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**IN THE YOUTH COURT
AT NAPIER**

**I TE KŌTI TAIOHI
KI AHURIRI**

**CRI-2019-241-000053
[2020] NZYC 273**

**NEW ZEALAND POLICE
Prosecutor**

v

**[JM]
Young Person**

Hearing: 27 May 2020
Appearances: Sergeant J Evans for the Prosecutor
D Kennedy for the Young Person
Judgment: 27 May 2020

ORAL JUDGMENT OF JUDGE B M MACKINTOSH

[1] [JM] faces a raft of charges in the Youth Court dated from 18 November 2019 to 20 February 2020 involving charges such as:

- Unlawful taking a motor vehicle.
- Theft of a wallet.
- Numerous charges of dishonesty relating to use of a bank card.
- Unlawful interference with a motor vehicle.
- Assault on police.
- Resisting police.
- Possession of an offensive weapon, using a baseball bat.

[2] An issue arises as to his fitness to plead in relation to these charges. Two s 333 reports are before the Court, one from Dr Knight dated 18 February 2020, a psychiatrist. The other from Ms Jacqui Sinclair dated 28 February 2020, a psychologist.

[3] Dr Knight believes, in summary, that [JM] does understand the charges, that he is able to enter a plea and understands the criminal justice system. He does have significant misgivings about his ability to follow the course of the proceedings but is fit to answer relatively minor charges against him if proceeded with in the Youth Court. He has reservations in relation to his participation if the charges are more serious or are more complex proceedings such as a High Court jury trial.

[4] Ms Sinclair does not believe that [JM] would fully understand the implications of pleading guilty or not guilty and does not appreciate adequately the consequences of his offending. She believes that he is unfit to plead.

[5] Unfit to stand trial in relation to a defendant means that:

- (a) A defendant who is unable, due to a mental impairment, conduct defence or to instruct counsel to do so.
- (b) Includes the defendant who is, due to a mental impairment, unable to:
 - (i) Plead.
 - (ii) Adequately understand the nature or purposes or possible consequences of the proceedings.
 - (iii) To communicate adequately with counsel for the purposes of conducting a defence.¹

[JM]'s Background

[6] [JM]'s background is relevant. [JM] has been the subject of earlier reports as to his fitness to plead. He was charged with an aggravated robbery in 2015 and there are two earlier reports before the Court dated 24 December 2015 and 8 April 2016 essentially finding him unfit to plead.

[7] He was assessed under the Full Scale Intelligence Quotient at 61 and his adaptive functioning was impaired and he met the diagnostic criteria for a mild retardation. Basically, the first report that I referred to from Dr Leeuwen and Ms Janson described by virtue of his mild mental retardation, immaturity, oppositional nature, that he was unfit to plead.

[8] The second report writer described the fact that he was distractible, difficult to interview given his low intellectual ability and a history of conduct disorder, that there was substantial data to suggest that he was unfit to plead.

¹ Criminal Procedure (Mentally Impaired Persons) Act 2003, s 4.

[9] Subsequent to those two reports, there was another report from Dr Gardner dated 23 May 2016 pursuant to the finding of unfitness to plead. He referred to the history of substance abuse, the fact that [JM] most likely met the criteria for ADHD, that he did meet the criteria for an intellectual disability pursuant to s 7 Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 and stated that:

In the event of future offending, I would recommend [JM]’s fitness to stand trial is reassessed. As [JM] ages, he is likely to develop a better understanding of Court processes and; therefore, could potentially be considered fit to plead and or stand trial.

[10] Ms Sinclair, in her report, completed a cognitive assessment and a neuropsychological assessment. The results of which are these, the cognitive assessment conducted pursuant to the Wechsler Adult Intelligence Scale assessed him on a Full Scale IQ test as extremely low range with a confidence level of 95, that is at 63. That was in comparison to 61 in the earlier test; therefore, over the preceding four years there has not been much change.

[11] In the neuropsychological assessment, she referred in particular to his executive functioning which is what she has particular concerns about. The D-KEFS Trail Making Test was conducted to assess attention and executive functioning. This assessment identified challenges in [JM]’s overall executive functioning, essentially meaning that there was going to be difficulty for him and disproportionate impairment in flexible thinking and, over and above any other cognitive deficits, which would impact on his ability to problem solve in the spur of the moment likely resulting in him being easily influenced by others.

[12] She also conducted some tests of adaptive functioning and found that the qualitative data showed that he was functioning at a very low level; however, when speaking to him he appeared to be “street smart” and have more insight into his offending behaviour than is apparent from his formal assessment. She was questioned about this during the course of evidence and indicated that that could be due to rote or learned behaviour from his own previous experience in the Court system and his own family circumstances which included having his father in jail. However, based on the formal results, his adaptive functioning was at a well below-average.

[13] Her view was that he had a mental disorder owing to cognitive impairment to a degree that poses a significant risk to himself and others. Dr Knight described him as having several mental impairments including mild retardation and attention deficit hyperactivity disorder.

[14] Ms Sinclair also said that he met the criteria for an intellectual disability as he suffered a mental impairment as was considered by s 4 Criminal Procedure (Mentally Impaired Persons) Act 2003.

[15] Both of the experts gave some consideration to the *Presser* criteria in terms of the *R v Presser*.² Dr Knight also considered the Court of Appeal case of *Nonu v R* which stated when considering the issue of fitness to plead, “A defendant must have the capacity to participate effectively in his or her own trial.”³

[16] Both Dr Knight and Ms Sinclair agreed that [JM] did:

- (a) Understand the nature of charges against him.
- (b) To a degree, understood the concept of different pleas.
- (c) Have a basic understanding of the criminal justice process.

[17] Dr Knight has significant misgivings about his ability to follow the course of proceedings due to his mild intellectual disability and unmedicated ADHD and Ms Sinclair said that whilst he was aware of the nature of the offending and the possible consequences of the offending and did recognise the authority of the Court, he was not unable to understand his role in the proceedings, stating his plan was to do what he had been told to do by his father, just to keep quiet and say “Yes, Your Honour,” whenever the Judge asks him anything.

[18] She said that he lacked maturity and cognitive awareness to be able to either offer a solid defence or to instruct counsel to conduct a defence on his behalf. He said

² *R v Presser* [1958] VR 45.

³ *Nonu v R* [2017] NZCA 170.

to her he would be denying the charges but was not able to explain how he might do this.

[19] Dr Knight said that [JM] was able to participate in limited discussion about sorts of things that could be considered evidence and how it would be tested in a Court of law and had some understanding of how he might defend himself against the charges. He was of the view he could communicate with his lawyer and that he was able to make his own version known to the Court.

[20] His opinion was qualified by the reservation that he was fit to plead to minor charges in the Youth Court but would not be able to effectively participate in charges of a more serious nature in a different forum, for example, High Court jury trial and he made a number of recommendations to assist the process including the appointment of a communications assistant.

Decision

[21] [JM] has been diagnosed with ADHD which is untreated as he will not take medication, a conduct disorder, an intellectual disability. He also has, since he was approximately eight years old, been abusing a variety of substances. It is my view that his current situation differs little from that which was referred to in the reports prepared for the Court in 2016 where he was found unfit to plead.

[22] He does have an apparent knowledge of the Court process and that, in my view, is likely due to his now street-smarts or what he has learnt by rote or the learned behaviour referred to by Ms Sinclair from his own experience, his own living environment and other mediums available to him.

[23] The difficulty in this case is that his executive functioning is challenged and, according to Ms Sinclair, would impact upon his ability to problem solve on the spur of the moment likely resulting in him being easily influenced by others. He does not have the executive functioning to have flexible thinking, enabling him to apply his knowledge to other situations. This becomes extremely problematic, in my view, in the Court process particularly in his ability to answer questions under cross-

examination in the event that he gave evidence and in this case, it is relevant that he says that the police have not got it all right and it appears he intends to defend the charges. It also would be very difficult for him to follow evidence given by others.

[24] According to Ms Sinclair, he does not have the in depth understanding of playing an active role in the Court process. [JM] needs to be able to effectively participate in the Court process. Due to his challenged executive functioning and other disabilities, in my view, he is unable to do so. He cannot conduct a defence or instruct counsel to do so. He is unfit to stand trial.

B M Mackintosh
Youth Court Judge