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IN THE YOUTH COURT
AT MANUKAU

I TE KŌTI TAIOHI
KI MANUKAU

CRI-2023-292-000255
[2024] NZYC 406

THE KING
NEW ZEALAND POLICE
Prosecutors

v

[BH]
Young Person

Hearing:	31 May 2024
Appearances:	N Ward for the Crown Sergeant R Lyle for New Zealand Police M Russell for the Defendant
Judgment:	31 May 2024

ORAL JUDGMENT OF JUDGE E B PARSONS

[1] Today has been set down for consideration of proceedings in the Youth Court relating to [BH]. The matter was called this morning but set down for this afternoon when it became apparent, even though the EM bail application previously advanced was not being pursued today, there was still a need to consider how [BH] was to be remanded from today.

[2] [BH] had earlier been remanded from 13 May until 14 June 2024, and also until today, to possibly consider s 10 Criminal Procedure (Mentally Impaired Persons) Act 2003 (CP(MIP) involvement matters and also how to progress the proceedings generally.

[3] The issue of what paradigm [BH]'s further remand status is to be considered within arises in light of the 29 April 2024 High Court decision of *Teika v District Court of New Zealand*.[1]

Current Arson Charge

[4] As well as earlier charges already directed to proceed under CP(MIP), [BH] currently faces a more recent singular charge of arson.

[5] That charge arises after an incident involving [BH] of intentional damage caused by fire, resulting in a charge under s 267(2)(a) of the Crimes Act 1961 and carrying a maximum seven-year imprisonment penalty. The events leading to that charge occurred on 4 April this year after a fire at [a secure youth justice facility] where [BH] then was.

[1] *Teika v District Court of New Zealand* [2024] NZHC 1017 at 17, Dunningham J.

Section 8A CP(MIP) Finding Unfit to Stand Trial Re Arson Charge

[6] On 1 May 2024 the Court made a finding pursuant to s 8A of the CP(MIP) that [BH] was unfit to stand trial in respect of the arson charge.

[7] An involvement hearing pursuant to s 10 CP(MIP) was scheduled to take place next Tuesday 4 June 2024; that has now been adjourned until Wednesday 5 June 2024 and is likely to be able to be resolved without any contention.

Section 8A CP(MIP) Finding Unfit to Stand Trial Re Earlier Charges

[8] On 25 October 2023 [BH] had earlier been found unfit to stand trial on other charges due to a finding that he was mentally impaired and consequent upon that finding, unfit to stand trial. In December 2023, [BH] was found to be involved in respect of those charges which included aggravated wounding, aggravated burglary, two charges of burglary and unlawfully takes a motor vehicle. An appeal of that involvement decision was heard, the result of which was that the s 10 involvement finding was upheld.

[9] A s 23 disposition report was consequently directed and filed on 5 February 2024 and an updated report is awaited prior to disposition.

Remand Paradigm/Jurisdiction

[10] Today, [BH] does not seek to advance the bail application previously indicated. However, in appearing today, he must be remanded in some form.

[11] After being found unfit to stand trial on 1 May earlier this year, [BH] was remanded in the custody of the Chief Executive pursuant to s 238(1)(d) of the Oranga Tamariki Act 1989 (OTA). The question of his further detainment and under which legislative provision(s) arises and requires some pause for consideration. Related to that is which paradigm of analysis is triggered.

[12] As already noted, this query arises in light of the recent High Court decision of *Teika v District Court of New Zealand* granting an application for a writ of *habeas*

corpus (in relation to an adult) on the basis of an unlawful detention occasioned by a person who had been found unfit to stand trial being subsequently remanded in custody.

Section 23 CP(MIP)

[13] As noted above [BH] has now twice been found unfit to stand trial (s 8A). The Criminal Procedure (Mentally Impaired Persons) Act process has been triggered.

[14] Section 23 CP(MIP) sets out the trajectory to be directed upon such a finding being made:

> **23 Inquiries about persons found unfit to stand trial or insane**
> (1) **When a person is found unfit to stand trial** or is acquitted on account of his or her insanity, **the court must order that inquiries be made** to determine the most suitable method of dealing with the person under section 24 or section 25.
> (2) **For the purposes of the inquiries under subsection (1), the court must** either—
> (a) **make it a condition of a grant of bail** that the person go to a place approved by the court for the purpose of the inquiries; or
> (b) **remand the person to** a hospital or **a secure facility**.
> (3) Despite any provision in the Bail Act 2000, in deciding whether or not to grant bail for the purposes of subsection (2)(a), **the need to protect the public is the paramount consideration.**
> (4) The inquiries under subsection (1) must be completed as quickly as practicable and, in any event, within 30 days after the date of the order under which the inquiries are made.
> (5) A person who has an intellectual disability must, during the period in which the inquiries are made under subsection (1), be assessed under Part 3 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.
> (Emphasis added)

Limited Options

[15] The critical point for the purposes of the s 23(1) CP(MIP) enquiries, the Court must either:

> (a) Make it a condition of the granted bail that the person go to a place approved for the purposes of the enquiries; or

(b) And this is the critical bit, remand the person to a hospital or to a secure facility.

[BH]'s situation

[16] Ms Russell had provided written submissions in support of bail today, which she does not today seek to pursue. She also provided oral submission in support of consideration of remand to a secure facility under s 23 CP(MIP). She says in her written submissions:

> [BH] is a young person who has been in care almost all of his life subject to what could only be considered as an unacceptable amount of placements. He has experienced significant trauma both in and out of care and this, along with his disabilities, requires extra care to be taken to get any placement right for him.

[17] She further submits he has spent around nine months in custody as well as eight weeks on EM bail. Unfortunately, EM bail options and straight bail options in general have been extremely limited.

Concurrent Care and Protection Proceedings

[18] Ms Russell notes that [BH] is also subject to a care and protection order in the Family Court (s 101 custody in favour of the Chief Executive) and has been under that order for almost all of his life.

[19] As discussed during the course of submissions this afternoon, this is not surprising, given that approximately 97 per cent of all young people appearing in the Youth Court have underlying care and protection issues, as noted by Judge Fitzgerald in a paper from 2021.[2]

> There is something even more compelling about the two parts of the Act that requires coordination of what happens in practice and that is the children and young people themselves. **97% of the 12 and 13-year-old children coming into the youth justice system are "cross over kids". That is 100% of the girls and 94 % of the boys.** For young people aged 14, 15, 16 and 17, the total percentage is 89.5%. That is **91 %** of the girls and **88%** of the boys.

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[2] Judge A FitzGerald, *The crossover between Youth Justice and Care and Protection* (undated paper) with data taken from *Youth Justice Indicators Summary Report December 2021*, (Ministry of Justice, December 2020).

> Therefore, across all ages, the percentage is 93.25% of children and young **people entering the youth justice system with some care and protection status**; that is more than **nine out of every 10**.
> (Emphasis added)

[20] [BH]'s previous caregivers cared for him between the ages of four and approximately 12 years old and he knows them as mum and dad. While they have confirmed they would like [BH] to return to their care, it is not possible at present.

Remand Submissions made by Youth Advocate – Ms Russell

[21] [BH]'s Youth Court advocate is very concerned about the time he spent in youth justice facilities and notes he is particularly vulnerable with continued exposure to negative influences in the Youth Justice facilities which has been particularly damaging for him. She submits he has complex needs which simply cannot be met in a secure youth justice residence and he requires a bespoke placement with a health focus. She notes he has been in the care of Oranga Tamariki almost all of his life and yet his placement at [community placement] in December last year was the first time he had been in a placement which focussed on his individual needs.

[22] The particular needs which [BH] has are occasioned by a finding that he has an intellectual disability amongst other issues, including features such as trauma, deafness and the earlier identified care and protection issues.

[23] Ms Russell has made submission in light of the recent High Court *Teika v District Court of New Zealand* decision, that the CP(MIP) must be the Act that applies when considering further remand of [BH] today rather than the provisions of the Oranga Tamariki Act.

[24] What she says that means is [BH] must be placed in a *secure facility* as referred to within s 23(2)(b) CPMIP which means that such a facility is compliant with the s 9 definition of both *secure* and *secure facility* of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (IDCCR). Ms Russell submits that a Youth Justice

secure residence does not meet that s 9 IDCCR definition and cannot be considered a therapeutic nor an available placement for him.[3]

[25] She accepts submissions made by the crown on behalf of the police that pursuant to s 364 OTA, arrangements and/or modifications could be made to a Youth Justice residence, such that the features and services then provided could potentially qualify as a *secure facility* under the IDCCR. However what is needed for [BH] she submits, is support for his disability. At present the available Youth Justice facilities do not provide that and nor do they meet the s 9 IDCCR criteria, hence they are not compliant *secure facilities*.

[26] She submits that even though there is realistically no bed available for [BH] right now, that is an issue for the Director General of Health in conjunction with the Chief Executive of Oranga Tamariki to resolve. In terms of [BH]'s situation today, the Court is faced with both a consideration of his legal situation and the reality of what may or may not be available as a consequence of any decision made.

[27] Ms Russell accepts public safety is a mandatory consideration, (i.e. it must be considered), but she submits public safety is not the sole criteria of consideration for remand options. She says for somebody in [BH]'s position, he is simply not safe in a Youth Justice residence, it is not therapeutic, and he cannot continue to be remanded there. She accepts that bail may be off the table at present without full supports being made available to him, but suggests some place such as Te Hikitia in Wellington, (a specialised placement which qualifies as a *secure facility*), is required, noting that it only has limited beds and apparently has a waiting list.

[28] At this stage she submits there is no choice for remand considerations between s 238(1)(d) or s 23(2)(b) of CPMIP but that in terms of *Teika v District Court of New Zealand*, the only option is an analysis within s 23(2)(b) of CPMIP, which requires

[3] **9 - Meaning of facility and secure facility** (1) a **facility** is a place that is used by a service for the purpose of providing care to persons who have an intellectual disability (whether or not the place is also used for other purposes). (2) A **secure facility** is a facility that – (a) has particular features that are designed to prevent persons required to stay in the facility from leaving the facility without authority; and (b) is operated in accordance with systems that are designed to achieve that purpose. (3) A facility that is not a secure facility need not have any particular features and, accordingly, a building (such as a residential house) that is not an institution can be used as such a facility. (4) In no case can a prison be used as a facility. (5) Subsection (3) is subject to any other enactment.

either bail (with conditions to mitigate public safety concerns) or remand to a *secure facility* (for somebody in [BH]'s position who is assessed to be mentally impaired due to a mild intellectual disability resulting in being unfit to stand trial).[4]

Crown/Police Submissions

[29] Ms Ward for the police acknowledges the difficulties presenting with the logistical realities of what is available combined with the uncertainties of the legal analysis required for children and young people appearing in the Youth Court under the Oranga Tamariki Act where provisions of the Criminal Procedure Act are also imported. She accepts that in terms of the process required for [BH], a s 10 CP(MIP) involvement hearing is required now that he has been found unfit to stand trial on the arson charge from April 2024.

[30] Ms Ward submitted in opening that the Court potentially has the choice of options of remanding [BH] further under s 238(1)(d) of the Oranga Tamariki Act or under s 23 CPMIP. By the end of hearing submissions I apprehend her position was in fact that s 23(2)(b) of the CPMIP applies, but a remand for a person in [BH]'s position could be to a Youth Justice secure residence under s 23(2)(b) on the basis that under s 364 OTA suitable arrangements could be made to ensure such a residence does qualify as a *secure facility* in terms of the s 9 definition of IDCCR. Given the limited time to prepare for this hearing she wished to reserve the final police position as to whether s 238(1)(d) OTA can also exist for someone in [BH]'s position as a remand option.

[31] I accept Ms Ward's submission that there is potential within s 364 OTA for Youth Justice residences to be established, altered and maintain residences; that is already legislatively provided for. Such modification establishment could potentially be made to coincide with classifying as a secure facility under s 9 IDCCR given that s 364(1) provides that residences are to be established in a sufficient range to cater effectively for the variety of special needs of children and young persons.

[4] Finding from s 8A CP(MIP) determination that [BH] is unfit - 25 October 2023.

[32] She is concerned that the practical implications of a remand for [BH] today under s 23 CP(MIP) includes there are no beds currently available for therapeutic/forensic purposes. Her reluctance to concede the s 238(1)(d) OTA remand option is not legally available to the Court is really predicated on a concern that a s 23 CP(MIP) bail, if no remand to a *secure facility* as defined in s 9 IDCCR is available, may not satisfactorily deal with the protection of public safety and/or general safety issues and the s 238(1)(d) OTA remand option needs to remain available as a backup remand option in the event a bed is not otherwise available.

[33] The proposition made is the reality for [BH] is that a continuation of the current placement in a Youth Justice residence is logistically necessary if there is no s 9 IDCCR qualifying placement available. Ms Ward rightly reiterates that public safety is paramount within the s 23 CPMIP considerations and that in relation to [BH] there is a history of risk of re-offending and of absconding.

CP(MIP) Applies to Youth Court Proceedings

[34] The December 2023 decision of *NZ Police v MW* confirms that the CP(MIP) applies to Youth Court proceedings.[5] This is accepted by all counsel. The question is how the CP(MIP) Act and the Oranga Tamariki Act interact and are to be applied in situations such as this; all submissions made are that it is not entirely clear.

[35] Ms Ward submits that any decision made by the Court today has effect immediately; I accept that. A decision made orally takes effect from the minute it is articulated; it does not depend on the written decision being signed.

[36] Ms Ward further submits if there is a decision made that [BH] is to be placed in a *secure facility*, it is then for the organisations to work out whether he can be placed or not and what flows from that, flows. If there is non-compliance with the placement, that is an issue not for the Court to pursue but for the Youth Advocate and other people representing for [BH]'s position which may include consideration of contempt of Court as suggested by Ms Ward where Court orders are not complied with.

[5] *NZ Police v MW* [2023] NZHC 3669, O'Gorman J

[37] The Court must apply the law to the factual scenario before it, and the ramifications of that are beyond the Court's remit of consideration. If there is an absence of availability of beds or placements for [BH], then that is a logistical situation arising from the application of the law and cannot inform the decision the Court is required to make.

Discussion

[38] What falls to be analysed today is the question of how [BH] is to be remanded. He has already been found unfit to stand trial on 1 May 2024 in relation to the charge of arson and previously last year, in relation to other charges. There are risk factors posed by [BH] in the community, but what they are precisely and to what level of risk has not been argued today given the acceptance that bail is not being sought. It is accepted he needs to remain at a secure facility and this is necessary while a plan for placement in the community is established with supports in a way which do not set him up to fail.

[39] So, what are the choices available to the Court for somebody in [BH]'s position? It is not disputed the next step for [BH] is an enquiry into his involvement in the offence under s 10 CP(MIP). If found to be involved, the Court moves to the next step of obtaining information relevant to disposition in terms of ss 13(4) and 23(1) CP(MIP), prior to consideration of making orders as to disposition as considered in ss 24 and 25 CP(MIP).

[40] As noted in *Teika v District Court of New Zealand* [6], the CP(MIP) provisions as currently drafted are confusing because the involvement enquiry now occurs after someone has been found unfit to stand trial, even though s 23 is predicated on both steps having been completed. Prior to the amendments made in 2018, the s 10 involvement hearing occurred before s 8A fitness was determined and therefore, every person found unfit to stand trial had already been found to be involved and s 23 enquiries as to disposition could proceed.

[6] *Teika v District Court of New Zealand* [2024] NZHC 1017 at [17].

[41] The High Court noted an interpretation that s 23 CP(MIP) applies from the moment of finding unfitness has been made is consistent with the New Zealand Bill of Rights Act 1990 (NZBORA) and specifically s 9 NZBORA, which provides that "everyone has the right not to be subject to torture or cruel, degrading or disproportionately severe treatment or punishment" and s 23(5) NZBORA which provides that "everybody deprived of liberty should be treated with humanity and with respect for the inherent dignity of the person".

[42] Counsel before the High Court submitted those who are found unfit to stand trial are from that point forward healthcare recipients and they are entitled to be kept in a therapeutic environment and, in line with s 23(4) CP(MIP), not a prison. Counsel further submitted that to allow someone to be held in prison when they cannot be criminally liable would be to adopt an interpretation which results in disproportionately severe treatment and is also inconsistent with the right to be treated with humanity and respect for the inherent dignity of the person.[7] These submissions were accepted by the High Court.

[43] Crucially, the High Court at [30] found that it was satisfied that an individual who has been found unfit to stand trial should not remain (for adult) in prison. It was noted that they are no longer at risk of being found criminally liable and it is not appropriate that they be held in custody. The Court stated that:

> Consistent with the original intent of the legislation and consistent with the New Zealand Bill of Rights Act, the options set out in s 23(2)(b) should apply at the point a person has been found unfit to stand trial, notwithstanding they appear to apply only once the Court is in a position to make inquiries into disposition.

[44] As a result of the findings that Her Honour made, she granted the writ of *habeas corpus* as sought stating that the applicant, pursuant to s 23(2) of the CPMIP was to be remanded to a hospital or a *secure facility*.[8]

[45] That decision related to an adult; this case relates to a young person under the Oranga Tamariki Act. However, the CP(MIP) applies to the Youth Court.

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[7] As noted at [20].
[8] At [31].

[46] Applying the reasoning of *Teika* to this situation, a s 238(1)(d) OTA remand option is not available to the Court, given the remand options available for someone in [BH]'s position who has been found unfit to stand trial, are those contained within s 23 CP(MIP). These are:

(a) bail (simpliciter or electronically monitored, each which can have conditions attached), or

(b) a remand to a hospital or a *secure facility*.

[47] [BH] has not been assessed to have any mental health disorder and so what is required is that a *secure facility* is made available to him.

[48] As noted above, the definition of a *secure facility* is set out within s 9(2) of the IDCCR. A secure facility has particular features which are designed to prevent persons being able to leave the facility without authorisation and crucially, in terms of the definition of *facility* is defined as "a place that is used by a service for the purpose of providing care to persons who have an intellectual disability, whether or not the place is also used for other purposes".

[49] Having found that s 238(1)(d) OTA is not available as a remand option for [BH] and finding that the provisions of s 23 CP(MIP) applies, specifically s 23(2)(b), [BH] is directed to be remanded to a *secure facility* as defined within s 9 of the IDCCR.

[50] There is perhaps some dissonance triggered in considering that CP(MIP) considerations override OTA ones for a young person in [BH]'s position, in that the paramount consideration under s 23 CP(MIP) is that of public safety,[9] whereas the four primary considerations under s 4A(2) OTA are the wellbeing and best interests of the young person, the public interest (which includes public safety), the interests of any victim, and accountability of a young person for their behaviour. I do not assess there is actual as opposed to potential conflict created by this dissonance in [BH]'s current situation. However whether that situation may arise in the future for another young person remains to be considered.

[9] Section 23(3) CP(MIP).

Proceedings Adjourned

[51] The proceedings are adjourned until 5 June 2024 at 9.30 am to consider compliance with the order, not that that will be for the Court to become involved in other than further remand considerations if required. The s 10 CP(MIP) involvement hearing is scheduled to be heard on 5 June, noting the indication it is not likely to be disputed, but also noting a formal finding is required to enable the proceedings to be progressed.

Family Court Proceedings

[52] The Family Court care and protection matters that were adjourned to today by Her Honour Judge King are also adjourned to 5 June. Her Honour has already assessed on 29 May 2024 that the plan filed is non-compliant with s 130. The s 101 continues.

[53] The proceedings are to remain before Judge Parsons until at least 5 June.

[54] To be clear, [BH] is remanded pursuant to s 23(2)(b) CP(MIP) to a secure facility and specifically not pursuant to s 238(1)(d) OTA.

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Judge Emma Parsons
Youth Court Judge | Kaiwhakawā o te Kōti Taiohi
Date of authentication | Rā motuhēhēnga: 06/06/2024