

SUPREME COURT OF QUEENSLAND

CITATION: *A-G v Kynuna (No 2)* [2011] QSC 376

PARTIES: **ATTORNEY-GENERAL FOR THE STATE OF QLD**
(applicant)
v
GREGORY DAVID KYNUNA
(respondent)

FILE NO/S: BS9492/09

DIVISION: Trial

PROCEEDING: Application under the *Dangerous Prisoners (Sexual Offenders) Act 2003*

DELIVERED ON: 11 November 2011

DELIVERED AT: Brisbane

HEARING DATE: 9 November 2011

JUDGE: Dick AJ

ORDER: **Application successful**

CATCHWORDS: CRIMINAL LAW – JUDGMENT AND PUNISHMENT – SENTENCE – MISCELLANEOUS MATTERS – SEXUAL OFFENDERS – *Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)* – respondent convicted of sexual offences – respondent contravened supervision order - application by Attorney-General to have the supervision order rescinded and the respondent detained indefinitely or alternatively amend the supervised order – whether conditions of the supervision order are appropriate
Dangerous Prisoners (Sexual Offenders) Act 2003

COUNSEL: M. Maloney for the applicant
T. Ryan for the respondent

SOLICITORS: Crown Solicitor for the applicant
Howden Saggars for the respondent

[1] **Dick AJ:** This is an application pursuant to s 22(2)(a) of the *Dangerous Prisoners (Sexual Offenders) Act 2003* hereinafter called “the Act”. The application is made on the grounds that the respondent has contravened the requirements of his supervision order made by Justice JS Douglas on 29 January 2010 and as amended

by me on 9 June 2011. The application is that the supervision order be rescinded and that the respondent be detained in custody for a definite term for care, control or treatment. In the alternative an application is made pursuant to s 22(7) of the Act that the supervision order be amended and the respondent be subject to such amended conditions as the court considers appropriate and that are stated in the order.

- [2] The application involves a two-part process:
- (a) determination of the breach or breaches of the supervision order;
 - (b) in the event that the breach or breaches are proven, discretion then arises for the court to rescind or amend the supervision order.
- [3] The application alleges that the supervision order was contravened in the following way:
1. The respondent failed to comply with a curfew direction or a monitoring direction as required by (v) of the supervision order; and
 2. The respondent failed to abstain from illicit drugs for the duration of the order, a condition contained in paragraph (xxv) of the supervision order.
- [4] The onus is on the Attorney-General to satisfy the court on the basis of probabilities that the respondent contravened a supervision order. The respondent admits that he has contravened the order in the manner particularised.
- [5] Once the court is satisfied the order has been contravened, the onus then shifts to the respondent to satisfy the court that, on the balance of probabilities, the adequate protection of the community can, despite the contraventions, be assured by the supervision order in its current form or as amended.
- [6] If the respondent does not discharge that onus the court must rescind the supervision order and make a continuing detention order, see s 22(2) of the Act.

Background

- [7] The respondent was born on 18 November 1964 in Cairns and is presently 47 years of age. He has an extensive criminal history which dates from when he was aged 21

including for sexual offences stealing, breaches of the *Bail Act*, resisting police, drug offences and breaches of domestic violence orders.

Details of the previous offences of a sexual nature

- [8] On 10 December 1987 the respondent was convicted and sentenced to three years and 18 months imprisonment for offences of break and enter of a dwelling with intent in the night time and six charges of aggregated assault of a sexual nature. The facts of the case show that the respondent entered a Cairns hostel where a number of female children were residing for a school excursion, he was seen to touch a number of children through the sheets in their genital area.
- [9] On 14 December 1990 he was convicted of one count of aggregated assault. The facts of the case are that the complainant who was an invalid pensioner returned to her residence at about 1:00 am in the morning to find the respondent and other persons there. As she entered the respondent grabbed her and dragged her to the bedroom. She managed to get away and the respondent pursued her with a pair of scissors. As he approached her, he kicked her in the groin area.
- [10] In 2004 he was sentenced to six years imprisonment for rape. The facts of the case were that the complainant in the matter was a six year old child who was unknown to the respondent. The complainant was playing in the street near his house when he was approached by the respondent who asked if he would like to go for a walk. The child at the time was only wearing a bathing suit. The child walked with the respondent who started punching and kicking him. He took the complainant to an infrequently used public laneway where he ripped a hole in the child's bathing suit in the genital area. The respondent placed his hand down the complainant's bathers and fondled his penis. He then started licking the complainant's genital's before placing the child's penis in his mouth. He then asked the child to lick his anus which the child did and he then performed the same act on the child. A nearby resident witnessed some of the offence, ie when the respondent procured the child to lick his penis. The respondent maintains he cannot recall the offence and had consumed alcohol and used marijuana before the incident.

- [11] The offence in November 2010 related to an incident where at the Brisbane Correctional Centre the respondent, in front of a female tutor, put his hand down his pants and appeared to be masturbating. He then removed his hand from his shorts and went to touch the tutor in her groin area and she pushed his hand away.

Drug and alcohol history

- [12] It is reported the respondent has been a heavy consumer of alcohol and marijuana in the past. He has numerous convictions for drug possession and drug related offences. During an interview with a community correctional officer in 2004 the respondent reported that prior to the commission of that offence as well as past offences, he had used marijuana extensively. He has in the past had treatment for alcohol and drug dependency.
- [13] In 1979 the respondent was unlawfully using a motor vehicle when he was pursued by the police and suffered a motor vehicle accident. His injuries included severe head injury. That injury has since been assessed as being a definite brain injury primarily to the right parietal area of his brain. In addition during an assessment conducted by Dr James Worridge in 2004, it was noted that the respondent experienced auditory hallucinations and it was thought that it might be as a result of the organic brain injuries suffered. He may have subsequently developed a schizophrenic illness or the illness might be secondary to long term severe alcohol abuse.
- [14] He has since been diagnosed with chronic schizophrenia and is currently on a medication regime including regularly anti-psychotic medication, anti-depressants and mood stabilisers. On all accounts, his schizophrenia is said to be well handled at the present time.

The respondent's history on supervision order

- [15] Justice Douglas made a supervision order with conditions on 29 January 2010. On 15 April 2010 the respondent was directed to participate in a random urine analysis test which proved positive for the presence of cannabis sativa and a search of his room revealed a smoking pipe suspected with being associated with the

consumption of illicit substances. Those facts breached condition (xxv) of the order of Douglas J on 29 January 2010. The respondent was detained in custody until a final decision was made on the application for contravention.

- [16] On 26 August 2010 while attending an information technology class at the Brisbane Correctional Centre he committed the offence referred to earlier in respect of a female tutor. The matter came on for hearing before me on 31 May 2011. Psychiatric evidence was before the court in the form of psychiatric risk assessment reports from psychiatrist Dr Michael Beech and Professor Basil James with further oral evidence being adduced from both. On that occasion counsel for the respondent conceded the contravention of the supervision order. It was submitted however that the risk posed by the respondent could be managed by a return to the community under the same supervision order made by Douglas J. Psychiatric opinion supported a return to the community under supervision order however concern was raised as to the intensity and immediacy of community treatment for the respondent's mental health issues once released. Such further information was obtained and the matter came on for further hearing before me on 9 June 2011. On that occasion I was satisfied that the risk posed by the respondent to the community could be adequately addressed by way of a supervision order with the conditions contained in the previous order and an amendment in respect of a mandatory condition as to s 16 of the Act and an amendment of condition with respect to compliance with a reasonable direction with Corrective Services staff.

The present contravention allegations

- [17] Condition (v) of the original supervision order required the respondent to "comply with the curfew direction or a monitoring direction". By 23 July 2011 the respondent's curfew allowed him to depart from his residence at 7:00 am to be back at the residence by 3:00 pm. On a number of occasions between 25 July 2011 and 30 July 2011 the respondent failed to abide by the curfew. On most occasions he contacted the office requesting an extension of curfew on the basis that he was late returning to his approved accommodation.
- [18] On 1 August 2011 Corrective Services were alerted to the fact that the respondent was absent at the start of his curfew and had not returned to his approved

accommodation by the required time. He was absent overnight and at 8:45 am on 2 August 2011, surveillance officers contacted the respondent via his mobile telephone and requested that he attend the reporting centre for a urine analysis test. He indicated he had failed to return to his approved accommodation the night before and stated he was at the Inala Civic Centre. Staff immediately attended the centre where the respondent was located and returned to Wacol.

- [19] There was another condition of the original supervision order, condition (xxv) which required the respondent to “abstain from the use of illicit drugs for the duration of the order”. On 2 August 2011 when he was tested the sample proved presumptive positive to cannabis.

His explanations

- [20] On 2 August 2011 the respondent was spoken to by the manager of the High Risk Offender Management Unit as to why he failed to contact staff in relation to being absent on curfew. He indicated that he did not have any credit on his mobile telephone or the funds to catch public transport or a taxi. He was asked why his eyes were bloodshot and he indicated it was because he had just showered and was tired. The manager queried if he had consumed any illicit substances or alcohol and he said no. The manager informed him that the test had proved positive and asked if he could explain why, he told the manager he would not consume cannabis again. He admitted to having a smoke of one joint two days prior that he had purchased from an old associate of his in Inala. There is some confusion as to whether the cannabis was consumed on the night of 1 and 2 August 2011 or one night earlier.

Assessments

- [21] In a report prepared by Professor Basil James for the first application, Professor James was of the view that the respondent could be diagnosed with an organic brain disorder, paranoid schizophrenia and chronic and severe substance abuse. It was his opinion that if the respondent was to be released from custody, his own commitment to abstinence from substances would need to be reinforced by careful monitoring and an order requiring intoxicant abstinence would be required for a period of 15 years.

Use of Cannabis

- [22] In a report from Lisa Smith dated 18 June 2009, which was an exit report from the ISOP program, she noted:

“He was able to identify how his drug and alcohol abuse, ceasing his mediation, lack of intimacy and feelings of anger and rejection influenced his offending behaviour.”

- [23] In the supplementary report prepared by Professor James dated 14 October 2009 he said as follows:

“In light of the above I consider that my estimated risk of reoffending as relatively moderate should be upgraded to moderately high even if Mr Kynuna adheres to the necessary requirements of psychiatric treatment and intoxicant abstinence, I maintain the opinion that **should he not adhere to the two key requirements the risk of his reoffending would be ‘very high’.**”

- [24] Dr Josephine Sunden prepared a report dated 24 September 2009 in respect of the original application. She said in part:

“Additionally he will need to be involved with a support program which will help him to maintain abstinence and sobriety. Groups such as AA or indigenous support programs for abstinence would seem vital. Intimate female partners appear the most likely potential victims for future violence from Mr Kynuna given his persisting attitudes for sexual entitlement. **In the past this violence has been fuelled by alcohol and distorted belief systems.**”

- [25] Dr Beech, in his report of 12 December 2009, said in part:

“In my opinion the dynamic factors speak to a high risk of reoffending sexually in the community. I do not believe he has a sexual deviance per se but **I do believe that when unwell and intoxicated he would be at risk of offending against children.** It is my opinion that the dynamic factors also speak to a high risk of general violence as well.”

- [26] On the previous application for contravention, several other risk factors were identified. The general geographic area of the respondent’s place of residence was of considerable difficulty. There were logistical matters related to the ease of accessibility of and by mental health services. He required an increase in anti-psychotic medication and **he required prompt detection of cannabis use and a response of return to custody should that happen.**

- [27] In his risk assessment at the time Dr Beech gave the opinion of **the significance of the respondent consuming cannabis within a few months of release was that much of his offending and indeed his particular violent and sexual offending had occurred in the context of intoxication with substances.**
- [28] On each occasion that the respondent has been released on a supervision order he has, within a short space of time contravened a requirement for abstinence from cannabis. The reports and evidence of the experts make it very clear that this is a central requirement to ensure the protection of the community.
- [29] At the time of my order I said that the evidence of the psychiatrists, Dr Beech and Dr James was consistent in the view that the supervision order would be sufficient to ensure the adequate protection of the community because careful arrangements had been made in respect of accommodation, support and treatment options.
- [30] However, in his report dated 13 September 2011 Professor James said in part:
- “The events of August 2011 make it clear that in **addition to the mood volatility and fragile impulse control already identified must be added poor self organisation including poor time management and lack of capacities, underlying diligence and the taking of responsibility, prompt detection and response by the supervising correctional officers lead to a significant curtailment of the time that Mr Kynuna may have been at risk of reoffending. But it should be noted that whilst absent he had consumed intoxicant cannabis and had spent the night in an unsupervised area exposed to the many vicissitudes and capricious opportunism of street life.** The history of Mr Kynuna defaulting with respect to his curfew times also appears to indicate a relative indifference to the requirements of the supervision order ... concerns quoted above regarding Mr Kynuna’s emotional volatility since his release into the community in June 2011 and the event of August 1 and 2 underlie the difficulties which had been anticipated in psychiatric reports prior to release and **are indicative of the very limited degree to which Mr Kynuna is able satisfactorily to perform to requirements, eg of a supervision order and to avoid settings in which the risk of offending is heightened.** The offences for which he was imprisoned in 2003 are indicative of a precipitous nature of his discontrol when it occurs and **in my view it is currently impossible to describe his potential for reoffending, either violently or sexually, as less than very high.** In my opinion it would be prudent at this time for Mr Kynuna to remain resident of an institution, either in prison or preferably in a maximum security psychiatric hospital unit and for the situation to be reviewed when he has been so resident of a period of 12 months. I would recommend

he would need to demonstrate a great degree of mood stability for a period of six months than has been the case to date and to this end further review of his medication including the possible use of anti-coagulences might be undertaken.”

[31] Dr Beech in his report of 11 September 2011 said in part:

“Despite counselling, supervision and mental health services involvement he has become stressed within the community which has provided for destabilising conditions for him. It is likely that his brain damage is more severe than was evident within the structure of a prison routine. In the community he has struggled with transport, organisation and daily activities. In turn he has displaced his frustration onto others, **repeated minor breaches in curfew eventually escalated to overnight absence and drug use. In my opinion that incident represented a heightened risk of sexual or other violence. It is reasonably foreseeable that such circumstances could have lead to intoxication, acute psychotic relapse, impulsive sexual behaviour and ultimately sexual assault.**”

[32] In May 2007 the respondent was referred to a psychologist, Olaf Hendrick by Queensland Corrective Services to provide psychological treatment as stipulated by the conditions of his supervision order. Mr Hendrick has seen the respondent on six occasions over eight and a half hours. He said in part:

“It is my clinical opinion that high accurately represents the risk for the poses of sexual offending and abuse of children. That said Mr Kynuna’s risk of sexual offence does appear to be eminent and requires constant monitoring of his access to potential victims. Risk is likely to be greatest in specific situations where emotional states (hyper-arousal/anger, frustration) co-occur in the context of him living in a big city ... based on what is known about his previous history and the available collateral (sic) **it would be expected Mr Kynuna would act impulsively of perceived sexual urges ignoring all social conventions, legal restrictions and victim considerations.** In this moment sexual gratification is the ultimate goal for Mr Kynuna. Explanations afterwards are considered minimisations, rationalisations or denial. Acts of sexual violence could be conducted intoxicated or sober and are directed towards available victims ranging from underage boys and girls to female prison tutors.”

[33] In conclusion he reported:

“Based on the length of time and frequency Mr Kynuna has been incarcerated, his presentation within this assessment and diagnosis of schizophrenia, acquired brain injury, vague future aspirations and limited cognitive skills a limited responsivity is anticipated. This said interventions need to be geared towards Mr Kynuna’s learning style, his ability to navigate the hurdles of city living and support

needs to be provided in terms of skill training for everyday activities which takes into account Mr Kynuna's clinical functioning habilitation and rehabilitation needs. **This should be a gradual process ranging from comprehensive assessment process in a high secure mental health facility ..."**

- [34] In a supplementary report prepared by Professor Basil James on 1 November 2011 he said in part:

"Although the derelictions on 1 August 2011 were on the face of it relatively minor it is my opinion that in the case of Mr Kynuna, there was a serious potential for unpredictable escalation, overed by prompt action of corrective services."

- [35] Professor James said that he remained of the opinion expressed in his report of 13 September 2011 that **it would be prudent for Mr Kynuna to remain resident in an institution either in a prison or (preferably) in a maximum security psychiatric hospital unit.** He believes the situation should be reviewed after 12 months and that unless he was receiving appropriate pharmaceutical treatment for his long standing psychotic illness, treatment for his diminished capacity for reliable self organisation and a carefully designed and reliably delivered system of rehabilitation and support, then the risk of his reoffending in an aggressive sexual fashion would be high. He was of the opinion that in the interim it would be highly desirable for discussions to be undertaken by the appropriate authorities with the goals of creating a mechanism for designing appropriate rehabilitation plans and a successful implementation with the necessary commitment and accountability.

- [36] Mr Ryan, on behalf of the respondent argues that the breaches of the order by the respondent are properly described as relatively minor. I am unable to accept that submission. The potential for reoffending in a significant way is set out clearly in the evidence of Professor James. The breach of the curfew order overnight is, in my view, a concerning breach because it led to the respondent being in circumstances which increased the risk of sexually offending.

- [37] In relation to the consumption of cannabis, I find it most likely that that occurred on the night that he breached his curfew. The reason I find so is that the altered state of his physical appearance was noted on the morning of 2 August. The combination of the intoxicating substance and being, as Professor James describes it, "exposed to

the many vicissitudes and capricious opportunism of street life” posed a serious risk.

[38] Mr Ryan argues that it is unsurprising that a 46 year old man who had been using cannabis for most of his adult life might be tempted to use that drug after being offered it by another. I accept that submission, however the submission must be tempered by the fact that on both occasions the applicant has been placed on a supervision order, within a short period of time he has breached an important condition – a condition designed to ensure that he does not re-offend. This raises serious concerns about his ability to abide by the conditions imposed by a supervision order.

[39] He argues that the fact that his use of the drug so readily detected demonstrates the monitoring component of the order is effective. This submission should be seen in the light of the fact that, on this occasion, he was readily detected because he was found quickly because he had breached his curfew. Mr Ryan argues that apart from the use of cannabis on one occasion, the other breaches of his curfews were examples of his disorganisation. It is true that on 1 August when he failed to abide by his curfew he went to the police at Inala to ask for a lift back to the Wacol precinct. His inability to organise himself to make good decisions in such circumstances again became apparent.

[40] I have come to the view that the opinions expressed by the assessing psychiatrists is that the order made by me was hoped to be successful but what has become apparent is that the respondent’s lack of lifestyle skills and his lack of decision making ability mean that the supervision order is now not capable of protecting the community. I think that the appreciation by the psychiatrists of that situation has become very clear and that the assessment of his reoffending has materially changed since his release on 9 June 2011.

[41] It seems to me that Professor James and Mr Hendrick very much favour a situation where the respondent be placed in a secure mental health facility where a comprehensive assessment can be undertaken and a raft of interventions applied which would provide the highest likelihood to success in a reduction of risk factors in his case. Unfortunately the mental health authorities have taken the view at the

present time that his clinical indicators do not warrant such a course. In that situation, Professor James has said that his psychological treatment will be more effective in prison where he does not have the stressors of getting to places and being in unfamiliar places and **he thinks that that will be required for at least 12 months.**

[42] Dr Beech is of the opinion that there would need to be a **range of service providers** who could give treatment or management to him but it is possible that he would fail to meet their criteria. He said:

“Ideally I think it would be a logistic service provider, housing, transport and an occupational therapist and experienced – a hardened occupational therapist who could start the training program from his accommodation out to the community and ... I’m not too sure that those services would be provided in a hospital setting. The difficulty with the prison setting is in fact I think he needs escorted leave if he is going to learn how to do that ... I think in the past he might have been a better candidate for a prison farm or something like that.”

[43] When asked who would provide it he said: “I suspect it will be a **multi agency team** run by someone like Acquired Brain Injury Association.” **He agreed that there is still a need for the addressing of his sexual offending behaviour and he said: “I can’t think at the moment of any scenario where it is manageable in the community as it is.”**

[44] He said: “**The 2003 offences occurred within a matter of 12 months from his release then. His contravention in Cairns occurred within a couple of weeks of release and this contravention has occurred within a couple of weeks from release. He needs a sheltered workshop, a sheltered accommodation, a big program around him and again I don’t know what is available in the community that could provide that**”.

[45] The Respondent argues that a supervision order, amended to include an additional requirement that the respondent receive instruction training and therapy in the acquisition of life skills from an Occupational Therapist would ensure the adequate protection of the community. The evidence of the psychiatrist persuades me that such a simplistic approach would not have that result. It is clear the doctors envisage a much more complex approach and that Dr James is of the view that such therapy should be conducted in a setting that does not create the stressors which

have become apparent. In any event, the condition does seem to be covered by the existing requirement (xxxii) in the previous orders.

- [46] Every attempt should be made to provide such treatment once a programme is devised and immediate steps should be taken to investigate sources for such holistic treatment.
- [47] On the expert evidence before me, the affidavit of the respondent and the facts surrounding the contraventions, the respondent has failed to satisfy me on the balance of probabilities that the adequate protection of the community can, despite the contraventions, be ensured. In the circumstances, I should rescind the existing supervision order and impose a continuing detention order to allow the respondent the opportunity to address the issues raised as to his absence of life skills in a secure and structured environment.
- [48] Pursuant to s22 (2) of the Act I order that the supervision order of Justice JS Douglas made on 29 January 2010 and amended by me on 9 June 2011 be rescinded and that the respondent be detained in custody for an indeterminate period for care, control and treatment