JURISDICTION	**:**	CHILDREN'S COURT OF WESTERN AUSTRALIA IN CRIMINAL
LOCATION	**:**	PERTH
CITATION	**:**	THE STATE OF WESTERN AUSTRALIA -v- R [2012] WACC 1
CORAM	**:**	JUDGE REYNOLDS
HEARD	**:**	19 DECEMBER 2011
DELIVERED	**:**	17 FEBRUARY 2012
FILE NO/S	**:**	C WB 99 of 2009 C KA 441 of 2011
BETWEEN	**:**	THE STATE OF WESTERN AUSTRALIA Prosecution AND R Accused

Catchwords:

Fitness to stand trial - Child 16 years old - Child ordinarily resides at remote aboriginal community - Two charges of sexual penetration - Competing expert reports - The legal test - Turns on own facts

Legislation:

Criminal Law (Mentally Impaired Accused) Act 1996 (WA)
Evidence Act 1906 (WA)

Result:

R unfit to stand trial.

Representation:

Counsel:

Prosecution	:	Mr S M Stocks
Accused	:	Mr R W Richardson

Solicitors:

Prosecution	:	Director of Public Prosecutions (WA)
Accused	:	Aboriginal Legal Service

Case(s) referred to in judgment(s):

Hillstead v The Queen [2005] WASCA 116
Makita (Australia) Pty Ltd v Sprowles [2001] NSW CA 305

JUDGE REYNOLDS:

The issue for determination

1 The issue in this matter is whether or not R, the accused, is fit to stand trial within the meaning of s 9 of the *Criminal Law (Mentally Impaired Accused) Act 1996* (the Act).

Introduction

2 R was born on 12 December 1995. He is now 16 years of age.

3 On 28 October 2009 R was charged with the offence that on 22 October 2009 at a remote aboriginal community north east of Kalgoorlie he sexually penetrated D, a child under the age of 13 years.

4 At the time of the alleged offence, R was 13 years of age. The alleged victim is a young girl who was 4 ½ years of age at the time. Both R and the alleged victim lived in the same remote community. It is alleged that at about 4:25 pm on 22 October 2009 that R lead the young girl and her two year old sister into a storage area where he penetrated the young girl's anus with his penis causing her extreme pain and as a result she started crying. After R stopped the sexual penetration he left the storage area. Other children in the community saw the alleged victim crying and threw rocks at R who then ran to his home.

5 On 27 October 2009 detectives attended the community and arrested R. An attempt was made to interview R but it was not continued because of a decision that he lacked understanding.

6 On 6 August 2011 R was on bail and living at a hostel in Kalgoorlie. A condition of bail was that he was under the 24/7 supervision of an officer of the Department for Child Protection (DCP). R has been in the care of the CEO of DCP since November 2009.

7 On 9 August 2011 another prosecution notice was made out alleging that on 6 August 2011 at Boulder, that R sexually penetrated J, a child under the age of 13 years.

8 At the time of this alleged offence R was 15 years of age. The alleged victim is an 8 year old aboriginal boy who resided in a foster family under the direction of the DCP. It seems that there was a lapse in the supervision of R. Sometime on the afternoon of 6 August 2011 both R and the alleged victim were playing in an area with other children. It is alleged that R and the alleged victim came to be in some bushland where

R told the alleged victim to remove his pants. It is alleged that R then inserted his penis into the alleged victim's anus.

9 R is currently remanded in custody.

The hearing of the two charges

10 The State has indicated that it wishes to have both charges joined and to be the subject of a joint hearing at which it wishes to rely on the provisions of s 31A of the *Evidence Act 1906* (WA) which deals with propensity and relationship evidence.

11 The defence has not raised an objection on the joinder of the two charges and the Court has not made any decision on it. Further, no decision has been made on whether or not the State can use the facts of one charge as propensity and/or relationship evidence on the other. Given all of that I wish to say that in my view the ultimate decision on R's fitness to stand trial does not turn on whether there is joinder or not and whether or not the State is allowed to adduce evidence pursuant to s 31A of the *Evidence Act.*

12 Even if one of the charges proceeded separately, and it would not matter which one, and the State was not allowed to avail itself of the provisions of s 31A, because there are two separate incidents as a matter of fact, R would still need to be able to distil and isolate in his mind the facts of one from the facts of the other and be able to exercise the necessary thought processes including long term, working and short term memory on each, such that on balance none of the criteria set out in s 9 of the Act would apply.

The relevant statutory provisions

13 Pursuant to s 4 of the Act, the Act applies in respect of any accused before any Court exercising criminal jurisdiction. Therefore the Act applies to R in the context of these charges before this Court.

14 Sections 8 and 9 of the Act apply as follows:

> 8. Terms used
>
> In this Part, unless the contrary intention appears —
>
> ***mental illness*** means an underlying pathological infirmity of the mind, whether of short or long duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli;

> ***mental impairment*** means intellectual disability, mental illness, brain damage or senility;
>
> ***trial*** means all court proceedings for an offence other than —
>
> (a) proceedings in relation to bail; and
>
> (b) sentencing proceedings.

9. Mental unfitness to stand trial, definition

> An accused is not mentally fit to stand trial for an offence if the accused, because of mental impairment, is —
>
> (a) unable to understand the nature of the charge;
>
> (b) unable to understand the requirement to plead to the charge or the effect of a plea;
>
> (c) unable to understand the purpose of a trial;
>
> (d) unable to understand or exercise the right to challenge jurors;
>
> (e) unable to follow the course of the trial;
>
> (f) unable to understand the substantial effect of evidence presented by the prosecution in the trial; or
>
> (g) unable to properly defend the charge.

15 It can be seen from the provisions of ss 8 and 9 that a threshold requirement before the criteria set out in s 9 are each considered is that the accused has mental impairment. It should also be noted that s 9 is drafted in such a way that the Court does not have to find that an accused meets all of the criteria set out therein. If any one of the criteria set out in s 9 is satisfied then an accused is not fit to stand trial.

16 Pursuant to s 10 of the Act, the accused is deemed to be fit to stand trial in the absence of evidence that proves, on the balance of probabilities, that he is not. Pursuant to s 11, the issue of the accused's fitness to stand trial can be raised by either party or the Court. Pursuant to s 12, once the issue of the accused's fitness to stand trial is raised then the question of whether the accused is fit to stand trial is to be determined on the balance of probabilities. The Court has a broad discretion in determining the issue and can inform itself in any way it thinks fit.

17 In this case, the Court has raised the issue of R's fitness to stand trial. The State's position is to assist the Court. Nevertheless the State is entitled to contend a particular position. It contends that R is not fit to stand trial. The defence contends that R is fit to stand trial.

R's developmental, medical and psychosocial history

18 There is no dispute as between the parties on the following details of R's developmental, medical and psychosocial history.

19 As mentioned, R was born on 12 December 1995. His mother and father lived in a remote aboriginal community. It is likely that R was exposed to substances during the antenatal period as his mother reportedly drank alcohol heavily during this time. His early environment was complicated by disrupted attachment, inconsistent parenting, poor supervision, as well as alleged sexual and physical abuse. He grew up with his maternal aunt as well as extended family members.

20 R has a history of developmental delay with cognitive and language difficulties: and possible traumatic brain injury due to physical assaults by his biological father. He has always been considered 'slow' and has never learned to read and write. He was provided with a teachers' aide for most of his primary school years. In a school setting he was grouped with much younger children instead of being with his peers. His school reports indicate that he has been disruptive, unable to focus and difficult to engage. His access to stimulation or educational resources has been limited. It seems that R has become socially alienated and rejected within his own community and family.

21 R has a history of epileptic seizures with the onset at six months of age, which have happened in the context of severe dehydration following gastroenteritis and poor nutrition. He has a history of developmental delay. He has bilateral middle ear disease and does not hear very well. He was recently diagnosed with diabetes (type 2). A recent MRI taken in April 2011 at Princess Margaret Hospital was abnormal and indicative of 'Microcephaly and mild thinning of the posterior body of the corpus collosum. There is also an impression of rather thin cortical outline'.

22 R has been raised in a remote aboriginal community and his first language is the dialect generally used in and about that community. His ability to speak English is gradually improving. His comprehension and conversational abilities in his native language are also limited compared with same age peers.

23 R has tribal markings on his back although he has not yet been initiated into adulthood within his community.

Psychiatric and psychological evidence

Evidence of Dr Wojnarowska

24 Dr Wojnarowska is a fully registered medical practitioner registered with the Medical Board in Western Australia. She has a speciality in psychiatry with a sub-speciality in forensic and child and adolescent psychiatry. She has 11 years experience in forensic psychiatry. She is a past Chair of the WA branch of the Royal Australian College of Psychiatrists. She has provided consultation for the State Forensic Mental Health Service as a visiting psychiatrist to juvenile detention centres. She has provided psychiatric reports on offenders for the Court over many years. Until recently, she was a clinical head at the Bentley Adolescent Unit, a position she held since 2002.

25 Dr Wojnarowska has a vast experience in assessing aboriginal children. About 40% of the inpatients at Bentley Adolescent Unit would be aboriginal children between the ages of 13 and 18. In addition to her work at that Unit she has provided regular sessions as Banksia Hill Detention Centre (BHDC) and Rangeview Remand Centre since 2002 where on average about 70% of the children in custody would be indigenous children. She has travelled to remote aboriginal communities on four occasions to interview aboriginal children.

26 On 8 March 2010 Dr Wojnarowska interviewed R and sourced other information for the purpose of providing the Court, at Kalgoorlie, with a report on R's fitness to stand trial in respect of the first charge. In her report dated 26 March 2010, Dr Wojnarowska set out the following conclusions.

> In my opinion [R] fulfils the criteria as outlined in Section 8 of the Act as suggested by the presence of the Intellectual disability, compounded by the others, such as environmental factors.
>
> **1. Ability to Understand the Nature of the Charge**
>
> [R] had no understanding of why he was questioned in relation to the offence. He initially stated that he did not remember what he was charged with. This question had to be modified by [Ms S] who used some dialect words and also reminded him how he rode in the Police car. He then seemed to remember what I was referring to and his posture changed. He covered his whole head with his T-shirt and additionally put his hands over his face. This indicated that there was

> a high degree of shame associated with the memories, but also suggested that [R] had no ability to make connections between being removed from his community, being questioned by the Police and then coming to Perth prior to being specifically asked about the offence. It also suggests that he is not able to hold information, even for a limited period of time, as he was explained by [Ms S] shortly before the appointment, what the appointment was in relation to.
>
> **2. Ability to Understand the Requirement to Plead or the Effect of a Plea**
>
> [R] became progressively confused when the questions of 'guilty' versus 'not guilty' plea were asked. He was not able to extrapolate from the examples he was given and it looked as if he thought that the interview was part of the court hearing. He continued to keep his T-shirt over his head and refused to reveal his face, even when [Ms S] started to play Peek-a-Boo with him which is apparently [R]'s favourite game. At this point I terminated the interview as by then there was enough evidence, such as presence of a mental Impairment and Criterion one and two met to suggest that [R] is Not Fit to Plead and Not Fit to Stand Trial.
>
> In my opinion, [R]'s only understands (when reminded) that he did something 'bad' as the act was sexual in nature. It is difficult to ascertain at this point in time whether he will be fit to plead in the near future. The placement in a hostel in Kalgoorlie will expose him to a new environment where he is likely to improve his communication in English. This would hopefully assist in a more accurate assessment of his cognitive abilities. It is not likely however to compensate for the years of neglect and under-stimulation. The word 'neglect' is used specifically in relation to [R] who has extensive needs and does not suggest that other children in the family were neglected.
>
> [R] requires intensive input from various disciplines including Speech Pathology and Occupational Therapy which may not be available for logistic or resource reasons. His level of engagement with those services if provided would be guided by his ability to trust. It is hopeful that consistent and culturally appropriate care which he has been receiving so far through DCP will continue and will assist [R] to develop to his potential.

27 The source of information used by Dr Wojnarowska to reach her conclusions as set out in her report dated 26 March 2010 included the psychological risk assessment report of Dr Phil Watts dated 29 January 2010. Dr Watts is a clinical and forensic psychologist. At the time of his report he had 20 years experience which included the preparation of assessments for boys from the same area as R for various Courts on a range of charges including charges of a sexual nature.

28 The report of Dr Watts dated 29 January 2010 contains the following comments and conclusions.

> It was evident that spoken English was a weak second language.
>
> I had planned to see him longer but his attention span was gone by 20 minutes.
>
> I estimate that his receptive language was probably at the borderline level and his expressive English language was mildly intellectually impaired.
>
> I observed him to be somewhat immature.
>
> I thought that he was excessively hyperactive and the behaviour was suggestive of Attention Deficit Hyperactivity Disorder.

29 Dr Watts administered the Ravens Progressive Matrices which is a non-verbal IQ test. Dr Watts reached the following conclusion from the results of such testing.

> The formal IQ score of non-verbal intelligence was an IQ of 58. I would suspect that this score is lower than his actual capability. I form an impression that his intelligence would be either just within or just outside of the mild intellectual disability range, but with fairly significant educational deficits, in other words a lad who is not overly smart and has had fairly limited learning.

30 Dr Watts expressed the following opinion on R's fitness to stand trial:

> In my opinion he would be a questionable case as to whether he is fit to plead the charges.
>
> In regards to the cause of the difficulty, there is little question that he was born with poor cognitive capacity. He has then lived in circumstances which have not developed his capabilities. He appeared to have been under-stimulated.

31 Dr Wojnarowska prepared another report dated 3 October 2011 on R's fitness to stand trial. For the preparation of this report, Dr Wojnarowska interviewed R again on 30 September 2011 in the presence of an interpreter. She also took account of the neuropsychological report of Dr Pestell, dated 21 May 2011, to which I will refer later. Dr Pestell carried out some neurological testing in May 2011 which Dr Wojnarowska properly took into account. Dr Wojnarowska also took into account the MRI of R's head performed in April 2011 to which I have earlier referred. Dr Wojnarowska is of the opinion that the abnormal results of the MRI are consistent with the clinical picture of global

developmental delay with mental retardation, language and motor problems.

32 Dr Wojnarowska expressed the following comments and opinions in her report dated 3 October 2011:

> The questions required to be repeated not only due to his receptive language impairment but also due to impaired hearing, more prominent on the left side.
>
> He had major problems in comprehending even basic topics irrespective of which language they were expressed in. The content of his speech revealed significant memory problems, abstract thinking difficulties, expressive and receptive language problems, but there was no evidence of psychiatric symptoms such as depressive or psychotic symptoms.
>
> Although it was requested to regard each charge separately it was not possible due to [R]'s significant impairment in the areas of memory, information processing and language.
>
> [R]'s inconsistencies in his story and the answers he provided were, in my opinion, reflective of his major cognitive difficulties specially in the memory, executive functioning and receptive language area and were not driven by his attempts at distorting the truth. His inability to process the information in a chronological manner, as well as significant memory problem presents itself as his inability to separate important information in time space in an organised sequential manner.
>
> The neuropsychological tests results indicated, amongst other things:
>
> (i) global cognitive impairment
>
> (ii) extremely low verbal abilities including comprehension skills
>
> (iii) extremely low speed of information processing
>
> These results are consistent with my clinical assessment of [R] who, due to the presence of mental impairment and significant language difficulties, is not able to understand the nature of the charge, to understand the requirement to enter a plea or the effect of the plea, does not have the cognitive capacity to understand the purpose of a trial or the substantial effect of evidence presented by the prosecution in the trial, or to properly defend the charge or instruct his lawyer appropriately. In addition, significant impairment in language (both expressive and receptive) would significantly in peat his ability to participate in a trial. Therefore [R] does not fulfil the criteria of section 8 and 9 of the Criminal Law, Mentally Impaired Accused Act, 1996 and as such he is unfit to stand trial. Furthermore, in my opinion, [R]'s cognitive abilities are not likely to improve significantly over time to a point of which he would be deemed fit to participate in a court proceedings.

33 The oral evidence given by Dr Wojnarowska was consistent with the contents of her reports. Dr Wojnarowska importantly stated in her evidence in chief that R would not have the ability to follow and comprehend the trial because it is a much more complex process than simply following and comprehending rules and it involves multiple people and multiple information being exchanged. She thought that R could not hold information in his brain for long enough to make a connection with what was just said. Accordingly, it was Dr Wojnarowska's view that R did not have a working memory that enabled him to participate in the trial process.

The evidence of Dr Pestell

34 Dr Pestell is a clinical neuropsychologist and clinical psychologist fully registered with the Psychologists Board of Australia and a member of the Psychological Society, including full membership of the College of Clinical Neuropsychologists. She has over 18 years specialist experience conducting neuropsychological assessments of children and adults with known or suspected neurological and/or psychiatric conditions within a medico-legal and/or clinical context. She has assessed about 200 young aboriginal males including some from remote areas. She assessed R on 15 May 2011. At the time R was accompanied by his residential care officer who is an indigenous person and who can speak R's native language. She is from the same community as R. She acted as an interpreter during the assessment.

35 During the assessment Dr Pestell administered a number of psychometric tests including the Wechsler Nonverbal Scale of Ability to estimate R's intellectual functioning. This test is a nonverbal measure of ability that has been designed for culturally and linguistically diverse groups and those who are unable to speak English and/or have hearing difficulties. Whilst the results needed to be interpreted cautiously due to the fact that the test has not been normed for children of Australian Aboriginal decent, his test profile was suggestive of an IQ range of 46-63, which is in the mild intellectually disabled range. This was in keeping with R's prior performance on the Ravens Progressive Matrices administered by Dr Watts, which yielded an IQ equivalent of 58. The following are some of the comments and conclusions stated by Dr Pestell in her report:

> [R] demonstrated borderline performances across tasks assessing visuo-spatial and perceptual reasoning.

> Furthermore, his performances across a range of tasks tapping both verbal and spatial 'working memory' abilities (those cognitive functions that enable one to hold information in mind, before mental manipulations and recall or utilise the resulting information to form responses and to solve problems), were in the extremely low range.
>
> [R]'s academic abilities are estimated to be at an early primary school level.
>
> [R]'s performance across executive functioning tasks were suggestive of significant difficulties in this domain.
>
> Neuropsychological testing indicates that [R]'s intellectual functioning is estimated as falling within the extremely low range…
>
> [R] exhibits severe impairment across all cognitive domains, particularly with regard to language. He was assessed as having significant difficulties expressing himself as well as understanding what is being said, even in his own native language. [R] is unable to read or write beyond an early primary school level.

36 Dr Pestell gave evidence based on the MRI brain scan which indicated Microcephaly that it is likely that R's global cognitive difficulties are primarily developmental in nature.

37 Dr Pestell expressed the following opinion on R's fitness to stand trial at page 10 of her report:

> I have taken into consideration Section 8 and 9 of the Criminal Law (Mentally Impaired Accused) Act 1996, and on this basis do not believe that [R] meets the criteria for fitness to enter a plea. In particular, [R] does not possess the cognitive capacity to fully understand the nature of the charges he faces. He does not possess the language or cognitive capacity to understand the purpose of a trial; to understand or exercise the right to challenge jurors; to understand the substantial effect of evidence presented by the prosecution in the trial; or to properly defend the charge. [R] was unable to answer specific questions about the nature of the charges he faced, or other aspects of the court process. His receptive language was so poor that it was not clear he fully understood any of the questions put to him. Whilst he is able to follow simple, concrete instructions [R] would have difficulties understanding more complex information especially if it was presented too quickly.

The evidence of Ms Julie Hasson

38 The defence has put into evidence the report of Ms Julie Hasson (Ms Hasson), a Forensic Psychologist, dated 20 September 2011, in which she

concludes that R is fit to stand trial. The defence also called Ms Hasson at the hearing in support of its case that R is fit to stand trial.

39 Ms Hasson has a Bachelor of Psychology and a Master of Forensic Psychology. She is also a registered Forensic Psychologist and has almost 20 years experience in the field of psychology. She spent much of the early part of her career working with the Department of Justice in several specialised roles predominantly in the adult custodial environment. Since February 2008 she has conducted a private forensic psychology practice. Included in the qualifications statement section of her report is reference to her being experienced in fitness to plead and criminal responsibility assessments.

40 Ms Hasson had two interviews with R at the Banksia Hill Youth Detention Centre on 7 and 14 September 2011. The first interview lasted one hour and the total interview duration was one hour and 40 minutes. Mr Stubbs, an ALS Court Officer based in Kalgoorlie, attended the first interview to assist with any language difficulties. Ms Hasson stated in her report that the majority of the assessment was conducted in English with minimal requirements for assistance in language except as encouragement for R to discuss matters that were uncomfortable for him. The second interview with R was conducted entirely in English and without an interpreter.

41 Ms Hasson gave evidence that the total time including waiting time for the first interview was about one and a half hours. She decided to discontinue the interview because R was looking very tired, yawning and getting a bit distracted.

42 Ms Hasson gave evidence that during the first interview she spoke with R about a television program that he had watched the night before, different coloured t-shits that were worn at the detention centre and what they meant, what he had ordered through the canteen, dot paintings and what the different symbols represented, a breaking and entering offence for which he had been charged on a previous occasion, going to Court, not being able to steal, breaching his curfew, his fingerprints linking him to a can, knowing his lawyers and with R saying that his lawyers would talk for him, that he would be able to tell people if something happens to him or if someone made up something about him, that guilty is if you do something wrong or naughty and that not guilty is if you didn't do something someone says and you go home, and that the judge tells you off and you get punishment.

43 Ms Hasson gave evidence that during the second interview R spoke to her about factual details about each of the alleged offences including places and names.

44 Ms Hasson accepted that R has some intellectual impairment.

45 Ms Hasson set out the following opinion in her report dated 20 September 2011:

> The decision about [R]'s fitness to stand trial is not a simple one. Culturally and personally he is an isolated individual who appears to enjoy positive attention and copes well with structure, routine and predictability. He is facing serious charges that he finds shameful and embarrassing to discuss which can at times be exacerbated by cultural and language difficulties. He does not appear to respond well to being 'told off' or that he is 'bad'. It seems as though his way of coping when he feels challenged or threatened is to withdraw and become unresponsive or at others times to act out and become aggressive as evidence in many of the documents reviewed in preparation for this assessment. The outcome of such a coping method is that he appears more intellectually limited than perhaps he is and that his behaviour is seen as impulsive and unregulated. During the current assessment he responded well to a relaxed, non-threatening, non-judgemental interview style that used a Socratic questioning method which probed [R] thinking and extended his answers without being confrontational.
>
> In summary, [R] presented with good recall of the events and his thoughts and feelings prior to, during and, after the alleged offending. His recall, although it presents an alternative explanation for the allegations against him is nonetheless generally consistent with witness statements and other materials contained in the resource documents suggesting his memory of these factors is in tact and relatively accurate.
>
> On the basis of probabilities, it is my opinion that [R] is fit to stand trial. In regards to the query as to whether [R] is fit to stand trial on one or both matters before the Court and whether these should be heard jointly, my opinion is that [R] is fit to stand trial on both matters and that there is no reason why the two matters should not be joined. [R] understands the nature and seriousness of the charges against him and can appreciate the consequences of various outcomes. He has a basic understanding of 'guilty' and 'not guilty' and is able to communicate his choice of plea and the facts of his case to his legal counsel. He may have some difficulties understanding the proceedings at different times, due to cultural and language difficulties, limited attention and concentration and, lack of familiarity with more complex legal concepts however this may be ameliorated with additional person and legal support, education, and the assistance of an interpreter. Allowing sufficient time for a trial and for those involved to speak clearly, slowly and in simple language so as to

ensure he has the best possible chance of understanding what is happening and being able to speak up for himself is strongly recommended.

Commentary and analysis

46 Both Dr Wojnarowska and Dr Pestell are highly qualified and very experienced. On my assessment both are well qualified to report on the issue of R's fitness to stand trial. There is no issue as between the parties on the information each has relied on in arriving at her respective findings and ultimate conclusions. In my view, each and both of their assessments are very comprehensive and soundly based. Each of their reports contains sufficient criteria to enable a valuation of the validity of their respective conclusions.

47 Before I go any further I wish to make the obvious point that this decision and decisions in cases of the same kind are in no way reached by reason of or taking into account the number of expert opinions for and against the ultimate conclusion.

48 It is necessary for experts to tell the truth and the whole truth, and to fully explain the way their opinion is formed. Experts must identify their qualifications, skill and experience in the purported field of expertise in which the opinion is proffered and prove any supported research. The process of inference by which an opinion is reached must be expressed in a manner which permits the conclusions to be scrutinised and a judgement made as to its reliability. The Court must be enabled to properly evaluate an opinion expressed by an expert. ***See Makita (Australia) Pty Ltd v Sprowles [2001] NSW CA 305*** and ***Hillstead v The Queen [2005] WASCA 116.***

49 Where there are expert opinions including competing expert opinions the Court must assess the validity of each of them by considering all of those things in combination.

50 Having said all of that, I now wish to comment on the reliability of the contents of the report and the oral evidence given by Ms Hasson in support of her opinion that R is fit to stand trial.

51 In my view Ms Hasson lacked the relevant experience to express an opinion on R's capacity to stand trial.

52 Ms Hasson has never examined a child before for the purpose of forming an opinion on whether the child is fit to stand trial. Of course, that of itself would not be a proper basis to reject her opinion. Rather, it goes to weight. A purported expert will always be required to express an

opinion for the first time. There will no doubt be cases where an expert gives an opinion on something for the first time but because of the expert's qualification and training and the sound reason or reasons for the opinion it should be accepted and acted upon. The issue in this case is not that it was Ms Hasson's first opinion per se on the fitness to stand trial of a child, but rather her reliability and the reliability of the reasons she gave to support her opinion.

53 On my assessment of Ms Hasson's report and the evidence she gave, she initially deliberately sought to create an impression and thereby mislead the Court to think that she did have some prior experience in assessing whether young persons were fit to stand trial when they were children at the time of the assessment when she in fact did not.

54 It is usual when experts provide reports, that they set out in their reports their qualifications and experience in the field that their opinion is given. Ms Hasson made no mention in her report that she had not previously done an assessment on whether a child was fit to stand trial. The following exchange occurred in cross-examination between counsel for the State and Ms Hasson:

> Would you agree that it's also an oversight in the report not to identify that you have never previously done this sort of assessment? ---Of juveniles, yes.
>
> Because it's directly tailored to the weight that might be given to the report, isn't it? ---Mm;hm, possibly.
>
> It's not to say you can't do the assessment? ---No, could be.
>
> But clearly somebody has experience, that experience gives that opinion a degree of weight. Would you agree with that? --- Might do.
>
> And the lack of that experience might undermine the weight that would otherwise be given to a report? --- Yes.
>
> So in terms of the determination of the value to be given to the report, would you accept that your level of expertise in this field is a relevant factor? ---Yes.
>
> So do you accept then it was an error not to put into the report that you have never previously undertaken this sort of assessment? ---Yes.

55 The following exchange occurred in cross-examination between counsel for the State and Ms Hasson:

> Dr Hasson, just a couple of things about your report. In terms of your experience of this sort of thing, you've obviously had a lot of experience dealing with adult sex offenders? ---Mm'hm.
>
> What experience do you have dealing with juvenile sex offenders? --- Limited.
>
> When you say 'Limited', how? --- Only in as far as I've assessed a number of individuals who have committed offences as a juvenile but not been and tried until adult, so predominantly my experience is adults.
>
> So in terms of the assessment of a juvenile at the time of the assessment - - - ? - - - Yes.
>
> - - - how many of those have you done? --- Minimal – none.
>
> None? --- None.
>
> Right, okay, because 'minimal' is different to 'none', isn't it? --- Yes.
>
> So this is the first time that you have ever done an inquiry into a fitness to plead for a child? --- Correct.

56 Ms Hasson only explained what she meant by 'limited' when pressed. In addition to that, while she corrected herself to 'none', it was after she initially said 'minimal', and when she knew that there was a difference between the two and on my assessment when she realised that she would likely be further challenged in cross-examination.

57 On my assessment, Ms Hasson conceded with a degree of reluctance, that she should have mentioned her lack of experience assessing children in her report, and that lack of experience might undermine the weight given to a report. Regrettably, I think that Ms Hasson was trying to create an impression of prior experience when she in fact had none.

58 A significant difference between the basis of the opinions of Dr Wojnarowska and Dr Pestell on the one hand and Ms Hasson by reference to her report on the other, is that Ms Hasson did not conduct or take into account any psychometric testing of R. Ms Hasson stated her explanation for not doing so at pages 4 and 5 of her reports as follows:

> **Psychological Assessment**
>
> Whilst psychometric testing is normally undertaken as part of a psychological assessment it was not carried out with [R] as the instruments typically administered are normed upon individuals within Western industrialised culture, [R]s Western Desert heritage, previously reported English and traditional language deficits, assessment of being 'near

> intellectually disabled', less than optimal learning opportunities, and background of emotional, social and familial deprivation and neglect precluded the administration of such tools on the basis of their limited cultural and linguistic diversity. Collateral information was reviewed and [R] was assessed following the guidelines recommended by the Australian Psychological Society (APS) College of Forensic Psychologists as well as the application of a contemporary understanding of the literature pertaining to Fitness to Plead assessments in Australia and elsewhere.
>
> In August 2011 I undertook a workshop in Queensland in the Advances in Assessments of Adolescents in Juvenile Justice by Professor Tim Grisso a world authority on juvenile assessment in a clinical forensic context. The workshop focused on recent developmental research on the brain and behaviour and the understanding that teens have yet to develop adult capacities for judgement and decision making. The question of youths' fitness to stand trial was also reviewed with guidelines on how to perform such an evaluation from a developmental perspective. In addition risk of recidivism and the prevalence and impact of mental disorders amongst youths in a juvenile justice setting was considered. I undertook similar training in March 1999 with Professor Grisso as well as covering such assessments during the coursework component of my Master's degree.

59 I accept the evidence of both Dr Wojnarowska and Dr Pestell that the fact that R is of Western Desert heritage does not make psychometric testing irrelevant in his case. I accept Dr Pestell's evidence that while it does not preclude the administration of such tests it does impact upon its effectiveness. Dr Pestell gave evidence, which I accept, that the Australian Psychological Society Guidelines of the assessment of Indigenous and Torres Strait Islander individuals does not preclude the administration of certain tests but requires them to be done by a qualified individual and to be interpreted cautiously. Dr Pestell, when giving evidence on this point, added the following:

> … you have to put the results in context, so it's about collecting information that's just not based on the test scores alone, but also considering other sources of information as well, such as brain imaging results and his educational history and developmental history and so on.

60 Dr Pestell also gave evidence that clinical presentation was included in the information considered for the assessment.

61 Dr Wojnarowska also gave evidence that such testing was allowed but that a more cautious approach was required when interpreting the results.

62 One of the psychometric tests that Dr Pestell conducted was the Wechsler Nonverbal Scale of Ability to estimate R's intellectual

functioning. As mentioned, this test has been designed for culturally and linguistically diverse groups. Because the test has not been normed for aboriginal children as with other tests, it needs to be interpreted cautiously.

63 In cross-examination Ms Hasson indicated that she was aware of this test and she agreed that it was designed for indigenous individuals. This is inconsistent with one of the reasons she gave in her report for not administering such testing.

64 When Ms Hasson was asked in cross-examination why she did not do the testing done by Dr Pestell, which was clearly a reference to psychometric testing, she said that it was because it had already been done recently and that repeat testing was not done within certain time frames and also because when she attended training on fitness to plead assessments the general rule is that such assessments are not necessarily related to IQ.

65 I note that Ms Hasson's report is dated 20 September 2011. In a report dated 14 October 2011, Dr Pestell stated that she was not in a position to do an additional neuropsychological assessment. One of the reasons she gave was that it is considered ethically and clinically inadvisable to repeat the same neuropsychological measures within a short time frame.

66 It is relevant to note that while this was one of the reasons given by Ms Hasson in cross-examination for not doing the testing, she did not mention it at all in her report. She gave evidence that not putting it in the report was an oversight on her part. I do not accept that. The contents of Dr Pestell's report dated 14 October 2011 were probably disclosed to Ms Hasson after she had made her report dated 20 September 2011 and before she gave her evidence. Anyway, on my assessment of Ms Hasson and her evidence, she did not take this reason into account when she actually decided not to do the testing but rather used it as a reason in substitution for the reasons she gave in her report in an attempt to sure up her approach and her ultimate opinion as set out in her report.

67 Another factual issue arising from the oral evidence is whether Ms Hasson was actually qualified to administer any psychometric testing when she assessed R. As previously mentioned, Dr Pestell gave evidence that such tests needed to be done by a qualified person. Dr Pestell was so qualified.

68 In cross-examination Ms Hasson accepted that she was not qualified to administer such tests for juveniles. She then retracted that response with a qualification. She said that her level of qualifications would enable her to do psychometric testing but that before she did so she would need 'to have an understanding of how the tests were developed, validated, normed and so certainly with some review, some reading, there would be no reason that I couldn't do that'. Ms Hasson had not done any of that before going to interview R at BHDC. Accordingly, when she interviewed R she was not actually in the position of being able to administer such testing at that time.

69 It should be noted that Ms Hasson made no mention at all in her report or when initially cross-examined on why she did not do any testing, that she was not actually qualified to administer psychometric testing when she interviewed R.

70 Ms Hasson accepted in cross-examination that there was issue with her not using a fairly standardised test in terms of the objectivity of her assessment.

71 During cross-examination and after being challenged for not doing any psychometric testing and in particular the Wechsler Test, the following exchange occurred between counsel for the State and Ms Hasson:

> Right. Both the psychologist and the psychiatrist have both combined their clinical assessment by way of the presentation of [R] with the objective testing process that they've gone through? ---Yes.
>
> Your report doesn't refer at all to any of those tests? ---No.
>
> Is that because you didn’t have regard to those tests in the formulation of your opinion, which was based principally upon the clinical assessment or the clinical presentation? ---No.
>
> Sorry, no, you're disagreeing with that as a proposition? ---No, I'm saying no, it doesn't mean that I didn't take into account what they'd written in their reports.
>
> I'm asking you if you took into account the testing? ---Yes.
>
> Not the opinion but the testing? ---Yes.
>
> Because there's nothing in your report about taking into account the testing? ---No. That's right.

72 Ms Hasson's evidence in this exchange is at odds with her report, because not only did she make no mention that she took into account the testing referred to in the reports of Dr Wajarowska and Dr Pestell, but she actually set out reasons why psychometric testing was not appropriate and so why she did not do any. On my assessment, Ms Hasson clearly shifted her position when she gave her evidence in this exchange. It needs to be borne in mind that conducting psychometric testing and/or taking the results of psychometric testing into account is a significant matter in the context of the assessment of R and in the context of such assessments generally.

73 At page 5 of Ms Hasson's report under the heading 'Understand the requirement to plead to the charge or the effect of a plea' she stated inter alia:

> [R] is able to communicate the facts of the case or 'his story' to his counsel. It is unlikely he would be able to give coherent evidence in Court.

74 The contents of those two sentences gives rise to an inconsistency. During Ms Hasson's examination in chief she was asked and said:

> … now how do you explain if there is a difference between the first sentence to the second?
>
> I think perhaps I didn't articulate that well myself. What I meant there was that sometimes he can be quite difficult to follow and he mumbles and his speech isn't always clear and I think it was more about being very patient, taking a lot of time and letting him get the words out. That's the – that's really what I meant.

75 This point was picked up again in cross-examination and Ms Hasson was asked and said:

> You say in your report – my friend asked you about this, 'it's unlikely he would be able to give coherent evidence in Court'? --- Mm'hm.
>
> That's not a reference to mumbling, is it? --- No.
>
> That's a reference to the quality of the evidence? --- Correct.

76 Ms Hasson's response in cross-examination is clearly inconsistent with her explanation in evidence in chief.

77 On a consideration of Ms Hasson's evidence generally, including all of those evidentiary matters just mentioned taken as a whole, I find that she was misleading and somewhat deceptive on her real qualifications and experience on conducting a fitness to stand trial assessment of a child, in

this case R. I also find that she was unreliable with some of the reasons and explanations she gave to support her approach, her secondary conclusions and her ultimate conclusion. On my assessment, she reached her ultimate conclusion superficially and then sought to hold onto it and justify it, in some instances in ways which I think were unreliable.

78 Following on from those findings I do not accept that the responses attributed by Ms Hasson to R during her interviews with him are necessarily precise and that they do not contain any subjective assessment on her part. Further, I do not accept her assessments of R's responses when she describes them as very clear, clear and precise or clear and concise or words to that effect. She used such language in her report when she referred to R's description of the charges and his memory of the offences.

79 In further support of that finding, I repeat that English is R's second language. In the submissions made on behalf of R, it is submitted that Ms Hasson had a rapport with R because she had Mr Stubbs with her. Mr Stubbs is a very experienced, well known and well respected ALS Court Officer. He gave evidence on when he represented R on other charges and on how he communicated with R. He said that he could speak with R in English. Mr Stubbs can also speak Wongai (the local aboriginal language spoken in and about Kalgoorlie) but not fluently. He said that he can speak with R using Wongai and also English. He does not speak with R using R's first language as used in R's remote community.

80 While I accept this evidence of Mr Stubbs, I think that it is also necessary to bear in mind evidence of Dr Watts in his report dated 29 January 2010 that at that time it was evident that R's spoken English was a weak second language and that his expressive English language was mildly intellectually impaired. Even though R's capacity to speak English has probably improved since then, I find that nevertheless he still has problems communicating because of mental impairment resulting in poor memory, including working memory, and also poor abstract reasoning.

81 It is with all of that in mind that I deal with the submission by the defence that Ms Hasson developed a good rapport with R because of the presence of Mr Stubbs which in turn is submitted as a reason which makes her assessment more reliable. On Ms Hasson's own evidence, Mr Stubbs was only present at the first interview. Further, Ms Hasson gave evidence that she did not get any information at all in relation to the two charges in the first interview. Therefore Ms Hasson obtained the information on the charges in the second interview when Mr Stubbs was not present. Indeed,

no interpreter was present at the second interview. In contrast to this both Dr Wojnarowska and Dr Pestell had interpreters present when they interviewed R. As already mentioned, the interpreter for Dr Pestell was an aboriginal person from the same community as R.

82 In my view all of that detracts from the reliability of Ms Hasson's second interview and gives reliability to the interviews of each of Dr Wojnarowska and Dr Pestell.

83 One of the matters referred to in Ms Hasson's first interview with R, that was relied on by her and in turn the defence to demonstrate some understanding or reasoning by R, was his reference to various coloured tops worn at the detention centre and what each of them meant. I accept Dr Wojnarowska's evidence that this would be based on visual experience and that she would expect R to be able to understand such a concept and also to be able to follow rules. Dr Wojnarowska contrasted this with R being unable to follow and comprehend the trial which was a much more complex process involving multiple people and multiple amounts of information being exchanged.

84 The failure by Ms Hasson to do any testing leads me to comment on her assessment that R's memory was clear and precise. That is a subjective assessment by her. It is inconsistent with the evidence of both Dr Wojnarowska and Dr Pestell. When Dr Pestell administered a formal test of memory, R's result was extremely poor. Further, Dr Pestell gave evidence that this finding by Ms Hasson was confusing because there are three types of memory, namely, long term memory, working memory and short term memory. She said that it was unclear which particular aspect of memory Ms Hasson was referring to. On formal testing by Dr Pestell, R did not have an age appropriate functioning level of any of those three types of memory.

85 I have previously referred to Ms Hasson's evidence that R would be able to communicate the facts of the case or 'his story' to counsel but that he would not be able to give coherent evidence. Further to that, while Ms Hasson was of the opinion that R could answer questions about his own conduct she also gave evidence that in relation to the conduct of others, he could say whether it was true or not but he could not follow someone else's evidence from an abstract reasoning perspective. In my view this evidence of Ms Hasson is actually consistent with R being unable to understand the substantial effect of the evidence and properly defend the charge.

86 At the hearing, counsel for R cross-examined Dr Wojnarowska on why she did not contact the ALS lawyers for R to take into account in her assessment whether or not R had been found to be incapable of giving relevant instructions. Dr Wojnarowska indicated that she had not done so because she wanted to ensure that her assessment was objective.

87 The submissions made on behalf of R make the point that there is no evidence from the ALS, or any of its solicitors, that R has been found to be incapable of giving relevant instructions. It is submitted that whether or not R has been able to communicate effectively with his solicitor or counsel is critical to a determination of the issue. It is further submitted that without such evidence it is difficult to see how the Court can come to any finding one way or the other.

88 Before considering this point any further, I wish to note that Ms Hasson has not included in her sources of information anything from the ALS on whether R has been able or unable to give them relevant instructions. Counsel for R, having made the point, has not caused me to be provided with any information either way on this issue. In my view he does not have to do so. It is also my view that none of the experts needed to have obtained such information and have included it in their respective assessments before their opinions could be accepted and relied upon to reach a decision in this matter.

89 In my view there is merit in Dr Wojnarowska's point on objectivity. It also goes to ensure the independence of the assessment. I also think that there is a clear distinction to be made between an accused giving an account of things that have and have not happened in a particular incident and for a lawyer to decide whether the account is adequate to form the basis of some legal advice and/or opinion on the one hand and an assessment of whether an accused has a mental impairment and also whether that accused because of that mental impairment falls within the operation of any one or more or all of the criteria set out in s 9 of the Act.

90 With respect, lawyers are not qualified to make assessments on the second of those two scenarios, and further in my view it is not correct to say that a duly qualified expert, as Dr Wojnarowska and Dr Pestell obviously are in this case, could not make a reliable assessment on the second of those scenarios without information from an accused's solicitors on their assessment of the accused's ability to given instructions.

91 Further to all of that, there is more to the issue of fitness to stand trial, than an accused's capacity as perceived by a lawyer, to give

instructions on what did and did not happen in a particular incident. In my view the evidence in this case of Dr Wojnarowska and Dr Pestell and the provisions of s 8 and the criteria set out in s 9 of the Act, are sufficient to clearly demonstrate that.

92 It needs to be borne in mind that it is an assessment of the accused and not of his or her counsel or solicitors. An accused must be able to consider and make his or her own decisions on what to do. Further, it is necessary for an accused to be able to understand the evidence and give instructions and decide how to act on advice given. It would not be satisfactory for an accused to be unable to understand the evidence but to proceed in a trial on the basis that his counsel and/or solicitor would attempt to explain the evidence to him or her during breaks along the way.

93 During the hearing, counsel for R cross-examined both Dr Wojnarowska and Dr Pestell on their knowledge of the elements of the offences for which R is charged and the defences to them. In my view, having that knowledge is not necessary. The expert evidence relevant to the issue of fitness to stand trial relates to cognitive capacity and functioning. It is about R's capacity to understand.

94 In the final analysis, it is a matter of deciding whether all of the evidence before the Court proves on the balance of probabilities that R is not fit to stand trial applying s 8 and the criteria in s 9 of the Act.

95 It is submitted on behalf of R that Dr Wojnarowska and Dr Pestell have not dealt with the issue of whether R would be able to give coherent evidence. With respect, in my view they have and they are of the opinion that he cannot. Further, it is submitted that they have not, in particular, dealt with how R would cope with leading questions. I think that it is open to conclude from their evidence as a whole, and I do conclude, that such questions would likely lead to unreliable responses. Of course, each response would need to be judged having regard to the complexities contained within the question. Anyway, leading questions are objectionable. As a fact finder, I often wonder why maximum weight is often sought for responses to leading questions, and particularly leading questions with a multiple number of component parts.

96 The criteria in s 9(d) of the Act is the ability of an accused to understand or exercise the right to challenge jurors. It seems that Ms Hasson was instructed by the ALS that this was not relevant in R's case because he is before the Court for a judge alone trial. That instruction may not be legally correct however I do not need to decide that point and

consider the relevance of s 9(d) and how it would apply in this case in order to reach my ultimate decision on R's fitness to stand trial.

97 On 29 January 2010 Dr Watts expressed his opinion that R's fitness to stand trial on the first charge was questionable. Dr Wojnarowska first expressed her opinion that R was unfit to stand trial on 26 March 2010. That was also after the first charge. Dr Pestell expressed her opinion that R was unfit to stand trial on the first charge on 21 May 2011. That is about 16 months after Dr Watts expressed his opinion and about 14 months after Dr Wojnarowska expressed her opinion.

98 Dr Wojnarowska again expressed the opinion that R was unfit to stand trial on 3 October 2011. That was after the second charge. It was also about 21 months after she had expressed that opinion for the first time. In a report dated 14 October 2011, Dr Pestell stated that given R's medical history and neuropsychological profile, it is unlikely that she would change her opinion regarding his fitness to enter a plea.

99 Given all of that, R's history and the significant level of R's mental impairment as outlined by both Dr Wojnarowska and Dr Pestell, I find that R will not become mentally fit to stand trial within the next six months.

Conclusions

100 For all these reasons:

1. I find Ms Hasson lacked the necessary qualification and experience to conduct a reliable assessment of R's fitness to stand trial and reach a reliable opinion on it.

2. I find Ms Hasson's account and subjective assessments of R's responses in interviews to be unreliable.

3. I find Ms Hasson's failure to carry out and/or take into account results of psychometric tests and MRI tests renders her opinion unreliable.

4. I accept each of the opinions of Dr Wojnarowska and Dr Pestell respectively as set out herein and the information and reasoning used by each of them to reach them.

5. I accept the clinical findings and opinion of Dr Watts as set out herein.

6. I find that R has mental impairment as provided in s 8 of the Act.

7. I find that applying all of the evidence that I accept to the provisions of ss 8 and 9 of the Act proves on the balance of probabilities that R would at the very least be:

   (i) unable to follow the course of the trial;

   (ii) unable to understand the substantial effect of the evidence presented by the prosecution at trial; and

   (iii) unable to properly defend the charge.

8. I find that R will not become mentally fit to stand trial within the next six months.

101 As a result of these findings, pursuant to s 19(1)(a) of the Act, I must make an order under s 19(4) of the Act. This case will need to be adjourned with programming orders for a hearing on the terms of the order under s 19(4) of the Act.