

SUPREME COURT OF QUEENSLAND

CITATION: *Attorney-General v. Francis* [2008] QSC 69

PARTIES: **Darren Anthony Francis**
(Applicant)
v
Attorney General for the State of Queensland
(Respondent)

FILE NO: BS 3069 of 2004

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 11 April 2008 (*ex tempore*)

DELIVERED AT: Brisbane

HEARING DATE: 11 April 2008

JUDGE: PD McMurdo J

ORDER: **Pursuant to section 21(6) of the *Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)*, the Applicant is released subject to the supervision order made by Justice Philippides on 7 November 2007.**

CATCHWORDS: DANGEROUS PRISONERS – Supervision orders under *Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)*- breach of order – application for release under section 21(3) pending determination of final application – “exceptional circumstances” under section 21(4)

COUNSEL: Mr M Cooke QC with Mr Fenton for the applicant
Mr B Farr SC with Mr G Del Villar for the respondent

SOLICITORS: Aboriginal and Torres Strait Islanders Legal Service for the applicant
Crown Law for the respondent

- [1] Mr Francis is subject to a supervision order made under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) made on 7 November 2007¹. It is alleged that he has recently breached a requirement of that order by using cannabis. A warrant was issued for his arrest under s 20 of the Act and he was arrested on 25 March and brought before the court the next day. The Attorney-General has filed an application for the rescission of the supervision order and for a continuing detention order in its place. That application has been set down for hearing on 12 May next.
- [2] Mr Francis applies pursuant to s 21(3) for an order that he be released pending the final decision on the Attorney-General's application.
- [3] By the terms of s 21(4), Mr Francis must satisfy the court that because exceptional circumstances exist, his interim detention is not justified.
- [4] The Attorney-General's case to be heard next month requires the Attorney to prove that Mr Francis has used cannabis. The evidence to be relied upon is the results of some random tests of urine samples on 18 and 21 March. The reliability of those tests is to be challenged at that hearing. That will require a considerable factual enquiry which is why the parties have asked for several days of hearing to be allocated. It is not possible to engage in that enquiry within this hearing and it would be inappropriate to do so. I will act on the basis that, as was conceded for Mr Francis, there is a serious question to be tried that he

¹ [2007] QSC 328.

breached the order by using cannabis, but there is also an apparent argument that a breach cannot be proved.

[5] On his behalf it was argued that the alleged use of cannabis was on any view slight and therefore any breach was not so serious as to warrant his going back into custody. But in my view that is more a question for the judge hearing the application next month, if satisfied that there has been a breach.

[6] The relevant enquiry for today is whether there are exceptional circumstances which make Mr Francis' detention for the next month unjustified.

[7] In *Baker v The Queen*,² Callinan J referred with approval to what Lord Bingham of Cornhill CJ had said in *R v Kelly (Edward)*,³ namely:

"We must construe 'exceptional' as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered."

[8] The circumstances of Mr Francis' sexual offending and the particular risk of re-offending need to be kept in mind. Most recently, they have been extensively discussed in the judgment of Philippides J last November. His offences were committed against women with whom he had formed an intimate relationship. He is not a paedophile and he has not offended against women in other circumstances. Undoubtedly his offences were very serious and the community is entitled to be protected against an unacceptable risk

² (2004) 223 CLR 513, 573.

that he will re-offend. But the risk of re-offending is unusual because it arises in the particular context where there is that circumstance of a relationship coupled with the abuse of drugs. As Philippides J discussed, it was that combination of circumstances which had been identified by many previous judgments in Mr Francis' case. Byrne J had noted that "his propensity for sexual violence is likely to manifest itself in relation to victims who enter into an on-going sexual relationship with him"⁴. Mackenzie J said that:

"Unlike many sexual offenders, the respondent's sexual offending has been of a particular kind ... In each case, they occurred in circumstances where amphetamine and alcohol abuse were factors. In each case, he assaulted a woman with whom he was in a sexual relationship because he apparently believed she had been unfaithful to him. ... The nature of the identified risk is that, if he forms an intimate relationship with a woman, he may commit a serious sexual offence on her, especially if he were to be abusing amphetamines or alcohol during the relationship"⁵.

[9] Another requirement of the present supervision order is that he not enter into such a relationship for 12 months from the order which was made last October. He is being monitored in that respect also and there is no suggestion of a breach.

[10] What must then be assessed is the extent of the risk that those set of circumstances will come together and create the particular risk in his case of re-offending, within the next month pending his hearing. The judge who conducts that hearing will have a different question which is the level of risk that will exist over several years. But the extent of the risk for the next few weeks must surely be less because it is such a short period and because he

³ [2000] QB 198, 208.

⁴ [2004] QSC 233, [23].

will have the strongest incentive not to breach any of the conditions of his order.

[11] His treating psychiatrist, Dr Hogan, says that the alleged use of cannabis, if it occurred, is a serious breach. That is surely correct. But that is one matter to be considered in the overall assessment of whether there are exceptional circumstances here.

[12] Under the terms of the present order he must undergo testing as directed by a Corrective Services officer. It is possible for him to be tested, say every few days, in a way which will be sure to detect any use of drugs.

[13] In my conclusion, Mr Francis has demonstrated that there are exceptional circumstances that justify his release pending the hearing in a few weeks. It will be ordered that he be released pending the final decision on the Attorney-General's application.

[14] I order that pursuant to section 21(6) of the Act the Applicant be released subject to the supervision order made by Justice Philippides on 7 November 2007.

⁵ [2005] QSC 381, [111], [112].