

**IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU**
(Criminal Jurisdiction)

Criminal Case No. 67/ 2014

PUBLIC PROSECUTOR

V

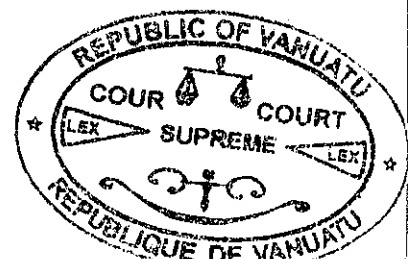
JOE SAWE

Hearing: Wednesday 19 August 2015 at Isangel, Tanna
Date of Judgment: Wednesday 2 September 2015
Before: Justice SM Harrop
Appearances: Betina Ngwele for the Public Prosecutor
Pauline Kalwatman (PSO) for the Defendant

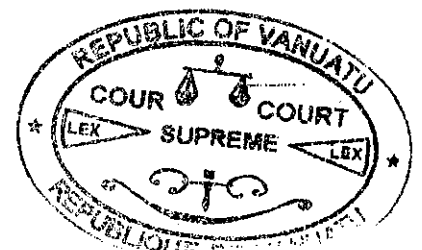
**JUDGMENT GIVING REASONS FOR FINDING DEFENDANT FIT TO
PLEAD**

Introduction

1. On 17 August 2015, having considered a mental health assessment report from Dr Obed Jimmy dated 12 August 2015, I ruled that Mr Sawe was fit to plead, albeit probably unfit to stand trial, and Mr Sawe then pleaded guilty to a freshly-laid count of aiding and abetting an intentional assault causing permanent injury pursuant to sections 30 and 107 (c) of the Penal Code.



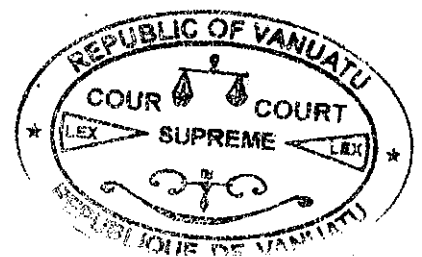
2. A sentencing hearing was arranged for Wednesday 19 August and the preparation of a pre-sentence report and submissions was directed.
3. Ms Kalwatman then drew my attention to the recent Supreme Court judgments in *PP v. John Raymond* [2014] VUSC 150 and [2014] VUSC 153 respectively issued on 29 September and 7 November 2014 by the Chief Justice. I was already aware of these but Ms Kalwatman highlighted that, like Mr Sawe, Mr Raymond was deaf and mute and that the Chief Justice had ruled Mr Raymond unfit to plead and made a guardianship order in respect of him under section 13 of the Penal Code.
4. Ms Kalwatman noted that Dr Obed Jimmy's report confirmed that Mr Sawe was both deaf and mute and concluded that he was not fit to plead a formal court setting. She said she had been able to obtain only fairly limited instructions from him by using two translators from his family who used a form of sign language and lip-reading but she could not obtain comprehensive instructions and had no expertise in determining fitness to plead.
5. Ms Kalwatman therefore asked the Court to reconsider the issue of fitness. I accepted the matter deserved further consideration.
6. At a short chambers hearing on 19 August, Ms Kalwatman reiterated the above points. Ms Ngwele submitted that if, as appeared to be the case, Mr Sawe understood what he was charged with and was able to plead guilty, then the guilty plea should stand and the sentencing should proceed.



7. I then ruled that Mr Sawe was, in my opinion, fit to plead, though not fit to stand trial. I said I would issue reasons in writing for reaching this conclusion. This judgment sets out those reasons.
8. Mr Sawe was, on conviction following his guilty plea, then sentenced to 12 months' imprisonment suspended for 12 months and ordered to do 40 hours' community work.

Procedural History

9. On 19 May 2015, the Public Solicitor Mr Kausiama applied under section 91 (1) of the Criminal Procedure Code ("CPC") for an order that the Court enquire into the question of whether Mr Sawe was "*of unsound mind and consequentially unfit to plead or incapable of making his defence*".
10. On the same day the Chief Justice made the following orders:-
 1. *The Court hereby orders to postpone further proceedings in this case pursuant to section 91 (2) of the Criminal Procedure Code.*
 2. *That the Court undertake an enquiry into the fitness of the accused to stand trial pursuant to section 91 (1) of the Criminal Procedure Code.*
 3. *That a medical report be prepared by a medical practitioner for the Court.*
 4. *That defendant be released from custody and not to commit any criminal offences.*



5. *The Criminal Case No. 67 of 2014 in PP v. Joe Sawe is recalled before Supreme Court at Isangel, Tanna on 17 August 2015.*
6. *The defendant to attend Court on the 17 of August 2015 at 9 am at Isangel, Tanna”.*

11. Section 91 of the Criminal Procedure Code provides as follows:-

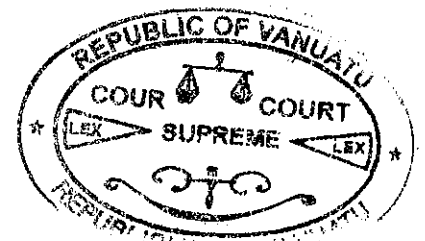
“ENQUIRY BY COURT AS TO INSANITY OF ACCUSED

91. (1) When at the commencement or in the course of a preliminary enquiry or a trial the court has reason to believe that the accused may be of unsound mind and consequently unfit to plead or incapable of making his defence, it shall enquire into the fact of such unsoundness, and shall for that purpose order him to be detained in a hospital for medical observation and report for any period not exceeding 1 month.

(2) If the court after enquiry under subsection (1) is of opinion that the accused is of unsound mind and consequently unfit to plead or incapable of making his defence, it shall postpone further proceedings in the case.

(3) The provisions of the Penal Code shall thereafter apply to the case.”

12. With respect, it appears that the Court ought not to have postponed further proceedings pursuant to section 91 (2) on 19 May because the obligation to do so under section 91 (2) arises only after the Court has undertaken the enquiry and formed the requisite opinion. However,



nothing turns on this and the case can simply be treated as having been adjourned from 19 May to 17 August for the enquiry to be undertaken.

13. Because of his extensive commitments Dr Obed Jimmy was not able to travel to Tanna to interview Mr Sawe until 11 August 2015. He then provided a mental health assessment report dated 12 August 2015 to the Public Solicitor which provided as follows:-

"12 August 2015

MENTAL HEALTH ASSESSMENT REPORT

TO: Public Solicitor

I. IDENTIFYING INFORMATION

Defendant: Joe Sawe
Sex: Male *DOB: - 1976*
Marital Status: MARRIED *Residence: Louanatom*
Origin: TANNA

II. REFERRAL INFORMATION

Mr. Jacob Kausiama, Public Solicitor, referred this case on the 6th of August 2015 requesting assessment of Mr. Sawe on three (3) issues: 1. Fitness to plead; 2. Defense of Insanity; 3. Diminished responsibility.

Evaluator: DR. OBED Jimmy (MBBS, PGDMH), Mental Health Registrar

Date of Evaluation: 11th August 2015

Date of Report: 12th August 2015

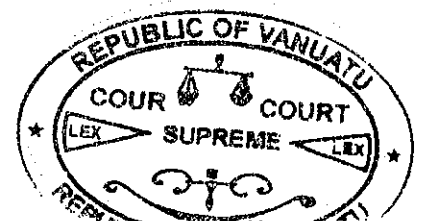
III. SOURCES OF INFORMATION

- Interview with Mr Sawe – 11 August 2015 (3 hrs)*
- Medical Record for Mr Sawe UN#14245, Lenakel Hospital, Tanna*
- Public Prosecutor vs Joe Sawe, Criminal Case No. 67 of 2014, Brief of Facts*

IV. RELEVANT HISTORY

Informant – Mr Sawe (Interpreter: Wife and RN Naumu)

Mr. Sawe is the youngest amongst 9 other siblings. He was well until the age of 15 years old when he sustained a head injury rendering him deaf and mute. He does not attend school and can barely write. He suffered cerebral malaria in 1987. Thee is no



other significant family history. He is married with one child that passed away after birth. Cause of death unknown. He is slow to understand and communicate due to his disability.

V. CURRENT CLINICAL PRESENTATION/BEHAVIORAL OBSERVATION

Mr Sawe is a physically fit and well young man. He was well kempt, maintaining eye contact throughout the interview. He was able to follow command, with some effort in trying to communicate with him. He is relevant with no psychotic features noted or reported. He has no formal thought disorder and his judgement is intact.

Clinical Diagnosis (based on DSM-IV)

- Axis I:** No psychotic and/or mood disorder
Axis II: No personality Disorder; No mental retardation
Axis III: sensorineural deafness – (Severe) complete hearing loss.
Axis IV: Problems related to interaction with legal system/crime
Axis V: Global Assessment of Functioning 99%

VI. FITNESS TO PLEAD

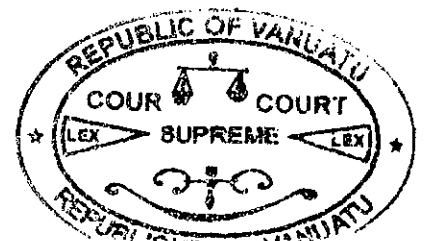
Mr. Sawe does not understand the general court proceedings. He does not understand the role of the judge and/or lawyers. However, if time and effort was was put into communicating effectively, he might learn and understand as he has some knowledge and understanding of a 'nakamal' setting and system of court in the nakamal. He says "sipos long nakamal, baemi save toktok, be mi no save wanem nao istap happen long court."

VII. DEFENSE OF INSANITY

Mr. Sawe understands and admits to his actions. He does not suffer from any mental impairment.

VIII. DIMINISHED RESPONSIBILITY

Mr. Sawe has problems with hearing and speaking which places a challenge to his communication and therefore learnng. He does



not appear mentally retarded. He is well able to make correct and sound judgement even though he is disabled.

XI. CONCLUSIONS AND RECOMMENDATIONS

Opinion regarding Fitness to Plead

In my opinion, Mr. Sawe is not fit to plead in a formal court setting as he does not fully understand court proceedings and the role of lawyers and judges. However if other alternatives are possible and/or available then that would benefit the client.

Opinion Regarding Defense of Insanity

Mr. Sawe is not insane.

Opinion Regarding Diminished Responsibility

Mr. Sawe's disability does not affect his social judgement. He is not mentally retarded. He has difficulty in communicating.

Recommendation

Mr. Sawe needs time and patience from anyone who wishes to communicate with him.

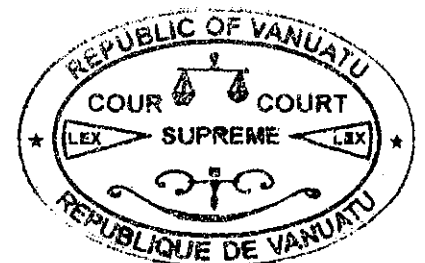
Dr. OBED Jimmy (MBBS, PGDMH)

Mental Health Registrar

Vila Central Hospital

PP v Raymond and overseas authorities

14. In *PP v. Raymond* [2014] VUSC 150, the Chief Justice was told by defence counsel that the accused was deaf and mute and an enquiry under section 91 (1) was undertaken. A medical report from Dr Richard Leona, Acting Medical Services Manager and ENT nurse said:- "*Mr John Raymond, 30 years old was brought into ENT clinic on the 19/08/2014 for check-up. He has a longstanding deafness since his childhood. He says he was sick when he was a little child. He has no recorded history of his illness.*"



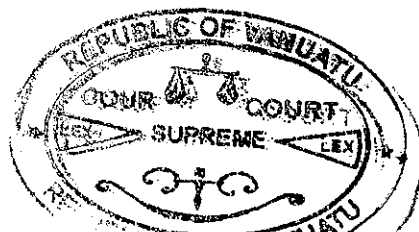
On examination: ears look normal, ear drum intact, nose - ok, tonsils - ok, pharynx - ok, tongue normal, voice - ok. Hearing test indicate a left dead ear and right severe to profound hearing loss.

A hearing aid would have assisted him during his childhood days in the development of spoken language and comprehending.

Mr John Raymond would only lip-read and nothing much can be done now according to his age. Deafness totally impedes the development of spoken language."

15. The Chief Justice considered a number of relevant authorities on the question of fitness to plead and stand trial.
16. The Chief Justice noted what Smith J had said in *R v. Presser* [1958] VR 45:

"[The accused needs] to understand what it is that he is charged with. He needs to be able to plead to the charge and to exercise his right of challenge. He needs to understand generally the nature of the proceedings, namely, that it is an enquiry as to whether he did what he is charged with. He needs to be able to follow the course of the proceedings so as to understand what is going on in the Court in a general sense, though he need not, of course, understand the purpose of all the various court formalities. He needs to be able to understand, I think, the substantial effect of any evidence that may be given against him: and he needs to be able to make his defence or answer to the charge. Where he has counsel, he needs to be able to do this through his counsel by giving any necessary instructions and by



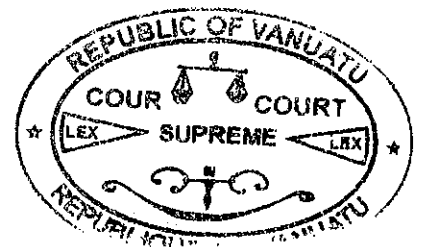
letting his counsel know what his version of the facts is and, if necessary, telling the Court what it is. He need not, of course, be conversant with court procedure and he need not have the mental capacity to make an able defence: but he must, I think, have sufficient capacity to be able to decide what defence he will rely on and to make his defence and to make his defence and his version of the facts known to the Court and to his counsel, if any."

17. These remarks have been approved by the High Court of Australia in *Kesavarajah v. The Queen* [1994] HCA 41: (1994) 181 CLR 230 and in *Eastman v. The Queen* [2000] HCA 29: (2000) 203 CLR 1.

18. The position was summarised in the former case as follows:

"In Reg. v. Presser, Smith J elaborated the minimum standards with which an accused must comply before he or she can be tried without unfairness or injustice. Those standards, which are based on the well-known explanation given by Alderson P to the jury in R v. Pritchard, require the ability:-

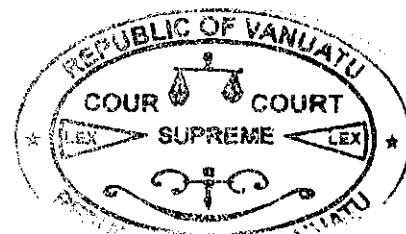
- (1) to understand the nature of the charge;*
- (2) to plead to the charge and to exercise the right of challenge;*
- (3) to understand the nature of the proceedings, namely, that it is an enquiry as to whether the accused committed the offence charged;*
- (4) to follow the course of the proceedings;*
- (5) to understand the substantial effect of any evidence that may be given in support of the prosecution; and*
- (6) to make a defence or answer the charge. (citations omitted)."*



19. The Chief Justice noted several authorities to the effect that an accused may not be fit to plead because of mental illness or physical incapacity. His Lordship noted that at least since 1836 it had been settled that a person who is a deaf mute may, depending the degree of disability, be unfit to plead: *R v. Pritchard* [1836] ER 540.
20. In *R v. Pritchard* and in *R v. Dyson* (1831) 7 C&P 305 (n) a deaf mute who was unfit to plead was held to be “insane” within the meaning of the Criminal Lunatics Act 1800 (UK). In *Kesavarajah* the High Court of Australia explained that in this context the word “insane” as used in section 393 of the Crimes Act 1958 (Vic) is not used in the colloquial sense but has an extended meaning which includes an accused person who does not have sufficient understanding to comprehend the nature of the trial so as to make a proper defence to the charge.
21. Having considered the medical report and noting that there is no professional sign language interpreter available in Vanuatu, the Chief Justice, applying the *Kesavarajah* test, formed the opinion that Mr Raymond was unfit to stand trial because of his physical inability to comprehend the nature of the trial so as to make a proper defence to the charge.
22. Section 91 (3) directs the Court to the provisions of the Penal Code following the reaching of such an opinion. It is section 13 of the Penal Code which is relevant. This provides:-

“13. Unfitness to plead

If any person charged with a criminal offence is by reason of insanity or other mental disorder unfit to plead or to stand trial,

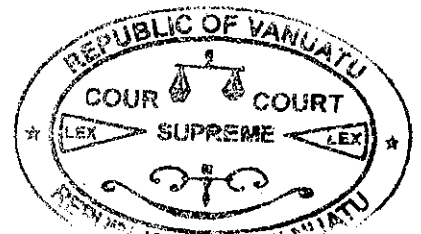


the court shall make an order placing him under guardianship in a manner to be prescribed in the order. The condition of the accused shall be established by a medical report ordered by the court."

23. The Chief Justice noted that the words "*other mental disorder*" in section 13 must also be seen to have the extended meaning applicable to someone in the position of Mr Raymond. The Public Prosecutor did not oppose the Court finding that Mr Raymond was unfit to plead or stand trial because of his physical inability.

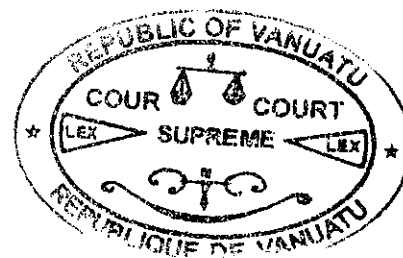
Is Mr Sawe "of unsound mind and consequentially unfit to plead or incapable of making his defence" in terms of section 91 (2) of the CPC?

24. Section 91(2) of the CPC envisages the Court reaching two separate opinions. The first is whether the accused is "*of unsound mind*" and the second is whether, *as a consequence of* such unsoundness, he is either unfit to plead or incapable of making his defence. Clearly a causative link is required.
25. I note it is the Court which must hold these opinions, not a doctor providing a report, though no doubt any opinion expressed on the point by a doctor will carry considerable persuasive weight. In this case I unreservedly accept Dr Obed's findings and opinions. I am not qualified to differ from them.
26. On the face of it, Dr Obed's report does not disclose any unsoundness of mind whatsoever on the part of Mr Sawe. What it discloses are merely communication difficulties leading to his not *fully* understanding Court



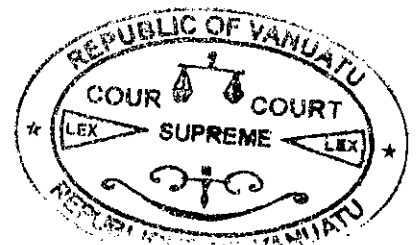
proceedings. Dr Obed concludes that Mr Sawe does not appear to be mentally retarded, and finds he is well able to make correct and sound judgments despite his communication disability. The latter does not affect his social judgment. Importantly, he is also recorded as understanding and admitting to his actions which have led to the charge before the Court. He is recorded as not suffering from any mental impairment and as having no formal thought disorder and his judgment is said to be intact.

27. The key question therefore is: do the difficulties Mr Sawe has in communicating and therefore in understanding the nature of the Court proceedings render him of “unsound mind”? That phrase needs to be considered in the context of an accused person facing a serious criminal charge in the Supreme Court.
28. Having considered the authorities which the Chief Justice helpfully considered in *PP v. Raymond*, and respectfully adopting the Chief Justice’s approach, I conclude that Mr Sawe , despite literally having no unsoundness of mind whatsoever, is “*of unsound mind*” in its extended meaning in this context.
29. In terms of the six criteria mentioned in *Kesavarajah* [see paragraph 18 above], while I consider Mr Sawe is capable of understanding the nature of the charge, of pleading to it and of understanding that the purpose of the Court is to enquire into whether he committed the offence, I am not satisfied that he could follow the course of the proceedings at a trial, understand the evidence and make his defence or answer the charge. This is however solely through communication difficulties and not in any way because of mental disability or lack of intelligence. As Dr.

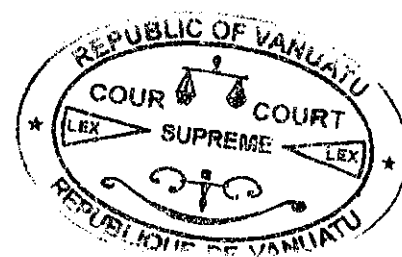


Obed notes, Mr Sawe is "*well able to make correct and sound judgement even though he is disabled*".

30. The second question of which the Court must be satisfied under section 91 (2) before it can be required to postpone further proceedings in the case is whether consequentially i.e. **as a result of** the unsoundness of mind he is *either* unfit to plead or incapable of making his defence.
31. Given the limited nature of Mr Sawe's "*unsoundness of mind*", I am clearly of the view that Mr Sawe is not as a result of that unfit to plead. I think there is a clear distinction to be made between an inability to plead and an inability to make his defence if he pleads not guilty. In my opinion, based on everything I have read and on the submissions of counsel, Mr Sawe's decision earlier this week to plead guilty is perfectly safely relied on and not in any way unreliable as a result of any "*unsoundness of mind*" in the extended meaning of that phrase.
32. I am reinforced in that view by the details Ms Kalwatman was able to provide in the chambers discussion on Monday 17 August as to the facts from Mr Sawe's perspective. She said that he had a clear recollection of the incident but thought he was being asked by his older brother to go to the crime scene simply to drink kava. In the brief facts originally prepared by the Public Prosecutor it was said that Mr Sawe had a knife and that he cut the victim's nose with it. Mr Sawe adamantly denied this and told Ms Kalwatman that all he did was to hold the victim's shoulders while the other two assailants assaulted him. He accepted that what he had done was wrong and that in this way he had aided and abetted their serious assault on the victim.

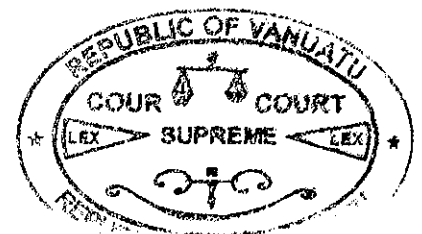


33. In these circumstances, there is no reason to think it unfair that Mr Sawe's guilty plea should stand. He knows what he did, he accepts that it amounts to aiding and abetting the assault by others and he has been able, with the assistance of family members, to convey instructions to Ms Kalwatman to an extent that allowed her to relay those to the Court and to propose an amendment to the charge and to confirm his willingness to plead guilty to it. This was subsequently confirmed by his guilty plea in Court.
34. The formality of the Court sitting may be, and I accept it is, unfamiliar to Mr Sawe but he was previously involved along with the other offenders in a custom reconciliation ceremony with the victim so he has already acknowledged his guilt and responsibility for what occurred in the traditional Vanuatu way. All that is happening this week is that the same thing is being done in the more formal setting of the Court.
35. If Mr Sawe had pleaded not guilty then I would equally have been satisfied that he was in a position to reach an informed view as to that plea.
36. The problem that arises is that section 91 (2) provides:-
"The accused is of unsound mind and consequentially unfit to plead or incapable of making his defence...."
37. These options are clearly disjunctive so that on a literal reading the Court is required to postpone further proceedings in the case if *either* the unsoundness of mind causes unfitness to plead *or* an incapability of making a defence. Here, while I am not satisfied that Mr Sawe's



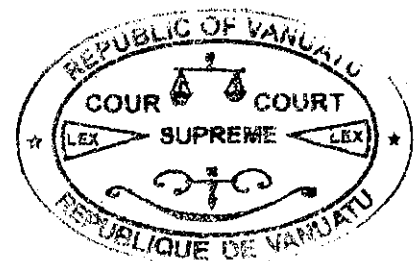
unsoundness of mind causes him to be unfit to plead, I am satisfied that it makes him incapable of making his defence.

38. In short, if he pleaded not guilty and a trial had been necessary, then because of the communication difficulties he has, I would not have considered a fair trial to have been possible. In the course of a trial there are many occasions when comments and instructions need to be given by the defendant to his counsel. I am sure based on what Dr. Obed said, and indeed based on what Ms Kalwatman has said, that he would simply not be in a position to do this because he would not understand the evidence which might give rise to a reason for him to give such comments or instructions. It would also be very difficult if not impossible for him to give evidence himself which of course he has a right to do, though having no obligation to do so.
39. I have come to the view however that because there is in my view a material distinction, and a relevant one in the context of Mr Sawe's particular disability, between fitness to plead and fitness to conduct a trial, that the criteria in section 91 (2) should not be read literally as disjunctive requirements. In the present case that would result in a nonsense and in a hindrance of rather than an advance of the interests of justice.
40. This provision is intended to protect a defendant against unfairness and the risk of injustice in the criminal process. But other interests which the Court must be keep in mind are those of the victim and the wider community. I am satisfied there is no risk of unfairness to the defendant in relation to his guilty plea and consequent sentencing. I do not see why the interests of the victim and the community in holding accountable a



defendant, who on an informed basis admits his guilt, and in his being sentenced accordingly, should be thwarted just because if he had denied responsibility and pleaded not guilty a fair trial would not have been possible.

41. I note too that if the proceedings are postponed pursuant to section 91 (2) section 13 of the Penal Code contains a similar provision with slightly different wording. The same aberrant result would follow if section 13 is read literally as including disjunctive requirements. If a defendant is by reason of "*other mental disorder*" (which Mr Sawe's disability must be held to come within) unfit to plead *or* to stand trial then the Court is *required* to make an order placing him under guardianship in the manner prescribed in the order.
42. The result would be that despite Mr Sawe being perfectly fit to plead guilty, I could not accept such a plea, enter a conviction and sentence him but would be required to place him under guardianship. That nonsensical outcome cannot have been intended by Parliament in section 13 any more than it intended in enacting section 91(2) to require postponement of proceedings where a defendant is fit to plead, though not fit to stand trial.
43. For these reasons I was satisfied that accepting Mr Sawe's guilty plea, convicting him and sentencing him was in accordance with the CPC when purposively interpreted and that it did not in any way cause him unfairness or injustice . Accordingly I ruled that the guilty plea entered on 17 August would stand and that sentencing would proceed on 19 August.



BY THE COURT

John M. Williams

