SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

DAUBNEY J

No 1027 of 2009

ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND	Applicant
and	
DONALD LEVI	Respondent

BRISBANE

..DATE 18/06/2009

ORDER

HIS HONOUR: This is an application by the Attorney-General for the State of Queensland for orders pursuant to section 13 of the Dangerous Prisoners (Sexual Offenders) Act of 2003 ("the Act") against the respondent Donald Levi.

The Attorney-General seeks an order that Mr Levi be detained in custody indefinitely for care, control or treatment or alternatively for an order that he be released on conditions under a supervision order pursuant to section 13 of the Act.

The respondent is currently serving a sentence of imprisonment of 11 years for the offence of maintaining an unlawful relationship of a sexual nature with a child under 16 years with circumstances of aggravation. His full-time release date is 6 July 2009.

The respondent has a criminal history going back to 1985 when he was convicted on two counts of rape and three counts of indecent assault on a female. He has other offences recorded in his criminal history, including for breaches of Domestic Violence Orders, assault, wilful damage to property and other public order offences.

The offences in respect of which he is presently imprisoned are those for which he was convicted in 1999, namely, the offence of maintaining an unlawful relationship of a sexual nature with a child under 16 years with circumstances of aggravation. He was originally sentenced to 13 years'

imprisonment by the learned trial Judge. However, on appeal, that sentence was reduced to 11 years.

In order to give some background to the matter, it is appropriate and sufficient simply to quote from the judgment of Davies JA, with whom de Jersey CJ and Jones J agreed, in the application for leave to appeal against sentence. His Honour said, "At the time of his sentence, the applicant was 34 years of age, having been born on 9 August 1964. He has a number of previous convictions, the most significant of which, for present purposes are the following. On 3 December 1985 he was convicted on two counts of rape and three of indecent assault for which he was sentenced to an effective term of 10 years imprisonment. He escaped from custody in 1991 and was sentenced for that offence in that year to six months imprisonment cumulative upon his previous sentence. Then on 24 October 1997 he was convicted of serious assault on a police officer, going armed, wilful damage, assault and resisting police for which he was sentenced to an effective term of 12 months' imprisonment suspended after three months for an operational period of 18 months. This short term of imprisonment interrupted the offending conduct, the subject of the present appeal, which continued unabated during part of the period of the suspended sentence. It is unnecessary to discuss in detail the applicant's revolting conduct towards his young and vulnerable stepson over the period to which I have referred. It is sufficient to say that they included not only nine acts of anal intercourse, to which I have already referred, but two incidents where the applicant rubbed his

penis against the child's anus without penetration. The applicant's mother must have suspected, before the end, that something was amiss because she had on a number of occasions, asked the child whether any sexual misconduct had occurred and the child had denied it. This was because the applicant had told him that he would hurt the child or his mother if the child ever mentioned what had occurred. Eventually, after the last of the nine sodomies, which occurred on 7 July 1998, the child did complain to his mother who then called in the police."

As I've already mentioned, the application for leave to appeal against sentence was allowed, as was the appeal, and the Court of Appeal imposed a sentence of 11 years' imprisonment.

The respondent has now very nearly served that term of imprisonment and the fact that he is due shortly to be released was the catalyst for this application by the Attorney-General.

For the purposes of the application, psychiatric evidence has been obtained from three eminent specialists, Dr Basil James, Dr Michael Beech and Dr Josie Sunden. I shall refer to their expert evidence shortly. Apart from each of those doctors providing several reports to the Court, each of them gave oral evidence before me today.

Also in the evidence before me are reports and outcome reports from the several sexual offending programs which the

respondent has engaged in while in custody, in particular, the Indigenous High Intensity Sexual Offenders Program which was completed by him in March of 2009, the results and outcome report of which became available in May 2009 and that being material which was further reviewed by each of the psychiatrists who gave evidence before me and which was of assistance to them in formulating their ultimate opinions with respect to this matter.

When one considers section 13 of the Act, the threshold issue is whether the Court is satisfied that the respondent is a serious danger to the community in the absence of a Division 3 order. The term "serious danger to the community" is defined by reference to section 13(2). Section 13(3) provides that the Court may decide that it is satisfied that the prisoner is a serious danger to the community in the absence of a Division 3 order only if it is satisfied by acceptable, cogent evidence and to a high degree of probability that the evidence is of a sufficient weight to justify the decision.

I am, on the evidence before me, satisfied to the necessarily high degree of probability on acceptable, cogent evidence that this respondent is a serious danger to the community in the absence of a Division 3 order and, in that regard, it is to be noted that it was expressly conceded on behalf of the respondent that it is proper for such a finding to be made.

The question then, pursuant to section 13(5), is whether the respondent should be detained in custody for an indefinite

term pursuant to a continuing detention order or whether he should be released from custody, subject to a supervision order.

In making the decision as to which form of order to make, section 13(6) provides that "the paramount consideration is to be the need to ensure adequate protection of the community."

In approaching the task of weighing the evidence before me relating to the appropriate form of order to be made, it is also necessary to bear in mind the underlying principle to be applied when considering this evidence and making that decision, as articulated by the Court of Appeal in Attorney General for the State of Queensland v Francis [2006] QCA324 at paragraph 39:

"The Act does not contemplate that arrangements to prevent such a risk must be “watertight”; otherwise orders under section 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 as warranted by the statute which authorised such constraint."

Whilst there is much common ground between the specialist psychiatrists who have given me the benefit of their professional opinion, there is a divergence between them, in particular in respect of one matter. I shall deal briefly with the evidence of the doctors.

In terms of the presentation of the respondent to the doctors, it is useful to refer to the report by Dr Beech dated 8 May 2009 where the doctor said at page 22:

"When put together the available information suggests I believe a deceptive man who likes to spin a yarn and who has given inconsistent and variable accounts of his past, his alcohol and drug use, and his offending and its antecedents. It is difficult to know where the truth lies with Mr Levi and in my opinion his self reports should be viewed with caution.

Nonetheless there is some evidence that in prison he has matured and he is no longer as impulsive reckless or irresponsible as he had been. However he continues to project responsibility for his offending and he has a limited capacity to view his own responsibility for his actions. In addition he has a limited insight into his personal style and its problems, his alcohol abuse and its consequences, his sexual offending and its effects, and his lack of planning and its pitfalls."

Having diagnosed the respondent as a paedophiliac, Dr Beech's opinion in that report in early May was that the respondent

was in a group of people at a high risk of re-offending sexually on release, but placed an express caveat on that opinion namely "mitigation from his recent IHISOP", although Dr Beech did then at that stage say "Even then I can see no palpable effect from that program, although by simply completing it, he would have reduced his apparent risk to some extent."

Having had the opportunity to review the IHISOP documentation and completion reports, Dr Beech provided a further report dated 2 June 2009. He noted that the respondent was assessed by the IHISOP as having a Static-99 score of 8, which placed him in the high risk category. Dr Beech reviewed the outcomes of the respondent's participation in the IHISOP and said:

"He was able to demonstrate general empathy and in particular was able to identify short and medium term consequences of his offending against his victim.

He was able to formulate future plans and identify protective factors and risk factors for offending. Risk factors that he noted included avoiding home and family and mixing drugs and alcohol. There was some concerns around his plans for the use of drugs and alcohol on release and it was thought to be an area for further counselling.

Overall it was thought that Mr Levi adequately addressed the intervention targets during a program and presented as a motivated man with the ability to re-integrate safely and

responsibly back into the community. It was recommended that he complete the Sexual Offending Maintenance Program once released into the community in order to consolidate treatment gains. It was also recommended that supervision incorporate culture appropriate counselling to assist him to develop relationship skills and to support him in remaining abstinent from drugs and alcohol. In addition, it was thought that he would need assistance to source work and family support in the Townsville region.

Factors which were associated with imminent risk included isolating himself from his supports, difficulties in his relationship with his wife, a decrease in co-operation with supervision and evidence of alcohol and drug use.

Overall, it is a positive report for Mr Levi about his progress during an intensive offender program. In my opinion, a number of factors identified are similar to those which are incorporated in my original report. Simply completing the course is likely to have had some effect on reducing his risk of further offending."

Dr Beech then went on to note some dissonance between the IHISOP report and the information which Mr Levi had provided Dr Beech. When being interviewed by the doctor, those disconnects particularly related to the respondent's insight into the contribution of alcohol and drugs into his offending behaviour, and also some lack of appropriate insight into his plans on release.

Dr Beech continued:

"In my opinion while the report is positive, I have considerable doubt about whether Mr Levi, on his own devices, would be able to follow through with his strategies and plans. I would agree whole heartedly that it is important for him to continue counselling and to be engaged in a maintenance program in the community.

I believe that Mr Levi would require supervision in order to add structure to and oversight of his compliance with such a plan. Failing this, I would have great concerns that he would simply go bush and return to old patterns of behaviour and living which he himself and others have identified as significant risk factors.

In my opinion it is essential that Mr Levi is in fact abstinent from drugs and alcohol. I would see these as disinhibiting factors which would make it more likely that Mr Levi would resort to old ways of thinking and behaving. I believe that also likely to fuel impulsivity and aggression.

I think it is important Mr Levi resides in appropriate accommodation which is close to the resources and the supports that he will need in order to make a positive transition into the community. It would be to his benefit, I believe, to be engaged in meaningful employment.

With these structures and supervision and supports in place, I believe that the risk of re-offending for Mr Levi would be reduced from high to moderate. Without them I would see him at high risk."

In evidence before me today Dr Beech confirmed his opinion that a desirable period of duration for any supervision order which might be made would be 10 years. He did so saying that having regard to the concerns with compliance which he and, indeed, all of the psychiatrists have expressed, a period of 10 years is sufficient to enable the respondent to demonstrate the ability and capacity to comply.

In evidence before me Dr Beech also re-affirmed his opinion that the Sexual Offenders' Maintenance Program, that being the next therapeutic intervention in which the respondent should engage, should be conducted and taken part in by the respondent while he is released in the community under a supervision order.

Put bluntly, Dr Beech's evidence was that this respondent is "as good as he is going to get in prison" and highlighted to me that the value of the Sexual Offenders' Maintenance Program is to continue the work and outcomes already achieved in prison through and into the respondent's place in the community.

For the purposes of considering this application a draft supervision order containing some 40 conditions was tendered

as Exhibit 1 and was the subject of a review by the doctors who gave evidence before me.

Specifically in relation to two conditions within that draft supervision order relating to child pornography, they being proposed conditions 35 and 39, Dr Beech thought that in the circumstances and given the history of this particular respondent's offending, and despite the fact that his diagnosis of the respondent as a paedophile, these conditions were not necessary.

Dr Sunden's initial report, following her assessment of the respondent on 20 March 2009, is dated 3 April 2009. I have already noted that there is a high degree of consistency of opinion between the psychiatrists in relation to such matters as the respondent's made at presentation, concerns that they have in relation to his degree of insight, compliance, veracity of reporting and so on. Without any disrespect at all to the doctors I do not propose reviewing the contents of their reports and assessments at unnecessary length.

It is sufficient for present purposes if I note that, in her initial report, Dr Sunden diagnosed the respondent as showing evidence of anti-social personality disorder, alcohol abuse (in remission while in prison) and marijuana (in remission while in prison).

She noted on the positive side that the respondent had given a positive report of his experience in the Indigenous Sexual

Offenders' Treatment Program but highlighted the negative aspect of the respondent at that time appearing still to be underestimating the impact of his actions of the complaint of relative, the fact that the respondent continued to provide inaccurate accounts of some of the important aspects of his offences and continued to lack insight into the contribution of alcohol and other substances into his pattern of offending at that time. Dr Sunden was of the view that the respondent's risk of future recidivism lay in the range of moderate to high.

After reviewing the IHISOP documents Dr Sunden noted that there appeared to be a theme in the report of the respondent "continuing to project and displace blame for his offending behaviour on what I would term confused cultural factors". She said: "It is noted by the facilitators that avoidance of isolation and work to ensure that Mr Levi integrates within the community and builds pro-social relationships are going to be important for him to avoid relapsing into offending behaviour patterns. This will clearly need some work given Mr Levi's stated plan to live somewhere remote and his stated preference to both myself and to Dr Beech that he would prefer to resume fairly remotely located employment again, such as pig hunting.

I would therefore say in conclusion that in reviewing the IHISOP report that while overall the report is generally positive; the nature of Mr Levi's participation in this program is not sufficient to alter my opinion that he needs to

be supervised within the community. My opinion is that at this stage Mr Levi's risk of re-offending without a supervision order is unsatisfactorily high. I have rated his global risk of future recidivism as moderate to high. With the imposition of a community supervision order and with community participation in a Sexual Offenders' Maintenance Program, I consider that his risk is reduced to moderate."

Dr Sunden also noted in her further report that participation in a Sexual Offenders' Treatment Program is, it is generally accepted, associated with reduction and overall risk of recidivism that the respondent had received a partially positive report from the group facilitators in that regard ad that is compliance with their recommendations to participate in the further maintenance program to participate in further alcohol and drug counselling programs and to comply in further cultural awareness programs should contribute to reducing his risk of sexually re-offending.

All that being said, Dr Sunden was not blind to the numerous character faults which this respondent exhibits, particularly his capacity to dissemble. She said "I note from the assessment undertaken by Dr Beech that there was similar dissonance and inconsistency in the reports that he obtained from Mr Levi. I am not entirely confident that these conflicting versions are necessarily cultural based; I am more inclined to believe that they reflect Mr Levi's attempts to rationalise and divert blame and are consistent with his patterns of other anti-social behaviours. I am mindful that

Mr Levi has an impressive spectrum of non-sexual offences in his criminal record, which causes me to be very cautious with regard to my prognostications as to his likely future compliance with a supervision order."

In evidence before me Dr Sunden also confirmed the opinion that an appropriate period of duration for any supervision order made would be 10 years. She also expressed concurrence with the view expressed by Dr Beech to which I have already referred that it would be better for the respondent to complete the further Sexual Offender Maintenance Program while in the community and under the conditions of a supervision order.

She also reaffirmed her view that the challenge in the immediate future would be for the respondent to comply with a supervision order generally and, particularly, the restrictive conditions relating to alcohol and drugs. She said that all of that had to be seen in light of the fact that there is a substantially high risk of non-compliance in this respondent because of his lack of insight and anti-authoritarian attitudes.

In relation to the draft supervision order, Exhibit 1, Dr Sunden was also of a view that the proposed conditions concerning child pornography were not necessary as this respondent has no history arising from such conduct and it does not present a particular risk. She identified, rather,

the risk as arising through opportunistic contact with children.

Turning now to the evidence of Professor James, I have the benefit of several reports from him. His initial report is dated the 28th July 2008. At that time Professor James observed: "Although Mr Levi has participated in several courses, described above, during the course of his imprisonment; and although he describes, following the death of his father earlier in the present year, a sense of liberation from the curses which he said were placed upon him as a child, Mr Levi had not, at the time of my examination, participated in a Sex Offenders' Treatment Program.

I have noted that Mr Levi said that he was to start a course on 30/06/2008; and I consider this participation of the very greatest importance. Not only would it serve to modify in an important way some of the attitudes previously described as being relevant to Mr Levi's offending, and particularly his potential dangerousness with respect to women, but it would also offer a very important opportunity for intense and prolonged evaluation of a kind that it is impossible as a result of a single “snapshot” examination.

Unless there is convincing evidence during the course of the Sex Offenders' Treatment Program that Mr Levi's attitude to women, and to some degree also to himself, have been substantially modified, then in my opinion it cannot be said

that Mr Levi's capacity for dangerous re-offending is anything but high."

Professor James's further report, consequent upon his review of the further material derived from the respondent's participation in the Sexual Offender Programs is an addendum report dated 10 June 2009. Professor James reaffirmed the matters and opinions expressed in his previous report and noted under the heading "Comments" a number of significant inconsistencies in the various accounts that the respondent had provided to various examiners.

He noted that some of the discrepancies are not insignificant and together they raise the doubt expressed in the report of Dr Beech as to "where the truth lies with Mr Levi". Professor James gives a number of examples of the sorts of inconsistencies to which he referred.

The professor then reviewed the exit report of the IHISOP. He reaffirmed the previous diagnosis he had given of the respondent suffering from an alcohol and drug abuse disorder and expressed the further opinion in light of the reports subsequently made available for his perusal, particularly those of Doctors Beech and Sunden, that he considered that the diagnosis of "Paedophilia non-exclusive confined to males" should be added.

Having regard to the further information to hand, Professor James revisited the assessments and scores attributed to the

various diagnostic tools available and said that in terms of the probability of violent sexual recidivism he placed the respondent in a group of persons, 75 per cent of whom will re-offend within 7 years and 89 per cent of whom will re-offend within 10 years.

He concluded: "In summary, I am not of the opinion that there has become available any 'convincing evidence during the course of the Sex Offenders' Treatment Program that Mr Levi's attitude to women, and to some extent also to himself, have been substantially modified'. There appear to remain significant ambiguities which impede a clear understanding of the dynamics underlying Mr Levi's sexual offending; and I do not consider that Mr Levi himself has a clear understanding of what led to his offending; and there lacks a basis structure upon which to base a relapse prevention strategy.I therefore consider that Mr Levi's capacity for dangerous re-offending remains high; and in my opinion, it would be preferable for Mr Levi to undergo the maintenance programme (as recommended in the IHISOP “Exit” Report) to a satisfactory standard prior to his release from prison.

With respect to the contents of the Draft Supervision Order, I have no further recommendation to make; but my opinion with respect to the desirability of a further Treatment Programme prior to his release from prison remains."

In evidence before me today, Professor James also expressed the view that a term of 10 years would be the appropriate

duration for any supervision order which might be made. He also confirmed in evidence before me his concern about the respondent's capacity to comply with the conditions of any supervision order that might be made. He pointed to the fact that there is what he described as a poor potential for compliance in this respondent.

The misinformation and disinformation which the respondent supplies to the psychiatrists and other health professionals makes it difficult, as Professor James points out, to formulate clearly the nature of the psychiatric problems or cultural problems, if they be so, from which he suffers. In Professor James's view it is difficult to map a safe pathway for this particular respondent out into the community, particularly when one has regard to the history of serious offending.

He also referred to the self-authored plans which the respondent had prepared in the course of the IHISOP and noted that these plans lack operational form. Professor James said, "I consider him less prepared for release from prison than most people I see under the Act."

Professor James was concerned- and this is really the point of divergence between the expert psychiatrists whose evidence I have seen- Professor James is particularly concerned to have the respondent complete the Sexual Offender Maintenance Programme before he is released from prison and into the community, even pursuant to a supervision order. He said that

this respondent is a prisoner who would "worry me very much," and also said that this respondent needed to demonstrate a higher understanding of the values and drivers for his behaviour.

Quite properly and fairly under cross-examination Professor James conceded that there has been demonstrated by this respondent a degree of cooperation by virtue of his having already completed the Sexual Offender Treatment Programmes, albeit within a prison setting, and he also quite properly acknowledged that transitions from prison life to freedom are always difficult to manage.

Again, however, Professor James highlighted the concerns that he had, particularly with this respondent's truthfulness. Professor James thought that conditions 35 and 39 relating to the pornographic images would probably be helpful, but I did not sense or apprehend from Professor James's evidence a strong opinion that these conditions were in any way necessary for the purposes of a supervision order that might be made, having regard to the particular nature of this respondent's offending.

It is and always will be a very serious thing to deprive an individual of their entitlement to liberty upon completion of a term of imprisonment which has been imposed on them. The Dangerous Prisoners Sexual Offenders Act, once the threshold of it being established that a particular respondent represents a serious danger to the community is satisfied,

requires that the balancing act in determining the appropriate form of order to be made has paramount regard to the need to ensure adequate protection of the community.

I have already referred to the judgment of the Court of Appeal in Francis's case. No supervision order can be watertight. As I've noted, there are a number of consistent themes which run through the evidence of the psychiatrists. In particular they are all squarely of the view that this respondent requires to complete a further Sexual Offenders' Maintenance Programme as part of his ongoing rehabilitation and to equip him to cope with life in the community. The only real point of divergence is whether that should be undertaken while in prison or while released under a supervision order.

Notwithstanding the serious concerns expressed by Professor James, I am satisfied on the preponderance of the evidence before me, and also having regard to the very strict and comprehensive supervision conditions contained in Exhibit 1, that adequate protection of the community can be achieved and ensured by releasing the respondent under a supervision order of the nature proposed in Exhibit 1, noting also in that regard that the close terms of the supervision order will undoubtedly provide a high degree of supervision, particularly while the respondent is undertaking and completing the further Sexual Offenders' Maintenance Programme and otherwise being rehabilitated for further ongoing exposure to the wider community.

I am satisfied from the consistent evidence of the psychiatrists that an appropriate term of duration in the circumstances for such an order is one of 10 years, and would make a supervision order for such a term.

On the balance of the expert evidence before me, I'm not persuaded that any purpose would be served by the inclusion of conditions 35 and 39 set out in Exhibit 1.

I have already mentioned on several occasions that this supervision order contains extensive limitations on the respondent's rights and liberties after release from prison. It is equally important to ensure that the limitations contained within such a supervision order do not extend to matters which are not necessary or justified in the circumstances of particular cases. As I've said, on the preponderance of evidence before me, the particular limitations that have been suggested with respect to child pornography are simply not warranted.

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