

The Mental Health Court - Determining Forensic Mental Health Issues Pre-trial

Hon. Justice Catherine Holmes

The Mental Health Court began its operations in February 2002, under the *Mental Health Act* 2000. The Court consists of a Supreme Court Judge assisted by two experienced forensic psychiatrists. Its major, but not sole, function is to determine references where a person is charged with a criminal offence and there are questions of insanity or unfitness for trial¹.

A reference can be made for a person charged with any indictable offence in a range from wilful damage to murder. Those references can come from a number of sources: from the person himself, from the Director of Mental Health where the person is already in the mental health system, from the Director of Public Prosecutions, from the Attorney-General² or from the Supreme or District Court on a plea of guilty³. Once a reference is made to the Court, the proceedings for the offence are suspended⁴ except for decisions on bail⁵.

A reference to the Mental Health Court must be accompanied by a copy of any expert report⁶ and each party must disclose all expert reports they have obtained in relation to the reference, whether or not they are detrimental to their case⁷. In most cases the Court will make a court examination order, on the recommendation of the psychiatrists who assist the Court, which requires the person the subject of the reference to be examined by one or more Court-appointed experts⁸.

¹ *Mental Health Act* 2000, Chapter 7, Part 4.
² Section 257.
³ Section 62.
⁴ Section 259.
⁵ Section 260.
⁶ Section 258.
⁷ Section 265.
⁸ Sections 422, 423.

The first issue for determination on a hearing of a reference is whether the person was of unsound mind with, in the case of murder, an additional question as to whether he or she was of diminished responsibility when the offence was committed⁹. But there are some caveats. The Court may not make a decision about unsoundness or diminished responsibility if it is satisfied there is reasonable doubt that the person committed the offence¹⁰. But the Court is not barred from proceeding if any doubt exists only as a consequence of the person's mental condition. The other situation in which the Court may not proceed to a decision on unsoundness or diminished responsibility is one where there is a fact, substantially material to the opinion of an expert witness, so in dispute that it would be unsafe to make the decision¹¹.

The expression "unsound mind" is defined¹² by reference to s 27 of the *Criminal Code* (Qld), which deals with insanity. The effect is that, in determining whether the person was of unsound mind when he committed the offence, the Court will have to consider whether he had a mental illness or what is called a natural mental infirmity (usually mental retardation of a significant degree) which deprived him of one of three capacities: the capacity to know he ought not do the act, the capacity to understand what he was doing or the capacity of control. In effect, the Mental Health Act provisions continue the common law approach to criminal responsibility, as it has stood for many years. But there is this qualification: The definition of "unsound mind" in the *Mental Health Act* excludes a state of mind resulting to any extent from intentional intoxication or stupefaction. That limitation does not apply in respect of diminished responsibility.

If the Court decides that a person was of unsound mind at the time the offence was allegedly committed, it must consider whether to make a forensic order¹³. In deciding whether to do so, it must have regard to the seriousness

⁹ Section 267.

¹⁰ Section 268.

¹¹ Section 269.

¹² Schedule 2.

¹³ Section 288.

of the offence, the person's treatment needs and the protection of the community. A forensic order commits a person to the care of an authorised mental health service. It may mean that the person is hospitalised immediately, or in less serious cases, it may simply mean that they remain in the community but come under the care of an authorised psychiatrist so that they are required to report and receive medication as directed.

Intellectually disabled people who suffer no psychiatric illness present particular difficulty when it comes to deciding whether to make a forensic order. Often it is obvious that they need some kind of supervision to prevent their re-offending, but the only supervision provided for in the Act, by way of a forensic order, is psychiatric supervision. From a practical point of view, placement options for these individuals are few, so that devising a satisfactory form of order for their management is all the harder.

If the Court decides that a person was not of unsound mind, or is precluded from making any finding because of reasonable doubt or a disputed fact, it must go on to determine whether the person is fit for trial¹⁴. That involves an application of common law tests: whether the person can understand the nature of the charge and the plea, can understand and follow the proceedings and the evidence, and can make his defence¹⁵. If any of those tests are not met, so that the person is unfit, the next question is whether the unfitness is permanent or temporary. If the unfitness is temporary, a forensic order must be made¹⁶. If it is permanent, the Court has a discretion.

If a finding of unsoundness or permanent unfitness is made, proceedings against the individual concerned are, in effect, forever stayed¹⁷. Where there is a finding of unfitness of a temporary nature, proceedings are temporarily stayed¹⁸, and the person's mental condition is reviewed by the

¹⁴ Section 270.

¹⁵ See *R v Presser* [1958] VR 45; *Kesavarajah v R* (1994) 181 CLR 230.

¹⁶ Section 288(4)

¹⁷ Sections 281, 283.

¹⁸ Section 280

Mental Health Review Tribunal, initially at three-monthly, and then at six-monthly intervals¹⁹. Those reviews continue over a period of three years in the usual course, or seven years for an offence carrying life imprisonment. If the person remains unfit at the end of that time, the proceedings are discontinued²⁰.

If the Court decides that the person was not of unsound mind when the offence was committed, and is fit for trial, the matter is ordered to proceed according to law²¹. If the person is found to be of diminished responsibility, and is fit for trial, the proceedings will continue on a charge of manslaughter²².

One of the advantages of the Court is flexibility. It is not bound by the rules of evidence²³, so it can receive relevant material in any form. Nothing a person the subject of a reference says at the hearing is admissible on any other proceeding²⁴. In reality, individuals the subject of a reference seldom give evidence. Because the real issue is mental competence, in the ordinary course, the only witnesses who are called at a hearing are experts.

Importantly, the Mental Health Court's decision does not preclude the person's raising his or her mental condition at a subsequent trial and the Mental Health Court's decision is not made known to the jury²⁵. No decision of the Court can be published until any trial is finished, or, where the proceedings are discontinued, for 28 days following the hearing²⁶. An appeal lies to the Court of Appeal from any decision of the Court and if an appeal is instituted, publication is deferred once more.

The Court as an institution has a number of advantages. It gets through an enormous amount of work which would simply not be possible if one had to

¹⁹ Section 209.
²⁰ Section 215.
²¹ Section 272.
²² Section 283.
²³ Section 404.
²⁴ Section 316.
²⁵ Section 317.
²⁶ Section 524.

proceed to trial in every case where unsoundness or diminished responsibility was an issue, or alternatively, use the procedure under s 613 of the *Criminal Code* for determination by a jury of fitness for trial. Matters are resolved quickly, and those suffering from mental illness or intellectual disability are not exposed to the rigours of the regular criminal process. It is a civilised and humane way of proceeding, but, unfortunately, not one about which the public or media are well-informed.