SUPREME COURT OF QUEENSLAND

CITATION:	*R J Welford, A-G for the State of Qld v Francis* [2004] QSC 233
PARTIES:	**RODNEY JON WELFORD, ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **DARREN ANTHONY FRANCIS** (respondent)
FILE NO/S:	BS 3069 of 2004
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	13 August 2004
DELIVERED AT:	Brisbane
HEARING DATE:	20 – 21 July 2004 and 6 August 2004
JUDGE:	Byrne J
ORDER:	**That the respondent be detained in custody for an indefinite term for care, control and treatment**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – MISCELLANEOUS MATTERS – OTHER SEX OFFENDERS – where applicant sought continuing detention order s 13(5)(a) *Dangerous Prisoners' (Sexual Offenders)* Act 2003 – where custodial program developed by psychiatrists – whether respondent is a serious danger to the community– whether continuing detention order appropriate *Dangerous Prisoners (Sexual Offenders) Act* 2003, s 13(2), s 13(3), s 13(4), s 13(5)(a), s 13(6), s 13(7), s 27(1)
COUNSEL:	B Thomas for the applicant J A Fraser for the respondent
SOLICITORS:	C W Lohe, Crown Solicitor for the applicant Aboriginal and Torres Strait Islander Legal Services for the respondent

BYRNE J:

An application for continued incarceration

[1] In January 1999, the respondent was sentenced to imprisonment for multiple sexual and other offences committed over about three months in 1996 against a 20 year old woman with whom he was living. The longest of the sentences expired on 8 May 2004. By this application, the Honourable the Attorney-General seeks an order pursuant to s 13(5)(a) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 that the respondent "be detained in custody for an indefinite term for care, control or treatment".

[2] Such an order may only be made where the Attorney-General proves that the prisoner is a "serious danger to the community": s 13(7). By s 13(2),

> "A prisoner is a serious danger to the community … if there is an unacceptable risk that the prisoner will commit a serious sexual offence –
> (a) if … released from custody; or
> (b) if … released from custody without a supervision order …"

[3] A conclusion that a prisoner is a "serious danger to the community" depends on the Court's satisfaction of that matter based on "acceptable, cogent evidence" proving the pertinent risk "to a high degree of probability": s 13(3). In considering that issue, "the Court must have regard" to the several matters specified in s 13(4).

[4] In deciding whether to make an order for continuing detention or a supervision order, "the paramount consideration is to be the need to ensure adequate protection of the community": s 13(6).

The psychiatrists plan

[5] It was not seriously in contest that the respondent's immediate release from prison would involve an unacceptable risk that he would commit a serious sexual offence. For reasons to be stated soon, that view is amply justified by the evidence. Importantly, in the end, the respondent was content to accept that his continuing detention for a while was warranted for a specific purpose: to permit his participation in a custodial program ("the plan") that has been designed to achieve his rehabilitation within the year that will elapse before any order for his detention must be reviewed: see s 27(1).

[6] The plan aims to reduce, to an acceptable level, the risk of his committing a serious sexual offence upon release. It was devised by three psychiatrists, Professor Nurcombe, Dr Lawrence and Dr Moyle, all of whom have seen the respondent and provided comprehensive reports recognising the high risk of recidivism were he to be released now. It requires his detention for a year, principally to treat a propensity for polysubstance abuse and to enable the respondent's graduated release to work and into the wider community. Its successful implementation depends upon both Government and respondent: the Government to provide the necessary resources – human and material – while the respondent must commit himself to genuine participation, in the expectation that he will be released a year from now, perhaps with some supervision for a time.

[7] The elements of the plan are:

- a coordinator is to be appointed from the Department of Corrective Services with authority to ensure that the plan is implemented. That person needs to have "the firmness and sympathy to help the respondent adhere to and make use of the plan";
- the respondent is to complete, within six months, substance abuse and managing relapse programs;
- a therapist is to be appointed for the respondent at the Community Forensic Mental Health Centre;
- at four months, the respondent is to be released on weekly day leave to attend the therapist. He is to be breathalysed and to provide urine specimens for drug screening after each day leave;
- at six months, following completion of the substance abuse program, and after suitable work has been found, the respondent should be transferred to a community correctional centre from which he will go to work;
- the respondent is not to be absent from his place of residence between 7pm and 8am (subject to the possibility that the times might be slightly altered if his work requires it);
- at six months, he is to report to the local community corrections office where an officer is to arrange frequent, random urine drug screening and breathalyser testing;
- the respondent should not have regular daytime visits to his mother's residence for six months;
- the respondent should not form an intimate relationship until 12 months after the plan has begun;
- at the end of 12 months, the respondent should move freely where he wishes, provided his place of residence is approved by the coordinator of the release plan;
- if the respondent fails to fulfil any of the requirements of the plan, the coordinator will decide if a warning will suffice or whether instead the respondent should be returned to prison to restart the program or whether some other measure is required;
- at the end of 12 months, the plan should be reviewed and revised. It is presently envisaged that longer-term supervision of a less stringent nature will be required.

[8] The respondent is, I am told, determined to involve himself diligently in the plan. For its part, the Department of Corrective Services has declared, through counsel for the Attorney-General, its "commitment to implementing the plan". This assurance is consistent with a stated object of the legislation: "to provide continuing … treatment … to facilitate … rehabilitation": s 3(b). It is also fundamental to my conclusion that, in all the circumstances, a continuing detention order should, as the respondent acknowledges, be made.

[9] The respondent's criminal history, drug abuse, nature of offending, restricted insight into his predicament, anti-social tendencies, limited involvement in relapse prevention programs, and other personal circumstances combine to explain the components of the plan.

Sexual offending

[10] The respondent was born in May 1973. He committed many offences as a juvenile. By the age of 21, he had an extensive criminal history; it included imprisonment for stealing. At 22, he was sentenced to 18 months imprisonment for several offences, including stealing and assault occasioning bodily harm. While serving that sentence, he was brutally assaulted by a gang of other prisoners. He reported being sodomised in the attack. Afterwards, the nature of his offending changed.

[11] In 1996, the respondent committed the serious offences for which he was sentenced in 1999. Violent, sexual assaults were involved: among them, the insertion of a knife handle into the victim's vagina and a broom handle into her anus. The respondent also bit her ferociously, punched her, dragged her by the hair, and committed other degrading acts of physical abuse. The offences were committed over eight occasions.

[12] By March 1997, the respondent was living in New South Wales with another woman. She also suffered sexual violence at his hands. In March 1998, the New South Wales sentencing judge spoke of incidents over about two days involving brutal, sexual misconduct, accompanied by irrational allegations concerning the sexual behaviour of his victim. After a year in prison, he was extradited to Queensland to be dealt with for the 1996 offences.

Section 13(4)

[13] Section 13(4) lists the matters the Court must consider in deciding whether a prisoner is a "serious danger to the community". The first is (see subs (4)(a)) "the reports prepared by the psychiatrists under section 11 and the extent to which the prisoner cooperated in the examinations by the psychiatrists".

[14] Valuable reports have been provided by the two independent, experienced and well-qualified psychiatrists, Professor Nurcombe and Dr Lawrence, who were appointed pursuant to s 11 to assess the level of risk of the respondent's committing another serious sexual offence. Their reports are thorough, detailed, and founded on a lot of information about the respondent, some of it provided by him in his, generally cooperative, interviews. Both reports indicate that, if released now, he would be highly likely to commit a violent, sexual offence within a few years.

[15] There was no challenge to the opinions of Professor Nurcombe or Dr Lawrence, to the accuracy of the historical facts on which their views are based, or to the reasons for their conclusions. In these circumstances (and despite the "detailed reasons" requirement of s 17(1)), the important matters emerging from the reports may be shortly stated:

- the respondent has a long history of polysubstance abuse, involving, at various times, alcohol, cannabis, LSD, cocaine, amphetamines and heroin;
- both sets of sexual offences were committed at times of drug addiction, including heroin use and frequent amphetamine ingestion;
- the sexual offending in this State took place while the respondent and his victim were living with his mother;

- the PC-LR Scale for Psychotherapy, HR-20 (a recognised risk management assessment scale), VRAG (Violence Risk Appraisal Guide) and SORAG (Sex Offender Risk Management Appraisal Guide) indicate a high risk of recidivism;
- at interview, the respondent presented with an overly optimistic view of the degree of risk of his relapse into drug addiction after release;
- the respondent has an anti-social personality;
- Dr Lawrence concluded:

> "the totality of my assessment points to [his] having a very high risk of recidivism for violent offences in the future. His primary risk lies as a result of his psychopathic (antisocial) personality which also increases the risk that he will readily revert to the use of substances and become abusive and dependent on substances, particularly amphetamines, cannabis and alcohol.
> …
> Under the influences of substances, his potential for violence, criminal behaviour and also aberrant sexual behaviour including violent behaviour will be very significantly increased. The actuarial assessments all support this clinical assessment that the probability of his re-offending within the next 7 to 10 years is high. It would be my opinion that his re-offending would occur possibly within 5 years."

- Professor Nurcombe, though acknowledging that the risk appraisal instruments were imperfect, said:

> "There are a number of clinical factors which could be addressed in order to reduce the risk of future violence or sexual offences, and to enable the prisoner to be discharged, when appropriate, with certain environmental constraints.
>
> Mr Francis' lack of insight and professed negative attitudes towards his victims and his offences may not be intransigent. According to my interview with him, he showed the beginnings of a capacity to face up to the seriousness of the offences, and a glimmering of the possibility that he might understand the fundamental motivation for his sexually sadistic behaviour. It is possible that, with treatment, his impulsivity could be reduced.
> …
> The four risk appraisal instruments utilized above, together with my clinical impressions of Mr Francis, lead to the conclusion that, if he is released from prison at this time, he is at high risk of committing a violent offence, or a violent sexual offence, within the next seven to ten years."

[16] By s 13(4)(b), another pertinent consideration in deciding whether the prisoner is a "serious danger to the community" is "any other medical, psychiatric, psychological

or other assessment relating to" him. There is a substantial volume of such material, none of it calling into question the views of the reporting psychiatrists; and they saw much, if not all, of it. In this material, a report of Dr Moyle written late last year is of particular significance. He concluded that, released untreated, the respondent posed a high risk of serious sexual violence within 7 to 10 years.

[17] Next to be evaluated is "information indicating whether or not there is a propensity on the part of the prisoner to commit serious sexual offences in the future": s 13(4)(c). The reporting psychiatrists and Dr Moyle deal with that. There is also an earlier report from another psychiatrist, Dr Lange. In December 2000, she considered that such a propensity then existed.

[18] Section 13(4)(d) concerns "…any pattern of offending behaviour on the part of the prisoner". As to that, the sexual offending was associated with violence within an ongoing heterosexual relationship in which victims and perpetrator were drug abusers. And the offending in both States involved the insertion of fingers and other objects into bodily orifices.

[19] The next consideration is (see s 13(4)(e)) "efforts by the prisoner to address the cause or causes of the … offending behaviour, including whether the prisoner participated in rehabilitation programs". In earlier times, the respondent has lacked motivation to address his offending behaviour. He did not take advantage of an available drug relapse prevention course, apparently because of his unwarranted optimism that, left alone, he would find the strength not to revert. And he did not complete a sexual offender's treatment program. He was excluded from it because of inappropriate behaviour in the group and an apparent lack of motivation. His behaviour at the time may well have largely been attributable to an unwillingness to discuss his 1996 prison encounter, for fear that mentioning it to his fellow sexual offenders might provoke a similar assault. Since those days, however, Professor Nurcombe has detected a willingness to take advantage of treatment opportunities. And, no less significantly, as a result of the recent intervention of his lawyers, the respondent is keen to take advantage of the plan.

[20] Whether "the prisoner's participation in rehabilitation programs has had a positive effect" is another pertinent consideration: s 13(4)(f). He did attend cognitive skills and anger management programs, and art and first aid courses. They may have been beneficial. Yet there is no reason to suppose that those courses have had a significant impact upon the likelihood of his committing violent, sexual offences.

[21] "The prisoner's antecedents and criminal history" (s 13(4)(g)) are canvassed, comprehensively and helpfully, in the reports of the three psychiatrists who have seen him in the last year.

[22] "The risk that the prisoner will commit another serious sexual offence if released into the community" is critical: s 13(4)(h). But, given the circumstances of this case, nothing more need be added to my discussion (see [14] – [15]) of the reports of the reporting psychiatrists.

[23] "The need to protect members of the community from" the risk of another serious sexual offence is another consideration: s 13(4)(i). His history indicates that his propensity for sexual violence is likely to manifest itself in relation to victims who enter into an ongoing sexual relationship with him. This suggests that, as counsel for the Attorney-General put it, "to that extent, he is not predatory". Were the

respondent to re-offend, however, his past conduct suggests that the consequences for his victim would be grave.

[24] Finally, the Court must consider (see s 13(4)(j)) "any other relevant matter". The respondent is in his early 30s. He is willing to undergo treatment and to involve himself in a graduated release program. Indeed, according to his counsel, the respondent sees the plan as his "best way forward". There seems, as Professor Nurcombe identified, hope for his redemption.

The near future

[25] The respondent's and the community's interest in his rehabilitation coincide. His genuine participation in the plan, combined with the Government's provision of the resources needed for its implementation, appear to offer the best chance of reducing, to an acceptable level, the risk of re-offending upon his eventual release.

[26] The Attorney-General has discharged the burden of proving, to the prescribed standard, and by acceptable, cogent evidence, that the respondent is "a serious danger to the community" right now.

[27] As the evidence reveals, and as the respondent accepts, that a s 13(5)(b) supervision order should not be made today, it is ordered pursuant to s 13(5)(a) that the respondent be detained in custody for an indefinite term for care, control and treatment.