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IN THE YOUTH COURT
AT NEW PLYMOUTH

I TE KŌTI TAIOHI
KI NGĀMOTU

CRI-2019-243-000009
[2020] NZYC 34

THE QUEEN
Prosecutor

v

[AU]
Young Person

Hearing:	21 January 2020
Appearances:	J Marnovich for the Crown K Pascoe for the Young Person
Judgment:	21 January 2020

ORAL JUDGMENT OF JUDGE H M TAUMAUNU

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[1] [AU] appears before me today in respect of a s 8A determination under the Criminal Procedure (Mentally Impaired Persons) Act 2003. There are three charges before the Court that are applicable to this determination. They are contained in a Crown charge notice and they allege one charge of sexual conduct with a child under 12 and two charges of sexual violation by unlawful sexual connection. Those three charges that are contained in the Crown charge notice relate to alleged offending against the same complainant. I will go into some detail later on in these comments about the actual allegations; however, for present purposes I will give some background at this stage.

[2] [AU] was aged 15 at the time of the alleged offending and due to the serious nature of the charges [AU] has been remanded in custody at [a Youth Justice residence] on and off for a long period of time since s 238(1)(d) Oranga Tamariki Act 1989. During [AU]'s time with the residence, there have been several concerns raised about his behaviour and mental fitness and as a result the Court ordered a psychological report pursuant to s 333 Oranga Tamariki Act and that initial report was produced by Dr McGinn.

[3] On 5 August, [AU]'s case was called in the Youth Court and Judge Barkle, having read the s 333 report provided by Dr McGinn, ordered a hearing to determine [AU]'s fitness to stand trial and also ordered a second health assessor's report which was completed by Dr Svoboda.

[4] As far as the law is concerned, the Criminal Procedure (Mentally Impaired Persons) Act allows a Judge to make a determination that a person is mentally impaired and, if so, conclude that he or she is unfit to stand trial. A Court may make a finding that a defendant is unfit to stand trial at any stage after the commencement of the proceedings and until all the evidence is concluded. A determination of unfitness is now governed by s 8A which states that:

> (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.

[5] Dr McGinn's first report was completed on 8 July 2019. Dr Svoboda's report was produced on 21 August 2019. Both reports have provided extensive discussions on [AU]'s background which has helped to provide a holistic view of his development and behaviour.

[6] Dr McGinn met with [AU] for six hours at [the Youth Justice residence] on [date deleted] June 2019. Dr McGinn assessed [AU] according to the revised Canadian FASD guidelines used in New Zealand since 2016. Dr McGinn found [AU] to show impairments in the brain domains of cognition, impaired verbal comprehension and huge discrepancies in abilities, adaptive function, daily living skills and social function below 99.9% of his age group, attention, ADHD tested, on medication, and executive function dysregulated, disorganised, rigid, cannot reason, cannot adapt and switch between demands. [AU] was also assigned the emotion regulation domain due to his longstanding history of severe anger outburst and ongoing irritability.

[7] Dr McGinn provided a provisional diagnosis of foetal alcohol syndrome disorder (FASD) without sentinel facial features pending a paediatric review to rule out other disorders which may have caused [AU]'s wide-ranging areas of brain

impairment found on testing. Dr McGinn also recommended a psychiatric review and treatment as [AU] was displaying suspicious thinking and had a history of self-harm.

[8] He was highly distressed and agitated at the time Dr McGinn saw him in June 2019. During the interview, [AU] was irritable, distressed, seemingly unable to regulate himself or realise how he came across to others. With deficits in five of the 10 domains of brain function, Dr McGinn concluded, "It is clear that [AU] suffers a severe pervasive neurodisability and suffers a mental impairment."

[9] Alongside the multiple diagnoses, Dr McGinn detailed the difficulties with [AU]'s upbringing. Various family members have attempted, without success, to manage [AU]'s behaviour. [AU]'s mother has suffered from mental health problems of her own. [AU] is said to have been emotionally neglected and has witnessed parental figures involved in various activities that are undesirable.

[10] Dr McGinn stated in her report that she was unable to get informed consent from [AU] due to the way that he presented at the first interview and his inability to reason or think. Information from [AU]'s parents indicated a fairly normal upbringing, despite his premature birth. In his early years, [AU] exhibited no sign of any mental impairment, but from the age of five he was diagnosed with attention deficit hyperactivity disorder (ADHD) and at 13 years of age autism spectrum disorder (ASD). This second diagnosis is disputed by Dr McGinn.

[11] Following that interview, Dr McGinn made a provisional diagnosis and recommended a medical review by a specialist.

[12] After that initial interview in June 2019, Dr McGinn found that [AU] was able to demonstrate an adequate understanding of what he was accused of and the substance of the evidence that was against him. [AU] was also aware of what was meant by "guilty" and "not guilty" and was conscious that if he entered a not guilty plea he would go to trial; however, Dr McGinn expressed doubts about whether [AU] could adequately communicate with counsel for the purpose of conducting a defence.

[13] Dr McGinn concluded in that first report that in terms of fitness to stand trial, it was her opinion that [AU] was able to demonstrate an adequate understanding of what he was accused of and the substance of the evidence against him. He showed an adequate understanding of what he was accused of and the substance of the possible consequences of legal proceedings, and Dr McGinn could communicate with him as long as she was very careful, spoke simply and waited for him to be ready to speak.

[14] Dr McGinn also considered that [AU] could not provide instructions or participate adequately in a defended hearing and as a result opined that [AU] was not fit to stand trial on the present charges. Dr McGinn qualified this, stating that it would be possible that he could become fit after a period of stable care and treatment by a psychiatrist.

[15] Dr Svoboda met with [AU] twice in August 2019 and, to assist Dr Svoboda, Dr McGinn's first report was made available to him. Dr Svoboda also had a discussion with [AU]'s youth advocate, Ms Pascoe.

[16] Dr Svoboda in his report clearly perceived [AU]'s mental fitness to be much greater than the assessment made by Dr McGinn. It is worth noting that [AU] had spent two months in secure care at [the Youth Justice residence] from the time that he had met with Dr McGinn until the time that he met with Dr Svoboda which may help to explain some of the divergence in opinion. Dr Svoboda appears to have accepted the findings of Dr McGinn in respect of the cognitive testing, but after hearing from Dr Svoboda in person today, I will need to say more about that when dealing with the issue of mental impairment.

[17] In Dr Svoboda's view, [AU]'s attention was generally well-focused, though often impulsive and sometimes demanding information from others that were not part of the interview. Further, [AU] was orientated to time, place and role and purpose of the interview.

[18] In respect of the legal process, [AU] was clear about the charges before him and that contesting these charges is a legal option available to him. Dr Svoboda noted that [AU] expressed some concern over the sexual charges and the potential for

receiving a long-term sentence of imprisonment. Some difficulty with communication was also noted by Dr Svoboda. The verbal impairment goes some way to explaining [AU]'s communication, but do not constitute a major barrier. The ability to communicate is an important factor to consider in respect of an assessment of fitness to stand trial.

[19] Dr Svoboda's view was that [AU] does not have foetal alcohol spectrum disorder, instead Dr Svoboda concluded that the great explanation is conduct disorder, a pattern of transgression of social boundaries. This pattern of behaviour arose during [AU]'s upbringing and has been exacerbated by the significant turmoil he has suffered. Dr Svoboda had no major concerns about [AU]'s ability to participate in the legal process. He concluded that [AU] does not demonstrate mental impairment and no psychological dysfunction that would inhibit him to participate adequately in the legal process. It was further noted that while there are some learning verbal barriers for [AU], they did not inhibit his participation legally.

[20] Dr McGinn has produced an updated report that was received by the Court today. Dr McGinn noted in that report that [AU] has now been reviewed by Dr Kate Gibson, paediatrician and clinical geneticist, who has provided a letter dated 18 September 2019. In that letter, Dr Gibson did not think that there were signs of a genetic disorder that would explain [AU]'s ADHD and behavioural difficulties. She agreed that [AU] did not show the sentinel facial features of what was previously known as foetal alcohol syndrome. Taking Dr Gibson's opinion into account, Dr McGinn concludes that this excludes genetic disorders and other serious brain assault from his prematurity.

[21] Dr McGinn considers that [AU] therefore fulfils the diagnosis criteria of foetal alcohol spectrum disorder without sentinel facial features. [AU]'s long recorded developmental history was of significantly dysregulated moods and behaviours from a young age. He was diagnosed with ADHD at the age of five and has gained some benefit from stimulant medication. He has shown all the neural behavioural symptoms of FASD since a very young age, including immaturity well beyond his 10 weeks of prematurity, attention deficits, emotional dysregulation, low stress tolerance, impulsivity, poor social skills and he was described by his case worker as totally self-

engrossed. On testing, [AU] lacked abstract reasoning, the capacity to appreciate other points of view to his own and was very rigid in his thinking. He could barely sit still, focus or listen for a minute and his behaviour was entirely socially inappropriate.

[22] Despite showing an adequate understanding of legal process as it applied to his less serious charges, Dr McGinn opined that at that time [AU] lacked the capacity to participate in legal process sufficiently to defend the two sexual violation charges and the other charge which is contained in the Crown charge notice. Dr McGinn hoped that [AU] may settle emotionally and improve with the regular routine and expert care that he was receiving at [the Youth Justice residence] and Dr McGinn confirmed in her report today that this has indeed been the case.

[23] Dr McGinn visited [AU] yesterday at [the Youth Justice residence] in [location deleted] and has provided the Court with an updated opinion which is seven months after her first assessment. Dr McGinn spent one hour with [AU] yesterday and discussed his charges and legal process. Dr McGinn also met with [SM], who although is no longer his case leader at [the Youth Justice residence] remains the staff member who knows [AU] best, and also Dr McGinn spoke to [AU]'s mum for over an hour by phone.

[24] [AU] had decided not to take his stimulant medication yesterday, despite taking it regularly without complaint for some time. Even without the medication, [AU] was better able to engage in conversation with Dr McGinn than he had been able to do so earlier. [AU] did continue to be overactive and fidgety, not remaining seated for long, but he continued to engage in the interview while moving around the room. He was very fidgety, switched the AVL monitor on and off and at one stage picked up a chair as if to throw it through the window, but he was only joking and had no intention to do so.

[25] In discussion, [AU] indicated that he was aware of all of his charges and now would talk about the sexual violation charges. He could explain that it meant sexually contacted someone and that it was a [under 12] year old boy. [AU] insisted that the boy was [ages under 12 years deleted] and that the police were lying about that; nevertheless, it was clear to Dr McGinn that [AU] knew exactly what he was accused

of. He was also able to identify evidence that the police had including DNA. When asked further about the evidence, he said that they found it on a sheet. He added that they had nothing else against him and this indicated to Dr McGinn that [AU] was aware that the police had to prove that he had done what he is accused of. [AU] did not mention the victim's statement as evidence.

[26] When asked about entering a plea, [AU] said that he was "denying it all the way" which was consistent with what he had indicated earlier. He was aware that if he denied the charge there would be a trial process, he thought in front of a jury. He also mentioned the Judge. When asked more about what would happen at trial, he said, "People come to stand, call witnesses and call prosecutor up and they decide and tell the Judge." [AU] did not mention his side of the case, but when asked what his lawyer would do to help him, he said, "Try to make out that I am innocent." When asked how she would do this, he indicated that she would say that. He was aware that the lawyer would talk on his behalf. Dr McGinn was of the impression that [AU] had a basic but adequate understanding of legal process as it may apply to his situation.

[27] Dr McGinn found that [AU] was better able to manage himself while discussing these matters and he said that he can understand his lawyer, Kylie, and does talk to her and listen to her. [AU] indicated that if he did not understand something, he would ask her and that she was there to help him. He said, "I talk to my lawyer if I don't understand, she is a good lawyer, it is not complicated, I got my lawyer."

[28] [SM] reported to Dr McGinn that [AU] had been very settled for some time now and had been able to move from the vulnerable unit to a mainstream unit. [SM] also reported that [AU] had been able to manage himself better when he had been at Court and in meetings in general, compared with six months ago when he would become highly stressed and agitated. He can stop and listen which he could not do and his inappropriate behaviours such as swearing and verbally abusing others had decreased significantly. [SM] reported that [AU] is still very limited in his reasoning and cannot be disagreed with.

[29] Dr McGinn also spoke with [AU]'s mum by phone and she reported that the progress [AU] has made at [the Youth Justice residence] has been outstanding.

[30] I now turn to consider the issue of mental impairment. Having received evidence from two health assessors, s 8A now requires the Court to determine on the balance of probabilities whether [AU] is mentally impaired. It not the role of the Court to determine which diagnoses are correct. The term "mentally impaired" is not defined in the Act. This eliminates the risk of creating an unintended gap in the legislation and permits the Courts to interpret the expression in a matter consistent with procedural fairness.

[31] In the case of *R v RTPH*, Kós J (as he then was) found that mentally impaired must encompass more than just mental disorder and intellectual disability.[1] His Honour found that it may also include other mental impairments such as those caused by degenerative neurological condition, substance abuse or acquired brain injury involving short-term memory and frontal lobe deficits, low intelligence or impaired cognition, any of which lead to difficulty processing information and responding. The focus, Kós J concluded, is whether the defendant has a condition that impairs mental function to the extent it may seriously affect their ability to comprehend charges, consider options and consequences, plead or mount a defence.

[32] From the contents of Dr McGinn's report, one would certainly conclude that [AU] is mentally impaired in accordance with that definition. Dr McGinn's report detailed [AU]'s mental impairment through qualitative observations and quantitative testing. Throughout Dr McGinn's first report, she stressed the severity of [AU]'s neurological disability. She also described [AU] as irritable, fidgety, emotionally volatile and noted his social skills were non-existent, he has low stress tolerance and an inability to adapt and manage behaviour.

[33] Dr McGinn also used neuropsychological tests to better understand the nature of [AU]'s brain damage. A diagnosis of FASD requires deficits in at least three of 10 brain domains evaluated with neuropsychological tests. Despite giving his best efforts, the test illustrated that [AU] has a deficit in five of the 10 brain domains. Dr McGinn concluded that although [AU] does not have an intellectual disability as

[1] *R v RTPH* [2014] NZHC 1423 at 9.

defined by s 7 Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, he does suffer from a mental impairment.

[34] Dr Svoboda reaches a different conclusion. Dr Svoboda does not agree that [AU] has a mental impairment and has stated that [AU] does not meet the criteria for a disability. Dr Svoboda notes that FASD is not a psychiatric disorder and there is essentially no link between the behaviour that has been observed and exhibited by [AU] and any psychiatric disorder because there is none, in Dr Svoboda's assessment, that applies to [AU]. Essentially, Dr Svoboda was concerned about the diagnosis because there did not appear to be any evidence that [AU]'s mother was drinking early in pregnancy and Dr Svoboda was quite firm in his opinion that there is a dispute among the clinicians involved and the experts involved in this area as to whether there is, in fact, any link between FASD and the type of behaviour that is attributed to [AU] in terms of his finding that conduct disorder was, in fact, the major issue at play for [AU].

[35] In her updated report Dr McGinn, and even in evidence today, noted that [AU]'s mother has confirmed that she was drinking early in pregnancy, that there is a minimum standard in the guidelines of nine standard drinks per week for an FASD diagnosis to be applicable, and that it was confirmed to Dr McGinn by [AU]'s mother that prior to her being aware that she was pregnant [AU]'s mother would have drunk that amount while she was pregnant, in her early pregnancy.

[36] The facial features that may be a marker of FASD are only seen in five percent of individuals with FASD. The severity of the condition is not related to the presence of facial dysmorphology, nor to the level of IQ. ADHD is a more common marker and [AU] has this and shows clear brain damage on neuropsychological testing. [AU] shows the full range of FASD both in his developmental history and on testing and clearly reaches diagnostic criteria. Although he was born prematurely and this may have contributed to his problems, it is clear that [AU] has a severe neurodisability and has followed a different developmental course to his twin who has developed normally and it is possible for twins to be differentially affected, as far as FASD is concerned. The emotional and behavioural dysregulation that [AU] suffers is not in

the realms of that experienced by a neuro-typical child, even if they had suffered severe post-natal trauma and disadvantage, which there is not evidence of for [AU].

[37] Dr McGinn has also given evidence today to the effect that the literature is clear. That prenatal exposure to alcohol has a definite link to difficulties in behaviour. Dr McGinn qualifies herself as an international expert in FASD, that she is up-to-date on the research, that she is across the literature that is involved in this area and I do note, of course, Dr McGinn was one of the experts who was quoted extensively by the Privy Councillor in the *Pora v R* case and her qualification as an international expert is one that I accept.[2] Dr McGinn has suggested perhaps that Dr Svoboda is not an expert in FASD and is potentially not as abreast of all of the current literature as Dr McGinn is.

[38] I go back to my point at the beginning, it is not the task of the Court to, in fact, determine the issue where there is a difference of diagnosis by the professionals and what I intend to do, in fact, is to simply apply the test that is set out in *R v RTPH* by Kós J and in applying that test I find that [AU] does suffer from a mental impairment for present purposes. [AU]'s overall mental functioning, in my assessment, is impaired to the extent that it will on the balance of probabilities seriously affect his ability to adequately comprehend the charges, his ability to consider his options and the consequences that will flow from choosing different options will likely be seriously affected, as will his ability to consider how he should plead to those charges and how he could mount a defence to them.

[39] [AU]'s behaviour in both initial interviews, that is both with Dr McGinn and Dr Svoboda, coupled with his extremely low scores on the neuropsychological tests that were conducted by Dr McGinn illustrate his impaired cognitive functioning which in turn restricts his ability to comprehend the charges laid and consider the options available to him. I am reinforced in coming to this view when I consider that the recent improvements noted by Dr McGinn over the last seven months have been largely due to the intensive management of [AU]'s extreme behaviour at [the Youth

[2] *Pora v R* [2015] UKPC 9.

Justice residence] and this has, in fact, required constant monitoring and supervision in a secure environment.

[40] I move on to consider the issue of fitness to stand trial. If the Court is satisfied that the defendant is mentally impaired, s 8A(2) requires the Court to record a finding to that effect and then determine, on the balance of probabilities, whether the defendant is unfit to stand trial. In making this assessment, each party must be given an opportunity to be heard and present evidence.

[41] The relevant phrase "unfit to stand trial" is helpfully defined in the Act to mean:

> (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.

[42] The factors listed in the definition are not exhaustive. In the case of *Nonu v R* the Court of Appeal outlined three key principles underpinning the fitness to stand trial requirements.[3] First, the requirements protect the defendant's right to a fair trial and to present a defence and thereby promote fairness. Second, the requirements also promote the integrity and legitimacy of the criminal justice system by only holding defendants accountable if they can adequately comprehend the reasons they have been prosecuted and convicted. Third, the requirements ensure the criminal justice system is reliable by not placing defendants on trial who are unable to advance an available defence.

[43] Generally, the threshold for determining whether a defendant is fit to stand trial is low. As evidenced by the inclusion of the word "adequately" in s 4(1)(b)(ii), an inquiry into a defendant's fitness to stand trial involves more than an assessment of whether or not the defendant can participate in his or her trial by simply performing

[3] *Nonu v R* [2017] NZCA 170 at 26.

relevant trial functions; a defendant must also have the capacity to participate effectively in his or her trial. The principles are not satisfied where the defendant is present, but unable to be meaningful involved in proceedings because of their mental impairment and is essentially nothing more than a bystander. This requires further than mere knowledge of the process and the roles of those involved. A defendant must be able to respond to what occurs in the trial as it progresses and instruct counsel accordingly.

[44] In the *Nonu* case, the Court of Appeal identified four different types of intellectual capacity necessary to ensure the defendant could effectively participate in his trial:

(a) Understanding. How can the defendant understand relevant information including the elements of the charge, the trial process, the role of the participants in the trial, evidence and the purpose and possible outcomes of the trial.

(b) Evaluation. How can the defendant process information, particularly evidence and directions and evaluation the impact of that information on the defence.

(c) Decision-making. How can the defendant make decisions normally required of the defendant during the course of the trial, including how to plead and whether to give evidence or put forward a particular defence.

(d) Communication. How can the defendant communicate his or her instructions to their lawyer and give evidence if elected to do so.

[45] The effective participation inquiry is a contextual inquiry. It recognises the defendant may have the capacity to participate effectively in a simple criminal proceedings (for example, by pleading guilty to shoplifting), but cannot participate effectively in more complex proceedings.

[46] The Court of Appeal in *Solicitor-General v Dougherty* noted:[4]

> We accept that the issue of fitness to stand trial is a case specific contextual assessment that must have regard to the nature of the impairment, how it manifests itself and the complexity and nature of the charges being faced. And perhaps also to the number of charges, because that can affect not only complexity but also the length of the trial, and therefore increases stress. Stress can in turn affect the severity and impact of the mental impairment.

[47] Looking at the complexity of the charges that are in the Crown charge notice, to prove charge 1, the charge of sexual conduct with a child, the Crown must prove beyond reasonable doubt: that the complainant [CC] was under the age of 12 years; that [AU] intentionally rubbed his penis against [CC]'s bottom; in the circumstances, the touching would be regarded as indecent by right-thinking members of our community; and that [AU] was aware of the aspects of the touching and the surrounding circumstances which right-minded members of the community would consider made his behaviour indecent.

[48] So, that is a fairly complex charge for [AU]'s youth advocate and for his communication assistant to be able to convey to [AU] and it also presents an issue for the presiding Judge who will be required to determine that particular charge as to whether it has been proved beyond reasonable doubt in terms of [AU]'s awareness of that particular material element, namely the aspects of the touching and the surrounding circumstances which right-minded members of the community would consider made his behaviour indecent. So, a matter for the Crown to consider whether that is a charge that should actually proceed to trial, given the concepts that are involved and the complexities of understanding in terms of not just [AU]'s understanding of the charge, but whether a Judge might actually be persuaded beyond reasonable doubt that he had that awareness at the time. In any event, that is a matter for the Crown to think through.

[49] As far as charge 2 is concerned, which is the sexual violation charge that arose from CRN ending 021: the Crown have already been invited to consider the wording of particulars of the Crown charge notice, it alleges penetration of [CC]'s anus, however under s 128(1)(b) it may well have to be amended to "introducing his penis

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[4] *Solicitor-General v Dougherty* [2012] 3 NZLR 586.

into [CC]'s anus" to follow the wording of the actual section, but that is one of the material elements; the next one is that [CC] did not consent; and the third one would be [AU] did not believe on reasonable grounds that [CC] was consenting.

[50] The third charge which is another charge of sexual violation, the Crown must prove beyond reasonable doubt: that [AU] effected the connection of his mouth with [CC]'s penis; [CC] did not consent; and [AU] did not believe on reasonable grounds that [CC] was consenting.

[51] Now, although there is some conceptual complexity surrounding the charges, the actual allegations themselves are very straight-forward. They are essentially that [AU] rubbed his penis against [CC]'s bottom, that he did insert his penis into [CC]'s anus, and that he placed his mouth over [CC]'s penis and sucked [CC]'s penis.

[52] Now, in that respect the allegations are straight-forward and so is the defence that is likely to be offered: "None of this happened." That is effectively the stance that, as I understand it from what [AU] told the police at the outset and from what I have been told by Ms Pascoe today, that will be the way that this case will be conducted. So although there are complexities associated with these charges, the actual factual allegations and the defence that is intended to be run are straight-forward and are concrete concepts at the end of the day, as I see them, and importantly the concepts involved in these charges, in terms of the allegations and the concepts involved in the defence, could be explained in concrete terms to [AU] by a combination through his youth advocate and also with the assistance of a communication assistant.

[53] The issue of consent does not actually arise on the way that this case has been explained, both by what [AU] told the police and by what he has told his youth advocate. Even if it did, again with the assistance of a communication assistant and also with the assistance of [AU]'s youth advocate, the issues surrounding consent could be adequately explained to [AU] with care and with time and with the expertise involved as well to go through those concepts in a concrete way.

[54] Now, just on that point about the added degree of complexity that consent brings with it. The Court of Appeal decision in *Barton v R* does provide some assistance in outlining how a trial Court may respond to multiple charges of different complexity.[5] In that particular case, the charges were split based on their complexity. Elements of offending that involved abstract concepts such as consent which is involved in the sexual offending, potentially, although unlikely in this case, recognised as being more difficult for defendants to understand and respond to and they also do require some degree of empathy in considering how another person might think or feel and it is quite evident that [AU] does have difficulty in this respect. Dr McGinn noted that appreciating the effects of his actions on others and showing remorse is outside his brain capacity.

[55] As far as understanding the trial process and its participants, [AU] demonstrated a simple but adequate understanding.

[56] Just moving on at this stage to deal with the fitness issue, the Court of Appeal has recognised the need for health assessor reports to be as up-to-date as possible and that was set out in the case of *Mohamed v R*.[6] Not only has Dr McGinn met with [AU] yesterday down in [location deleted], but has also filed a comprehensive updated report. In addition to that, I have also heard in person from both of the experts today. Dr Svoboda maintains his recommendation that [AU] should be assessed as fit to stand trial in respect of these charges. Dr McGinn has modified her original recommendation, that is based on the improvements she has observed since her first interview with [AU], and Dr McGinn is now of the opinion that [AU] should be assessed as fit to stand trial in relation to the charges that are before the Court.

[57] I note the further recommendations that have been made by Dr McGinn, that [AU] will need considerably more preparation for trial and scaffolding to be able to withstand the demands of a defended hearing, especially should he choose to give evidence himself which is his right. There was a suggestion that a support person sitting directly next to [AU] would be of assistance. There was also a suggestion that a communication assistant could be helpful. It is considered vital that [AU] take his

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[5] *Barton v R* [2012] NZCA 295 at 21.
[6] *Mohamed v R* [2010] NZCA 259 at 10.

ADHD medication throughout the course of the proceedings and that he is given regular breaks to avoid him becoming overloaded and stressed.

[58] I will just note for completeness sake that I have offered, throughout the course of this proceeding, an opportunity for [AU] to actually not remain in Court while these reasons are being given and although he originally decided that he wanted to remain in Court, he has now left the Court and decided he would prefer not to remain for the rest of the time that I give the reasons, and that is just one example of this idea of [AU] being given regular breaks and also for the Court to be very flexible to avoid him becoming over-loaded and stressed. Because elevated levels of stress will need to be carefully monitored and it can reach the point, which is one of the other recommendations made by Dr McGinn, where fitness to stand trial is an ongoing and continuing issue and may have to be revisited if it gets to the point where [AU] cannot continue with the trial. So, the presiding Judge will have to monitor this very carefully.

[59] Dr McGinn has continued with the recommendation that [AU] be treated by a psychiatrist for his suspicious thinking and mood dysregulation, as this is often helpful for young people with FASD who experience extreme emotions and unusual thinking; although Dr McGinn acknowledges it is very difficult for [AU] to engage with mental health providers and so far he has not, in terms of attending any sessions with a psychiatrist apart from the ones with Dr Svoboda. Any interventions that can help [AU] should be pursued so that his extremely high risk for adverse outcomes can be lessened.

[60] It has also been noted that given his distrust of new people, especially those in positions of power, it is unlikely that in normal circumstances [AU] will communicate effectively or respond appropriately under cross-examination. Bearing those points in mind, I direct that a communication assistant be appointed forthwith to assist [AU] at all future appearances and I also will need the registry in making this appointment to ensure that the communication assistant is actually available between 6 to 9 April for the Judge alone trial of this case.

[61] In her first report to the Court, Dr McGinn raised the concern that [AU] has such a short fuse and is so inappropriate in his behaviour that this would prevent him

from being able to participate adequately in legal process. Although it is clear that [AU]'s behaviour has improved significantly since that first interview with Dr McGinn, it is also clear that the presiding Judge will need to be alert to that issue and monitor that situation carefully as well and be well aware of the background issues that lead to that type of display of behaviour and to deal with it appropriately, armed with the knowledge of why that behaviour is happening in Court. So, it is going to be something that is necessary for the presiding Judge to be aware of and it will require a careful reading of Dr McGinn's report, Dr Svoboda's report and also Dr McGinn's updating report in preparation for the actual trial, to be fully conversant with the issues that are at play when [AU] is in Court.

[62] There will be a need for an increased number of adjournments to allow [AU] sufficient time for his youth advocate and communication assistant to help him understand what is happening in the trial and to also allow him adequate time to manage his elevated stress levels as they will arise from time to time.

[63] I do repeat the essential need for [AU] to take his ADHD medication during the course of proceeding and for him to be encouraged to do so, so that he can take a full and effective part in the proceedings.

[64] It does seem to me to be important that Oranga Tamariki arrange for the [Youth Justice residence] staff who accompany [AU] from [location deleted] for the Judge alone trial in April to actually remain with [AU] throughout the course of the trial. It is quite clear that [AU] does not react well to change and it is a matter of trying to facilitate his presence in New Plymouth for the course of the trial in a manner that will allow him to actually participate in this trial fully and not be distracted by things that can actually be contained, namely the change of staff which would be unhelpful.

[65] Despite his extensive problems limiting his ability to focus, communicate and think through consequences and his ability to regulate his behaviour, [AU] is significantly improved in his ability to actively participate in the legal process and that is something that has come through loud and clear from the evidence I have heard today.

[66] Accordingly, in respect of all charges I am satisfied on the balance of probabilities that [AU] is able to plead, to adequately understand the nature or purpose or possible consequences of the proceedings and to communicate adequately with counsel for the purposes of conducting a defence. [AU]'s continuing fitness to stand trial will need to be constantly monitored throughout the course of the proceedings and it may need to be revisited if circumstances arise that require it.

H M Taumaunu
Chief District Court Judge