

Reasons for order *Criminal Justice (Mental Impairment) Act 1999*

LJMT faced trial for the crime of manslaughter, alleged to have occurred on 24 November 2019. At that time he was 16 years of age. While remanded in custody at Ashley Youth Detention Centre he was assessed by his treating psychiatrist, Dr Teresa Flower, who provided an opinion that he was unfit to stand trial. In the case of proceedings in the Supreme Court, the question of whether a defendant is fit to stand trial must be determined by a jury under the *Criminal Justice (Mental Impairment) Act 1999*. At the hearing to determine whether LJMT was unfit to stand trial, he was represented by Ms Mainwaring and a witness intermediary was appointed in the exercise of the Court's inherent jurisdiction in order to facilitate his participation in the proceedings. Evidence was called on behalf of the defence from Dr Flower and speech pathologist, Catherine Wood. Their evidence was not contentious. Dr Flower gave evidence that, even with the benefit of a witness intermediary to assist him, he was unable to follow and understand the evidence, and unable to give evidence due to his autism spectrum disorder of level 2 severity, severe language disorder associated with Autism Spectrum Disorder, cognitive difficulties with an IQ in the very low borderline range and an anxiety disorder. The Crown called Professor Brett McDermott at the hearing who gave evidence and agreed, essentially, with the opinions of Dr Flower.

On 4 April 2022 the jury found LJMT was unfit to stand trial and that he was unlikely to become fit to stand trial during the next 12 months. As a consequence of this finding, a special hearing was conducted under the *Criminal Justice (Mental Impairment) Act* in order to provide an opportunity for LJMT to be found not guilty of manslaughter if the jury were not satisfied of guilt beyond reasonable doubt. After the conclusion of the special hearing, the jury's finding on 30 May 2022 was that a finding could not be made that he was not guilty.

The incident giving rise to the charge of manslaughter was captured on CCTV footage, providing a visual but not an audio recording. The essential facts are largely uncontroversial. The incident occurred during mid-afternoon on 24 November 2019 in the forecourt of the Shell Service Station at the corner of Pearsall Avenue and Roslyn Avenue in Blackmans Bay. As noted, LJMT was then aged 16. The victim was a 41 year old man attending the service station, accompanied by his partner and her two children, to return a hired trailer. LJMT attended the service station with his 14 year old sister, her 16 year old boyfriend, referred to as Master A, who was riding a scooter, and another male. At the service station LJMT and Master A waited outside while the other two in the group went inside the service station to make a purchase. As Mr Ludwig left the service station and walked across the forecourt there was an altercation between Mr Ludwig and Master A. The evidence suggests that Master A said something at a time when the CCTV footage shows Mr Ludwig walking away, that Mr Ludwig took umbrage at what was said and walked back to confront him and in the context of that confrontation he pushed Master A, which can be seen on the CCTV footage.

During the altercation, LJMT had taken off his backpack, and taken out a large knife, and produced it. Then, when Mr Ludwig was facing the defendant, LJMT lunged and stabbed Mr Ludwig to the abdomen once. Mr Ludwig staggered and collapsed on the ground. LJMT said to Master A immediately afterwards, "I shouldn't have done that" and to his sister "Why did I do that". LJMT was in the company of a responsible male by-stander for some 15 minutes

before the police arrived. In his evidence, he described LJMT as dazed and bewildered. They had a conversation and he asked LJMT why he did it, and he replied that the man was "in his mate's face and wouldn't back off". He had asked him to back away and "the man just kept coming, so I stabbed him.

At the time of the stabbing, Mr Ludwig was unarmed with anything, and had made no threat or gesture towards LJMT.

The jury's finding reveals that they were satisfied beyond reasonable doubt that the defendant voluntarily and intentionally stabbed Mr Ludwig with a knife and caused his death. The uncontroversial evidence was that a stab wound to his abdomen penetrated deeply into his body and penetrated the iliac artery causing a large loss of blood. Mr Ludwig suffered cardiac arrest and could not be resuscitated and died in hospital soon afterwards. Further, the jury must have been satisfied that LJMT either intended to cause bodily harm at the time of the stab wound or that the stabbing was commonly known to be likely to cause bodily harm. The jury must also have been satisfied beyond reasonable doubt that he did not act in lawful self-defence or lawful defence of Master A. If he did act for a defensive purpose, the jury found that the force was excessive and not reasonable and thus not lawful.

These findings are apparent from the jury's verdict that it could not make a finding that he was not guilty. It was not open to the jury in these proceedings to bring in a verdict of guilty given the nature of the proceedings under the *Criminal Justice (Mental Impairment) Act* and because LJMT, was unfit to stand trial. Of course, this means that LJMT cannot be punished for what occurred. He cannot be sentenced because he is presumed innocent unless found guilty and he has not been found guilty of the crime. However, the law makes special provision for this situation where a person is unfit to stand trial and a finding cannot be made that they are not guilty.

Section 18(2) of the *Criminal Justice (Mental Impairment) Act* provides that in the event that a finding cannot be made that the defendant is not guilty of an offence the court is to: (a) make a restriction order; or, (b) release the defendant and make a supervision order; or, (c), make a treatment order; or, (e) release the defendant on such conditions as the court considers appropriate; or, (f) release the defendant unconditionally.

As mentioned, the jury's finding that a finding could not be made that he was not guilty of manslaughter was delivered on 30 May 2022. Since his arrest, LJMT had been remanded in custody at Ashley Youth Detention Centre. Once the finding was made, an interim restriction order was made under the *Criminal Justice (Mental Impairment) Act*, pending the preparation of further reports addressing the range of orders that are available under s 18(2) of the Act.

Before a court makes one of the orders provided for by this section, there are certain requirements that must be satisfied. The court cannot release a defendant under s 18(2) unless the court has considered the reports of the Chief Forensic Psychiatrist and one other expert who has personally examined the defendant on matters concerning the condition of the defendant, and the possible effects of the proposed action, ie the order, on the behaviour of the defendant, and also a report prepared under s 33 of the Act on the attitudes of the victims and next of kin, who have been given reasonable notice of the proceedings. I have reports from Dr Sonny Atherton, a delegate of the Chief Forensic Psychiatrist and Dr Teresa Flower and I have a copy of the s 33 report, and so these requirements have been met.

I have read the report provided pursuant to s 33. I have the views of the defendant's next of kin, provided by LJMT's mother.

The report also provides information as to the views of the victims provided by immediate family of the deceased victim: Laraine Ludwig, Melanie Turner, Jim Ludwig, Poppy Turner, Matilda Ludwig, Jimmy Ludwig, Mel Vanderstaay and Kirby Goscombe.

They provide insight with respect to the impact of the death of the victim upon their lives. The impact is devastating, profound and enduring.

Arising from these reports, there are discrete matters identified by Crown Counsel, Ms Wilson SC, which need to be taken into account, and should be taken into account, in determining the appropriate orders. There is need for finality, the extensive court proceedings in this matter have taken their toll. There is concern and anxiety about the prospect of chance encounters with LJMT particularly in a certain area of Hobart. Such encounters would be traumatic for Mr Ludwig's family. It can also be seen that the family hold grave concerns that, given his permanent condition, he remains a danger to the community and that he may reoffend. I also note that notwithstanding the depth of agony and grief expressed, there are expressions of hope that LJMT can rehabilitate.

In determining these proceedings and deciding which order to make under s 18(2), I am obliged to have regard to the principle in s 34 of the Act:

"A court is to apply, where appropriate, the principle that restrictions on the defendant's freedom and personal autonomy should be kept to the minimum consistent with the safety of the community ..."

Further, there are various criteria that I must have regard to which are set out in s 35(1). I consider these in turn. The first criterion is referred to in s 35(1)(a), the nature of the defendant's mental impairment or other condition or disability.

There is a divergence of views expressed by Dr Flower and Dr Atherton regarding the extent of the nature of LJMT's mental impairment. However there is agreement that LJMT suffers from Autism Spectrum Disorder.

Dr Flower was LJMT's treating psychiatrist during the period from December 2019 – May 2022 while he was on remand at Ashley Youth Detention Centre. Her opinion is based on consultations with LJMT and also informed by other reports such as the Speech Pathology assessment report of Catherine Wood 3 May 2021, cognitive assessment by Julia Lane 5 March 2020 and psychiatric report of Dr Danny Sullivan 22 September 2020. She describes LJMT as having a significant disability arising from his Autism Spectrum Disorder and associated severe speech and language disorder, and cognitive difficulties associated with low IQ, with his adaptive functioning in the extremely low range.

Dr Flower noted that there is no specific or curative treatment for neurodevelopmental disorders and there would be no benefit to his rehabilitative prospects from being detained in a secure mental health unit such as the Wilfred Lopes Centre, and she did not recommend a restriction order. Further his condition was not sufficiently serious to warrant regular input from a mental health service and a supervision order was not supported by her. Given there was no recommended treatment, a treatment order was unlikely to be helpful. Dr Flower

recommends that LJMT be released into the community provided that an appropriate National Disability Insurance Scheme support package has been set up.

Dr Atherton, Clinical Psychiatrist, provided a report dated 31 August 2022 at my request as a delegate for the Chief Forensic Psychiatrist. He has been Acting Statewide Specialty Director for the Forensic Mental Health Service in Tasmania. LJMT has been under his care at the Wilfred Lopes Centre since he was admitted to that Centre on 30 May 2022. While at the Centre, LJMT has been subject to a comprehensive multidisciplinary assessment.

Dr Atherton noted that what became clear during the admission was that the Wilfred Lopes Centre was poorly adapted to manage someone like LJMT, who does not have a treatable mental illness in the psychiatric sense or a need for intensive inpatient support and thus, there are no clearly defined psychiatric goals.

Dr Atherton notes the diagnosis of Autism Spectrum Disorder, a history of language delay, social difficulties and other indicative features from early childhood. Formal re-testing of his cognitive function and occupational therapy assessment was undertaken at the Wilfred Lopes Centre by psychologist, Dr Jennifer Wells. Dr Atherton notes that that assessment indicates his cognitive ability falls between the low average and superior ranges across different cognitive domains. An occupational therapy assessment conducted at the Centre indicated that he is likely to be able to function independently in the community with some targeted support to assist him build capacity in relation to social engagement, engagement with education and/or vocational development, and additional supports with planning and decision-making. These assessments indicate that his Autism Spectrum Disorder is more likely at Level 1 (able to function independently with some/minimal support) rather than Level 2 (requiring substantial support). Dr Atherton noted an assessment conducted at the Wilfred Lopes Centre and that LJMT was not diagnosed with an intellectual disability. He noted that he does have a substance use disorder and is at high risk of future substance use without monitoring and supervision.

Dr Atherton highlighted that in his opinion, it was unlikely at this stage he would consider LJMT unfit to stand trial. It is to be noted that the evidence at the fitness hearing was that LJMT's condition was essentially static. It can be seen in the reports of Dr Atherton and Dr Flower, that there is a significant divergence of opinion as to the severity of LJMT's Autism Spectrum Disorder and cognitive and language abilities. This case serves to highlight the value of second opinions for the purpose of hearings as to fitness, in particular, second opinions not limited to the ultimate psychiatric diagnosis and the fitness criteria but extending to the opinions and assessments that underpin and inform those psychiatric opinions such as assessments of cognitive and language ability. It seems that these assessment findings may be influenced by factors such as anxiety and stress arising from recent incarceration.

Returning to the criterion of LJMT's mental impairment, Dr Atherton noted that Autism Spectrum Disorder is generally considered to be broadly a type of neurodevelopmental disorder and is not a treatable mental illness in the psychiatric sense. Intervention is thus mostly of a supportive and capacity building nature and focusses on helping the person manage in the world with the difficulties that their Autism Spectrum Disorder might cause them, rather than treating their underlying condition per se. In Dr Atherton's assessment, LJMT's Autism Spectrum Disorder is considered to be at a level which does not require extensive support. He does not otherwise have a serious mental illness of a nature or degree that would warrant inpatient or intensive psychiatric care.

It is not necessary for me to resolve the question of the severity of LJMT's Autism Spectrum Disorder. The psychiatrists, Dr Flower and Dr Atherton, are in agreement that regardless of the severity of his condition, a restriction order, supervision order or treatment order would not be appropriate. It is agreed by them that a release order with conditions under s 18(2)(e) is appropriate and the conditions that are in contemplation by the Court can respond to his needs and provide ongoing assessment of those needs. Community Corrections is prepared to supervise these conditions and has given that indication on the assumption that his condition is severe, as opined by Dr Flower.

The second criterion is whether the defendant is, or if released be, likely to endanger another person or other persons generally.

This is a question of the risk that LJMT poses to the community. This matter has been considered by both Dr Atherton and Dr Flower. Dr Atherton notes that a risk assessment was compiled by Dr Wells during LJMT's admission at the Wilfred Lopes Centre. He notes historical risk factors. I note in this context that there are no prior convictions. Dr Atherton notes a significant past history of violence from a young age towards peers and also the violence which is before the Court today. Other risk factors including problems with substance use, experiences of trauma, and attitudes supportive of violence. Further, he notes that his risk of future serious violence is, in his view, more driven by general criminogenic risk factors such as associating with anti-social peers, increasing substance use, lack of pro-social activity or vocational engagement, and interpersonal and relationship difficulties. Dr Atherton states:

"Overall, I consider that [LJMT] presents a low risk of future similar offending, as long as he does not carry weapons and he can work on his attitudes to violence, and process his traumatic experiences insofar as they may contribute to his perception of the world as dangerous and improve his general coping and emotional well-being. He would, as Dr Wells suggests, benefit from strong pro-social male role models and psychological intervention to further develop his interpersonal skills, anxiety management and insight about his diagnosis, future potential for violence, criminogenic risk factors and building on his strengths towards protective factors, such as pro-social engagement and vocational development."

Dr Atherton agrees with Dr Wells' assessment that "LJMT poses a moderate long-term risk of verbal aggression which could escalate to physical aggression (eg punching, kicking or impulsive weapon use if available to him) which may arise in the context of inter-personal stressors/conflict, boredom or frustration." Further he opines in his report that in relation to his likelihood of endangering another person or other persons generally, that "LJMT's risk of similar offending in the future is low provided he does not carry weapons and does not find himself in situations where he may become involved in altercations or antagonistic confrontations.... As outlined above..., his risk for future violence, in general, is at least moderate. The serious nature and extent of that violence will of course be highly dependent on situational factors."

Dr Atherton notes it is "imperative that LJMT's general criminogenic risk factors which impact on his future risk of violence be addressed, including associating with antisocial peers, engaging in antisocial activities, substance use, limited pro-social activity, managing frustration and emotions and problem solving skills".

Dr Flower in her report of 26 June 2022 states:

"It is difficult to predict the risk of future similar offences occurring. At the time of the index offence, LJMT's neuro-developmental difficulties had not been identified, no assistance provided. The index offence was very serious but appears to have resulted from a most unfortunate set of circumstances which in hindsight would have been difficult to predict."

The third criterion which the Court must consider is under s 35(1)(c), whether there are adequate resources available for the treatment and support of the defendant in the community.

The capacity building supports and general supports identified as being needed by Dr Atherton, have been considered by Community Corrections and addressed in the proposed order which would mandate supervision and compliance. In other words, the supports and resources which have been identified by Dr Atherton as essential are available in the community. The order that is proposed reflects the recommendations of Dr Atherton involving a kind of "correctional supervision" and addresses the criminogenic factors which I have referred to in considerable detail. It is noted that LJMT has been assessed by NDIS while in custody at the Wilfred Lopes Centre and a plan has been formulated. It is also noted that this is not fixed and can be reassessed as further needs are identified.

Dr Flower in her report identifies:

"25 It is to be hoped that now an accurate diagnosis has been made, appropriate supports can be provided for LJMT which would assist with his eventual reintegration into the community. Such supports are likely to be found through allied health practitioners in the community rather than through an adult mental health service. LJMT is eligible for funding under the National Disability Insurance Scheme and an NDIS plan could provide the level of support required for him in the community."

It is noted that this plan has, as I have already noted, been formulated but I also note that Dr Flower has in mind more comprehensive supports than are presently identified in that plan. She notes that an appropriate NDIS support package might include "regular support from allied health practitioners such as Psychology, Occupational Therapy and Speech Pathology with medication prescribed by an appropriately skilled General Practitioner or Psychiatrist". She recommends that the Court make engagement with the NDIS and treatment providers to be identified, a condition of release into the community.

As recommended by Dr Flower, engagement with the NDIS and a probation officer is reflected in the proposed conditions of the order that has been carefully canvassed with Mr Palmer from Community Corrections.

Both specialists see NDIS support as an important part of the support network. There is agreement that the Wilfred Lopes Centre is not a suitable environment for LJMT given his condition.

The fourth criterion is whether the defendant is likely to comply with the conditions of a supervision order: s 35(1)(d).

In essence, there are no specific concerns in this context.

This factor is considered in the context of the proposed order which is not a supervision order as such under the *Criminal Justice (Mental Impairment) Act*, but an order releasing LJMT with strict conditions.

Dr Atherton does not raise concerns about compliance with the proposed order. Dr Flower notes:

"A Treatment Order is unlikely to be helpful as there is no specific or recommended treatment for Neurodevelopmental Disorders, and there is no evidence that LJMT is likely to be non compliant with any future treatment".

She also notes LJMT's general compliance with counselling and appointments while he was at Ashley Youth Detention Centre.

The question of enforcement of the release and conditions order was raised by Community Corrections. This is the first such order to be supervised by Community Corrections. It is noted though that the statutory regime under the *Criminal Justice (Mental Impairment) Act* for breach proceedings in relation to orders made under s 18(2)(e) fully addresses the concerns raised by Community Corrections. Having considered that statutory regime Mr William Palmer, on behalf of Community Corrections, has no residual concerns in that regard.

The final criterion under s 35(1)(e) is any other matters that the court thinks relevant.

It should be mentioned here that the concerns of the family of the deceased have been considered in the raft of proposed conditions that will be imposed. These conditions also respond to the extensive criminogenic concerns raised by Dr Atherton and also by Community Corrections. Under the proposed order, these strict conditions are enforceable and will be in place for a lengthy period. In light of the circumstances of this case, the criminogenic factors that need addressing and the gravity of the violent act leading to the death of Mr Ludwig, the conditions that I intend to impose are appropriate and, in my view, meet the test in s 34 of being no more than the minimum that is necessary to respond to the safety of the community.

I mention that I have the benefit of reports from Mr Palmer dated 31 October 2022 and 22 November 2022. Mr Palmer has been consulted about the proposed order and conditions, to ensure that Community Corrections are able to provide the necessary and appropriate level of supervision. In addition to the reports that Mr Palmer provided to the Court, he also provided substantive information to the Court orally on 12 December 2022 about Community Corrections capacity to supervise the order which has satisfied me that it has capacity to both closely supervise the order and co-ordinate, with NDIS, the necessary supports to address the criminogenic factors and the safety of the community specifically addressed by Dr Atherton.

Community Corrections has formally indicated that they are prepared to supervise LJMT under the terms of the proposed order. An indication has also been given that the proposed conditions are considered to be appropriate. It is noted that the NDIS has assessed LJMT and moreover, that that assessment can be reviewed during the currency of the release order. He has a speech disorder which may benefit from treatment from a speech pathologist and his cognitive impairment might require additional support through NDIS. I note too that LJMT's nominated address has been assessed by Community Corrections and is regarded as suitable and has been approved by Community Corrections.

Counsel for LJMT, Ms Mainwaring, submits that an order under s 18 is appropriate, having regard to the criteria in s 35 addressed by Dr Flower in her report. Section 34 was highlighted and the principle of keeping restrictions to freedom and personal autonomy to a minimum. It was submitted that having regard to this principle, a curfew condition and abstinence from alcohol condition are not warranted given that they were not factors in his offending and given his lack of prior convictions.

However, having regard to the broader criminogenic concerns highlighted by Dr Atherton and noted by Community Corrections relevant to future risk, I am satisfied that these conditions are warranted.

Having regard to the information I have, including the opinions of both psychiatrists and the s 34 principle and the criteria set out in s 35 of the Act, I am satisfied that the appropriate order and indeed, the only appropriate order is an order under s 18(2)(e) of the Act for a lengthy period, and with comprehensive conditions supervised by a probation officer allocated by the Director of Community Corrections.

Order

Pursuant to s 18(2)(e) of the *Criminal Justice (Mental Impairment) Act*, an order is made releasing LJMT on the following conditions which are to be in place for a period of three years from today. The conditions are that he:

- Be subject to supervision of a Probation Officer who shall be such person appointed for the purpose of supervising these conditions from time to time by the Director, Community Corrections.
- Report to the Probation Officer, or other person nominated by the Probation Officer, in the manner and at the places and times directed by the Probation Officer and that he shall be available for interview at such times and places as the Probation Officer or nominee may from time to time direct.
- Reside at the address arranged or approved by the Probation Officer.
- Not change address or employment without first obtaining the permission of the Probation Officer, or, if that is not practicable, then he must inform the Probation Officer of any change of address or employment within 48 hours after its change.
- Obey all reasonable directions of the Probation Officer including such directions as the Probation Officer may see fit to give as to counselling or treatment, assessment and support including directions that he attend appointments arranged by the National Disability Insurance Scheme or with his NDIS support co-ordinator, for assessment and support.
- Obey the Probation Officer's direction in relation to his associates.
- Not go to or visit any place or district specified in a direction by the Probation Officer.
- Not leave the State of Tasmania without the prior written approval of the Director, Community Corrections.
- Not to leave his place of residence between the hours of 10:00pm and 6:00am unless approved by the Probation Officer.
- Be of good behaviour and not commit any offence punishable by imprisonment.
- Attend as directed by the Probation Officer any rehabilitation program nominated by the Probation Officer and not, without the permission of the Probation Officer, be discharged from or do anything to bring about a discharge from that program.

- Do whatever is necessary to authorise all medical or other professional or technical advisers or consultants to make available to the Probation Officer relevant reports as to his medical or other conditions at all reasonable times.
- Not, other than in strict accordance with his treating medical practitioner's directions, to use, possess or administer any drug or substance, which cannot be legally obtained without prescription from a medical practitioner unless he has such a prescription.
- Not to use or administer any illicit drug or prohibited substance as defined, in the *Misuse of Drugs Act 2001*.
- Not to remain in the presence of any person using or administering any prohibited substance.
- Must present for urine and/or breath analysis or other testing as and when required by the Probation Officer and do all things and sign all such documents as may be necessary to enable such an analysis or testing.
- Must abstain from the consumption of intoxicating liquor.
- Must not carry a knife or a weapon or collect knives or weapons and must not use or have possession of a firearm.