SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v Buckby* [2007] QSC 370
PARTIES:	**Attorney-General for the State of Queensland** Applicant v **Desmond George Buckby** Respondent
FILE NO/S:	BS11102/06
DIVISION:	Trial Division
PROCEEDING:	4 December 2007
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	7 December 2007
DELIVERED AT:	Brisbane
HEARING DATE:	4 December 2007
JUDGE:	White J
ORDER:	1. Rescind the supervision order made by Atkinson J on 12 April 2007. 2. Desmond George Buckby be detained in custody for an indefinite term for control, care and treatment pursuant to the provisions of the *Dangerous Prisoners (Sexual Offenders) Act 2003*.
CATCHWORDS:	CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE- JUDGMENT AND PUNISHMENT - SENTENCE - MISCELLANEOUS MATTERS - SEXUAL OFFENDERS - *Dangerous Prisoners (Sexual Offenders) Act 2002* (Qld) - where the respondent was declared a serious danger to the community and released on a supervision order with certain conditions - where one of the conditions required the respondent not to have contact with children without the permission of a corrective services officer - where the respondent breached this condition - whether the existing supervision order is sufficient to ensure the protection of the community - whether the respondent should be detained for care, control and treatment *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld)

COUNSEL: Mr JM Horton for the applicant

Mr PE Smith for the respondent

SOLICITORS: The Crown Solicitor for the applicant

Legal Aid Office (Qld) for the respondent

[2] On 12 April 2007 Atkinson J, being satisfied to the requisite standard that the respondent constituted a serious danger to the community in the absence of an order pursuant to Division 3 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* ("the Act") ordered that the respondent be released from prison subject to 40 conditions by which the risk to the community was to be managed. Relevantly, those conditions required him to

> "(xiii) … comply with every reasonable direction of an authorised corrective services officer; and
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> …
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> (xxvi) not have any supervised or unsupervised contact with children under 16 years of age except with prior written approval of an authorised corrective services officer. The respondent is required to fully disclose the terms of the order and nature of offences to the guardians and caregivers of the children before any such contact can take place; Queensland Corrective Services may disclose information pertaining to the offender to guardians or caregivers and external agencies (i.e. Department of Child Safety) in the interest of ensuring the safety of the children."

[3] The respondent was released into the community on 14 May 2007 subject to the conditions set out in the order of 12 April 2007.

[4] The Attorney-General has contended that the respondent contravened a requirement of the supervision order insofar as he had breached the conditions set out above by being found with five children under the age of 16 in his unit in Townsville without the prior written approval of an authorised corrective services officer. Neither had he disclosed the terms of the order and the nature of his offences to the father of the children.

[5] The respondent was taken into custody on 4 October 2007. On 11 October 2007 Daubney J made orders for the respondent to undergo examinations by Professor Basil James and Professor Barry Nurcombe both psychiatrists, who were to report in accordance with s 11 of the Act. He further ordered that, pursuant to s 21(2)(a) of the Act, the respondent be detained in custody until a final determination by the court pursuant to s 22 and adjourned the final hearing to 4 December 2007.

[6] If the court is satisfied, on the balance of probabilities, that a released prisoner has contravened a requirement of a supervision order, then, unless the released prisoner satisfies the court, on the balance of probabilities, that the adequate protection of the community can, despite the contravention, be ensured by the existing order (as amended), the court must

> "(a) if the existing order is a supervision order, rescind it and make a continuing detention order …". s 22(1) and (2)(a).

In brief, it is for the Attorney-General to satisfy the court that a condition of the supervision order has been breached and for the released prisoner to satisfy the court that the protection of the community can be ensured by the existing order (including any amendments).

[7] The respondent conceded through his counsel and in his affidavit filed on the morning of the hearing, and also when giving oral evidence that he had contravened a requirement of the supervision order made on 12 April 2007 in that he had contact with children under the age of 16 in breach of condition (xxvi) and had been specifically directed to give effect to that condition by direction on 3 October 2007.

[8] That being so, Mr PE Smith, for the respondent, accepted that the respondent bore the onus showing that the adequate protection of the community can, notwithstanding that contravention, be ensured by the existing order.

[9] There is some conflict in the material put before the court but only the evidence of the respondent was tested. The evidence of the father of the children, neighbours and a friend who visited was in the form of statements attached to an affidavit of Constable Schneider which described a greater level of contact than admitted by the respondent. Mr Horton, for the Attorney-General was content to rely on the respondent's account of his contact with the children.

Background

[10] The respondent is presently aged 60 years.

[11] He has a criminal history which commenced in 1974 with a conviction for stealing. In 1981 he was dealt with in the Melbourne County Court for indecent assault and released on a good behaviour bond. In 1994 he was convicted of two counts of stealing in respect of which he was fined and in 1987 convicted of making false statements in connection with social security benefits.

[12] He was imprisoned for 12 months by the District Court at Brisbane on 3 December 1990 for indecent dealing with a child under the age of 12 which had occurred earlier that year. In 1995 he was convicted of a number of very serious offences of a sexual nature which had taken place over several years, including carnal knowledge of a child, for which he was imprisoned for 10 years, wilful exposure of a child to an indecent video and three charges of indecent dealing with a child under the age of 12. The respondent's appeal against conviction to the Court of Appeal was dismissed in 1996. The sentence of 10 years was set aside and instead one for seven years was imposed.

[13] The respondent had known two of the children's parents for some years. He was friendly with the parents of all of the children concerned. He had taken them on outings. He took photographs of the children. Some of the young girls slept over in his caravan on many occasions. It was alleged that he had shown them pornographic videos, had attempted to administer a stupefying drug and sodomised one of the children who was 15.

[14] After he had served that sentence and had been out in the community for about a year, he offended again against children and in July 2004 was convicted of indecent treatment of two children under the age of 16 with a circumstance of aggravation, of administering a drug for the purpose of a sexual act and of attempting to administer a drug for the purpose of a sexual act. The head sentence imposed was four years. He was dealt with for those offences in July 2004. Before his release, the Attorney-General sought an indefinite detention order on the expiration of his term of imprisonment.

[15] Those offences involved two girls aged 11 and eight who had been permitted by their parents to stay overnight in the caravan in which the respondent was living. In the course of the night, he fondled the children's genitals, took photographs of them in their underwear and aggravated the offences by the use or attempted use of sedative drugs to produce a state of passivity or altered consciousness, as described by Professor James in his report dated 24 March 2007.

[16] The respondent has maintained a strong stance of denial with respect to the 1995 and 2004 sexual offences.

[17] Both Professor James and Professor Nurcombe concluded in reports prepared for the hearing before Atkinson J that the respondent was at high risk of re-offending in the absence of strict conditions. Professor Nurcombe wrote at p 18 of his report dated 22 February 2007 (ex 3)

> "If offences occur in the future, they are likely to involve indecent dealing with children aged 5 to 15 years. … He is not likely to abduct his victims or harm them physically, beyond penetrating their genitals. The psychological harm to victims is likely to be considerable. … In all instances but one, the victims were known to [the respondent]. Sexual offending, should it recur, is likely to take place only after a period of familiarisation, ingratiation, and grooming of families and victims. The general pattern of offending in the past has involved [the respondent's] living in areas (i.e. caravan parks) where there are families with many children. He becomes well-known to the families who are reassured that their children can visit his caravan and stay overnight with him. If it recurs, sexual violence is likely to be repeated. The sexual violence risk is chronic. It is possibly reduced, but not necessarily eliminated, by his age and reported loss of sexual libido. The type of sexual offence perpetrated by [the respondent] is relatively common. He has had 14 charges over 23 years (1981 – 2004). The density of sexual offences appears to have increased since 1990. A worrying aspect of the most recent offence is [the respondent's] use of sedation to stupefy one of his victims. He has no friends or supports in the community, having lost contact with all his ex-partners and children. Loneliness and isolation are likely to be important factors in his offending. Offending is clearly more likely to occur if he lives in situations (e.g. caravan parks) where he has access to female children. Supervision and distance from children are likely to be risk-protective factors. It is doubtful that he will be able to benefit from sex offender therapy."

[18] Professor James was rather more sanguine about the success of one-to-one therapy treatment – p 23 of his report of 24 March 2007 (ex 4).

[19] The uncontested facts here are that after a short period living in a residential facility after being discharged from prison, the respondent took up accommodation in a unit in Townsville which had been assessed by Community Corrections as suitable. He furnished the unit and purchased a car with his savings. He resided alone at that address. The unit next door was intermittently occupied but after a month or so a man who had separated from his wife and five children occupied the unit. The respondent deposes that the man's wife told him that they had separated but were trying to reconcile and that their children would stay with their father fortnightly.

[20] The respondent engaged in neighbourly conversation with the father who told him that the children would be visiting from time to time. The respondent deposes that on one occasion the children ran into his unit believing it to be their father's and that the father came in "seconds later" and apologised. The respondent, who has some enthusiasm for cooking, was making biscuits for his other neighbours and he gave some to the children. The next day the children were playing cricket in their father's back yard and during the game the ball came over the fence. The respondent returned the ball and noted in his affidavit that their father was with them in the back yard. The father told the respondent that the children would stay for about five days with him during the September school holidays. He told him this while he was having a drink over the fence with the father. The respondent deposes that the father invited him to go on a swimming outing for the youngest boy's birthday, but he declined. After they returned, he gave the father some sweet food that he had prepared which, he said, he had made for other neighbours.

[21] The following day he knew that the children were going to a film with their father and said that he found out for the first time that the eldest girl had finished high school and he believed that she was over 16. Later that day, when the children were playing football, the ball came over the fence and smashed one of four solar panel garden lights which the respondent said he had recently bought. He deposes that he "yelled" at the youngest boy because he was angry and he ran off crying. He deposes that later that day two friends that he had made when he was staying at the facility after he was released from prison came to his unit and one, "Les", bought a mobile phone with a camera. The respondent asked Les to take a photo of his car. He noted that Les was not only taking photographs of his car but also of the children. He deposes that he was angry with Les for taking the photographs and told him he wanted them developed straight away to give them to the father so that there could be no suggestion that he was breaching the order. The men went to the shopping centre and had the photographs developed and they were given to the father.

[22] The respondent deposes that he saw the father again later that afternoon and they had a drink over the fence while the children were playing in the back yard. Whilst at the shopping centre having the photographs developed, the respondent bought the boy, whose birthday it was, a game because he felt guilty about shouting at him. But, not wanting to give a present to one of the children, he bought each of the other children some presents too, which he says were not expensive. He gave those presents to the eldest girl in the presence of her father over the back fence to give to the children.

[23] On another occasion he gave the father some UNO cards for the children to play with over the fence. He deposes that the children were playing with those cards "on the fence line" and some of the cards fell onto his side of the fence and he helped them pick them up. He deposes that two of the boys asked him if he wanted to play cards with them and, although he said he should not have agreed to do so, because the father was there, he did. He adds

> "At one stage one of the girls hopped on my lap for a few minutes. I told her she was heavy and got her to hop off. Her father was there during that as well."

[24] The respondent refers to a separate occasion when the father brought one of the boys over to his unit who had hurt his eye and since the respondent had a first aid certificate he gave the father some advice.

[25] On the final encounter with the children, the respondent deposes that he was in his backyard cutting the husks off coconut shells. The children asked if they could use them as footballs but he refused. He said they then wanted some coconut milk so he gave them some to try

> "I went into my unit. I had a DVD on. Unfortunately the kids followed me in. I did not invite them in.
>
> I didn't say anything to the kids. I should have told them to go. I did not. They should not have been there.
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> …
>
> Their father was at the fence line during all of this and there is a clear line of sight from there to where we were.
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> Very soon after that, two Corrective Services officers came into my unit where the children were there."

[26] The respondent admitted that he had breached the order but protested that he did not deliberately seek out the children. He deposed, and confirmed in oral evidence that he should have told them to go. He knew he should have stayed inside when they were in the back yard. The respondent sought in cross-examination to explain how he had come to breach the condition that he not have contact with children. He said it had all happened quickly and that he "had not seen children much then". He was confused and it happened unexpectedly. He said he did want to "become friends with the father and I didn't want to be a friend of the children" and he knew that it was in breach of the order, transcript p 43.

[27] Ms Nadine Hedger, a parole officer employed by Queensland Corrective Services, was one of the supervising officers for the respondent from September 2007. Those officers maintained an electronic diary of their contacts with him. During a random visit about 10 o'clock by one of the surveillance officers to check on compliance with his curfew on 29 September, the respondent mentioned something about the children who resided "sporadically" with their father next door. That information was taken up by Ms Hedger with the respondent on 1 October 2007. The respondent was given a direction in writing which was the terms of condition (xxvi) that he have no contact with children under the age of 16 years without written approval. He signed the direction as having understood it.

He was advised that if he were to have prolonged contact with the children next door he was to disclose his current situation to their father or else Queensland Corrective Services would be obliged to do so.

[28] On 3 October 2007 the respondent reported to the Corrections office. Ms Hedger discussed the photographs being taken of the children and the respondent's social interaction with the father.

[29] Later, on 3 October 2007, Ms Hedger and the Corrections regional manager conducted a random home visit to the respondent. The following appears in the diary

> "Upon entering his garden the screen door was open and [the respondent] was sitting on the couch with 5 children with the youngest being aged 6 wearing a bikini. The children stated that they were watching a movie with the offender. The father of the children came from his unit and asked if there was a problem and [the respondent] asked the father to take the children home, while he went back into the house to collect a drink that one of the children had left in the kitchen."

[30] In accordance with a requirement of the supervision order, the respondent commenced therapy with Ms Megan Fisher, a psychologist, on 4 July 2007. Ms Fisher reported on 8 August 2007

> "With regard to progress made, there is little to report. Since the commencement of therapy he has been consistently resistant. His [sic] continues to deny involvement in the offences and continues to blame his victims for fabricating malicious allegations. His narrative of his offending is frequently convoluted and punctuated by illogical explanations of his innocence. Mr Buckby likes to portray himself as a victim of circumstances.

[31] Ms Fisher ceased therapy sessions on 20 August 2007. She wrote in a letter to Community Corrections on 3 September 2007

> "I am of the opinion that a group program rather than individual counselling is more likely to produce progress. Mr Buckby is very guarded and suspicious of persons in authority. He has been assessed by multiple psychologists/psychiatrists and has subsequently developed very strong defence mechanisms to manage his interactions with treating practitioners. He is not opposed to attending individual therapy and should he be referred to another psychologist he would likely be quite agreeable. My concern however is that the repeated cycling from therapist to therapist is likely to contribute to strengthening his defence mechanisms.
>
> Alternatively group therapy is a situation in which he is not being 'judged' by authoritative figures, but instead is evaluated by his peers. This is the primary reason why Mr Buckby reportedly refused to attend group therapy in custody, fear of damaging his reputation amongst other inmates. Mr Buckby is not an unintelligent man and it is my opinion that he is aware that in a peer situation, that other offenders will find him unconvincing; that is a highly confronting

> notion for Mr Buckby and a situation in which his methods of distorting his involvement in offending are unlikely to be effective."

[32] Professor Barry Nurcombe prepared a report dated 11 October 2007 pursuant to the order of Daubney J. He did not interview the respondent for this report and said in oral evidence that that was important because it did not permit him to explore with the respondent what his present attitude to his earlier offending and treatment was. He had not had an opportunity to read the respondent's affidavit but did so whilst giving evidence.

[33] He described the respondent as ingratiating himself with the father of the children. He characterised the giving of presents, food and playing cards to the children, whether directly or through their father, as grooming conduct and as ingratiating himself in a way that was consistent with his previous *modus operandi*. He concluded that, given the failure, as he would see it, of the very intrusive supervision order to curb the respondent's conduct, continued release from custody could not be recommended.

[34] Professor Nurcombe was pessimistic that imprisonment would convey any benefit to the respondent but that it would offer protection to the community. He thought it "possible though unlikely" that exposure to the High Intensity Sex Offender Treatment Program in prison would enable the respondent to admit to himself the extent of his offending against children, examine its origin and plan to avoid relapse. He was of the view that the respondent represents a risk to children that is unlikely to abate in the foreseeable future with the passage of time alone. He could conceive of no further order which would assist in curtailing the respondent's risk of re-offending. Since the respondent had not completed satisfactory psychological counselling the risk that he would re-offend, in Professor Nurcombe's opinion, remained high if he did not admit his guilt. In his opinion

> "The fact that he [the respondent] would breach supervision requirements in such a flagrant manner suggests a recklessness and heedlessness of self-destructive quality."

[35] Professor Basil James interviewed the respondent at the Townsville Correctional Centre and reported on 26 November 2007. The respondent expressed considerable anger to Professor James about the oppressive nature of the conditions of the supervision order which he regarded as unreasonable and preventing his re-integration into society. Professor James noted the respondent's continuing denial about his past offending behaviour, his inability to engage in a dialogue about the reality of the court order and his poor judgment in purchasing gifts for the children and watching videos with them. Professor James concluded

> "The likelihood that [the respondent's] observed and recorded behaviour represented an intractable relapse of the offending behavioural cycle rather than simply naivety received considerable confirmation from [the respondent's] contribution to the dialogue during my examination of him …"

[36] As a consequence of the reported conduct, the respondent's lack of insight during examination and his resistance to true engagement indicative of therapeutic potential, Professor James concluded the respondent remains at very high risk of re-offending were he again to be released into the community. He is "even less optimistic" than he was in his previous expression of hope that the respondent might

engage in therapy on a one-to-one basis. Contrary to Professor Nurcombe's opinion, Professor James is of the view that the respondent might have sustained some brain damage in a past accident which would reduce considerably the respondent's potential for flexibility and change. He concluded that were the respondent again to be released on the same conditions that were contained in the order made by Atkinson J "that a similar level of incipient recidivism would occur and that his re-integration into the community at large would be more than usually difficult and will require even greater restrictions".

[37] Professor James could envisage no further restrictions which would have the desired effect of reducing the risk. It was the element of poor judgment, even if the respondent's protestations of innocent intention were accepted, that most concerned Professor James. He cited, as an example, having the photographs developed rather than deleted immediately and a failure to understand why his conduct with the children would be of concern to those who knew his history. Professor James said it was absolutely pivotal to the respondent's release that he exercise sound judgment in his community dealings.

[38] In her reasons for decision on 12 April 2007, Atkinson J said

> "It is essential that any supervision order address two main factors. The first is to provide conditions which reduce the opportunity for him to re-offend, and secondly, conditions which provide that he must obtain treatment to reduce his desire to re-offend. Both of those are necessary conditions of any supervised release."

[39] While it is impossible to draft conditions which will entirely eliminate risk, nonetheless, the conditions that were imposed upon the respondent were such that, with his cooperation, they should have reduced the opportunity for him to re-offend and thus reduced the risk to children. Through no plan of his, the children next door became occasional neighbours after he had established himself in his residence. But, even on his own assessment of his conduct, he demonstrated bad judgment and it was the exercise of this judgment that was absolutely pivotal if he were to remain in the community. He had a clear reminder, were it necessary, on 1 October 2007 with the written direction. The second problem is his failure to engage in meaningful treatment which would allow him to have some understanding of the concerns which are expressed by the psychiatrists.

[40] Notwithstanding the severe derogation from the respondent's entitlement to be at liberty having served the term of imprisonment imposed lawfully upon him, at this stage, in the absence of meaningful treatment and a failure to accept the reality of the non-contact condition imposed upon him, I have concluded that the respondent has not discharged the onus imposed upon him by s 22(2) of the Act that the adequate protection of the community can, despite the contravention, be ensured by the existing order.

[41] That being so, the order is

1. Rescind the supervision order made by Atkinson J on 12 April 2007.
2. Desmond George Buckby be detained in custody for an indefinite term for control, care and treatment pursuant to the provisions of the *Dangerous Prisoners (Sexual Offenders) Act 2003*.