SUPREME COURT OF QUEENSLAND

CITATION:	*A-G for the State of Qld v Winston* [2009] QSC 11
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** **Applicant** **v** **DENNIS WINSTON** **Respondent**
FILE NO/S:	No 9202 of 2008
DIVISION:	Trial Division
PROCEEDING:	Application under the *Dangerous Prisoners (Sexual Offenders) Act 2003*
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	6 February 2009
DELIVERED AT:	Brisbane
HEARING DATE:	5 February 2009
JUDGE:	Byrne SJA
ORDER:	**That pursuant to s 13(5)(a) of the *Dangerous Prisoners (Sexual Offenders) Act 2003* the respondent be detained in custody for an indefinite term for control care and treatment.**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – MISCELLANEROUS MATTERS – SEXUAL OFFENDERS – Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld) – where respondent serving a period of imprisonment for sexual offences involving children – where application made under s13 Dangerous Prisoners (Sexual Offenders) Act 2003 (Q) for continuing detention order – whether the respondent is a serious danger to the community – whether adequate community protection afforded by supervision order. *Attorney General v Francis* [2006] QCA 324 ss 13(4) – (5) *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld)
COUNSEL:	M. Maloney for the Applicant.

C. Heaton for the Respondent.

SOLICITORS: Crown Law for the Applicant.
Legal Aid Queensland for the Respondent.

BYRNE SJA:

[1] The Honourable the Attorney General seeks an order pursuant to section 13(5) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 that the respondent be detained in custody for an indefinite term.

[2] It is common ground, and there is ample evidence to demonstrate, that the respondent is a serious danger to the community in the absence of a division 3 order within the meaning of that expression in section 13 of the Act. The fact is demonstrated by acceptable, cogent evidence, and to a high degree of probability.

[3] The respondent contends that adequate protection to the community can be afforded by a supervision order and that, therefore, his indefinite detention in custody is not appropriate.

[4] The respondent was born in February 1950. Tomorrow, his imprisonment on sentences aggregating 12 years and eight days ends.

[5] The respondent was first convicted of an offence of a sexual nature in 1966: in respect of a 10 year old boy. He walked past the boy and flicked him on the penis. He was fined.

[6] About 30 years passed without the respondent being charged with sexual offences.

[7] In January 1996, he pleaded guilty to five offences, all committed on 1 April 1995, concerning a 14 year old boy. The boy's statement indicated that the respondent befriended him and his mother, and he joined the boy in bicycle riding. Eventually, the mother was persuaded to allow the boy to stay overnight with the respondent. He persuaded the boy to take his clothes off. He removed his own clothes and attempted to fondle the youth. He showed the boy pornographic magazines and a pornographic movie. He fondled the boy's genitals. The boy felt scared and uncomfortable. In time, he pretended to be asleep. He awoke to find the respondent hugging him and forcing his tongue into his mouth and rubbing his penis against the boy's body. The boy attempted to escape. The respondent grabbed him and threw him at the wall. When the boy escaped from the house, the respondent threatened to kill him.

[8] One sentence was for two years imprisonment, wholly suspended for an operational period of four years. Another was for three years probation, with a condition that required the respondent to attend programs directed by an authorised officer. The respondent was, it seems, directed to attend a 20 session sexual offenders treatment program. He attended two sessions.

[9] Between 30 November 1996 and 1 January 1997, the respondent committed serious sexual offences against four children. In respect of a charge of maintaining an unlawful relationship of a sexual nature with a child under 12, during which he

committed multiple acts of anal intercourse with circumstances of aggravation, he was sentenced to imprisonment for 10 years. Lesser sentences of imprisonment were imposed for other offences. The offending occurred during the operational period of the suspended sentence. The two years suspended imprisonment was ordered to be served cumulatively upon the 10 year sentence.

[10] One of the complainants was a nine year old boy. The respondent encouraged him to go to his property to carry out odd jobs to earn money. The first time the boy was there, the respondent pulled down his own shorts and underpants. On the second occasion, the respondent undressed the boy and put his penis into the child's anus. Then he performed fellatio on the boy. He threatened to kill the child if he told anyone else.

[11] On a later date, the respondent gave the boy $5 to walk with him to a nearby beach. On the way there, he undressed the child and had anal intercourse with him. At the beach, the respondent held the child's head underwater and forced him to place his mouth around his penis. He then inserted his penis into the child's anus. Subsequently, the respondent showed the child pornographic magazines and a pornographic video. He told the boy not to tell anyone or he would be killed. The boy estimated that he was a victim of unlawful anal intercourse on about 20 occasions.

[12] The second complainant was aged 11. He also attended the respondent's property to earn some money. The respondent indecently dealt with the boy several times. He sodomised the child once.

[13] The third complainant was a 10 year old female. She was shown a pornographic movie and told not to tell anyone else, otherwise he would have to go to gaol for 40 years.

[14] The respondent took the fourth complainant to his bedroom and showed him homosexual pornographic magazines. He pulled down the boy's underwear and began to rub himself on the complainant. He inserted an unknown object or body part into the child's anus.

[15] The respondent has considerable intellectual impairment, perhaps due to brain damage during birth.

[16] Since incarnation, he has suffered two psychotic episodes. The first was in 2002, when he was in hospital after a suicide attempt. The second was in 2004, resulting in admission to the John Oxley Hospital. The hospital discharge summary spoke of a week long history of distress and agitation, including hallucinations.

[17] In prison, the respondent has undertaken a number of educational and vocational programs. These include sexuality and human relationships and intimate relationship programs, as well as anger management.

[18] Importantly, however, he has not undertaken a custodial sexual offender treatment program.

[19] The respondent cooperated in examinations by three psychiatrists: see ss 13(4)(a) and (b) of the Act.

[20] Professor James saw the respondent at the Palen Creek Correctional Centre on 7 April 2008, when the respondent presented as a man of borderline intelligence with no apparent current mental illness. He was taking anti-psychotic medication. Professor James wrote that, in view of the history of offending, presentation at and the results of examination, were the respondent to be released from prison without further exposure to a sexual offenders treatment program, and without a supervision order, the chances of re-offending would be high.

[21] Professor James recommended strongly that, before the respondent's release from prison, he undertake a suitably structured sexual offenders treatment program, and that his performance during the program and its effect be considered before a final decision is made for release.

[22] In testifying, Professor James identified a number of factors which account for his assessment of the degree of risk of sexually offending with boys on release. He spoke of the respondent's offending in a serial way; that the offences for which he was sentenced in 1997 occurred while he was subject to a suspended sentence; there has been no pertinent treatment; the respondent is of limited learning capacity; his support in the community is poor; and the respondent "feels himself to be a child essentially" and relates most comfortably to children.

[23] Professor James thinks that the respondent ought to undertake the Inclusion sex offender program offered by Queensland Corrective Services in a custodial environment. It is designed for people of limited intellectual capacity, such as the respondent, after completing a 'Getting Started' preparatory program. He considers that the respondent would be likely to benefit from the Inclusion program, involving, as it does, participation in a group. This would mean that the course would not simply have the therapist give instructions. The respondent would also have peers to assist him.

[24] Professor James considers that the inclusion course, which is only offered in custody, should be completed. Were the respondent, instead, to undertake a broadly comparable program on release in the community, Professor James is concerned that the risk of relevant recidivism would manifest itself before "significant benefit from the program would accrue." Were the respondent not under observation, he would be capable of putting himself "in at risk situations."

[25] Professor James considers that it would be extremely difficult to manage the risk of sexually re-offending with boys under a supervision order, at least without the imposition of restrictions so extensive as "would hardly make community living justifiable." Professor James also holds reservations about any "supervisory" regime before completion of an appropriate treatment program. What he describes as “active contribution on the part of the individual” is needed to reduce the risk appropriately. The Inclusion program "would enable the respondent, to play a more active, and indeed quite crucial role, complimenting the supervisory action of Corrective Services officers. The respondent needs to be armed with strategies to identify at risk situations and to cope with them, and before release."

[26] Professor Nurcombe examined the respondent in November last year. He considers that "In the absence of appropriate post-release supervision, the risk of re-offending is regarded as high. The risk of re-offending would be reduced by comprehensive post-release supervision. It is important that Mr Winston complete an appropriately

modified sex offender program prior to release, and that he receive sex offender maintenance treatment following release. At the present time, his relapse prevention plan consists of no more than empty promises and fragmentary jargon."

[27] In testifying, Professor Nurcombe identified a number of major risk factors for relevant re-offending: that the respondent is sexually deviant and emotionally identifies with young children; there is a history of sexual offending against boys; the respondent breached his probation during a suspended sentence; he has unresolved issues to do with his own sexual abuse as a child; he suffers from a serious deficit in social skills and capacity for intimacy with people his own age, which combined with an emotional identification with children, has him gravitate towards children; and he has not received treatment while in custody. In Professor Nurcombe's assessment, the risk of re-offending is no different now to what it was 12 years ago.

[28] Professor Nurcombe also considers that the respondent should undergo the Inclusion program and that treatment in custody is needed "because the prospects of re-offending following release are so serious" that every opportunity should be taken to reduce the risk.

[29] Professor Nurcombe considers that warning signs of imminent sexual molestation could be expected. But it is a question whether the signals would be available to people other than the respondent. In Professor Nurcombe's opinion, the nature and extent of the risk of relevant recidivism is such that every opportunity should be taken to reduce it, although he acknowledges that the Inclusion program may not have such an effect.

[30] The prospect that the Inclusion program may not be successful must be acknowledged, especially given the respondent's limited intellect: see the report of the neuro-psychologist, Debra Anderson, dated 22 January 2009, especially at page 7.

[31] Dr Beech, another psychiatrist, considers that the respondent is at high risk of sexual offending if released at this stage, describing him as a dull, untreated recidivous child sex offender, prone to psychosis and depression when stressed and who has no plan for his future.

[32] The risk of re-offending could be reduced by further treatment, which, in Dr Beech's opinion, would include an appropriate sex offender treatment program of sufficient intensity delivered in a manner suitable for the respondent's risk and intellect.

[33] Dr Beech believes it would be preferable for the respondent to undertake a sex offender program before release. Because of the high risk of offending related to the nature of the respondent's sexual deviance, the re-offending that resulted in the 10 year imprisonment and the absence of a relapse prevention plan, he considers that the Inclusion sex offender program, which would be undertaken after successful completion of the 'Getting Started' program, is suitable, designed as it is for people like the respondent with an intellect below 80.

[34] There are, in Dr Beech's view, distinct advantages in undertaking such a program in custody. There is the structure of the prison setting. This matters because sometimes these programs can be stressful and participants like the respondent may

need support. Being housed in a place where he is used to the routine "would actually be of benefit." Dr Beech identifies other reasons for preferring custodial delivery of an appropriate treatment program. During such a course, the offender is at risk. And there are practical impediments to continued participation, such as getting transport to the place where a program is delivered in the community. (The respondent attended only two of the 20 sessions of the program to which he was directed during probation).

[35] Dr Beech acknowledges that a satisfactory program could be delivered within the community over about a year. But he considers that even if the respondent were to be accepted for such a program, which is by no means assured, he would need an escort to and from a safe and secure environment until facilitators were sufficiently confident that he could travel within the community with a lower level of supervision.

[36] None of the psychiatrists was presented with a detailed proposal for close and continuous supervision for their evaluation. And no such proposal was presented at the hearing, let alone in advance of it, to enable a highly restrictive regime to be assessed for feasibility of delivery and, if it matters, cost.

[37] There is information indicating whether there is a propensity on the part of the prisoner to commit serious sexual offences in future - see section 13(4)(c). Reference has already been made to it.

[38] There is a pattern of offending behaviour. It involves serious sexual offending against boys.

[39] The respondent has declined to participate in the Inclusion sexual offender treatment program. He was offered participation in it more than two years ago. He says that he refused a place because the program did not offer individual counselling and because he did not want to be a group of people "because I know people talk about what happens during the program to other inmates." The psychiatric evidence, however, shows that a small group program would be better than individual counselling.

[40] The factors mentioned in section 13(4)(e) to (h) of the Act have already been addressed.

[41] All three psychiatrists assess the risk of relevant re-offending as high. All think that the respondent needs to participate in a sexual offender treatment program before release, and, after release, in a maintenance program under supervised release. All consider that the Inclusion course is suitable and that such a treatment program conducted in a custodial setting is better protection for young boys than the respondent's release, when he might, perhaps, be accepted for a sexual offender treatment program offered privately in the community and, if he were, might, perhaps, take advantage of the opportunity.

[42] The respondent says that he is prepared to abide by "whatever conditions are thought necessary to reduce the perception of risk" and that he is committed to not re-offending, having spent 12 years in prison, and facing the prospect of indefinite incarceration should he re-offend.

[43] As Mr Heaton pointed out, no release is without some risk. And, as was said in Attorney General v Francis [2006] QCA 324, "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."

[44] In this case, the community cannot be adequately protected by a supervision order.

[45] Untreated, the respondent poses too great a risk of committing serious sexual offences against boys. This risk could not be adequately addressed by a supervision order, at least not unless the regime prescribed were to contain such extensive restraints upon the respondent's freedom of movement and association as would see him at effectively no greater liberty than if in custody.

[46] Anyhow, no detailed proposal for such a regime has been advanced for assessment by the psychiatrists or those who would need to find the money and people to implement it. And it is not shown that the respondent has much chance of being accepted into a community-based sexual offender treatment program let alone that he might, this time around, complete such treatment.

[47] There should be a continuing detention order for treatment and control.