appropriate for the conduct of the hearing.

[26] As I understand it, the police are likely to have two witnesses, that is the complainant and the officer in charge and the defence will have one or two, possibly an expert witness that I have indicated above may be required relating to the mens rea aspect of the matter.

[27] I will excuse [ZF]'s appearance on [date deleted] for the reasons that are probably self-evident.

B P Callaghan
Youth Court Judge