

SUPREME COURT OF QUEENSLAND

CITATION: *Attorney-General for the State of Queensland v Kynuna*
[2015] QSC 369

PARTIES: **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND**
(Applicant)
v
GREGORY DAVID KYNUNA
(Respondent)

FILE NO/S: Brisbane No BS9492 of 2009

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 18 December 2015

DELIVERED AT: Brisbane

HEARING DATE: 14 December 2015

JUDGE: Boddice J

ORDER: **The supervision order made on 7 October 2014 is rescinded and the respondent is detained in custody for indefinite control, care and treatment.**

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 applicant applies under section 22 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* for rescission of a supervision order and an order that the respondent be detained in custody for an indefinite period of care, control or treatment – where the applicant alternatively applies under section 22(7) of the *Dangerous Prisoners (Sexual Offenders) Act 2003* to have a supervision order amended – where there is an alleged contravention of a supervision order by the respondent – whether it can be determined that the respondent breached a supervision order – whether the court exercises its discretion to rescind or amend a supervision order under section 22 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* if a breach of a supervision order is determined – whether the Court is satisfied that the adequate protection of the community can,

despite contraventions, be ensured by a supervision order in its current form or as amended.

Dangerous Prisoners (Sexual Offenders) Act 2003, s 13, s 16 and s 22

Attorney-General v Phineasa [2012] QCA 184, cited

Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705, cited

COUNSEL: M Maloney for the Applicant
T Ryan for the Respondent

SOLICITORS: GR Cooper Crown Solicitor for the Applicant
Howden Sagers Cridland Hua Lawyers for the Respondent

- [1] The Attorney-General for the State of Queensland makes application, pursuant to s 22 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (“the Act”), for the rescission of a supervision order made under that Act or, alternatively, for an amendment of that order on the grounds that the respondent has contravened a condition of that order, namely, that he not commit an offence of a sexual nature during the period of the order.
- [2] The respondent does not contest that he has contravened the order. On 22 June 2015, the respondent pleaded guilty to one count of sexual assault on 25 October 2014. At issue is whether this Court ought to rescind or amend the supervision order.

Background

- [3] The respondent was born on 18 November 1964. He has an extensive past criminal history. Relevantly, he has been convicted of sexual offences in 1987, 2004 and 2010. He was also convicted of aggravated assault of a female in 1990. The respondent has been sentenced to substantial periods of imprisonment as a consequence of that offending.
- [4] The respondent suffers from a number of medical conditions. At age 15, he suffered a significant head injury as a consequence of which he developed an acquired brain injury leaving him with permanent cognitive deficits. The respondent also developed an Antisocial Personality Disorder. It is likely the respondent had antisocial personality traits prior to his head injury which were significantly exacerbated by his acquired brain injury and by significant marijuana and alcohol abuse from an early age. The respondent

is reported to have demonstrated distorted negative attitudes to women. He also has displayed jealousy and anger in past relationships.

- [5] In addition to those conditions, the respondent developed a chronic psychotic illness, which has been diagnosed as schizophrenia, in his mid to late twenties. That illness has required intensive treatment, including ongoing prescription of high doses of antipsychotic medication. His condition has remained well controlled in recent years. He has had no recent evidence of psychotic symptoms.

Supervision Order

- [6] The respondent was first made subject to a supervision order under the Act on 29 January 2010. That supervision order contained 41 requirements and was to remain in force until 29 January 2025. The respondent breached that supervision order on 15 April 2010, and 26 August 2010. The first contravention related to the use of cannabis sativa. The second contravention related to the commission of an offence of a sexual nature. The complainant in the offence of a sexual nature was an adult female who was tutoring at the Brisbane Correctional Centre. The respondent had placed his hands down his shorts and masturbated his penis before touching the female tutor in her groin area. He was sentenced to five months imprisonment.
- [7] Although these contraventions were found to be proven, the respondent was returned to the community, subject to an amended supervision order on 9 June 2011. However, on 2 August 2011, the respondent contravened his amended supervision order by using cannabis sativa and being absent on curfew. As a consequence of that contravention, the amended supervision order was rescinded on 9 November 2011, and the respondent was made the subject of a continuing detention order under the Act.
- [8] The continuing detention order was affirmed on review in 2013, on the basis that the adequate protection of the community could not be ensured by the respondent's release on a supervision order. On 7 October 2014, the continuing detention order was again reviewed in accordance with the Act. The Court found the adequate protection of the community could be ensured by the respondent's release on a supervision order. The respondent was ordered to be released from custody, subject to a supervision order containing 42 conditions. That order was to remain in place until 7 October 2024.

- [9] The current proceedings relate to a contravention of that supervision order. The contravention occurred in the following circumstances on 25 October 2014. The respondent, whilst receiving treatment at the Princess Alexandra Hospital for ongoing health problems, grabbed the hand of a female nurse and placed it on his genitals, holding her hand in that position until she pulled away. On 22 June 2015, the respondent was convicted and sentenced to 12 months imprisonment, to be suspended after four months, for an operation period of 18 months.

Previous sexual offending

- [10] The respondent was convicted of his first sexual offences on 10 December 1987. Those convictions related to two counts of break and enter a dwelling house with intent in the night time, and six offences of aggravated assault of a sexual nature on a female child under the age of 17 years. The respondent had entered a Cairns hostel in which female children were residing for a school excursion. The respondent was seen to touch a number of 10 year old females in the area of the genitals, through the sheets. The respondent was sentenced to an effective sentence of three years and 18 months imprisonment.
- [11] On 14 December 1990, the respondent was convicted of a single count of aggravated assault on a female. He was fined for that offence. The complainant was an invalid pensioner. She had returned to her residence in the early hours of the morning to find the respondent and other persons in the residence. The respondent grabbed her, dragged her to the bedroom and subsequently pursued her with a pair of scissors as she left the room.
- [12] On 28 May 2004, the respondent was sentenced to six years imprisonment for rape. The complainant was a six year old male child who was unknown to the respondent. The respondent had approached the child, who was wearing only a bathing suit, in the street near his residence. He took the child to a secluded area where he ripped a hole in the child's bathing suit and placed his hand down the complainant's bathers in front of his penis. The respondent later licked the complainant's genitals before placing the child's penis in his mouth. He asked the child to lick his anus and performed the same act on the child. On sentence, it was noted the offence was not simply opportunistic. There was a predatory element involved in the behaviour, and physical force.

Psychiatric evidence

- [13] The respondent has been the subject of risk assessment by two experienced forensic psychiatrists, Dr Grant and Dr Beech. Both assessed the respondent as a high risk of sexual re-offending in the future in the absence of a supervision order.
- [14] Although Dr Grant assessed the respondent as at high risk of sexual re-offending, that risk was moderated by virtue of the respondent's continued abstinence from substances, his ongoing support and supervision, individual psychological treatment and the effects of increasing age and maturation. Dr Grant noted, however, that there was an ongoing risk of impulsive sexual re-offending which Dr Grant considered to be of a less serious nature to his past more serious sexual offences involving children.
- [15] The distinction between the risk of the more serious sexual re-offending with children, and the risk of impulsive sexual re-offending with adults arose because of differing triggers for such re-offending in the future. The risk of the former was moderate but increased in the presence of relevant risk factors, particularly intoxication, social isolation and lack of support. A lack of psychiatric treatment and relapse of the respondent's schizophrenia would also significantly increase that risk.
- [16] The risk of impulsive sexual re-offending arose primarily as a consequence of the effects of the respondent's significant acquired brain injury and the development of antisocial personality traits. Those conditions led to impulsivity which was unlikely to significantly change in the future, although it may improve with ongoing individual psychological treatment and age.
- [17] As to a continuation of the supervision order, Dr Grant opined:¹

“In my opinion, a Supervision Order will be reasonably effective at significantly containing the risk of serious sexual re-offending but it will not be totally effective at reducing impulsive opportunistic offending. Maintenance of sobriety, control of psychiatric illness and quite intense social support and supervision will be the relevant factors in containing risk. In my opinion, there will be an ongoing significant risk of impulsive sexual offences, most likely of the less severe variety.

Mr Kynuna is currently not receiving individual psychological therapy. Hopefully that would be resumed if he is released into the community.

¹ Affidavit of Donald Archibald Grant (affirmed 23 November 2015), DAG-2, page 24.

Whilst the risk to the community cannot be totally contained, in my opinion a Supervision Order will act to contain more serious threatening or offending behaviour and should be effective in quickly detecting contraventions of supervision in regard to substance use. Monitoring of Mr Kynuna's movements and social interactions would be a relevant aspect of his management. He should not be allowed to have any unsupervised contact with children.

In my opinion, whether or not the court decides to release Mr Kynuna will probably depend upon the degree to which an ongoing risk of impulsive behaviour can be tolerated and the degree to which the Supervision Order would be able to reduce that risk. In my opinion, the risk would be acceptable. I would recommend a comprehensive Supervision Order similar to that which has previously been applied. I believe the Order needs to be in place for a longer term such as 10 years, as the particular risk presented by Mr Kynuna are not going to be ameliorated in the short term. As he ages, it is likely that the tendency toward aggressiveness and impulsivity will gradually decline."

- [18] In evidence, Dr Grant expanded on this opinion. He noted that the contravention had occurred in circumstances where whilst the respondent's schizophrenia was well controlled, the respondent was in hospital suffering a chest infection in the context of chronic obstructive airways disease. There was evidence he was actually lacking oxygen at the time of the offending behaviour. He was unco-operative and verbally aggressive. His behaviour could therefore be seen as secondary to his physical illness which was complicating his mental illness at the time. As such, it could be said to have occurred in highly unusual circumstances.
- [19] Dr Grant noted that the respondent had been undergoing an individual psychological program with Dr Hatzipetrou which had been helpful, although it had not continued whilst he has been in custody. It is likely the respondent would benefit from a continuation of that program upon his release. That program addressed issues of self-regulation or self-control and strategies of recognising situations that might be at risk. The continuation of that therapy would therefore act as a protective factor for impulsivity.
- [20] Dr Grant also noted that the respondent has been well behaved in custody, although custody would not have given him much exposure to females in a situation where he might have an impulsive action. Dr Grant accepted that the risk of sexual offending in the future was more likely to be a sexual assault as a consequence of an impulsive groping action. More serious sexual offending against children was unlikely if the respondent remains sober, abstinent from illicit drugs and had his schizophrenia well controlled.

- [21] Dr Beech noted that without the monitoring conditions of a supervision order, the respondent was likely to struggle with community living and would quickly deteriorate in terms of compliance with his medication and a return to substance use. Under those circumstances, his mental state would deteriorate and he was likely to act impulsively with a significant risk that the sexual offences would involve a child or, alternatively, a vulnerable female. A supervision order similar to the existing order would significantly reduce that risk to below moderate. Such an order ensured monitoring and significantly reduced the risk of abuse of substances. It also provided support, ongoing counselling, rehabilitation and ensured compliance with medication for his psychotic illness.
- [22] Dr Beech accepted that even with such a supervision order, there was a risk the respondent would act indecently as a consequence of his impulsivity. That risk "...would occur in a somewhat exceptional circumstances where his impulsivity is aggravated by intoxication, mental illness or close proximity to a woman in an un-monitored circumstances".² That risk could be managed by alerting those who treat him, or come in close proximity to him when he is unwell, as to those risks.
- [23] In evidence, Dr Beech confirmed that the respondent's risk of sexual offending as a consequence of impulsive acts arose out of his mental illness and his acquired brain injury which leads to impulsivity and affective instability. Use of illicit substances exacerbates both those conditions. Dr Beech agreed with Dr Grant that the risk of future sexual offending was more related to impulsive acts as opposed to involving children, although the risk of offending against children increased with the abuse of alcohol or drugs.
- [24] Dr Beech also agreed with Dr Grant that the contravention occurred in exceptional circumstances when the respondent was hypoxic. His mental sensorium was affected and he acted impulsively. There was "a big difference" between that incident and what had happened earlier with the prison tutor in 2013, let alone the earlier offending in 2003. Dr Beech accepted that there remained a risk of future sexual offending as a consequence of impulsivity. There would be a need for people monitoring him to be vigilant.
- [25] In Dr Beech's opinion, any future sexual offending was more likely to occur in circumstances where the respondent found himself alone with a woman and under

² Affidavit of Michael Joseph Beech (sworn 30 November 2015), MJB-2, page 10

circumstances or stress which caused him to act impulsively. A supervision order would monitor those circumstances. The risk would be further limited because people are now aware of the fact that he acts sexually impulsively at times.

Legislative Scheme

- [26] The Act provides a scheme for the continued detention or, alternatively, release upon a supervision order, of prisoners found to be a serious danger to the community in the absence of such orders. Section 13 of the Act provides that if the Court is satisfied a prisoner is a serious danger to the community in the absence of such an order, the Court may order the prisoner be detained in custody for an indefinite term for control, care or treatment, or be released subject to the requirements of the supervision order.
- [27] A prisoner is a serious danger to the community if there is an unacceptable risk the prisoner will commit a serious sexual offence if released from custody or released without a supervision order. Relevantly, for present purposes, a serious sexual offence means an offence of a sexual nature involving violence, or against a child. The Court must be satisfied by acceptable, cogent evidence and to a high degree of probability, that the evidence is of sufficient weight to justify the decision.
- [28] Section 13(4) of the Act sets out factors the Court must have regard to in deciding whether a prisoner is a serious danger to the community. If the Court orders the prisoner's release from custody under a supervision order, the order must specify particular requirements as set out in s 16 of the Act.
- [29] Section 22 of the Act applies if the Court is satisfied on the balance of probabilities that a prisoner has contravened a supervision order. Relevantly, it provides:
- “(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, for example, an order—
 - (i) in the nature of a risk assessment order, subject to the restriction under section 8(2); or
 - (ii) for the revision of a report about the released prisoner produced under section 8A;
 - (c) consider any further report or revised report in the nature of a report of a type mentioned in section 8A.
- ...
- (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 all of the requirements under section 16(1) if the order does not already include all of those 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).”

Submissions

[30] The Attorney-General submits that the Court would be satisfied on the evidence that the respondent breached a condition of his supervision order by committing an offence of a sexual nature during the period of the order. The onus then shifts to the respondent to satisfy the Court, on the balance of probabilities, that the adequate protection of the community can, despite the contravention, be ensured by a continuation of the supervision order, in its current form or as amended.

[31] The Attorney-General submits that whilst the psychiatric evidence raises concerns as to the risk of future sexual offending, it is open to the Court, on the evidence of the psychiatrists, to be satisfied that despite the contravention the respondent could be released on the existing terms of the supervision order.

- [32] The respondent does not contest that he has contravened a requirement of the supervision order by committing an offence of a sexual nature during the period of the order. However, the respondent submits he has discharged his onus of satisfying the Court, on the balance of probabilities, that the adequate protection of the community can, despite that contravention, be ensured by the requirements of the existing supervision order.
- [33] The respondent submits the risk posed by him in respect of future sexual offending is in respect of sexual offences similar to the offence the subject of the contravention. That risk can be adequately managed and controlled within the framework of a supervision order. Further, it is a risk that does not involve children, and which does not involve violence as that term is to be understood in the context of the Act.

Discussion

- [34] There is no doubt the respondent has contravened his supervision order. His conviction in July 2015 was of an offence of a sexual nature. That offence was committed during the operation of the supervision order. The commission of such an offence is contrary to clause 17 of the supervision order.
- [35] The contravention having been proven, the onus is on the respondent to establish that the adequate protection of the public from the risk of the commission of a serious sexual offence in the future can be met by the continuation of the supervision order or an amended supervision order. The respondent has not discharged that onus.
- [36] Whilst the respondent swears in his affidavit that he will comply with the terms of any supervision order, his past performance is concrete evidence of non-compliance with those conditions, including the pivotal condition that he not commit offences of a sexual nature. His previous contraventions have included the commission of sexual offences on two separate occasions. Whilst the second such contravention is said to have occurred in highly unusual circumstances, whilst the respondent was hypoxic, that was not the situation for the first such contravention. His impulsivity is of particular concern in relation to his ability to adhere to the conditions of a supervision order in the future.
- [37] The risk factors identified by Dr Grant and Dr Beech are not adequately addressed by the imposition of even stricter conditions, as part of a supervision order. Whilst those

conditions may address the risk of future serious sexual re-offending in respect of children, they do not address the significant risk of re-offending in respect of adults. The respondent's behaviour in respect of the tutor in the Brisbane Correctional Centre and the nurse at the Princess Alexandra Hospital evidence the dangerousness his impulsivity presents should he be alone with an adult female. Each of these offences occurred in public institutions. They were not committed in isolated locations. Each occurred in circumstances where the very conditions now suggested to provide an adequate protection against the risk of future serious sexual offending were insufficient to protect those vulnerable adult women. It is simply unacceptable to place adult women at risk in the future.

- [38] The respondent submitted that the risk in question would not satisfy the definition of a serious sexual offence. Whilst it is true that the risk of sexual offending does not relate to children, it cannot be said that the risk of sexual offending does not involve violence. The respondent's most recent contravention by the commission of an offence of a sexual nature involved more than "groping" of the female victim. The respondent forcibly placed the hand of the complainant on his genitals.
- [39] In *Attorney-General v Phineasa*,³ Muir JA said of the reference to violence in the definition of serious sexual offence at [38]:

"... the 'violence' referred to in the definition of serious sexual offence is force significantly greater in degree than mere physical contact or even, at least as a general proposition, acts such as pawing, grasping, groping or stroking. The language of ss 8 and 13, in particular, is inconsistent with the application of the Act to sexual offences other than of a very serious kind where offending against adults is concerned. Those sections are addressing conduct of such a nature, that the risk that a prisoner, assumed to be a member of a particular class, might engage in it and harm a member or members of the public if released from custody or if released without a supervision order, is regarded as unacceptable. Consequently, the 'violence' contemplated by the Act (excluding for present purposes threats and intimidation) would normally involve the use of force against a person to facilitate the 'rape' of that person within the meaning of s 349 of the *Criminal Code* or which caused (or in the case of predicted conduct would be likely to cause) that person significant physical injury or significant psychological harm."

³ [2012] QCA 184.

- [40] Forcibly placing the hand of an adult female onto his genitals involves more than mere physical contact. It involves the application of force without the consent of the adult woman. It is conduct which is likely to cause significant psychological harm to that adult woman.
- [41] Ultimately, the issue that must be addressed is, as Dr Grant candidly admitted, the level of risk this Court is prepared to find acceptable. The risk of future sexual offending posed by the respondent's impulsivity is unacceptable. It cannot be adequately addressed by conditions under a supervision order. The Court can have no confidence the respondent will comply with those conditions, particularly, a condition that he not commit an offence of a sexual nature whilst subject to that supervision order.
- [42] Whilst Dr Grant and Dr Beech gave considered reasons for their opinions as to the risk of future sexual offending being adequately protected by a supervision order, it is a matter for the Court. In this respect, the observations of Heydon JA (as his Honour then was) in *Makita (Australia) Pty Ltd v Sprowles*,⁴ are apposite. His Honour cited with approval the following passage from *Davie v Lord Provost, Magistrates and Councillors of the City of Edinburgh*:⁵

“Expert witnesses, however skilled or eminent, can give no more than evidence. They cannot usurp the functions of the jury or Judge sitting as a jury, any more than a technical assessor can substitute his advice for the judgment of the Court ... Their duty is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence. The scientific opinion evidence, if intelligible, convincing and tested, becomes a factor (and often an important factor) for consideration along with the whole other evidence in the case, but the decision is for the Judge or jury.”

Conclusion

- [43] The respondent has not discharged the onus placed upon him. The existing supervision order is revoked. The respondent is detained in custody for indefinite control, care and treatment.

⁴ (2001) 52 NSWLR 705 at [59].

⁵ [1953] SC 34, at 39-40.

Orders

1. The supervision order made on 7 October 2014 is rescinded and the respondent is detained in custody for indefinite control, care and treatment.