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**IN THE YOUTH COURT  
AT KAITAIA**

**I TE KŌTI TAIOHI  
KI KAITAIA**

**CRI-2018-229-000022  
[2019] NZYC 85**

**NEW ZEALAND POLICE  
Prosecutor**

v

**[CW]  
Young Person**

Hearing: 23 January 2019  
Appearances: Senior Constable Varton for the Prosecutor  
D Sayes for the Young Person  
Judgment: 23 January 2019

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**DECISION OF JUDGE G L DAVIS**

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[1] [CW] is before the Youth Court in Kaitaia today by which a number of matters that he has before the Court need to be dealt with.

[2] [CW] has the following charges that are yet to be disposed of:

- (a) A threatening behaviour charge on 3 October 2018.
- (b) Possession of an offensive weapon, namely a metal bar, on 3 October 2018.
- (c) Escaping the lawful custody of Oranga Tamariki on 6 November 2018.
- (d) Escaping the lawful custody of Oranga Tamariki on 16 November 2018.
- (e) A burglary at [address 1 deleted] on 18 November 2018.
- (f) A burglary at [address 2 deleted] on 17 November 2018.

[3] [CW] also has matters that require disposal including the following:

- (a) An aggravated robbery charge in [location deleted] on 17 June 2018.
- (b) A theft of petrol at [location deleted] on 26 March 2018.
- (c) Theft of a hat from the [store 1 deleted] on 26 March 2018.
- (d) Unlawfully getting into a motor vehicle on 26 March 2018.

[4] Questions as to [CW]'s fitness to enter pleas and to stand trial have been raised and on 27 November 2018 His Honour Judge de Ridder issued an in-Chambers Memorandum determining that the charges that I have listed in paragraph [3](a) to [3](d) were proved in accordance with s 9 of the Criminal Procedure (Mentally Impaired Persons) Act 2003. On the same day His Honour determined [CW] was unfit

to enter pleas and to stand trial. Those matters were not the subject of a disposition hearing at the time.

[5] In the meantime, [CW] absconded from the care of Oranga Tamariki and whilst he was on the run it is alleged he committed the offences that I have listed at paragraph [2](a) to (f).

[6] The purpose of today's hearing is to determine [CW]'s involvement in the charges as set out at paragraph [2](a) to (f) and in the event the Court is satisfied that [CW] committed the acts or the admissions that give rise to the offences to then move to consider whether [CW] is fit to enter pleas and to stand trial.

[7] Whatever the outcome of the s 9 and s 14 determinations, as far as the offences listed in paragraph [2](a) to (f) the Court is also in a position to dispose of those charges in paragraph [3](a) and any other matters that [CW] is found to have committed should he remain unfit to enter pleas and to stand trial.

[8] At the commencement of the hearing on 22 January 2019 I signalled the outcome of the hearing would be as follows:

- (a) The charges listed at paragraph [2](a) to [2](e) were in my view proved on the balance of probabilities for the purposes of s 9 of the Criminal Procedure (Mentally Impaired Persons) Act.
- (b) The charge at paragraph [2](f) was not proved for the purposes of s 9 of the Criminal Procedure (Mentally Impaired Persons) Act 2002 and that charge would be dismissed.
- (c) That I, like His Honour Judge de Ridder, was satisfied that [CW] was unfit to enter pleas and to stand trial in respect of the charges that have been proved.
- (d) I also signalled that all matters that were for disposal would be dealt with by way of an order under s 25(1)(b) of the Criminal Procedure (Mentally Impaired Persons) Act 2002 such that [CW] be cared for as

a care recipient under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 for a period of 24 months with [Support Centre deleted].

(e) Reasons would follow. These are the reasons for the decisions.

**Hearing as to involvement in the offence: s 9 Criminal Procedure (Mentally Impaired Persons) Act 2002**

*Threatening behaviour and possession of an offensive weapon charges*

[9] The Court has received formal written statements from [Constable 1] and [Constable 2]. Each of the constables were stationed in [location deleted].

[10] On 3 October 2018, each constable was directed to attend an incident in [address 3 deleted]. [CW] was at the address intoxicated. He had tried to hit a member of the public and his mother. When the police arrived at the address they saw [CW] outside of the dwelling holding a metal bar which was approximately 60 cm long. He dropped the bar and ran off. He saw the police. He yelled, words to the effect, “Fuck the police,” and ran away returning with a metal object in his hand. He then began taunting the police with the metal object. He then moved to the corner of [street deleted], crouching down in the middle of the road leaning from side to side taunting and yelling at the police officers. He threw the metal object in the direction of the police officers, none of whom were struck. It was located shortly thereafter at an address near the end of [street deleted]. [CW] was then approached by his uncle who managed to calm [CW] down. He was taken to the police station.

[11] Neither [Constable 1] nor [Constable 2] were required to attend the Court in person to be cross-examined as to the content of the evidence contained in their formal written statements.

[12] Having read the formal written statements of each of the Constables I am satisfied on the balance of probabilities that the evidence against [CW] is sufficient to establish that [CW] caused the acts that form the basis of the two offences that he is

charged with. I am satisfied that in respect of the threatening behaviour charge he was in a public place, namely [address 3]. He was taunting and threatening police officers including with a metal bar and was behaving in a way likely to cause violence to start.

[13] Further to that, I am satisfied he had an offensive weapon, namely a metal bar approximately 60 cm in length at a public place, namely [address 3] and he did not have any reasonable authority or excuse to have in his possession that metal bar.

*Escaping lawful custody: 6 November and 16 November 2018*

[14] In respect of these charges I have the formal written statement of [FQ]. [FQ] is employed by [workplace deleted], however he also does voluntary work with the [Youth Residence 1 deleted]. The [Youth Residence 1] is a residential program for youth offenders set up as an alternate to secure custody for youth who have been remanded under s 238(1)(d) Oranga Tamariki Act 1989. The youths are in custody in accordance with the provisions of s 238(1)(d).

[15] In November 2018 [CW] was remanded under s 238(1)(d) into the [Youth Residence 1]. On three occasions [CW] left the [Youth Residence 1] on 6 November. He was later found by the Kaitaia police. He left again on 16 November and absconded from [FQ]'s care. He was removed from the [Youth Residence 1]. [FQ] was not required to be available to be cross-examined and I am satisfied that his statement is admissible. I am also satisfied from that formal written statement to the standard on the balance of probabilities that the evidence was sufficient against [CW] to establish that he caused the acts or the omissions that forms the basis of the offences.

[16] I am satisfied that [CW] was remanded to the custody of the Chief Executive of Oranga Tamariki pursuant to s 238(1)(d) of the Act. I am also satisfied that is an alternate to secure placement [CW] was placed into the [Youth Residence 1]. I am further satisfied that [CW] absconded from that program on 6 November and again on 16 November 2018. The charge, as I have signalled, has been proved to a standard on the balance of probabilities.

*Burglary [at address 1]*

[17] It is alleged that [store 2 deleted] on [street deleted] was burgled. I have formal written statements from [Constable 3], [Constable 4], [Constable 5], [Constable 6] and [Constable 7]. In addition to that I have a number of photographs. None of the constables were required to present themselves for cross-examination.

[18] [Constable 3]'s evidence was that on 18 November he was working a late shift with [Constable 6] at about 10:05 pm. A member of the public alerted the constables to a pair of young people walking on [street deleted]. One of them was bleeding heavily leaving a bloodied footprint impression with every step.

[19] At about 10:15 pm an incident was attended on [address 3]. [CW] was found at the address at [address 3] with a large cut on his leg. [Constable 3] began first aid and waited for an ambulance to arrive. [CW] was taken to the hospital. [CW] said he was jumped by mobsters who stabbed him with a machete. [Constable 6]'s evidence largely mirrored that of [Constable 3].

[20] [Constable 4]'s evidence was that on 19 November he was working a day shift with [Constable 1]. At about 7:35 am they were at [store 2] on [address 1]. They had been told by the night shift that there had been a burglary and that a suspect's blood was smeared at the entrance of the shop. They conducted a scene examination. A DNA swab from a glass panel inside the shop was taken and retained as an exhibit. Fingerprints were then dusted for at the point of entry. A partial handprint was uplifted. They were a designated exhibit LCO 1. Further fingerprints were taken and exhibited as LCO 2.

[21] At about 9:50 am [Constable 4] was directed to a further break in at [store 3 deleted] on [address 2]. There was a substantial amount of blood located near a smashed window. [Constable 4] went to the [store 3]. Multiple boot prints along the entry which divided the bar and the smoking area. They were consistent with a suspect attempting to kick their way into the scene. They remained there for about two hours.

[22] The constable then went to an address in [address 3] where clothing belonging to [CW] was seized. A pair of [details deleted] shoes, a [details deleted] jacket and a pair of [details deleted] shorts were seized. They were covered in blood.

[23] The fingerprints contained in the exhibit LCO 1 were sent off for examination and they came back as belonging to [CW].

[24] [Constable 5] provided a formal written statement. She was directed by her supervisor to relieve [Constables 3 and 6] at the hospital where they were attending with [CW]. [CW] was receiving treatment for injuries sustained that evening at about 12:30 am. [Constable 5] advised [CW] he was under arrest for escaping custody and burglary. He was accompanied by his mother at the time who was identified as his nominated person. The Bill of Rights cautions were read and [CW] understood them. He was asked to make a statement but [CW] refused to do so. Little turns on that.

[25] [Constable 7] provided a formal written statement. His job was to preserve biological and physical evidence at a crime scene. [Constable 7] took blood samples from [store 3] which, for reasons that will become apparent, are not in my view relevant to the proceedings. He also took photographs of the scene. For reasons that are not clear to me none of the blood samples that were taken from the scene of either the burglary at [store 2] or the burglary at [store 3] were sent for DNA analysis. The only evidence therefore that links [CW] to the burglaries are the fingerprint that was located at the entry to the [store 2] premises and the circumstantial evidence to say blood was found at the scene of [store 2] and more blood was found at the scene of the [store 3] burglary, while at around a similar time [CW] was seen away from home and bleeding. His clothes that were seized and his shoes that were seized also had blood on them.

[26] The police also invite the Court to infer, given the timing of the injuries that [CW] sustained and the timing of the burglary, that it must have been [CW] who committed the burglary. I remind myself that for the purposes of s 9 of the Criminal Procedure (Mentally Impaired Persons) Act the Court must be satisfied on the balance of probabilities. In other words, is it more likely to have been [CW] that committed

the burglary or less likely. It does not import a standard of proof as such and certainly not, to the standard beyond a reasonable doubt.

[27] I accept that 10:30 pm on 18 November, [CW] was seen on [street deleted]. It appears that none of the burglaries were drawn to the police attention until 7.30 am the following morning, in respect of the [store 2] premises and at 9.00 am the following morning in respect of the [store 3] premise. That is a significant period of time, in my view. I have no evidence before me to suggest when the burglaries were committed. I only have evidence to confirm when the police were alerted to the burglaries.

[28] There is significant circumstantial evidence against [CW]. I also accept that there is sufficient evidence in the form of the fingerprint to suggest on the balance of probabilities that [CW] committed the [store 2] burglary. It is likely that [CW] committed the [store 3] burglary, however, I have to be satisfied to a standard on the balance of probabilities.

[29] [CW] gave an explanation as to how he was bleeding. The police have not have presented any evidence to the Court to disprove [CW]'s explanation. It is not clear whether [CW]'s explanation was investigated at all – let alone discounted.

[30] I have no evidence before me to say what time the burglaries occurred on 17 November 2018.

[31] I am satisfied that in respect of the [store 2] burglary the evidence against [CW] is sufficient to establish on the balance of probabilities that he committed the act or the omission that forms the basis of the offence for which he is charged, that being that he entered a building at [address 1]. He did not have authority to do so at the time. That charge is proved.

[32] However, in respect of the [store 3] burglary while highly suspicious of [CW]'s behaviour it does not in my view meet the threshold on the balance of probabilities and in accordance with s 13(1) of the Criminal Procedure (Mentally Impaired Persons) Act I am satisfied that [CW] committed the acts or omissions that give rise to the following charges:



- (a) The threatening behaviour charge on 3 October 2018;
- (b) the possession of an offensive weapon without reasonable excuse on 3 October 2018;
- (c) the escaping the custody of Oranga Tamariki on 6 November 2018;
- (d) the escaping custody of Oranga Tamariki on 16 November 2018; and
- (e) the burglary committed at [address 1], namely [store 2] on 17 November 2018.

[33] Equally, I am not satisfied that [CW] committed the burglary at [address 2] and in accordance with s 13(2) Criminal Procedure (Mentally Impaired Persons) Act I dismiss the charge using provisions of s 147 of the Criminal Procedure Act 2011

#### *Fitness to plead*

[34] It has been agreed by the parties that the reports to determine [CW]'s fitness to enter pleas and to stand trial that were used by His Honour Judge de Ridder on 26 November 2008 may also be used by the Court today to determine whether [CW] is fit to enter pleas and to stand trial. I am told that nothing in [CW]'s medical history has changed. While those reports have been available to the Court to be utilised I have the advantage of an additional specialist risk assessors report from the Regional Youth Forensics for the purposes of disposition on those matters that remain for disposition. Again, that confirms very little has changed for [CW]. I do not intend to revisit the findings made by His Honour Judge de Ridder and signal that I agree with Judge de Ridder's findings that the reports are detailed and thorough. Each report writer concludes that [CW] is unfit to stand trial and the only conclusion that can be reached is that [CW] is unfit to stand trial and like Judge de Ridder I formally make that finding.

#### *Disposition*

[35] Given the findings made by His Honour Judge de Ridder and myself that [CW] is not fit to enter pleas and to stand trial it is now a matter for the Court to determine how all of the charges that remain before the Court should be disposed of. To that extent I have the following reports available for consideration:

- (a) A letter dated 17 January 2019 from James Ram;
- (b) a specialist assessors report dated 17 January 2019 completed by Dr Karmyn Billing;
- (c) a Care and Rehabilitation Plan and Program completed by James Ram; and
- (d) a Needs Assessment dated 14 January 2019 completed by James Ram.

### **Disposition**

[36] An inquiry as to disposition allows the Court to consider whether [CW] should in general terms be treated as a special patient or a special care recipient in accordance with s 24 of the Criminal Procedure (Mentally Impaired Persons) Act or whether [CW] can be subject to one of the orders in s 25 of the Criminal Procedure (Mentally Impaired Persons) Act. Those orders include:

- (a) [CW] being treated as a patient under the Mental Health Act.
- (b) Be treated as a care recipient under the Intellectual Disability (Compulsory Care Rehabilitation) Act 2003.
- (c) Be sentenced to a term of imprisonment or the order for immediate release.

[37] The fundamental difference between an order under s 24 of the Act and s 25 of the Act is whether [CW] is kept in secure care and not able to be released until both the Director of Mental Health and the Minister of Health agree that [CW] can be

released. Section 25(1)(a) and (1)(b) also allow for a person be kept in secure care, but in the community.

[38] Each section requires the Court to look at the circumstances of the case. The circumstances of the case include not only the facts of the case itself but also broader considerations including [CW]'s personal circumstances, the risk that he poses both to himself and to society in general, and the desirability of [CW] being kept as far as it is practical within a broader whānau network.

[39] The circumstances of the offending itself, in particular the aggravated robbery, which is by far the most serious case, requires some examination. It involves an allegation that [CW] and a friend have disguised themselves, gone into a residential property in [location deleted] and have taken a bag from a resident under threat of violence. In addition to that, a second resident was confronted. Shortly thereafter [CW] was found and arrested.

[40] The reports describe only a superficial rapport being able to be achieved when [CW] was interviewed. [CW] would often have seizures. It appears that some of those seizures may have been real, others may have been faked. It was difficult for the report writer to distinguish between the two possibilities. [CW] has a history of self-harming, [details deleted]. There are a number of [injuries deleted] which he described as being self-inflicted. [CW] was at the time of the inquiries as to disposition at [Youth Residence 2 deleted].

[41] [CW] has an extensive history with Oranga Tamariki. He is now, aged 17.

[42] Issues drawn to Oranga Tamariki's attention include domestic violence, parental alcohol abuse, [CW]'s behavioural problems, poor supervision and neglect. [CW]'s father was arrested in [date deleted] for assaulting [CW].<sup>1</sup> [CW] is subject to a s 101 Custody Order.

[43] [CW] has absconded from many placements, including placements with whanau members. He has often made his way from placements to his parent's homes

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<sup>1</sup> Report Dr Karmyn Billing 17 January 2019 at para [42].

when he has absconded. The reports say that when [CW] returns home his parents do not inform Oranga Tamariki.

[44] [CW] is in a relationship and has a [young] child.

[45] There were a number of incidents that [CW] had had, however they were all relatively minor. [CW] has regularly used alcohol, cannabis and cigarettes in the community. He is also reported as drinking “hospital stuff” meaning sanitiser. He describes himself as using cannabis a lot when it is around. [CW], in the various reports, is described as having a history of assaulting other students, disruptive behaviour, sexualised behaviour and property damage. [CW]'s caregivers have reported [CW] as feeling [mental health issues deleted].

[46] Earlier section 333 reports record behavioural problems including absconding, assaulting other students, disruptive behaviour, sexualised behaviour and property damage. He has previously been diagnosed with Conduct Disorder.

[47] A Wechsler Intelligence Scale for Children Test (WISC-IV) in 2009 recorded a Full-Scale IQ score of 44. That score being in the lower 0.1 percentile. A further test in 2017 recorded a score consistent with the 2009 results.

[48] [CW]'s adaptive skills were also recorded as having significant deficits in Communication, Functional Academics, Self-Care. He was also described as having relative strengths in Home Living and Health and Safety.

[49] Dr Billing concludes [CW] has sub-average general intelligence based on previous cognitive tests. He meets the criteria for diagnosis of intellectual disability.

[50] His risk of re-offending was estimated using the Youth Level Service/Case Management Inventory (YLS/CMI) 2.0.

[51] Dr Billings makes the following observations:

[83] Information used in considering [CW]'s current estimated risk of reoffending was gathered from clinical interviews, collateral information, and also guided by the use

of the Youth Level of Service/Case Management Inventory (YLS/CMI) 2.0. The YLS/CMI is a psychometric instrument developed to aid in assessment of risk and needs in adolescent offenders (12 to 18 years). Part I of the YLS/CMI focuses on Assessment of Risk and Needs with eight domains: Prior and current offence/s; Family circumstances/Parenting; Education/Employment; Peer relations; Substance abuse; Leisure/Recreation; Personality/Behaviour; and Attitudes/Orientation.

[52] The report notes [CW] has a history of self-harming and suicidal behaviour. [CW] is described as having difficulty managing strong emotions<sup>2</sup>. [CW] has indicated an intention to assault [Youth Residence 2] staff if he was not permitted to go home by the Judge.<sup>3</sup>

[53] The report notes given [CW]'s risks and vulnerabilities he requires an intensive and co-ordinated approach from Oranga Tamariki, disability and mental health services.<sup>4</sup>

[54] Of particular note are the comments by Dr Billing at paragraph [97]:

[97] [CW]'s risk of future offending is estimated to be in the high range. His risk is related to his engagement in education, antisocial peers, poor use of leisure time, personality and behavioural issues, family relationships, some attitudes that condone offending, and substance use. Many of the risk factors are amenable to treatment and could be addressed in order to reduce his risk of re-offending. In addition to his risk of re-offending, his intellectual disability, mental health problems, and care and protection issues mean that he requires additional intensive support and a structured living environment in order to meet his particular needs. I am of the opinion that a period of containment and rehabilitation is necessary. I do not consider that his risk can be effectively managed in the community. Although he has settled while in [Youth Residence 2] there have still been incidents including physical aggression. He has reportedly developed some good relationships with staff but has nevertheless been described as requiring significant support and interventions to manage his behaviour.

[55] Dr Billings comments further:

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<sup>2</sup> Report Dr Karmyn Billing 17 January 2019 at para [83].

<sup>3</sup> Report Dr Karmyn Billing 17 January 2019 at para [89].

<sup>4</sup> Report Dr Karmyn Billing 17 January 2019 at para [95].

[98] With regards to disposition options available to the Court under section 25, I consider that [CW] is eligible for disposition under the ID(CCR) Act. Taking into account his risk of re-offending, his age and vulnerability, and considering the least restrictive alternative to manage his risks, I am of the opinion that [CW]'s risks could be effectively managed and addressed through a period of rehabilitation as a care recipient under the ID(CCR) Act.

[99] With regards to the level of care that is required to manage his risk, I consider that [CW] is at high risk of absconding. While in [Youth Residence 2] he has threatened to assault staff to obtain their keys so that he can escape. Due to the risk of absconding and possible violence towards care staff I would argue that he needs to be contained and managed in a secure care setting. Following consultation with Mr James Ram, Compulsory Care Co-ordinator, I understand that [CW] can be placed with [the Support Centre] given that he is now 17 years old. It is important to note that care orders are subject to six monthly reviews and the order can be varied to a less restrictive order once reasonable gains have been made.

[56] She makes the following recommendations:<sup>5</sup>

- I. That [CW] should be determined as a Care Recipient who receives care and rehabilitation in a **Secure Community** setting. In consultation with the appropriate professionals the length of time for this order is recommended to be **two years**.
- II. [CW] is currently undergoing assessment with [name deleted] in-reach mental health services at [Youth Residence 2]. Although he has generally been avoidant when asked about difficult topics he has started to disclose post-traumatic stress symptoms to his treating clinicians in [the mental health service]. He has also been willing to engage with interventions. [CW] will require mental health follow-up in the community and [the mental health service] will be able to arrange a transfer of care to [location deleted] Child and Adolescent Mental Health Service (CAMHS) when [CW] is placed with [the Support Centre]. His mental health needs are related to his trauma history, suicidal ideation and self-harm, poor sleep, and problems consistent with Attention Deficit Hyperactivity Disorder. Clinicians from [the mental health service] are able to assist [CW] to transition to [CAMHS] where it is important that he is able to develop therapeutic relationships.
- III. [CW] requires support to maintain contact with his family as appropriate. Family contact is very important to him.

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<sup>5</sup> Report Dr Karmyn Billing 17 January 2019 at paragraph 100

- IV. [CW] would benefit from interventions to assist him to make better decisions, improve social skills and develop positive interpersonal skills, and manage strong emotions. A referral to the Intellectual Disability Offender Liaison Service (IDOLS) is recommended so that he can access rehabilitation programmes.
- V. Referral to substance use services is indicated.
- VI. [CW] has shown some ambivalence about his level of interest in his cultural identity and participation in cultural activities. Support from [the Support Centre] to develop and maintain his cultural identity is recommended.
- VII. [CW] is subject to a s 101 Custody Order with Oranga Tamariki. While he is a care recipient it is still important that Oranga Tamariki continue to engage with him and assist with planning for his transition back to the community at the end of his order.

[57] [CW]'s whānau wish him to return home. I understand that to be [CW]'s wish also.

[58] Having read the report from Dr Billing it is clear [CW] has a number of complex needs. He poses a high risk of harm not only to himself but to others, and if [CW] does not receive the appropriate treatment, that risk will remain. Any treatment regime needs to be intensive, structured and secure. Dr Billings does not consider that the needs identified can be either adequately managed or treated in a community setting. I agree. I would extend Dr Billings' concern to include [CW] receiving treatment while residing with whanau. Helpfully, Dr Billings notes that many of the identified risk factors are amenable to treatment.

[59] Her report makes a number of recommendations as to [CW]'s on-going treatment needs that I invite the authorities to consider. I direct a copy of Dr Billings report may be released to treatment providers as required. No further disposition of the report is permitted without further order of the Court.

[60] Accordingly, I make the following orders as to disposition:

- (a) [CW] is to be treated as a Care Recipient who receives care and rehabilitation in a Secure Community setting in accordance with s 25(1)(b) Criminal Procedure (Mentally Impaired Persons) Act 2003;
- (b) The order is to remain in force for 24 months.

Judge GL Davis  
Youth Court Judge