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**IN THE YOUTH COURT
AT MANUKAU**

**I TE KŌTI TAIOHI
KI MANUKAU**

**CRI-2018-292-000334
[2019] NZYC 612**

THE QUEEN

v

[HJ]

Hearing: 5 December 2019

Appearances: S Norrie for the Crown
G Earley for the Young Person
S Mandeno as Counsel to Assist
T Weeks s14(1)(e) Application
L Kovaleski as Chief Executive for Oranga Tamariki

Judgment: 5 December 2019

ORAL JUDGMENT OF JUDGE I M MALOSI

Introduction

[1] [HJ] was to appear today for a determination pursuant to s 8A Criminal Procedure (Mentally Impaired Persons) Act 2003 as to his fitness to stand trial. He was physically brought to Court, but it has been reported to me by his Lawyer for Child (or at least one of them) Mr Weeks, that he is very distressed and not wanting to participate in this hearing at all.

[2] Various options were explored as to limiting his physical participation in Court but I have been satisfied, after hearing from Mr Weeks and from Mr Earley, who is [HJ]'s Youth Advocate, that he is too mentally impaired to appear and participate in this hearing. Accordingly, his attendance has been excused. I know that both Mr Weeks and Mr Earley will report back to [HJ] as to the outcome of this hearing and what the next steps are to be.

[3] I am not surprised at all that he is losing hope and, I suspect, faith in the system because these matters have taken so long to resolve, and frankly there is some time yet before we are able to cross the finish line.

[4] [HJ] faces a number of charges before the Youth Court and has related matters before the Family Court which form the basis of an application by the Police for a declaration pursuant to s 14(1)(e) Oranga Tamariki Act 1989.

[5] In respect of his Youth Court proceedings, his charges (all laid under the Crimes Act 1961 with the exception of one) are as follows:

- (i) Sexual violation of [ZS] between [date range deleted];
- (ii) Sexual violation of [PF] between [date range deleted].

Both of these offences are alleged to have occurred when [HJ] was 13 years old.

- (iii) Unlawfully getting into a motor vehicle;

- (iv) Possession of instruments for conversion;
- (v) Aggravated robbery (x 2);
- (vi) Unlawful taking of a motor vehicle (x 2);
- (vii) Endangering transport; and
- (viii) Reckless driving.

[6] In respect of [HJ]'s Family Court proceedings those involve lower level alleged sexual offending by him which do not meet the jurisdictional threshold for filing in the Youth Court, against the aforementioned complainants as well as an additional complainant.

[7] The allegations are that he attempted to sexually violate by unlawful sexual connection [PF] and [ZS], and indecently assaulted [PF] and [VM].

Relevant law

[8] Section 8A prescribes the process for determining if a person is unfit to stand trial. It provides as follows:

- (1) *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.*

- (5) *If the court records a finding under subsection (2) that the defendant is unfit to stand trial, the court must inquire into the defendant's involvement in the offence under section 10, 11, or 12, as the case requires.*

[9] Two points are worth making at this juncture:

- (a) While the Court is clearly obliged to have regard to the evidence of two health assessors, the decision as to fitness is ultimately a judicial one. Arguably, even more care is required when those health assessors concur on the issue of fitness and there is no challenge to their conclusions by either the prosecution or defence.
- (b) The Act does not specifically define mental impairment. 'Mental disorder' as defined in the Mental Health (Compulsory Assessment and Treatment) Act 1992 and 'intellectual disability' as defined in the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, will often fall into the definition of mental impairment, but outside of those two obvious impairments the boundaries are ever shifting, particularly in the Youth Court where understanding of neuro disabilities and other challenges faced by young people is growing.

[10] Unfit to stand trial is of course defined in s 4 of the Act as:

- (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.*

[11] As mandated by s 8A, two health assessor reports, both dated 4 November 2019, have been received by Dr Karmyn Billing, Clinical Psychologist and Angela Person, Clinical Psychologist and Neuropsychologist. Each of them subsequently provided an update, dated 3 December and 2 December respectively, covering all charges before the Youth Court and matters before the Family Court.

[12] In essence, both report writers are of the view that [HJ] is unfit to stand trial. Neither has been required by any counsel for cross-examination today.

[13] Based on the evidence of Dr Billing and Ms Person I concur with their opinion that [HJ] does not meet the criteria for mental disorder or intellectual disability. In respect of the latter I note that on 6 July 2018, in relation to an aggravated robbery charge, [HJ] was made subject to a 12 month secure care recipient order and placed at [a Youth Justice Residence], but upon reassessment of his intellectual and adaptive behavioural functioning that order was subsequently discharged early by the Family Court following his first mandated review.

[14] Notwithstanding, it is clear that [HJ] faces a number of challenges. The health assessors identify he has been assessed, either by them or others, as having:

- (i) FASD;
- (ii) ADHD;
- (iii) Conduct disorder (early onset severe);
- (iv) Impaired verbal comprehension and significant difficulties understanding spoken language;
- (v) Difficulties with memory;
- (vi) Suffered a head injury in [year deleted] as a result of a motor vehicle accident;
- (vii) A history of drug use, including methamphetamine as young as seven years old;
- (viii) Been exposed to significant family violence;
- (ix) A number of mental health symptoms, including affective problems;

- (x) Anxiety (an example of which I suggest we have seen today outside of the Court);
- (xi) Anger, behavioural issues/emotional dysregulation; and
- (xii) Low self-concept.

[15] With respect, I consider that Dr Billing sums up [HJ] in one sentence of her report [at para (66)] where she opines, '[HJ] has a complex presentation and significant therapeutic needs.'

[16] [HJ]'s proceedings before the Youth Court and Family Court are procedurally complex in nature. We have ventured into territories not previously traversed and that looks likely to continue. Even with the benefit of education on various aspects regarding his case in the course of the health assessors' assessment, and ongoing assistance from a communication assistant, [HJ] has struggled to follow what has been happening and what is to come. That is a significant cause for concern given the very serious nature of some of the charges and allegations he faces.

[17] For all of the above reasons, and having had due regard to the two health assessors' reports, I conclude that [HJ] is mentally impaired and is unfit to stand trial on both his Youth Court and Family Court matters, and make a finding accordingly.

I M Malosi
Youth Court Judge