SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v Daphney* [2013] QSC 190
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **BRIAN JOHN DAPHNEY** (respondent)
FILE NO/S:	4437 of 2013
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	29 July 2013
DELIVERED AT:	Brisbane
HEARING DATE:	29 July 2013
JUDGE:	Philippides J
ORDER:	**Order for supervised release of the respondent on the conditions provided in the draft order until 8 August 2018.**
COUNSEL:	K Philipson for the applicant K Prskalo for the respondent
SOLICITORS:	Crown Law for the applicant Legal Aid Queensland for the respondent

The application

[1] The applicant, the Attorney-General, seeks orders against the respondent, Brian Joseph Daphney, pursuant to s 13 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (the Act). It should be noted at the outset that while the applicant maintains his application for continuing detention in the alternative to a supervision order, it was conceded that the most recent psychiatric reports of Dr Scott Harden and Dr Josie Sundin supported a supervision order being made.

Background

[2] The respondent was born on 22 June 1979. On 11 September 1998, the respondent was convicted on his own plea of guilty and sentenced to a term of 15 years imprisonment for one count of rape, and one of break and enter premises and

commit an indictable offence. He was further sentenced to five years imprisonment for one count of break and enter or in dwelling with intent to commit an indictable offence at night and two years for one count of stealing, to be served concurrently. He is also serving a three month sentence for assault occasioning bodily harm whilst in company and four months for assault occasioning bodily harm, both committed whilst in custody in 1999 and 2001 respectively, cumulative on his previous sentences.

[3] On present calculations, the respondent is due for release on full time discharge on 8 August 2013.

The Index Offences and Prior History

[4] At approximately 4.00 am on 16 November 1997 the respondent forced a screen on a window in a home in Townsville and entered the premises, and stole $100.00 from a handbag in the lounge room. He anally raped a four year old girl who shared her room with her five year old sister, having taken the victim outside into a nearby laneway to do so before returning her to the house. Earlier that same night the respondent had broken into and entered a squash centre and escaped when police entered those premises. The respondent was 19 years of age at the time of the offences and reported that he was drunk at the time.

[5] Although the respondent had a significant criminal history and periods of detention in custody as a juvenile, he did not have any prior convictions for offences of a sexual nature.

Treatment Programs

[6] Whilst in custody the respondent undertook a range of programs, including for substance abuse, anger management and transitions programs. On 24 November 2009, the respondent completed a Getting Started Preparatory Program at Townsville Correctional Centre.

[7] Because he was assessed as a moderate to high risk of recidivism and had a high level of related treatment needs, he was recommended for the Sexual Offending Program for Indigenous Males (SOPIM) which he commenced on 22 November 2011 and completed in April 2012 with an exit report noting the respondent was an active and engaged participant who was motivated to learn and completed all required work. It was also recommended that he participate in the Staying on Track Sexual Offending Maintenance Program (SOMP) and attended community based drug and alcohol services (ATODS), and that his case manager monitor potential risk areas of victim access, sexual preoccupation, social supports, hostility, substance abuse, emotional collapse and rejection of supervision.

Psychiatric Risk Assessment Reports

[8] Psychiatric risk assessments were conducted by Drs McVie, Sudin and Harden who have all provided reports. Those reports support the making of a supervision order in the circumstances of this case with none of the experts advocating for the making of a continuing detention order as appropriate.

Report of Dr McVie dated 28 August 2012

[9] Dr McVie assessed the respondent for the purpose of the risk assessment for an application under the Act.

[10] Dr McVie noted that the respondent (who was born in Cairns and raised predominantly on Palm Island and in Townsville by his extended family and mother) commenced cannabis use at the age of 13 and drank alcohol regularly from the age of 15. He had convictions and had been in custody on and off from the age of 14. He had had some work on a farm near Mareeba for about four to five months. The respondent advised that he had been sexually abused as a child and was sodomised by an older teenage relative.

[11] Dr McVie undertook a number of formal assessments. On the Static 99, the respondent score was placed in the moderate to high category of risk of reoffending sexually. On the Hare Psychopathy Checklist – Revised (measuring personality traits representing a traditional concept of psychopathy) Dr McVie considered the respondent did not present with affective features of psychopathy, but he scored highly on anti-social factors including criminal versatility, juvenile delinquency, impulsivity, lack of realistic long term goals, poor behavioural controls, parasitic lifestyle and probably promiscuous sexual behaviour and early behaviour problems. On the Risk for Sexual Violence Protocol 2003 (RSVP) it was noted that the respondent's history of sexual violence appeared isolated to the index event. The respondent did not appear to minimise his responsibility for the offence. He had problems with substance abuse (particularly alcohol and cannabis) and had some opportunistic use of other substances. There was a significant history of non-sexual criminality and a lack of suitable employment. Dr McVie did not score the Stable 2007, but on review noted that his risk factors included lack of positive family support. However, protective factors were possibly his strong identification with his indigenous culture and the recent development of his ability in painting. He did not appear to have any sexual preoccupations, had no clear history of using sex as a coping mechanism, gave no history of an excessive sexual drive or deviant sexual interests, did not identify emotionally with children, did not appear hostile towards women, reported appropriate social connectedness and concern for others within the custodial environment , and his impulsivity seemed to have abated over the previous few years as there had been no history of recent breaches.

[12] Dr McVie gave the opinion that in terms of actuarial risk assessment, the respondent presented as a least a moderate risk of sexual reoffending and would present as a high risk of general criminal reoffending; his risks would be ameliorated by abstinence from alcohol and cannabis and other illicit substances; his risks would be considerably reduced if he found suitable ongoing employment and a supportive community environment.

[13] As to future plans, the respondent hoped to gain work, do more painting, be involved with his family and have a strong support network (family, local doctors and police). He said he would abide by any order or restrictions placed on him and he planned to stay away from alcohol and drugs

[14] Dr McVie gave the opinion that one potential problem with supervision could be the respondent's history of breaches in custody, including two major breaches of assault. She noted they took place some time ago and there had been no breaches

since 2008. She also noted that he did not appear to have had any real ongoing contact with family other than letters and phone calls he initiated.

[15] Dr McVie recommended that the respondent would benefit from a period of supervision in the community of at least two years to assist him to re-establish himself in his community and to gain further supports. The supervision period would also assist to assess if the social and psychological development he had reported to have achieved in recent years was able to be maintained while living in the community and to assess if his maturity will be a protective factor in terms of potential for recidivism (both general criminal and sexual). He would benefit from ongoing counselling in relation to his own sexual abuse, and perhaps individual therapy to determine what, if any, relationship that abuse had in regard to the index offence; he would also benefit from maintenance programs in the community for sexual offending and substance abuse to reinforce his need to avoid substances and to re-evaluate his attitudes to relationships, women and sexual activity once he is able to have access to normal sexual outlets.

Report of Dr Sundin dated 4 July 2013

[16] Dr Sundin saw the respondent on 21 June 2013 for the purpose of providing her risk assessment report. She diagnosed the respondent as having a Mixed Personality Disorder, avoidant and anti-social personality traits. Dr Sundin did not find any evidence that the respondent suffered from a Paraphilia, nor did she find that the criteria for Psychopathy satisfied. He gave an account sufficient to warrant the diagnoses of Alcohol Abuse and Cannabis Abuse/Dependence, both now in sustained remission whilst in prison.

[17] Dr Sundin assessed the respondent using a range of risk assessment instruments. While on the Hare's Psychopathy Checklist revised (PCLR-20), the respondent did not meet the criteria for Psychopathy, he showed evidence of Conduct Disorder and juvenile anti-social behaviour. However, his more prominent personality traits were demonstrated by an avoidant coping style, a sense of disaffection and disengagement from others, together with feelings of estrangement and low self-esteem. He did not impress as evidencing callousness, failure to take responsibility or absence of victim empathy.

[18] On the Static-99, the respondent was placed as a moderate to high risk of future sexual recidivism. Dr Sundin also had regard to the Sex Offender Risk Appraisal Guide (SORAG), the respondent had a raw score placing him in Category 8 and the Manual for Sexual Violence Risk – 20 (SVR-20). In respect of the latter, Dr Sundin found the following items to be present; victim of child abuse, substance use problems, relationship problems, employment problems, past non-violent offences, past supervision failures and physical harm to victim in sex offence. On that physician's guideline, Dr Sundin concluded that the respondent's risk of future sexual offending to be in the moderate zone.

[19] From a dynamic perspective, Dr Sundin noted that the respondent was subject to a prejudicial childhood and adolescence and that despite his descriptions of his family as a pro-social influence, his connections to family appeared to have been relatively tenuous and he lacked the opportunity to be cared for by a responsible, protective adult. There appeared to have been a high level of tolerance to his very itinerant lifestyle and he appeared to have been placed in the role of caretaker for his mother

who was, at the time, subject to significant problems with alcohol. Having been bullied at school and then sexually abused by an older cousin, the respondent's sense of self-worth was further damaged and his patterns of avoidance, lack of trust and disconnection with intimate partners had become well established. His sexual relationships appeared to have been quite superficial with connections revolving around mutual alcohol and substance abuse rather than any ongoing mutual intimacy. His dysfunctional anti-social and avoidance coping mechanisms were then substantively aggravated over at least a six year timeframe by his abuse of alcohol and cannabis and that highly disturbed lifestyle had caused him to suffer economic, educational and vocational disadvantage, all of which would need to be kept in mind during his transition into the community in the future.

[20] Dr Sundin considered however, that while the score obtained by the respondent on the Sex Offenders Risk Appraisal Guide was elevated, a more realistic assessment of his future risk of sexual recidivism was in the moderate zone.

[21] Dr Sundin opined, given the respondent's adverse history prior to his entrance into prison, his unmodified risk of future sexual and general recidivism was at a level unacceptable to the community, without the assistance of a high level supervision program. However, she also noted that the respondent had responded very well to the therapeutic programs undertaken by staff within Corrective Services, and had demonstrated a satisfactory degree of appreciation of his pathways to offending, with an awareness of the risk factors and a recognition of the need to engage with professional services and parole officers upon his release from prison in order to remain offence-free. He was a very young man when he first entered prison and had a lengthy history of low level, anti-social behaviours prior to his incarceration for his index offence. He did not appear to have strong personal supports other than his uncle on Palm Island who, by the description given of him, was a clearly pro-social role model.

[22] Dr Sundin's recommendation was that the respondent was suitable for release into the community on a high intensity supervision program with identified issues being able to be addressed within the clauses of the supervision order for a period of five years. In that regard, she considered that he would need to maintain absolute abstinence from all mood altering licit and illicit substances through that period of time and would benefit from ongoing support from Corrective Services staff. Additionally, Dr Sundin considered that the respondent would require quite high levels of supervision and support when he left prison in order to mitigate the stressors and risk factors he would experience upon return to the community, and would need assistance with accommodation, finding employment, linkage with indigenous cultural activities and engagement with group therapeutic programs for maintenance of sobriety to consolidate the gains he had achieved whilst in prison.

Report of Dr Harden dated 16 July 2013

[23] Dr Harden saw the respondent on 24 June 2013. Dr Harden noted that the respondent was an indigenous man with a significant history of antisocial and criminal acts beginning in adolescence and associated with poly-substance abuse, following a disrupted early life with his care giving undertaken by a number of his family members and at times his mother, who struggled with alcohol problems. He had been a victim of sexual abuse during his childhood. He also noted that there had been only one sexual offence apparently committed when intoxicated and when

acting on impulse. While initially the respondent's institutional behaviour while incarcerated was characterised by some ongoing impulsivity and aggression, in more recent years, he appeared to have done well and had successfully completed appropriate intervention programs with regard to his sexual offending as well as his alcohol and drug problems. He had in the past had some difficulty in complying with community orders. He had no significant employment history prior to incarceration and had spent his entire adult life to date, incarcerated.

[24] In Dr Harden's opinion, the respondent met the criteria for Antisocial Personality Disorder, albeit that some of the features may have reduced with age. The respondent also met a diagnosis of alcohol abuse (in remission because of incarceration) and had a previous history of marijuana abuse (in remission because of incarceration). Alcohol and marijuana abuse was significant because of the disinhibiting effect of intoxication which had been intimately involved in facilitating his offence. Dr Harden did not consider that a diagnosis of Paedophilia was supported on the material before him and opined that it was most likely that attitudes of sexual entitlement, intoxication and other psychological features contributed to his offence against the four year old girl. The effect of the respondent's own experience of sexual abuse on him and any link this may have had to his sexual offence remained unclear at this point.

[25] Dr Harden scored the respondent using a number of assessment instruments as follows. On the STATIC 99, the respondent was placed in the moderate to high risk of recidivism category relative to other adult male sex offenders. On the Stable 2007, the respondent was placed in the high needs group in terms of sexual offender's dynamic risk, with areas identified for focus for future intervention being relationship stability, sex drive, sex as coping and cooperation with supervision. On the Sexual Offender Risk Appraisal Guide, which assesses the risk of violent reoffending, the respondent scored highly. The respondent's score on the Hare Psychopathy Checklist was elevated compared to the general community, but not when compared to the correctional population. On the SVR-20 Dr Harden assessed the respondent as being in the moderate risk category on this measure of sexual violence risk.

[26] Dr Harden was of the opinion the respondent's future risk of sexual reoffence was moderate to high. The critical issues appeared to be substance abuse and intoxication, persistent criminal behaviour and the possible effects of his previous experience of being sexually abused. However, Dr Harden considered that if the respondent was supervised in the community, with abstinence from alcohol and effective reintegration into social and vocational life, his risk of sexual re-offending would be lowered to moderate.

[27] It was Dr Harden's recommendation that the respondent be supervised for at least five years in the community, with conditions that he be required to be abstinent from alcohol and drug use and undergo appropriate random testing regime, that he participate in an ongoing individual therapy program for sex offenders and substance abuse treatment and that the therapy program should also explore the respondent's experience of being sexually abused and the relationship of his substance use and previous offending behaviour. In Dr Harden's view, the respondent's long-term prognosis was reasonably good if he were able to successfully reintegrate into the community.

The scheme under DPSOA

[28] The objects of the Act as contained in s 3, are to provide for continued detention or supervision of a particular class of prisoner and to provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation.

[29] The Act establishes a scheme for the continued detention in custody or supervised release of prisoners who are deemed to be at risk of committing serious sexual offences if released at all, or if released without appropriate supervision. If the court is satisfied that the prisoner is a serious danger to the community in the absence of a division 3 order, the court may make a continuing detention order or a supervision order: s 13(5). A prisoner is a serious danger to the community if there is an unacceptable risk that the prisoner will commit a serious offence if released from custody or if released without a supervision order being made: s 13(2). The court may decide that it is satisfied a prisoner poses a serious danger to the community only if satisfied by acceptable, cogent evidence, and to a high degree of probability: s 13(3). A "serious sexual offence" is an offence of a sexual nature, whether committed in Queensland or outside Queensland, involving violence or against children.

[30] Section 13(4) provides a list of factors to which the court must have regard when deciding whether a prisoner is a serious danger to the community. These include:

- reports prepared by psychiatrists under s 11 and the extent of prisoner co-operation during the examination
- other medical, psychiatric, or psychological assessments relating to the prisoner
- information indicating whether or not there is a propensity on the part of the prisoner to commit serious sexual offences in the future
- the pattern of offending behaviour on the part of the prisoner
- efforts by the prisoner to address the cause or causes of the offending behaviour and his participation in rehabilitation programs
- whether or not the prisoner's participation in rehabilitation programs has had a positive effect on him or her
- the prisoner's antecedents and criminal history
- the risk of the prisoner committing another serious sexual offence if released into the community
- the need to protect members of the community from that risk
- any other relevant matter.

[31] In deciding whether to make a continuing detention order or a supervision order, the paramount consideration is the need to ensure adequate protection of the community (s 13(6)(a)) and the court must consider whether adequate protection of the community can be reasonably and practicably managed by a supervision order and the requirements under s 16 can be reasonably and practicably managed by corrective services officers (s 13(6)(b)).

Determination

[32] The respondent is a 36 year old indigenous prisoner currently serving a 15 year period of imprisonment for the anal rape of a four year old girl. It was submitted by the applicant that although the respondent did not have a history of sexual offences prior to the index offence, the risk assessment reports support the conclusion that he

is a moderate to high risk of sexually re-offending. It was further submitted that notwithstanding that the respondent has participated in sexual offender treatment programs in custody, the effects of and relationship between his own sexual abuse as a child and the index offence, substance use and previous offending behaviour remained unclear and remained a critical issue that should be explored in an ongoing individual therapy sex offender program. Such program could be implemented and participation therein enforced by way of a supervision order.

[33] I consider that there is sufficient cogent evidence to satisfy the court to a high degree of probability that the respondent is a serious danger to the community in the absence of a division 3 order in that there is an unacceptable risk that he will commit a sexual offence in the absence of a division 3 order. The question that then arises is whether adequate protection of the community may be ensured by a supervision order or whether a continuing detention order is indicated.

[34] In the circumstances of this case, as the applicant conceded in submissions, the evidence supports the conclusion that the respondent's risk of sexually re-offending can be decreased so as to ensure adequate protection of the community. This may be achieved by a strict supervision order and high level of community support and re-integration. To that end a draft supervision order compiled as a result of discussions between the parties was provided to the court.

[35] Bearing in mind the considerations in s 13(4) and the expert reports before the court and having regard to the paramount consideration of ensuring adequate protection of the community, I am satisfied that a supervision order in the strict terms of the draft order provided will adequately address the risk posed by the respondent and that the adequate protection of the community can be reasonably and practicably managed by such an order.

[36] In those circumstances, I make an order for supervised release of the respondent on the conditions provided in the draft order until 8 August 2018.