ORDER PROHIBITING PUBLICATION OF THE REASONS IN NEWS MEDIA OR ON THE INTERNET OR ANY OTHER PUBLICLY AVAILABLE DATABASE UNTIL FINAL DISPOSITION OF THE RETRIAL. PUBLICATION IN LAW REPORT OR LAW DIGEST IS, HOWEVER, PERMITTED.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA371/2010
[2011] NZCA 404

BETWEEN	ROSS ARANATIAKI RUKA Appellant
AND	THE QUEEN Respondent

Hearing: 7 and 8 June 2011

Court: Glazebrook, Randerson and Harrison JJ

Counsel: T Ellis and G Edgeler for Appellant
M D Downs and M G Coleman for Respondent

Judgment: 23 August 2011 at 2.15 pm

JUDGMENT OF THE COURT

A Extension of time to appeal granted.

B Appeal allowed.

C Orders quashing (a) finding under s 9 of the Criminal Procedure (Mentally Impaired Persons) Act 2003 and (b) order that appellant be detained as a care recipient.

D Proceeding remitted to District Court for rehearing under s 9 CPMIP Act and such other hearings as may be necessary. The order made in this Court on 5 October 2010 granting Mr Ruka bail is extended until further order in the District Court.

E **Order prohibiting publication of the reasons in the news media or on the internet or in any other publicly available database until the final disposition of the retrial. Publication in a law report or law digest is, however, permitted.**

REASONS OF THE COURT

(Given by Harrison J)

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Introduction

[1] The appellant, Mr Ross Ruka, applies for an extension of time to appeal against a finding made against him in the District Court at Auckland. Judge Kiernan found under s 14 of the Criminal Procedure (Mentally Impaired Persons) Act 2003 (the CPMIP Act) that Mr Ruka was mentally impaired and unfit to stand trial on 20

charges of sexual offending.[1] The Judge had previously found under s 9 of the CPMIP Act that evidence tendered by the Crown was sufficient to establish that Mr Ruka had caused the acts which formed the basis of the charges. She directed that he be detained pursuant to s 25(1)(b) of the CPMIP Act as a care recipient.

[2] Mr Ruka's counsel, Mr Ellis, does not challenge Judge Kiernan's s 14 finding that Mr Ruka was unfit to stand trial. However, he challenges her threshold s 9 finding on a number of grounds. Our primary focus is on whether the Judge erred in refusing Mr Ruka's application to allow cross-examination of the prosecution witnesses at the s 9 hearing.

[3] At the conclusion of the hearing in this Court we requested counsel to file supplementary memoranda on discrete issues. At our direction Judge Kiernan has filed a report on the special procedural measures taken when dealing with Mr Ruka's case. Mr Downs has lodged a separate schedule of all applications and findings made under the CPMIP Act since 2005. Both have been of assistance to us.

[4] In the absence of opposition from the Crown we grant Mr Ruka's application for an extension of time to appeal.

District Court

(a) Background

[5] The Crown alleges that Mr Ruka sexually offended against four young sisters between 2004 and 2007. The girls were in the foster care of Mr Ruka's family; at the relevant times they were aged variously between about three and nine years. Mr Ruka was then aged between about 13 and 17 years.

[6] Interviews with each complainant were recorded by video on 4 and 5 September 2007. Mr Ruka was interviewed by Detective Pivac on 19 September 2007. Mr Ruka denied offending against any of the girls, despite the officer's increasingly intensive questions. He was later charged with 20 offences including

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1 *R v Ruka* DC Auckland CRI-2007-044-6866, 15 February 2010.

four of rape against one girl. His sister was indicted jointly with him on two additional charges relating to separate offending against the girls.

[7] The written transcripts of the complainants' video interviews constituted the Crown's primary evidence at the committal hearing on 25 February 2008. There was no cross-examination. Mr Ruka's counsel, Mr Levett, apparently accepted the existence of a case to answer and he was committed for trial in the District Court. A fixture for trial was later set for 27 January 2009.

[8] On 22 January 2009 the scheduled trial was adjourned on Mr Ruka's unopposed application because of the Crown's late disclosure of material about the complainants from the Children and Young Persons Service. A new fixture for trial was allocated for 20 April 2009. Mr Levett also advised the Court of a prospective application pursuant to s 44 of the Evidence Act 2006. He intended to seek leave to cross-examine the two older complainants on alleged previous sexual activity with their biological father and the younger one's retraction of the allegations. A hearing was set for 20 March to determine Mr Ruka's application but it was withdrawn on that date.

[9] The trial was unable to commence on 20 April. The next day Judge Kiernan convened a sentence indication hearing. After carefully examining the options, the Judge indicated a likely sentence for Mr Ruka of 12 months home detention. Mr Ruka was then arraigned and pleaded guilty to an amended indictment containing 12 counts. The four counts of rape in the original indictment were omitted. Mr Ruka's sister pleaded guilty to the two charges she faced. The Judge adjourned the proceeding for sentencing on 4 June. She ordered the Department of Corrections to prepare a comprehensive psychological report on Mr Ruka.

[10] Dr Samantha Patel, a psychologist, prepared a psychological assessment report dated 28 May. A number of significant facts emerged. Mr Ruka had suffered a head injury immediately after his birth and another in early childhood. While he was the subject of special needs placements and of intensive support structures at college, he had not come to the attention of the police or any social agencies. In Dr Patel's opinion, Mr Ruka was suffering from an intellectual disability as a result

of his brain and head injuries; in particular, he suffered from unspecific impairments in cognitive and adaptive functioning. Dr Patel recommended that the Court commission assessment reports under s 38 of the CPMIP Act. The purpose of such reports is to assist the Court to determine a range of issues including whether a defendant is fit to stand trial. Significantly, Mr Ruka maintained his denial of offending against the complainants.

[11] A defendant who is unfit to stand trial is defined under s 4 of the CPMIP as a person:[2]

> (a) ... who is unable, due to mental impairment, to conduct a defence or to instruct counsel to do so;
>
> (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.

[12] Judge Kiernan adjourned Mr Ruka's sentencing on 4 June. On that date the Forensic Court Liaison Nurse also recommended, following a meeting with Mr Ruka, that the Court consider commissioning s 38 assessment reports. The Judge ordered two assessments from health professionals.

[13] Dr Mhairi Duff, a consultant psychiatrist with the Waitemata District Health Board, prepared a report dated 20 July 2009. In Dr Duff's opinion, Mr Ruka was confused about the meaning of entering a plea to the charges: he understood that a guilty plea would mean he would not be sent to prison, whereas a plea of not guilty would result in a sentence of imprisonment. Dr Duff noted Mr Ruka's adamant denial of the alleged offending.

[14] Dr Duff forecast that a Court would be likely to find Mr Ruka unfit to stand trial on the basis of his current assessment and concluded that he:

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[2] CPMIP Act, s 4(1), definition of "unfit to stand trial" in relation to a defendant.

> ... lacked a capacity to enter a meaningful plea as he lacked an understanding of the nature and possible consequences of entering a plea, lacked an ability to understand the nature and process of the trial procedures and lacked a capacity to communicate adequately with legal counsel for the purposes of conducting a defence.

[15] Dr Sabine Visser, a clinical psychologist with the Waitemata District Health Board, also assessed Mr Ruka. In her report dated 1 September Dr Visser reached a conclusion similar to Dr Duff's about Mr Ruka's fitness to face trial. She assessed that his overall cognitive ability was in the extremely low range of intellectual functioning. His IQ of between 56-64 placed him within the range of mild intellectual disability; his thinking and reasoning abilities exceeded only 1% of adults of his age. As he had to Detective Pivac and the other health professionals, Mr Ruka maintained his denial of offending.

[16] On 21 September Judge Kiernan granted Mr Levett leave to withdraw as Mr Ruka's counsel. Mr Ruka had instructed Mr Levett that he wished to vacate his pleas of guilty entered on 21 April. Mr Levett believed that he was placed in a position of conflict given Mr Ruka's original instructions and his advice to his client.

[17] Judge Kiernan convened a further hearing on 22 October. On that occasion, in the words of the Judge, "another group of people ... wish[ed] to represent ..." Mr Ruka and to have the charges against him and his sister determined on a marae. The Judge denied them leave to represent Mr Ruka. The proceeding was further adjourned to 16 November to hear Mr Ruka's application to vacate his pleas of guilty and to conduct a s 9 hearing to determine whether the factual elements of the charges against Mr Ruka were proven. By then a new counsel, Mr Hoskin, was engaged to represent Mr Ruka.

(b) The first section 9 decision

[18] In order to understand what followed it is necessary to set out the relevant provisions of the CPMIP Act then in force:[3]

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[3] Section 11(3) has since been repealed and amended by s 18 of the Summary Proceedings Act (No 2) 2008 with the effect that the provisions of that statute in so far as they relate to a committal hearing apply to every hearing under s 11(2).

7 When finding of unfitness to stand trial may be made

(1) A court may make a finding under this subpart that a defendant is unfit to stand trial at any stage after the commencement of the proceedings and until all the evidence is concluded.

(2) Subsection (1) is subject to section 9.

...

9 Court must be satisfied of defendant's involvement in offence

A court may not make a finding as to whether a defendant is unfit to stand trial unless the court is satisfied, on the balance of probabilities, that the evidence against the defendant is sufficient to establish that the defendant caused the act or omission that forms the basis of the offence with which the defendant is charged.

...

11 Inquiry into defendant's involvement if committal proceedings required

(1) This section applies if committal hearings under Part 5 of the Summary Proceedings Act 1957 are required.

(2) If the question whether the defendant is unfit to stand trial is to be determined before or without a committal hearing, the Court must hold a special hearing to ascertain whether the Court is satisfied of the matter specified in section 9.

(3) The provisions of Part 5 of the Summary Proceedings Act 1957 that relate to committal hearings, so far as they are applicable and with any necessary modifications, apply to every hearing held under subsection (2).

(4) A hearing held under subsection (2) takes the place of a committal hearing under Part 5 of the Summary Proceedings Act 1957.

(5) If the question whether the defendant is unfit to stand trial is to be determined in the course of a committal hearing, the Court must ascertain whether it is satisfied of the matter specified in section 9.

(6) For the purpose of subsection (5), the Court may (whether on the application of the party or on the Court's own initiative) do either or both of the following:

(a) consider any evidence presented at the committal hearing:

(b) hear any new evidence.

(7) A District Court Judge must preside over a Court that conducts a special hearing under subsection (2) or determines whether the defendant is unfit to stand trial in the course of a committal hearing.

12 Inquiry at trial into defendant's involvement

(1) If the question whether the defendant is unfit to stand trial is to be determined in the course of a trial, the court must ascertain whether it is satisfied of the matter specified in section 9.

(2) For the purpose of subsection (1), the court may (whether on the application of a party or on the court's own initiative) do 1 or more of the following:

(a) consider any evidence presented [for the purposes of the standard committal or at the committal hearing] or at the trial:

(b) rehear any of the evidence presented [for the purposes of the standard committal or of the committal hearing]:

(c) hear any new evidence at any stage before the commencement of the closing addresses.

13 Outcome of consideration of defendant's involvement

(1) When the court has ascertained, in accordance with any of sections 10 to 12, whether the court is satisfied of the matter specified in section 9, the court must record its finding on the matter.

(2) If the court is not satisfied of the matter specified in section 9, the court must discharge the defendant.

(3) A discharge under subsection (2) does not amount to an acquittal.

(4) If the court is satisfied of the matter specified in section 9, the court must proceed to determine the matters specified in section 14.

[19] We interpolate that no issue was taken before us about Judge Kiernan's jurisdiction to convene the s 9 hearing after committal but before trial. On a literal reading, there is a statutory hiatus: ss 10, 11 and 12 provide respectively for a s 9 hearing at a summary hearing, at a committal hearing and at trial. There is no provision for a discrete s 9 hearing between the latter two events. In *McKay v R* this Court filled in the gap to make the legislation work by reading s 12(1) as allowing for a s 9 hearing between committal and trial.[4] We respectfully endorse that course.

[20] The s 9 hearing did not proceed on 16 November 2009. On that date Mr Hoskin applied for a direction that the four complainants be made available for cross-examination. The Crown opposed. Mr Ruka still faced the 12 charges contained in the amended indictment presented on 21 April – four of sexual violation

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4 *McKay v R* [2009] NZCA 378, [2010] 1 NZLR 441 at [90]–[96].

by unlawful sexual connection, three of indecent assault on a girl under 12, three of sexual contact with a child, and two of aggravated assault.

[21] Judge Kiernan granted Mr Ruka's application. It is appropriate in the context of this appeal to set out her reasons in full:[5]

> [49] What is clear is that the rights of the accused and the interests of the young complainants must both be balanced against the overall interests of justice. As Professor Brookbanks neatly summarises matters, the evidential inquiry and the procedure adopted must be subject to the requirements of natural justice and the ability to test any evidence which may be inherently unreliable. This is the conclusion which the Court of Appeal noted at paragraph 48 in *McKay* they did not wish to comment upon, but considered that his conclusion was probably right.
>
> [50] In the case before me I state clearly that in my considered opinion that conclusion and the ambit of the evidential enquiry must be right and I approach my consideration on that basis.
>
> [51] *It is not enough for this Court to view the videotaped evidence of the complainants, however compelling the Crown suggests that might be, in a factual scenario where the basic credibility of the complainants is squarely in contest. This is, in addition, against a background where there may be other factors to be put to at least two of the complainants in cross-examination. For the Court to admit the evidential videotapes without any testing of the evidence in any sense would be unconscionable.* Although ss 11 and 12 of the statute are no help in this situation, the principles developed under s 185C Summary Proceedings Act [1957] are of assistance.
>
> [52] The object of that section is, obviously, to spare a complainant the stress and embarrassment of giving evidence twice except where necessary in the context of that consideration. There is a parallel, in my view, with s 9. Obviously, as recognised in the Evidence Act and acknowledged by Courts, young complainants are to be spared from undue stress. Unpalatable as it may be to require young complainants to potentially give evidence twice I cannot see any way to avoid that circumstance in this case. *The accused is entitled to test the evidence before the Court makes a determination as to whether he caused the acts that form the basis of the offences with which he is charged.*
>
> [53] Although the s 9 hearing is clearly designed to ensure that a person is diverted from proceedings before being a risk of being found unfit to stand trial, the Court needs to reach a decision, albeit on the balance of probabilities, that the evidence is sufficient to establish the actus reus.
>
> [54] I rule that the evidence to be before the Court at this s 9 hearing in respect of the complainants are the videotaped interviews as evidence in chief and the complainants be available for cross-examination at the hearing. The officer in charge, Detective Pivac, is also to be available for cross-examination. Further, from submissions of counsel, it appears that the

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5 *R v Ruka* DC Auckland CRI-2007-044-6866, 16 November 2009.

> evidence of the medical doctors will also be part of the evidence on which the Court makes its decision, though they are not presently required for cross-examination.
>
> (Our emphasis.)

[22] The Judge noted that it would be for the Crown to determine whether all four complainants should give evidence or whether it elected to bring the oldest complainant only to Court, limiting the determination sought under s 9 to the charges which related to her.

(c) The second section 9 decision

[23] The s 9 hearing was to proceed on 17 December 2009. However, on that date the prosecutor requested Judge Kiernan to review her decision on 16 November on the scope of the s 9 hearing, on the ground that this Court's decision in *R v Te Moni*[6] had been delivered on 26 November: it was said by the prosecutor to contradict the Judge's earlier s 9 decision.

[24] Judge Kiernan made a number of orders on 17 December. She granted leave to Mr Ruka and his sister to withdraw their pleas of guilty and quashed their convictions.[7] She also granted the Crown leave to file an amended indictment against Mr Ruka, effectively reinstating the original 20 charges including the four of rape.

[25] The Judge was satisfied that she had jurisdiction to review her original decision on the scope of s 9 hearing. She heard submissions from the Crown and from Mr Hoskin in opposition. Her decision placed particular reliance on these passages from *Te Moni*:

> [94] Where an inquiry into [an] accused person's fitness to stand trial is held either prior to committal (at a special hearing) or at a committal hearing, the provisions of Part 5 of the Summary Proceedings Act apply: s 11 of the [CPMIP] Act. In cases of a sexual nature, Part 5A (imposing protections on the complainant where the defendant is charged with an offence of a sexual nature) will also apply. In our view, that will also be the case where the

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6 *R v Te Moni* [2009] NZCA 560.

7 Mr Downs points out that the Judge was without jurisdiction to quash the convictions, see *Re Kestle* [1980] 2 NZLR 337 (SC).

> inquiry into the accused person's fitness to stand trial arises after committal but before trial. This Court said in *McKay* that the Court may conduct a hearing under s 12(2) of the [CPMIP] Act. Such a hearing will be governed by Part 5 of the Summary Proceedings Act. That means that the procedure will be the same as that for a committal hearing. In our view, Part 5A will also apply if the case involves an allegation of sexual offending, because any hearing governed by Part 5 in a case of a sexual nature must be also governed by Part 5A. That is an important protection for the complainant because under s 185C, which appears in Part 5A, provision is made for the complainant's evidence to be given by written statement, subject to certain exceptions. This is designed to avert the need for a complainant to give evidence and be cross-examined twice.
>
> [95] One of the exceptions is where the Court considers it is necessary for the complainant to give oral evidence at the special hearing in order to make the determination required by s 9: see s 185C(1)(b). In a case where the issue is whether the sexual activity was or was not consensual, the need for the complainant to give oral evidence may arise so that the Court is in a position to determine whether it is established on the balance of probabilities that the sexual activity was not consensual.

[26] After reciting that she was bound by this Court's interpretation in *Te Moni* of the interrelationship between parts 5 and 5A of the Summary Proceedings Act 1957, and without further reasoning, the Judge concluded that:

> [33] ... in reliance on *Te Moni* I rule that the evidence to be before the Court at the s 9 hearing should be the videotaped interviews with the four complainants, the brief of evidence of Detective Pivac and the interview conducted by Detective Pivac with Mr Ruka.

[27] Later, after conducting her s 9 inquiry, the Judge found as follows:

> [38] Having carefully considered the evidence of the four complainants and the charges against Mr Ruka set out in the indictment, and having regard to the tests in s 9 I am satisfied, on the balance of probabilities, that the evidence against the accused is sufficient to establish that he had caused the acts set out in the indictment that form the offences with which he is charged in respect to each of the four complainants.

(d) The section 14 decision

[28] The Judge then considered the consequential question of whether Mr Ruka was mentally impaired. Section 14 provides:

> **14 Determining if defendant unfit to stand trial**
>
> (1) If the court records a finding of the kind specified in section 13(4), 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 commence or continue the hearing or trial, or commit the defendant for trial, as the case may require.

[29] Drs Visser and Duff were cross-examined at the hearing. Judge Kiernan also considered Dr Patel's report. The Judge was satisfied on the balance of probabilities that Mr Ruka was unfit to stand trial on the ground that:

> [59] ... Mr Ruka would have difficulties in areas of understanding concerning the nature and the possible consequences of the proceeding and certainly in being able to communicate adequately with counsel for the purposes of conducting a defence. It is also clear from the doctor's reports and questioning during the hearing that he would have difficulties in following the proceeding and would be unable to make an informed decision as to whether or not to give evidence.

(e) Disposition

[30] Mr Hoskin was subsequently replaced by Mr Minchin as Mr Ruka's counsel.

[31] On 26 March 2010 Judge Kiernan, exercising her powers under s 25 of the CPMIP Act, ordered that Mr Ruka be cared for as a care recipient under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 for a term of 18 months.

[32] On 5 October 2010 this Court granted Mr Ruka's application for bail pending disposition of his appeal on strict terms as to residence, non-association and a curfew.[8]

Appeal

[33] This Court's jurisdiction to determine Mr Ruka's appeal is found in ss 16 and 17 of the CPMIP Act as follows:

> **16 Appeal by defendant against finding relating to fitness to stand trial**
>
> (1) A defendant about whom a finding under section 14(2)(b) has been made may appeal against 1 or both of the following findings:
>
> (a) that the evidence against the defendant is sufficient to establish that the defendant caused the act or omission that forms the basis of the offence with which the defendant is charged:
>
> (b) that the defendant is unfit to stand trial or, as the case may be, fit to stand trial.
>
> (2) For the purposes of an appeal under this section,—
>
> (a) the finding appealed against is to be regarded as a conviction; and
>
> (b) the provisions of the Crimes Act 1961 or the Summary Proceedings Act 1957 relating to appeals against conviction, so far as they are applicable and with any necessary modifications, apply to the appeal.
>
> **17 Matters for appellate court on appeal under section 16**
>
> (1) If, on an appeal under section 16, the court is satisfied that the evidence against the defendant is not sufficient to establish that the appellant caused the act or omission that forms the basis of the offence with which the appellant is charged, the court must quash the finding appealed against and direct that the appellant be discharged.
>
> (2) A discharge under subsection (1) does not amount to an acquittal.
>
> (3) In the case of an appeal against a finding relating to the appellant's fitness to stand trial, the court must (except where the appellant has been discharged under subsection (1)) consider the evidence of 2 health assessors, and confirm or quash the finding relating to the appellant's mental impairment.
>
> (4) If the court is satisfied that the appellant is mentally impaired, the court must—

[8] *Ruka v R* [2010] NZCA 456.

> (a) give the appellant and the respondent an opportunity to be heard and to present evidence as to whether the appellant is unfit to stand trial; and
>
> (b) confirm or quash the finding relating to the appellant's fitness to stand trial.
>
> (5) If the result of the appeal is that the appellant is fit to stand trial, the court must remit the case to the High Court or the District Court, as the case may require.

[34] This appeal is limited to the first finding, the s 9 finding, listed in 16(1)(a). As earlier noted, the Judge's second finding about fitness to stand trial is not in issue.

[35] It is appropriate to preface the rest of this judgment by recording now that Mr Ruka's appeal must be allowed. We are satisfied that Judge Kiernan was wrong in her second s 9 decision to refuse Mr Ruka leave to cross-examine the complainants, essentially for the reasons carefully set out in her first s 9 decision (see at [21] above). We shall explain our own reasoning when addressing counsels' submissions and in a separate conclusion. However, before reaching that stage we must address a number of submissions from both counsel in the hope that our judgment will answer relevant issues of interpretation relating to the CPMIP Act.

[36] Mr Ruka's original notice of leave to appeal was filed by his then counsel, Ms Te Whata, on 16 June 2010. The notice identified the sole ground of appeal as Judge Kiernan's error in her second s 9 decision in finding there was sufficient evidence to establish that Mr Ruka caused the acts forming the basis of the offences with which he was charged.

[37] Mr Ellis was later instructed as counsel. On 14 September 2010 he filed an amended notice. In summary, that notice expanded the grounds of challenge to the second s 9 decision. Independently it mounted an attack on the constitutional validity of the CPMIP Act, with the apparent objective of persuading us to stay the proceeding rather than remit it to the District Court for rehearing if we quashed the second s 9 decision.

[38] Mr Ellis' written submissions identified ten discrete grounds of appeal. On analysis, the first three overlap in constituting a challenge to the correctness of Judge

Kiernan's second s 9 decision. The remaining seven are generally a challenge to the constitutional validity of the CPMIP Act – again some overlap or are repetitive.

[39] In order to do justice to the competing submissions we shall deal with the appeal under the same two broad headings – successively, the second s 9 decision itself and the wider constitutional issue. And we shall approach the first primarily by addressing Mr Downs' submissions in support of the second s 9 decision and Mr Ellis' arguments to the contrary.

Second s 9 decision

(a) Crown's primary argument: Implicit reasoning

[40] Mr Ellis relies on the absence of fact specific reasons for Judge Kiernan's second s 9 decision: Mr Downs seeks to uphold the decision by what he calls its implicit process of reasoning. He suggests, for example, that the Judge may have had particular regard to the apparent quality of the evidential interviews which could not in her view be impeached by cross-examination.

[41] Mr Downs refers to individual factors which may have influenced the Judge: namely, that on the face of the material each complainant presented a graphic and detailed account of the offending; that generically all young children do not tend to provide detailed accounts; that one complainant raised the issue with a respite care giver whose evidence, if admissible, may have pre-empted any challenge based on recent invention; that Mr Ruka's denial was of a general nature; and that Mr Ruka had ample opportunity to commit the offending while the complainants were living with his family.

[42] Mr Downs properly accepts, however, that none of these factors were explicitly discussed or relied upon by the Judge. Each may have been relevant to an assessment of the reliability or veracity of the competing accounts. But in our judgment they could not on their own be sufficient to justify the second s 9 decision. In particular, we reject Mr Downs' submission that the evidential interviews might have established the case to the statutory standard of proof: the Judge herself

convincingly answered this proposition in her first s 9 decision (see at [21] above). While Mr Ruka maintained his denial of offending, the Judge could not properly have determined the ultimate issue of whether he caused the acts complained of without the prosecution evidence being tested by the orthodox process of cross-examination coupled with a right to call evidence in denial.

[43] In this respect, Mr Downs recognises the importance of Mr Ruka's right to apply under s 44 of the Evidence Act 2006 for leave to cross-examine the two older complainants on alleged previous sexual activity with their biological father and a retraction by one (see at [8] above). That application was made in anticipation of the scheduled trial but withdrawn by counsel for unknown reasons. Mr Downs has helpfully provided a full outline of the relevant facts. These events were, as the Judge herself recognised, directly relevant to an assessment of the reliability of the complainants' evidence against Mr Ruka.

[44] This issue of earlier allegations of sexual offending and a retraction clearly required investigation under oath. The circumstances raised questions of collusion and contamination. As Mr Downs acknowledges, the factual basis for the s 44 application would have been relevant if Mr Ruka had been found fit to stand trial. The same considerations must apply equally to a s 9 hearing.

[45] In this respect we add that when Judge Kiernan made her s 9 decisions there would have been little risk of subjecting the complainants to cross-examination at two contested hearings – one to determine whether the Crown had proven the elements of s 9 and another at a later trial.[9] By early September 2009 the Judge was in receipt of reports from the two health professionals and the forensic nurse. While the decision on Mr Ruka's fitness to stand trial ultimately rested with the Judge, the experts were both of the opinion that he was unfit to plead. It was unlikely that the Judge would conclude differently. So, in reality, the s 9 hearing would be Mr Ruka's only opportunity to test the prosecution evidence and present his defence.

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9 See *Te Moni* at [96].

(b) Crown's secondary argument: nature of s 9 hearing

[46] Mr Downs submits that the statutory scheme vests a Court with a discretion to determine its own procedural course in conducting a hearing under s 9. The cornerstone of his submission is a proposition that the CPMIP Act procedure does not involve the determination of a criminal charge. Thus the minimum standards of criminal procedure prescribed by s 25 of the New Zealand Bill of Rights Act 1990 (the NZBORA) do not apply. Accordingly, he submits, Mr Ruka was not entitled as of right to test the complainants' evidence by cross-examination and the Judge correctly exercised her discretion in the second s 9 decision to refuse that course.

[47] In support Mr Downs cites this passage from Lord Hutton's speech in *R v Antoine,*[10] commenting on s 4A of the Criminal Procedure (Insanity) Act 1964 (UK), (the equivalent of s 9), that:[11]

> The purpose of [the] section ... in my opinion, is to strike a fair balance between the need to protect a defendant who has, in fact, done nothing wrong and is unfit to plead at his trial and the need to protect the public from a defendant who has committed an injurious act which would constitute a crime if done with the requisite mens rea. The need to protect the public is particularly important where the act done has been one which caused death or physical injury to another person and there is a risk that the defendant may carry out a similar act in the future. I consider that the section strikes this balance by distinguishing between a person who has not carried out the actus reus of the crime charged against him and a person who has carried out an act (or made an omission) which would constitute a crime if done (or made) with the requisite mens rea.

[48] Mr Downs also cites Lord Bingham's statement in *R v H* that:[12]

> It would be highly anomalous if section 4A, introduced by amendment for the protection of those unable through mental unfitness to defend themselves at trial, were itself to be held incompatible with the Convention. It is very much in the interest of such persons that the basic facts relied on against them (shorn of issues concerning intent) should be formally and publicly investigated in open court with counsel appointed to represent the interests of the person accused so far as possible in the circumstances. The position of accused persons would certainly not be improved if section 4A were abrogated. In my opinion, however, the argument is plainly bad in law. Whether one views the matter through domestic or European spectacles, the answer is the same: the purpose and function of the section 4A procedure is

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10 *R v Antoine* [2001] 1 AC 340 (HL).
11 At 375–376.
12 *R v H* [2003] UKHL 1, [2003] 1 WLR 411 at [18].

> not to decide whether the accused person has committed a criminal offence. The procedure can result in a final acquittal, but it cannot result in a conviction and it cannot result in punishment. Even an adverse finding may lead, as here, to an absolute discharge. But if an adverse finding leads to the making of a hospital order, there is no bar to a full criminal trial if the accused person recovers, an obviously objectionable outcome if the person has already been convicted. The section 4A procedure lacks the essential features of criminal process as identified in *Customs and Excise Comrs v City of London Magistrates' Court* [2000] 1 WLR 2020, 2025.

[49] In Mr Downs' submission both statements, to which we shall return, accord with this Court's view in *Te Moni:*[13]

> [66] ... that the determination required by s 9 does not engage the right to trial by jury in s 24(e) of the Bill of Rights. That right applies only where a person charged with an offence is tried for that offence. A hearing that occurs in the course of determining whether a person is fit to stand trial cannot itself constitute a trial of the offence with which the person has been charged. The defendant's guilt or innocence is not being determined: a finding of evidential insufficiency does not amount to an acquittal (s 13(3)), just as a finding of evidential sufficiency does not amount to a conviction.

[50] Mr Downs also seeks support from the decision of the Canadian Supreme Court in *R v Demers*.[14]

[51] The short answer to Mr Downs' submission is that Judge Kiernan did not purport to exercise a discretion when reaching her second s 9 decision. Instead, the Judge proceeded wrongly as if bound by *Te Moni* to refuse Mr Ruka's request to cross-examine whereas she correctly exercised her discretion when giving her first s 9 decision. However, we shall address the substance of Mr Downs' submission.

[52] We agree with Mr Downs that, first, ss 11(4) and 12(2) vest a measure of discretion in the Judge about the procedure to be adopted when conducting a s 9 hearing; and, second, the process of making a determination under s 9 is not a criminal trial.[15] That second conclusion must follow from the statutory provisions that a person who is found fit to plead is required to be committed for trial; and that a discharge of a person where a Court is not satisfied under s 9 does not amount to an acquittal.[16] The process does not result in the defendant's conviction or

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13 *R v Te Moni* [2009] NZCA 560.
14 *R v Demers* 2004 SCC 46, [2004] 2 SCR 489 at [33]–[36].
15 *Te Moni* at [66].
16 CPMIP Act, ss 14(4) and 13(3).

condemnation.[17] An adverse s 9 finding is only treated as a conviction for the purpose of an appeal.[18]

[53] However, that conclusion does not answer Mr Ellis' submission. Mr Ruka was charged with and committed for trial on a range of criminal offences. Mr Downs does not suggest that Mr Ruka was not entitled throughout the District Court process to the benefit of the rights provided by ss 23 and 24 of the NZBORA except to the extent that at the s 9 hearing he was not entitled to a trial by jury (s 24(e)). It was of critical importance to Mr Ruka in this case that he have the benefits of the s 24(a), (c) and (d) rights to be informed promptly and in detail of the nature and cause of the charges; to consult and instruct a lawyer; and to have adequate time and facilities to prepare a defence.

[54] Mr Downs is strictly correct that, in terms of the minimum standards of procedure guaranteed by s 25 of the NZBORA, the Court was not determining the charges when conducting a s 9 hearing. However, the NZBORA is to be interpreted generously and purposively. In terms of s 25, Mr Ruka had been charged with offences and the s 9 hearing was arguably a step taken "in relation to the determination of the charge[s]". The Court was hearing the evidence which formed the basis of the charges. And it was required to make a formal determination based upon that evidence of whether it was satisfied to the defined standard that Mr Ruka had caused the relevant acts.

[55] Moreover, it cannot be denied that the minimum standards successively prescribed by s 25(a)–(e) would apply to the s 9 hearing (subject to modification for the fact that it was not a trial of the charges), namely the rights to a fair and public hearing by an independent and impartial court; to be heard without delay; to be presumed innocent until the s 9 burden of proof was satisfied; not to be compelled to give evidence; and to be present at the hearing and present a defence. It would be an odd result if the succeeding and related s 25(f) right to examine prosecution witnesses did not apply with equal force.

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17 *Customs and Excise Commissioners v City of London Magistrates' Court* [2000] 1 WLR 2020 (QB) at 2025 per Lord Bingham.

18 CPMIP Act, s 16.

[56] The s 9 process resembled a criminal trial. It was the prescribed manner for determination of Mr Ruka's rights, if not of the charges themselves. The prosecution was obliged to tender its evidence of Mr Ruka's involvement in causing the factual elements of the charges. Mr Ruka's denial made the process adversarial in nature. And if the determination was adverse, he would be exposed to the risk of loss of his liberty. The presence of these features provided a necessary foundation for permitting Mr Ruka the right to cross-examine prosecution witnesses.

[57] In *R v Cumming*[19] French J accepted that, where an issue under s 9 must be determined in the course of trial and the credibility of the complainant's evidence is central, the defendant is entitled to test it for reasons of fairness and natural justice. The same reasoning, which we endorse, was expressly adopted by Judge Kiernan in her first s 9 decision in finding that Mr Ruka was entitled in the circumstances of this case to test the prosecution evidence by cross-examination and by calling his own witnesses where the essential facts were in sharp contest; and where as a result the Court was faced with diametrically opposed versions of events and collusion or contamination was a possibility. In *R v McKay* this Court expressed its provisional approval of Professor Warren Brookbanks' opinion that the s 9 procedure imports the requirements of natural justice and the ability to test any evidence which may be inherently unreliable.[20]

[58] We add that we do not read the passage from *Te Moni* at [66] as supporting Mr Downs' submission. This Court was simply noting that s 24(e) of the NZBORA – the right to trial by jury – is not engaged by the s 9 procedure; that is because the s 9 hearing is not a trial of a criminal charge and thus there can be no right to determination by a jury. Nor do the passages cited by Mr Downs from the decision in *Demers* assist. A different issue arose in that appeal: the Canadian Supreme Court was addressing a constitutional challenge to the equivalent of s 9 which provided the lower standard of whether the Crown was able to adduce sufficient evidence to the defendant on trial.

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19 *R v Cumming* HC Christchurch CRI-2001-009-835552, 17 July 2009.
20 *R v McKay* [2009] NZCA 378, [2010] 1 NZLR 441 at [48].

(c) Mr Ruka's standard of proof submission

[59] Mr Ellis separately challenges Judge Kiernan's second s 9 decision on the ground that she wrongly adopted the civil standard of proof of the balance of probabilities. Despite its apparently unambiguous wording, he submits that s 9 still requires proof beyond reasonable doubt. That is because the s 9 hearing is a criminal process and an adverse decision upon it is in the nature of a determination of guilt. It follows that there can be no fair trial unless the criminal standard of proof beyond reasonable doubt is required. In support, Mr Ellis submits that the wording of s 9 empowers the Judge with a discretion to substitute the criminal standard.

[60] We have already concluded, in agreement with *Te Moni*, that the s 9 hearing is not a criminal trial; and that an adverse decision does not amount to a finding of guilt and a discharge is not an acquittal. However, the simple answer to Mr Ellis' submission lies in the plain words of s 9: they require satisfaction of causation of the factual elements of the charge "on the balance of probabilities". As Mr Downs points out, Parliament adopted the civil standard of proof following a deliberative process.

[61] Mr Downs cites this passage from the Select Committee's report on the Criminal Justice Amendment Bill:[21]

> We note the concerns of the Human Rights Commission and Auckland City Council that a compulsory care order can, in the circumstances envisaged by this bill, have effects that are equivalent to a criminal conviction. However, a finding of unfitness does not involve a determination of criminal liability and leads to civil detention. We consider that the appropriate standard of proof is on the balance of probabilities. Similarly, the finding under proposed new section 111 that the defendant caused that act or omission is not a determination of criminal liability: it is merely a determination that the prosecution has produced sufficient evidence to make out a prima facie case in relation to the physical elements of the offence. That is not conducive to proof beyond reasonable doubt. We therefore consider that the appropriate standard is also on the balance of probabilities.

[62] Parliament's rationale for adopting this standard, as Mr Downs submits and we have accepted, is that, even though a finding of unfitness can result in a curtailment of a person's liberty and compulsory treatment, it does not constitute a

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[21] Criminal Justice Amendment Bill (No. 7) 1999 (328-2) (select committee report) at 4-5.

conviction and imprisonment is not an available order for a person found unfit to stand trial. Section 9 is a safeguard for a defendant; it is a screening mechanism designed to protect a person from being subjected to the consequences of a finding of unfitness to face trial in the absence of proof to a defined standard of involvement in the alleged offending.

[63] Furthermore, on its plain meaning s 9 does not vest a discretion in the Court to adopt a standard other than the balance of probabilities, as Mr Ellis separately submits. The opening words of s 9 are unambiguously prohibitory. Its effect is that a Court has no jurisdiction to make a finding on fitness to stand trial unless it is first satisfied that the defendant probably caused the relevant acts.

(d) Mr Ruka's counsel incompetence submission

[64] Mr Ellis alternatively submits that Mr Ruka's counsel in the District Court were incompetent, and arguably guilty of misconduct. Based on an affidavit sworn and filed by Mr Ruka's mother shortly before this appeal was heard, he says that counsel must have known of Mr Ruka's disability and were in breach of a duty to advise the Court. He asserts that both defence and prosecution counsel were aware from Mr Ruka's mother of his intellectual disability. He says that condition must also have been readily apparent to defence counsel when taking instructions. He says this alleged failure caused a breach of natural justice from the outset.

[65] We cannot properly consider this submission in the absence of affidavits from counsel who represented Mr Ruka in the District Court. Mr Ellis seeks an adverse finding by adopting a route which effectively deprives those counsel of a right of reply: basic principles of fairness, which underpin many of Mr Ellis' submissions, apply equally to those who stand accused of professional misconduct. Mr Ellis' assertion that Mr Ruka's incapacity does not allow him to validly waive privilege does not sit easily with the way this appeal has been conducted; Mr Ruka's incapacity has not apparently interfered with his counsel's formulation of a wide range of legal arguments on appeal. In any event, Mr Ellis on Mr Ruka's behalf could have sought directions from this Court before the appeal was heard on the

terms of affidavits to be sworn by defence counsel on limited issues which would not have required a waiver of privilege.

[66] In this respect Mr Downs' table of applications and orders made under the CPMIP Act since 2005 is instructive. It could be construed as evidence of a widespread appreciation within the criminal defence bar of their statutory responsibilities. The breakdown is as follows:

Table 1: Number of applications made under Section 14 (Determining if defendant unfit to stand trial) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 – 2005 to 2010.

Court	2005	2006	2007	2008	2009	2010	Total
High Court	11	9	14	10	9	7	60
District Court	311	276	226	190	221	208	1432
Youth Court	1	4	7	7	5	6	30
Total	323	289	247	207	235	221	1522

Table 2: Number of persons deemed unfit to stand trial - Section 14 (Determining if defendant unfit to stand trial) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 – 2005 to 2010.

Court	2005	2006	2007	2008	2009	2010	Total
High Court	1	1	2	3	1	4	12
District Court	32	34	45	60	54	53	278
Youth Court	0	1	7	5	2	5	20
Total	33	36	54	68	57	62	310

[67] It is easy, in a case like this, to criticise trial lawyers with the benefit of hindsight. Counsel face many difficulties in this problematic area. They are not trained health professionals. Often they must rely on instinct, experience or advice from a family member or friend. As Ms Coleman points out, those suffering from intellectual disabilities have very different capacities.

[68] Also, the symptoms of disability are not uniform. Some cases will be obvious. But other cases will be at the margins – where the existence of a mental impairment rendering a defendant unable to conduct a defence or instruct counsel will not be readily apparent. Frequently a defendant will have an ascertainable history of mental illness. Or he or she may have demonstrated a pattern of offending which calls into question his or her mental capacity. What was unusual in this case, as the health professionals noted, was that Mr Ruka had not previously come to the attention of official agencies including the police.

[69] It is not for us to formulate a practice note. We can only reinforce the importance of counsel exploring carefully a defendant's ability to give instructions or conduct a defence wherever a doubt is raised. If doubts remain, counsel is under a duty to raise the issue with the Judge who must then consider whether to appoint health professionals to provide reports.[22] However, given the evidential deficiencies in this case we repeat that we are not in a position to decide questions of counsel's competence. And, in any event, there was always a more obvious and compelling ground of appeal.

(e) Mr Ruka's interpreter submission

[70] Mr Ellis also submits that Mr Ruka had a right to an interpreter at the CPMIP Act hearings. He says that this appointment was necessary in view of Mr Ruka's linguistic, communication and cognitive disabilities; and that no fair hearings were possible without communication or specialist assistance.[23] He says this Court was wrong in *Te Moni* when rejecting a similar submission in these terms:

> [58] We conclude that the right to an interpreter in s 24(g) of the Bill of Rights is not engaged in a case such as this, where the needs of the accused person are for explanation of difficult concepts rather than translation from one language to another. Such a person does, however, have a right to a fair trial, and there may be cases in which a person with specialist training in explaining criminal procedures and legal concepts to an accused person is needed. That need should be met if that is what is required to ensure that the accused person receives a fair trial.
>
> [59] In most cases, it can be expected that counsel will have sufficient linguistic ability to explain legal concepts to a party who has been found to satisfy the fitness to stand trial requirements of s 4 of the [CPMIP] Act. But if that is not the case in a particular trial, the trial Judge may direct that specialist assistance be provided.

[71] The decision in *Te Moni* was a judgment of permanent members of this Court. We are not persuaded that it is wrong or should be revisited. In particular, we note the Court's express recognition of the Judge's power to direct specialist assistance where necessary. It will invariably be a question of judgment to be exercised in the particular circumstances. A similar power to appoint an

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22 *R v Walls* [2011] EWCA Crim 443, [2011] 2 Cr App R 6 at [61]; see also *Te Moni* at [39] and [40].

23 Evidence Act, s 4(1), definition of "communication assistance" and s 80.

intermediary exists in England.[24] Also, of course, in centres which provide such facilities, the Court is able to call upon the services of a forensic nurse.

(f) Our conclusion

[72] We are satisfied that Judge Kiernan erred in her second s 9 decision because she, like the prosecutor in the District Court, misinterpreted *Te Moni*. The issue arising in *Te Moni* was different from this case. Mr Te Moni was convicted at trial in the District Court on one charge of rape. He was sentenced to five years imprisonment with an order committing him as a special care recipient. At trial he admitted the act of sexual intercourse. His defence was consent.

[73] Mr Te Moni had through his counsel made an application to determine his fitness to stand trial before the trial commenced. His counsel withdrew the application after the presiding Judge had indicated that abandonment may better serve Mr Te Moni's interests. His fitness to stand trial was never raised again. The particular ground of appeal was whether the Judge erred in law in not making a finding on Mr Te Moni's intellectual disability or fitness to plead.

[74] In *Te Moni* this Court, as it had done earlier in *McKay,* carefully reviewed the process for determining a person's fitness to stand trial under the CPMIP Act. The Court was satisfied in *Te Moni* that the Judge erred in allowing the application for a ruling on fitness to be discontinued before determining it. When discussing s 9 in the context of a wider discussion about rights of cross-examination at a committal hearing pursuant to s 11 of CPMIP Act, the Court noted that "the act ... that forms the basis of the offence with which the defendant is charged included in a rape charge both elements of penetration and consent".[25] It was against this background that the Court made the observations at [94] and [95] (see above at [25]) which carried such weight with Judge Kiernan.

[75] However, on analysis, those passages do not support Judge Kiernan's second s 9 decision. In *Te Moni* this Court recognised that there will be exceptions to the

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[24] *R v Walls* at [36 vi].
[25] At [81].

general presumption against cross-examination of complainants before an accused is committed for trial on sexual offences, principally in cases where the complainant's oral evidence is necessary to make the threshold determination at a s 9 hearing. By reference to the facts in *Te Moni*, the Court gave as an example of such an exception a dispute about proof of the factual element of an absence of consent in a charge of rape. The same reasoning would apply where the other factual element of "... the act ... that forms the basis of the offence ..." – that of penetration or touching, for example – is in dispute. *Te Moni* is not authority for a blanket prohibition on cross-examination of complainants in sexual offending at a s 9 hearing.

[76] In this respect we endorse Professor Brookbanks' opinion that:[26]

> It is now clear that the prevailing approach of the Courts when considering the evidential requirements of a s 9 hearing is towards maximising, rather than minimising, the opportunities for the presentation and testing of evidence. This is despite the fact that s 9 hearings are statutorily located within standard committal processes. The reality, which the Courts have come to accept, is that a s 9 hearing has profoundly different consequences from a conventional committal hearing. An accused, following a determination that he caused the act or omission that constituted the offence charged, faces a real risk of indefinite detention if ultimately found unfit to stand trial. No such risk attends an accused committal for trial following a standard committal under part 5 SPA. For this reason the courts are alert to the need to treat oral evidence applications with care and caution before deciding to decline such applications.

[77] We add that a Court must not lose sight of the fact that, while it is not a criminal trial, a s 9 hearing has many of the hallmarks of a criminal trial. The Crown remains subject to the onus of proving that the defendant caused the relevant acts; and an adverse finding exposes the defendant not to imprisonment but to a degree of deprivation of liberty. With respect, the Judge in her second s 9 decision appears to have conflated the burden of proof with its standard and confused the requirement for a prima facie case at committal with the s 9 test.

[78] We are satisfied that Judge Kiernan's first s 9 decision and its reasoning were unquestionably right and it is unfortunate that the prosecution persuaded her to review and reverse it.

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[26] Warren Brookbanks "Section 9 Hearings: Oral Evidence" [2010] NZLJ 326 at 328.

Disposition

[79] The question then is one of disposition. The answer appears obvious. Mr Ruka's appeal against the finding made in the second s 9 decision is treated as being an appeal against a conviction.[27] The provisions of s 385 of the Crimes Act 1961 apply.[28] We must allow the appeal and set aside the finding on the ground that it is a wrong decision on a question of law.[29] However, we have a statutory discretion as to disposition.[30]

[80] Mr Ellis does not suggest that we direct that Mr Ruka be discharged, which would be the appropriate course were we satisfied that the evidence was not sufficient to establish the factual elements of the charges.[31] The logical alternative is to direct a new s 9 hearing.[32] However, Mr Ellis submits that the justice of the case requires a stay of proceedings.

[81] Mr Ellis seeks this result by challenging the constitutional integrity of the CPMIP Act. He describes the legislative scheme (particularly ss 9–14) as creating a discriminatory criminal justice process, applying only to persons suffering a mental impairment. He submits that discrimination is prohibited by s 19 of the NZBORA and s 21 Human Rights Act 1993 (the HRA). He says Mr Ruka is deprived of his right to a fair hearing. He describes Parliament's enactment of a "strange type of absolute liability offence for the intellectually disabled".

[82] Mr Ellis goes so far as to say that judges who preside over hearings under the CPMIP Act are in breach of their judicial oath.[33] That is because the judge cannot do right to all manner of people without fear or favour, compromising his or her independence in the face of a legislative command under ss 9–14 to behave unfairly.

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27 CPMIP Act, s 16(2).
28 CPMIP Act, s 16(2)(b).
29 Crimes Act, s 385(1)(b).
30 Crimes Act, s 385(2).
31 CPMIP Act, s 17(1).
32 Crimes Act, s 385(2).
33 Oaths and Declarations Act 1957, s 18.

[83] To illustrate the unfair and discriminatory nature of the process, and show Mr Ruka will never have the benefit of a fair hearing, Mr Ellis points to the process adopted by Judge Kiernan when determining Mr Ruka's fitness to plead in the District Court. He submits that the Judge failed to take sufficient steps to ensure that Mr Ruka's rights were protected, for example by arranging communication assistance or other aspects of an intellectually disabled friendly court. He says that the Judge failed to take steps, at least from July 2009, to ensure that Mr Ruka understood or at least understood to the best of his ability, what the proceedings were about; and that the Judge's vacation of pleas was insufficient.

[84] In response to this submission, Mr Downs sought our direction that Judge Kiernan file a report on the procedures adopted at Mr Ruka's CPMIP Act hearings.[34] We reproduce in full the contents of her report dated 15 June 2011 filed in compliance with our direction issued on 8 June:

> [1] This report is ... on any special procedural measures that were taken (including, for example, how the courtroom was set up) during the processes relating to Mr Ruka under the Criminal Procedure (Mentally Impaired Persons) Act 2003 to take account of Mr Ruka's intellectual disability.
>
> [2] Mr Ruka made a number of appearances before the District Court. Many of them were callovers or short appearances. No special procedural measures were taken on those occasions. On each occasion I was the presiding Judge. Mr Ruka attended Court represented by his counsel of the time, and supported by his parents and other whanau. My recollection is that on the occasion of short appearances before the Court Mr Ruka was allowed to stay seated beside his family in the public gallery while I heard from counsel.
>
> [3] With regard to the substantive hearings that took place, and in particular the hearings in November and December 2009, Mr Ruka's matter was the only matter called before the Court. On November 16, 17 and 18 the hearings were conducted either in a Family courtroom or in a small Criminal court. Mr Ruka was seated in court beside his counsel with his family, and in particular his parents, placed just behind him. There were no other members of the public in the courtroom.
>
> [4] On 17 and 18 December, when the hearing pursuant to s 9 of the CP(MIP) Act took place, again Mr Ruka was seated beside his counsel in a small courtroom with his parents close to him.
>
> [5] On every occasion after Forensic Services had become involved in his case, the court forensic nurse was present at the hearing in the courtroom. On every occasion that Mr Ruka appeared in the District Court I took care to

[34] Court of Appeal (Criminal) Rules 2001, r 17.

> ensure that his counsel had ample opportunity to obtain and receive instructions if required. I was also assisted by the presence of the forensic nurse, who on occasion was able to provide the Court with information.

[85] It is unfortunate that Mr Ellis did not request the Court to direct a report from Judge Kiernan after the appeal was set down in October 2008 and before asserting that Mr Ruka's hearing was conducted unfairly. The Judge's report stands as an emphatic answer. Mr Ellis now acknowledges the steps taken by her but nevertheless maintains various residual complaints. While all cases will depend on their circumstances, we are satisfied that the Judge's approach was exemplary once questions were raised about Mr Ruka's fitness to plead.

[86] There is also an answer to Mr Ellis' generic attack on the constitutional validity of the CPMIP Act. A powerful starting point is our acknowledgment of Parliament's sovereignty. Judges in this country have no power to question or decline to apply legislative enactments. The judicial function is limited to interpretation of the laws passed by Parliament.[35] In the absence of an express legislative mandate, we cannot determine that a process laid down by Parliament should not be followed even if we were persuaded that it was discriminatory.

[87] As Mr Downs submits, the legislature enacted the CPMIP Act, with related references to the Intellectual Disability (Compulsory Care and Rehabilitation) Act, to restate and reform the law relating to fitness to plead. Parliament has, following a deliberative process, created prescriptive processes for determining trial fitness for those whose mental capacities may be called into doubt after a criminal prosecution is initiated.

[88] Parliament's purpose is succinctly summarised by s 3 of the CPMIP as follows:

> The purpose of this Act is to restate the law formerly set out in Part 7 of the Criminal Justice Act 1985 and to make a number of changes to that law, including changes to—

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[35] See generally *British Railways Board v Pickin* [1974] AC 765 (HL) at 798 per Lord Simon; *Rothmans of Pall Mall (NZ) Ltd v Attorney General* [1991] 2 NZLR 323 (HC) at 330 quoted with approval in *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154 (CA) at 157.

(a) provide the courts with appropriate options for the detention, assessment, and care of defendants and offenders with an intellectual disability:

(b) provide that a defendant may not be found unfit to stand trial for an offence unless the evidence against the defendant is sufficient to establish that the defendant caused the act or omission that forms the basis of the offence:

(c) provide for a number of related matters.

[89] Mr Ellis does not, and could not, submit that Parliament is not entitled to adopt a process designed to deal with those suffering from mental or intellectual disabilities within the criminal justice system. His complaint is that the system adopted is discriminatory. He does not suggest that Part 1A of the HRA applies; and, neither of his only possible avenues for advancing that argument, s 19 of the NZBORA and s 21 of the HRA, assists.

[90] While s 21 of the HRA identifies intellectual or psychological disability or impairment as a prohibited ground of discrimination, s 21B(1) states:

> To avoid doubt, an act or omission of any person or body is not unlawful under this Part if that act or omission is authorised or required by an enactment or otherwise by law.

[91] This provision does avoid doubt if it ever existed otherwise. The HRA does not apply to or render unlawful under Part 2 any act or omission authorised or required by the CPMIP or otherwise by law. The acts of a court or a judge in conducting the hearings required by ss 9 to 14 of CPMIP Act fall squarely within the exclusionary purview of s 21(B)(1). Section 19 of the NZBORA does not advance Mr Ellis' argument. It does no more in this context than reaffirm the right to freedom from discrimination on the grounds found in the HRA.

[92] We should add that appellate courts in other jurisdictions have considered and dismissed challenges to the constitutional integrity of legislation similar to the CPMIP Act. The passages from the speeches of Lord Hutton in *Antoine's* case and in Lord Bingham in *H* (cited above at [47] and [48]) highlight the balance created by the procedures found in ss 9–14 between protecting two interests. One is the public interest in detaining and treating those who present a risk through no fault of their own. The other is of the defendant himself or herself who needs care and assistance

and thus should not be visited with the punitive response of conviction and sentence which society deems to be appropriate for the mentally or intellectually able.

[93] As Lord Hutton explained in *Antoine*, s 9 provides the appropriate mechanism for balancing these interests by excluding the requirement to prove the mental element of the offence. It creates a lower threshold for the state's intervention and a justification for assisting those who need care and treatment, while preserving the public interest in detention of those who present a risk to society. Consistently with this approach, Parliament has removed the formal sanctions of guilt and punishment for a person found unfit to stand trial.

[94] Finally, we add the obvious: a judge who in the performance of his or her office conducts a s 9 hearing cannot be in breach of his or her statutory oath when presiding over a hearing conducted in accordance with a statutory provision enacted by Parliament. And, for similar reasons, we cannot say that a defendant's detention under a supervised care order constitutes arbitrary detention contrary to s 22 of the NZBORA.

Result

[95] We allow Mr Ruka's appeal against the finding made in the District Court at Auckland on 17 December 2009 that he had caused the acts which formed the basis of the offences with which he is charged.

[96] The finding made against Mr Ruka in the District Court under s 9 of the CPMIP Act and the order for his detention as a care recipient are quashed. The proceeding is remitted to the District Court at Auckland for a rehearing under s 9 of the CPMIP Act and for such other hearings as may be necessary. The order made in this Court on 5 October 2010 granting Mr Ruka bail (see at [32] above) is extended until further order of the District Court.

Solicitors:
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