CASE NOTE: *N V R* [2017] NZCA 170

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I. INTRODUCTION

The ongoing discourse around unfitness to stand trial still has the capacity to surprise. Occasionally, new decisions of the courts challenge the accepted orthodoxy of earlier jurisprudence in ways that foreshadow significant change — both in the way in which legal ideas are conceptualised and in the practical workings of a particular legal doctrine. *N v R* is such a case.[1] Of particular interest is the adoption by the Court of Appeal of the notion of "effective participation" as the hallmark of a criminal defendant's capacity to undertake a trial.

"Effective participation" acknowledges a differentiation between the capacities required for participation in proceedings of differing degrees of complexity. It moves beyond the evaluation of trial competence as a monolithic, abstract, once-only evaluation to a more nuanced assessment that evaluates an offender's ability to process information in real time (and in respect of quite specific trial decisions). As the Court observed, the need to inquire into an offender's capacity to participate *effectively* in a trial arises in cases where there is a superficial appearance of participation but in reality the offender is no more than a bystander (for example, because of the impact of intellectual disability). Such cases offend against fundamental principles underpinning the fitness to plead rules.

A. The Facts

The appellant appealed his conviction for aggravated robbery following a jury trial. The question on appeal was whether, at the time of his trial, Mr N was 'unfit to stand trial' within the meaning of s 4 of the Criminal Procedure (Mentally Impaired Persons) Act 2003, which would have rendered his conviction a miscarriage of justice.

The appellant, together with three other men and two women, embarked on a plan to lure an unsuspecting male to a secluded location — ostensibly for sexual purposes — and there to rob him of his money. The 53-year old victim had driven to a location in suburban Auckland looking for women available for sexual services. The two women were in the area waiting and approached the victim when he stopped, asking him if he wanted to use their services. He agreed and proceeded to drive the women to the secluded location where the three other men were waiting. When the women got out of the car, having requested and received $100 from the victim, the men rushed the car and began to assault the victim. As a result of the assault he suffered a broken eye socket, lacerations to his lip and left ear, head abrasions and a black eye. The offenders left the scene in the victim's car, together with his wallet containing about $900 in cash and many credit cards. They were located by Police near Napier airport the next morning.

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[1] *N v R* [2017] NZCA 170 at [26] (*N*).

At the Police interview held at the Napier Police Station the following afternoon, Mr N answered questions in a simplistic manner, often laughing or nodding. His answers were difficult to comprehend and he showed signs of confusion. In his interview he appeared to have told Police that he had drunk some alcohol that evening and had heard some arguing and noise. Soon afterwards a friend drove up in a car and asked him to get in. He and the other occupants drove until they were stopped by police. Mr N was charged with aggravated robbery. At his trial, the two women co-accused pleaded guilty and gave evidence. It was alleged that Mr N, who did not give evidence, physically participated in the attack on the victim. However, through his counsel, Mr N claimed that he had joined the co-offenders after the victim had been assaulted. He was, nonetheless, convicted with another co-accused of aggravated robbery.

A pre-sentence report revealed that the appellant suffered comprehension difficulties, possibly due to head injuries suffered as a child. The report writer suggested that the Court request a neuro-psychological assessment to confirm whether Mr N had any brain dysfunction.

At the sentencing hearing the Judge sentenced the principal offender to 3½ years imprisonment and indicated his intention to sentence the appellant to 3 years' imprisonment. However, the Judge adjourned sentencing to obtain a report on the appellant's cognitive abilities.

B. Psychologist's Report

Pursuant to s 38(1) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 (the CPMIP Act), a report was submitted by a clinical psychologist to assist the Court in determining whether the appellant was unfit to stand trial. This revealed that Mr N had left school at the age of 14 and could neither read nor write. A mini mental-status examination and executive functioning tests revealed that the appellant had serious cognitive problems. He could not follow correctly a three-step command and did not have a good grasp of left and right. In addition, he was unable to read the words "close your eyes" and could not print a sentence. The Wechsler Adult Intelligence Scale Test administered by the clinical psychologist revealed Mr N's full IQ score to be 62, placing him in the extremely low range of intellectual functioning. Other tests administered revealed that Mr N satisfied two of the three criteria in the definition of "intellectual disability" in s 7(1) of the Intellectual Disability (Compulsory Care & Rehabilitation) Act 2003 (the IDCCR Act) — his history indicating that he was also likely to meet the third criterion.[2] It was considered that Mr N may not have been fit to stand trial. The significance of this assessment was that if the appellant had been

[2] 'Intellectual disability' is defined in s 7 of the IDCCR Act. It requires "permanent impairment" in three nominated domains, namely:

(a) significantly sub-average general intelligence;

(b) significant deficits in adaptive function in at least two statutorily listed skills (eg communication, self-care, home living, social skills, use of community services and others); and

(c) became apparent during the person's developmental period.

The judgment does not indicate which criteria were satisfied or which was likely to be met.

unfit to stand trial because of an intellectual disability, in all likelihood he would have become a care recipient under the IDCCR Act, and may have no longer been subject to the criminal justice system.

On receipt of the report the trial judge recognised there were real issues concerning the appellant's fitness to stand trial, but was prevented from making any finding at that stage of the proceedings that the appellant was unfit to stand trial because of the operation of s 7(1) of the CPMIP Act.[3] The Court of Appeal found that the language of s 7 was clear, and prevented the trial judge from undertaking an assessment of the appellant's fitness to stand trial following the conclusion of all the evidence. Sentencing was then adjourned pending an appeal to the Court of Appeal to determine whether: (a) the conviction should be quashed; and (b) hearings should be conducted under ss 9 and 14 of the CPMIP Act to determine if the appellant was fit to stand another trial.

Reports from two forensic psychiatrists were then obtained under s 38(1)(a) of the CPMIP Act, which assessed the appellant's mental state and fitness to stand trial. These reports determined that the appellant had a poor understanding of the consequences of pleas of guilty and not guilty and of the legal significance of the charge. They also noted that his cognitive difficulties would have rendered it difficult for him to follow in general terms the course of proceedings before the court.

The reports concluded that it was likely the appellant fulfilled the statutory criteria for being unfit to stand trial. In particular, one of the psychiatrists gave evidence that the appellant's intellectual impairment meant that he was unlikely to have participated effectively in his trial, although what this meant in context was not elaborated upon in the Court's judgment.

C. Legal Principles

The Court then considered the legal principles applicable in determining whether there may have been a miscarriage of justice in terms of s 385(1)(c) of the Crimes Act 1961 (under which the appeal was brought).[4] It found that the appellant's trial would have been a miscarriage if he was unfit to stand trial, because it is a "fundamental feature of the criminal justice system that only those who passed the threshold of being fit to stand trial are subjected to all that is entailed in responding to criminal charges".[5]

The Court briefly outlined the origins of the new regime for determining fitness to stand trial in New Zealand. It noted, in particular, the legislature's decision to broaden the qualifying criteria by abandoning the "mental disorder" threshold applied in the test previously contained in s 108 Criminal Justice Act 1985 and substituting a threshold test of "mental impairment". This reflected Parliament's intention to ensure

[3] Section 7 says:

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

[4] Section 385 of the Crimes Act 1961 was repealed by s 6 of the Crimes Amendment Act (No 4) 2011 and replaced by s 232 of the Criminal Procedure Act 2011 (Criminal Procedure Act).

[5] *N*, above n 1, at [24].

that persons with intellectual disabilities, personality and neurological disorders and 'other conditions' were not forced to stand trial where that would offend the principles underlying the fitness to stand trial requirements of the CPMIP Act. These were identified as:[6]

> (1) Fairness to the defendant by protecting his or her rights to a fair trial and to present a defence;
> (2) Promoting integrity and legitimacy of the criminal justice system by only holding defendants accountable if they understand the reasons why they have been prosecuted, convicted and punished;
> (3) Enhancing society's interest in having a reliable criminal justice system by not placing on trial defendants who, through lack of fitness, are unable to advance an available defence.

This list represents an amalgam of grounding principles drawn from established case law and commentary from leading theorists on criminal law and procedure.[7]

The Court then reviewed the criteria for unfitness set out in s 4 of the CPMIP Act. It noted that the criteria, first articulated in *R v Pritchard*,[8] have evolved, and that — within the New Zealand jurisdiction — are now supplemented by the "more discriminating"[9] list of trial functions outlined in *R v Presser*[10] and adopted by the High Court in *P v Police*.[11] Nevertheless, it is worth noting that the *Presser* criteria contain no qualifying language which might indicate the level or quality of understanding required, so that the application of the criteria still suggest a relatively low level of understanding permitting an accused person to be brought to trial. Nevertheless, these additional criteria were considered by the psychiatrists when assessing the appellant.

The Court then made the following observation — which directly introduced the concept of "effective participation" and the explanation of this term:[12]

> An inquiry into a defendant's fitness to stand trial, however, involves more than an assessment of whether or not the defendant can participate in his or her trial by simply performing relevant trial functions. A defendant must also have the capacity to participate effectively in his or her trial. This involves an assessment of the defendant's intellectual capacity to carry out relevant trial functions. The reason for the need to inquire into the defendant's capacity to participate effectively in his or her trial is that the principles we have explained above are not honoured in cases where, for example, a defendant superficially appears to participate in his or her trial but in reality is, because of intellectual disability, nothing more than a bystander.

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[6] At [26].
[7] See *Cumming v R* [2008] NZSC 39, [2010] 2 NZLR 433 at [13]; *R v Presser* [1958] VR 45 (SC) at 48; (*Presser*); RA Duff *Trials and Punishments* (Cambridge University Press, Cambridge, 1986) at 119; Richard Bonnie, "The Competence of Criminal Defendants: A Theoretical Reformulation" (1992) 10 Behav Sci and Law 291 at 295.
[8] *R v Pritchard* (1836) 7 Car & P 303, (1836) 173 ER 135 (KB) at 135.
[9] *N*, above n 1, at [28].

[11] *Presser*, above n 7, at 48; *P v Police* [2007] 2 NZLR 528 (HC) at [43].
[12] *N*, above n 1, at [29].

The helpful nature of the psychiatric evidence was acknowledged by the court in helping to explain how an assessment of the appellant's fitness to stand trial involved an inquiry into his capacity for effective participation in the trial. Four different types of intellectual capacity were identified as relevant to the inquiry:[13]

> (1) Understanding: including capacity to "understand relevant information, including the elements of the charge, the trial process, the role of participants in the trial, evidence, and the purpose and possible outcomes of the trial".
> (2) Evaluation: including the appellant's "capacity to process information, particularly evidence and directions, and to evaluate the impact of that information on the defence".
> (3) Decision-making: including the "capacity to make decisions normally required of a defendant during the course of the trial" (which encompasses how to plead and to give evidence putting forward a particular defence).
> (4) Communication: including capacity to communicate instructions to his lawyer and to give evidence if the appellant elected to do so.

The Court noted that these functions needed to be carried out "rationally by Mr [N] and in real time".[14] However, the Court did not go so far as to suggest that the requirement for rationality implied that the defendant must be capable of acting in his best interests.[15] In an extensive footnote the Court explained that the concept of "rationality", while vague and not universally understood, is a requirement "well ingrained" in other jurisdictions.[16] In particular, the Court noted that in the United States rationality was interpreted to mean, at least in relation to capital sentences, that a defendant's understanding "should not be adversely affected by delusional thoughts".[17]

The Court did not attempt to offer an explanation of what that might mean in New Zealand, other than to suggest that the decision in *R v Cumming*[18] meant that rational understanding was also an important ingredient in unfitness to stand trial requirements and thus "an established feature of our law".[19] In *Cumming* the Court of Appeal held that an accused must rationally be able to understand the proceedings and functionally be able to defend it through participation in the trial process.[20] What this might mean in practice has yet to be fully determined by the courts. What it apparently does not mean is that a defendant must be capable of making trial decisions which are in his or her best interests. Giving it an affirmative meaning is more challenging, because it is not possible to determine in advance the multitude of circumstances where a defendant's thinking must be reasonable for justice to be done.

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[13] At [30].
[14] At [30].
[15] This issue was extensively surveyed by the Court of Appeal in *Solicitor-General v Dougherty* [2012] NZCA 405 at [31]–[40]. There the Court concluded that the law was settled, and that there was no indication that Parliament intended to change the settled law to include an inquiry into whether the accused will act in his or her best interests. The Court reaffirmed its commitment to the underlying principle of giving "preeminence" to personal autonomy (at [55]).
[16] *N*, above n 1, at [30], n 15. See also *Youtsey v United States* 97 F 937 (6th Cir 1899); *Dusky v United States* 362 US 402 (1960).
[17] *N*, above n 1, at [30], fn 15. See also *Panetti v Quarterman* 551 US 930 (2007).
[18] *R v Cumming* [2006] 2 NZLR 579 (CA) at [38] (*Cumming*).
[19] *N*, above n 1, at [30], fn 15.
[20] *Cumming*, above n 18, at [38], citing Warren Brookbanks "Judicial Determination of Fitness to Plead" (1992) 7 Otago LR 520 at 521 (cited by the Court in support of the rationality requirement).

This must be assessed on a case by case basis in light of the principles undergirding the fitness rules, namely, dignity, reliability and autonomy.

The Court of Appeal also noted that the effective participation test originated in decisions of the European Court of Human Rights (ECtHR) in relation to minimum fair trial rights (as to which see art 6(3) of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950[21]) and is the test for fitness to stand trial recently endorsed by the Law Commission of England and Wales.[22] It is also the test applied in international criminal tribunals.[23]

Of particular interest is the decision in *SC v United Kingdom*[24] where the ECtHR gave a detailed account of what was meant by effective participation. It said it:[25]

> presupposes that the accused has a broad understanding of the nature of the trial process and what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence …

Concerning the application of the effective participation construct in the New Zealand context, the Court of Appeal noted that it is a contextual enquiry. This recognises that a defendant who may have the capacity to participate effectively in a simple criminal proceeding — for example, by pleading guilty to shoplifting — may lack the capacity to participate effectively in more complex proceedings (particularly those requiring an ability to process information in real time and to communicate effectively in order to be able to advance a defence). This meant, the Court concluded, that in the present appeal the enquiry should be whether the appellant could participate meaningfully in his trial.

D. Analysis

The Court rejected Crown counsel's submission that the trial did not require a significant level of executive functioning on the part of the appellant, implying that he was fit to stand trial. On the contrary, it found that the appellant's circumstances called into question his ability to perform all the intellectual capabilities outlined earlier in the judgment, such that he was unable to effectively participate in his trial. The Court

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[21] Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 222 (opened for signature 4 November 1950, entered into force 3 September 1953), art 6.3.
[22] See Law Commission of England and Wales *Unfitness to Plead Volume 1: Report* (LAW COM No 364, 2016) at [3.32].
[23] See Ian Freckelton and Magda Karagiannakis "Unfitness to Stand Trial under International Criminal Law: The Influential Decision of the International Criminal Tribunal of the Former Yugoslavia in Relation to Pavle Strugar and its Ramifications" (2014) 21 Psychiatry, Psychology and Law 611. See also Criminal Justice and Licensing (Scotland) Act 2010, s 170.
[24] *SC v United Kingdom* (2005) 40 EHRR 10 (ECHR).
[25] At [29], cited in Kris Gledhill "Ability to Participate in Criminal Proceedings" in Colin Wells (ed) *Abuse of Process* (3rd ed, Oxford University Press, Oxford, 2017) at [10.21].

noted, for example, the psychiatric testimony that the appellant had little understanding of "charge", "aggravated" or "robbery", and that his cognitive impairments meant that he would have struggled to follow the proceedings. Notably, the appellant would have struggled to understand the evidence as it was presented, and to process the evidence and understand how it applied to him "in a rational manner".[26]

In allowing the appeal against conviction and ordering a retrial, the Court concluded that the appellant lacked the capacity to make the decisions normally required of a defendant, or to communicate instructions effectively with his counsel. Furthermore, he lacked the ability to give evidence in order to properly advance his defence and would have been unable to understand questions put to him in cross-examination (and would likely have simply given affirmative answers in response to questions).

The Court found that the combined effect of the expert psychiatric testimony was that the appellant lacked the ability to participate effectively in his trial and that his cognitive disabilities were such that he met the criteria for unfitness to stand trial in s 4 of the CPMIP Act. This meant that he should have been assessed under the Act before facing trial and that requiring the appellant to stand trial when he was unfit to do so was unfair and gave rise to a miscarriage of justice.

The appeal against conviction was allowed. The conviction was quashed and a retrial ordered. The Court concluded that "[i]f the Crown wishes to proceed against Mr [N] then a full evaluation of his fitness to stand trial will need to be undertaken pursuant to ss 9 and 14 of the CPMIP Act".[27] The decision is subject to a publication prohibition pending final disposition of the retrial.

II. Discussion

The *N* case illustrates the increasing complexity and sophistication of the legal questions involved in determining unfitness to stand trial. What was once a tolerably simple determination as to whether an offender had the cognitive ability, at a fairly basic level, to understand the proceedings and instruct counsel as to a defence, has now become a more demanding and nuanced inquiry. It asks whether a defendant can perform those tasks *effectively* so that the offender's participation in the trial can be said to be *meaningful*. By its nature, effective participation appears to privilege active engagement in, and shaping of, the trial process, and speaks of a defendant having a positive experience of voice and judicial engagement.[28] This would seem to be a significantly different form of curial engagement than the merely passive ability to "adequately" understand proceedings and communicate with counsel — even if that does represent the current statutory test in New Zealand.[29]

[26] *N*, above n 1, at [35].
[27] At [38].
[28] See Amy Kirby, Jessica Jacobson and Gillian Hunter "Effective participation or passive acceptance: How can defendants participate more effectively in the court process?" in The Howard League for Penal Reform *What is Justice? Reimagining Penal Policy* (Working Papers 9/2014) at 11.
[29] See the definition of "unfit to stand trial" in the CPMIP Act, s 4.

The reality, it would seem, is that while the statutory test is the law "and must always remain the ultimate question",[30] it may be necessary for the test to be "reinterpreted by the courts to make it more appropriate for the trial process".[31] What this will mean in practical terms remains to be seen. However, if meaningful participation is now a significant measure of trial capacity, it would seem that, at a minimum, the court should have regard to what the particular legal process will involve and the demands it will make on the particular defendant. The degree of complexity of different legal proceedings may vary significantly, but typically the court will have to consider the nature and complexity of the issues in the particular proceedings, the likely duration of those proceedings and the number of parties. It is not a question of whether the defendant lacks capacity to participate in some theoretical or abstract proceedings. The question will always be "does the defendant have the capacity to participate in the proceedings which he faces".[32]

[30] *Solicitor–General v Dougherty*, above n 15, at [57].
[31] *R v Marcantonio* [2016] EWCA Crim 14 at [4].
[32] *N*, above n 1 at [17].