SUPREME COURT OF QUEENSLAND

CITATION:	*A-G (Qld) v Francis* [2006] QCA 324
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant/respondent) **v** **DARREN ANTHONY FRANCIS** (respondent/appellant)
FILE NO/S:	Appeal No 452 of 2006 SC No 3069 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	30 August 2006
DELIVERED AT:	Brisbane
HEARING DATE:	11 August 2006
JUDGES:	Keane and Holmes JJA and Dutney J Judgment of the Court
ORDER:	**1. Appeal allowed** **2. Decision of the learned primary judge set aside** **3. The further hearing of the appeal, in relation to the orders which should now be made under s 13(5) of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), is adjourned to 26 September 2006** **4. In accordance with s 43(2)(c) of the Act, the parties are to place before the Court evidence that circumstances existing at the time the matter was before the primary judge either continue to apply or have been overtaken by events**
CATCHWORDS:	STATUTES - ACTS OF PARLIAMENT - INTERPRETATION - *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) - appellant convicted of violent sexual offences against two women - order made that the appellant be detained after his sentence expired - upon review further order made that the appellant continue to be subject to the continuing detention order - original order included a rehabilitative plan which included treatment program - rehabilitative plan has not been fully implemented - appellant argued he was worse off under the further order than the original order because there was no treatment program in place or in prospect - whether primary

judge erred in affirming the original continuing detention order in these circumstances

STATUTES - ACTS OF PARLIAMENT - INTERPRETATION - *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) - primary judge held that conditions necessary to supervised release of appellant could be sufficiently enforced only if Department of Corrective Services made a sufficiently intensive commitment of resources to monitor compliance - whether the primary judge made an error of law on the question whether the protection of the community could adequately be ensured by an order for supervised release

Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s 3, s 13, s 16, s 30, s 43

Fardon v Attorney-General for Queensland [2004] HCA 46; (2004) 78 ALJR 1519, considered
Norbis v Norbis (1986) 161 CLR 513, applied

COUNSEL: N M Cooke QC, with M J Rinaudo, for the appellant
M D Hinson SC, with M Maloney, for the respondent

SOLICITORS: Aboriginal & Torres Strait Islander Legal Service for the appellant
Crown Law for the respondent

[1] **THE COURT:** The appellant was convicted of violent sexual offences against two women. He was sentenced for those crimes to terms of imprisonment in New South Wales and Queensland. The latter sentence expired on 8 May 2004. On 13 August 2004, Byrne J made an order for the continuing detention of the appellant. That order was made under s 13(5)(a) of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ("the Act"). On 21 December 2005, the learned primary judge ordered that the appellant continue to be subject to the continuing detention order made by Byrne J on 13 August 2004.

[2] It is the order of the learned primary judge, made under s 30 of the Act, which the appellant challenges in this Court. It is useful, however, to explain how Byrne J had dealt with the matter before moving to the primary judge's principal findings of fact and the contentions advanced on appeal.

The outcome of the proceedings before Byrne J

[3] In the proceedings before Byrne J, it was accepted by the appellant 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)."[1]

The plan had been devised by three psychiatrists, Professor Nurcombe, Dr Lawrence and Dr Moyle.[2]

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1 *Attorney-General v Francis* [2004] QSC 233 at [5].
2 *Attorney-General v Francis* [2004] QSC 233 at [6].

[4] It was envisaged, under the plan, that the appellant would refrain from alcohol and drug use, and would not form an intimate relationship with any woman until 12 months after the plan began. In this way, the plan was aimed at putting a limit on the occasions when the appellant's propensities posed the highest risk to the community.[3] Byrne J contemplated that, at the end of this period of 12 months, the plan would be reviewed, it being "envisaged that longer-term supervision of a less stringent nature will be required".[4]

[5] The plan required the appointment of a co-ordinator in the Department of Corrective Services ("the department") with authority to ensure that the plan was implemented.[5] This appointment did not occur.

[6] The appellant was to complete a substance abuse and managing relapse program. This course was done.

[7] A therapist was to be appointed for the appellant at the Community Forensic Mental Health Centre. In the event, that organisation was not available to assist and Dr Hogan, a psychiatrist in private practice, was engaged. Dr Hogan visited the prison and there conducted eight therapy sessions with the appellant.

[8] The plan envisaged that, after four months, the appellant would be released on weekly day leave to attend therapy sessions. This step in the plan did not occur. Because Dr Hogan was visiting the prison, the appellant's release on weekly day leave was not necessary. In any event, the department would not release the appellant on leave because of his security classification. Before the learned primary judge, it emerged that, notwithstanding the assurance given to Byrne J, the appellant's security classification meant that he could not lawfully be granted leave by the department to attend extra-custodial placements.[6]

[9] The plan also contemplated that, following completion of the substance abuse program, and after suitable employment had been found for the appellant, he would be transferred to a community correctional centre. This did not occur.[7] When the time came for the appellant to be transferred, there was no community correctional centre in operation. Problems were encountered in attempting to arrange employment and appropriate accommodation.

The primary judge's findings

[10] It was rightly said by the learned primary judge that Byrne J made "strenuous efforts to ensure that [the plan] was feasible and that both the [Attorney-General] and [the appellant] were committed to its implementation".[8] It is fair to say that Counsel who appeared for the Attorney-General made it clear in argument before Byrne J that the Attorney-General could not "say with complete certainty that this plan can be implemented".[9] Nevertheless, counsel for the Attorney-General told Byrne J on 6 August 2004:

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3 *Attorney-General v Francis* [2005] QSC 381 at [12].
4 *Attorney-General v Francis* [2004] QSC 233 at [7].
5 The elements of the plan are set out in full in *Attorney-General v Francis* [2004] QSC 233 at [7].
6 *Attorney-General v Francis* [2005] QSC 381 at [26].
7 *Attorney-General v Francis* [2005] QSC 381 at [11].
8 *Attorney-General v Francis* [2005] QSC 381 at [13].
9 Transcript extracted in *Attorney-General v Francis* [2005] QSC 381 at [22].

> "Your Honour, I can say that the Department of Corrective Services will give a commitment to implementing the plan. I should point out that there are statutory discretions that need to be exercised in relation to certain parts of the plan; that is, a weekly, daily, even placement at a community correctional centre and they are exercised by the Director-General or the general manager or their delegates. To that extent they obviously can't fetter themselves in advance but any recommendation by Your Honour would be given decisive weight in decision, assuming the prisoner has been undertaking the plan as recommended."[10]

[11] It is clear that the primary judge was concerned by the performance, or lack of performance, by the department of its role in the plan. He concluded that the department either did not understand that a co-ordinator of the plan was required, or disregarded that requirement. No-one in the department undertook the function of co-ordinator. Nor does it appear that anyone within the department fully understood what the plan required of it.[11]

[12] On his review, the learned primary judge was satisfied by the evidence "to a high degree of probability" that the appellant remained a serious danger to the community in the absence of a continuing detention order.[12] It was on this basis that he confirmed the continuing detention order made by Byrne J in August 2004.

[13] The evidence before the learned primary judge supported his Honour's findings that the incidents which led to the appellant's imprisonment were "violent and sadistic" incidents exhibiting psychopathy and an anti-social personality disorder[13] in relation to which amphetamine and alcohol abuse were contributing factors.[14] But the evidence did not suggest that the appellant was a danger to children. The risk which the appellant's dangerous propensities posed for the community was to women with whom he formed an intimate relationship, especially if he consumed amphetamines or alcohol.[15] At the time of the hearing before the learned primary judge, that risk was placed, on the evidence, at "moderate to high to high".[16]

[14] While the plan contemplated by Byrne J was not implemented,[17] it was not the evidence of the psychiatrists who gave evidence before the primary judge that it was likely to have been successful even if that plan had been fully implemented by the department. The evidence before the primary judge was that, even with the treatment which the appellant has received, he still did not have insight into his offending, nor did he yet accept responsibility for what he had done.[18] The learned primary judge found that the appellant was not yet committed to abstaining from the use of alcohol.[19]

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10 Transcript extracted in *Attorney-General v Francis* [2005] QSC 381 at [25].
11 *Attorney-General v Francis* [2005] QSC 381 at [30].
12 *Attorney-General v Francis* [2005] QSC 381 at [106].
13 *Attorney-General v Francis* [2005] QSC 381 at [65] - [68], [77], [84] and [95].
14 *Attorney-General v Francis* [2005] QSC 381 at [111].
15 *Attorney-General v Francis* [2005] QSC 381 at [112].
16 *Attorney-General v Francis* [2005] QSC 381 at [120].
17 *Attorney-General v Francis* [2005] QSC 381 at [34] - [54].
18 *Attorney-General v Francis* [2005] QSC 381 at [123].
19 *Attorney-General v Francis* [2005] QSC 381 at [125].

[15] Before the primary judge, attention was squarely focussed on the point that any supervision order would need to contain provision for a curfew, a prohibition on forming intimate relationships with women, and restrictions on his consumption of alcohol or drugs. These conditions would need to be supervised and enforced because the appellant could not be trusted voluntarily to conform to the regime.[20]

[16] Accommodation at a community correctional centre was no longer available, but it was proposed, on the appellant's behalf, that he might be accommodated at premises operated by the Brisbane Boarders Association Inc ("the BBA"). Mr Ogle, the General Manager of the BBA, gave evidence before the learned primary judge.

[17] The BBA had experience "in housing people released from prison, including aboriginal prisoners, and people with drug and alcohol problems".[21] Mr Ogle explained that the BBA's housing buildings each had caretakers but those caretakers had "no control over tenants' lives": it "would not be the case at all" that they would actively check to see if a resident was at home within the hours of a curfew.[22] While Mr Ogle went on to say that the BBA "would support" a situation where a person was required to be at the premises at a particular time, he expressed uncertainty as to "the means of trying to work out how we could actually do that".[23]

[18] The learned primary judge was not satisfied that the appellant could be sufficiently supervised in such accommodation to ensure that the conditions necessary for a supervision order would be enforced.[24] In the end, he was "not persuaded that adequate protection to the community can be achieved by a supervision order".[25] It will be necessary to consider his Honour's conclusion in this regard more closely in due course.

The appellant's arguments

[19] We turn now to address the arguments advanced on behalf of the appellant on the appeal.

Affirming the order of Byrne J

[20] The appellant's first contention was that the learned primary judge erred in affirming the continuing detention order of Byrne J so as to leave the appellant worse off than he was under the order of Byrne J because there was no treatment plan now in place or in prospect.

[21] The legal basis for this complaint is not clear. It must be said immediately that, at the hearing before the learned primary judge, it was expressly accepted by the appellant's counsel that the appellant posed an unacceptable risk of committing a serious sexual offence if he were to be released from custody unsupervised. The learned primary judge came to the conclusion on the evidence before him that the risk could not be reduced to an acceptable level on supervised release. Whether or not the appellant is "worse off" than he was under a prior order for continuing detention is irrelevant.

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20 *Attorney-General v Francis* [2005] QSC 381 at [126] - [131].
21 *Attorney-General v Francis* [2005] QSC 381 at [101].
22 *Attorney-General v Francis* [2005] QSC 381 at [104].
23 *Attorney-General v Francis* [2005] QSC 381 at [104].
24 *Attorney-General v Francis* [2005] QSC 381 at [98] - [105].
25 *Attorney-General v Francis* [2005] QSC 381 at [132].

[22] If the appellant's complaint is that the learned primary judge did not come to a decision independently of the conclusion of Byrne J, it is clear that it is misconceived. Section 30(1) of the Act provides for the power of the court to order that the prisoner be subject to a continuing detention order or a supervision order. That power depends, under s 30(3) of the Act, on the court first affirming the earlier decision that the prisoner is a serious danger to the community in the absence of an order under s 13 of the Act.

[23] The appellant's submissions emphasise the department's failure to support the program of graduated release contemplated when the order of Byrne J was made. It might be said that the appellant's submissions over-emphasise the department's responsibility in this regard, bearing in mind the evidence of the appellant's equivocation in his commitment to his rehabilitation. But in any event, the task posed by the Act for his Honour's determination is not one which can be resolved in the appellant's favour simply by pointing to departmental ineptitude.

[24] There may be cases in which departmental recalcitrance, in relation to the rehabilitative treatment of a prisoner in continuing detention, will give rise to a question on subsequent review by the court as to whether the continued detention of the appellant is justified under the Act. It must always be borne in mind, in this regard, that one of the purposes of the regime of post-sentence detention established by the Act is treatment of the prisoner.

[25] The order which may be made by the court under s 13(5) of the Act, and confirmed under s 30 of the Act, is, in terms, an order made for "control, care or treatment" of a dangerous prisoner. By virtue of s 13(2) of the Act, such an order may be made only if the court is satisfied that a prisoner would constitute a serious danger to the community in the form of "an unacceptable risk that the prisoner [would] commit a serious sexual offence". As an alternative to a continuing detention order, under s 13(5)(a), the court may order, under s 13(5)(b), that the prisoner be released from custody subject to appropriate conditions.

[26] The objects of the Act are expressed in s 3 of the Act as being:

> "(a) to provide for the continued detention in custody or supervised release of a particular class of prisoner to ensure adequate protection of the community; and
>
> (b) to provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation."

[27] Section 13(6) provides that, in deciding whether to make an order under s 13(5)(a) or (b), "the paramount consideration is to be the need to ensure adequate protection of the community".

[28] Section 13(5)(a), in speaking of a continuing detention order as an order "for control, care or treatment", identifies the three purposes for which an order may be made: control of the dangerous prisoner, care for the dangerous prisoner, or treatment of the dangerous prisoner. These purposes are identified as alternatives. The phrase "control, care or treatment" must, as a matter of ordinary language, be read disjunctively.

[29] This disjunctive reading suggests that there may be cases where the basis for an order may be, either

- the control of an incorrigible offender, or
- the care of an offender whose propensities endanger the offender as well as others, or
- the treatment of an offender with a view to rehabilitation.

It will often be the case that more than one of these considerations will inform the making of an order.

[30] It may be, however, that, in some instances, a dangerous prisoner has such clear and pressing prospects of rehabilitation that the court's choice of an order under s 13(5)(a), rather than under s 13(5)(b), will turn on the answer to the factual question whether further treatment, necessary to ensure adequate protection to the community, is likely to be available or effective only while the prisoner remains in detention. If the court were to be satisfied in a particular case that further treatment of a prisoner was necessary, and likely, to reduce the risk of reoffending to acceptable levels, but that such treatment would not be made available to the prisoner in detention, then that would be a good reason to make an order under s 13(5)(b). The choice between an order under s 13(5)(a) or (b) must, of course, be controlled in the end by s 13(6) of the Act; but, in such a case, it might make little sense to make a continuing detention order for the purpose of "control, care or treatment" of the prisoner.

[31] It is possible, too, that the view taken by Gummow J in *Fardon v Attorney-General for Queensland*[26] supports an argument that executive government repudiation of the preventive objects of the Act in a particular case (as, for example, by the refusal of any treatment to a prisoner clearly capable of, and amenable to, rehabilitation) could lead the court to refuse to make any order at all. If it were to appear to the court that any further detention would be truly punitive in character and, thus, contrary to the intention of the legislation, there would be no basis for the court to make an order of any kind under the Act. The conditions of further restraint upon the detainee's liberty would be out of character with the intention of the legislature: that such restraint is preventive. The character of the detention authorised by the Act is, as was explained in the reasons of the High Court in *Fardon v Attorney-General for Queensland*,[27] not punitive but preventive.

[32] In the present case, the learned primary judge did not find, and, indeed, was not asked to find, that the sole or the dominant reason for continued detention or supervision was the provision of treatment to the appellant rather than the ongoing control of the appellant. Nor was it suggested that any necessary treatment could, and would, only be made available outside detention. For these reasons, we would reject the appellant's first contention.

Adequate protection

[33] The primary judge concluded that a continued detention order was necessary because the adequate protection of the community could not be assured on supervised release. The appellant's rehabilitation had not, on his Honour's view, progressed to the point where the appellant had the necessary insight to accept responsibility for his offending, and to make a commitment to abstain from alcohol so as to reduce the risk to the community sufficiently to make a supervision order an

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26 (2004) 223 CLR 575 at 620 - 621 [113].

27 (2004) 223 CLR 575 at 586 [2], 592 [19], 595 - 597 [33] - [34], 609 - 613 [72] - [81], 619 - 621 [107] - [113], 647 - 648 [196], 653 - 658 [214] - [233].

"adequate protection to the community". The learned primary judge held that the evidence established that there was a need for intensive supervision of the appellant given the current unsatisfactory stage of his rehabilitation.[28]

[34] It is to be emphasised here that the primary judge's assessment "call[s] for value judgments in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right".[29] It follows that it would be wrong for:

> "a court of appeal to set aside a judgment at first instance merely because there exists just such a difference of opinion between the judges on appeal and the judge at first instance. In conformity with the dictates of principled decision-making, it would be wrong to determine the parties' rights by reference to a mere preference for a different result over that favoured by the judge at first instance, in the absence of error on his part. According to our conception of the appellate process, the existence of an error, whether of law or fact, on the part of the court at first instance is an indispensable condition of a successful appeal."[30]

[35] It is, therefore, necessary, at this point, to consider more closely the learned primary judge's reasons in order to determine whether his Honour's reasons reveal an error of law or fact. His Honour concluded:[31]

> "The drafts of possible supervision orders in the event that such an order were to be made include prohibitions on the use of drugs and alcohol, a curfew and a prohibition on forming intimate relationships for a period. **There are requirements that the [appellant] subject himself to testing for the use of prohibited substances at the direction of an officer of the Department. The effectiveness of them in achieving adequate protection for the community has to be weighed against the risk of serious consequences if they prove not to be effective.**
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> This is a rather difficult issue, since breaches of the four conditions are those which may create the climate for similar reoffending. At one end of the spectrum, where the [appellant] adheres to all of them, the risk is small. If he breaks any of them, the breach may be of varying degrees of seriousness. At the top end of the scale, if the [appellant] were to abscond and relapse into drug and alcohol abuse, there would be serious grounds for concern, especially if he were to remain at large for a substantial period.
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> A breach of the condition relating to curfew could be detected by observation if a Departmental officer happened to visit the premises where the offender was supposed to be, but he was not there. A breach relating to substance abuse could be detected by testing, provided the person could be found in a timely way. One other possible scenario is that if, for any reason, the [appellant] failed to find employment, he may have the opportunity to surreptitiously begin a relationship without breaking curfew or the substance abuse conditions of his release. **These examples show how important**

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28 *Attorney-General v Francis* [2005] QSC 381 at [128].

29 *Norbis v Norbis* (1986) 161 CLR 513 at 518.

30 *Norbis v Norbis* (1986) 161 CLR 513 at 518 - 519.

31 *Attorney-General v Francis* [2005] QSC 381 at [126] - [132].

intensive checking of the [appellant] would have to be under a supervision order, given his current state of rehabilitation.

The ambivalence towards abstinence from alcohol provides the simplest example of how there would be a risk of absconding or breach of curfew. The risk of being found in breach of the abstinence condition of the order may well lead to consequential breaches of conditions. If there was no reasonable excuse for a breach, the concern that he might abscond is a real one. If there were a breach without excuse, the fear that there would be a significant chance he would be returned to prison because the breach showed he could not be trusted (ss 21, 22, *Dangerous Prisoners (Sexual Offenders) Act* 2003) would be an obvious possible catalyst. **In the absence of evidence that the person has shown that he could be trusted to conform to strict release conditions, and there is no watertight regime to monitor the [appellant's] compliance if released into the community, it is something that must be factored in as a matter of commonsense.**

With respect to the proposed accommodation arrangements, it is assumed that the [appellant] would be acceptable as a tenant of the [Brisbane Boarders] Association. If not, the question of accommodation is left unresolved. The answers by Mr Ogle in [104]-[105] about advising the Department about possible breaches of the conditions of release suggest, as is not surprising, that the Association does not see its role as closely monitoring the activities of its tenants, except to the extent that their conduct may be disruptive or otherwise inappropriate in the context of living in the kind of establishment the Association runs. **If there was a court order requiring a report to the Department that a particular tenant had ceased to live in the accommodation provided by the association it would abide by the order. But it may, in my view, be inferred from the evidence of Mr Ogle that actively checking on a person's presence in the building at particular times or checking on whether a person appeared to have consumed alcohol or drugs is not something that would be ordinarily done in a proactive way.**

In my view, it is difficult, in any event, to justify imposing that kind of obligation on a private organisation or person. At the practical level, there is an issue of enforcing accountability. Monitoring the matters referred to above would be the responsibility of the caretaker from time to time, in the first instance. I have reservations that such an obligation, especially without the consent of those likely to be bound by it, at the front line level, ought to be imposed. Further, from the aspect of enforceability, it could only reasonably be taken to be an infringement if the person knew that the tenant was in breach of the terms of the supervision order. Imposing any more onerous burden than that on a private individual would be unjustifiable. To impose it only when there was knowledge of a suspected breach would be of doubtful utility. **An arrangement to live in what is essentially private accommodation, would only work, from an enforcement point of view, if there was sufficiently intensive**

> **commitment of resources by the Department to monitoring compliance.**
>
> The point to which the discussion leads is that **I am not persuaded that adequate protection to the community can be achieved by a supervision order. The [appellant] has made relatively minor progress in addressing the causes of and unacceptability of his offending. If he were to abscond and remain at large for a period long enough to form another relationship, the risk that he will commit violence on a member of the segment of the community that might be persuaded to enter into a relationship with him is inadequately protected against. I am not persuaded that his progress has been sufficient to allow his release on a supervision order of the kind proposed**. I will therefore order the [appellant] continue to be subject to the continuing detention order made by Byrne J on 13 August 2004." (emphasis added)

[36] It appears from the penultimate paragraph in the passage cited that his Honour was of the view that the conditions necessary to the supervised release of the appellant could be sufficiently enforced to ensure adequate protection of the community only if "there was sufficiently intensive commitment of resources by the department to monitoring compliance". It is implicit in the paragraph which follows in his Honour's reasons that he had come to the view that the department would not provide a sufficiently intensive commitment of resources "to provide effective supervision of the [appellant] to ensure compliance with the conditions essential to supervised release".

[37] There was no evidence, however, that the resources required of the department to provide effective monitoring of the appellant's compliance with the conditions of supervised release would be so extensive that it would be unreasonable to expect them to be provided, or that the effective provision of such resources would be impracticable. It must be borne in mind that any supervision order made by the court under the Act must contain, by virtue of s 16(2)(f), a condition for supervision of the prisoner while on supervised release. The Act thus assumes that supervision will be available. The court should not conclude either that it will not be made available or will not be made sufficiently available in the absence of clear evidence to that effect and an explanation as to why its provision is regarded as unreasonable or impracticable. There was no reason to conclude that any necessary supervision by the department could not, or would not, be made available.

[38] In this regard, it is necessary to focus upon the particular nature of the risk which the appellant poses to the community. Those women at risk are those with whom the appellant is in an intimate relationship, and the risk arises when he has engaged in alcohol or drug abuse. Monitoring by the department with the assistance of information from BBA would be likely to prevent the concatenation of circumstances which makes the appellant dangerous. Examples of such monitoring were adverted to in the extract from the learned primary judge's reasons above.

[39] Insofar as his Honour was concerned that, if the appellant began to use alcohol or drugs, he might abscond, the risk of a prisoner absconding is involved in every order under s 13(5)(b). The Act does not contemplate that arrangements to prevent such a risk must be "watertight"; otherwise orders under s 13(5)(b) would never be

made. The question is whether the protection of the community is adequately ensured. If supervision of the prisoner is apt to ensure adequate protection, having regard to the risk to the community posed by the prisoner, then an order for supervised release should, in principle, be preferred to a continuing detention order on the basis that the intrusions of the Act upon the liberty of the subject are exceptional, and the liberty of the subject should be constrained to no greater extent than is warranted by the statute which authorised such constraint.

[40] Accordingly, we respectfully consider that his Honour's reasoning reveals an error of law in his approach to the question whether the protection of the community could adequately be ensured by an order for supervised release.

Conclusion and orders

[41] It follows that the decision of the learned primary judge must be set aside.

[42] While the evidence that was before his Honour is available to this Court, that material is now some eight months out of date. Because of this lapse of time since his Honour's decision, this Court is not currently in a position to determine whether an order for supervised release should be made in the exercise of this Court's discretion.

[43] Under s 43(2)(c) of the Act, this Court may "on special grounds, receive further evidence as to questions of fact". In our opinion, special grounds exist to warrant the reception of further evidence bearing upon the desirability and feasibility at this time of making an order under s 13(5)(b) of the Act.

[44] In any event, the appellant's continued detention must be reviewed by 21 December 2006 at the latest.[32] Presumably, matters are in train for the review to be conducted in accordance with the Act. It is not the intention of the Court to conduct that review on the further hearing of this appeal. What the Court requires to be placed before us is evidence that the circumstances existing at the time the matter was before the primary judge either continue to apply or have been overtaken by events. We would not anticipate that it will take more than a few days to assemble such evidence. The further hearing of the appeal in relation to the orders which should now be made should be adjourned to 26 September 2006.

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[32] While it is unnecessary for the purposes of this appeal to consider what is entailed in the requirement in s 27(1) that a continuing detention order be reviewed “at the end of 1 year”, it is a matter of some concern that although the original order was made by Byrne J on 13 August 2004, the respondent did not file its application for review until 10 August 2005, with a September return date. The result was that, notwithstanding an expeditious hearing and decision, the review was not complete until 21 December 2005 something in excess of 16 months after the original order. That was neither “at the end of 1 year” (taking the expression literally) nor as close as practicable to it (adopting a more generous approach). In a matter so drastically affecting the liberty of the subject, rigorous adherence to legislative time requirements is essential.