SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Qld v Phineasa* [2012] QSC 76
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) v **HENRY SIMEON PHINEASA** (respondent)
FILE NO/S:	BS 1811/12
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	28 March 2012
DELIVERED AT:	Brisbane
HEARING DATE:	23 March 2012
JUDGE:	Ann Lyons J
ORDER:	**1. The application is refused.**
CATCHWORDS:	STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – STATUTORY POWERS AND DUTIES – EXERCISE – GENERAL MATTERS – where respondent convicted of multiple sexual offences – whether respondent is a "serious sexual offender" for purposes of *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) – whether respondent was convicted for sexual offences involving violence. *Dangerous Prisoners (Sexual Offenders) Act* 2003, s 3, s 5, s 8, s 13. *Attorney-General for Queensland v SBD* [2010] QSC 104. *George v Rockett* (1990) 170 CLR 104.
COUNSEL:	T Ryan for the applicant S Lewis for the respondent
SOLICITORS:	G R Cooper Crown Solicitor for the applicant

Legal Aid Queensland for the respondent

ANN LYONS J:

[1] The Attorney-General for the State of Queensland, applies pursuant to s 8 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 ("the Act") for an order that a date be set for the hearing of an application for a Division 3 order and for an order that the respondent undergo examination by two psychiatrists named by the Court who are to prepare independent reports.

The legislation

[2] Section 5 of the Act provides that the Attorney-General may apply to the Court for an order or orders under s 8 and a Division 3 order in relation to a prisoner. A prisoner is then defined in s 5(6) in the following way:

> "prisoner 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, whether the person was sentenced to the term or period of imprisonment before or after the commencement of this section."

[3] Accordingly, a prisoner to whom this Act applies is a prisoner 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.

[4] The issue before the Court therefore is essentially whether Mr Phineasa is a prisoner who is serving a period of imprisonment for a serious sexual offence or a period of imprisonment that includes a term of imprisonment for a serious sexual offence. A serious sexual offence is defined in the dictionary in the Schedule of the Act to mean an offence of a sexual nature involving violence or against children. Violence is then defined in the Schedule to "include" both "(a) intimidation; and (b) threats".

[5] If the Court is satisfied that the offence is a serious sexual offence the remaining issue is whether the requirements of s 8(1) of the Act have been satisfied. That section requires the applicant to satisfy the Court that there are reasonable grounds for believing that the prisoner is a serious danger to the community in the absence of a Division 3 order.

[6] Pursuant to s 13(2) of the Act, a prisoner is a serious danger to the community if there is an unacceptable risk that the prisoner will commit a serious sexual offence:

(a) If the prisoner is released from custody; or
(b) If the prisoner is released from custody without a supervision order being made.

[7] To determine those issues it is first necessary to examine the circumstances of Mr Phineasa's imprisonment and the circumstances surrounding his offences.

The respondent's history of offending

[8] The respondent is currently 25 years old. The respondent has both a Queensland and New South Wales criminal history which commenced when he was 18 years

of age. Whilst the respondent has a lengthy criminal history, most of those offences comprise charges of 'indecent acts in a public place' and mainly relate to offences where he exposed himself and or masturbated in front of females or in public. The most serious of his offences involve entering a dwelling with intent and two sexual assaults.

The New South Wales offences in February 2006

[9] The New South Wales history relates to offences committed in February 2006. The respondent was convicted of property offences as well as an offence of committing an act of indecency on 19 February 2006 with a person aged 16 years or over.

The Cairns offences in May 2006

[10] The respondent's history of offending in Queensland commenced on 2 May 2006 when he committed four offences. On that day he exposed his penis and masturbated in the presence of females at a hotel in Cairns. He was observed to have extended his hand behind a woman's bottom to touch her bottom as she stood at a poker machine while he continued to masturbate (Charge 1). On the same evening, the respondent was observed to remove his penis from his pants, masturbate and then attempted several times to rub his penis against the back of another female patron in the hotel (Charge 2).

[11] Shortly afterwards the respondent was then observed to walk behind another woman sitting in front of a poker machine. He was observed to expose his penis, place it on the top back section of the chair and attempt to poke the woman on he back as he ran his penis along the top of the chair (Charge 3).

[12] Minutes later the respondent was observed to be closely walking behind a female and fiddling with his groin area (Charge 4). When later questioned the respondent denied all knowledge of the conduct. He stated he had only recently moved from Sydney.

[13] On 17 August, 2006, the respondent was convicted of these four charges of committing indecent acts and sentenced in the Mareeba Magistrates Court to three months imprisonment wholly suspended for a period of 2 years as well as an Order for 2 years probation with a special condition that he participate in a community Sex Offender Treatment Program.

The January 2007 offences

[14] On 31 January 2007, when the respondent was aged 19, he committed offences of entering a dwelling with intent to commit an indictable offence in the dwelling in the night time; unlawful indecent assault on a female and committing an indecent act in a public place.

[15] The circumstances surrounding the first two of those offences were that at about 5.45am the respondent entered the bedroom of the female complainant who was sleeping in her bed wearing a t-shirt and underwear. She was awoken when she felt someone touch her buttocks area, pulling her underpants to one side. The claimant screamed for help and the respondent climbed out of her bedroom.

[16] At a different location on the same day, the respondent placed his hand down the front of the shorts that he was wearing and appeared to masturbate in front of a 64-year-old woman and, whilst masturbating, asked the complainant "Do you get naked?"

[17] On 5 September, 2007, the respondent was sentenced in the Cairns District Court for the offences involving the entering of the dwelling and indecent assault and sentenced to 6 months imprisonment with 2 years probation. For the third charge, the respondent was sentenced to 3 months imprisonment. It was a condition of the Probation Orders that the respondent undertake programs to address his sexual offending. The sentencing Judge, Bradley DCJ, observed that the respondent's behaviour would have been terrifying for the woman involved:

> "For someone to wake up to be touched by a stranger intimately in their own home in their own bed is a particular serious offence and it would have had, I am quite sure, a very serious effect on the person to whom it is being done."

The November 2007 offences

[18] On the day of his release from prison following that sentence, namely 23 November 2007, the respondent entered a curtain shop in Mareeba where a 47-year-old female shop assistant was working alone. The respondent approached to within three metres of the woman, exposed himself and then masturbated in front of her until he ejaculated on the floor of the shop. As he was leaving the store he touched the complainant on the bottom.

[19] The next day, 24 November 2007 the respondent sat beside at woman at a McDonald's Restaurant in Cairns and grabbed and rubbed her several times on the bottom. Surveillance footage of the incident shows the respondent rubbing his crotch whilst rubbing and grabbing the woman's bottom. In a later interview the respondent said that his touching of the woman was for the purposes of sexual gratification.

[20] At about 1.00am on 26 November 2007 the 33 year old complainant was in her home in Cairns and was unable to sleep. She walked naked into her lounge room to watch television. She observed the shadow of a man walk past her sliding door a number of times and rattle her security door. The respondent then said "Let me in. I'm coming in." The respondent then moved to the front window, looked through the blinds at her and again told her he was coming inside. The respondent was unknown to the woman. She then called police. When later questioned, the respondent told police he was trying to get into the dwelling because he thought the woman was good looking and he wanted to get to know her. These offences constituted breaches of the Probation Order made on 5 September 2007.

[21] On 4 July 2008 the respondent was sentenced in the Cairns District Court in relation to offences of indecent assault, committing an indecent act and observing in breach of privacy to 6 months imprisonment to be served cumulatively upon a sentence of 2 and a half years imprisonment as a result of his resentencing for the offences of entering a dwelling with intent at night and sexual assault for which he had been placed on probation. Her Honour, Bradley DCJ observed:

> "Clearly, you have a very serious problem that has to be addressed. It's clear from what's happened over the last year that it cannot be

> addressed in the community, and it's clear that the community, until it has been addressed, needs to be protected from you, and the only way that that can be done is to sentence you to further imprisonment."

Offences in custody

[22] While in custody on 5 January 2010 Mr Phineasa is alleged to have masturbated in front of a female Corrective Services officer. On 11 July 2011 Mr Phineasa also pleaded guilty to eight offences relating to exposing his penis or masturbating in front of female Corrective Services officers. Those offences occurred between 7 February 2010 and 20 September 2010.

[23] In relation to each of those offences he was sentenced to 12 months imprisonment with a parole eligibility date fixed at 11 October 2011.

Is Mr Phineasa a prisoner serving a sentence for a serious sex offence?

[24] The Act clearly applies to those prisoners who are serving a term of imprisonment for a serious sexual offence which is defined to mean sexual offences involving children or sexual offences involving violence.

[25] Mr Phineasa has never offended in relation to children.

[26] Mr Phineasa pleaded guilty to offences of sexual assault in relation to both the January 2007 and November 2007 incidents. The issue therefore is whether those offences, which were clearly sexual assaults, were sexual offences involving violence.

[27] Counsel for the Attorney-General argues that the circumstances of Mr Phineasa's offending are such that "violence" was involved.

[28] It was argued that the offences in January 2007 of indecent assault and November 2007 necessarily involved intimidation and threats. Counsel submitted[1];

> "So, plainly in those circumstances, there was non-consensual, physical - an application of non-consensual, physical force to her which, in my submission, constitutes a serious sexual offence in that it involves violence."

[29] Counsel continued[2];

> "My submission is that touching - any non-consensual application of force of a sexual kind would constitute - would be sufficient for the purposes of constituting a serious sexual offence."

[30] It is clear that the most serious offence is the offence involving him breaking into a house at night, crouching beside a woman's bed and moving her underwear to one side. Most of the other offences involved masturbation and exposure. The other serious offence was in November 2007 and involved him sitting beside a woman in McDonald's and rubbing her several times on the bottom. They are the only

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1 Transcript p 6, ll 28-31

2 Transcript p5, ll 1-4

incidents which involve any touching or the use of any element of force on a woman.

[31] The other offences, whilst they are offensive and may have occurred where a woman was nearby, do not involve touching of the victim in any way. The most serious of the non-touching offences would seem to be the offence occurring at 1.00am on 26 November 2007 when a 33-year-old complainant was sitting naked in her lounge room watching television and Mr Phineasa rattled her security door and said "let me in. I'm coming in".

[32] There is no doubt that the respondent has been convicted of a number of sexual offences. I also note that when Mr Phineasa was sentenced by Bradley DCJ in the Cairns District Court in July 2008, her Honour indicated that Mr Phineasa needed to be psychiatrically assessed and that he should undertake the Indigenous High Intensity Sex Offender Treatment Program.

[33] My initial assessment would be that, prima facie, those offences do not appear to me to be offences that involve violence, however I consider that it is necessary to consider the reports of the assessing psychiatrist Dr James to fully determine if that is, in fact, the case as he has fully examined the circumstances surrounding the respondents offending behaviour.

The risk assessment reports by Dr Basil James

[34] In a risk assessment report dated 16 November 2009, Dr James noted Mr Phineasa's background and his history of offending. He also noted the persistent masturbation and exposure whilst in prison. Dr James also noted the report by Dr Garry Kidd, psychologist, who indicated that there was probably some measure of intellectual retardation and that he considered that Mr Phineasa's seemingly uncontrolled episodic perseveration to be indicative of his "intellectual retardation, developmental lag, and lack of insight and control [which] likely would be exacerbated by the disinhibiting effects of alcohol".

[35] Dr James concluded that it was likely that Mr Phineasa had a psychiatric illness given his inappropriate behaviour during the examination with him, his marked restricted thought content and the likelihood of the presence of hallucinations which were considered to be likely to be leading to a delay in his responding to questions and his incongruent effect at times. Dr James considered it was impossible to arrive at a valid conclusion in relation to his risk of reoffending until there was diagnostic certainty reached. In particular, Dr James considered that his history of offending:

> "records an offending history which is dense (i.e. of high frequency), persistent, inept, insightless, seemingly quite unaffected by community-based sanctions, and seemingly equally beyond Mr Phineasa's ability or inclination to exercise control".

[36] In an addendum psychiatric report dated 10 February 2010 Dr James noted Mr Phineasa's interaction with the Prison Mental Health Services. Dr James considered that the observations of the Correctional Services officers "would be consistent with, but not conclusive of, a chronic, low-grade psychotic disorder. I consider this diagnosis to be highly likely."

[37] Dr James considered that at the present time, there was a high risk of Mr Phineasa's continuing to offend as he had done previously. He considered that should a diagnosis of psychosis be confirmed a Community Treatment Order under provisions of the *Mental Health Act* 2000 (Qld) should be made prior to Mr Phineasa's release from prison.

[38] A further report dated 29 November 2011 was also obtained. Dr James noted that Mr Phineasa was being treated by psychiatrist Dr Mark Schramm in prison and that he had improved significantly. He was on Zyrprexa medication which made him feel more normal. Dr James noted that Mr Phineasa had confirmed to Dr Schramm that he had previously heard voices but had not heard any for a year or more. He described the voices as being different individuals but mostly male. Dr James indicated that Dr Schramm was highly suspicious that Mr Phineasa suffered from schizophrenia particularly given his very strong family history of the illness.

[39] Dr James also referred to Dr Schramm's description of Mr Phineasa's serious deterioration in functioning since the age of 16. Dr Schramm indicated that once he was started on Olanzapine in September 2010 he had not engaged in any behaviour such as masturbating or exposing himself. Dr Schramm also opined that Mr Phineasa probably lacked the cognitive capacity to participate in any sex offender treatment programs.

[40] Dr James also stated that the Corrective Services Reports also confirmed that Mr Phineasa's behaviour had improved significantly once he was started on antipsychotic medication.

[41] Dr James therefore concluded that Mr Phineasa has a severe chronic and disabling condition, namely chronic schizophrenia. He considered this diagnosis rests on the specific nature and patterns of his prior offending and the fact that it continued throughout his imprisonment until September 2010 when he obtained sustained treatment.

[42] Dr James also considered that his psychotic disorder had been a major contributing factor to his offending behaviour at all times. He believed that his illness will require virtually indefinite treatment and without treatment his risk of reoffending would be high.

[43] He considered however that with continued medication he would be able to be managed in the community with appropriate social support. It is likely therefore that an involuntary treatment order ("ITO") would be necessary. He also considered that there were ample grounds for both the making of the ITO and the maintenance of such an order.

[44] Dr James also considered that he might have a dual diagnosis in that he might suffer from a degree of intellectual handicap in addition to chronic psychosis. He also indicated that IQ testing should be undertaken so as to guide the likelihood or otherwise of his being able to benefit from a sex offender treatment program. Dr James indicated however that he had some doubt about the necessity of such a program provided his longstanding illness is, at last, adequately treated.

Is the respondent a prisoner to whom the Act applies?

[45] The essential question is whether Mr Phinasea is serving a sentence for a serious sexual offence as defined? Do his offences actually involve violence which is defined to include threats and intimidation?

[46] In my view, the sexual offences for which Mr Phineasa pleaded guilty were distressing to the women involved and are clearly offensive and indecent acts. In terms of sexual offences however they are at the minor end of the scale of seriousness. The maximum penalty imposed was two years and six months and that was on the basis that he had breached a suspended period of imprisonment and he was being re-sentenced for those offences.

[47] I note that violence is defined in the Macquarie Dictionary as:

> "1. rough force in action …
> 2. rough or injurious action or treatment…
> 3. any unjust or unwarranted exertion of force or power, as against rights, laws, etc; injury; wrong; outrage.
> 4. a violent act or proceeding.
> 5. rough or immoderate vehemence, as of feeling or language; fury; intensity; severity.
> 6. a distortion of meaning or fact."

[48] Counsel for the Attorney General contended for a different definition, relying on the Oxford Dictionary as follows;[3]

> "The meaning that's offered or the suggested definition is, to mean "Unlawful exercise of physical force." Now, "unlawful" in that context means, I'd submit, non consensual - a non consensual application of physical force really is what violence amounts to.
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> And, of course, there can be different forms of - different extremes of violence, of course. On my argument, of course, at its lowest, a violent - an act of violence can constitute - can be constituted by a touching, which might not be terribly even hard or firm. On the other hand it could involve a very severe application of force, for example, by a weapon or something of that sort. So, there are, of course, different possibilities as to the level of violence that might be used."

[49] Essentially, Counsel for the respondent is contending for a definition of violence which would mean that any touching or the threat of any touching of a sexual nature, no matter how fleeting or minor, without the consent of the victim is an act of 'violence' and would trigger the *Dangerous Prisoners (Sexual Offenders) Act*. That would in my view mean that most prisoners found guilty of a sexual offence would come within the ambit of this legislation.

[50] In this regard it is necessary to consider the objects of the Act. Section 3 sets those out in the following way:

> (a) to provide for the continued detention in custody or supervised release of a particular class of prisoner to ensure adequate protection of the community; and

[3] Transcript p11, ll 47-55

> (b) to provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation.

[51] It is clear therefore that the Act is aimed at a particular class of prisoner and aims to provide continuing care, control or treatment for that particular class of prisoner. That clearly is aimed at prisoners who are serious sex offenders in that they have either committed an offence against children or they have committed offences which involved violence.

[52] In this regard I note that the Explanatory Notes for the *Dangerous Prisoners (Sexual Offender) Bill* 2003 states that:

> "The number of prisoners who will be affected by these amendments is minimal and therefore the costs of continued detention and supervision will be funded from existing budget allocations."

[53] Sexual assault pursuant to s 352 of the Criminal Code, to which Mr Phineasa pleaded guilty, carries a penalty of 10 years imprisonment.

[54] In the second reading debate the Attorney General made the following remarks:

> "As I have indicated publicly, it is not clear how many prisoners there are currently within the prison system to which this legislation might apply, but my discussions with the Corrective Services Commission indicate that we are probably talking about approximately a dozen or so very, very serious offenders, most of whom have been in prison for a long time... I am satisfied that the terms of the legislation provide adequate authority for an Attorney-General to make applications as the need arises. Ultimately, it is a matter for the Supreme Court to determine whether the evidence justifies a risk assessment order being made and, if that is made, then subsequently determining whether any final orders are made. But I should emphasise again that there are a very small number of prisoners that I would imagine this legislation will apply to. That is why the legislation is carefully drafted to ensure that a court must be satisfied to a high level of probability that the person is in fact a serious danger to the public."

[55] I also note that the Explanatory Notes also made reference to a 'violent offence' in the context of the *Penalties and Sentences Act* 1992 (Qld) in the following terms:

> "Section 163 of the [Penalties and Sentences] Act allows a court to impose an indefinite sentence on an offender convicted of a violent offence if satisfied that the offender is a serious danger to the community. 'Violent offence' is defined as an offence of violence carrying a maximum penalty of life imprisonment or certain sex offences carrying a maximum penalty of life imprisonment. An indefinite sentence may only be imposed pursuant to the [Penalties and Sentences] act at the time the offender is sentenced."

[56] I cannot be satisfied that the offences the respondent pleaded guilty to, in fact, involved violence.

[57] I am not satisfied therefore that Mr Phineasa is the class of prisoner as defined by the Act. In this regard the Explanatory Notes also make it quite clear that the

legislation does not apply to persons who have in fact been rehabilitated or the mentally ill:

> "The law does not presently provide a mechanism whereby the community can be protected from a potentially dangerous individual, who is not mentally ill for the purposes of the mental health legislation and who has not committed a criminal offence (that is other than an offence for which the individual has already been sentenced)."

[58] Furthermore, even if I were satisfied he was a class of prisoner for whom the Act was designed I do not consider that the test posed by the legislation would be satisfied. In particular, I do not consider there are reasonable grounds for believing that he is a serious danger to the community in the absence of a Division 3 order.

[59] In this regard it is necessary to have regard to the nature of Division 3 orders before an order can be made pursuant to s 8. That section, which is in Part 2 of the Act, deals with continuing detention or supervision. The first step in proceedings envisaged by this Part is an application pursuant to s 8 for orders. A Division 3 order is an order either that a prisoner is detained in custody or an order that a prisoner be released from custody subject to a supervision order. There is necessarily a relationship between s 8 and s 13 because the test raised in s 8 is whether there are reasonable grounds for believing that the person in question is a serious danger to the community in the absence of a Division 3 order.

[60] It is this expression "serious danger to the community" which is defined in the schedule to the Act by reference to s 13(1).

[61] Section 13(2) then explains the expression in the following terms:

> "(2) A prisoner is a serious danger to the community as mentioned in subsection (1) if there is an unacceptable risk that the prisoner will commit a serious sexual offence—
>
> (a) if the prisoner is released from custody; or
>
> (b) if the prisoner is released from custody without a supervision order being made."

[62] Section 13(4) then outlines the matters the court is required to take into account. I agree with previous determinations[4] that a consideration of s 8 necessarily involves an examination of the matters identified in s 13 and that those matters inform a determination under s 8. Accordingly, an application for orders under s 8 includes a consideration of whether there are reasonable grounds for believing there is an unacceptable risk that, if the person in question is released from custody, they will commit a serious sexual offence or, if released from custody without a supervision order, they will commit a serious sexual offence.

[63] There is no doubt therefore that a final determination in relation to that question is governed by the requirements of s 13(3), which requires that the Court must decide that question only if it is satisfied by acceptable cogent evidence to a high degree of probability that the evidence is of sufficient weight to justify the decision. Whilst s 8 only requires a determination of whether there are reasonable grounds for believing there is an unacceptable risk, I agree that the decision in *SBD* that, in

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[4] *Attorney-General for Queensland v SBD* [2010] QSC 104.

dealing with an application pursuant to s 8, the Court does not need to be satisfied that a person is a serious danger to the community in accordance with the standards set in s 13(3). But, in determining whether there are reasonable grounds for believing that a person is a serious danger to the community in the absence of a Division 3 order, it is important to bear in mind that the standard in s 13(3) will apply to the final determination of the question.

[64] I accept that the test is whether there are 'reasonable grounds for believing' as discussed in *George v Rockett*[5], which involved a question as to whether there were reasonable grounds for believing something to support the issue of a search warrant:

> "The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture."

[65] I am not satisfied however that there are sufficient objective circumstances to show that there is a reason to believe that Mr Phineasa would commit a serious sexual offence if released without a Division 3 order. I note in this regard that the current evidence is that his offending arose out of his psychiatric illness. Furthermore he is adequately treated at present and is not a danger of reoffending if he is adequately treated. There have been no recent incidents and his behaviour has in fact moderated and there have been no further incidents since he was placed on medication in September 2010.

[66] Furthermore the compulsive behaviour that he has been guilty of in the past amounts to essentially masturbation and exposure. They are not serious sexual offences as, in my view, they have not involved offences of violence.

[67] The application is refused.

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5 (1990) 170 CLR 104.