5. Raising fitness

Introduction

The *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 is designed to bring the matter of fitness before the court as soon as possible. Generally the question of fitness is heard before a trial begins. However a person's mental health may fluctuate and fitness may become an issue at any stage of the proceedings. If the question of fitness is raised during a trial it must be dealt with in the absence of the jury. The court, the prosecutor, or the accused may raise a question of an accused's unfitness to be tried: s 39.

In forming a professional judgment as to whether the time has arrived to raise a question of unfitness, an advocate will be guided by several considerations, including:

- any evidence of unfitness known to the advocate
- the stage of proceedings the matter has reached
- the interests of the accused person in raising the question, and
- necessity and practicality of raising the question.

As to the role and responsibility of an advocate see further ***3. Taking instructions and giving advice***

Note: if a person has been charged with federal offences, the mode of determining fitness and the test to be applied is regulated by State provisions but the consequences of a finding of unfitness is regulated by Commonwealth provisions. See further ***9 Commonwealth provisions.***

In good faith

The Court does not have to hold an inquiry unless it appears to the Court the matter has been raised "in good faith": s 42(3). If there is a real and substantial question to consider, or a genuine concern, the matter may be assumed to have been raised in good faith: *R v Tier [2001] NSWCCA 53; (2001) 121 A Crim R 509* at [69]–[72]; *R v Mailes [2001] NSWCCA 155; (2001) 53 NSWLR 251; (2001) 126 A Crim R 20* at [227]. A matter is not raised in good faith where the motivation is to disrupt the trial process: *R v Tier.*

Raised by the prosecutor

In *R v Zhang [2000] NSWCCA 344* at [25]–[27] Dunford J found the provisions in s 10 of the former Act (now s 42) were "explicit and mandatory" and did not allow a prosecutor to "withdraw" a question of unfitness after raising it.

Raised by the court

The Court has a duty to consider the issue even where it is not raised by either the accused or the prosecution: *Kesavarajah v The Queen [1994] HCA 41; (1994) 181 CLR 230* at [30] per Mason CJ, Toohey and Gaudron JJ; *Eastman v The Queen [2000] HCA 29; (2000) 203 CLR 1* at [294]-[295] per Hayne J. In *R v Tier [2001] NSWCCA 53; (2001) 121 A Crim R 509* at [56]–[57] Kirby J stated the Court has a duty to consider the question if through information or observation it becomes aware an accused may not be fit.

In *R v Mailes [2001] NSWCCA 155; (2001) 53 NSWLR 251; (2001) 126 A Crim R 20* at [11], Spigelman CJ stated:

> Where, as sometimes occurs, apparent unfitness is accompanied by an insistence on the part of the accused that he or she is fit, legal representatives may reveal their doubts and the basis for those doubts to the trial judge. The question of unfitness can then be "raised … by the Court" within s 5.

Note: Section 5 of the former Act referred to by Spigelman CJ corresponds to s 39 of the Act.

Case Study 6

An appropriately qualified expert had reported a client is unfit to be tried on several grounds in the s 36 "fitness test". The client, although unfit to be tried on several other grounds, none-the-less was able to plead to the charge; instruct lawyers; and decide upon a defence. Furthermore, the client expressly instructed a wish to plead guilty; the client firmly instructed there was no challenge to any of the allegations; and the legal representative was of the opinion that the available evidence was capable of proving the prosecution case beyond reasonable doubt. The client expressed remorse, pleaded guilty and obtained a discount for the plea of guilty and raised subjective features in mitigation on sentence. The accused was sentenced to a term of imprisonment with a nominated non-parole period and earliest date for release being recorded.

Case Study 7

An appropriately qualified expert had reported on behalf of the defence a client was unfit to be tried due to a mental illness. Subsequently, another appropriately qualified and experienced forensic expert had reported on behalf of the prosecutor that the accused was fit to be tried because over a period of time and with appropriate treatment, their mental health had improved sufficiently. The matter was still in the committal stage before the Local Court. The client had a strong preference to be found fit and did not wish the question of unfitness to be raised with the court. In this case, a defence of mental health impairment may also have been available; however, the accused person specifically instructed he did not wish to raise that defence. Legal representatives for the accused formed the view that the evidence supported all elements of the charges and that no defence other than mental health impairment was available and accepted his instructions not to challenge any of the evidence or allegations and to enter pleas of guilty on the basis of the latest assessment of fitness. The accused raised his mental health issues only in mitigation on sentence and was sentenced to a term of imprisonment with a nominated release date.

Fitness raised at committal

A potential question of unfitness may arise at an early stage. An advocate may have taken instructions, obtained an expert report and informed the DPP. It may be appropriate to inform the Magistrate in the Local Court in order to obtain an adjournment to allow time for the DPP to also obtain an expert report prior to the committal.

Although the issue of unfitness is determined in the District or Supreme Court, the question may be raised at committal and the Magistrate may commit the accused for trial: ss 93, 94 *Criminal Procedure Act 1986 (NSW)*. The Magistrate may require a psychiatric or other report before committing the accused for trial: s 93(3). Where a person has been committed for trial under these sections, no case conference is required: s 69(c). If the person is subsequently found fit the matter can be remitted to the Local Court for a case conference: s 52.

Fitness raised before arraignment

Where fitness is raised before arraignment, the Court must determine whether an inquiry into fitness should be held and must conduct that inquiry if it does not subsequently determine there is no longer a need for the inquiry: ss 40, 42(1)(a).

An inquiry is to be held as soon as practicable after the Court has determined an inquiry should be conducted: s 42(2). An inquiry is not mandatory and the Court may decide not to hold an inquiry if it becomes apparent that it is no longer needed: s 40(2). See *Coles ats R [2008] NSWSC 672* per Grove J.

For example, in *R v Dunn [2012] NSWSC 946*, a medication regime utilised with respect to the accused led to an improvement in his mental health over a period of time, leading to a subsequent psychiatric assessment of fitness following initial assessments of unfitness. Johnson J said at [13]:

> It is apparent then in the statutory scheme, that an inquiry is not mandatory once directed. If the Court is in a position to determine, no doubt by reference to a body of reliable evidence, that there is no longer a question as to fitness to be tried raised, the Court may determine that an inquiry is no longer needed.

Fitness raised after arraignment

Where fitness is raised after arraignment, the Court must hold an inquiry into the question provided it appears to the Court the question has been raised "in good faith": s 42(1)(b),(3). See above: **In good faith**.

The Court must hear any submissions relating to holding an inquiry in the absence of any jury that has been constituted for the purpose of the proceedings: s 41. An inquiry is to be held as soon as practicable after the matter has been raised: s 42(2).

Fitness raised again

The question of fitness remains open throughout a trial and may be raised on more than one occasion in the same proceedings: s 37(2).

The test for a subsequent inquiry is not whether there is "fresh evidence" but whether the matter has been again raised in "good faith": *R v Mailes [2001] NSWCCA 155; (2001) 53 NSWLR 251; (2001) 126 A Crim R 20* at [6]–[17] per Spigelman CJ; at [219]–[229] per Wood CJ at CL.

Dismissal of charge before an inquiry

Under s 42(4), the Court may determine not to hold an inquiry, dismiss the charge and order that the accused be released if it is of the opinion that it is inappropriate to inflict any punishment, having regard to the following:

- the trivial nature of the charge or offence,
- the nature of the accused's mental health impairment or cognitive impairment,
- any other matter the Court thinks proper to consider.

In considering the virtually identical s 10(4) under the former Act, Spigelman CJ concluded this section addresses the appropriateness of punishment, seeking to avoid unnecessary delays, costs and complications of fitness hearings where no punishment would ultimately be inflicted. He further found "any punishment" includes conviction with no further penalty and orders of the Court after special hearing, and that the section is analogous to s 10 *Crimes (Sentencing Procedure) Act 1999 (NSW),* which empowers the Court to dismiss a charge without recording a conviction: *Newman v R [2007] NSWCCA 103; (2007) 173 A Crim R 1* at [34]–[46].

Actions pending a fitness inquiry

The Court may do one or more of the following before holding an inquiry:

- adjourn the proceedings
- grant the accused bail
- order the accused be remanded in custody for 28 days or less
- order the accused undergo a psychiatric, or other, examination
- order that a psychiatric report or other report relating to the accused be obtained
- discharge the jury
- make orders the Court thinks appropriate: s 43.

The Court will expect reports as to fitness. The qualifications of the expert to be used will depend on the accused's condition. For example:

- an accused with a mental health impairment may require a psychiatrist's report
- an accused with an intellectual disability or cognitive impairment may require a psychologist's report
- an accused with dementia may require a report from a psychiatrist, geriatrician or physician
- an accused with a brain injury may require a report from a neuropsychologist
- a defence solicitor may write an affidavit explaining difficulties encountered while trying to take instructions from the accused.

The expert will need to assess the criteria referred to in s 36 of the Act.

If an accused is found unfit to stand trial, s 47 requires the Court to also determine whether the accused is likely to become fit within 12 months. If the accused may become fit, the court process will be put on hold and the accused referred to the Mental Health Review Tribunal. For this reason expert reports should comment on whether there is likely to be any change in the accused's fitness and what kinds of treatment or fitness restoration would be needed.

See further ***4. Expert Witnesses***.