

# SUPREME COURT OF QUEENSLAND

CITATION: *Attorney-General for the State of Queensland v Francis*  
[2009] QSC 312

PARTIES: **ATTORNEY-GENERAL FOR THE STATE OF  
QUEENSLAND**  
(applicant)  
v  
**DARREN FRANCIS**  
(respondent)

FILE NO/S: 3069/09

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court

DELIVERED ON: 28 September 2009

DELIVERED AT: Brisbane

HEARING DATE: 24 September 2009

JUDGE: A Lyons J

ORDER: **Order as per attached schedule**

CATCHWORDS: CRIMINAL LAW – SENTENCE – SENTENCING  
ORDERS – ORDERS AND DECLARATIONS RELATING  
TO SERIOUS OR VIOLENT OFFENDERS OR  
DANGEROUS SEXUAL OFFENDERS – DANGEROUS  
SEXUAL OFFENDER – GENERALLY – where the  
Attorney-General applies for an order under Division 3  
Dangerous Prisoners (Sexual Offenders) Act 2003 that the  
respondent be detained in custody for an indefinite term –  
whether the respondent is a serious danger to the community  
in the absence of such an order

*Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld) s 22*

*Attorney-General v Francis* [2004] QSC 233  
*Attorney-General v Francis* [2005] QSC 381  
*Attorney-General v Francis* [2006] QCA 324  
*Attorney-General v Francis* [2006] QCA 372  
*Attorney-General v Francis* [2007] QSC 328  
*Attorney-General v Francis* [2008] QSC 69

COUNSEL: Mr B Farr SC with Mr J Horton for the applicant  
Mr C Heaton for the respondent

SOLICITORS: G R Cooper, Crown Solicitor for the applicant  
Legal Aid Queensland for the respondent

## **A LYONS J:**

### **Background**

- [1] Darren Anthony Francis is currently 36 years of age. On 29 January 1999 he was convicted of 15 charges of indecent assault with circumstances of aggravation, 10 charges of assault occasioning bodily harm and two charges of indecent assault with circumstances of aggravation. All the offences occurred between August and October 1996 and arose out of his relationship with two separate women. Mr Francis was sentenced to a period of imprisonment of six years.
- [2] Mr Francis full time release date was 8 May 2004 however, prior to his release an application was made pursuant to the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) (the Act). On 13 August 2004 Byrne J<sup>1</sup> ordered that Mr Francis be detained for control, care or treatment. On the first annual review of that order, Mackenzie J affirmed that he should be detained<sup>2</sup>: Mr Francis successfully appealed that decision to the Court of Appeal and a supervision order was therefore imposed on 26 September 2006.<sup>3</sup> In that decision the Court of Appeal stated:<sup>4</sup>
- “The evidence before the learned primary judge supported his Honour's findings that the incidents which led to the appellant's imprisonment were ‘violent and sadistic’ incidents exhibiting psychopathy and an anti-social personality disorder in relation to which amphetamine and alcohol abuse were contributing factors. But the evidence did not suggest that the appellant was a danger to children. The risk which the appellant's dangerous propensities posed for the community was to women with whom he formed an intimate relationship, especially if he consumed amphetamines or alcohol. At the time of the hearing before the learned primary judge, that risk was placed, on the evidence, at ‘moderate to high to high.’”
- [3] Within about six months of that supervision order being made, Mr Francis returned positive tests showing he had used methamphetamines. On 7 November 2007 Philippides J found the contraventions proved and amended the supervision order.<sup>5</sup> Within months of that amended order being imposed it is alleged Mr Francis contravened the order again by using cannabis in March 2008. Mr Francis was brought before the Court on a warrant and was released on 11 April 2008 after an application brought by him on the grounds that exceptional circumstances existed.<sup>6</sup>
- [4] Mr Francis again contravened the supervision order before the cannabis contraventions could be dealt with. The contraventions this time involved the

<sup>1</sup> *Attorney-General v Francis* [2004] QSC 233.

<sup>2</sup> *Attorney-General v Francis* [2006] QSC 381.

<sup>3</sup> *Attorney-General v Francis* [2006] QCA 324 and [2006] QCA 372.

<sup>4</sup> *Attorney-General v Francis* [2006] QCA 324 and [2006] QCA 372 [13].

<sup>5</sup> *Attorney-General v Francis* [2007] QSC 328.

<sup>6</sup> *Attorney-General v Francis* [2008] QSC 69.

alleged use of amphetamine and methamphetamine. On 5 November 2008 Daubney J ordered that Mr Francis be returned to custody on the basis of those alleged contraventions of the supervision order. Mr Francis has been detained in custody since that date.

### **The current application**

- [5] There are two applications before the Court. The first application was filed on 26 March 2008 and concerns the allegations that Mr Francis used illicit drugs, namely cannabis on 18 and 20 March 2008. The second application was filed on 5 November 2008 and concerns allegations that Mr Francis took amphetamines and methamphetamines. He tested positive for these substances on 30 October 2008.
- [6] The applications seek orders pursuant to s 22 of the Act.

### **The Act**

- [7] Section 22 of the Act is as follows:

**“22 Court may make further order**

- (1) *The following subsections apply if the court is satisfied, on the balance of probabilities, that the released prisoner is likely to contravene, is contravening, or has contravened, a requirement of the supervision order or interim supervision order (each the **existing order**).*
- (2) *Unless the released prisoner satisfies the court, on the balance of probabilities, that the adequate protection of the community can, despite the contravention or likely contravention of the existing order, be ensured by the existing order as amended under subsection (7), the court must—*
- (a) *if the existing order is a supervision order, rescind it and make a continuing detention order; or*
- (b) *if the existing order is an interim supervision order, rescind it and make an order that the released prisoner be detained in custody for the period stated in the order.*
- (3) *For the purpose of deciding whether to make a continuing detention order as mentioned in subsection (2)(a), the court may do any or all of the following—*
- (a) *act on any evidence before it or that was before the court when the existing order was made;*
- (b) *make any order necessary to enable evidence of a kind mentioned in section 13(4) to be brought before it, including an order in the nature of a risk assessment order.*
- (4) *To remove any doubt, it is declared that the court need not make an order in the nature of a risk assessment order if the court is satisfied that the evidence otherwise available under subsection (3) is sufficient to make a decision under subsection (2)(a).*

- (5) *If the court makes an order in the nature of a risk assessment order, the psychiatrist or each psychiatrist examining the released prisoner must prepare a report about the released prisoner and, for that purpose, section 11 applies.*
- (6) *For applying section 11 to the preparation of the report—*
  - (a) *section 11(2) applies with the necessary changes; and*
  - (b) *section 11(3) only applies to the extent that a report or information mentioned in the subsection has not previously been given to the psychiatrist.*
- (7) *If the released prisoner satisfies the court, on the balance of probabilities, that the adequate protection of the community can, despite the contravention or likely contravention of the existing order, be ensured by a supervision order or interim supervision order, the court—*
  - (a) *must amend the existing order to include the requirements mentioned in section 16(1)(da) and (db), if the existing order does not already include the requirements; and*
  - (b) *may otherwise amend the existing order in a way the court considers appropriate—*
    - (i) *to ensure adequate protection of the community; or*
    - (ii) *for the prisoner's rehabilitation or care or treatment.*
- (8) *The existing order may not be amended under subsection (7)(b) so as to remove any requirements mentioned in section 16(1)."*

- [8] Section 22 therefore essentially provides that if the court is satisfied on the balance of probabilities that the respondent has contravened a supervision order then unless the respondent satisfies the court on the balance of probabilities that adequate protection of the community, despite the contravention, can be ensured, the court must rescind the supervision order and make a continuing detention order.
- [9] Mr Francis has not admitted to the breaches of the conditions of his supervision order. He has not however challenged the allegations. The affidavit material clearly sets out the factual basis for the alleged breaches. The results of the random urine drug screens indicate positive tests on 18 and 20 March 2008 for cannabis and on 30 October 2008 for amphetamines and methamphetamines. On the basis of that material and given no further evidence has been produced by Mr Francis I am satisfied on the balance of probabilities that Mr Francis has breached the condition of his supervision order that required him to abstain from illicit drugs.
- [10] Accordingly, as I am satisfied that Mr Francis has contravened a requirement of a supervision order, then pursuant to s 22(2) of the Act, Mr Francis needs to satisfy the court that, on the balance of probabilities, adequate protection of the community can, despite the contravention, be ensured by the existing order as amended. As this

as an existing supervision Unless Mr Francis satisfies this onus the supervision order must be rescinded and the court must make a continuing detention order.

- [11] Clearly then, as I am satisfied that there has been a breach of a supervision order, the onus has shifted to the respondent to demonstrate, on the balance of probabilities, that despite the contravention, adequate protection of the community can be ensured.
- [12] The applicant submits that Mr Francis supervision order should be rescinded and he should be detained in custody for control, care or treatment because:
- (a) of the risk he poses to the community given the contraventions and his recidivism;
  - (b) of the previous contraventions which were dealt with by this Court in November 2007.
- [13] The applicant submits that the threat Mr Francis poses to the community is of violent sexual conduct of the kind which falls within the Act. In particular the applicant states that the trigger for that risk is a combination of two factors:
- (i) the existence of an intimate relationship with a woman; and
  - (ii) substance abuse (most likely amphetamines or methylamphetamines)
- [14] The applicant however accepts that the reports of the two psychiatrists who have been appointed under the Act are supportive of Mr Francis being released into the community pursuant to a supervision order.

#### **The reports of the psychiatrists**

- [15] Dr Nurcombe and Dr James have both provided reports with respect to this application. Both psychiatrists have previously had a lengthy involvement with Mr Francis. Both psychiatrists are clearly of the view that the risk that Mr Francis presents to the community is one which can be appropriately met by the imposition of a supervision order with appropriate conditions.
- [16] Dr Nurcombe states that Mr Francis risk of recidivism is high if he is abusing drugs whilst Dr James considers it to be “moderately high”. It is clear therefore that the restrictions on the use of drugs which were contained within the conditions of the previous supervision order are still essential. It is clear that there has to be total abstinence from the use of illicit drugs.
- [17] The psychiatrists also conclude that the risk arises if there is intoxication which is combined with an intimate relationship. Dr Nurcombe in his 15 July 2009 report states that:<sup>7</sup>
- “The most serious risk is that, when intoxicated and in an intimate relationship, he will behave in a dangerous manner towards a sexual partner ... such violence is not imminent. It would only occur in an intimate relationship (which he has avoided during release because he was unemployed). Signs that the risk would be increasing or imminent would be as follows: 1) a positive blood test for illicit drugs; 2) reversion to antisocial behaviour; 3) consorting with antisocial associates. The sexual violence, if it occurs, is likely to do

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<sup>7</sup> Report of Prof Barry Nurcombe dated 15 July 2009 [21]

so on several occasions over a brief space of time. The risk for such behaviour is chronic. Based on his history the risk of recidivism is low to moderate if he is not abusing drugs. The best way to monitor warning signs that the risk is increasing is as follows:

- 1) continued urine/breath tests for illicit drugs and alcohol;
- 2) supervision;
- 3) individual therapy.”

- [18] Dr James stated that Mr Francis is now well aware of the reality of an efficient drug monitoring programme and that it was not necessary for him to stay in prison in order to manage the risk.<sup>8</sup>
- [19] Both psychiatrists also emphasised the importance of Mr Francis continuing in employment as this would reduce the risk of recidivism. Dr Nurcombe also recommended that Mr Francis not enter into an intimate relationship until he had been employed for 12 months. There was support however from the psychiatrists for a clarification of the conditions of the existing supervision order to ensure that the reporting requirements in relation to Mr Francis employment were clearer.

#### **Further evidence**

- [20] Evidence was also received at the hearing which indicated that Mr Francis would be able to reside with his mother if he was released subject to a supervision order. This had been a supportive residence during his previous releases. Both psychiatrists considered he had a good relationship with his mother and that this relationship was likely to be helpful in his rehabilitation. Mrs Francis indicated in her affidavit that she does not drink alcohol and there was no alcohol in her home. She also stated that she would “not tolerate illicit drug use in her house”. Mrs Francis also stated that when her son had been released previously he had received a great deal of support from Ms Young, the social worker from the Aboriginal and Torres Strait Islander Legal Service.
- [21] Evidence was also received from Ms Tabitha Young, the social work support officer. She stated that Mr Francis would continue to be supported in the community by the Aboriginal and Torres Strait Islander Legal Service. The service had provided assistance previously and a good relationship had been established with Mr Francis whilst he had been in the community. There was also advice from Career Employment Australia as to the assistance which would be provided to Mr Francis in becoming established with Centrelink and in finding work.
- [22] The psychiatrists also stated that Mr Francis had developed a good therapeutic relationship with Dr Hogan and that this had been very beneficial.
- [23] It would also seem clear from the evidence that apart from the use of substances Mr Francis has otherwise complied with the requirements of the supervision order.

#### **Should the supervision order be rescinded?**

- [24] It is clear that both psychiatrists, who have had a lengthy involvement with Mr Francis, do not consider it necessary that the current supervision order be rescinded. It is also apparent that any risk to the community is not imminent. Having

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<sup>8</sup> Report of Prof Basil James dated 14 September 2009.

considered the reports of the psychiatrists as well as the affidavit material I consider that any risk to the community which is posed by Mr Francis conduct can be adequately protected by the conditions imposed by the supervision order as amended. Mr Francis has previously been very carefully monitored and controlled in the community to the extent that any breaches, particularly in relation to the consumption of illicit substances, are quickly detected. As Philippides J stated<sup>9</sup>

“The contraventions of the supervision order are of concern in that the respondent has breached important conditions of his supervised release directed towards ensuring adequate protection of the community. However, the stringent conditions imposed by the Court of Appeal under the supervision order have been shown to have been apt to ensure adequate protection of the community having regard to the nature and extent of the identified risk. The conditions imposed under the supervision order, particularly as to drug testing, enabled the respondent’s drug use to be detected promptly. In this regard, I note that there was rigorous monitoring of the respondent, with almost daily surveillance and drug testing being conducted about twice a week.”

- [25] I agree that the current conditions have been apt to ensure adequate protection of the community having regard to the nature and extent of the identified risk. I consider therefore that the respondent has satisfied the onus incumbent on him to establish on the balance of probabilities that the adequate protection of the community can be ensured despite the contravention. I am therefore satisfied that the risk that Mr Francis will commit a serious sexual offence if released under supervision is not unacceptable and that the adequate protection of the community does not require the rescission of the supervision order.
- [26] Both psychiatrists indicate that the existing supervision order is appropriate and there does not need to be any additional conditions added. There should however be some amendments to the existing order to ensure clarity, particularly in relation to employment, as the existing conditions may be unnecessarily restrictive and not conducive to Mr Francis obtaining employment given he works as a contractor and attends at different places to work. Accordingly, the current orders should be amended so that condition (vi) indicates that it is the business address of the employer which needs to be notified and condition (vii) should be amended to indicate that the notification relates to a change of employer rather than a change of the type of employment. The other amendments simply bring the existing supervision order up to date.
- [27] There will therefore be an Order in the terms annexed.

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<sup>9</sup> [2007] QSC 328 at [31].

**The Order of the Court is that:**

1. The Respondent be released subject to the supervision order made by the Court of Appeal on 26 September 2006 and amended by Philippides J on 7 December 2007, amended as follows.
2. Upon release from prison, the respondent be subject to the following conditions until 28 September 2012, or further order of the Court:
2. The respondent must:
  - (i) be under the supervision of a corrective services officer ('the supervising corrective services officer') for the duration of this order;
  - (ii) report to the supervising corrective services officer at the Department of Corrective Services District Office closest to his place of residence between 9 am and 4 pm on ~~29 September 2006~~, the day of his release, and therein to advise the officer of the respondent's current name and address;
  - (iii) reside at his mother's current address and thereafter at such other place within the State of Queensland as approved by a corrective services officer by way of suitability assessment and not stay overnight at any other address without the prior written permission of the supervising corrective services officer;
  - (iv) report to and receive visits from the supervising corrective services officer at such frequency as determined necessary by the supervising corrective services officer;
  - (v) notify and obtain the approval of the supervising corrective services officer of every change of the prisoner's name at least two business days before the change occurs;
  - (vi) notify the supervising corrective services officer of the nature of his employment, the hours of work each day, the name of his employer and the

business address of the premises where he is employed and obtain approval from the supervising corrective services officer prior to entering into an employment agreement or engaging in volunteer work or paid or unpaid employment. The Respondent may work for more than one employer and at more than one location during any day;

- (vii) notify the supervising corrective services officer of every change of employment at least two business days before the change occurs;
- (viii) notify the supervising corrective services officer of every change of the respondent's place of residence at least two business days before the change occurs;
- (ix) not leave or stay out of the State of Queensland without the written permission of the supervising corrective services officer;
- (x) not commit an offence of a sexual nature during the period for which these orders operate;
- (xi) obey the lawful and reasonable directions of the supervising corrective services officer;
- (xii) respond truthfully to enquiries by the supervising corrective services officer about his whereabouts and movements generally;
- (xiii) notify the supervising Corrective Services officer of the make, model, colour and registration number of any motor vehicle owned by, or regularly used by him, whether hired or otherwise obtained for his use;
- (xiv) not enter into an intimate relationship ~~within 12 months of the~~ until employed for a continuous period of 12 months from the commencement of this Order;

- (xv) notify the supervising corrective services officer of all personal relationships entered into by the respondent;
- (xvi) abstain from the consumption of alcohol for the duration of this Order;
- (xvii) abstain from the use of illicit drugs for the duration of this Order;
- (xviii) take prescribed drugs as directed by a medical practitioner;
- (xix) submit to alcohol and drug testing as directed by a corrective services officer, the expense of which is to be met by the Department of Corrective Services;
- (xx) not visit premises licensed to supply or serve alcohol without the prior permission of the supervising corrective services officer;
- (xxi) attend with Dr Tom Hogan or such other psychiatrist or other mental health practitioner who has been approved by the Supervising Corrective Services officer at a frequency and duration which shall be recommended by the treating psychiatrist or other mental health practitioner, the expense of which is to be met by the Department of Corrective Services;
- (xxii) permit any medical, psychiatric, psychological or other mental health professional to disclose details of medical treatment and opinions relating to his level of risk of re-offending and compliance with this Order to the Department of Corrective Services if such request is made in writing for the purposes of updating or amending the supervision order and/or ensuring compliance with this Order;
- (xxiii) attend any program, course, psychologist, counsellor or other mental health practitioner, in a group or individual capacity, by decision of the treating psychiatrist and the Supervising corrective Services Officer, the expense of which is to be met by the Department of Corrective Services;

- (xxiv) agree to undergo medical testing or treatment (including the testing of testosterone levels by an endocrinologist) by decision of the treating psychiatrist and the Supervising Corrective Services Officer, and permit the release of the results and details of the testing to the Department of Corrective Services, if such a request is made in writing for the purposes of updating or amending the supervision order, the expense of which is to be met by the Department of Corrective Services;
- (xxv) not commit an indictable offence during the period of this order;
- (xxvi) not have any direct or indirect contact with a victim of his sexual offences;
- (xxvii) attend upon and submit to assessment and/or treatment by a psychiatrist, psychologist, social worker, counsellor or other mental health professional as directed by the supervising corrective services officer at a frequency and direction which shall be recommended by the treating intervention specialist, the expense of which is to be met by Queensland Corrective Services;
- (xxviii) not engage in acts which are intended to dominate or intimidate any other person including interpersonal violence or aggression;
- (xxix) if directed by his supervising corrective services officer following consultation with any treating medical, psychiatric, psychological or other mental health professional, make complete disclosure of the terms of this supervision order and the nature of his past offences to any person as nominated by the supervising officer who may contact such persons to verify that full disclosure has occurred;
- (xxx) comply with a curfew direction or monitoring direction given by an authorised corrective services officer.

Signed:

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Registrar of the Supreme Court of Queensland