

# MENTAL HEALTH COURT

CITATION: *Re IMM* [2002] QMHC 012

PARTIES: **REFERENCE BY THE PATIENT'S LEGAL REPRESENTATIVE IN RESPECT OF IMM**

PROCEEDING NO: 0006/02

DELIVERED ON: 28 June 2002

DELIVERED AT: Brisbane

HEARING DATE: 30 May 2002

JUDGE: Wilson J

ASSISTING PSYCHIATRISTS: Dr D A Grant  
Dr J F Wood

FINDINGS AND ORDERS: **1. That there is reasonable doubt that the patient committed the offence of rape or alternatively the offence of incest, that doubt not existing as a consequence of his mental condition;**

**2. That when the other alleged offences were committed, the patient was not suffering from unsoundness of mind as described in schedule 2 of the *Mental Health Act 2000 (Qld)*;**

**3. That the patient is fit for trial;**

**4. Order that the proceedings against the patient for rape or alternatively incest be continued according to law;**

**5. Order that the proceedings against the patient for the other alleged offences be continued according to law.**

CATCHWORDS: MENTAL HEALTH – DECLARATION OR FINDING OF MENTAL ILLNESS OR INCAPACITY – where patient charged with sexual offences against a child under 12 in his care – where patient intellectually handicapped – whether patient of unsound mind at the time alleged offences occurred – whether patient fit for trial – whether inconsistencies in accounts and statements of intention given by patient were attributable to patient's mental state

*Mental Health Act 2000 (Qld)*, s 268, s 270, s 405, schedule 2

*Kesavarajah v R* (1994) 181 CLR 230 at 245, referred to

COUNSEL: J Thompson for the patient  
C Heaton for the Director of Public Prosecutions  
J Tate for the Director of Mental Health

SOLICITORS: Legal Aid Queensland for the patient  
The Director of Public Prosecutions  
The Crown Solicitor for the Director of Mental Health

- [1] On 20 April 2001 IMM's legal adviser referred the matter of his mental condition to the Mental Health Tribunal under Part 4 of the *Mental Health Act* 1974. The reference was in relation to the following offences:

5 counts of indecent dealing with a child under the age of 16;

1 count of procuring a child to engage in carnal knowledge; and

1 count of incest.

- [2] By an indictment presented to the District Court at Maryborough on 13 June 2000 the patient was charged with:

3 counts of indecent dealing with a child under the age of 16 with two circumstances of aggravation, namely that the child was under the age of 12 and that she was under his care for the time being;

1 count of permitting himself to be indecently dealt with by a child under the age of 16 with two circumstances of aggravation, namely that the child was under the age of 12 and that she was under his care for the time being;

1 count of rape - alternatively, 1 count of incest; and

1 count of procuring a child under the age of 16 to commit an indecent act on him with two circumstances of aggravation, namely that the child was under the age of 12 and that she was under his care for the time being.

Having regard to the way the reference was conducted before the Mental Health Court on 30 May 2002, and to the circumstance that the offences all allegedly occurred on the one occasion and involved the same child, I have proceeded on the basis that the indictment contains a correct statement of the charges he is presently facing.

- [3] The Court was informed that with respect to the charge of rape and the alternative charge of incest there is a dispute of fact within s 268 of the *Mental Health Act* 2000, in that the patient denies sexual penetration. Accordingly, this Court must not make a determination on the reference insofar as it relates to those charges.
- [4] The patient was born on 6 November 1956. He suffers from "mild intellectual impairment". That is a clinical term, which does not convey the extent of his disability to a layperson. Psychometric testing showed that he has a full scale IQ of

63 and a verbal IQ of 62 (both ranking him within the lowest one percentile of the community in terms of intellectual capacity). His performance IQ is 70, ranking him within the second percentile. He has a marked speech impediment. He is illiterate and innumerate.

- [5] He was married to an intellectually handicapped woman and there were three children of the marriage. At the time of these alleged offences he had been living alone for some time. He got by on social security benefits and what he earned from some seasonal work and lawn mowing. His children spent every second weekend with him. The alleged offences took place on one of the access weekends, when the children's cousins had been left with him to look after. The complainant was one of those cousins.
- [6] The patient's counsel conceded that he was not of unsound mind at the time of the alleged offences. I note that there was initially some difference of opinion between two psychiatrists who examined him for the purpose of this reference. In his report dated 9 February 2002, Dr William Kingswell expressed the opinion that he was deprived of the capacity to reflect on the moral worth of his actions towards the child and to know that he ought not to do the act. Dr Peter Fama gave a report dated 22 May 2000 in which he expressed the opinion that he had a mere impairment of that capacity. However, in oral evidence, Dr Kingswell described his capacity as marginal and ultimately agreed that it was impaired rather than totally absent.
- [7] The issue then became that of fitness for trial. In the Dictionary in schedule 2 to the *Mental Health Act 2000* the following appears –
- “ ‘fit for trial’, for a person, means fit to plead at the person's trial and to instruct counsel and endure the person's trial, with serious adverse consequences to the person's mental condition unlikely.”
- [8] Everyone is entitled to a fair trial, and there cannot be a fair trial if the accused is unfit for trial. In *Kesavarajah v R* (1994) 181 CLR 230 at 245 Mason CJ, Toohey and Gaudron JJ said –
- “In *Reg. v Presser*, Smith J elaborated the minimum standards with which an accused must comply before he or she can be tried without unfairness or injustice [1958] VR 45 at 48. Those standards, which are based on the well-known explanation given by Alderson B. to the jury in *R. v Pritchard* (1836) 7 Car & P 303 at 304; 173 ER 135 at 135, require the ability (1) to understand the nature of the charge; (2) to plead to the charge and to exercise the right of challenge; (3) to understand the nature of the proceedings, namely, that it is an inquiry as to whether the accused committed the offence charged; (4) to follow the course of the proceedings; (5) to understand the substantial effect of any evidence that may be given in support of the prosecution; and (6) to make a defence or answer the charge”.
- [9] This Court must decide whether the patient is fit for trial, and if it decides he is unfit, whether the unfitness is of a permanent nature: *Mental Health Act 2000* s 270. No party bears the onus of proof, and the matter must be decided on the balance of probabilities: s 405.

- [10] The matter for determination is his fitness for trial, not his capacity to participate in and endure sentence proceedings should he plead guilty. I note both Dr Fama and Dr Kingswell thought he would be fit for sentence proceedings.
- [11] As counsel for the Director of Public Prosecutions submitted, the allegations against the patient are quite simple, the complainant saying he did certain things to her. My perusal of the transcript of his interview by the police and the transcript of a conversation with the complainant's mother has persuaded me that he understands the nature of the charges against him. There are some inconsistencies, especially in relation to the question of penetration, which is an element of the rape charge. However, that is complicated by the medical evidence of the complainant's hymen being intact. He seemed clearly to understand the significance of penetration, even though his vocabulary was limited. His speech impediment should not be overlooked in this context.
- [12] Dr Fama noted that he said he would plead not guilty to all the charges, but then explained:

“Tttt...try to get the words out, and all that... tt...tell the...court get the words out, ttt...truth out... Say I only done *some* of the things but not *all* of them.”

“[The complainant] tells a coupla lies, all the time... She just tells...aaany...anything.”

Dr Fama commented –

“I think his presentation very poor and I doubt if his comments can be regarded as serving adequately to instruct counsel in his defence. Certainly he indicated that he agrees that he persuaded [the complainant] to stimulate him sexually, and that he molested her, but that he did not carry out any penetrative (he knows now the meaning of that word, that is, putting your dick or finger into her hole or vagina) assault. But on the other hand, he has said that he wants to plead not guilty to everything, and to accuse [the complainant] of telling a lot of lies. Moreover, of what reliable and relevant comments might he be capable if, for example, he had to listen to medical or technical evidence? And what might he himself be able to say were he to choose to give evidence? I can see him in the witness box as suggestible, self-contradictory, and often vague in this [sic] thinking.

In my assessment, I think that the patient probably lacks sufficient intellect and composure to take part effectively in his own trial.

Nevertheless, were he to be placed on trial, I do not think that thereby he might suffer any significant further decline in his mental condition.”

In the course of oral evidence, I asked Dr Fama -

“Doctor, it must often be the case that people give inconsistent accounts. What is it that leads you to the conclusion his giving inconsistent accounts is attributable to his mental state rather than for some other reason?”

Dr Fama replied -

“Well, that’s a very good question, your Honour. Certainly other people give inconsistent accounts to lawyers but not usually as inconsistent as this and, secondly, the fact that we know that he is mildly mentally retarded means that we have to interpret what he says in that light. That’s all I can say. I don’t think that it would be fair to say look this man is mildly mentally retarded but what he says and what he tells us we ought to really attribute to something else other than this without any evidence to point to any particular reason for changing his account in another way.”

- [13] Dr Kingswell described the patient as barely meeting the requirements for fitness for trial. He considered that if the Court were prepared to accommodate his disability by proceeding in a much slower fashion and explaining everything to him, it might be possible to have a trial in which he understood what was being said and was able to offer instructions. However, he doubted that that was practical. He agreed with Dr Fama that he could not be relied on to give clear or consistent instructions.
- [14] I do not accept that the inconsistencies in his accounts and statements of intention with respect to the proceedings are necessarily attributable to his mental state. There can be many reasons why someone (even someone not afflicted by mental retardation) tells untruths or gives inconsistent versions of events, such as nervousness, fear of the consequences of telling the truth, a desire to avoid extraneous consequences, or even knowledge that the truth would implicate him or her in the commission of an offence. I take into consideration the advice of Dr Wood, one of the Assisting Psychiatrists, that the patient’s giving inconsistent accounts could well be related to his diminished capacity, but that one cannot be confident or certain that this is the case - although one cannot readily dismiss his limited capacity from contributing significantly to that.
- [15] If someone has the capacity to follow proceedings and to instruct counsel adequately, albeit with special allowances being made (in time and explanations) for his or her disabilities, the issue of the practicality of conducting the trial in that way does not bear on his or her fitness for trial. For example, Courts regularly accommodate cases where interpreters are required and where parties have no cultural familiarity or affinity with the Court process.
- [16] Dr Fama and Dr Kingswell agreed in oral evidence that he would be unable to understand the body of evidence and to make a reasoned decision, based on advice and an understanding of the substance of the evidence, whether or not to give evidence himself. However, at least so far as Dr Kingswell was concerned, I took that to be his opinion if appropriate procedural allowances could not be made for his disabilities.

- [17] As for challenging jurors, Dr Fama said he would be able to identify someone who, for example, was his neighbour, but that would be all.
- [18] The patient functions reasonably well on a day to day basis, but I take into account the advice of Dr Grant, the other Assisting Psychiatrist, that that does not necessarily reflect accurately on his ability to think in an abstract way to make decisions during a trial process.
- [19] Weighing all the evidence relevant to fitness for trial, and taking account of the advice of the Assisting Psychiatrists and the submissions of counsel, I am satisfied on the balance of probabilities that the patient is fit for trial.
- [20] With respect to the charge of rape and the alternative charge of incest, I am satisfied that there is reasonable doubt that the patient committed the offence and that that doubt does not exist as a consequence of his mental condition. I find that he is fit for trial. I order that the proceedings against him for those charges be continued according to law.
- [21] With respect to the other charges, I am satisfied that when the alleged offences were committed, the patient was not suffering from unsoundness of mind as described in schedule 2 of the *Mental Health Act 2000*. I find that he is fit for trial. I order that the proceedings against him for those offences be continued according to law.

*This decision was appealed to the Queensland Court of Appeal. The appeal was dismissed and the decision of the Mental Health Court was confirmed. See Re M [2002] QCA 464.*