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IN THE YOUTH COURT
AT NAPIER

I TE KŌTI TAIOHI
KI AHURIRI

CRI-2019-241-000053
[2020] NZYC 499

NEW ZEALAND POLICE
Prosecutor

v

[JM]
Young Person

Hearing:	1 October 2020
Appearances:	Constable D Cresswell for Police Mr D Kennedy for the Youth Ms L Wainright for Oranga Tamariki (on care and protection file)
Date of Decision:	7 October 2020

WRITTEN REASONS OF JUDGE PJ CALLINICOS

Introduction

[1] [JM] is a young man who turns 18 years of age in [early] 2021.

[2] He has had a long involvement in the youth justice process, a process which has been dominated by concerns over whether he is possessed of sufficient capacity to partake in proceedings. There have been previous serious charges against [JM], which were resolved by way of him being discharged and for his care to be managed under a s 101 custody order in favour of the Chief Executive of Oranga Tamariki which was made in associated proceedings in the Family Court. He continues to be subject to that order.

[3] There have been many specialist reports obtained in respect of [JM] throughout his pathway through the Youth Court, which have concluded that he was both unfit to stand trial and that he has an intellectual disability. Further detail on those issues will be found in these reasons.

[4] In respect of his current involvement in the Youth Court, he has been responsible for committing various acts which have led to three sets of charges against him.

[5] The first set comprise of 12 charges occurring between 18 October 2019 and 20 February 2020 which are;

- Six charges of use of a document,
- Theft from a car,
- Unlawful interference with a motor vehicle,
- Resisting police,
- Assaulting police,

- Possessing instruments for conversion, and

- Possession of an offensive weapon under the Crimes Act.

[6] The second set of four charges arose on the 22nd of August 2020 being:

- Aggravated assault,

- Possession of instruments for conversion,

- Possession of an offensive weapon under the Crimes Act, and

- Unlawful taking of a motor vehicle.

[7] He was arrested for those matters and granted bail on the 27th of August 2020.

[8] While on bail he then committed three further offences [in early] September 2020 being; assaulting a police officer, intentional damage of a police vehicle and possession of instruments for conversion.

[9] As I will detail, he has progressed through the somewhat complex processes deriving from the Criminal Procedure (Mentally Impaired Persons) Act 2003 (CP(MIP) Act). This led to Her Honour Judge Mackintosh making a determination on the 27th of May 2020 in respect of the first set of charges that [JM] was declared unfit to stand trial. That determination was based upon reports filed by Dr Knight and Ms St Clair.

[10] That determination led to the next step of determining whether the young person had committed the actus reus component of the charges under s 10. His counsel, Mr Kennedy, conceded that the evidence was strong in supporting the conclusion that [JM] had committed the acts underpinning charge. In respect of the subsequent two sets of charges, Mr Kennedy has since conceded that the young person did commit the foundation acts comprising those further charges against him.

[11] Given the findings of unfitness to stand trial and the determination under s 10, the enquiry then moved to one under s 23 of the CP(MIP) Act, which requires the Court to order enquiries as to the most suitable way of dealing with a person such as this young man. In a situation where a person has an intellectual disability, the process requires assessment under Part 3 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (ID(CCR) Act).

[12] For the purpose of that enquiry I directed an assessment, which was conducted by a clinical psychologist, Mr Peter Robertson, whose report is attached to an affidavit sworn by him which in turn is attached to a letter from Mr Gregory Sayer, a Compulsory Care Co-ordinator appointed under s 140 of the ID(CCR) Act for the central region.

[13] The consequence of those inquiries was that [JM] appeared before me on 1 October 2020. I heard from Mr Kennedy who made it plain that his client did not wish to undergo the various assessments for fear of being placed in "an institution". This led [JM] to abscond on occasions, sometimes with the support of his whanau, who were likewise afraid of the potential for their young man to be placed in some form of containment. Mr Kennedy confirmed that [JM] was not greatly interested in any steps to address his mental health needs, that he wants to obtain a job and not be involved with such processes.

[14] At the conclusion of the hearing I indicated that I would be making an order pursuant to s 25(1)(b) of the CP(MIP) Act that [JM] be ordered to be cared for as a care recipient under the provisions of the ID(CCR) Act in terms of the care and rehabilitation plan submitted before the Court. Given [JM]'s compromised level of functioning and his obvious distress at this sad situation, I indicated that rather than providing detailed reasons in Court, I would provide them in writing. This decision records those reasons.

[15] There have been preliminary reports in the current set of proceedings, together with detailed reports filed in respect of earlier charges against [JM]. These reports overwhelmingly support the conclusion that he is suffering from an intellectual disability.

[16] On 15 September 2020 Mr Sayer filed a variety of documents which comprised the assessment directed under Part 3 of the CP(MIP) Act. This included the documentation which is required to meet the requirements of a s 23 order, being;

(i) The specialist assessors report and affidavit dated 14 September 2020, they being authored by Mr Robertson,

(ii) A copy of the s 23 CP(MIP) Act order for enquiry dated 25 June 2020,

(iii) A full needs assessment dated 3 September 2020 produced by the Forensics Co-Ordination Service, and

(iv) A care and rehabilitation plan dated 2 September 2020.

[17] Mr Robertson recommended that [JM] be made as secure care recipient for a period of two years. I summarise the salient points of his report as follows;

(i) [JM] was found unfit to stand trial for the initial set of charges, his lack of fitness deriving from his intellectual disability.

(ii) [JM] has a full-scale IQ identified as being 63 which, together with adaptive functioning reconfirms intellectual disability diagnosis previously undertaken. As such, [JM] could become a care recipient under the ID(CCR) Act.

(iii) The young person has a lifetime exposure to dysfunction including such matters as;

a. Substance abuse;

b. Exposure to violence;

c. Gang culture; and

d. Criminal activities.

The report writer states that these have become established features of [JM]'s lifestyle.

(iv) For any positive change to occur, [JM] needs to gain skills and have opportunities to establish a lifestyle in which his needs are met without the recourse to offending which has dominated his recent life. Mr Robertson states that the issue becomes one as to whether an order under the ID(CCR) Act is the most appropriate option to achieve such a goal.

(v) By being made a care recipient, [JM] would be compelled to reside in a designated facility in [another location], where he would be monitored all the time and participate in rehabilitative activities. He would then be reintegrated into the community, with disability and other supports in place to assist.

(vi) As to why such an option is the only appropriate one, Mr Robertson acknowledges the difficulty for [JM] being separated from his family and being subjected to both compulsory placement and treatment. However, he opines that without a care order, [JM] will be likely to continue his offending, as he has done to date while on bail.

(vii) The report seeks a two-year care recipient period.

[18] The full assessment traverses the history of the report process to date and [JM]'s various steps to avoid participation in the assessment. The report confirms the instructions conveyed by Mr Kennedy that [JM] does not want to be a care recipient. He has told the assessor that he will not co-operate with any plan and that he wishes to remain in the local area and obtain a job in the forestry. When he was asked how his continual drug use would make obtaining such a job difficult, he responded that he

would refrain from using cannabis until he obtained a clear test, would then obtain his employment and then resume his use of drugs.

[19] The report details many findings of the earlier reports which determine that [JM]'s intellectual functioning is seriously compromised.

[20] In terms of his offending, [JM] acknowledged that he has learnt how to break into cars and steal them, he claims that he was the leader in such offending rather than a follower, that he abused a female driver who was involved in a motor incident with him and did so while he was holding a baseball bat. He believed that the female driver was responsible for the collision. He acknowledges that he carried the bat to protect himself. [JM] sees that a solution to his offending is that he should not get caught. He was unable to empathise with his victims, had little insight to the dangers of carrying or using weapons. During another offence he tried to take a Moped off the owner while threatening the person with a hammer. He committed that act simply because he required a vehicle so he could get home.

[21] The report summarises a variety of earlier specialist reports detailing [JM]'s disability and its relationship with his offending. It records how he previously was not made a care recipient under the ID(CCR) Act, because his issues were believed to have been capable of being managed under the Oranga Tamariki Act s 101 Custody Order and Plan. That point is relevant when the Court is required to assess different levels of restrictive options available to it.

[22] The report turned to the issues of what programmes [JM] has partaken into in an attempt to modify his behaviours. From the report, it appears that there have been a variety of initiatives since as long ago as 2013 when he attended a residential school in [another city]. He returned to [his current location] in 2017 and was involved in the Youth Horizons Teaching Home. He has also been involved in [two other programmes]. In March 2019 he attended [a kaupapa Māori youth service], but was discharged from that service due to his behaviour. He has also participated in [another kaupapa Maori service] educational programme, and is said to have engaged well.

[23] Mr Robertson observed that despite attendances at so many therapeutic initiatives, most programmes are unable to provide [JM] with the level of support and skills that he requires if he is to effect positive change.

[24] The report made comment upon the whanau. [JM] is close to his mother, siblings and maternal grandmother and they all wish the best for him. However, [JM] is resistant to attempts by his mother to give his positive direction. There is significant and negative influence from his father, who is deeply immersed in gang culture and criminal lifestyle.

[25] [JM] is also a long-time user of substances. He has used a wide variety of substances since a very young age and continues to be a daily user of cannabis and a regular user of alcohol. He has no desire or capacity to modify his views of the negative consequences of such substance abuse.

[26] Mr Robertson undertook a risk of reoffending assessment, utilising a tool designed for 12-18 year old youths. He reported that [JM] scored very highly and placed him in the very high risk category for re-offending. He expressed the opinion that [JM]'s low intellectual functioning is likely to increase this risk and limit his opportunities to participate in society. The risk assessment referred to a number of factors evident for [JM], which may be paraphrased as follows:

- Exposure to gang culture through family.
- A developing anti-social personality.
- Continual offending, even during periods when he was on bail.
- Increasing tendency for aggression during offending acts.
- His attitude is strongly orientated towards offending, with little insight or motivation to change.
- He has a large number of anti-social peers with whom he associates.

- He is a regular user of alcohol and drugs.

- He has had poor engagement in most of the educational or vocational training and has abandoned many programmes previously.

- He is not involved in any structured leisure activities. Instead, he gains more sense of reward of consuming substances, from offending and from associating with gangsters and other at risk youths.

[27] In terms of the type of re-offending potential, Mr Robertson expresses the opinion that it will likely be dishonesty offences with associated assaults against any persons involved in the incidents whom [JM] perceives are obstructing his goals, or he sees as disrespecting him.

[28] Mr Robertson considered the issue of whether an order under the ID(CCR) Act is the most appropriate option to achieving positive change. He observed that the Mental Health Act criteria would unlikely be met in [JM]'s case in terms of the definition of a mental disorder. In addition, he stated that the current level of risk posed by [JM] would not meet the criteria required to be made a special patient under the Mental Health Act.

[29] In respect of whether [JM] could be a special care recipient under s 24(2)(b) of the CP(MIP) Act, Mr Robertson was not of the opinion that [JM]'s situation meets that higher level of intervention.

[30] He turned to the consideration of whether, under s 25(1)(b) of CP(MIP) Act, [JM] has a sufficient level of intellectual disability to become a care recipient under the Intellectual Disability Act. As noted, such an order would compel [JM] to reside in a designated facility in [another location], be monitored and be required to participate in rehabilitation activities with the goal of eventual reintegration back into the community. That was the first option. An alternative option would be that [JM] could be discharged by the Court to reside with his family and access supports in the community, while living in the community. It cannot be disputed that the second option is the least restrictive one. However, that option has effectively already been

attempted when [JM] was last discharged by this Court and was left to the care and protection processes afforded by the custody order in favour of Oranga Tamariki under s 101 of the Oranga Tamariki Act. That plan and order have shown to be ineffective in achieving even a remote positive change. Despite that option having previously been utilised, [JM] has continued to act in a manner which has led to a further 19 offences being committed by him, with increasing levels of risk posed to others.

[31] It follows that Mr Robertson was of the view that the first option, namely an order under s 25 CP(MIP) Act was required and has provided the Court with a care and rehabilitation plan to implement such an order.

Decision

[32] In order for an order to be made under s 25(3) as recommended, the Court must be satisfied on the evidence of one or more health assessors that;

(i) The person has an intellectual disability. That has been a consistent opinion of all assessors throughout [JM]'s pathway through the Youth Court to date.

(ii) That the person has been assessed under Part 3 of the Intellectual Disability Act. That assessment has been completed and is reflected by Mr Robertson's report.

(iii) The person will receive care under a care programme. A care programme has been provided.

[33] Given the long history of [JM]'s journey through the Youth Court processes, the many programmes and courses that he has participated in and taking into account the many and detailed reports about his level of functioning, it is clear that attempts at the least restrictive option, namely management of his care under a s 101 custody order, has proven woefully insufficient to effect any change for the better in him. The point has been reached where the only appropriate option is to order that he be made

a care recipient in the hope that the care and rehabilitation plan will effect the changes that all other initiatives have failed to achieve. No other viable option is available.

[34] Put another way, unless the step of making [JM] a care recipient is adopted and proves successful as a therapeutic intervention, then his future pathway seems destined to move to one of being a special care recipient, as continuing offending is likely to worsen. The risk assessment provides tangible support for such a conclusion. In assessing the limited options, I have had regard to youth justice principles in the Oranga Tamariki Act. Sadly, the care and protection and youth justice options have not affected any identifiable reduction in [JM]'s increasingly concerning offending behaviours.

[35] For the reasons above, I made the order under s 25(1)(b) of the CP (MIP) Act that [JM] be made a care recipient under the Intellectual Disability Act in accordance with the care and rehabilitation plan submitted.

Associated Care and Protection Proceeding

[36] At the hearing I also considered the s 135 review of the plan in respect of [JM] deriving from the s 101 custody order which he is subject to.

[37] The ongoing care and protection plan required to support the s 101 custody order was necessarily dependent upon the outcome of the Youth Court process. Given this decision of the Youth Court, the current care and protection plan is now, by virtue of the CP(MIP) Act order, overtaken.

[38] Bearing in mind [JM]'s age and the reality that he will now be cared for under the CP(MIP) Act order, Oranga Tamariki will file an amended care and protection plan which simply references that [JM]'s care and protection needs will be addressed pursuant to the CP(MIP) Act order and rehabilitation plan thereunder. As noted, as [JM] turns 18 years of age in [early] 2021, the s 101 order will expire at that time. No further review of that plan will be required.

[39] The registrar of the Family Court should formally remit the file to a Judge for consideration of that amended plan when received.

Delivered at 1pm 7 October 2020

P J Callinicos
Youth Court Judge