ORDER PROHIBITING PUBLICATION OF THE NAME OR IDENTIFYING PARTICULARS OF THE APPELLANT

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA211/2020
[2022] NZCA 389

BETWEEN	CG Appellant
AND	THE QUEEN Respondent

Hearing:	13 June 2022
Court:	Cooper P, Mander, Fitzgerald JJ
Counsel:	G H Vear and H J Croucher for Appellant Z R Johnston for Respondent
Judgment:	22 August 2022 at 2:30 pm

JUDGMENT OF THE COURT

A The application for an extension of time to appeal against conviction is granted.

B The appeal against conviction is allowed.

C The three convictions for aggravated robbery are quashed.

D To maintain the effectiveness of the suppression ordered in the High Court we make an order prohibiting publication of the name or identifying particulars of the appellant.

REASONS OF THE COURT

(Given by Fitzgerald J)

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Introduction

[1] Mr G seeks an extension of time to appeal against three convictions for aggravated robbery dating back to 1997 and 2000. Mr G's proposed appeal is accordingly more than two decades out of time.

[2] Mr G wishes to appeal against his convictions on the basis that he has never been fit to stand trial and thus his conviction on each of the charges gives rise to a miscarriage of justice. There is no dispute that Mr G has a moderate intellectual disability, and in a joint report prepared for this appeal by psychologists retained by each of Mr G and the Crown, both experts agree that it is unlikely Mr G was fit to stand trial at the time of the relevant convictions.

[3] As at March 2021, Mr G had 75 convictions spanning the period 1995 to 2015, including the three convictions the subject of the present appeal. On 29 March 2021, Edwards J in the High Court quashed 72 of those convictions, on the basis that Mr G was unfit to plead or stand trial at the relevant times.[1] An appeal against the three aggravated robbery convictions must, however, be made to this Court.

[4] The Crown neither consents to nor opposes the application for an extension of time or the substantive appeal (which it agrees has merit). Nor has it appealed

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1 *CG v New Zealand Police* [2021] NZHC 645.

Edwards J's judgment quashing Mr G's remaining convictions. But given the length of time since the convictions, the principle of finality, a question as to the Court's jurisdiction to quash the convictions on the grounds of fitness, and the Crown's position that a conclusion on Mr G's fitness is not straightforward, the Crown considered it appropriate that the matter be the subject of a substantive hearing before the Court.[2] We are grateful to counsel for both Mr G and the Crown for their comprehensive and responsible submissions on the appeal.

[5] The following issues arise for determination:

(a) Should Mr G be granted an extension of time to appeal?

(b) If yes, does this Court have power to quash Mr G's convictions on the grounds of fitness?

(c) If yes, should the Court quash Mr G's three convictions for aggravated robbery on the basis that he was unfit to stand trial at the relevant times?

Should Mr G be granted an extension of time to appeal?

[6] As noted, Mr G's appeal has been filed many years out of time. The application for an extension of time falls to be determined under s 388(2) of the Crimes Act 1961, being the relevant statutory provision in force at the time of the convictions.[3] There is no dispute, however, that the relevant principles mirror those applied under the current provisions of the Criminal Procedure Act 2011.

[7] As this Court explained in *R v Knight*, the touchstone for whether to grant an extension of time will be the interests of justice in the particular case.[4] This involves balancing a number of factors including:[5]

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2 The Crown had earlier indicated that if the High Court quashed Mr G's remaining convictions and the Crown did not seek to challenge that decision, the appeal against the three aggravated robbery convictions could potentially be dealt with on the papers or by consent.

3 Section 388(1) required an appeal against conviction to be brought no later than 10 days after the date of sentence.

4 *R v Knight* [1998] 1 NZLR 583 (CA) at 587; and see also *R v Lee* [2006] 3 NZLR 42 (CA) at [96]–[99].

5 *R v Lee*, above n 4, at [99].

> … the wider interests of society in the finality of decisions, the strength of the proposed appeal, whether the liberty of the subject is involved, the practical utility of any remedy sought, the extent of the impact on others affected and on the administration of justice, and any prejudice to the Crown.

[8] We first deal with a minor preliminary point. As mentioned earlier, the Crown does not challenge Edwards J's approach to the substantive appeal in respect of the remaining 72 of Mr G's convictions. It does, however, say that Edwards J erred in articulating the test for granting leave to appeal out of time, submitting that "the existence of an arguable case is not enough".[6]

[9] We do not discern this to be the basis upon which Edwards J approached the issue. The Judge correctly identified the test as articulated above, stating that the touchstone of the interests of justice "is to be arrived at by balancing all relevant factors".[7] And at [13] of her judgment (the aspect which the Crown says was in error), the Judge merely notes that the fact Mr G had a seriously arguable case on his appeal "tips the balance in favour of an extension of time". This conclusion reflects the balancing exercise required. We therefore do not accept the Crown's submission that the Judge erred in her approach to the test for whether an extension of time ought to be granted.

[10] Turning to the application for an extension of time in the present appeal, no affidavit has been filed in support of Mr G's application. That is understandable, given the basis for his present appeal. We also note that the experts' joint report records that Mr G had a very limited understanding of the appeal process and would have had difficulties instructing a lawyer in relation to an appeal. Reflecting this, the Crown accepts that Mr G would have found it difficult to pursue an appeal.

[11] We recognise the importance of finality in cases such as this, particularly given the very lengthy period of time since Mr G's convictions were entered. We also take into account that Mr G's liberty is no longer impacted (the sentence having been served), and that the length of the delay creates some prejudice in relation to the

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6 The Crown refers to this Court's observations in *R v Lee* at [104] rejecting the submission that a finding that an appeal is arguable will automatically lead to an extension of time being granted.

7 *CG v New Zealand Police*, above n 1, at [10].

inability to access contemporaneous records.[8] Nevertheless, given the recent expert evidence that Mr G is unlikely to have been fit to stand trial at the time he was convicted of the three charges, there is, as accepted by the Crown, undoubtedly merit to the appeal. Further, as this Court said in *Nonu v R*, "it is a fundamental feature of our criminal justice system that only those who pass the threshold of being fit to stand trial are subjected to all that is entailed in responding to criminal charges".[9] It is therefore right that this feature carries considerable weight in the balancing exercise. The Crown also accepts that there is no substantial prejudice to it, nor are there circumstances where victims face the stressful possibility of a retrial.

[12] Taking all of these factors into account, we are satisfied that it is appropriate to grant Mr G an extension of time to file his appeal.

[13] We therefore turn to consider the substantive appeal.

Approach to the appeal

[14] Mr G's appeal proceeds under (the now repealed) s 385 of the Crimes Act.[10] Under s 385(1)(c), the Court must allow the appeal if it is of the opinion that there was a miscarriage of justice on any ground. Although "miscarriage of justice" was not defined under the Crimes Act, a miscarriage arose under s 385(1)(c) when there was a reasonable possibility that a not guilty (or a more favourable) verdict might have been delivered if nothing had gone wrong.[11]

[15] In *R v Le Page*, this Court observed that it is only in exceptional circumstances that an appeal against conviction will be entertained following a plea of guilty.[12] However, one situation identified by the Court as indicating a miscarriage of justice is where the appellant did not appreciate the nature of or did not intend to plead guilty to

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8 Though unlike in some similar cases, a reasonable amount of contemporaneous material is still available in relation to the three convictions in issue.

9 *Nonu v R* [2017] NZCA 170 at [24].

10 Criminal Procedure Act 2011, s 397.

11 *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 at [110] per Tipping J. Gault J, writing for the majority, referred to the common principle as being "that prejudice to the outcome of the trial is the trigger for appellate intervention" and later in the context of counsel error or irregularity referred to the test as being whether there was a "real risk it affected the outcome": at [58] and [70], respectively.

12 *R v Le Page* [2005] 2 NZLR 845 (CA) at [16].

a particular charge.[13] In *Cumming v R*, the Supreme Court held that a court is not empowered on appeal to make a formal finding of unfitness to plead or stand trial, but this does not prevent the court from inquiring into and deciding whether, by reason of a mental disorder from which a defendant was suffering at the time of trial, a miscarriage of justice has occurred.[14]

The applicable principles — fitness

[16] Before addressing the factual background to the appeal, it is helpful first to summarise the legal principles concerning fitness that were applicable at the time of Mr G's convictions.[15] These principles give context to the assessments of Mr G's fitness undertaken at the time of or proximate to the convictions under appeal.

[17] At the time of Mr G's convictions, the law relating to fitness was contained in pt VII of the Criminal Justice Act 1985 (the CJA). Section 108 of the CJA set out the test for determining whether a person is fit to plead, providing:

> **108 Interpretation**
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> (1) For the purposes of this Part of this Act, a person is under disability if, because of the extent to which that person is mentally disordered, that person is unable—
>
> (a) To plead; or
>
> (b) To understand the nature or purpose of the proceedings; or
>
> (c) To communicate adequately with counsel for the purposes of conducting a defence.
>
> …

[18] Section 111 outlined the procedure to be followed when fitness was in issue:

> **111 Procedure**
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> (1) In any case where a defendant who is charged with an offence punishable by imprisonment or death appears to be under disability and the Judge is satisfied on the evidence of 2 medical practitioners that the defendant is mentally disordered, the Judge shall, after giving the

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13 At [17].

14 *Cumming v R* [2008] NZSC 39, [2010] 2 NZLR 433 at [13].

15 The inquiry into whether a miscarriage of justice has occurred must be determined as against the law that applied at the time the convictions were entered: *Ferguson v R* [2010] NZCA 2 at [23].

> prosecution and the defendant an opportunity to be heard and to call evidence on the matter, determine whether the defendant is under disability.
>
> (2) Where the Judge is satisfied that the defendant is under disability, the Judge shall direct a finding to that effect to be recorded.
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> (3) The jurisdiction conferred on a Judge or court by this section and sections 109 and 110 of this Act may be exercised in the absence of the defendant if the Judge or court is satisfied that the defendant's mental condition is such that he or she is too ill to come to court.

[19] The term "mentally disordered" was defined for the purposes of s 108 as having the same meaning as it had in the Mental Health Act 1969.[16] Following amendments in 1992 to the definition of "mentally disordered",[17] intellectual disability was excluded from that definition. Counsel for Mr G accepts that the exclusion was deliberate but says that later amendments confirm that it was only intended in the context of that definition to apply to the categories of persons who could appropriately be subject to compulsory treatment. Counsel submits that the implications of the omission for pt VII of the CJA and fitness to stand trial were not fully considered. She refers in this context to the first reading of the Bill that brought about the 1992 amendments, at which the Hon David Caygill, the then Minister of Health, explained:[18]

> The Bill is designed to balance the need to safeguard individual rights and civil liberties with the realities of psychiatric illness and its treatment. There is specific exclusion of religious or cultural belief, sexual preference, drug-taking, delinquency, *and intellectual handicap as reasons on their own for detention. That is intended as a signal to safeguard against any possible abuse of psychiatric hospitals for the purposes of social control*.

[20] Counsel also drew our attention to the 2002 Law Commission report *Protections Some Disadvantaged People May Need*, in which the Commission observed:[19]

> The impetus for the 1992 change seems to have been a desire to distinguish between mental impairment that was treatable (hence the short title's reference to "Assessment and Treatment") on the one hand and such other conditions as personality disorders and congenital disability on the other hand which are

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16 Criminal Justice Act 1985, s 2.
17 By the introduction of the Mental Health (Compulsory Assessment and Treatment) Act 1992.
18 (8 December 1987) 485 NZPD 1628–1629 (emphasis added).
19 Law Commission *Protections Some Disadvantaged People May Need* (NZLC R80, 2002) at [3].

> not. But insufficient consideration seems to have been given to the gap left by the new provision.

[21] This gap was identified as one of the main considerations in the subsequent Criminal Justice Amendment Bill (No 7) 1999 and the Intellectual Disability (Compulsory Care) Bill 1999, both introduced on 5 October 1999.[20] The explanatory note to the latter Bill explained the gap as follows:[21]

> Persons with an intellectual disability were included in the definition of "mental disorder" in the Mental Health Act 1969, which was later linked to the Criminal Justice Act 1985. However, the Mental Health (Compulsory Assessment and Treatment) Act 1992 deliberately excluded persons with an intellectual disability (unless they also have a mental disorder). This is because intellectual disability is now seen as a learning disability that results in substantial limitations in functioning. Unlike a mental illness, it cannot be treated. It is therefore inappropriate for persons with an intellectual disability to be subject to an order requiring them to undertake treatment.
>
> This exclusion created a legislative gap, for the offender group, between the Mental Health (Compulsory Assessment and Treatment) Act 1992 and Part VII of the Criminal Justice Act 1985, resulting in limited options being available to the courts for dealing with persons with an intellectual disability who are charged with or convicted of an imprisonable offence. This has sometimes resulted in inappropriate placement in prison, mental health services, or discharge into the community. This Bill links with the *Criminal Justice Amendment Bill (No. 7)* to enable criminal courts to impose appropriate orders for people with an intellectual disability.

[22] The two bills were passed into legislation on 30 October 2003 and came into force on 1 September 2004. Section 3(a) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 (the CPMIP Act) records that one of the purposes of that Act is to "provide the courts with appropriate options for the detention, assessment, and care of defendants and offenders with an intellectual disability". Consistent with this, the definition of "mentally disordered" was replaced with the (undefined) term "mentally impaired", thus capturing both mental disorder and intellectual disability.

[23] Despite the exclusion of intellectual disability from the statutory regime for fitness prior to the coming into force of the CPMIP Act, courts faced with similar circumstances as those arising in this case have resorted to the courts' inherent power

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20 The former Bill later became the Criminal Procedure (Mentally Impaired Persons) Bill 1999 (328–3) and the latter became the Intellectual Disability (Compulsory Care and Rehabilitation) Bill 1999 (329–3).

21 Intellectual Disability (Compulsory Care) Bill 1999 (329-1) (explanatory note) at ii.

to protect the fair trial rights of an accused, and in particular, the courts' power to stay criminal proceedings where the defendant is not fit to stand trial.[22]

[24] As the Supreme Court explained in *Siemer v Solicitor-General*:[23]

> [113] All courts in New Zealand have inherent powers. While these powers have in the past sometimes been described as part of the "inherent jurisdiction" of the courts, we think that the term "inherent powers" more aptly describes them. "Jurisdiction" and "power" are two distinct concepts. The jurisdiction of a court is its substantive authority to hear and determine a matter. Jurisdiction may be inherent in a particular court or it may be conferred by statute. But every court has inherent powers which are incidental to or ancillary to its jurisdiction, whether that jurisdiction is inherent or statutory.

[25] The Court stated that the courts' inherent powers extend to preventing abuse of the courts' processes and protecting the fair trial rights of an accused.[24] The Court also confirmed that inherent powers may be exercised in respect of matters regulated by statute or rules of court, so long as the court can do so without contravening any statutory provision.[25]

[26] It will be immediately apparent that (in the case of proceedings pre-dating 2004), the existence of the Court's inherent power to stay a proceeding on the ground that a defendant's intellectual disability means they are unfit to stand trial must be reconciled with the statutory scheme of pt VII of the CJA. This Court grappled with that issue in *R v L*.[26] The Court prefaced its consideration of the issue by stating:[27]

> … the requirement the accused must be fit to stand trial is fundamental to our criminal justice system. An accused's right to a fair trial is affirmed in s 25(a) of the Bill of Rights. It is self-evident that a trial will not be fair if the accused suffers a disability which prevents him or her from effectively defending him or herself.

[27] The Court went on to say:[28]

> We recognise that the existence of the Court's inherent jurisdiction to stay a proceeding on the ground that the accused person, although not suffering a

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22 And if convictions were entered despite that position, the appeal court's ability to quash the convictions on the basis a miscarriage of justice has been exercised.

23 *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 (footnotes omitted).

24 At [114].

25 At [118] citing *Taylor v Attorney-General* [1975] 2 NZLR 675 (CA) at 680.

26 *R v L* [1998] 2 NZLR 141 (CA).

27 At 144.

28 At 146–147 (emphasis added).

> mental disorder, is not fit to plead or stand trial must be reconciled with this express statutory regime contained in Part VII. Mr Ellis adopted the view that the accused's right to a fair trial, as affirmed by s 25, is paramount, and he tended to equate Ms L's psychological condition with a mental disorder as contemplated by s 108(1). For his part, Mr Pike submitted that the statutory regime set out in Part VII should prevail. The concept of mental disorder should not be applied to psychological conditions or personality difficulties of this kind. If this is done, he contended, the statutory regime may be effectively circumvented.
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> As is often the case, there is some merit in both arguments. In the first place, we are not prepared to resile from the proposition that the right to a fair trial is a fundamental right. *If, by reason of some disability a person cannot obtain a fair trial as guaranteed by s 25, he or she cannot be made to plead or stand trial*. As stated in *R v Duval*, the right to a fair trial defines the limits to which society may go in prosecuting persons who are unable to defend themselves. *We accept, therefore, that the express statutory regime in Part VII does not exclude the possibility that persons who do not suffer from a mental disorder in terms of s 108(1) may be held unfit to plead or stand trial pursuant to the Court's inherent jurisdiction*. It would defy logic to insist that a person who does not have a mental disorder but who, for some other involuntary reason, is unfit to plead, cannot understand the nature or purpose of the proceeding, or cannot effectively communicate with counsel, should be required to face a criminal prosecution. The merit in Mr Pike's submission, however, is that it serves to emphasise that the occasions when an accused person who does not have a mental disorder will be unable to obtain a fair trial necessarily will be rare. Short of a mental disorder rendering the accused unfit to plead or stand trial as contemplated by s 108(1), the criminal process and procedure is sufficiently adaptable to be able to accommodate most psychiatric or medical conditions which give rise to real difficulties.
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> …
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> To take a less restrictive view would be to run the risk of trespassing on Parliament's domain. Effectively, a statutory regime established by Parliament for persons considered unfit to stand trial would be expanded to embrace psychological conditions without the necessary imposition of the constraints contained in the Act. The restriction on when a finding of disability may be made in s 109 would not apply. Nor would the alternative orders which may be made under s 115 be available. Clearly, therefore, as urged by Mr Pike, the Courts must be cautious about finding that a psychological condition such as that suffered by Ms L is so disabling that the person suffering that condition cannot obtain a fair trial. Other than in an exceptional case, the accused will be able to be given a fair trial notwithstanding his or her psychological or personality problems.
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> (citations omitted)

[28] *R v L* was an unusual case, in which it was argued that the appellant could not have a fair trial because she was a pathological liar. The Court rejected that contention, holding that despite that diagnosis, she was fit to plead, able to understand the nature

and purposes of the proceeding and able to adequately communicate with her counsel for the purpose of conducting her defence.[29]

[29] However, consistently with the reasoning adopted in *R v L*, the High Court (acting in an appellate role) has recognised its inherent jurisdiction to consider whether a miscarriage of justice has occurred on the basis that the appellant had an intellectual disability and was thus unfit to stand trial, despite the exclusion of intellectual disability from the jurisdiction conferring provisions of the CJA, and has quashed convictions on that basis.[30] Edwards J also adopted this approach in relation to Mr G's remaining 72 convictions.[31]

[30] A similar issue arose before this Court in *Lawler v R*.[32] The Court ultimately concluded that there was no evidential foundation for interfering with the historic convictions in that case.[33] In this context, the Court declined to express a view on existence of the inherent power discussed in *R v L*, and considered the issue on the basis that either the provisions of pt VII of the CJA applied directly or alternatively, if *R v L* applied, an analogous process would have been appropriate in determining whether the High Court's inherent power to grant a stay should have been exercised.[34] The Court reviewed the evidence as to whether the appellant suffered from an intellectual disability. The Court concluded that it was unnecessary to make a finding on that issue, stating that if the inherent power referred to in *R v L* is applied, it is not necessary that the person suffers from an intellectual disability, but rather that he or she does not have the capacity described in s 108 of the CJA.[35] As noted, the Court concluded that the evidence did not disclose the potential for a miscarriage and dismissed the appeal.

[31] The Crown does not dispute on the present appeal that a trial court has the inherent power to stay criminal charges, including on the grounds of fitness. The

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29 At 145.
30 See for example *Christie v New Zealand Police* [2018] NZHC 2149 at [35] and [50]; and *Epere v Police* [2022] NZHC 866 at [21]–[22] and [57].
31 *CG v New Zealand Police*, above n 1, at [27].
32 *Lawler v R* [2013] NZCA 308.
33 At [64]–[65].
34 At [11].
35 At [50].

Crown submits, however, that this will require consideration of "whether the case is a rare and exceptional one where a stay is necessary", drawing on this Court's observations in *R v L* as set out at [26] to [27] above.

[32] The Court in *R v L* was not dealing with an intellectually disabled defendant, but rather one who had been diagnosed as a pathological liar. The respondent's argument before the Court was that the concept of mental disorder should not be applied "to psychological conditions or personality difficulties *of this kind*".[36] The Court's observations in relation to "rare" and "exceptional" cases should be understood in that context. In practice, and certainly following the passage of the CPMIP Act, the need to have recourse to the courts' inherent power is likely to be rare or exceptional. But we do not consider it necessary to add the gloss of circumstances needing to be rare or exceptional before the inherent power may be exercised. Rather, and as the Court observed in *R v L*, if by reason of some disability a person is unable to obtain a fair trial as guaranteed by s 25 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act), yet that person falls outside the statutory scheme governing fitness, recourse may be had to the court's inherent power.[37]

[33] We observe that now, consistent with the Supreme Court's decision in *Fitzgerald v R*, the issue should be approached by asking whether anything in the relevant legislation requires the Court to take an approach that is inconsistent with rights protected by the Bill of Rights Act.[38] As is apparent from the extracts set out at [27] above, the Court in *R v L* did not consider pt VII of the CJA required such a result. We agree. The legislative history summarised at [17] to [22] above is consistent with this conclusion. It would be wrong to ascribe to Parliament the intention to abrogate a person's right to a fair trial, a fundamental right affirmed by the Bill of Rights Act, from what was clearly an unintended legislative gap.

[34] We turn now to the facts of this case.

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36 *R v L*, above n 27, at 146 (emphasis added).
37 At 146. That is so provided such recourse does not contravene the statutory scheme.
38 *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551.

The convictions and assessment of Mr G at the time

1997 aggravated robbery

[35] On 13 March 1997, when Mr G was aged 18, he together with two associates (including a 14-year-old family member) robbed a superette in Ōtara. Mr G was armed with a 44 cm machete, which he used to threaten the victim, who removed $200 from the cash register and gave it to Mr G. Mr G then left the shop and the money was divided between him and the two associates. The summary of facts records that when he was spoken to by the police, Mr G openly admitted his involvement in the robbery and that he did it for the money.

[36] No sentencing notes have been able to be located, though it seems that Mr G pleaded guilty on 19 September 1997. Mr G's criminal history discloses that he was sentenced on 30 October 1997 to one year's imprisonment, followed by one year of supervision.

[37] Shortly before this offending, Mr G had been assessed by Dr Seth, a psychiatrist, for the purpose of establishing whether he was fit to stand trial on a charge of indecent assault. Dr Seth completed his report in December 1996. His report refers to an earlier 1993 assessment of Mr G which assessed his IQ at between 43 and 53. Dr Seth observed (using the parlance of the time) that this put Mr G in the "moderately retarded range of intelligence". It also appears from the report that Dr Seth carried out other forms of cognitive testing of Mr G.

[38] Dr Seth recorded that when initially asked about the indecent assault charge, Mr G did not appear to fully comprehend what had been said and appeared very confused about the actual meaning of the words "guilty" and "not guilty". Dr Seth stated, "I am sure if his aunt was not there he would have been totally unable to even attempt to consider the questions." Dr Seth also recorded that Mr G "had little comprehension of the court process and I do not believe that he will be able to instruct his counsel in order to challenge what was being said in court". Dr Seth stated:

> I was fairly clear that without his aunt's presence Mr G would definitely not be fit to plead. When his aunt was present the likelihood of Mr G being fit to plead would still very much [be] in doubt.

[39] Under the heading "disability", Dr Seth stated:

> It would appear that Mr G is not fit to plead as he did not really understand the concept of guilty and not guilty nor did he understand the court process and I feel he was unable to instruct his counsel.

[40] In terms of a formal finding of fitness, Dr Seth concluded:[39]

> Intellectual [h]andicap/[l]earning disability is not considered as a mental disorder as defined by the Mental Health Act nevertheless it is an abnormal state of mind and in this case it has resulted in Mr G being unfit to plead. *It is unlikely that his condition will improve to any significant extent and I believe that Mr G will always remain unfit to plead.* There may be some slight improvement but this will probably be marginal [—] certain treatments may be available but I do not expect these to result in major improvements in Mr G's mental condition.

[41] Mr G's fitness was again assessed following his March 1997 offending, this time by Dr Heed, also a psychiatrist.[40] Dr Heed concluded that Mr G was not "under disability" for the purposes of s 108 of the CJA.

[42] Dr Heed's report (dated 1 April 1997) is relatively brief and unlike Dr Seth, it does not appear that he carried out any formal tests in relation to Mr G's cognitive abilities. Instead, it appears he based his assessment on Mr G's presentation. Dr Heed referred to Dr Seth's report, and concluded from his interview that Mr G was "suffering from mental retardation". He opined that if Mr G's IQ was the same as tests showed in 1993, his disability would be defined as moderate. Dr Heed stated, however, that:

> My clinical impression is that his capacity is higher than that, possibly now mild (defined as an IQ level between fifty – fifty-five to seventy). Even though this diagnosis is according to the definition in DSM IV (Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition) it is in the view of most psychiatrists not seen as a psychiatric disorder in the core sense.

[43] Dr Heed also stated that:

> Considering Mr G's understanding of the meaning of pleading guilty or not guilty, the nature of the court procedure and his level of capacity to

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39 Emphasis added.

40 A fitness assessment having been recommended in a report dated 18 March 1997 by a forensic court liaison nurse, Rebecca Faulkner. Ms Faulkner recorded that Mr G's "childlike manner is of concern" and that his responses were "without substance or any perceived comprehension on his part".

> communicate re the alleged offence, I am of the opinion that Mr G does not suffer from disability as defined by the Criminal Justice Act although he does not have the same capacity in this respect as an average person.
>
> On balance, I suggest that the issue of legal disability in my opinion is a matter of subjective threshold.

[44] Like Dr Seth, Dr Heed expressed the opinion that Mr G's mental capacity was not likely to increase significantly in the future. Dr Heed concluded (in somewhat unclear terms) that "[a]t this stage I respectfully suggest to address the issue of legal disability in view of the two recent, and differing opinions in the matter."

1999 assessments

[45] A pre-sentence report was prepared in August 1999 following Mr G's conviction for burglary, to which he had pleaded guilty. It does not appear from the materials before the Court that fitness was raised prior to plea. However, the report recorded that "[d]iscussion with his former Probation Officer revealed that Mr G is of limited intellectual ability and that little of what he says can be taken at face value". The report writer was unable to access the complete version of an earlier (1997) psychiatric report and recommended that an updated psychiatric report be obtained before sentencing.

[46] A psychiatric report was accordingly prepared in September 1999 by Dr Simpson. Dr Simpson interviewed Mr G on one occasion, though it appears he did not carry out any independent testing. Dr Simpson had available to him Dr Seth and Dr Heed's earlier reports.

[47] From his interview, Dr Simpson recorded that Mr G could tell him the name of his lawyer and that Mr G discussed the pleas that he had previously made in relation to previous charges. His report records that Mr G "manipulated the concepts of guilty and not guilty with clear precision about what it meant in relation to himself". Dr Simpson went on to state:

> [Mr G] realised that his lawyer was there to represent him and that the Judge would make an Order one way or the other in relation to his situation. He stated that the police were trying to put new cases on him. He could give me a clear version of the alleged offence, and could describe to me what action he wished to take over it.

[48] Dr Simpson opined that Mr G clearly had a history of disturbance in his intellectual function. He referred to the earlier assessment of Mr G's IQ as being in the range of 43 to 53, though stated:

> … he certainly does not present as someone of moderate mental retardation. Rather, his current presentation is much more suggestive of someone with an IQ in the range of 60 to 70.

[49] On this basis, Dr Simpson considered that Mr G's clinical picture was "much more consistent with mild mental retardation than moderate mental retardation".

[50] Dr Simpson then referred to s 108 of the CJA, and stated:

> The central conundrum of Mr G's case is how can a man with an attested IQ less than 50 be possibly have been found fit to stand trial and cope within the prison system. His responses to me in terms of being able to give an account of the alleged offence, the various pleas that are open to him, and the knowledge of legal process in terms of how evidence could be called and the possible sentences he might receive, does not appear to reach the thresholds of being unable to plead, to understand the nature and purpose of proceedings or adequately communicate with counsel for the purpose of conducting a defence.
>
> As I have already commented, I think it most likely that Mr G has a mild mental retardation with gross problems with literacy, not moderate mental retardation as previously assessed. He is clearly experienced with prison and Court systems and understands the nature and consequences of his behaviour in relation to the legal process. While certainly somewhat unsophisticated in terms of complex issues in relation to evidence he appears to have a working understanding of pleas, legal representation and Court process. Whilst a finding of disability must relate to an overall sense of justice, and therefore there are threshold issues about when such a finding of disability could be made, in my view Mr G would be likely to be found not under a disability.

[51] Mr G was subsequently sentenced to one year and three months' imprisonment on the burglary charge.

2000 aggravated robberies

[52] Mr G was 21 years old at the time of this offending, the charges relating to events that took place on 20 and 24 July 2004.

[53] On 20 July 2000, Mr G, together with a co-defendant, entered an ANZ bank in East Tāmaki. The co-defendant approached the teller, demanding money and

brandishing a knife. The teller handed over $2,500 in cash. Mr G remained standing inside the foyer. The pair then ran off together and got into a vehicle which was later abandoned.

[54] On 24 July 2000, Mr G and the same co-defendant entered a Westpac bank in Papatoetoe. Mr G was carrying a knife. The co-defendant approached the teller and demanded cash. The teller handed over $1,202.70. Mr G approached another teller, presented the knife and shouted and swore at the teller, who handed over $1,178.75. Mr G and his co-defendant then ran off on foot and were seen getting into a vehicle.

[55] Mr G was spoken to by police about both incidents on 31 July 2000. He admitted the facts and said he was forced to commit the robberies.

[56] There is no indication that Mr G's fitness was subject to assessment at this time. He pleaded guilty to the charges and on 8 December 2000 was sentenced to six years' imprisonment.

[57] A pre-sentence report dated 5 December 2000 records that Mr G said "I did the Hunters Corner one but I didn't do the East Tāmaki one". He is recorded as saying he was "considering his right of appeal". The report noted that Mr G had been "assessed as having mild mental retardation", and referred to the earlier IQ assessment in 1993, and Dr Simpson's assessment that Mr G's presentation suggested an IQ more in the range of 60 to 70. The report also recorded the results of an assessment by a visiting psychologist at the Ōtara Community Probation Service Centre, including an assessment of Mr G as "low intellect". The psychologist was noted as observing "cognitive distortions, lack of moral reason and inability to evaluate the negative consequences of his behaviour". The psychologist was also reported as observing Mr G attempting to create an image of himself as bad, for example informing the psychologist that he had "done 50 lags".

Subsequent assessments

[58] Mr G's remaining convictions date from March 2007 to June 2015. His fitness does not appear to have been formally raised and assessed prior to any of these convictions, although a number of reports were prepared for the purposes of

sentencing. Edwards J's judgment contains a helpful summary of all assessments of Mr G over this period.[41] We refer only to those that are of primary relevance to the matters we must determine.

[59] In January 2010, Dr Duff, a psychiatrist, prepared a report pursuant to s 38(2)(b) of the CPMIP Act for the purposes of sentencing. Dr Duff nevertheless commented on Mr G's fitness to stand trial. She recorded that Mr G showed clear evidence of an intellectual disability, antisocial personality disorder and of institutionalisation. Dr Duff concluded, however, that Mr G's intellectual disability was not so severe as to impact on his competency to stand trial. Dr Duff considered there was no evidence to suggest that Mr G lacked competency to enter a plea, to understand the nature, cause and consequence of the legal proceedings, or to instruct legal counsel adequately in his defence.

[60] Later in 2010, a psychological assessment of Mr G was undertaken by Dr Botha for the purposes of assessing his needs on release. Tests administered by Dr Botha established that Mr G's full-scale IQ score was in the extremely low classification range. Other tests established that Mr G had severe verbal deficits. Dr Botha's report suggested that Mr G had some ability to rote learn, meaning that if he were exposed to frequent repetitions of important information he might be able to retain that information over a longer time period, although Dr Botha added that it was unclear whether Mr G could internalise this sufficiently to translate into observable behaviour in terms of social norms.

[61] In 2015, a pre-sentence report noted that Mr G's offending was likely encouraged by his intellectual impairment as well as decreased cognition following a head injury in 2013, and that he suffered from epileptic fits and seizures. In 2017, a forensic court liaison nurse undertook a brief assessment of Mr G and determined him fit to stand trial.

[62] A formal assessment into Mr G's fitness was carried out in May 2018 by Dr Smith, a clinical psychologist, in relation to charges of unlawfully interfering with a motor vehicle. Dr Smith reported that Mr G did not demonstrate an adequate

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41 *CG v New Zealand Police*, above n 1, at [45]–[55].

understanding of the concepts of guilty and not guilty, was unaware of his lawyer's name or how to contact her, and lacked awareness of the key participants in court. He was unable to retain information and repeat it back and demonstrated an insufficient understanding of the nature, purpose and range of possible consequences of court proceedings and evidence. Dr Smith considered Mr G would be unlikely to be found fit to stand trial.

[63] A few months later, Dr Bevin, a forensic psychiatrist, prepared a report pursuant to s 38 of the CPMIP Act in relation to the unlawfully interfering with motor vehicle charges. She reported that Mr G had a rudimentary understanding of his plea options and of court processes, and he was also aware of the possible consequences of court proceedings. In Dr Bevin's opinion, Mr G's intellectual disability and memory deficits were of such an extent that they adversely impacted on his ability to follow court proceedings and to communicate adequately with counsel for the purposes of conducting a defence. Dr Bevin concluded that Mr G was on the borderline of being fit to stand trial but, on balance, she considered that the court could appropriately find Mr G not fit to stand trial.

[64] Mr G was subsequently found unfit to stand trial and in January 2019 Dr Nuth, a clinical psychologist, prepared a disposition report pursuant to s 23 of the CPMIP Act. Dr Nuth noted that Mr G presented with significant cognitive impairment and developmental difficulties. He was of the firm view that Mr G met the clinical criteria for an intellectual disability, lying in the moderate, as opposed to mild, range.

Dr Sakdalan and Ms McFadden's reports

Dr Sakdalan's report

[65] Later in 2019, Dr Sakdalan, a forensic psychologist, was engaged by counsel for Mr G to provide an expert opinion on Mr G's fitness to plead and stand trial in relation to his entire criminal history. Dr Sakdalan assessed Mr G for that purpose in April 2019. He administered tests which established a full-scale IQ score for Mr G of 52, representing a moderate intellectual disability, and that his overall cognitive ability fell within the extremely low range of intellectual functioning. Dr Sakdalan also considered Mr G to have significant impairment in verbal comprehension and

reasoning, working memory, and information processing speed and attention, being areas Dr Sakdalan considered relevant to a defendant's ability to engage meaningfully in the court process. Dr Sakdalan's opinion was to the effect that an IQ in the moderate intellectual disability range, coupled with associated impairment in several areas of cognitive and neuropsychological function, was "almost incompatible" with being fit to stand trial.

Ms McFadden's report

[66] In July 2020, Ms McFadden, a clinical psychologist, prepared an expert report for the Crown on Mr G's fitness. The results of formal tests she administered were consistent with those obtained by Dr Sakdalan, with Mr G's intellectual disability falling within the moderate range. Ms McFadden questioned Mr G across two interviews about aspects of the court process and formed the view that he demonstrated an ability to answer to charges and to enter a plea, as well as the capacity to weigh up his options, albeit in a simplistic manner. Ms McFadden expressed her concern about Mr G coping with a defended hearing process, though recorded that this would depend on a range of factors, such as the number and complexity of the charges, Mr G's level of engagement with counsel and his stability in his home life at the time. She considered Mr G had the ability to learn information with repeated exposure and that he demonstrated an ability to answer to charges and to enter a plea. She agreed with previous assessors that Mr G's knowledge of the legal process was in excess of what might be expected given his measured performance on cognitive tests. Ms McFadden was ultimately of the opinion that there was insufficient data to suggest that Mr G had never been fit to stand trial.

The joint report

[67] Dr Sakdalan and Ms McFadden subsequently prepared a joint report for the purposes of this appeal, dated 9 November 2021. While they agree on many matters relevant to the appeal, there remain some areas of difference. The following are the key points we draw from the report.

[68] Both Dr Sakdalan and Ms McFadden consider that retrospective assessment of fitness is challenging and poses difficulties. They agree that there are times when

Mr G may have understood and made an informed decision, and times when he did not. They also agree that there are considerable challenges for the Court in picking this apart retrospectively.

[69] Dr Sakdalan confirms his opinion that repeated exposure to the legal process had led to Mr G exhibiting a "learned response", rather than a more full or meaningful understanding of the consequences of the legal process. Ms McFadden, on the other hand, is satisfied that Mr G was "not just parroting/masking" his knowledge. She also expresses her view that on occasions, there was a delay between offending and fitness assessments, and that there is some evidence of Mr G "being strategic" around the entering of guilty pleas, in terms of being aware of the potential cost of late guilty pleas.

[70] Both experts have concerns about Mr G's ability to engage meaningfully in the defended hearing process, due to a range of clinical and cognitive factors. Both also agree that the lower the "full-scale IQ score", the higher the likelihood that fitness is impaired, and that Mr G's level of intellectual disability is best characterised as moderate (falling within a full-scale IQ range of 40 to 55).

[71] Dr Sakdalan and Ms McFadden also agree that the facts of any particular case or charge against Mr G, and the resulting complexity of matters he may need to understand, are important to any determination as to fitness. For example, Dr Sakdalan is of the view that Mr G could border on fitness in the context of minor offences. Ms McFadden similarly considers that there is a higher likelihood of Mr G demonstrating the capacities required for fitness when there is a single charge or the charges and circumstances are straightforward and well known to him. Ms McFadden confirms her overall opinion that there is insufficient data to say that Mr G had never been fit to stand trial, whereas Dr Sakdalan's view remains that there is an extremely high probability that Mr G was unfit to stand trial in relation to most if not all of his previous charges.

[72] Turning to the charges the subject of this appeal, Dr Sakdalan and Ms McFadden agree that Dr Heed's assessment of Mr G's fitness in 1997 is problematic. They observe that the report is brief and its language ambiguous.

Dr Sakdalan is concerned that Dr Heed overestimated Mr G's IQ. He also raises concerns about the quality of psychiatrist assessments of intellectual disability at the time, based on practice issues surrounding the mental health legislation, as well as psychiatrists having more limited exposure and experience with intellectually disabled defendants than psychologists.

[73] Dr Sakdalan and Ms McFadden observe that at the time of the High Court hearing before Edwards J, they were agreed it was highly likely Mr G was unfit to plead and stand trial on the 1997 aggravated robbery charge. They have since received further information in relation to this charge, and Ms McFadden notes that at the time he was charged, Mr G was only 18 years old and not as experienced with the legal system as he was shown to be in 2020. She also notes that he interviewed poorly when seen by Dr Heed and appeared confused about key issues such as the role of his lawyer. Ms McFadden is therefore of the view that, on balance, Mr G was likely unfit to plead and unfit to stand trial on this charge. Dr Sakdalan's opinion is that it is unlikely that Mr G understood his rights when he was interviewed by the police, and that he was unfit to stand trial for this charge.

[74] Turning to the charges of aggravated robbery in 2000, both experts note that there was no fitness assessment of Mr G in relation to these charges. Ms McFadden records that Mr G told her that he defended the charges, though he pleaded guilty to them. Referring to the report of Dr Simpson (discussed at [46] to [50] above and the closest in time to the 2000 charges), Dr Sakdalan is of the view that the report raises issues of "cognitive bias" because of the overestimation of Mr G's cognitive ability based on a clinical interview only. Ms McFadden is less concerned about the report demonstrating bias, and notes that Dr Simpson pointed out the "central conundrum" in this case, namely how a person with an IQ less than 50 has been found fit to stand trial (which Dr Sakdalan and Ms McFadden observe "remained an issue across Mr G's lifespan"). Given the complexity in relation to these charges, however, including that there were co-defendants, Ms McFadden is of the opinion that Mr G was highly likely unfit to plead and unfit to stand trial for both charges. Dr Sakdalan is of the view that Mr G was likely unfit to stand trial for both charges.

Discussion

[75] As this Court observed in *Nonu v R*, the list of functions establishing unfitness in s 4 of CPMIP Act (which are very similar to those functions referred to in s 108 of the CJA) are broadly based upon the trial functions expected of a defendant as articulated over 180 years ago in *R v Pritchard* and refined in later decisions such as *R v Presser*.[42] The fitness requirements ensure fairness to a defendant by protecting his or her rights to a fair trial and to present a defence, which are affirmed in s 25(a) and (e) of the Bill of Rights Act.[43]

[76] As the Court in *Nonu v R* also stated:[44]

> [29] 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.

[77] While we are only concerned in this appeal with Mr G's fitness in relation to the three aggravated robbery charges from 1997 and 2000, we take into account Edwards J's careful consideration of Mr G's fitness across all remaining convictions, which encompasses the time period in which Mr G was convicted for the three aggravated robberies. As the Judge noted, Mr G's full-scale IQ was formally tested in 1993 (IQ of 43 to 53), 2010 (IQ of 53) and in 2019 (IQ of 52).[45] The results are consistent across time, and place Mr G in the moderate range of intellectual disability and in the extremely low range of intellectual functioning. We accordingly accept the findings in the joint report that Mr G has always had a moderate intellectual disability.

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42 *Nonu v R*, above n 9, at [27]–[28], citing *Rex v Pritchard* (1836) 7 Car & P 303, (1836) 173 ER 135 (KB) at 135; and *P v Police* [2007] 2 NZLR 528 (HC) at [43]. See also *R v Presser* [1958] VR 45 (SC).

43 *Nonu v R*, above n 9, at [26] and n 8.

44 Footnotes omitted.

45 *CG v Police*, above n 1, at [65].

[78] Mr G has been found fit to stand trial on three occasions: in 1997 by Dr Heed, in 1999 by Dr Simpson and in 2010 by Dr Duff. But as Edwards J observed, those assessments were based on Mr G's presentation rather than formal testing, and the report writers' assessment of Mr G's IQ is inconsistent with the formal test results noted above.[46] We also see some force in Dr Sakdalan's concern about Mr G's ability to rote learn,[47] which may go some way to explain what Dr Simpson referred to in 1999 as the "central conundrum" in this case.[48] We note Ms McFadden's view that given the extent of Mr G's engagement in the criminal justice system, his apparent understanding of the system cannot always be explained by him "parroting" his experiences. However, the convictions we are considering were entered in the first few years of Mr G's engagement in the adult criminal justice system, and thus without Mr G having the benefit of a decade or so to meaningfully "learn" or "understand" the relevant aspects of that system. We also have some doubt that a learned response merely from consistent engagement in the criminal justice process is cogent evidence of a defendant's capacity to participate effectively and meaningfully in the full range of trial and pre-trial processes.

[79] In his report completed only a matter of months before Mr G's convictions on the 1997 aggravated robbery charge, Dr Seth considered Mr G unfit to stand trial and, with some prescience about the issues that have subsequently arisen, considered he was unlikely ever to be found fit. We acknowledge that Dr Heed did not consider Mr G to be "under disability" in relation to the 1997 charge. But we accept Dr Sakdalan and Ms McFadden's reservations about that report, which as they note is relatively brief and hard to understand in parts. We find Dr Seth's report more helpful than that of Dr Heed. In addition to our earlier comments about the true extent of Mr G's intellectual disability, it is also clear that Dr Heed was influenced by the legislative regime in force at the time. So too with Dr Simpson in 1999. And as mentioned, neither Dr Heed nor Dr Simpson carried out formal testing of Mr G's cognitive abilities, relying instead on his presentation at a clinical interview. We agree with Edwards J's observation that weight should be given to both the

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46 At [70].

47 Dr Botha in 2010 and Ms McFadden also assessed Mr G as having an ability to learn information from repeated exposure.

48 See [50] above.

contemporaneous and more recent testing results in preference to those subjective assessments.

[80] While we acknowledge the very real difficulties in retrospectively assessing a defendant's fitness, this is not a case where the only formal assessment of fitness is based on recent expert opinion which is sought to be applied retrospectively and in a vacuum. Mr G's fitness has plainly been an issue from the outset of his engagement in the criminal justice system. The legislative framework in existence prior to 2004 has shaped some of the opinions in that regard. Ultimately, however, we see the contemporaneous materials as supporting, rather than undermining, Dr Sakdalan and Ms McFadden's more recent assessments.

[81] Accordingly, given Mr G's clear and permanent impairments in key areas of cognitive function which are important for making choices about plea and the defence of a charge at trial, and taking into account the contemporaneous materials and joint opinion of Dr Sakdalan and Ms McFadden, we are satisfied that Mr G was not fit to plead or stand trial on any of the three charges the subject of this appeal. Our conclusion is accordingly consistent with Edwards J's (unchallenged) finding that Mr G "was not fit to either plead or stand trial at any point in time in the past".[49]

[82] For these reasons, a miscarriage of justice has occurred, and Mr G's appeal against the three aggravated robbery convictions must be allowed.

Result

[83] The application for an extension of time to appeal against conviction is granted.

[84] The appeal against conviction is allowed. The three convictions for aggravated robbery are quashed.

[85] In the High Court, Edwards J made an order prohibiting publication of the name or identifying particulars of the appellant, on the basis her judgment referred to sensitive personal information about Mr G.[50] Although this judgment does not refer

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49 *CG v Police*, above n 1, at [92].
50 At [98].

to all of the information referred to in the High Court judgment, to maintain the effectiveness of the suppression ordered in the High Court, it is appropriate that a similar approach is taken in relation to this judgment. We accordingly make an order prohibiting publication of the name or identifying particulars of the appellant.

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