

SUPREME COURT OF QUEENSLAND

CITATION: *Attorney-General (Qld) v Allen* [2017] QSC 58

PARTIES: **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND**
(applicant)
v
ROBERT KELLY ALLEN
(respondent)

FILE NO: BS11156 of 2016

DIVISION: Trial Division

PROCEEDING: Application for a Division 3 order

DELIVERED ON: 10 April 2017 (ex tempore)

DELIVERED AT: Brisbane

HEARING DATE: 10 April 2017

JUDGE: Mullins J

ORDER: **As per the draft order initialled by Mullins J and placed with the file.**

CATCHWORDS: CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – DANGEROUS SEXUAL OFFENDER – GENERALLY – where respondent serving sentence of imprisonment for the offence of carnal knowledge of a child under the age of 16 years – where applicant seeks orders pursuant to s 13 of *Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)* – where the respondent has a history of drug and alcohol abuse – where respondent diagnosed with antisocial personality disorder and psychopathic personality disorder – where respondent has not completed a sexual offender treatment program whilst in prison – whether there is an unacceptable risk to the community that the respondent will commit a serious sexual offence – where respondent is willing to participate in the High Intensity Sexual Offender Program which is only delivered in prison – where an order for continuing detention made

Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s 13
Attorney-General for the State of Queensland v Sutherland [2006] QSC 268, considered

COUNSEL: J B Rolls for the applicant
E D Whitton for the respondent

SOLICITORS: G R Cooper, Crown Solicitor for the applicant
Legal Aid Queensland for the respondent

HER HONOUR: This is the final hearing of an application made under the Dangerous Prisoners (Sexual Offenders) Act 2003 (the Act) for a division 3 order against the respondent, Mr Allen. Mr Allen is 31 years old. He is currently serving a sentence of two years six months imprisonment for one count of carnal knowledge of a child under 16 years that was committed on or about 18 October 2014. He is also serving concurrent sentences for other offending that was dealt with in the District Court on 10 July 2015 at the same time of Mr Allen's guilty plea to the carnal knowledge count. Mr Allen's fulltime discharge date is 24 April 2017.

The summary of Mr Allen's formative years in the psychiatric reports aptly describes his having a prejudicial upbringing. For the purpose of providing reasons for my decision today, it is unnecessary to outline that dysfunction in detail, other than to note that it was reflected in a criminal history that started from a young age, and relevantly he commenced to be dealt with as an adult in the Magistrates Court from October 2003.

It is also relevant to note that from a young age Mr Allen commenced using illicit substances, and the use of those substances appears to have been a relevant factor in his criminal history, and his use of such substances is treated as a relevant factor by the psychiatrists in connection with risk of sexual offending.

Although the current period of imprisonment to which Mr Allen is subject is much shorter than the terms of imprisonment that are often seen in connection with applications under the Act, it is Mr Allen's prior offending that puts the offending, that was the subject of his current sentence for unlawful carnal knowledge, into context, and highlights the risks associated with his release from prison.

I will start with the entry in Mr Allen's criminal history in the Bundaberg District Court on 9 February 2012. He pleaded guilty on that occasion to four charges of carnal knowledge of a child under 16 years, committed between 26 January 2011 and 23 February 2011. He also pleaded guilty to another count of carnal knowledge of a child under 16 years committed between 26 January 2011 and 23 February 2011.

On that occasion he was sentenced to an effective sentence of two years imprisonment, to be suspended for three years, after serving 352 days in pre-sentence custody which he had already served from the time that he had gone into custody on 23 February 2011 until the date of the sentence. In relation to the fifth count of carnal knowledge, he was given probation for two years. He was also dealt with for other offences on that occasion that were covered by the same probation order.

The circumstances of the offending were that when he was 24 years old he had sexual intercourse with a runaway girl who was 14 years old. It was consensual in

that the sentencing judge recorded that there was no coercion. As a result of Mr Allen's conviction for these offences, the Bundaberg Magistrates Court on 14 November 2012 made a prohibition order in relation to Mr Allen, pursuant to the Child Protection (Offender Reporting) Act 2004 which prohibited him from having any unsupervised contact with a female aged under 16 years. The order was to remain in place for five years.

Within approximately three months of Mr Allen's release from custody for the offences for which he had been sentenced on 9 February 2012, he offended again by forming a relationship with a 15 year old girl who was in the custody and care of the Department of Child Safety. He breached the suspended sentence and the probation order imposed on 9 February 2012. Again, the relationship appears to have been consensual. Mr Allen was returned to custody, and he remained in custody until he was dealt with in the District Court at Bundaberg on 6 September 2012

On that occasion the balance of the suspended sentence that had been imposed earlier that year was activated. He was re-sentenced for the original offences in respect of which the probation order had been granted in February 2012. He was re-sentenced to 378 days in prison. For breaches of the probation order he was sentenced to three months imprisonment that was also concurrent.

For the breach of the prohibition order he was dealt with in the Magistrates Court at Bundaberg, where he was sentenced to nine months imprisonment for some of the failure to comply with prohibition order offences, and 18 months imprisonment for the failure to comply with other aspects of the prohibition order.

Whilst in prison serving the current sentence, Mr Allen has undertaken the Pathways High Intensity Substance Abuse Program that is conducted over a period of almost six months, and he completed that on 13 June 2016. He undertook the Getting Started Preparatory Program which is the mandatory course required before any sexual offender treatment program is undertaken. That program was commenced on 11 January 2017, and completed on 15 March 2017.

For the purpose of the preliminary hearing in relation to this application, Mr Allen was examined by a psychiatrist, Dr Grant, on 11 March 2016. Dr Grant diagnosed Mr Allen with an anti-social personality disorder with additional narcissistic traits. Using the psychopathy checklist, Dr Grant considered that Mr Allen would satisfy the diagnostic criteria for a psychopathic personality disorder. Dr Grant noted that Mr Allen's history was of heavy alcohol and drug abuse with periods of probable dependence, although he was currently in remission in custody.

On the basis of the childhood history that was related by Mr Allen, Dr Grant noted a possible childhood diagnosis of attention deficit hyperactivity disorder, or alternatively a conduct disorder and noted that it was apparently treated with medication for a period during Mr Allen's childhood. Dr Grant undertook the application of the formal risk assessment instruments, and summarised his conclusion that they indicate a high risk of future sexual reoffending, and noted that those instruments are heavily weighted in terms of risk by the presence of very prominent psychopathic personality traits.

Dr Grant noted that there was a lack of any definite diagnosis of a sexual paraphilia, and noted the previous sub-cultural context in which the offending by Mr Allen had occurred, plus the strong influence of alcohol and drug abuse, and intoxication on increasing risk. Dr Grant expressed the opinion that future risk for sexual reoffending by Mr Allen is moderate, but could increase to high in the context of alcohol and drug abuse, and mixing with a dysfunctional, dis-social network where sexual promiscuity was accepted, and boundaries in regard to precise ages of females may not be clearly delineated.

Dr Grant favoured the completion by Mr Allen of a sexual offender treatment program prior to release from prison, describing that as ideal, but noted that given the date of Mr Allen's fulltime release, completion of such a program may not be possible.

Dr Grant was asked to provide a supplementary report for the purpose of the preliminary hearing of this application, and explained his recommendation that Mr Allen would be suitable for undertaking the Medium Intensity Sexual Offender Program (MISOP) expressing the view that the MISOP would be sufficient to address Mr Allen's sexual offending needs, and that the program could be conducted then either in custody, or in the community.

Psychiatrist Dr Sundin interviewed Mr Allen on 19 January 2017. Her diagnosis of Mr Allen is similar to that made by Dr Grant. In Dr Sundin's risk assessment she stated:

I draw the Court's attention to his history of behaving in a cunning, and a manipulative fashion. His lack of remorse and guilt, his lack of empathy, his callous attitude, his history of parasitic lifestyle, his history of poor behavioural controls, prominent promiscuous sexual behaviour, his history of early behavioural problems, his irresponsibility and failure to accept responsibility for his own actions, and his history of reoffending whilst on community supervision orders.

Dr Sundin concluded that overall the risk of sexual offending in the future, in her assessment for Mr Allen, was moderate to high. In Dr Sundin's initial report, Dr Sundin recommended that Mr Allen be considered for a supervision order, noting that Mr Allen was an individual who does represent an unacceptable risk to the community.

Dr Sundin was asked to provide a supplementary report. She did that after being advised that Mr Allen had completed the Getting Started Preparatory Program, and was informed that Mr Allen had been recommended for participation in the High Intensity Sexual Offender Program (HISOP). In the supplementary report Dr Sundin recommends to the Court that Mr Allen be detained, so that he can complete the HISOP, noting:

Successful participation, and completion of the program will lower the risk he poses to the community, and will better inform future supervision conditions.

Another psychiatrist Dr Aboud interviewed Mr Allen for some two and one-half hours on 17 February 2017. His diagnosis is similar to the other psychiatrists' diagnoses. Dr Aboud is unclear whether Mr Allen is sexually deviant. Dr Aboud notes:

Both of his victims were under-age girls, but physically they apparently were post-pubescent. He consistently denies any paraphiliac drive. On balance I suspect that he does not harbour paedophile inclination, and his offending reflects high poor judgment, impulsivity, possible intoxication, high sexual urge, and the highly self-serving tendencies associated with psychopathy.

Dr Aboud considers that Mr Allen's overall risk, if released without any supervision, monitoring or support, would be moderate to high in respect of sexual violence. Dr Aboud expresses the opinion that Mr Allen's risk of sexual reoffending would be reduced to below moderate in the context of a supervision order, and notes the importance of Mr Allen engaging with a psychologist, if he were released to the community, to assist him in remaining motivated to abstain from illicit drugs and alcohol, and to assist him in remaining motivated to abide by the conditions of the order.

It is also Dr Aboud's view that Mr Allen would benefit from undergoing group sexual offender treatment, and that it would be preferable for such treatment to occur prior to Mr Allen's release from prison, partly on account of the availability of such treatment in prison, and also because, in Dr Aboud's view, there remains some uncertainty as to whether Mr Allen harbours any sexual deviance.

Dr Aboud also notes that when Mr Allen was participating in the preparatory program he did struggle with the containment of his emotions, so it would be sensible for such challenging psychological work, that is required in a group sexual offender treatment program, to occur in a safe, and contained environment. Dr Aboud also suggests that in the future some consideration be given to the benefits of addressing Mr Allen's trauma history from his developing years as part of his psychological therapy with his psychologist.

On hearing an application that is made under section 13 of the Act, the Court may decide that it is satisfied that a respondent in Mr Allen's position is a serious danger to the community in the absence of the division 3 order, only if it is satisfied by acceptable cogent evidence, and to a high degree of probability that the evidence is of sufficient weight to justify the decision. See section 13(3) of the Act.

The Court is also required to have regard to the matters prescribed in section 13(4) of the Act in deciding whether the respondent is a serious danger to the community. The material that was filed on behalf of the applicant in support of this application has addressed the matters that are set out in section 13(4) of the Act. The evidence of the psychiatrists is acceptable and cogent, and satisfies me to the high degree of probability that is required under the Act, that Mr Allen's moderate to high risk of reoffending in respect of sexual violence is an unacceptable risk as contemplated by section 13(2) of the Act.

The issue then is whether the applicant, who seeks the detention order, has satisfied the Court at this time that the community cannot be adequately protected by a supervision order made in respect of Mr Allen. See the discussion by Justice Philip McMurdo in *Attorney-General for the State of Queensland v Sutherland* [2006] QSC 268 at [28] to [30].

Mr Rolls, of counsel, on behalf of the applicant, submits that even though Mr Allen completed the Getting Started Preparatory Program, he has not undertaken a formal sex offender treatment program, and therefore should be characterised as an untreated sexual offender. The submission is made that the diagnosed conditions of anti-social personality disorder with psychopathy render treatment and supervision more difficult, and Mr Allen's breaches, history of breaches of bail, probation and parole suggest that his release untreated is something that is doomed to fail.

It is therefore submitted that every endeavour ought to be made to lower the risk of sexual reoffending, and the only means by which this can be done practically, in the present circumstances, is for Mr Allen to undertake HISOP which will better inform the supervisors in the future of Mr Allen under any supervision order, and those who will be treating him. Such a program is not offered in the community.

It is to Mr Allen's credit that he has made some progress whilst in custody, as Mr Whitton, of counsel, who appeared on behalf of Mr Allen, made it clear that it was Mr Allen's instructions, after having the implications of them explained to him, that he would not oppose the making of an order for his continuing detention to facilitate his undertaking HISOP in custody. It is also to Mr Allen's credit that he conceded that the evidence of the psychiatrists was sufficient to support the making of a division 3 order. It is not irrelevant that Mr Allen does not oppose an order for continuing detention, although the question of what division 3 order is made remains one for the Court.

The applicant's position in seeking a detention order is supported by the diagnosis of anti-social personality disorder, and psychopathy, and the inability of Mr Allen between 2012 and 2014 to comply with the myriad of Court orders to which he was subject, including the prohibition order that had been made specifically for the purpose of keeping him away from girls under 16 years of age.

In all of the circumstances I am not satisfied that at the present time that the adequate protection of the community can be reasonably, and practicably managed by a supervision order. The applicant has discharged the onus of satisfying the Court that a continuing detention order should be made. I therefore make an order in terms of the draft, initialled by me, and placed with the file.

.
