SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General (Qld) v Brown* [2017] QSC 264
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **TROY JIMMY CHARLES BROWN** (respondent)
FILE NO/S:	SC No 422 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	15 November 2017
DELIVERED AT:	Brisbane
HEARING DATE:	6 November 2017
JUDGE:	Davis J
ORDER:	**1. The supervision order made on 28 April 2014 be amended by addition of condition 27A after the current condition 27, as follows:** **"27A Attend upon and submit to examination and assessment by a psychiatrist as directed by an authorised corrective services officer for investigation as to the appropriateness of the respondent being prescribed anti-androgen medication."** **2. The respondent be released from custody, pursuant to s 22(2) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 and continue to be subject to the supervision order made on 28 April 2014 as amended by these orders.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – DANGEROUS SEXUAL OFFENDER – GENERALLY – where a supervision order was made with respect to the respondent under Division 3 of Part 2 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) – where it was alleged that

the respondent had contravened a requirement of the supervision order – where a warrant was issued for the arrest of the respondent pursuant to the Act and the respondent was detained in custody – where the applicant sought orders with respect to the respondent under s 22 of the Act – where the contravention was admitted by the respondent – where the applicant had previously contravened the supervision order but not committed any further serious sexual offences – whether the adequate protection of the community could, despite the contravention of the order, be ensured by the existing supervision order

Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s 13, s 20, s 22, s 43AA

Attorney-General (Qld) v Brown (Unreported, Supreme Court of Queensland, No 422 of 2009, Daubney J, 22 June 2011)
Attorney-General (Qld) v Brown (Unreported, Supreme Court of Queensland, No 422 of 2009, Daubney J, 27 January 2015).
Attorney-General (Qld) v Brown (Unreported, Supreme Court of Queensland, No 422 of 2009, Henry J, 12 November 2012).
Attorney-General (Qld) v Brown (Unreported, Supreme Court of Queensland, No 422 of 2009, Martin J, 16 June 2009)
Attorney-General (Qld) v Brown [2014] QSC 84 (28 April 2014)
Attorney-General (Qld) v Francis [2012] QSC 275
Attorney-General (Qld) v Sands [2016] QSC 225
Kynuna v Attorney-General (Qld) [2016] QCA 172
Turnbull v Attorney-General (Qld) [2015] QCA 54

COUNSEL: Mr J Rolls for the applicant
Mr E Whitton for the respondent

SOLICITORS: Crown Law for the applicant
Legal Aid Queensland for the respondent

[1] Troy Jimmy Charles Brown (the respondent), who was born on 8 September 1980 and is therefore now 37 years of age, was made the subject of a continuing detention order under s 13 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) ('the Act') on 16 June 2009 by order of Justice Martin ('the continuing detention order').[1] The

[1] (Unreported, Supreme Court of Queensland, No 422 of 2009, Martin J, 16 June 2009).

continuing detention order was affirmed by Justice Daubney on 22 June 2011[2] and by Justice Henry on 12 November 2012.[3] Justice Ann Lyons, on 28 April 2014, ordered the respondent's release from custody, subject to a supervision order ('the supervision order').[4] The terms of the supervision order relevantly required the respondent's abstinence from the use of drugs and alcohol.

[2] Justice Martin, when making the continuing detention order on 16 June 2009 commented that, "… the respondent's problems may have developed in part from serious dependence problems he had with respect to alcohol, cannabis and petrol."[5] Justice Daubney also referred to the respondent's alcohol and drug dependence when affirming the continuing detention order in 2011,[6] as did Justice Henry in affirming the continuing detention order in 2012.[7]

[3] Justice Ann Lyons, when making the supervision order on 28 April 2014 commented, "It is important that Mr Brown understands that he must not take any substances or use any alcohol and that the concern about his relapse is in relation to the resumption of his use of substances and alcohol. It is clear that if those factors can be addressed then the risk to the community can be managed to an appropriate degree."[8]

[4] In October 2014, the respondent was returned to custody pursuant to s 20 of the Act upon the allegation that he had breached the supervision order by consuming alcohol and illicit drugs. That breach was found by Justice Daubney to have been proven and, on 27 January 2015, his Honour ordered the respondent's release from custody upon the terms of the supervision order.[9]

[5] In July 2015, the respondent was again returned to custody for allegedly breaching the supervision order. This time it was alleged that he had failed to disclose upon request the names of persons with whom he associated. He had also allegedly breached the prohibition against visiting parks without permission. It was also alleged that he had again consumed alcohol and illicit drugs.

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2 (Unreported, Supreme Court of Queensland, No 422 of 2009, Daubney J, 22 June 2011).

3 (Unreported, Supreme Court of Queensland, No 422 of 2009, Henry J, 12 November 2012).

4 *Attorney-General (Qld) v Brown* [2014] QSC 84 (28 April 2014).

5 (Unreported, Supreme Court of Queensland, No 422 of 2009, Martin J, 16 June 2009).

6 (Unreported, Supreme Court of Queensland, No 422 of 2009, Daubney J, 22 June 2011).

7 (Unreported, Supreme Court of Queensland, No 422 of 2009, Henry J, 12 November 2012).

8 [2014] QSC 84 at [18].

9 (Unreported, Supreme Court of Queensland, No 422 of 2009, Daubney J, 27 January 2015).

[6] Justice Applegarth, on 2 December 2015, found the contraventions proven and ordered that the respondent be released from custody on the terms of the supervision order.[10]

[7] The respondent was in the community on the supervision order from December 2015 until August 2017. That period was not completely blemish free. He returned a positive urine test for synthetic cannabis on 6 December 2016 but no action was taken.

[8] On 10 April 2017, a urine test revealed that the respondent had consumed cannabis. The results of that test, a presumptive one, were later confirmed. A further urine test was performed on 24 April 2017 and another on 29 May 2017. Both these tests proved positive for traces of cannabis. The respondent was charged under s 43AA of the Act with contravening the supervision order. That contravention related to the urine sample taken on 10 April 2017. There may be criminal proceedings pending for breaches relating to the other two occasions the respondent tested positive for cannabis but the evidence is not clear about that.

[9] On 8 June 2017, a warrant was issued for the arrest of the respondent pursuant to s 20 of the Act and on 3 August 2017, he was brought before the court and detained pursuant to s 22.

[10] As is properly the practice of the Attorney-General, an application was filed seeking determination of the breach proceedings commenced by the issue of the warrant under s 20. As to the appropriateness of that procedure, see *Attorney-General (Qld) v Sands*.[11]

[11] Section 22 empowers the court to rescind the supervision order and make a continuing detention order or release the prisoner on the existing supervision order, amended as necessary. The jurisdiction to make such orders arises, relevantly here, where the prisoner has contravened the requirements of the supervision order.

[12] On behalf of the respondent, the contravention of the supervision order was admitted.

[13] It is now well established that s 22 of the Act operates so that the onus falls upon the prisoner to prove on the balance of probabilities that if he is released on a supervision order, the supervision order will ensure adequate protection of the community. The term "the adequate protection of the community" has the same meaning as in s 13. In other words, the respondent must prove that the supervision order will ensure adequate protection of the community by removing unacceptable risk that the respondent will commit a serious sexual offence.[12]

[14] The respondent's criminal history dates back to events in 1994, when the respondent was 14 years of age. They were offences of breaking and entering a dwelling house with

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[10] (Unreported, Supreme Court of Queensland, No 422 of 2009, Applegarth J, 2 December 2015).

[11] [2016] QSC 225.

[12] *Kynuna v Attorney-General (Qld)* [2016] QCA 172 at [60]; see also *Turnbull v Attorney-General (Qld)* [2015] QCA 54 at [36].

intent to commit an indictable offence. There were also other offences of dishonesty. On 3 October 1995, when he was 15, the respondent was convicted of rape which he committed in July 1995, a short time before his 15th birthday. On that occasion, the respondent entered the apartment of an 86 year old woman who was resident in a retirement village. He attacked and raped her. The respondent was detained for a period of 5 years.

[15] Then, on 1 November 1999, the respondent was convicted of indecent assault that occurred on 16 July 1995 and therefore pre-dated the offence of rape for which he was convicted on 3 October 1995. There then followed fairly regular appearances in Magistrates Courts in far north Queensland. These appearances largely concerned offences of dishonesty and street offences.

[16] On 6 February 2003, the respondent was convicted of rape and robbery with actual violence. Those offences had occurred on 27 June 2002. He was sentenced to terms of imprisonment of seven years and four years respectively. It was that offence of rape which led ultimately to an order being made under Div 3 of the Act.

[17] The offences committed in 2002 were very serious. The 26 year old female victim left a Cairns nightclub at about 5 am in the morning and entered a public toilet cubicle and closed the door. The respondent forcibly opened the door, then pushed the complainant against the cubicle wall, punched her and digitally penetrated her vagina. On the occasion of the rape, the respondent was intoxicated by alcohol, cannabis and amphetamines. The 2002 rape offence was the last sexual offence committed by the respondent.

[18] For the purposes of this application the respondent was examined by two psychiatrists: Dr Aboud and Dr Sundin. Both doctors conducted a mental state examination, both used actuarial tools and guidelines.

[19] Dr Sundin, in her report, diagnosed the respondent as follows:

> "• Mixed Personality Disorder; borderline and antisocial personality traits;
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> • Alcohol Use Disorder, in sustained remission;
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> • Cannabis Use Disorder, several recent breaches whilst in community; and
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> • Inhalant Use Disorder, in sustained remission"

[20] Dr Sundin also noted that the respondent's "IQ appeared to be extremely low."

[21] Dr Aboud in his report diagnosed the respondent as follows:

> "Mr Brown has a number of established psychiatric conditions, including alcohol abuse/dependence, cannabis abuse/dependence, other substance abuse (solvents opiates possible stimulants), mixed personality disorder (with predominantly antisocial traits, and in my view possible paranoid and borderline traits), psychopathic features and borderline mental retardation."

[22] Both doctors administered the Static-99R instrument and concluded with a score of eight, placing the respondent in the group regarded as at high risk of reoffending. Other tests administered by both doctors confirmed that risk.

[23] It can be seen then that the two doctors agree in substance upon the diagnosis of the respondent and his level of risk. Despite agreement on many matters, the doctors have very different views on the prospect of the respondent being successfully managed in the community by a supervision order. Dr Aboud, in his report, opined as follows:

> "In my opinion, at the time when he was returned to custody in June 2017, his risk of sexual reoffending was escalating. I take into account his argumentative disposition; lack of respect and anger towards Correctional staff; deceptive behaviour; sexual activity with a woman in December 2016 and possible other associations with women; relapse back into repeated substance abuse in April and May 2017. It is my view that Mr Brown's current overall unmodified risk would be high in respect of both sexual and violent reoffending.
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> I believe that it is not currently feasible to release him back to the community, subject to the same circumstances as before, and to not consider his risk to be high and unmanageable. He has clearly demonstrated that he has struggled to work agreeably and safely within the provisions of the supervision order. I recommend that he be engaged in motivational work, by a psychologist, to focus on the importance of abiding by conditions of a supervision order and specifically the importance of: substance abstinence; open disclosure regarding any female association; the need to trust correctional and therapy staff and to not verbally abuse them. I believe this psychological work should be conducted in prison, and that a satisfactory report by the treating psychologist be achieved prior to consideration of release to the community.
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> When the above motivational work has been successfully completed, I would consider his risk of reoffending to be reduced to below moderate, and probably manageable, in the context of stringent monitoring and supervision in the community …"

[24] Dr Sundin on the other hand, in her report, expressed this view:

> "Taking all the factors in Mr Brown's history, I consider that he represents an unsatisfactory, unmodified risk to the community. The supervision order is serving its purpose in moderating Mr Brown's risk for sexual recidivism from high to moderate high and identifying potential increased risk times when he has succumbed to intoxicants.
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> Whilst he continues to be a quite difficult supervision candidate for QCS staff, the supervision order is in my opinion serving its purpose in moderating the risk that Mr Brown poses to the community. I do not consider that he requires ongoing detention."

[25] Dr Aboud was cross-examined on the topic of conditions that could be placed in a supervision order to lessen the respondent's risk to the community. Dr Aboud made a concession of sorts that there were conditions which could be applied which would adequately protect the community. That concession was relied upon in submissions made on behalf the respondent.

[26] However, in truth the so called concession does not aid the respondent and indeed highlights Dr Aboud's concerns. The exchange was as follows:

> "So you directly relate them or the breaches to a likelihood of reoffending rather than the likelihood of just committing further breaches?---Yes. I think that it might be possible to manage his dynamic risk in the community on a supervision order if he were to be on a very close curfew, to have pretty much no freedom whatsoever, to not be given the opportunity to find cannabis, he claims that he's picked up cannabis by way of cigarette butts, but he must be procuring his cannabis somehow. So perhaps if he was on the most – the highest level of restriction that an individual could be on, then he could be managed in the community. I'm still concerned that he was on that level of highly restricted management when he came back positive again for cannabis and he was – so I don't think I can really change my mind about how I'm conceptualising his risk, but I think that the community could be made safe if he was on a very stringent curfew and I guess, for a very long time."[13]

[27] And then later:

> "But the sort of supervision, strict supervision which you describe, would be adequate to protect the community in those circumstances?---As in a stringent - - -
>
> From the commission of?--- - - - a stringent curfew.
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> Yes?---And then a record of his movements.
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> Yes?---Again, he would need to abide by those things, but yes."[14]

[28] Dr Aboud's concession in my view went no further than an observation that compliance with supervision would lower risk. The real issue in Dr Aboud's mind though was whether the respondent would in fact comply. That concern about potential non-compliance with any supervision order is what justifies, in Dr Aboud's mind, his opinion that motivational therapy should be undertaken before the respondent is released.

[29] Dr Aboud's opinion was that certain behaviours were indicative of a heightening of risk. These particular behaviours were:

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[13] Transcript 1 1-21 ll 1-12.

[14] Transcript 1-21 ll 35-44.

1. Hostility towards Correctional staff.

2. An incident where the respondent apparently had sexual intercourse with a woman in a stairwell.

3. Contact with a woman working at Woolworths from which the respondent believed that she was attracted to him where other evidence did not support this.

[30] The stairwell incident and the attitude towards the employee of Woolworths, in Dr Aboud's opinion, showed a preoccupation with sexual matters which heightened risk.[15] The incident in the stairwell occurred in December 2016 and the respondent reported his belief about the Woolworths employee's interest in him in late February 2016. Both these things obviously occurred prior to the respondent being returned to custody.

[31] Dr Sundin thought that any specific motivational therapy was unlikely to be of use. She thought that psychologists were already dealing with those issues and thought that through psychological counselling the respondent was progressing. She was aware of uncooperative behaviour with Corrections staff and the psychologist but thought that progress was being made nonetheless. In particular, Dr Sundin thought that progress was evidenced by the respondent's abstinence from alcohol, the fact that the respondent had desisted in his previous use of pornography,[16] and that the respondent had not sexually reoffended. Also of importance to Dr Sundin was the fact that the breach of the supervision order constituted by the ingestion of cannabis had been detected and he had been returned to custody without the commission of any sexual offences.

[32] Dr Sundin conceded that the supervision order had not prevented the sexual encounter in the stairwell.[17] However, that encounter was, it seems, consensual.

[33] Dr Sundin thought that there were some indications, prior to being returned to custody, of increased risk of re-offending but thought overall that there had been progress.[18]

[34] Dr Sundin though expressed this view:

> "Given the level of his ongoing sexual preoccupation, it is, perhaps, worthy of consideration that he get assessed for the use of an anti-androgen drug, such as Androcur, to try and lower his libido quite dramatically, to therefore lessen his level of sexual preoccupation. Now, that would require his consent. It would require a set of medical examinations and ongoing checks

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[15] Transcript 1-9.

[16] Transcript 1-26 ll 7-12.

[17] Transcript 1-28.

[18] Transcript 1-26 ll 7-9.

> to ensure – blood tests, to ensure compliance, and medical checks to ensure adequate safety without too many adverse side effects."[19]

[35] It was submitted to me that I ought not make it a condition of any supervision order that the respondent be prescribed Androcur. That is obviously correct. There is no evidence to support such a condition. Dr Sundin's evidence went no further than recommending that the appropriateness of a medication regime be investigated. However, it was also submitted to me that there was no need to amend the supervision order because the issue raised by Dr Sundin concerning Androcur was sufficiently dealt with by condition 27 of the existing supervision order. That condition compels the respondent to: "attend upon and submit to assessment and/or treatment by a psychiatrist, psychologist, social worker, counsellor or other mental health professional as directed by a Corrective Services officer at a frequency and duration which shall be recommended by the treating intervention specialist." In my view, given the specific concerns raised by Dr Sundin, any supervision order upon which the respondent might be released ought specifically require the respondent to submit to assessment for the use of an anti-androgen drug.

[36] Mr Whitton, for the respondent, urges acceptance of Dr Sundin's evidence and submits that the respondent has discharged the onus cast upon him by s 22 of the Act. Mr Rolls for the applicant submits that the respondent should, consistently with Dr Aboud's opinion, remain in custody for further treatment.[20] Mr Rolls properly conceded that Dr Sundin's evidence, if accepted, would support a conclusion that the respondent had discharged the onus under s 22.

[37] Both doctors are well qualified and very experienced in assessing respondents under the Act. There is no basis upon which the evidence of one of the two doctors could be preferred over the other on the basis of qualifications, expertise or experience.

[38] However, Dr Sundin holds an advantage over Dr Aboud when it comes to assessing this particular respondent. Dr Aboud only had the opportunity to examine the respondent once. That was on 28 July 2017 when Dr Aboud travelled to Townsville to interview the respondent in Townsville Correctional Centre. Dr Sundin on the other hand has had much more contact with the respondent. She first assessed the respondent in 2009 and prepared a report. Dr Sundin prepared two reports concerning the respondent in 2010, one in 2014 and one in 2015. Dr Sundin then has had the opportunity to observe and assess the respondent over a period of some seven years and is therefore, in my view, better placed than Dr Aboud to assess the implications of the breaches of the supervision order.

[39] I also think it is important that, notwithstanding that over the years since the supervision order was made there have been breaches, there has been improvement in the respondent's behaviour. As already observed, he appears no longer to consume alcohol

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[19] Transcript 1-27 ll 31-37.

[20] Transcript 1-45 ll 24-35.

and the fact that he no longer habitually uses pornography is, as Dr Sundin opines, a positive change.

[40] Further, the issue for me is not whether there is an unacceptable risk that the respondent will breach the supervision order. The issue is whether there is an unacceptable risk that he will commit a serious sexual offence.[21] The breach of the supervision order constituted by the ingestion of cannabis was detected and the respondent was returned to custody. The fact is that the respondent has not committed a sexual offence since 2002.

[41] In all the circumstances, I therefore accept Dr Sundin's opinion that despite the contraventions, the supervision order was, prior to the breach, fulfilling its function in protecting the community.

[42] I find that the respondent has discharged the onus cast upon him under s 22 of the Act.

[43] In my view, the adequate protection of the community can, despite the contravention, be ensured by the existing supervision order subject to one amendment. A condition ought to be added compelling the respondent to submit to any examination recommended with a view to assessing the desirability of him being prescribed an anti-androgen drug.

[44] I make the following orders:

1. The supervision order made on 28 April 2014 be amended by addition of condition 27A after the current condition 27, as follows:

> "27A Attend upon and submit to examination and assessment by a psychiatrist as directed by an authorised corrective services officer for investigation as to the appropriateness of the respondent being prescribed anti-androgen medication."

2. The respondent be released from custody, pursuant to s 22(2) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 and continue to be subject to the supervision order made on 28 April 2014 as amended by these orders.

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[21] *Attorney-General (Qld) v Francis* [2012] QSC 275 at [64]-[67].