# SUPREME COURT OF QUEENSLAND

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| CITATION: | *A-G (Qld) v Robinson* [2007] QCA 111 |
| PARTIES: | **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND**<br>(applicant/respondent)<br>**v**<br>**NIGEL PATRICK ROBINSON**<br>(respondent/appellant) |
| FILE NO/S: | Appeal No 10282 of 2006<br>SC No 4096 of 2006 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 5 April 2007 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 13 March 2007 |
| JUDGES: | Keane and Holmes JJA and Douglas J<br>Separate reasons for judgment of each member of the Court, each concurring as to the order made |
| ORDER: | **Appeal dismissed** |
| CATCHWORDS: | APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – where the appellant served a nine year term of imprisonment for sexual offences – where the learned judge at first instance determined that the appellant was a serious danger to the community in the absence of an order under s 13 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) – where the learned judge made a continuing detention order – whether the learned judge erred in not finding that a supervision order with appropriate conditions would provide adequate protection to the community<br><br>*Corrective Services Act 2006* (Qld)<br>*Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), s 13, s 13(2), s 13(5)(a)<br><br>*Attorney-General (Qld) v Francis* [2006] QCA 324; CA No 452 of 2006, 30 August 2006, considered<br>*Attorney-General (Qld) v Robinson* [2006] QSC 328; SC 4096 of 2006, 1 November 2006, cited |

*R v Robinson; ex parte Attorney-General (Qld)* [1998] QCA 107; [1999] 1 Qd R 670, considered

COUNSEL: B G Devereux, with T A Ryan, for the appellant
J M Horton for the respondent

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

[1] **KEANE JA:** I agree with Holmes JA.

[2] **HOLMES JA**: The appellant appeals against the making of a continuing detention order against him pursuant to s 13(5)(a) of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld). He did not contend, in this Court or at first instance, against a finding that he was a serious danger to the community in the absence of an order under s 13; rather he argued that a supervision order with appropriate conditions would provide adequate protection to the community on his release, and that the learned judge at first instance erred in not making a finding to that effect.

[3] Other grounds of appeal turned on the learned judge's finding that the appellant did not have a sufficient support network in the community; it was said that this was improperly used as a basis for refusing to make a supervision order, and that an onus was thus wrongly cast on the appellant, when Corrective Services ought to have attended to his support needs. In addition, it was said, the learned judge had failed properly to evaluate the expert psychiatrist evidence, and had erred in making the continuing detention order when the examining psychiatrists did not advocate it and their opinions as to the risk of re-offending did not warrant it. Finally, the order was wrongly made because no further treatment of the appellant in custody was proposed, and it amounted to ordering punitive detention until he met the judge's requirements that he establish a support network and develop satisfactory release plans.

**The offences**

[4] The appellant is 28 years old. He served a nine year term of imprisonment, which ended on 11 November 2006, on two counts of deprivation of liberty, one count of rape and one count of indecent assault on a child under 12 years of age. He had pleaded guilty to the charges against him. The first set of charges, deprivation of liberty and rape, was committed against a young woman he saw at a local shopping centre. Having decided to assault her, he stole a knife from a supermarket, and used it to threaten her and force her into bushland where he raped her at knifepoint. Eventually the victim was able to get herself in a position to grab the knife from him and scream, which caused him to flee. While the appellant was on bail for that offence he went to a local primary school after classes had finished for the day and persuaded a nine year old girl to accompany him to an empty classroom. He put his hand over her mouth to quieten her, made her remove her clothes, and took off his own. The learned judge described the offence as the appellant having "rubbed his fingers and hands over her body, touching her on the breast and vaginal area";[1] but the Court of Appeal judgment[2] (given on an Attorney-General's appeal against sentence) suggests a slightly different version, according to which the appellant

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1 *Attorney-General (Qld) v Robinson* [2006] QSC 328, at para 10.

2 *R v Robinson; ex parte Attorney-General (Qld)* [1998] QCA 107 at p 12.

pushed two fingers into the child's anus. Hearing someone approaching, he dressed rapidly and left.

[5] At the time of the offending the appellant was 18 years old. He was one of a large family and had had a number of health problems. He was physically under-developed, enuretic, and during his teenage years was diagnosed as suffering from coeliac disease and insulin-dependent diabetes. His sexual experience was limited to a couple of isolated and humiliating encounters, and he was given to watching pornographic videos and fantasising about rape and bondage. He had been expelled from school at the age of 15 without completing Grade 10 and at the time of the offending was, on his own account, smoking a great deal of marijuana. He had, however, no criminal history, apart from one conviction for stealing a bicycle.

**The psychiatric evidence**

[6] For the purpose of the application under the *Dangerous Prisoners (Sexual Offenders) Act* the appellant was examined by two psychiatrists, Dr Donald Grant and Professor Basil James, who concurred in a diagnosis of anti-social personality disorder. Each of them administered a battery of tests designed to assist in risk measurement. It is unnecessary to explore the details of those, except to mention that Dr Grant scored the appellant at 30 on a psychopathy check list, indicating he was at the threshold for that diagnosis, whereas Professor James arrived at a much lower score and did not consider that the appellant showed the signs of psychopathy.

[7] Dr Grant reached a general conclusion that the appellant posed a high risk of re-offending in some way on release from prison. A good deal depended on whether his offending reflected the conflicts he was facing in his life or whether it was the result of a developing paraphilia, possibly sexual sadism. If the latter, it could be expected to continue, and the possibility made the risk of recurrence of offending serious.

[8] Professor James added a diagnosis of impulse control disorder to that of anti-social personality disorder, but he did not discern any paraphilia. He considered that the appellant's risk of re-offending was low to moderate, provided he had access to personal support, restrictions were imposed on him as to residence and employment, and he was prohibited from contact with young girls. In the absence of those conditions, the risk would be at least moderate.

[9] Neither of the examining psychiatrists expressed the view that the appellant ought to be the subject of a continuing detention order. Neither saw any prospect of his obtaining any further useful treatment or intervention in the way of programmes in custody. On the other hand, both emphasised the need for stability and support on release. Dr Grant described the appellant's plans "as worryingly vague". The appellant was liable to be destabilised easily; ideally, he ought to have a graduated return to the community with increasing degrees of freedom and responsibility. Strict supervision, involving readily available and flexible attention, was certainly essential and would reduce the risk of re-offending, probably to a moderate level, but it could not be guaranteed to prevent it. Professor James thought the lack of detail in the appellant's plans unsurprising, given his inexperience in independent living. He emphasised the need for support from someone in whom the appellant had trust and confidence. In his report, Professor James suggested an "appropriately trained Therapist" to whom the appellant could have access at times of crisis; in

evidence, asked to consider the question in the context of a draft supervision order, he suggested that the appellant needed a very attentive case manager to assist in establishing him in the community.

[10] In addition to the reports and evidence of Dr Grant and Professor James, her Honour had before her an assessment prepared in 1998 by a psychiatric registrar, Dr Harden, for the purposes of a pre-sentence report. At that time the appellant was still, to a great extent, denying the details of his offences, although pleading guilty. He did, however, admit to sexual fantasies concerning pre-pubescent girls, on the basis of which Dr Harden made a provisional diagnosis of paedophilia. In addition, he diagnosed schizoid personality disorder and anti-social personality disorder, and commented on the appellant's immaturity and lack of remorse and empathy. There were few positive prognostic signs, Dr Harden said.

[11] Dr Prabal Kar, a psychiatrist, provided reports in two contexts: one in September 2004 for the assistance of the Community Corrections Board, and a second in November 2005, at the stage at which the respondent was considering whether to make an application under the Act. In the first of those reports, Dr Kar described the appellant as having a "significant family genetic vulnerability towards sexual offending and criminality" with an "extreme" degree of psychopathy. Dr Harden's diagnosis of paedophilia and anti-social personality disorder remained applicable and the appellant presented a "high risk of dangerous sexual re-offending".

[12] There was some moderation in Dr Kar's views in his later report; he thought that the appellant was likely to have benefited from completing a number of courses including the sexual offenders' treatment programme and his anti-social personality traits might have mellowed. Further education such as the Sexual Offenders' Maintenance Programme in the community would be of benefit. Nonetheless, there remained, Dr Kar said in evidence, a high risk of re-offending.

**Progress in Custody**

[13] The appellant had been dealt with for a number of breaches of the disciplinary provisions of the *Corrective Services Act 2006* (Qld) while in custody. Generally these involved refusing to obey instructions and behaving in an offensive way. The most recent, in November 2005, involved possessing medication without approval. The learned judge considered the history of breaches to be a matter of serious concern, particularly an incident in July 2005 in which the appellant needed to be physically restrained because he was head-butting and kicking walls, and another incident in which he wrote an abusive letter to the Community Corrections Board in August 2005. The appellant had completed a number of programmes and courses of study including Junior Maths, computer courses and an Occupational Health and Safety course, but his employment history in custody had been unsatisfactory.

[14] In 2002 the appellant began a Sexual Offenders' Treatment Programme but was excluded from it for disruptive behaviour. He undertook the programme again in 2003, this time successfully. Ms Sky, the psychologist who co-ordinated the programme provided a relatively favourable exit report, which recommended that he be granted community based release with supervision. He was assessed as a medium level risk for re-offending; that risk would be exacerbated by a failure to develop a suitable support network and a relationship with a mature adult, by social isolation, depression or boredom and avoiding problems. The learned judge at first instance regarded those identified risk factors as extremely significant.

[15] The appellant had put before the court a "transition plan" by way of a proposal for what he would do on release from custody. He could not return to live with his parents who remained in the country town where he had committed his offences. Instead, he proposed obtaining accommodation in Beaudesert or Toowoomba. At Beaudesert he had a better chance of public housing because it had a shorter waiting list. He had made a contact in the Catholic Prison Ministry who was helping him to find short term accommodation. He had had some assistance from "transitions facilitators" (a service for prisoners about to be released), had attended a session about budgeting and had obtained the name of a contact at an organisation which specialised in prisoner rehabilitation.

**The primary judge's findings**

[16] The learned judge made the finding that the appellant was a serious danger to the community in the absence of a s 13 order, without challenge from the appellant, and correctly identified the essential question as whether the adequate protection of the community could be ensured by the making of a supervision order. She found, not surprisingly, that the appellant had an anti-social personality disorder, as well as problems with impulse control which might amount to an impulse control disorder. It was, she observed, only in the last 12 months that the respondent had exhibited control of his behaviour.

[17] Her Honour preferred the evidence of Dr Grant as to the appellant's scoring on the psychopathy check list and concluded that none of the diagnoses of psychopathy, sexual sadism or paedophilia could be excluded. Of Dr Kar's evidence, she said that, although his categorisation of the respondent as a "dangerous sexual psychopath" was made without the aid of any risk prediction instrument, this was accepted by experts as a legitimate approach; by inference, it seems that she was prepared to act on his opinion in this regard. However, she rejected the notion of a genetic predisposition to serious sexual offending, accepting the evidence of Professor James and Dr Grant that it lacked any scientific basis.

[18] The learned judge criticised the appellant's lack of a firmer release plan and his failure to establish links in the community. He had failed, she said, to develop a strategy to manage the risk factors identified in the Sexual Offenders' Treatment Programme Exit Report. There was no arrangement in place for him to have access to a therapist and there were practical difficulties in finding such a person in Beaudesert or Toowoomba. The appellant's employment record in prison had been poor and he had not taken advantage of courses available in the prison to obtain real work skills for use on his release. He had not developed any strategies for budgeting and managing the costs associated with his diabetes and coeliac disease. He had not, she said, "done what is required of him to enable him to be released subject to a Supervision Order".

[19] Her Honour observed that the draft supervision order which had been placed before her contained provision for the appellant to attend a psychiatrist as required, and any other programme as directed, but it did not indicate the type of programmes proposed, or the nature of the psychiatric care or its frequency, and it did not deal with how the stressors of unemployment and social isolation could be managed. She concluded with this summary:

> "I am concerned that the respondent's his [sic] more mature behaviours have really only commenced in the last 12 months of his nine year term in an environment where the respondent has high

> supervision. In addition the proposed plans for his release and indeed the supervision order are woefully inadequate and do not in any meaningful way address the very real stressors which the respondent will be exposed to on release. In essence the reasons for this are that given the nature of the respondent's psychological condition, the stressors for him, and his own failure to address these stressors, the plan proposed and the draft supervision order in particular do not adequately address the risks that are presented. In particular there are very real risks given the premeditated nature of the offences, the violence involved, and the respondent's clear problems with impulse control.
>
> In the current circumstances I am satisfied that there is a high probability that the respondent will be destabilised by stress. I am also satisfied that the current plans will actually place the respondent in an environment of considerable stress. I am further satisfied that the current Transition Plan and the Draft Supervision order do not adequately manage the risk presented and I am not therefore satisfied that the adequate protection of the community can be ensured by the making of a supervision order."

The judgment ends with an exhortation to the appellant to spend the 12 months until review under the Act

> "building up his support networks, managing his medication, looking at his employment skills, saving such money as he can and putting in place a realistic plan for his life on release".

**The judge's responsibility to devise a supervision order**

[20] At one point in her judgment her Honour identified the relevant question in this way:

> "The question I must answer is whether on the current information I am satisfied that the adequate protection of the community can be ensured by a Supervision Order".

Counsel for the appellant submitted that the phrase "on the current information" revealed error. These were not, he contended, simple adversarial proceedings. If it were possible to achieve adequate protection of the community by a supervision order, the Court was obliged to establish for itself what form of supervision order would be effective, and then to prescribe it. On the evidence before her the learned judge ought to have made further investigation as to whether a supervision order could be achieved which gave adequate protection. She ought, at least, to have required that a more detailed proposal be formulated.

[21] Counsel put the argument in these terms:

> "If the question is whether the protection of the community can be adequately ensured by such an order, then it should be made, and if that means it should be investigated and questions should be asked by the judge and suggestions should be made arising out of the evidence, then that's what's required by the Act".

The submission, counsel said, was based on the examining psychiatrists' evidence: Dr Grant as to the need for strict supervision to reduce the risk of destabilisation,

Professor James as to the desirability of some sort of case manager and therapist to oversee the supervision of the appellant. There should have been an enquiry into the practicability of that step.

[22] That submission cannot, in my view, be supported by reference to anything in the *Dangerous Prisoners (Sexual Offenders) Act*. The Court is required by s 13(2) to make the finding as to whether there is an unacceptable risk that the prisoner will commit a serious sexual offence. A judge considering the making of a s 13 order must certainly consider whether a supervision order, with what conditions, can achieve community protection; and in that process it may be necessary to go beyond a draft provided by the parties. But that is a different exercise from embarking on an enquiry into resources which might be drafted to the prisoner's cause; and it was really the latter which the appellant was proposing. The learned judge would have been entitled to seek further information from the parties in that regard; but it was not incumbent on her to do more than consider, on the evidence which was before her, what level of protection could be achieved by the conditions of a supervision order.

**The relevance of the support network and the appellant's failure to build it**

[23] Allied with that submission was an argument that the appellant's failure to establish a support network of jobs, friends and accommodation was irrelevant. The appellant argued that he had been treated as if he carried an obligation to take sufficient steps towards establishing a satisfactory support network. And Counsel for the appellant placed particular emphasis on this answer given by Professor James when asked about the appellant's failure to offer satisfactory release plans:

> "He hasn't gone through the usual sort of process that most of us do, and I think it is genuinely difficult, and in my view that explains why there is no detail. I don't think it necessarily represents a sort of intrinsic deficit in himself, but a deficit which arises from his last nine years or more, 12 years experience really".

The learned judge had, Counsel said, made the mistake of treating factors thus identified as external to the appellant as though they represented some form of psychological inadequacy. That was particularly evident, he contended, from the concluding paragraph of her reasons, in which she urged the appellant to spend the next 12 months attending to such matters.

[24] It would not have been proper for the Court to regard the appellant's lack of organisation as itself deserving of an order; but it was entirely appropriate to consider the absence or presence of available forms of support and the appellant's ability to manage outside custody, as those factors affected risk. Some of the language used by the judge is suggestive of the former, in its emphasis on the appellant's failure during his time in prison to attend to networking and obtaining skills: "The respondent has not done what is required of him to enable him to be released subject to a Supervision Order". But a fair reading of the judgment, particularly the paragraphs set out at [18] above, indicates that the learned judge was fundamentally concerned with the state of risk, rather than with holding the appellant accountable for failing to put better arrangements in place.

[25] The learned judge's comments as to the appellant's failure to use his time in prison productively or to address the obstacles confronting him are, in context, an expression of concern as to those matters as reflecting his state of maturity and

capacity to cope on release. They are consistent with her comments, already quoted, as to his "more mature behaviours" only having recently commenced in an environment of high supervision. In practical terms, it is difficult to see a meaningful distinction between lack of maturity and the lack of life experience referred to by Professor James, for the purpose of assessing risk. Whether the reasons were regarded as intrinsic or extrinsic, the essential concern was the appellant's capacity to manage his life outside prison without relapse into offending. It was relevant to consider both his own level of functioning and the external means of support available to him.

[26] The comments do not reflect a reversal of the onus of proof. While for myself I have some doubt as to the feasibility of the appellant's establishing a support network from jail, I do not think her Honour's exhortation at the end of her judgment reflects anything more than a desire to encourage the appellant.

**The treatment of the psychiatric evidence**

[27] It was contended that the learned judge had not sufficiently identified the psychiatric opinion upon which she acted in determining the level of risk presented by the appellant. It is clear from her reasons, however, that she accepted Dr Grant's opinion in preference to that of Professor James as to the level of risk and considered that Dr Kar's opinion provided some additional cause for concern as to the existence of paedophilia. While her Honour did not make any positive finding as to the existence of paedophilia, sexual sadism or psychopathy, she properly regarded the indicia of those conditions identified by the various psychiatrists as relevant to the assessment of risk. It was also argued that since the examining psychiatrists had not recommended the making of a continuing detention order, the learned primary judge ought not to have made such an order. But that, of course, does not follow; the discretion was one for her Honour to exercise.

**Was the continuing detention order punitive?**

[28] The appellant argued that, given he did not require treatment or care, the only purpose of his continued detention was control. He was effectively being punished for his inability to meet the requirements identified by her Honour. It seems to me, however, that it was open to the learned judge to reach the conclusion that she did as to the danger posed by the appellant on release, even were a supervision order imposed. Having made that finding, she was obliged to impose instead a continuing detention order; and for the reasons already given I do not think that that involved imposing requirements on the appellant, let alone punishing him for a failure to meet them.

[29] It is plain, however, that her Honour considered it entirely possible that the level of risk posed by the appellant could be reduced to an acceptable level, particularly if satisfactory support structures were to be available to him in the community; hence her encouragement to him to persevere in setting them in place. It may be expected, too, that the respondent through the Department of Corrective Services would take all available steps to assist the appellant in alleviating what her Honour identified as risk factors. The objects of the Act include the provision of "continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation"[3]. It was not suggested that this case fell into a class where rehabilitation was not achievable. The evidence was that there were no further programmes available in

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[3] Section 3(b)

custody which would assist in the appellant's rehabilitation. It follows that his rehabilitation is best achieved outside custody; the respondent's obligation, correspondingly, is to do all it can to help the appellant achieve that result, so that the character of his detention does not (for the reasons discussed in *Attorney-General (Qld) v Francis*[4]) become punitive rather than preventive.

**Order**

[30] For the reasons given, the appeal should be dismissed.

[31] **DOUGLAS J:** I agree with the reasons and order proposed by Holmes JA.

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4 [2006] QCA 324 at para 31.