

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

MULLINS J

No 8272 of 2008

ATTORNEY-GENERAL FOR THE
STATE OF QUEENSLAND

Applicant

and

DARCY ROBERT BURKE

Respondent

BRISBANE

..DATE 02/12/2008

..ORDER

HER HONOUR: This is an application under the Dangerous Prisoners (Sexual Offenders) Act 2003 that Mr Burke be the subject of a Division 3 order. Mr Burke is nearing the conclusion of a period of imprisonment of approximately 13 years. He is 39 years old. He was raised in the Cherbourg community and identifies strongly with his Aboriginality.

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Mr Burke had a dysfunctional childhood. He was physically and sexually abused. From the age of nine years, he was placed for a short period in a boys' home under a care and control order. On his return to Cherbourg, he associated with delinquent peers and commenced antisocial activities, including sniffing petrol. He became a user of cannabis sativa from age 11 years, and abused alcohol from an early age. In 1985 he spent three months in another boys' home.

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His criminal history as an adult dates from 1987. His criminal offending is consistent with someone who could not observe the legal constraints placed on members of any community.

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His first sexual offence was committed in about 1992. He was looking after the young daughter of a friend. He was under the influence of alcohol. He was intending to assault her and was violent towards her, and had removed her clothing from her waist down. He did not actually sexually assault her. He was sentenced to two years' imprisonment.

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His current term of imprisonment dates from August 1995. He

was first charged with a rape that was committed in February 1995. He was on bail for that rape when he committed a second rape in August 1995. He was given a sentence of imprisonment of six years for the first rape.

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The second rape also involved an assault with intent to sodomise the victim. He was given a cumulative sentence of seven years for the second rape, and a concurrent sentence of three years with the term of seven years for the assault.

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His full-time discharge date is 17 December 2008. For most of the last 28 years, except for one period of about 12 months, the respondent has been institutionalised.

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The offences of rape were opportunistic. In each case he befriended the victim a short time before committing the offence. There was consumption of alcohol or cannabis sativa involved, and he then committed the offence.

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The respondent had attempted suicide on four occasions before his current imprisonment. He was sexually active with girls from about the age of 14 years. He had difficulty in entering into any meaningful relationship. He fathered five children from five relationships over a short period of time. Of those children, he commenced contact with one daughter, who is now 24 years old. He first met her in 1998.

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He has made seven applications for parole. Each was rejected. His behaviour in custody improved after 2004. He underwent the Indigenous Sexual Offenders' Treatment Program for 11

months from May 2001. He received a positive report on completing that program. He also underwent other courses in prison including anger management and stress management. He underwent the Sex Offenders' Maintenance Program that he completed in May 2006. He also received a positive report from his participation in that program.

For the purpose of this application, I heard evidence from four psychiatrists. There were written reports from each of these psychiatrists in the material that was before the Court.

Dr Kar examined the respondent in August 2007 for the purpose of a parole application. Dr Kar was supportive of the parole application because he considered that the respondent needed appropriate supervision in the community to be monitored for drug and alcohol abuse which were identified as critical factors in Mr Burke's past sexual offending. Dr Kar considered that Mr Burke's motivation not to re-offend was genuine. Dr Kar maintained his opinion about the benefit for Mr Burke of appropriate supervision in the community for the purpose of this application.

Professor James was engaged by the applicant to assess whether the respondent should be the subject of an application for a Division 3 order. Professor James' report is dated 12 December 2007 and was prepared after Professor James examined Mr Burke for three hours at the correctional centre. Professor James expressed the opinion that Mr Burke would currently represent a serious risk to the community if he were

discharged without further treatment or preparation for his future life in the community and that the risk would be a high risk. Professor James also noted Mr Burke's very strong Aboriginal and tribal identification and expressed the view that it was vital to incorporate this identification in any plan for Mr Burke's release and reintegration into the community. Professor James observed that it was a challenging issue for those charged with planning and overseeing Mr Burke's rehabilitation.

Professor James repeated those views in the oral evidence before me and identified the importance to the success of any supervision order for the respondent that cultural reassimilation of the respondent be addressed.

The Court had ordered that two psychiatrists undertake independent reports of the respondent for the purpose of section 11 of the Act. Those psychiatrists were Professor Nurcombe and Dr Beech. They were the other witnesses who gave oral evidence.

Professor Nurcombe expressed a similar opinion to Professor James on the critical issue of Mr Burke's identification based on his Aboriginality and related it to the wider issue of the need for authorities that are responsible for administering the Act to recognise and address the challenges that exist in the application of the Act to indigenous offenders.

Professor Nurcombe stated at the hearing on 17 November 2008,

"The problem is when the State introduced this legislation, I think the State - we - all the of the people involved Corrections, Crown Law, psychiatrists and psychologists involved in the case, had no idea of the complexity of the issues that were going to be involved and particularly, since about 30 percent, I understand, of people in the Dangerous Prisoners' Program are Aboriginal, we had no idea of what to do about that issue. I mean, I think there needs to be a conference of all people concerned to start to think about what the ideal programs are (sic) required for Aboriginal offenders and to start to plan in a more complex way. We just do not have the information at this point to know what to do."

Professor Nurcombe's opinion expressed in his report was that, the risk of sexual violent offending is high for the respondent but if the favourable changes in dynamic factors such as attitudes condoning sexual violence, capacity for empathy, sense of responsibility for the offence and capacity to control impulsive behaviour are authentic and durable in the face of stresses of life outside the prison, Mr Burke's risk of sexual or violent re-offending can be regarded as moderate to high.

Dr Beech interviewed Mr Burke for three and one-half hours. Dr Beech diagnosed Mr Burke as suffering from an antisocial personality disorder, but Dr Beech recognised that Mr Burke had benefited from the programs undertaken in prison. Dr Beech was of the opinion that Mr Burke still represents a moderately high risk of sexually re-offending if released in

the community, but that the risk of re-offending would be substantially reduced if supports are put in place to assist the respondent's reintegration into the community.

Dr Beech identified as supports that are appropriate as stable accommodation and links to community agencies that would assist in the transition as well as in finding employment and social contacts, and that the respondent should receive individual psychological support both for his childhood abuse, but also to help with his relapse prevention, and that he would benefit from involvement in a Community Sexual Offenders' Treatment Maintenance Program. Dr Beech emphasised the importance of supporting and encouraging Mr Burke to abstain from alcohol and other substances.

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Mr Burke himself has recognised in prison the need for assistance on his release from custody in both alcohol and drug counselling and a Community Sexual Offenders' Program. This was part of his application for parole. He has also undergone a Transitions Program in prison to assist him in making the transition from institutional life, which has marked almost all of his adult life, to community living.

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After the hearing of the further psychiatric evidence on 17 November 2008, the hearing of the application was adjourned to enable further inquiries to be made by Legal Aid Queensland on behalf of the respondent and Crown Law and the Corrective Services Department as to options for the accommodation for the respondent and the access to counselling and support by

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any organisation or counselling service that was qualified in supporting indigenous sex offenders.

Further affidavits were filed at the hearing today from Ms Lynas, the Director of the High Risk Offender Management at Queensland Corrective Services, and Mr Law, the legal officer at Legal Aid who has the carriage of the matter on behalf of the respondent. These affidavits deal with the further inquiries that have been made seeking accommodation and counselling for the respondent. The assistance given by both sides of the record in endeavouring to respond to the issues that remained outstanding after the hearing on 17 November 2008 must be acknowledged.

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One of the inquiries made by Mr Law was with the Aboriginal and Torres Strait Islander Legal Service Queensland Ltd.

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A further affidavit was filed today by Mr Mark Conway, a senior social worker with that service. Mr Conway attended for an interview with Mr Burke yesterday regarding possible release proposals for Mr Burke that would facilitate his release under a supervision order under the Act. Mr Conway deals at length in his affidavit with the proposals that he was able to put to Mr Burke and Mr Burke's response to

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Mr Conway of what he saw as to what was required of him in order to perform appropriately under the supervision order and remain offence free. It is of assistance that Mr Conway was able to undertake this interview at short notice and was able to put in train inquiries that can be pursued before the full time discharge date of 17 December 2008.

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At the hearing on 17 November 2008, the Attorney-General had proposed conditions that could be seen as appropriate for a supervision order in relation to the respondent. Although the application under the Act, as filed, seeks either a continuing detention order or a supervision order, Ms Maloney, on behalf of the Attorney-General, acknowledged that a supervision order on the conditions proposed would be an appropriate order in the circumstances, given the evidence of the psychiatrists on this application.

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As was observed by Mrs Ryan on behalf of the respondent, none of the psychiatric reports recommends continuing detention for Mr Burke. Mrs Ryan, on behalf of the respondent, conveyed to the Court that the respondent accepts that the applicant has proven to the standard required under section 13(3) of the Act that he is a serious danger to the community in the absence of a Division 3 order.

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Although the positions adopted in response to the application by both the Attorney-General and the respondent are helpful, the Court has to determine the application and whether to make a Division 3 order by reference to the matters that are set out in section 13(4) of the Act. The Court may decide that it is satisfied that the respondent is a serious danger to the community in the absence of a Division 3 order only if it is satisfied by acceptable, cogent evidence and to a high degree of probability that the evidence is of sufficient weight to justify the decision.

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The evidence of Dr Kar, Professor James, Professor Nurcombe and Dr Beech is acceptable and cogent and satisfies me to the high degree of probability that is required under the Act that the respondent's moderately high risk to high risk of sexually re-offending, unless appropriately supervised, is an unacceptable risk in terms of section 13(2) of the Act.

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I accept the psychiatrists' opinions that 10 years would be an appropriate period for a supervision order for Mr Burke.

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I am satisfied that appropriate conditions have been formulated for a supervision order in the light of the psychiatric evidence pertaining to Mr Burke and that a supervision order should be made in the terms of the draft order initialled by me and placed with the file.

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