SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v Hynds* [2007] QSC 374
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **GREGORY ALAN HYNDS** (respondent)
FILE NO:	SC No 7584 of 2007
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	7 December 2007
DELIVERED AT:	Brisbane
HEARING DATE:	7 December 2007
JUDGE:	Fryberg J
ORDER:	**The respondent be detained in custody for an indefinite term for control.**
CATCHWORDS:	Criminal law – Jurisdiction, practice and procedure – Judgment and punishment – Sentence – Miscellaneous matters – Other sex offenders – Application for respondent to be detained in custody pursuant to s 13(5)(a), *Dangerous Prisoners (Sexual Offenders) Act 2003* – Adequate protection of community – Refusal to acknowledge offences or admit guilt – Risk of recidivism unacceptable – Improbability of respondent complying with supervision order – Refusal to undergo treatment – Requirement of control while detained in custody *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s13 *Attorney-General for the State of Queensland v Francis* [2006] QCA 324 cited *Attorney-General for the State of Queensland v Waghorn* [2006] QSC 171 cited
COUNSEL:	Applicant: J Rolls Respondent: D Lynch
SOLICITORS:	Applicant: C Lohe (Crown Solicitor) Respondent: Legal Aid Queensland

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

[2007] QSC 374

FRYBERG J

No 7584 of 2007

ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND	Applicant
and	
GREGORY ALAN HYNDS	Respondent

BRISBANE

..DATE 07/12/2007

JUDGMENT

HIS HONOUR: I have had the opportunity to consider the evidence and these matters during the recent break, and I am in a position to deliver reasons for judgment now, which I propose to do.

The Attorney-General seeks a division 3 order; that is, an order that Gregory Alan Hynds be detained in custody for an indefinite term for control care or treatment, pursuant to section 13(5)(a) of the Dangerous Prisoners (Sexual Offenders) Act 2003, which I shall call, "the Act".

The Court may make such an order if it is satisfied that a prisoner is a serious danger to the community in the absence of such an order: section 13(1). A prisoner, for the purposes of that provision, means a prisoner detained in custody who is serving a period of imprisonment for a serious sexual offence, or serving a period of imprisonment that includes a term of imprisonment for a serious sexual offence.

A serious sexual offence is defined as including an offence of a sexual nature, whether committed in Queensland or outside Queensland, involving violence: see the schedule to the Act.

Mr Hynds was sentenced in New South Wales to a period of imprisonment of somewhat less than 20 years in late 1989 for several such offences. He has been transferred to Queensland under the legislation which makes provision for such transfers, and his sentence is to be regarded as having been imposed by a Queensland Court, which has power to impose that sentence.

There is no doubt that he is a prisoner within the meaning of the Act, and that has been admitted on his behalf.

In deciding whether a prisoner is a serious danger to the community for these purposes, a Court must have regard to a list of factors set out in section 13(4) of the Act.

In the present case, Mr Hynds has formally admitted that he is a serious danger to the community in the absence of a division 3 order.

Ordinarily in civil proceedings, which (perhaps surprisingly) is what the present proceedings are, that would be sufficient to warrant a finding to that effect. However, section 13.4 is phrased in mandatory terms.

Counsel for the Attorney-General was initially disposed to submit that the concession removed the need for a decision to be made, and hence the need to take section 13.4 into account for this purpose.

Counsel for Mr Hynds submitted that the Court had to comply with the statutory language, and consider the matters in the subsection.

Counsel for the Attorney-General in the end, I think, conceded the correctness of this view.

It must be so, since section 13 applies only if the Court is satisfied under subsection(1). In order to determine whether it is so satisfied, the Court must inevitably make a decision, and that immediately engages subsection (4).

I am satisfied that Mr Hynds is a serious danger to the community, in the absence of a division 3 order.

In reaching that conclusion, I take into account the unanimous views of Dr Moyle, Dr Beach and Dr Sundin to that effect; the participation by Mr Hynds in rehabilitation programs, but not including the sexual offenders treatment program; limited evidence of positive effects resulting from those programs; Mr Hynds' criminal history; the risk that Mr Hynds will commit another serious sexual offence if released into the community; the need to protect members of the community from that risk; and the concession made at the commencement of the proceedings. I shall expand on some of that evidence later in these reasons.

Subsection 13(5) provides:

> "(5) If the Court is satisfied as required under subsection(1), the Court may order--
>
> (a) that the prisoner be detained in custody for an indefinite period for control, care or treatment (continuing detention order); or
>
> (b) that the prisoner be released from custody subject to the requirements it considers

appropriate that are stated in the order (supervision order)."

It is not altogether clear whether "may" in that provision means "must". If it does, then the Court is limited to making the two orders specified, and may not decide to make no order at all.

There are powerful factors in favour of such a construction, and neither counsel before me was disposed to argue against it. However, there may be cases where making no order would be appropriate. I should not determine this question in the absence of full argument, particularly since it is common ground in the present case that the only options practically open are the two specified in the Act.

The Act explicitly states that the Attorney-General has the onus of proving that a prisoner is a serious danger to the community as mentioned in subsection (1): see subsection 13(7).

It is silent as to the onus in relation to subsection 13(5). It may be that this is a provision of such a discretionary nature that the question of onus does not arise. Counsel for Mr Hynds submitted that not withstanding the failure of the Act to specify the onus, in circumstances where it had specified the onus in relation to subsection (1) the onus was still on the Attorney-General in respect of subsection (5).

There is some judicial support for that view. In Attorney-General v. Francis [2006] QCA [324], the Court of Appeal said:

> "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."

In Attorney-General v. Waghorn [2006] QSC [171], Justice McMurdo said:

> "A continuing detention order is warranted if it proved by the Attorney-General that the risk of reoffending is unacceptable if [the prisoner] is released, even under strict supervision."

I shall assume without deciding that the onus lies upon the Attorney-General to show why a continuing detention order should be preferred to a supervision order.
In making that decision, the paramount consideration is the need to ensure adequate protection of the community: section 13(6). Other factors which counsel submitted were material were the impact of the order on the prisoner; any efforts at rehabilitation made by the prisoner; and the proposed

conditions of a supervision order. It is, therefore, necessary to consider those facts.

Mr Hynds is 46 years old. The offences for which he is currently imprisoned are the only offences he has ever committed outside the Navy. They occurred on two separate occasions. On the first occasion, Mr Hynds had befriended the wife of one of his Navy colleagues. He called at her home on two occasions while she was alone with her baby. According to her, nothing occurred on these occasions, other than a casual chat over a cup of coffee, after which he left.

On the evening of 3 April 1988, he again arrived without prior arrangement at her home. On this occasion, his colleague was at home with his wife. My Hynds suggested to him that they go to a club, and he agreed. He changed his clothes and the two of them left, leaving the colleague's wife at home with the baby.

They attended a number of clubs before Mr Hynds told his colleague that he was going to the toilet. In fact, he departed from the club and returned to the residence. He gained admission to the home by telling the victim that he was concerned about what might have happened to her husband, and that he should await his return.

Having done so, he produced a knife and forced her into the bedroom. Threatening her with the knife, he procured her to have both vaginal and oral intercourse with him, each on two

separate occasions. In addition, he attempted to have anal intercourse with her, but was unable to achieve penetration.

After these acts of sexual violence, he expressed concern that the victim would report him. He was determined to kill her. The victim threw a television set at him, but it fell short. She struck him on the head with a bedside lamp, causing a severe laceration to his forehead.

He attempted to strangle her; first manually, later with a telephone cord. She suffered a sub-conjunctival haemorrhage. He was kneeling over her, threatening her with a knife when her husband walked in. After a brief struggle with the husband, Mr Hynds left.

Police approached him the following day, when he denied that he had been at home on the previous night, and said he had sustained his injuries by falling down some stairs.

He was granted bail in respect of those offences.

The second occasion occurred some eight months later, while he was on bail.
He enticed the wife of another Navy colleague to an isolated spot and there committed sexual offences upon her. At the trial, he gave evidence that he had enlisted the aid of a person - whom he declined to identify - to assist him in the deception which placed the victim at his mercy. He was aware that her husband had been sent to Sydney on a course.
According to the evidence adduced at the trial, he arranged

for the other person to ring the victim, and to inform her that her husband had been involved in a motor vehicle accident in Sydney, and that the Navy was arranging for her to be flown up to Sydney.

After the telephone call - and having carefully surveyed the area on the day before - Mr Hynds arrived with a Navy truck, picked the victim up and drove her to an isolated air field. He then left the vehicle and returned with a knife which he used to subdue the victim, allowing the offences to be committed.

He applied for leave to appeal against the sentences, resulting from both occasions. The Court of Appeal of New South Wales rejected his application. It noted there was no suggestion of remorse.

Mr Hynds has no substantial history of drug abuse, but some history - prior to the offences at least - of alcohol abuse. He has no material history of medical or psychiatric debility.

Since his incarceration, Mr Hynds has had a minimal breach history, and his security classification is low. He has completed the substance abuse core program, the cognitive skills program, the anger management core program and the violence intervention program. He has refused to participate in the sexual offenders treatment program, because that program involves an admission that he committed the offences.

Mr Hynds' refusal in this regard is curious. When initially interviewed in relation to the first occasion of offending, he denied involvement. However, at trial, he gave evidence and his defence was that his victim was consenting.

Since then, he has resiled from that version, and now alleges that he had no direct contact with the victim, but rather forced her husband to perform a number of sexual acts upon her. He continues to maintain his inability to recall the events surrounding the second occasions. His changes of story are bizarre.

All three psychiatrists diagnosed Mr Hynds as suffering from anti-social personality disorder. Dr Moyle expressed the view that he was not psychopathic.

Mr Hynds refused to cooperate fully with the psychiatrists, in that he would not discuss certain areas of his life. These related not only to his actual offences, but also to areas involving his sexuality and disciplinary history, possibly for offences of violence in the Navy.
As a result - although the psychiatrists were still able to form an assessment of the risk that Mr Hynds would reoffend if released without a supervision order - that assessment was less reliable than it would have been, had he cooperated. All three rated him at levels from moderate to high risk of reoffending.

There is some disagreement among the psychiatrists as to whether it is possible to formulate a set of conditions which,

if Mr Hynds adhered to them, would provide adequate protection to the community.

Dr Beach was inclined to the view by a narrow margin that it was possible to do so. Dr Sundin had the opposite view. And, at the end of the day - as I understand his evidence - so did Dr Moyle. All doctors thought that their analysis was impaired to a significant extent by Mr Hynds' non-cooperation in refusing to talk about some areas of his life, including the offences.

On the prisoner's behalf, Mr Lynch submitted that I should be satisfied that the protection of the community can be adequately ensured by the making of a supervision order. He submitted that I should refer the evidence of Dr Beach, and that Dr Moyle was, to an extent, in agreement with Dr Beach. He submitted that I should reject Dr Sundin's evidence to the contrary.

He referred me to Mr Hynds' productive behaviour in prison, other courses he has completed, and the assistance he has given to younger prisoners. He referred to the fact that Mr Hynds has work and accommodation available if he is released, although the evidence in this regard is very thin. I am not satisfied that adequate attention has been given by Mr Hynds to this aspect of the matter. He submitted that Mr Hynds long period of good conduct in prison, and otherwise positive advancement was not outweighed by his refusal to admit his guilt and his consequent non-completion of the SOTP course.

In my judgment, a refusal by a prisoner to admit his guilt might, in some circumstances, be rational and not to be held against him, particularly if the evidence against him were weak. That is not so in the present case. The evidence against Mr Hynds was strong. His continuing changes of story in relation to the first occasion of offending, when combined with this strength, make his refusal either irrational or deliberately obstructive.

There is no evidence that he is suffering from any condition which would give rise to irrationality. I do not believe that he himself honestly believes in his own innocence.

All of the psychiatrists were concerned with whether Mr Hynds could be relied upon to comply with conditions of a supervision order. They accepted that knowledge of the likelihood of further imprisonment - by reason of section 43B in the event of a breach of any supervision order - would be a factor reducing the risk of breach.

I must carry out a balancing exercise. In doing so, I must make my own assessment of Mr Hynds. He has chosen not to give evidence in these proceedings. That makes my task much more difficult. I am unable directly to make an assessment of the extent and seriousness of his attitude to rehabilitation, and of the reliability of the promise which he makes through his counsel to adhere to the conditions of a supervision order.

He has chosen, quite deliberately, not to give evidence. I can only assume that nothing he has to say will improve his position in relation to these matters.

The paramount consideration is the need to ensure adequate protection of the community. The starting position should be that I favour making a supervision order, unless there is a reason not to. I am satisfied on the evidence that such a reason exists in the present case. To the extent that it has been possible to assess Mr Hynds' risk of recidivism, that risk is moderate to high. Such a risk is unacceptable.

I am not satisfied that I can rely upon Mr Hynds to comply with the conditions as proposed. I think there is a real risk that he would not comply.

The other factors relevant to my decision do not outweigh that paramount consideration.

An order must therefore be made under paragraph (a). That order must be for one or more of the purposes of control, care or treatment. There is no evidence that Mr Hynds needs any care. That was common ground. Mr Hynds has persistently and consistently refused to undergo the SOTP course, and I see no prospect of his changing his attitude. There is no suggestion that any other treatment is necessary or desirable. There is, therefore, no point in my making an order for the purpose of treatment.

Adequate protection of the community can be ensured by ordering that he be detained in custody for an indefinite term for control. That is the order which I make.
