MENTAL HEALTH COURT

CITATION:	*In the matter of FCZ* [2021] QMHC 2
PROCEEDING:	Reference
FILE NO:	MHC No. 48 of 2020
DELIVERED ON:	4 June 2021
DELIVERED AT:	Brisbane
HEARING DATE:	28 May 2021
JUDGE:	Flanagan J
ASSISTING PSYCHIATRISTS:	Dr S J Harden and Dr J G Reddan
DETERMINATION:	**1. The defendant was not of unsound mind when the offences were allegedly committed.** **2. The reference is adjourned to a date to be fixed.**
COUNSEL:	C L Morgan for the defendant S Robb for the Chief Psychiatrist J D Finch for the Director of Public Prosecutions (Qld)
SOLICITORS:	Legal Aid Queensland for the defendant Office of the Chief Psychiatrist Director of Public Prosecutions (Qld)

[1] This is a reference under the *Mental Health Act 2016* (Qld) (**Act**) in relation to FCZ. The reference concerns seven charges, three committed in 2015 and four in 2016. The 2015 charges include charges 5 and 6 on the reference, being one charge of grievous bodily harm and one charge of armed robbery in company with personal violence, both allegedly committed on 3 August 2015. Charge 7 on the reference is assault or obstruct staff member allegedly committed on 2 October 2015. For the 2016 charges, charge 1 on the reference is serious assault of a Corrective Services officer allegedly committed on 8 August 2016. There are three charges allegedly committed on 4 December 2016: charges 2 to 4 on the reference, being charges of rape, assault with intent to commit rape and deprivation of liberty.

[2] The charges allegedly committed on 3 August 2015 concern the defendant being in company with three others at the City Botanic Gardens. The complainant was approached by the defendant who asked for spare change. Upon being told that the complainant had no change to offer, the defendant allegedly commenced punching the complainant repeatedly with a closed fist causing the complainant to stumble back and fall to the ground. The defendant continued the assault while his associate attempted to rip the complainant's backpack from his hand as he lay on the ground bleeding. The associate took possession of the complainant's backpack and smartphone.

[3] The most serious charges on the reference are those allegedly committed on 4 December 2016. The defendant is alleged to have approached the complainant at Wickham Park, Spring Hill. The defendant requested money from the complainant but was declined. The defendant then followed the complainant, saying words to the effect, "I can't wait to fuck you. I want you to suck my dick." The complainant continued walking through the park towards Wickham Terrace to her hotel and the defendant persisted in following her. When the complainant reached her hotel, a receptionist was on duty and there were two operating CCTV cameras inside the receptionist's office. It is alleged that the defendant grabbed hold of the complainant from behind, wrestled her to the ground and punched the complainant to the rear of her head. The complainant resisted and the receptionist called triple zero. Seeing this phone call, the defendant knocked the phone out of the receptionist's hand. The defendant is alleged to have continued to attack the complainant, who was then on the floor of the reception office. The defendant was on top of the complainant and groped at the complainant's breast and groin area, with the defendant putting his hand down the front of the complainant's pants area, and with his hand coming into contact with the complainant's vaginal area. The allegation of rape is one of digital penetration. When police sirens were heard, the defendant ceased his attack and exited the reception office. When intercepted by police he refused to be interviewed.

[4] The only issue on the reference is whether the defendant is fit for trial.

[5] The Court has previously considered the defendant's fitness for trial. On 14 November 2018, the Court determined that the defendant was fit for trial. On that occasion, the Court had before it a report of a clinical neuropsychologist, Dr Mariani, who noted that, while the defendant's raw scores across all tests administered would place him in the extremely low to borderline range of intellectual capacity, he did not exert full effort on testing and there were several occasions where there was evidence of deliberate attempts to deceive the examiner. The Court had considered whether it was appropriate to adjourn the reference for the purpose of further neuropsychological testing but, as the defendant had previously failed to cooperate in that process and was unlikely to cooperate in any future testing, the Court proceeded to make a finding that the defendant was fit for trial in relation to each of the offences. The Court did, however, have before it some earlier testing which assessed the defendant's IQ as low as 41.

[6] The Court's reasons of 14 November 2018 included that both Assisting Clinicians had advised the Court that it should accept the opinions expressed by Drs Arthur and Aboud that there was sufficient evidence to find that the defendant was fit for trial. The Court noted:

> "While he has a mild intellectual impairment, both Assisting Psychiatrists advise that he is, in fact, fit for trial."

[7] The charges against the defendant are yet to be finalised and he remains on remand at Wolston Correctional Centre. Findings in relation to fitness may be revisited at any time during the life of the criminal proceedings.

[8] There is now further material before the Court regarding the issue of fitness, including:

(a) a report by a neuropsychologist, Ms Debbie Anderson, dated 20 September 2019;

(b) an addendum report and further addendum report of Dr Kovacevic dated 12 January 2021 and 4 March 2021;

(c) a CEO report of Dr Arthur dated 12 February 2021; and

(d) an update report of Dr Tie dated 20 May 2021.

[9] There is a divergence of opinion between Ms Anderson and Dr Kovacevic on one hand, and Dr Arthur and Dr Tie on the other. Ms Anderson and Dr Kovacevic opined that the defendant is permanently unfit for trial primarily because he suffers from mild to moderate intellectual disability. His full-scale IQ as measured by Ms Anderson is 55. Dr Arthur opined that, with certain accommodations, the defendant remains fit for trial. This is also the opinion of Dr Tie. Ms Anderson and Drs Kovacevic, Arthur and Tie all gave oral evidence. There is also evidence from the defendant's legal representatives of their ongoing difficulties in obtaining instructions from, and explaining the legal process to, the defendant.

Ms Anderson's report

[10] On 6 August 2019 at Arthur Gorrie Correctional Centre, Ms Anderson evaluated the defendant during two separate sessions of no more than two hours each, with a two-hour break in between each session. Ms Anderson noted that the defendant appeared to be reasonably cooperative. She noted that the defendant's literacy was very poor, but that he seemed to exert satisfactory effort on the formal tasks. The time constraints, however, meant that the examination of some issues was, according to Ms Anderson, "less than optimal". She noted that effort was focused on obtaining valid and interpretable cognitive test performances.

[11] The defendant told Ms Anderson that he did not like reading but that he could read, whereas he was not good at maths and was unable to count. He thought he was satisfactory at writing.

[12] As to the validity of the testing, Ms Anderson noticed that, for two of the most well-known measures, being the Test of Memory Malingering and the Rey 15-item test, the defendant performed above the generally used cut-off point. However, there were some tasks where the results were less clear. For example, on the dot counting test, compared to the learning disability group, his results were in the "suspect effort range" primarily because he made several errors in counting the dots. However, with the caveat that the defendant's response set was indiscriminate at times, Ms Anderson opined that it appeared that the defendant's performance was satisfactory on the most reliable test of performance validity.

[13] In terms of intellectual assessment, she noted that the defendant's overall performance on the verbal comprehension index scored in the extremely low range. The defendant also scored in the extremely low range for attention and concentration skills which were evaluated using the working memory index.

[14] The defendant also scored in the extremely low range in terms of his overall level of ability to register new information, as indicated by the immediate memory index. The defendant's overall performance on the general intelligence test scored in the extremely low range, namely 55. This suggests individual functioning at the very low end (likely

exceeded by 99.9% of the population) on measures of intellect, memory and academic achievement.

[15] In her report at part 7.4, Ms Anderson addressed each of the *Presser*[1] criteria. She identified that, in terms of understanding the nature of the charges the defendant is facing, he indicated that he was charged with a serious assault. However, on questioning, he angrily denied that he had anything to do with the rape charge. Ms Anderson opined that the defendant understands the difference between pleading guilty and not guilty. As to the defendant's ability to follow the course of proceedings, Ms Anderson opined that, based on the cognitive test results, the defendant is unlikely to be able to appreciate the majority of the discussion in court. He is likely to struggle to understand the concepts and his poor memory would mean limited ability to update his knowledge if new facts were presented. As to understanding the substantial effect of evidence, the defendant appeared to have limited appreciation of what evidence would be examined. According to Ms Anderson, the defendant's demonstrated intellectual levels suggest he would most likely find it very difficult to see information from another point of view or to appreciate the complex details that would ordinarily be contained in the evidence presented at a trial. She identified the possibility that the defendant engages in a simplistic method of avoiding the situation. She could not, however, provide any suggestions that would reliably overcome the defendant's widespread and significant cognitive limitations.

Ms Anderson's oral evidence

[16] In oral evidence, Ms Anderson confirmed that the defendant did not wish to speak to her about the offences allegedly committed on 4 December 2016.

[17] She noted that the defendant was able to give some version of events in relation to all offences to other reporting doctors, including Drs Arthur and Tie. Ms Anderson identified multiple factors that cause the defendant to present differently on occasions. That the defendant has an alternative diagnosis of antisocial personality disorder is one factor that may explain why he engages differently with various reporting doctors and his legal representatives. There is also some history of the defendant having seizures for which he is medicated. The defendant is also on medication for anxiety which may, from time to time, change his presentation. Combined with these factors is the defendant's long-term intellectual disability which may impact on how he presents on various occasions. Ms Anderson stated that, *prima facie*, if there had been an improvement in how the defendant presented, that would perhaps suggest an improved ability to recall events but would not mean that his capacity to be educated had improved.

[18] The defendant performed in the extremely low range in the delayed memory test, where the maximum delay was up to 30 minutes but more usually in the range of 20 to 30 minutes. Ms Anderson opined that the defendant would be unable to follow proceedings and remember the information, nor be able to add new information to that information for the purposes of giving instructions. She added that, because of the defendant's literacy difficulties, he would not be assisted by matters being reduced to writing, nor in having matters repeated to him.

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1 *R v Presser* [1958] VR 45.

Dr Kovacevic's reports

[19] In his report of 12 January 2021, having considered Ms Anderson's report, Dr Kovacevic considered that the test results were interpretable and reliable.

[20] When examined by Dr Kovacevic on 12 December 2020 for approximately one hour and 15 minutes, the defendant gave a version of events that was in "direct opposition" to the version reported by the rape complainant. Dr Kovacevic noted that the defendant's attitude noticeably changed while discussing this version, and he became irritable and guarded. The defendant effectively withdrew from the interview process to the point where Dr Kovacevic's further enquiries became futile. Dr Kovacevic therefore found it difficult to conduct an evaluation of the defendant's fitness for trial. The defendant could tell the difference between pleading guilty and not guilty. He vaguely understood that a lawyer would be representing him in court, but he could not discuss the roles and responsibilities of any other court officials. The defendant began a pattern of responding to questions from Dr Kovacevic with the words, "I don't know".

[21] According to Dr Kovacevic, the critical finding is Ms Anderson's neuropsychological assessment showing that the defendant has a full-scale IQ of 55. This indicates, according to Dr Kovacevic, on the balance of probabilities, that the defendant suffers from a mild to moderate intellectual disability that would likely interfere with his ability to assist in his own defence and instruct counsel. Dr Kovacevic was of the opinion that the defendant does not have sufficient capacity to understand the effect of evidence against him or give instructions as the trial progresses. He would not be able to make an informed decision whether to give evidence or not.

[22] In his later report, Dr Kovacevic, having considered Dr Arthur's report of 12 February 2021, adhered to his opinion that the defendant is unfit for trial. Dr Kovacevic identified the following matter:

> "Clearly, the findings from the psychometric testing cannot be immediately translated into the opinion that [the defendant] is unfit to stand trial without considering the specific *Presser* criteria. Again, this is where [the defendant's] performance has been consistently inconsistent. Based on the findings from my own examination, I previously concluded on a balance of probability that [the defendant] was not fit to stand trial and I remain of the same view."

Dr Kovacevic's oral evidence

[23] In oral evidence, Dr Kovacevic confirmed that the defendant does not have a mental illness. The evidence from the defendant's legal representatives concerning their difficulties in obtaining instructions is, according to Dr Kovacevic, consistent with his assessment of the defendant. He doubted that any modification at trial will overcome the defendant's difficulties arising from his intellectual disability.

[24] According to Dr Kovacevic, the results of the clinical testing performed by Ms Anderson, particularly in the areas of verbal comprehension and memory, served to confirm his opinion that the defendant is unfit for trial. He considered that the defendant's significant deficits mean that he does not have the capacity to follow

proceedings in the sense of listening to the evidence, processing it and adding new information to old information.

[25] Dr Kovacevic accepted that there were significant differences between the defendant's presentation to him and to Dr Arthur. Dr Kovacevic opined that there could be multiple reasons for these differences, such as deliberate avoidance. This was Dr Kovacevic's initial impression when he examined the defendant in 2016 but, over time, he has become of the view that the presentational differences are a result of the defendant's long-term intellectual disability. Another explanation is the defendant's cognitive fatigue which arises from his intellectual disability. Dr Kovacevic cautioned that one should not assess the defendant's capacity based on his best performance. He was concerned that, while the taking of short breaks in the course of a trial may be helpful, equally it may not be helpful in terms of increasing the cognitive load on the defendant.

Dr Arthur's report

[26] Dr Arthur assessed the defendant for approximately 90 minutes at Wolston Correctional Centre on 12 February 2021. Unlike with Ms Anderson and Dr Kovacevic, the defendant spoke candidly with Dr Arthur about his offences, including the alleged rape. As recorded at paragraph 58 of Dr Arthur's report, the defendant was able to give an account of the charges that allegedly occurred on 4 December 2016. His explanation for the offences was that he was severely intoxicated, somewhat sexually preoccupied and frustrated that he did not have a partner.

[27] While Dr Arthur accepted that the defendant's clinical presentation was consistent with a degree of cognitive impairment, he was of the opinion that the defendant is fit for trial. Dr Arthur stated:

> "At interview, it was apparent that [the defendant] has a degree of intellectual disability, which I would estimate to be mild to moderate in severity. Whilst I believe that this would have an impact on his ability to follow court proceedings, I was otherwise satisfied that he fulfilled the *Presser* criteria. It is not clear why [the defendant] has now decided to be more cooperative with the assessment process. It is likely that he has matured over the last three to four years and had time in jail to reflect on his behaviour. He appears motivated to be released."

[28] At paragraphs 70 to 80 of his report, Dr Arthur addressed each of the *Presser* criteria. He noted that the defendant was able to give a version of events that was generally consistent with what he had previously told Dr Arthur. He understood the difference between a plea of guilty and not guilty. Dr Arthur was satisfied that the defendant could be educated about the exercise of the right of challenge. The defendant understood that the court was a place where "they decide whether you are guilty or not" and he demonstrated an understanding of his legal team's role.

[29] Dr Arthur noted that the defendant had difficulty concentrating on conversations for long periods of time and often did not understand complex words. He acknowledged that the defendant became fatigued during the assessment and found it increasingly difficult to maintain focus.

[30] The defendant was aware of video footage of the alleged sexual assaults and some CCTV footage of him around the QUT building on the day of the grievous bodily harm

charge. The defendant informed Dr Arthur that he trusted his legal team and would be totally honest with them. He was unsure, however, as to how he would cope if called to give evidence in court.

[31] In expressing his opinion as to the defendant's fitness, however, Dr Arthur noted that his main concern was about the defendant's ability to follow court proceedings:

> "He clearly suffers from cognitive fatigue, has difficulty concentrating for extended periods of time and would most likely struggle with comprehension and retention of new information. However, I believe that, were he given special consideration, these difficulties could be compensated for. This would include the option of taking breaks should he become cognitively fatigued, carefully going through the facts of the case and the strength of evidence against him prior to the court date, and providing him with sufficient education and opportunities to ensure he has an adequate understanding of the nature of the proceedings and is able to consistently decide on what defence he would rely upon. If possible, it would be best for him to provide his version of events to the court in written form."

Dr Arthur's oral evidence

[32] Dr Arthur confirmed that the defendant does not have a mental illness. He does, however, suffer from seizures that may also affect his cognitive abilities. Dr Arthur was able to obtain details of the offending with some prompting and by seeking to trigger the defendant's memory. If the defendant was given the opportunity of being educated about court processes and legal concepts by repetition, Dr Arthur was of the view that the defendant has some capacity to learn. He considered that the defendant has the capacity to remember details of the offending.

[33] As to accommodations, Dr Arthur accepted that, at trial, the defendant would experience considerable difficulties but that, with breaks and repetition of information, he would be assisted in following the course of proceedings. Dr Arthur's main concern was the defendant's capacity to follow proceedings which encompasses listening to, retaining and adding new information to the information he receives. Dr Arthur accepted that, based on the neuropsychological assessment, the defendant's capacity to follow proceedings is of real concern. Dr Arthur also readily accepted that the defendant will have difficulty assimilating new information into information he already has.

[34] As to future management, Dr Arthur noted that there is a risk of future violence given the defendant's previous alleged offending. A psychiatric facility would be an inappropriate place for the defendant's detention. He noted the defendant's history of antisocial behaviour and his history of assaulting police and correctional staff.

Dr Tie's report

[35] Dr Tie evaluated the defendant on 14 May 2021. The defendant tolerated a psychiatric assessment of approximately 50 minutes, after which he demonstrated cognitive fatigue.

[36] Dr Tie was more inclined to the clinical opinion that the defendant is fit for trial with specific reference to the *Presser* criteria. The defendant understood the nature of each charge and could articulate his version of the events. Dr Tie noted that the defendant was aware that there were witnesses to the alleged offences and that he understood that his past statement could be brought up during legal proceedings.

[37] There is, however, a significant caveat to Dr Tie's opinion as to fitness:

> "I note that [the defendant] has difficulty sustaining concentration for extended intervals of time. [The defendant] does struggle with abstract concepts and more complex communication, with associated deficits in comprehension and retention of new information.
>
> However, I formed the impression that the identified deficits could be accommodated through – the option of taking breaks should he become cognitively fatigued; – regular orientation and continued education regarding the nature and potential impact of evidence during the course of legal proceedings."

Dr Tie's oral evidence

[38] Dr Tie has reviewed the defendant six times. The most recent interview was conducted on 14 May 2021 for the purposes of assessing the defendant's fitness for trial and producing a report for this Court. This assessment took approximately 50 minutes. Dr Tie confirmed that, at the time of his assessment, the defendant was taking a medication, Sertraline, which was being used as an anti-anxiety medication to modulate impulsivity and aggressive acting out. Dr Tie accepted that the defendant was exhibiting signs of cognitive fatigue by the end of the 50-minute assessment. Dr Tie did not conduct any formal cognitive testing of the defendant during the assessment.

The defendant's legal representatives' evidence

[39] The defendant has filed three affidavits in this reference. They are affidavits of his legal representatives in relation to the criminal charges, one of whom is Mr Edwin Whitton, a barrister currently employed as in-house counsel at Legal Aid Queensland.

[40] In February 2019, following this Court's decision of 14 November 2018 that the defendant was fit for trial, Mr Whitton was briefed by a solicitor, Ms Lauren Heaney, to represent the defendant.

[41] On 26 February 2019, Mr Whitton and Ms Heaney conferred with the defendant at the Arthur Gorrie Correctional Centre where they attempted to obtain instructions for committal proceedings. Mr Whitton and Ms Heaney attempted to distil the relevant advice into the most basic form so that the defendant could understand it and provide instructions.

[42] Mr Whitton soon formed the view that they were unable to take instructions from the defendant. The defendant was effectively mute for much of the first part of the conference. Neither Mr Whitton nor Ms Heaney were able to obtain an adequate version of the alleged events from the defendant. Mr Whitton recalled that there were long periods where the defendant simply remained silent in response to questions, mostly staring at the floor or the wall. Mr Whitton did not believe that the defendant

was being deliberately obstructive or simply refusing to engage with them, although he acknowledged this was a possibility.

[43] On 20 May 2021, Mr Whitton again conferred with the defendant, this time at Wolston Correctional Centre with Mr Tim Clements, another solicitor who has provided an affidavit. At this conference, Mr Whitton formed the view that the defendant's ability to engage and discuss his legal proceedings had improved significantly. Despite this improvement, Mr Whitton remained sceptical about whether the defendant understood much about the proceedings he faced, even when concepts were distilled to the simplest form possible. While he could be educated about, for example, the role and function of a jury when explained in simple terms, the defendant could not recall such explanation even five or ten minutes later.

[44] Mr Whitton was also concerned that the defendant, in responding to Mr Whitton's questions, would sometimes give affirmative answers, suggesting gratuitous concurrence. Mr Whitton was concerned about a legal representative's ability to ethically act on any instructions given by the defendant, especially in the context of a jury trial.

[45] Ms Heaney, who has had carriage of the defendant's criminal charges since August 2016, has also given an affidavit. During her several conferences with the defendant, she has never been able to obtain a version of events from him in relation to the alleged offences or specific instructions in relation to his legal matters. At a conference on 10 January 2019, Ms Heaney presented to the defendant basic notes of the evidence, including pictures, maps and a diagram depicting the committal process. She had completed basic instructions in plain English and with minimal legal language. However, she was not satisfied that the defendant could understand the committal process, even with these additional aids. She recalled that Mr Whitton attempted to further reduce the language and concepts into three paragraphs but she remained unsatisfied that the defendant could understand this document and he did not sign it. Both Mr Whitton and Ms Heaney also gave oral evidence and confirmed the difficulties that they have encountered in obtaining instructions from the defendant and explaining legal processes to him.

Assisting Clinicians

[46] Dr Reddan's advice to the Court was to accept the opinions expressed by Dr Kovacevic and Ms Anderson. Dr Reddan advised that it is very unlikely that any accommodations would sufficiently overcome the defendant's significant impairments in verbal comprehension and in auditory and verbal memory. The concern is that the defendant will be unable to follow or remember the evidence given at trial.

[47] Dr Reddan noted that the defendant's verbal comprehension index is only 56 and that his auditory memory and verbal memory are "very, very low". This would impact on the defendant's ability to follow the evidence and Dr Reddan advised the Court to accept Dr Kovacevic's evidence that this deficit could not be accommodated nor overcome.

[48] As to future management, Dr Reddan noted that a forensic order (disability), inpatient category, is necessary. If the defendant cannot be accommodated by the Forensic Disability Service, Dr Reddan advised that he should be accommodated for risk

assessment at a secure unit at The Park. Dr Reddan noted that, in view of the nature of the offences and the defendant's relative youth, "the drive for offending was still likely to be somewhat high". However, as there has not been any history of violence for the last four-and-a-half years, Dr Reddan suggested that a medium secure unit, rather than a high secure unit, could be considered.

[49] Dr Harden generally agreed with Dr Reddan's advice. He also advised the Court that, on balance, it should accept Ms Anderson's report. He noted that Dr Arthur's points are well made and that, while the defendant may fulfil most of the *Presser* criteria, a major concern remains about the defendant's ability to follow the proceedings and effectively participate in a trial. He noted that the defendant's IQ is 55 and his memory is extremely poor.

[50] Dr Harden noted that the defendant's ability to understand, retain and think about information is all globally affected. Dr Harden described the defendant as having a very severe impairment.

[51] Dr Harden did not consider it unusual that the defendant could recall some aspects of the offending. He characterised as speculative the suggestion that the defendant's deficits could be accommodated by having matters being constantly repeated to the defendant.

[52] As to future management, Dr Harden also agreed that the defendant requires a secure facility and that a forensic order (disability), inpatient category, should be made. The defendant should remain at a secure facility until appropriate risk assessments have been performed.

Consideration

[53] In *R v Presser*,[2] Smith J stated that the test of fitness for trial should be applied in a "reasonable and commonsense fashion". The defendant must be able to follow the course of the proceedings so as to understand what is going on in court in a general sense, though he need not, of course, understand the purpose of the various court formalities. He needs to understand the substantial effect of any evidence given against him, and he needs to be able to make his defence or answer the charge.

[54] In *Berg v Director of Public Prosecutions*,[3] the Court of Appeal discussed the relevant authorities. An important aspect of the *Presser* test is the ability of the accused to follow the course of proceedings. There is also the requirement in relation to fitness to instruct counsel, which necessitates that the accused personally understand the evidence so as to answer the charge. As observed by Connolly J in *R v House*:[4]

> "Capacity to instruct counsel involves understanding the evidence which is led so as to be able to inform counsel whether it is true or not and whether there are other facts which qualify or explain the evidence adduced."

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2 [1958] VR 45, 48.
3 [2016] 2 Qd R 248.
4 [1986] 2 Qd R 415, 422.

[55] In *R v M*,[5] de Jersey CJ observed that, even where a person has an intellectual disability, the question of fitness for trial must be determined in accordance with the *Presser* criteria. The Chief Justice noted that, in that case, the defendant was illiterate and innumerate and spoke with a marked impediment. His Honour stated:[6]

> "In approaching this issue, one does not overlook the circumstance that the appellant is represented by counsel. A person in the position of the appellant need not, therefore, in order to be tried fairly, appreciate the nuances of court procedure or the intricacies of the substantive law."

[56] The Chief Justice referred to the decision of the High Court in *Ngatayi v The Queen*[7] where Gibbs, Mason and Wilson JJ observed as follows:[8]

> "The test looks to the capacity of the accused to understand the proceedings, but complete understanding may require intelligence of quite a high order, particularly in cases where intricate legal questions arise."

[57] Their Honours continued, however, that:[9]

> "It is notorious that many crimes are committed by persons of low intelligence, but it has never been thought that a person can escape trial simply by showing that he is of low intelligence."

[58] In *R v M* at [14], it was observed:

> "Questions of unsoundness of mind aside, the public interest warrants the trial of persons accused of criminal offences whether their level of intellectual capacity be normal or otherwise."

[59] There is, in my view, a marked difference between how the defendant interviewed with Ms Anderson and Dr Kovacevic and how he interviewed with Drs Arthur and Tie. The defendant was able to give Drs Arthur and Tie a version of events in relation to the offending. It would also appear that Dr Arthur was able to educate the defendant about various aspects of the trial process and the nature of the charges, although, on the evidence, it is unlikely that the defendant would be able to retain the information.

[60] The real issue is whether the defendant has the capacity to instruct counsel and follow the proceedings, which involves understanding the evidence which is led so as to be able to inform counsel whether it is true and who and whether there are other facts which qualify or explain the evidence adduced. The question of such a capacity arises in the context of the defendant being tested with an IQ of 55, which is in the extremely low range. Dr Arthur's primary concern about the defendant's fitness for trial was his ability to follow court proceedings. Dr Arthur noted that the defendant suffers from cognitive fatigue and has difficulty concentrating for extended periods of time and would most likely struggle with comprehension and retention of new information. This is the primary concern also expressed by Dr Kovacevic and Ms Anderson, as well as

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5 [2002] QCA 464.
6 [2002] QCA 464, [5] (citations omitted).
7 (1980) 147 CLR 1.
8 (1980) 147 CLR 1, 8.
9 (1980) 147 CLR 1, 8.

both Assisting Clinicians. Given the defendant's significant cognitive deficits, I am of the view that he will be unable to follow the course of proceedings and will be unable to instruct counsel. I accept the advice of both Drs Reddan and Harden and prefer the opinions of Dr Kovacevic and Ms Anderson as to fitness. I note the same concerns as to the defendant's capacity to following proceedings are expressed by Drs Arthur and Tie, but they both suggested this could be overcome with accommodations. I do not accept this. It is inconsistent with the experience of the defendant's legal representatives and is contrary to the evidence of Ms Anderson and Dr Kovacevic that accommodations, such as regular breaks and repetition of information, would overcome the defendant's significant cognitive deficits.

Disposition

[61] The defendant was not of unsound mind when the offences were allegedly committed.

[62] Apart from that finding, the Court will not, at this stage, make any further determinations. This is because, if the Court was to make a finding that the defendant is permanently unfit for trial under ss 118(2) and (3) of the Act, the proceedings against the defendant for the alleged offences would be discontinued pursuant to s 122(a). The defendant is presently on remand at Wolston Correctional Centre.

[63] Where a finding is made that the defendant is permanently unfit for trial, s 131(2) requires the Court to make the order required under division 2 ('Forensic orders') or division 3 ('Treatment support orders') of part 4 of chapter 5 of the Act.

[64] Based on the Assisting Clinicians' advice and the evidence, the appropriate order in the present case is a forensic order (disability), inpatient category. Prior to making that order, the Court will seek a certificate from the Director of Forensic Disability under s 148(2) of the Act. That certificate must state whether or not the Forensic Disability Service has the required capacity within the meaning of s 147. The term "required capacity" is defined in s 147(8) to mean "(a) the physical capacity to accommodate the person; and (b) the capacity to provide care for the person under the order". For the purposes of determining whether the Forensic Disability Service has the required capacity, the Director of Forensic Disability will be provided with a copy of these reasons, together with the Court's request for a certificate.

[65] Until the certificate is received, the Court cannot decide that the Forensic Disability Service is responsible for the defendant.[10] Therefore, apart from the finding as to unsoundness, the only other order of the Court is that the reference is adjourned to a date to be fixed.

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10 *Mental Health Act 2016* (Qld) s 147(2).