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IN THE COURT OF APPEAL OF NEW ZEALAND

CA695/2008
[2009] NZCA 560

THE QUEEN

v

M

Hearing: 8 October 2009

Court: Glazebrook, Chambers and O'Regan JJ

Counsel: T Ellis and J McVay for Appellant
F E Guy Kidd and B P D Leslie for Crown

Judgment: 26 November 2009 at 11.30 a.m.

Reissued: 23 December 2009 (correcting a slip at [97])

Effective date of judgment: 26 November 2009

JUDGMENT OF THE COURT

A **The appeal is allowed.**

B **The conviction on the charge of sexual violation by rape is quashed.**

C **A retrial on the charge of sexual violation by rape is ordered.**

D **If the Crown pursues a retrial and the question of the appellant's fitness to stand trial remains in issue, the District Court must undertake the process required under the Criminal Procedure (Mentally Impaired Persons) Act 2003 to determine whether the appellant is fit to stand trial.**

E **An order is made prohibiting publication of this judgment in news media or on the Internet or other publicly available database until final disposition of retrial or a finding is made that the appellant is unfit to stand trial, whichever occurs first. Publication in Law Report or Law Digest permitted.**

REASONS OF THE COURT

(Given by O'Regan J)

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Fitness to stand trial

[1] This appeal raises a number of issues about the process for determining whether an accused person is unfit to stand trial. That process is mandated by the Criminal Procedure (Mentally Impaired Persons) Act 2003 (the CP Act). In the present case, an application by Mr M's trial counsel for a finding that Mr M was unfit to stand trial was withdrawn before a decision was made. The primary issue on the appeal is whether the failure to complete the fitness to stand trial inquiry caused a miscarriage of justice.

Appeal

[2] Mr M was charged with one count of sexual violation by digital penetration and one count of rape. Both charges related to the same complainant and arose out of a single series of events. A jury acquitted Mr M in relation to the alleged digital penetration but convicted him of the rape. Judge Bidois imposed a sentence of five years' imprisonment, with an order committing Mr M as a special care recipient under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (the ID Act). Mr M appeals against his conviction.

Factual background

[3] At the time of the offending, Mr M and his mother were living with the complainant and her family. Mr M was in his early twenties; the complainant was in her late teens.

[4] On the morning of the alleged offending, the complainant awoke and went to Mr M's room. She found him alone, playing a video game. The two sat on Mr M's bed and took turns playing the game.

[5] The complainant gave evidence that, at some point, Mr M began kissing her on the neck. She told him to stop. He initially desisted but then resumed kissing her and touching her body, placing his hand between her legs. The complainant removed Mr M's hand from her groin region, telling him to stop touching her. Instead, he threw her onto the bed, placed his hand under her clothing and inserted his fingers into her vagina. Mr M then removed the complainant's trousers and underwear and had sexual intercourse with her.

[6] In her evidence, the complainant said that while Mr M was having sex with her, she was crying, swearing at him and struggling to push him off. After a few minutes, he did get off. He apologised repeatedly and then began crying. The complainant left the room, but then returned and continued playing the video game, crying. Mr M initially remained seated on the bed, but then left the room, went into the kitchen and began attempting to cut himself with a knife.

[7] In his video interview, Mr M acknowledged putting his fingers inside the complainant's vagina and having sexual intercourse with her. He said that she had willingly participated in this activity. He said that once she told him to stop, he had got off her and left the room. At trial, therefore, Mr M's defence was consent or reasonable belief in consent. As noted earlier, he was convicted on the count of rape but acquitted on the count of sexual violation by digital penetration.

Mr M's fitness to stand trial

[8] Prior to trial, three assessment reports were carried out on Mr M. The defence retained Dr Susan Shaw, a neuropsychologist, and Ms Tanya Breen, a clinical psychologist. Both interviewed Mr M, carried out a variety of tests on him, watched his evidential video interview and analysed the transcript.

[9] Dr Shaw's report assessed Mr M's current level of cognitive functioning. She found him to have a very limited intellect, fitting the criteria for mental retardation and consistent with individuals who have sustained a brain injury very early in life. She said that his very limited cognitive abilities meant that he finds it difficult to understand fully all aspects of a situation and foresee the consequences of his actions. He is also unable to process spoken language quickly and needs information to be provided to him in very short, simple phrases. She concluded by noting that Mr M was, at that time, significantly depressed.

[10] Ms Breen assessed Mr M's intellectual status. She found him to have a mild degree of intellectual disability, placing him in the first percentile of people of his age (ie 99 out of 100 randomly selected people his age would score better than him in a test of intellectual level or "IQ"). (We interpolate that "mild intellectual disability" is a technical term which denotes a level of disability that is more significant than the term "mild" would signify to an unqualified observer.) He was "profoundly deficient" in terms of overall adaptive functioning (a measure of the skills required for a person to live independently), his communication skills, in particular, being equivalent to those possessed by a child aged three years, three months old. In addition, she noted that he had a high suggestibility score when asked leading questions and a very high degree of total suggestibility. Ms Breen also analysed Mr M's video interview. She found that only 46 per cent of the questions asked were open-ended. She raised concerns about the possibility that his answers may have been biased because of the form of questions used and that he may not have properly understood his rights when read to him.

[11] In addition to those reports, the District Court Judge requested a psychiatric assessment on, amongst other matters, whether Mr M was fit to stand trial.

This request was made in response to an application filed by Mr M's trial counsel for a finding that Mr M was unfit to stand trial.

[12] Dr Shailesh Kumar, a forensic psychiatrist employed by Health Waikato, produced the requested report. His assessment was largely clinical, based on an interview with Mr M and other historical information. Unlike Dr Shaw and Ms Breen, he did not utilise any standardised clinical or psychological tools. Dr Kumar concluded that, although Mr M had a mild degree of mental retardation and was experiencing a major depressive episode, he was fit to stand trial. Dr Kumar said that Mr M had a very good understanding of the way courts operate; the respective roles of the Judge, lawyers and jury (following a briefing from his mother); his right to instruct counsel; his option and the consequences of entering either a plea of guilty or not guilty; and the availability of legal aid. In Dr Kumar's opinion, Mr M had no cognitive problems that could interfere with his ability to stand trial.

[13] On 25 January 2008, a hearing was held in relation to Mr M's fitness to stand trial. All three report-writers gave evidence. Dr Kumar was the only expert to address specifically Mr M's fitness to stand trial. In his oral evidence, he acknowledged that his conclusion of fitness was made on the basis of a "low threshold", meaning that he required only a basic, rather than sophisticated, understanding of the matters detailed in his report.

[14] Before us, the Crown filed affidavits from the prosecutors who were involved in the fitness to stand trial process. The Crown prosecutor who appeared at the hearing on 25 January 2008, Mrs Wrigley, deposed:

> 5. At the conclusion of the evidence Judge Ingram raised with [Mr M's trial counsel] the possibility that the appellant might be exposed to a more restrictive outcome if he was found unfit to stand trial than if he was found guilty following trial.
>
> 6. Judge Ingram stated that if the appellant's application to be declared unfit was to be pursued, he would allow or obtain (I am not sure which) further reports concerning the appellant's suggestibility, ability to deal with cross-examination and the "Brookbanks criteria".
>
> ...

> 8. The "Brookbanks criteria" was a reference to a list of factors relevant to an assessment of fitness to stand trial contained in... Warren Brookbanks & Sandy Simpson *Psychiatry and the Law* (LexisNexis NZ Limited, Wellington, 2007)....
>
> 9. [Trial counsel] withdrew the appellant's application to be declared unfit to stand trial. Judge Ingram then issued, orally, his minute dated 25 January 2008.

[15] Mr M's trial counsel told the Judge that his decision to withdraw the application was based on a particular approach to a trial strategy that he had been instructed to take but which might need to be revisited during the course of the trial. The Judge, in a minute issued that day, accepted counsel's assessment and noted that it would be possible, although perhaps unlikely, to renew the application during the trial. Although the Judge did not make a finding on Mr M's fitness to stand trial, he did make the following comments:

> [8] The issue for the Court in a fitness to stand trial application in my view must always be whether or not the accused can obtain a fair trial. The sole trial issue, which appears to be the likely subject of a defence, is the issue of consent. That issue is a narrow one and it is an issue in respect of which the accused has in my view, more than adequately expressed himself in the course of a video interview that he gave to the Police. It is not a matter for my judgment but a matter for his counsel as to whether or not the contents of the video interview provide an adequate basis for a defence to be mounted at trial. It is not appropriate for me to make an assessment of the prospects for such a defence at trial. The issue for me however, is whether or not that particular issue is capable of being understood and meaningful advice given to the accused and meaningful instructions obtained from the accused in respect of that prospective defence.
>
> [9] On the material presently before me, I am persuaded that a particular trial strategy revolving around that defence could properly be dealt with by adequate advice. I am satisfied that the accused can understand that advice and give meaningful instructions in respect of it at this stage. As I say, that may change. Both the accused's mental state and abilities might change or alternatively, the approach to be taken at trial may for any one of a number of reasons, necessarily require to be re-examined either before or during the trial.
>
> [10] However, on the information presently before me and given [trial counsel's] indication that he considers he is adequately able to advise and receive instructions, the present application is withdrawn.
>
> [11] Before passing from the matter, I consider it desirable to record my view that this trial is not appropriately scheduled for the last two days of the week of 21 April. I propose to raise with the local jury liaison Judge the prospect of rescheduling this trial, because in my view it is highly likely that the trial Judge will need to make special arrangements for defence counsel to have appropriate breaks during the course of the trial to advise his client and

> obtain instructions on a pretty regular basis, given the limited intellectual resources the accused has. A precaution of that kind may well be sufficient to ensure a fair trial, but that matter will need to be examined closely by the trial Judge and it would be an appropriate matter to raise at the pre-trial conference immediately before the trial is commenced.

[16] Mr M's trial commenced in the District Court at Tauranga before Judge Bidois and a jury on 30 June 2008. Neither the issue of Mr M's fitness to stand trial nor the need for special arrangements during the trial was ever revisited. The trial accordingly proceeded in an ordinary manner, with the Judge summing up on 3 July 2008.

History of the appeal

[17] Mr M's appeal was filed with this Court on 6 November 2008, some 11 months prior to the present hearing. The history of the appeal was discussed by this Court in R v M [2008] NZCA 443, following the hearing of an application on 15 September 2009. Counsel for Mr M, Mr Ellis, says that he cannot speak to his client without the assistance of a qualified expert and at the time of the 15 September hearing had not even spoken to Mr M. The Legal Services Agency refused funding for an expert. Mr Ellis has applied for a review of that decision. Initially, he sought an adjournment of the appeal hearing, pending that review.

[18] During the hearing on 15 September, this Court indicated its view that some of Mr M's grounds of appeal could be argued prior to resolution of the legal aid dispute. On 24 September 2009, counsel filed a joint memorandum in relation to the hearing set down for 8 October 2009. They agreed that, instead of vacating the fixture, the time allocated could be used to argue the merits of two grounds of appeal, particularly:

(a) Whether Judge Ingram erred in law by not making a finding, after the hearing on 25 January 2008, on Mr M's intellectual disability or fitness to plead; and

(b) Whether the failure of the trial Judge to adopt any of the precautions suggested by Judge Ingram meant that Mr M did not obtain a fair trial.

[19] This Court confirmed its acceptance of the proposal contained in the joint memorandum: [2008] NZCA 443 at [27]. It noted that, should resolution of the above issues result in Mr M's appeal being allowed, a further hearing would not be necessary and the dispute over legal aid funding would become moot. Should, however, Mr M's appeal not be allowed, the Court signalled its intention to reserve leave for further argument in the event that provision of funding for an expert led to further grounds becoming arguable.

[20] The Court also expressed its concern about the delay in pursuing the appeal and the fact that, despite having accepted engagement as Mr M's counsel in November 2008, Mr Ellis had still not spoken to Mr M at the time of the September 2009 hearing. The delay in pursuing Mr M's appeal should not have occurred.

Issues for consideration

[21] Given the narrow scope of this hearing, the two primary issues for resolution in this judgment are those set out at [18] above. In addition, the Crown contended that the steps taken by Judge Ingram had, in substance, amounted to the undertaking of the unfitness to stand trial process and that the failure to observe the strict formalities did not lead to a miscarriage of justice. That issue also needs to be resolved on the appeal.

[22] We propose to deal with the first issue by posing and answering the following questions:

(a) Did the Judge make a s 9 decision?

(b) Did the Judge make a decision on fitness to stand trial?

(c) If not, did the failure to complete the process cause a miscarriage of justice?

[23] In relation to the second issue, we will address the contention advanced by Mr Ellis that Mr M should have had an "interpreter" at the trial.

[24] In the course of oral argument, Mr Ellis raised a point not foreshadowed in his written submissions: that decisions under the CP Act had to be made by a jury. We will address that issue too.

[25] Another issue which arises is whether the Court should remit the matter to the District Court for a new fitness to stand trial process to be undertaken, or simply allow the appeal and direct an acquittal.

[26] We also propose to comment on a number of issues relating to the s 9 procedure which have come to our attention as we have considered the above issues.

[27] Before addressing those issues, we will set out the statutory framework.

The legislative regime

[28] The process for determining whether an accused person is unfit to stand trial is set out in Subpart 1 of Part 2 of the CP Act. This Court recently considered the operation of that process in *R v McKay* [2009] NZCA 378. In summary, the Court determined:

(a) The process should be triggered if the accused, his or her counsel or the Crown raises a question as to the accused's fitness to stand trial. In the normal course of events, whenever there is an application or request, the statutory process should thereafter be followed, though in rare cases a Judge may consider the application sufficiently lacking in apparent merit that some further inquiry is appropriate before instigating the process: at [34] and [39].

(b) Once the process is triggered, the Court must make a determination under s 9 of the CP Act. That section provides:

> **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.

(c) If, and only if, the Judge is satisfied on the s 9 matter, it is then necessary to embark on the process to determine the accused person's fitness to stand trial under s 14. This is specifically provided for in s 13(4): at [42].

[29] Section 14 provides as follows:

> **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.

[30] In *McKay*, this Court indicated that this section envisaged six steps. The Court said:

[50] The section obviously needs to be read in the context of the Act as a whole. In that context, we think the section (as amplified) envisages the following six steps:

Step 1 It will be rare, at this stage of the process, for the court already to have two health assessors' reports. So the first step is to obtain them. If the defendant is on bail, he or she will probably usually be willing to undergo assessment as to whether he or she is mentally impaired. If so willing, no court order is required. If the defendant is in custody, then the court can order reports from two health assessors under ss 38 and 39 of the Act. That will normally be the first step. If the defendant is on bail and will not agree voluntarily to be assessed, then there is a problem. A court is not entitled to refuse bail just so an assessment can be undertaken: see s 38(3). What the court should do in these circumstances must await another day; we have not had argument on the point and, in any event, this is likely to be a rare situation.

Step 2 If, as will normally be the case, the reports have been ordered under s 38 and/or s 39, those reports must be made available to the defendant's counsel and (generally) the defendant (s 45) and to the prosecutor (s 46(1)(a)).

Step 3 The court must give each side the opportunity to present evidence as to whether the defendant is mentally impaired (s 45(5)) and/or as to whether he or she is unfit to stand trial (s 14(2)(a)).

Step 4 The court must give each side the opportunity to make submissions (s 14(2)(a)).

Step 5 The court must make and record findings (on the balance of probabilities: s 14(3)). Three findings are possible:

(a) The defendant is not mentally impaired. (Such a finding will automatically mean he or she is fit to stand trial.)

(b) The defendant is mentally impaired but nonetheless fit to stand trial.

(c) The defendant is mentally impaired and unfit to stand trial.

Step 6 If findings (a) or (b) are made, s 14(4) applies. The case will proceed to trial. If finding (c) is made, then the court will proceed in accordance with Subpart 3.

[31] Subpart 3 deals with the detention, treatment and care of persons who have been found unfit to stand trial.

Did the Judge make a s 9 finding?

[32] As noted earlier, there was no formal decision in the present case because the application was withdrawn, and the Judge recorded certain findings in a minute. There is nothing in the Court file which indicates that the Judge at any time made a decision that he was satisfied on the balance of probabilities that the evidence against Mr M was sufficient to establish that Mr M caused the act that formed the basis of the offences with which he was charged.

[33] For the Crown, Mrs Guy Kidd argued that the Judge had concluded prior to the hearing on 25 January 2008 that s 9 was satisfied. She relied on an affidavit of Ms O'Brien, a Crown prosecutor who had been involved in the matter, sworn for the purposes of the appeal. Ms O'Brien said that during a telephone conference prior to the hearing the Judge indicated that he would rule that he was satisfied of "involvement in the crime" for the purposes of s 9, and that the hearing would therefore be dealing with the issues raised by s 14.

[34] While we accept that it is likely that the Judge did form that view, there is no formal decision in the Court record and so the matter must be seen as not having been resolved, because the application for a ruling that Mr M was unfit to stand trial was withdrawn and the process was never completed. It is also unclear as to what the Judge considered had to be established under s 9. We return to that topic later (see [71] - [80] below).

[35] If the Judge had made a s 9 finding, we would have expected that it would be recorded in a judgment. An accused person who is the subject of a s 9 finding has a right of appeal under s 16 of the CP Act. A Judge who makes a s 9 finding should give sufficient reasons for the decision to allow the accused person to assess the chances of success in an appeal and for the appellate court to fairly consider the appeal.

Did the Judge make a finding that Mr M was fit to stand trial?

[36] We consider it is clear that the Judge never made a finding that Mr M was fit to stand trial: rather, he proceeded on the basis that because the application for a ruling was withdrawn, it was not therefore necessary for him to make a determination. In light of the decision in *McKay*, the Judge was in error in allowing the process to be discontinued at that point. In fairness to the Judge, it should be noted that *McKay*, which makes that clear, was released over a year after the events in this case took place.

[37] Mrs Guy Kidd accepted that there was no express judicial finding by Judge Ingram as to whether or not Mr M was unfit to stand trial. But she said that the Judge's minute recorded a satisfaction that Mr M could understand advice revolving round the defence of consent and give meaningful instructions in respect of it. She said that these words closely followed the definition in s 4(a) of the CP Act of "unfit to stand trial" and could be taken as satisfying the statutory requirements of s 14(2)(b) and (c). She argued that the purpose of the statute, namely ensuring that only those who are fit to stand trial do so, had been complied with.

[38] We are unable to accept that submission. The observations made by the Judge in his minute were not findings in terms of s 14. In our view, it is clear that no s 14 decision was made in this case. That leads to the next question: did that failure lead to a miscarriage?

[39] Before turning to that question, we observe that the situation which arises where an accused person instructs his or her lawyer to withdraw an application for a finding that he or she is unfit to stand trial creates something of a dilemma for counsel and for the Court. The position of the Court has now been resolved by *McKay*: the process, once it has been properly commenced, must be completed. The reason is that, until a fitness to plead assessment has been made, the Court cannot be satisfied that the accused person was capable of giving instructions to his or her lawyer. Counsel would, of course, have to comply with his or her instructions, having endeavoured to provide advice about the process to the accused person in

language he or she can comprehend. But as the decision in *McKay* makes clear, the effort to withdraw an application that has been properly made or cause the process to be discontinued will now be futile: once the process is begun, a Judge must ensure it is completed.

Did the failure to make a decision on fitness to stand trial cause a miscarriage of justice?

[40] The Crown not surprisingly relied on this Court's decision in *McKay* for the proposition that a failure to follow the strict procedure required by Subpart 1 of Part 2 of the CP Act does not necessarily lead to a miscarriage of justice, if the process which the Court undertakes broadly follows the requirements of the legislation. In that case, the Judge had not embarked on the s 9 inquiry, but the satisfaction of the s 9 criteria was obvious on the evidence which was before the Court. The Judge had then undertaken all of the six steps outlined at [50] of *McKay*, even though he had not addressed his mind to satisfaction of those conditions because he believed that defence counsel was no longer pursuing an application to have the defendant declared unfit to stand trial.

[41] We do not see the process undertaken in this case as substantially meeting the requirements of Subpart 1. It is in a different category from *McKay*. The Crown's submissions on this aspect of the case were:

(a) Although there was no s 9 determination, there was none in *McKay* either.

(b) The Court had received evidence from Dr Shaw and Ms Breen, both of whom were health assessors under the CP Act, which addressed whether Mr M was mentally impaired. Each gave evidence at the 25 January 2008 hearing as to the intellectual disability of Mr M. Accordingly, this complied with s 14(1).

(c) The Judge's minute recorded that he was satisfied on the basis of the evidence given by Ms Breen and Dr Shaw that Mr M suffered

from a mild intellectual disability. This satisfied the opening part of s 14(2).

(d) Both parties were given the opportunity to present evidence as to whether Mr M was unfit to stand trial, and similarly the Judge gave counsel for Mr M an opportunity to be heard, but apparently not to Crown counsel, according to the affidavit of Mrs Wrigley. This was at least partial compliance with s 14(2)(a).

(e) While the Judge did not make a finding in specific terms that Mr M was fit to stand trial, his finding at [9] of his minute (see [15] above) addressed in a positive way the elements of the meaning of unfit to stand trial, and recorded the his satisfaction that Mr M was not unable to conduct a defence or instruct counsel. This amounted to a finding that he was fit to stand trial.

(f) The record of that finding in the minute satisfied s 14(c).

[42] The major difficulty with this argument is the acknowledgement in Mrs Wrigley's affidavit at [6] (see [14] above). In our view, it is clear that the Judge was indicating that, before he could make a decision on fitness to stand trial, he would need to consider further reports concerning suggestibility, ability to deal with cross-examination and the so-called "Brookbanks criteria".

[43] Mrs Guy Kidd sought to convince us that all the Judge was indicating was that those issues may arise if it became likely that Mr M would need to give evidence at trial, in which case his ability to deal with cross-examination would come into play. Thus, she argued, the Judge had indicated his satisfaction of fitness to stand trial, but indicated also that this might need to be revisited if circumstances changed.

[44] We do not consider that that reflects the position outlined in Mrs Wrigley's affidavit. In any event, we do not think it is possible for the Court to make a finding of fitness to stand trial against an assumption as to the way the trial will pan out,

when there is no way of knowing whether the trial will, in fact, turn out as anticipated. In particular, it cannot be assumed that an immutable decision not to give evidence at trial has been made some months before the commencement of the trial.

[45] In our view, it is clear that the Judge had not satisfied himself that Mr M was fit to stand trial: rather, he had indicated a degree of comfort with the withdrawal of the application given his views about Mr M's capacity. In light of *McKay*, it was not correct for the Judge to allow the withdrawal of the application: he needed to go on to consider it and make a positive finding. We do not accept that the steps he did undertake constitute sufficient compliance. In our view, there has been no finding for the purposes of s 9 and none for the purposes of s 14. The process has not been completed and, in light of this Court's decision in *McKay* and its later decision in *R v Dalley* [2009] NZCA 419, a miscarriage has occurred. We therefore allow the appeal on this basis.

Did the failure to take special precautions mean that Mr M did not obtain a fair trial?

[46] In view of our conclusion on the first issue, it is not strictly necessary for us to deal with this point. But we intend to set out our views, at least in brief terms, for the benefit of the Judge presiding at the re-trial, should one occur.

[47] The special precautions which Judge Ingram suggested are those which appear at [11] of his minute of 25 January 2008, which is quoted at [15] above. In brief, the precautions were "special arrangements for defence counsel to have appropriate breaks during the course of the trial to advise his client and obtain instructions on a pretty regular basis".

[48] It is difficult to assess the impact of the failure to take these precautions in the absence of input from Mr M's trial counsel, and, as it is not necessary to do so, we do not formally answer the question posed by this issue. Given Judge Ingram's assessment, it is surprising that Mr M's trial counsel did not raise the

issue with the trial Judge, Judge Bidois. However, that may be indicative of a judgement on trial counsel's part that these measures were unnecessary.

[49] It is not productive to make general statements about the measures required at a trial of this nature. The starting point is that the trial is taking place because a Judge has determined that the accused person is fit to stand trial. That means, in terms of s 4 of the CP Act, that a Judge has determined that the accused person is able to conduct a defence or instruct a counsel to do so, which includes the ability to plead, to understand the nature or purpose or possible consequences of the proceedings, and to communicate adequately with his or her counsel for the purpose of conducting a defence. The measures which may be taken will, therefore, be measures which enhance the ability of the accused person in relation to those criteria. Normally one would expect that defence counsel will ask for time if this is required to explain a matter to the accused person.

[50] Before us, Mr Ellis argued that Mr M ought to have had an interpreter during the trial, and that the failure to provide one was a breach of s 24(g) of the New Zealand Bill of Rights Act 1990 (the Bill of Rights).

[51] The right to an interpreter also existed at common law. In *R v Lee Kun* [1916] 1 KB 337, for example, the Court of Criminal Appeal established that where a person is "ignorant of the English language", the evidence given at trial must be translated. The Court held that compliance with this rule is mandatory. The rationale for such a rule, it explained at 341 – 342, was closely tied to the right of an accused to be present at his or her trial:

> The reason why the accused should be present at the trial is that he may hear the case made against him and have the opportunity, having heard it, of answering it. *The presence of the accused means not merely that he must be physically in attendance, but also that he must be capable of understanding the nature of the proceedings.* The prisoner may be unable, through insanity or deafness or dumbness, or the combination of both conditions, to understand the proceedings or to hear them, either directly or by reading a record of them, or to answer them either by speech or writing. In these cases a jury is sworn to ascertain whether the prisoner is "fit to plead," which is interpreted in *Rex v. Pritchard* [7 C&P 303 at 304] as meaning whether he is "of sufficient intellect to comprehend the course of proceeding on the trial so as to make a proper defence. ... *If you think that there is no certain method of communicating the details of the trial to the prisoner, so that he can clearly*

> *understand them, and be able properly to make his defence to the charge, you ought to find that he is not of sane mind.*" If the accused is found not fit to plead, he is not tried, but is detained during His Majesty's pleasure.
>
> (Emphasis added)

[52] The Court then went on at 342:

> If the accused is fit to plead it may yet be that no communication can be made in the ordinary way; it may be that he is deaf and can only be approached by writing or signs, or dumb, and can only make his views known by writing or signs, or a foreigner who cannot speak English and requires the assistance of an interpreter to understand the proceedings and make answer to them. *In such cases the judge must see that proper means are taken to communicate to the accused the case made against him and to enable him to make his answer to it.* In the case of a foreigner ignorant of the English language who is undefended no difficulty has arisen in practice. The evidence is always translated to him by an interpreter.
>
> (Emphasis added)

[53] It is clear that the Court saw the right to an interpreter as part of a broader rule requiring proceedings to be communicated to an accused person in a manner that he or she can comprehend. As noted, the end that this rule serves is the same as that served by the usual requirement that trials be conducted in the presence of the accused, a connection drawn by the Privy Council in *Kunnath v The State* [1993] 1 WLR 1315 at 1319:

> It is an essential principle of the criminal law that a trial for an indictable offence should be conducted in the presence of the defendant: *Lawrence v. The King* [1933] A.C. 699, 708, per Lord Atkin. As their Lordships have already recorded, the basis of this principle is not simply that there should be corporeal presence but that the defendant, by reason of his presence, should be able to understand the proceedings and decide what witnesses he wishes to call, whether or not to give evidence and, if so, upon what matters relevant to the case against him: *Rex v. Kwok Leung* [1909] 4 H.K.L.R. 161, 173-174, per Gompertz J., and *Rex v. Lee Kun* [1916] 1 K.B. 337, 341, per Lord Reading C.J. A defendant who has not understood the conduct of proceedings against him cannot, in the absence of express consent, be said to have had a fair trial.

[54] The leading New Zealand case on the right to an interpreter is *Alwen Industries Ltd v Collector of Customs* [1996] 3 NZLR 226 (HC), which was concerned with an application by the accused for written translations of briefs of evidence and other documentary exhibits. Robertson J began his discussion by noting at 229 that a "rights-centred" approach must be taken to interpreting

provisions of the Bill of Rights: "The provisions are not to be construed narrowly or technically but are to be given a purposive interpretation so that their true significance and value are available to all citizens". The Judge then went on to make the following comments at 229 on the nature of the right enshrined in s 24(g):

> The right is not a separate language right but an aspect of the fundamental right to a fair trial (*MacDonald v Montreal (City)* [1986] 1 SCR 460, 499). As such, it is interlinked with other aspects of this right, such as the rights of defendants to be informed of the case against them; to prepare and conduct a full defence; and to have the trial conducted in their presence. Justice requires that "presence" of a defendant be interpreted in its active sense, as referring not simply to corporeal presence but to the ability of the defendant to understand the proceedings in order to participate meaningfully in them.

[55] Robertson J then discussed the proper interpretative approach to s 24(g) at 230:

> The following factors emerge from the wording of the section. The phrase "assistance of an interpreter" is broad and inclusive: nothing on the face of the provision limits its application to contemporaneous oral interpretation. I accept that "interpreters" are commonly understood as those persons who orally translate the spoken language of others in their presence, but I do not consider that the meaning is necessarily restricted in this way -- particularly in the present context where it is the "assistance" of an interpreter which is referred to.
>
> If the purpose of the right is to ensure an accused person understands and participates meaningfully in the proceeding, then to restrict interpretative assistance to the spoken word (when much of significance in legal proceedings appears in written form) would rob the right of its true force.
>
> The right to assistance is triggered by the fact that a person is unable to understand or speak the language used in Court. Once that criterion is met, the right to interpretative assistance should attach generally, not in a restricted capacity.

[56] It is clear from the passages cited from *R v Lee Kun* and *Alwen Industries* that the role of an "interpreter" is to translate from one language to another. Mr M did not require assistance of that kind. On the face of it, s 24(g) is not engaged. However, Mr Ellis urged us to take a broader interpretation. He argued that the phrase "assistance of an interpreter", covers the assistance of any person whose role it is to convert what is said in court into a form that is understandable to the accused.

[57] In our view, it is not necessary to strain the wording of s 24(g) in that way. We say that because, regardless of whether s 24(g) is engaged, an accused person is

entitled to a fair trial: s 25(a). In order to achieve this, he or she must be able to understand the nature of the proceedings and the evidence that is given. The passage cited from *R v Lee Kun* at [51] above explains that a person will be unfit to stand trial only if there is no method by which the details of the trial can be communicated to him or her. The corollary of this – that a trial may take place if, through whatever method, the necessary details can be communicated to the accused – is that such steps must be taken in order to ensure the fairness of the trial: *Kunnath* at 1319.

[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 CP Act. But if that is not the case in a particular trial, the trial Judge may direct that specialist assistance be provided.

Should a jury make the determination required in s 9 of the CP Act?

[60] Section 9 of the CP Act provides that a court cannot consider whether a defendant is unfit to stand trial "unless the court is satisfied on the balance of probabilities ... that the defendant caused the act or omission that forms the basis of the offence with which the defendant is charged". "Court" is simply defined in s 4 to be "any court exercising jurisdiction in criminal proceedings". Mr Ellis said that s 9 effectively required a defendant's guilt to be determined on the balance of probabilities, and such decisions are usually made by juries. He therefore submitted that "court", as used in that section, should be interpreted as encompassing a Judge sitting with a jury. He argued that this interpretation was tenable and that it should be preferred as that most consistent with the Bill of Rights, particularly s 24(e).

[61] Because this argument was first raised by Mr Ellis in his oral submissions, following the hearing the Court issued a minute permitting the Crown to seek leave to file brief written submissions on this topic. The Crown did so, and Mr Ellis filed written submissions in response.

[62] Mrs Guy Kidd resisted the interpretation advanced by Mr Ellis, although her submissions focussed on s 14(2) instead of s 9. She pointed out that the phrase "the court" is used throughout the CP Act. In some instances, she said the context makes it clear that this phrase can only mean a Judge sitting alone. Because an identical phrase is used in s 14(2) (and, we note, s 9), she said this reference must also be to a Judge without a jury. She said the decision making process involved in deciding whether a defendant is unfit to stand trial involves inquiries that are not well suited to a jury process (for example, applying the definition of "unfit to stand trial"). She further submitted that under the previous legislation (s 111 of the Criminal Justice Act 1985), the process of ascertaining whether a person was under a disability was determined by a Judge alone, and there was no indication that the CP Act intended to change this position.

[63] It is also notable that the procedure in Part 5 of the Summary Proceedings Act 1957 (dealing with committal proceedings) applies to hearings for the purposes of s 9 that occur prior to trial: see s 11 of the CP Act. Section 11(7) requires that a District Court Judge preside. This obviously contemplates a Judge alone procedure.

[64] In our view, it is clear that a determination under s 9 is to be made by a Judge, without a jury. This is reinforced by the statutory provisions concerning fitness to plead that preceded the CP Act. Section 39C of the Criminal Justice Act 1954 (as amended in 1980), for example, provided that the decision whether a defendant was under a disability was to be made by a Judge. Section 111 of the Criminal Justice Act 1985 was in similar terms, although s 109 referred to "a court" making a finding of disability. The author of *Adams on Criminal Law* (looseleaf ed) at CM7.01 observes that this adoption of the expression "the court" in the relevant provisions of the 1985 Act and the CP Act:

> ... did not alter the position that only a Judge could make such a determination, but reflects the fact that the jurisdiction to determine unfitness

> was no longer limited to the High Court, but extended to all levels of the Court hierarchy with an original jurisdiction. An encompassing generic expression was called for, and in this context "the Court" was an appropriate choice.

[65] As Mrs Guy Kidd pointed out, there is nothing in the legislative history of the CP Act to indicate that determinations relating to a defendant's fitness to stand trial should now be made by a jury. In fact, the indications are to the contrary. In its report on the Bill which later became the CP Act, for example, the Select Committee noted the concerns of one submitter that the Bill would enable a Justice of the Peace to carry out an inquiry as to the defendant's involvement in the offence. The Committee agreed that this would be inappropriate and that "all such hearings should be held before a District Court Judge". For this reason, subs (7) was added to what is now s 11, specifying that "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 preliminary hearing". The Committee clearly did not believe any other changes were required to ensure that s 9 determinations were made by Judges.

[66] We also record our conclusion 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.

What has to be proved under s 9?

[67] As no decision was made under s 9 in this case, it is not strictly necessary for us to deal with the difficult issues which arise as to what has to be established under s 9 and what procedure should be adopted for a special hearing convened for the purposes of making the determination required by s 9. But our consideration of the issues raised by the appeal has required us to confront those issues and we consider it

appropriate to comment on them. We are also conscious that the outcome of the present appeal may make it necessary for the s 9 process to be undertaken in respect of the appellant, if his fitness to stand trial remains in issue.

[68] The purpose of the requirement in s 9 is to avoid the possibility of a person who is found unfit to stand trial being subjected to detention or similar measures in circumstances where he or she has not, in fact, committed an offence. *R v H* [2002] 1 WLR 824 (CA) describes the history of a similar provision in the United Kingdom, which resulted from a case where an innocent person was detained in a prison and, subsequently, a secure hospital after being found unfit to stand trial, when an inquiry into the facts would have established that she had not committed the offence.

[69] For reasons which are not immediately apparent to us, the New Zealand legislation requires that the s 9 determination take place *before* the court embarks on the process of deciding whether a person is unfit to stand trial. That can be contrasted with the position in the United Kingdom (s 4A of the Criminal Procedure (Insanity) Act 1964, as modified by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991) and most of the Australian States and Territories (eg s 315C of the Crimes Act 1900 (ACT), s 19 of the Mental Health (Forensic Provisions) Act 1990 (NSW), s 12 of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic), s 43R of the Criminal Code (NT) and s 15 of the Criminal Justice (Mental Impairment) Act 1999 (Tas)). The only Australian State in which the equivalent of a s 9 determination can be made before the fitness to stand trial determination is South Australia, where the order in which to conduct these inquiries is left to the discretion of the trial Judge: s 269E of the Criminal Law Consolidation Act 1935.

[70] The order adopted in the United Kingdom and in the Australian States and Territories means that the s 9 procedure is an alternative to a trial (conducted in circumstances where it has been established that the accused person is not fit to stand trial). In all cases, the requirement that the Crown prove "guilt" to the normal standard (beyond reasonable doubt) applies, though of course the procedure adopted cannot mirror the precise requirements of a trial because of the inability of the accused person to take part in the trial in the normal way. However, the CP Act

contemplates the possibility that the s 9 process will be in addition to the trial, because at the time when the s 9 process takes place no decision has been made (and no inquiry commenced) to determine whether the accused person is fit to stand trial. If he or she is subsequently found to be fit to do so, then a trial will subsequently take place.

What is the "act or omission"?

[71] Of considerable importance is the meaning of the phrase, "caused the act or omission that forms the basis of the offence with which the defendant is charged". Similar phrases are found in comparable legislation in the Australian Capital Territory (s 317(1) of the Crimes Act 1900) and in the United Kingdom (s 4A of the Criminal Procedure (Insanity) Act 1964).

[72] In *R v Antoine* [2001] 1 AC 340, the House of Lords considered the meaning of the words "did the act or made the omission charged against him as the offence" in the English statute. Lord Hutton, who delivered the only substantive speech, observed at 375 that the object of the legislation was 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.

[73] He then went on at 375 – 376 to say that this balance was struck 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.

[74] The phrase "did the act or made the omission" was therefore interpreted as effectively synonymous with the actus reus of an offence. Lord Hutton did, however, propose one qualification to this interpretation. In circumstances where there is "objective" evidence that the defendant would have had an arguable defence of accident, mistake or self-defence – defences which ordinarily involve an inquiry into the defendant's state of mind – the prosecution is required to negative that

defence: at 376 – 377. Where, however, the defendant cannot produce a witness to support such a defence, there is no requirement that it be addressed.

[75] A similar approach was taken by the Court of Appeal of the Australian Capital Territory in *R v Ardler* [2004] ACTCA 4. The phrase in question, "the acts that constitute the offence charged", was very close to that considered by the House of Lords. At [55] the Court set out three possible interpretations of the phrase in question:

(a) Proof is required of the commission of the physical act or acts only;

(b) Proof is required of both the physical and mental elements of an offence; or

(c) Proof is required of "something that is unlawful (in a broad sense) so as to be an offence or an element of an offence but not to require proof of the full mental element necessary in law to establish the commission of the offence".

[76] The Court decided to adopt the third option, relying heavily on the decision in *Antoine*. It rejected the proposition that there should never be an inquiry into the mental elements of an offence, holding instead that the Crown must prove that "any specific intent or knowledge necessary to constitute the particular offence alleged was present". To hold otherwise, the Court reasoned:

> [81] ... would lead to the ludicrous situation that possession of stolen goods would lead to liability for incarceration, at least on a mental health order, if the alleged offender was unfit to plead, but not if it appeared at trial that he lacked knowledge that the goods had been stolen. It would be no answer to say that, had the accused not been mentally impaired, he would have realised that the goods were stolen.

[77] In reaching this conclusion, the Court observed that the actus reus of many offences incorporates or implies a specific mental element. Professor Brookbanks, in his article "Special Hearings under CPMIPA" [2009] NZLJ 30, gives two examples. First, whether an article constitutes an "offensive weapon" for the purposes of the offence of having an offensive weapon in a public place may depend

on the intention with which the article is carried. Similarly, under s 267 of the Crimes Act 1961, the crime of arson requires, in addition to proof of intentional or reckless damage to property by fire, that the accused person knew or ought to know that danger to life was likely to ensue.

[78] Where, however, there is a lack of intent, specific or general, arising from mental impairment or diminished responsibility, the Court in *Ardler* held that the accused may still be held to have committed the acts that constitute the offence charged: at [86]. The Court then concluded with the following summary at [90]:

> When a Special Hearing is embarked upon..., the prosecution is required to prove beyond reasonable doubt the physical acts of the offence charged which would constitute an offence if done intentionally and voluntarily and with any particular intent or knowledge specified as an element of the offence but is not required to negative lack of mental capacity to act intentionally or voluntarily or to have the specific knowledge or intention specified as an element of the offence unless there is objective evidence which raises such an issue including mistake, accident, lack of any specific intent or knowledge of the particularity necessary to constitute the offence that is an element of the offence or self-defence in which case the prosecution must negative that issue beyond reasonable doubt.
>
> Pleas of mental impairment, provocation, or diminished responsibility are not able to be relied upon at a Special Hearing.

[79] That approach requires difficult distinctions to be made. Such distinctions would be unnecessary if the s 9 inquiry were limited to proof that the defendant committed the *physical* acts that form the basis of the offence, as opposed to the actus reus. There is some indication in the Hansard debate relating to the Bill which became the CP Act that that may have been what was envisaged by Parliament as the test applying under s 9. However, that approach does not appear to set a sufficiently high threshold to meet the objective of s 9, which is to ensure that a court has made a finding of criminal culpability before the sanctions which can apply to a person who is unfit to stand trial can be imposed on that person.

[80] It is unnecessary for us to determine this issue and, as we did not hear argument on it, we leave it for decision in a later case. The lack of clarity in the provision is concerning, however.

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

Section 9 hearing: procedure

[82] The procedure for a s 9 hearing will depend on a number of factors. One of these is the stage at which the issue of fitness to stand trial arises. It is necessary to consider the position at the point in the proceedings when that issue arises:

(a) Prior to depositions;

(b) At depositions;

(c) Post-depositions, but pre-trial;

(d) At trial.

[83] Section 7 of the CP Act provides that a finding as to a defendant's fitness to stand trial may be made at "any stage after the commencement of proceedings and until all the evidence is concluded". This provision is in similar terms to its predecessors, s 109 of the Criminal Justice Act 1985 and s 39C(1) of the Criminal Justice Act 1954. However, the procedure for a s 9 hearing will depend on the point in the criminal trial process at which the s 9 hearing occurs. We consider each of the four stages noted in [82].

Prior to the committal (or preliminary) hearing

[84] On 29 June 2009, the Summary Proceedings Amendment Act (No 2) 2008 substituted new Parts 5 and 5A into the Summary Proceedings Act. These

provisions reformed the law relating to preliminary hearings by replacing preliminary hearings with a standard committal procedure (which does not involve a hearing or consideration of the evidence). A number of amendments were also made to the CP Act, including the substitution of a new s 11.

[85] Pursuant to the new s 11, if the issue of fitness to stand trial is raised prior to a committal hearing, the court is required to hold a special hearing to determine the s 9 issue: s 11(2). At such a hearing, the provisions of Part 5 of the Summary Proceedings Act 1957 that relate to committal hearings apply and the hearing takes the place of a committal hearing: s 11(3) and (4).

[86] Under the old s 11, a similar process applied where the defendant's fitness to stand trial was to be determined before the preliminary hearing (ie a special hearing, taking the place of preliminary hearing and governed by Part 5 of the Summary Proceedings Act, was required to be held).

At a committal (or preliminary) hearing

[87] Section 11 also governs s 9 hearings that take place during depositions. Section 11(5) provides that if the defendant's fitness 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 s 9". The court is empowered to consider any evidence presented at the hearing, and it may hear new evidence: s 11(6). Committal hearings are governed by Parts 5 and 5A of the Summary Proceedings Act.

[88] The relevant provisions of the old s 11 were in identical terms.

Post-committal, but pre-trial

[89] Where the fitness of a defendant to stand trial arises after he or she has been committed for trial but prior to the commencement of the trial, it was, until the decision in *McKay*, unclear what procedure should apply or, indeed, whether there is jurisdiction to consider the issue. This was the stage at which Mr M's fitness to plead was raised.

[90] As noted above, s 7 of the CP Act provides that a determination of a defendant's fitness to stand trial may be made at "any stage after the commencement of the proceedings and until all the evidence is concluded". The CP Act explicitly provides the procedure for making such a determination prior to committal, at committal or at trial. No specific reference is made to the procedure governing a determination that is made post-committal but prior to trial.

[91] In *McKay*, this Court pointed out that neither s 11 nor s 12 deals with the situation where the defendant's fitness to stand trial arises after committal but before trial. It commented that, in such a situation, Parliament cannot have intended that the issue had to be deferred until the beginning of the trial. The suggestion that the court lacks jurisdiction to consider the issue post-committal but pre-trial was inconsistent with s 7(1). The Court concluded that this is "a plain case where the courts are required to fill in gaps in the statute so as to make the legislation work". It did so by reading the italicised words into s 12(1):

> If the question whether the defendant is unfit to stand trial arises *after committal or* in the course of a trial, the court must ascertain whether it is satisfied of the matter specified in section 9.

[92] The Court concluded in the following way:

> [97] In terms of s 12(2), where the court does deal with the question after committal but before trial, the court may:
>
> (a) consider any evidence presented for the purposes of the standard committal or at the committal hearing;
>
> (b) rehear any of the evidence presented for the purposes of the standard committal or at the committal hearing;
>
> (c) hear any new evidence.

At trial

[93] As foreshadowed above, a determination as to fitness to stand trial can be made during "in the course of a trial": s 12(1) of the CP Act. In reaching such a determination, the Court is empowered by s 12(2) to:

(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.

Requirements in cases of sexual offending

[94] Where an inquiry into a 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 CP 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 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 CP 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.

Policy considerations

[96] Our discussion in relation to s 9 reveals areas of concern (as did the earlier discussion in *McKay*). We raise for consideration whether the s 9 requirement ought to come after the fitness to stand trial assessment has been made, so that a s 9 hearing would occur only where there is to be no trial. It seems to us that the current provisions require an accused person whose fitness to stand trial is in doubt to undergo a form of trial as part of a process to determine whether he or she is fit to do so. If the s 9 hearing happened after the assessment of fitness to stand trial, the process could be tailored to deal with the reality that the accused person could not properly participate. And the possibility that a complainant in a sex case would be required to give evidence twice would be avoided.

Should we order a retrial?

[97] We see no reason to depart from the normal course of ordering a retrial, as is customarily done in cases where the trial process has miscarried and an appeal has been allowed. Counsel suggested that, if the appeal were allowed on the basis that the trial was a nullity, a new trial could involve both the digital penetration charge (on which the jury found the appellant not guilty) as well as the rape charge. As stated at [45] above, the appeal is allowed on the basis that there was a miscarriage of justice, not on the basis that the trial is a nullity, so the issue does not arise. That was also the outcome in *Dalley*: see [21] of that decision. Mr M should face trial only on the count for which he was convicted. He cannot be required to face a further trial on a count on which he was acquitted. Even if we had allowed the appeal on the basis that the trial was a nullity, we would still not have ordered a retrial on the charge on which Mr M had been acquitted.

[98] If Mr M's fitness to stand trial remains in issue, it will be necessary for the District Court to undertake the CP Act process to determine whether Mr M

is fit to stand trial. In relation to s 9, the Judge will need to determine whether it has been established on the balance of probabilities that the sexual intercourse which took place between Mr M and the complainant was non-consensual. In our view, the Judge will be entitled to take into account the evidence given (but not the verdict of the jury) at the first trial in coming to that assessment. There is no provision in the CP Act governing the process for a special hearing under s 9 after a trial, but evidence given at a trial can be considered for the purposes of s 9 if a determination of fitness to stand trial is made at trial. That being the case, we can see no reason why trial evidence should not be considered when the determination is required to be made after trial.

[99] *R v Roberts (No 2)* HC AK CRI-2005-092-14492 22 November 2006 is an example of the adoption of that approach. In that case at [41] – [42], Fogarty J made the s 9 determination solely on the evidence which had been given at a trial at which he had presided, but which had had to be aborted. Given that the evidence given at the trial in this case included the examination-in-chief and cross-examination of the complainant, the Judge may not consider it necessary for her to be called to give evidence for the purpose of the s 9 decision. There may be some advantage in the fitness to stand trial process being conducted by Judge Bidois, who presided at the first trial and therefore saw and heard the witnesses. But we do not see that as essential.

Result

[100] We allow the appeal and make the orders set out in the Judgment of the Court.

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