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**IN THE YOUTH COURT
AT MANUKAU**

**I TE KŌTI TAIOHI
KI MANUKAU**

**CRI-2020-292-000131
[2020] NZYC 354**

**NEW ZEALAND POLICE
Prosecutor**

v

**[MW]
Young Person**

Hearing: 18 May 2020

Appearances: Sergeant P Devane for the Prosecutor
A Ulu for the Young Person

Judgment: 18 May 2020

ORAL JUDGMENT OF JUDGE T V CLARK

[1] [MW] appears before me today in the Manukau Youth Court facing four charges.

[2] One charge relates to a burglary on 5 December 2019. I have received two psychological reports relating to interviews that have taken place between [MW] and two health assessors. The first report was completed by Bridget Fleming, who is a clinical psychologist, and the second report was completed by James Gardiner, who is a psychiatrist.

[3] Even though [MW] was spoken to by both of these health assessors about the charge(s) he faced, for some reason, he was not spoken to about another burglary charge that arose on 22 February 2020. Following the completion of these two reports it is alleged that there was another burglary on 7 May 2020 and there is also a charge of escaping custody.

[4] With regard to all four of these charges, no pleas have been entered and that is properly so because the issue of fitness to plead and fitness to stand trial must be determined first.

[5] I address now the content of the two health assessors' reports, bearing in mind, of course, that [MW] was only spoken to about the burglary on 5 December 2019.

[6] For the sake of completeness, I do not consider that there is any difficulty in me coming to a finding of fitness even and although the health assessors have not spoken to [MW] about the other three charges, two of which are very recent. I say that because I cannot see any utility in seeking an update with regard to the issue of fitness for the more recent charges. I consider that the matters that have been canvassed in the two reports sufficiently cover off the period of time within which the additional charges would have arisen.

[7] With regard to the first report, completed by Ms Fleming, there was some discussion as to [MW]'s mental health background. In general terms, it seems as though [MW] came to attention in around about 2016-2017 when his behaviour at that

stage was of concern. More recently he was admitted on 1 May 2019 and discharged on 20 May 2019 from the Child and Family unit. He had been taken there because of his behaviour. As I understand his background, at that stage he was considered to be psychotic.

[8] Ms Fleming in her report talks about mental health issues but she concentrates a lot on issues of [MW]'s behaviour as well as his cognitive functioning. Unfortunately, due to the mental health issues that [MW] was experiencing when she wrote the report on 24 March 2020, she was unable to fully complete some of the tests that would ordinarily be completed to try to come to a determination as to [MW]'s cognitive functioning. In her report she came to the view that, based upon her observations as well as previous testing completed, [MW] was someone who perhaps suffered from ADHD and who fell into the category of having a mild intellectual disability. The conclusion that she reached in her report was that it could be argued that [MW] had a mental impairment due to a combination of factors and ultimately in she concluded that the Court was likely to find that [MW] was unfit to stand trial.

[9] In the second report, prepared by Dr Gardiner, he focused more on the mental health aspects. His report is dated 1 May 2020. He went over the background that I have already mentioned in relation to [MW]'s contact with mental health services, both in terms of admissions and in the community. He confirmed that [MW] was, some time ago now, made subject to a community treatment order under the Mental Health (Compulsory Assessment and Treatment) Act 1992. He very briefly in his report talked about neurodevelopmental impairment and the possibility that [MW] was suffering from an intellectual disability. He did tend to, in my view at least, focus upon mental health issues and provided a diagnosis of schizophrenia.

[10] In his report Dr Gardiner confirmed that, although [MW]'s understanding of the Court process seemed to have improved since Ms Fleming spoke to him in March of this year (and he would therefore be in a position to enter a plea), because of a combination of mental health and potential cognitive issues, he would be unable to meaningfully participate in the trial process. He determined in conclusion that [MW] was suffering from a mental impairment, more to do with mental health than anything

else. Although he could enter a plea, Dr Gardiner found that it was likely that the Court would find [MW] unfit to stand trial.

[11] I have read through a memorandum filed by the prosecution and it is accepted that [MW] would be unfit to stand trial based upon the reports that I have just mentioned. Today I have also been provided with submissions on behalf of [MW] filed by Mr Ulu, who is his youth advocate. Mr Ulu helpfully goes through a lot of the content in the two reports and he submits that this is a situation where the Court should make a determination that [MW] is unfit to stand trial.

[12] I certainly came to the view, having read through the two sets of submissions and, more importantly, the two health assessors' reports, that [MW] would be unfit to stand trial but there was a lingering question in my mind as to whether or not further time would assist the Court to come to a determination as to exactly why [MW] is unfit.

[13] As I have already said, Ms Fleming concentrated on cognitive and adaptive functioning whereas Dr Gardiner concentrated on mental health issues. I could not really get a clear appreciation, based upon the reports, of exactly what was causing the unfitness, although I accept that [MW] is unfit.

[14] To that end I asked Ms Rixon, who appears today on behalf of forensic services, to make further enquiries of Dr Gardiner to see whether or not there would be any utility in putting this matter off and allowing for [MW] to be more thoroughly assessed over time so that there could be some clarity brought to the issue of unfitness; that is whether it was unfitness based upon his cognitive and adaptive functioning or whether it was unfitness because of mental health or a combination of both, which is a real likelihood in my view.

[15] Ms Rixon spoke with Dr Gardiner, who advised that there would be no utility in delaying today's determination under s 8A of the Criminal Procedure (Mentally Impaired Persons) Act 2003, and for that reason I have made a decision to go ahead and make a formal determination that [MW] is unfit to stand trial.

[16] Of course, the next part of the process then is to deal with [MW]'s involvement in respect of each of these four alleged offences. The prosecution and defence will probably need some additional time to determine amongst themselves as to how they would like the issue of involvement to be dealt with. I have raised very briefly whilst in Court today the prospect that all of the evidence that the prosecution relies upon could be provided to the Court in writing in a bundle, for example, so that a Judge in chambers could then make a determination as to the sufficiency of that evidence insofar as the actus reus is concerned to confirm whether or not the Court is satisfied that [MW] was involved in relation to each of these different charges.

[17] Mr Ulu has told me today that he is yet to receive full disclosure so I will allow some additional time for counsel and the police to liaise as to how they wish the issue of involvement to be dealt with. I am assuming that will be on the papers but I will not push Mr Ulu to make a decision about that today because he has not seen the disclosure. What I am going to do is perhaps timetable the filing of a memorandum from both the defence and the prosecution as to the agreement they have reached with regard to the involvement hearing.

[18] If there is going to need to be an actual hearing involving the taking of evidence and so on, obviously that is a matter that will require a hearing date. If, however, the issue of involvement can be dealt with in chambers on the papers, then my expectation is that there would be an agreed bundle filed with the Court together with that memorandum confirming that both parties are content for the issue to be dealt with in that way.

[19] Once involvement is dealt with one way or the other, a disposition hearing can then be allocated so that recommendations can be made in a report, preferably from Dr Gardiner but perhaps another responsible clinician could also provide that information to the Court to clarify exactly what is required in terms of disposition for [MW]. This may depend on any additional testing and treatment that can be completed in the meantime.

[20] So, for today's purposes the s 8A determination has been made. [MW] is found to be unfit to stand trial and I just need to have a quick word with Ms Rixon to see if

there are any additional orders that the Court must make with regard to the likely transfer of [MW] to a facility in [location A].

[21] I am going to timetable the filing of a joint memorandum and all papers. I will give it another date for mention. No appearance is required by [MW]. That will be to sort out what is happening in terms of a suitable disposition hearing date.

[22] What I have written down is that a s 8A finding has now been made by me and reasons have been given. [MW] is unfit to stand trial. Counsel are to file a memorandum with regard to involvement by 8 June 2020. I have made a note that that may be able to be dealt with on the papers and that once involvement has been dealt with a disposition hearing date will be allocated and so I will just give you a date after 8 June. I have just put here, "For mention on 10 June", but the remand is still under s 238(1)(d). I have made a note of a likely transfer to [a youth inpatient service].

[23] So, [MW], I have made a decision that because of your current circumstances you are not fit to stand trial. The next step is that the Court needs to make a decision about whether you were even involved in this offending. Mr Ulu will talk to the police and we will figure out how that is going to be done. Sometimes there can be a hearing but other times the Judge can just have a look at the documents and make a decision based on the documents. Mr Ulu will be helping the Court with that. We will call matters again on 10 June at 10.15 am but your attendance on that date is excused because it is really just to figure out what we need to do in relation to whether you were involved or not. At the moment I am simply remanding you on the same terms, so you are going to stay where you are for now and Dr Gardiner is going to come and see you in the morning to have a chat to you about your current circumstances. We are done now.

Judge TV Clark
District Court Judge

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