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IN THE YOUTH COURT
AT NAPIER

I TE KŌTI TAIOHI
KI AHURIRI

CRI 2019-241-000041
[2020] NZYC 178

NEW ZEALAND POLICE
Prosecutor

v

[CA]
Young Person

Hearing: 2 April 2020

Appearances: Ms A V Bryant for Crown
Mr S Jefferson as Youth Advocate

Date of Decision: 15 April 2020

RESERVE DECISION OF JUDGE P J CALLINICOS
[Section 10 Inquiry]

Introduction

[1] This is a decision issuing after a submissions only hearing set pursuant to s 10 Criminal Procedure (Mentally Impaired Persons) Act 2003 (CPMIPA) to inquire into the involvement of the young person, [CA], in the offence for which he is charged namely, sexual violation by unlawful sexual connection; s 128(1)(b) and 128B Crimes Act 1961.

[2] It is alleged that on 27 April 2019 he committed this offence by way of connection of his lips on the penis of a five-year-old victim. [CA] was aged thirteen years at that time, meaning he was a child at the time. As he is now fourteen years of age I will also refer to him as "the young person".

[3] The charge was laid on 25 September 2019 and in the six months elapsing, [CA] has been the subject of two specialist reports undertaken pursuant to s 333 Oranga Tamariki Act; a psychological report completed by Ms Jacqui St Clair on 18 November 2019 and a psychiatric assessment by Dr James Knight dated 16 December 2019 (the formal reports).

[4] There are other reports which have been provided to the Court, including a psychological evaluation of [CA] completed by the Child, Adolescent and Family Service (CAFS) on 12 April 2018 and reports from the specialist sexual counselling service, Wellstop in September 2019. The Court has also been provided with a progress report of [residence deleted], a specialist residential sexual offenders treatment provider, which has been providing therapeutic treatment to him since 9 December 2019.

[5] For the purposes of the s 10 inquiry, my principal reference point has been to the formal reports obtained under s 333.

Process - General

[6] In situations where there are concerns regarding the capacity of persons charged with offences to either stand trial or understand the nature and effect of their actions underpinning any charge, there is a progressive process deriving mainly from the CPMIPA to determine such issues.

[7] The first step derives from s 8A, being an assessment as to whether a defendant is mentally impaired. In undertaking that assessment, the Court must receive the evidence of two health assessors. If the Court is satisfied on the evidence of the two health assessors that the defendant is mentally impaired, it must record a finding to that effect. The Court must then give each party an opportunity to be heard and to present evidence as to whether or not the defendant is "unfit to stand trial", determine whether or not the defendant is unfit to stand trial and record a finding on that issue. The standard of proof required as to fitness to stand trial is on the balance of probabilities.

[8] In any situation where the Court determines a defendant is fit to stand trial, then the process continues in the normal way. However, if the Court determines that the defendant is unfit to stand trial, then it must enquire into the defendant's involvement in the offence pursuant to the provisions in sections 10, 11 or 12, as the case may require. In turn, s 10 moves to an inquiry as to whether the evidence against a defendant, again assessed on the balance of probabilities, is sufficient to establish that the defendant caused the act or omission that forms the basis of the offence for which that person is charged.

[9] Section 10 permits the Court to consider any formal statements have been filed, any oral evidence taken or any other evidence that is submitted by the prosecution or defence. This inquiry becomes somewhat convoluted in situations, such as that confronting [CA], where the actus reus involves consideration of mental components, for instance where elements of consent or understanding of right versus wrong forms part of the charge.

[10] Section 13 proceeds to detail the options available to the Court consequent upon the determination of the section 10 issue. If the Court is not satisfied that the

defendant caused the act or omission that forms the basis of the offence charged, then the charge must be dismissed against the defendant and any finding previously made that the defendant is unfit to stand trial is thereby deemed, for all legal purposes, to have been quashed. In this situation, the Court must not deal with the defendant under subpart three of the Act which governs determination of how a defendant found unfit to stand trial ought to be dealt with.

[11] Conversely, if the Court determines that the dependent did cause the act founding the charge, the Court must move to deal with the defendant under subpart 3.

Process in respect of Young Person

[12] On [CA]'s first appearance on this charge, it was apparent he had a history of psychiatric or psychological impediments to his functioning. He has been in the custody of the Chief Executive of Oranga Tamariki (OTMC) pursuant to s 101 of the Oranga Tamariki Act due to his problematic issues and behaviours. The Ministry held a considerable amount of information as to the significant issues impacting his functioning. The psychological report undertaken by CAFS in April 2018 opined that he had a significant history of adverse life experiences and met criteria for a variety of disorders or disabilities, including; Fetal Alcohol Spectrum Disorder (FASD), Mild Intellectual Disability, Attention Deficit Hyperactivity Disorder (ADHD) and Severe Speech Language Disorder.

[13] The Severe Speech and Language Disorder takes on significance given the prosecution seeks to have considerable weight placed on statements made by [CA] following the alleged offence. The CAFS assessment indicated that this young person's expressive and receptive language abilities fell into the extremely low range. Similar conclusions were reached by Dr Knight and Ms St Clair, both of whom expressed the view [CA] would be unable to participate in the justice process without a communication/language assistant.

[14] Consequent upon [CA] entering the Youth Court, the concerns raised by OTMC and his youth advocate led to the obtaining of the reports under s 333. Following receipt of those reports, it was apparent both Dr Knight and Ms St Clair confirmed the earlier opinion from CAFS. They expressed their expert opinions that

[CA] was mentally impaired to an extent that significantly impacted his fitness to stand trial. Accordingly, I directed a hearing under s 8A of the Act, it being accepted by the young person's Advocate and by the Crown that the evidence could be by way of affidavit.

[15] At the s 8A hearing conducted on 20 February 2020, I determined on the balance of probabilities that [CA] was mentally impaired and unfit to stand trial for the purposes of s 8A. I did so after giving each party an opportunity to be heard. In accordance with s 8A(5), I directed matters then proceed to the inquiry required under s 10. I turn to present the determinations arising from that inquiry.

Section 10 Inquiry

Introduction

[16] As prefaced, the s 10 inquiry requires the Court to decide whether it is satisfied on the balance of probabilities, that the evidence against the person charged is sufficient to establish they caused the act or omission that forms the basis of the offence so charged.

The Evidence against [CA]

[17] The evidence tendered by the Crown included;

(a) an affidavit of [Detective A], the Police officer in charge of the proceeding,

(b) a statement attached to that affidavit obtained by the police pursuant to s 82 Criminal Procedure Act from the mother of the complainant,

(c) a transcript of the DVD evidential interview of the five-year-old complainant to the current charge,

(d) a transcript of the DVD interview of [CA].

[18] In the affidavit of [Detective A] she referred to statements from a thirteen-year-old girl as to alleged inappropriate behaviours of [CA] towards her and further hearsay statements of seven-year-old and eight-year-old girls who made similar allegations. Significantly, no statements (whether written or recorded, formal or informal) from those purported complainants were provided to me. The Crown submissions sought to rely upon those hearsay comments as propensity evidence.

[19] I decline to place any weight upon those distant hearsay comments. As noted, I was not provided with any written or recorded statements made by those persons, whether of an informal or formal nature. I was not provided any information as to whether the makers of those statements were in fact unavailable to provide a statement more reliable than that conveyed by [Detective A]. In general terms only, I was concerned as to the potential significant prejudice that might be caused to this young person if such statements were to be admitted and weight were to be placed upon them. This is especially so in a situation where the Court has been asked to determine matters effectively "on the papers", without any opportunity of testing the Detective upon matters such as how the statements were taken and whether there were any formal records made of them.

[20] The main evidentiary focus of my inquiry derives from the recorded interviews and the s 333 reports to which I have referred.

The Physical Acts

[21] In terms of the issue as to whether [CA] physically caused the act of connecting his lips on the victim's penis, Mr Jefferson responsibly conceded that the Court could be satisfied on the balance of probabilities that [CA] did the acts that form the basis of the charge.

The Mental Element

[22] However, both Mr Jefferson and Ms Bryant submitted there was an issue concerning the mental element which is intrinsically linked to the current charge. I was referred to decisions of the High Court and the Court of Appeal concerning the approach to what was then a s 9 inquiry in the context of certain sexual offences.

[23] In *R v Wira*[1] Keane J followed the approach adopted by the Court of Appeal in *R v Moni*[2] which held;

> [81] In the present case, there is no dispute that Mr Te Moni caused the physical act of penetration. There is, however, a dispute about consent. It cannot be the case that all that needs to be established for the purposes of s 9 [now s 10] is penetration, because that begs the issue as to whether the act was lawful or unlawful. Non-consensual penetration is qualitatively different from consensual penetration: they are different acts. For the purposes of the present case, we consider that the determination under s 9 must be whether non-consensual penetration took place.

[24] In *R v R* Winkelmann J expressly referred to *Te Moni* and considered that something more than proof only of the physical acts would be required in a case of sexual violation by rape.[3]

[25] Ms Bryant submits that those decisions support the view that the finding for the Court ought to be whether it is satisfied on the balance of probabilities that the young person committed a non-consensual sexual connection. Mr Jefferson adopts a similar approach. Accordingly, whilst the wording of s 9 appears to limit the inquiry to the actus reus, the authorities show that consideration of mental elements sometimes becomes necessary.

Doli Incapax – s 22 Crimes Act

[26] In addition, both counsel submitted that I must consider s 22 Crimes Act 1961, being the codification of the doctrine known as Doli Incapax, namely that no child between the age of 10 but under the age of 14 years shall be convicted of an offence committed at that age, unless he or she knew either that the act or omission was wrong or that it was contrary to law. Application of that doctrine involves consideration of similar factors relevant to mens rea as the authorities to which I have referred indicate I must determine for the purposes of s 10 inquiry.

[27] I was referred to the Youth Court decision of Judge Recordon in *Police v HJ* [4], in which he held that although the wording of s 9 limited the inquiry to the actus reus,

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[1] *R v Wira* [2016] NZHC 869.
[2] *R v Moni* [2009] NZCA 560, at [81].
[3] *R v R* [2015] NZHC 783 at [7].
[4] *Police v HJ* [2018] NZYC 286.

some authorities held to the view that the prosecution must rebut the presumption of doli incapax within the s 9/ 10 hearing. He held that doli incapax should be addressed at the s 10 stage.

[28] Although the point is not pivotal to the outcome of this hearing, I hold a different view than His Honour. Given the primary task for the Court is to determine the s 10 issue, the inquiry should properly be undertaken by reference to s 10 alone, and the considerations of doli incapax would only arise if the Court were first to find the defendant had caused the act or acts underpinning the charge and, perhaps more significantly, in a situation where a conviction was actually a possible outcome. The approach deriving from *Police v HJ* conflates the two provisions, yet they have distinct purposes and in different situations.

[29] The single purpose of s 10 is to consider whether a defendant caused the actus reus element (which may in the words of *Te Moni* incorporate or imply a specific mental element[5]) in order to determine 'did the defendant do it' or not. However, the sole purpose of s 22 Crimes Act is whether or not persons of a certain age ought to be convicted of an offence, and the criteria for such. Section 10 is a substantive inquiry into the issue of whether an act or omission was committed, whereas s 22 is an assessment of outcome flowing after a substantive assessment of responsibility. Those are different purposes, albeit involving consideration of similar factors and assessed at different stages of the justice process.

[30] In addition, the central purpose of ss 10, 13 and subpart 3 of the CPMIP Act is to determine how Courts should deal with defendants who are found to be unfit to stand trial. As indicated[6], for a s 10 inquiry to occur, a Court must first have determined under s 8A that the given defendant is unfit. In the subsequent s 10 inquiry, if the Court is not satisfied the person committed the requisite act then the charge is to be dismissed; conviction is not an option. Conversely, where a Court determines the act was committed by a person already deemed unfit to stand trial, then matters move to disposition under subpart 3. That subpart provides[7] options of detention as a special

[5] n 2 above, at [77].
[6] Above [6] to [11].
[7] Criminal Procedure (Mentally Impaired Persons) Act 2003, ss 24 and 25.

patient under the Mental Health (Compulsory Assessment and Treatment) Act 1992 or as a special care recipient under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003. Options of conviction do not arise under CPMIP Act for the very reason the defendant is unfit.

[31] Accordingly, where a defendant such as [CA] has been found unfit to stand trial then, regardless of the outcome of the actus reus assessment, they cannot be convicted. Such being the case, s 22 Crimes Act does not appear to me to have relevance to the s 10 inquiry. I have approached the assessment by concentrating upon the criteria in s 10 alone.

Did this Young Person have requisite Mental Element?

[32] The Crown submit the Court can determine on the balance of probabilities that [CA] knew that the physical act committed by him was wrong and that such conclusion may be drawn from the following three acts by him;

(a) the physical act occurred in his bedroom, in circumstances where he was prohibited from going with other children,

(b) [CA]'s immediate reaction after the complainant went to his mother was to tell the complainant's mother and his foster mother that the complainant's complaint had been read from a Scrabble board and, when it was pointed out to [CA] that the complainant could not read, he then denied the act altogether,

(c) during the interview with the Police, when confronted with questions regarding the incident, [CA] responded by saying; "I'll get my arse kicked when I, when this gets (inaudible)".

[33] In addition to those circumstances, I note from the Police interview of [CA], conducted some five months after the alleged offence, that very soon after being given his rights and upon being asked what he was doing with the seven and eight year old complainants (namely, the children in respect of whom no statements were provided), [CA] responded; "um, I was inappropriately touching them and that".

[34] In respect of these circumstances relied upon by the Crown and [CA]'s comment about inappropriate touching, I present the following findings.

[35] First, I do not regard it as evidence that [CA] recognised his actions were wrong or unlawful simply because the incident occurred in his bedroom, being a place from which she was prohibited from going with other children. While it may be the case that he took the complainant into that room knowing that to do so was not permitted, it is drawing a considerably long bow to conclude that such an action could be proof that he appreciated that the touching was morally wrong and unlawful,

[36] In respect of [CA]'s immediate reaction to explain away the complainant's allegation and to deny that anything happened, extreme caution is required when assessing the behaviours of a child, especially one with his considerable range of mental and psychological limitations. The temporal focus point of s 10 is to assess mental awareness of the underlying act at the time when it occurred, as opposed to [CA]'s later actions or comments. In her psychological report, Ms St Clair recorded that [CA] reported how he was told by "everybody, all the time" to stop his alleged harmful sexual behaviour and that he had been told very often that his behaviour was wrong. It cannot be overlooked that this troubled young person has been told by many people, on many occasions, that his behaviours are wrong or "inappropriate" and is likely to sense when adults are concerned about his behaviours. However, sensing disapproval is a different thing from knowing that what he did may be wrong.

[37] Accordingly, there is a very high risk that in a situation where [CA] gleans that adults are unhappy with his behaviours, he is able to predict their reaction to him and respond accordingly to avoid repercussion. His responses are most likely aimed to reduce repercussions, rather than indicating that he necessarily understands at the time of his actions that such actions were wrong or unlawful.

[38] It is also significant that Ms St Clair observed that it was difficult for [CA] to remember his mental state at the time of the offending and that he has recorded memory difficulties in any event. Given this deficit, it would be very unsafe to place much weight upon what he may have stated in an interview some 5 months after the event in question.

[39] This facet is also relevant to the Crown's submission that [CA]'s comment that he would get his "arse kicked" for his actions amounts to proof he actually understood his actions at the time of the alleged offence were wrong. Such comment arose five months after the alleged incident and after he had been the subject of significant adult discussion from the complainant's mother, in all probability from his foster mother, from social workers, from Wellstop counsellors (having had some 5-6 years of counselling) and in interviews by Police Officers where he was given has rights and told that anything he might say could be used in Court. Given his significant exposure to regular and repeated comments that his behaviours are wrong, it is unsurprising that he responded with such an answer. He knew he was in trouble, but that does not mean he knew the act was wrong at the time it was committed.

[40] Ms St Clair reported that when she was trying to ascertain whether the [CA] understood what was meant by the word plead, he believed that if he admitted to the offending he might 'go to [the residence]'. The fact this troubled young person knew that he might be sent to "[the residence]" (which is the term social workers and therapists generally use when referring to [the specialist residence]) indicates that he must have been involved in discussions about such being a possible outcome. He could not have thought of that possibility or that term without being exposed to adult comments. That such discussions occurred with this child in the midst of an investigation is of concern to me.

[41] Overall, when one takes into account the expert opinions of a psychiatrist and a psychologist as to [CA]'s limited functioning, and the pattern of him being told he is behaving badly, I determine on the balance of probabilities that his answers were more likely the product of an awareness that many people were unhappy with him and the consequences of what they perceived to be his wrongdoing. His responses are more related to a perception of consequence, than anything reflecting an appreciation of the wrongfulness of the incident founding the charge.

[42] In terms of [CA]'s comment in the Police interview of him that he was "inappropriately touching [the young girls]…", I am concerned that [CA]'s comment reflects more the implanting within him of adult disapproval of his behaviours than a comment reflecting an understanding that his behaviours were wrong. It appears the

incident in question occurred a year before the interview of [CA] which, given the experts' reservations about the quality of his memory, heightens my concerns about the cogency of things said by him in that interview. In addition, the use of the word "inappropriate" appears to be well beyond the likely scope of his language and comprehension. As noted, Ms St Clair and the earlier CAFS reports commented upon his severe speech and language disorder. I find it most unlikely [CA] would have known for himself what "inappropriate" meant.

[43] In her report, Ms St Clair commented that [CA]'s embarrassment seemed to be owing to having been caught out or having to talk to professionals about the alleged sexualized behaviour. This observation reinforces my concern about the dangers arising by reading his responses to questions as being an acceptance of criminal responsibility, as opposed to mere reaction to his sense that he was, by dint of the situation confronting him, in some sort of trouble.

[44] The report of Dr Knight commented upon how his attempts to prepare [CA] for the psychiatric report took much longer than it would usually take him with other defendants to the point where, at the end of his conversation, Dr Knight was not entirely sure that [CA] fully understood what he was consenting to. He recorded his significant misgivings regarding [CA]'s ability to follow the course of any proceedings and referred to his difficulty in processing verbal information, amongst a range of other issues he possesses. Dr Knight had significant concerns as to the extent to which [CA] knew that his actions were morally wrong and unlawful at the time when he committed the offence.

[45] Ms St Clair expressed similar serious reservations regarding [CA]'s limited communication skills. Like Dr Knight, she too opined that he would require the assistance of a language or communication assistant to partake in any proceedings. That raises concern as to what reliance could be placed upon much of what [CA] said within the formal Police interview. He had no independent person to assist him in understanding such complex matters, especially for a thirteen-year-old with a serious range of intellectual deficits who is being examined by adults. He had no specialist communication assistant present. Although the Police interviewer presented [CA] with his lawful rights, having regard to the s 333 reports and abundant evidence before

me, it is difficult to conclude he would have understood much at all of what was being said to him.

[46] Although the point was not argued before me, this interview process raises concerns as to how the interview was structured and undertaken in a situation where such a young person, with such profound issues as to functioning, is interviewed on matters carrying such far-reaching consequences. There was a significant body of information held by Oranga Tamariki about [CA]'s range of serious deficits and yet he had no legal advocate, no support person and no communication assistant present. The social worker cannot be regarded as independent.

The Expert Opinion on Mental Component

[47] Both Dr Knight and Ms St Clair addressed the issue of whether [CA] is likely to have an understanding as to whether his actions were morally wrong or unlawful. Neither party required to examine either report writer. Hence, I assess their respective reports 'on the papers' to determine on the balance of probabilities whether or not [CA] possessed adequate understanding.

[48] I summarise the key points of their opinions on that specific issue as follows;

(a) Ms St Clair expressed the opinion that [CA] has a functioning at a maturity level equivalent to an 8-9 year old. His foster mother holds a similar view. Neither counsel disputes that such an assessment is likely to be accurate,

(b) She observed, with some concern, that [CA] believes sexual interaction is one method that children make friends. She opined that such comment highlights his lack of social skills, lack of insight into the seriousness of his offending and lack of malicious intent,

(c) His awareness of the "naughtiness of his actions is limited to the fact he knows he should not do it. She stated that [CA] has "clearly not yet mastered the internal moral maturity to manage his own urges that might be expected of a 13 year old",

(d) Ms St Clair's conclusion was that [CA] was not consistently able to choose right from wrong with regard to his offending behaviour, a view shared by his caregiver and the Wellstop therapists who have been working with him for over a year,

(e) Given she assessed that [CA] functions at a maturity level equivalent to an average 8 to 9 year old, it would invoke the 'condition of Doli Incapax',

(f) In undertaking his assessments, Dr Knight had read Ms St Clair's report. Like Ms St Clair, he held concerns regarding the extent to which [CA] knew that his actions were morally wrong and unlawful at the time he allegedly committed them.

Decision

[49] In summary, there is a wealth of evidence derived from the range of material presented, to support the conclusion on the balance of probabilities that;

(a) [CA] did cause the act that forms the basis of the offence for which he is charged (the actus reus component),

(b) At the time of the alleged offence, [CA] did not have sufficient capacity to understand that has physical actions were morally wrong or unlawful (the mental element).

[50] Accordingly, in terms of s 10(2) I am not satisfied this young person caused the act which forms the basis of the charge he faces. Consequent upon those pivotal s 10 findings and pursuant to s 13 CPMIP Act, I determine that;

(a) the charge against [CA] must be dismissed; s 13(2)(a), and

(b) the previous finding by me that [CA] is unfit to stand trial is deemed, for all legal purposes, to be quashed (s 13(2)(b)), and

(c) I record that the Court must not proceed to deal with the young person pursuant to sub part 3 of the Act; s 13(2)(c).

[51] The consequence of those determinations is that the Youth Court prosecution is concluded and the charge dismissed. I understand that [CA]'s care and control will continue to be managed pursuant to the powers and duties reposed in the Chief Executive of Oranga Tamariki under the s 101 Custody Order held by it.

[52] A copy of this decision may be made available to the Care and Protection social worker at Oranga Tamariki, to Dr Knight and Ms St Clair. If required by them, Oranga Tamariki may provide a copy of the decision to the relevant personnel at [the specialist residence] where [CA] is receiving treatment.

Delivered at 10.45 am this 15th day of April 2020

P J Callinicos
Youth Court Judge