

SUPREME COURT OF QUEENSLAND

CITATION: *Attorney-General for the State of Queensland v Kynuna*
[2019] QSC 76

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

FILE NO: BS No 3832 of 2010

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 14 March 2019, *ex tempore*

DELIVERED AT: Brisbane

HEARING DATE: 11 March 2019 and 14 March 2019

JUDGE: Bowskill J

ORDER: **The application for immediate release is refused.**

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 for an interim order that the respondent be detained in custody until the final decision of the Court – where the respondent applies for an order for his immediate release

Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)

COUNSEL: J B Rolls for the applicant
E Whitton for the respondent

SOLICITORS: Crown Law for the applicant
Legal Aid Queensland for the respondent

- [1] For the following reasons the respondent's application for immediate release is refused. On Monday 11 March 2019, Mr Kynuna was brought before the Court under a warrant. The Attorney-General has made an application for an order under section 22 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003, and has applied for an interim order under section 21 that Mr Kynuna be detained in custody until the final decision of the Court under section 22.
- [2] Mr Kynuna applies, under section 21(4), for an order that he be released now. That section provides that the Court may order the release of a prisoner only if the prisoner satisfies the Court on the balance of probabilities that his or her detention in custody, pending the final decision, is not justified because exceptional circumstances exist. Under section 21(6), if the Court orders the release of the prisoner, the Court must do so subject to the existing supervision order, or as amended under section 21(7).
- [3] It is relevant to note, albeit briefly, the following chronology in this matter.
- [4] On 6 April 2011 a supervision order under the Act was made in relation to Mr Kynuna for a period of five years.
- [5] In August 2011, Mr Kynuna breached that order and was returned to custody. This involved the use of cannabis.
- [6] On 20 March 2012, he was released on the supervision order again, having served about seven months in custody.
- [7] In August 2012, Mr Kynuna breached the supervision order again and was returned to custody. This appears to have involved damaging property belonging to Queensland Corrective Services.
- [8] On 6 May 2013, he was released again, having this time served about eight months in custody.
- [9] In November 2013, there was a further breach of the supervision order and Mr Kynuna was returned to custody. This involved, again, the use of cannabis.
- [10] On 20 November 2013, Mr Kynuna was released from custody, pending finalisation of the contravention hearing.
- [11] In February 2014, there was a further breach of the supervision order and Mr Kynuna was returned to custody. On this occasion it involved consumption of alcohol.
- [12] He was released again on 20 April 2015, having this time served about 10 months in custody.
- [13] In October 2015, there was a further breach of the supervision order and another return to custody. This time, again, involving consumption of cannabis.

- [14] On 10 December 2015, Mr Kynuna was released on a supervision order again, with the order being amended so that it would now end on 6 April 2018.
- [15] There was then a year that passed before December 2016, when there was a further breach of the supervision order and, again, a return to custody; again, involving the consumption of cannabis.
- [16] On 15 May 2017, Mr Kynuna was released on the supervision order again.
- [17] In January 2018, there was a further breach of the supervision order and a return to custody. This involved consumption of a schedule 4 drug, for which no prescription was held.
- [18] On 13 February 2018, the period of the supervision order was extended.
- [19] On 1 May 2018, Mr Kynuna was released on a supervision order again, this time with the expiration date extended to 19 June 2020. This is dealt with in the reasons of Lyons SJA [2018] QSC 90.
- [20] On 1 May 2018, also, Mr Kynuna was given a direction to abstain from all illicit and prohibited substances.
- [21] On 3 March 2019, he was required to undergo a urine test, in circumstances I will outline shortly, which came back with the result positive to amphetamine and methylamphetamine (see page 12 of Ms Monson's affidavit).
- [22] He was returned to custody on 7 March 2019.
- [23] There are, in evidence, parts of Mr Kynuna's offender file record. These records show that on 2 March 2019 Mr Kynuna was stopped by police at about 7 pm in the Valley. He was with another male. They were stopped due to "apparent intoxication". It is said in the records that police searched Mr Kynuna and noticed track marks on his skin. They also found a capped and packed needle in his bag. When he went to Wacol the next day, 3 March, for a urine test, he is recorded as saying he had not knowingly ingested any intoxicating substances, but that he had consumed a "slurpee" the previous evening and subsequently could not sleep all night, and, therefore, wondered if anything had been added to the slurpee. He said the needle found by the police, he was carrying for his friend (see page 34 of Ms Monson's affidavit).
- [24] The offender file notes also record that Mr Kynuna was only moved to independent accommodation in the community on 6 February 2019. Prior to that, he was living at the Wacol Precinct, where there were recorded "concerns" about his behaviour in relation to other Wacol residents and in relation to illicit substances. The notes record that moving him into independent accommodation was hoped to assist to stabilise him. He was also recently approved for employment on a casual basis (see pages 35 to 36 of Ms Monson's affidavit). That employment is also referred to in the affidavit of Mr Cummings, filed today.

- [25] Mr Kynuna has also been referred to an alcohol and drug outreach program in the community, but had not yet made contact with the service before his recent arrest.
- [26] The alleged use of amphetamine and methylamphetamine, intravenously, is recorded in the notes as being regarded as a significant escalation in his substance abuse which has previously comprised alcohol, cannabis and prescribed medicine misuse (see page 36 of Ms Monson's affidavit).
- [27] In his oral evidence before the Court on Monday, Mr Kynuna gave evidence that when he finished up work on Saturday, he had met up with somebody he knew near the Valley train station, and that this person gave him a drink of his slurpee. He said he noticed straightaway that it was bitter, that he thought it was alcohol and he gave it back to this person thinking that he had spiked his drink. He said that is his explanation for how this positive test came up. As to the needle being found in his bag, he explained that the person he was with asked him to hold that for him because he (Mr Kynuna) had a bag and this other person did not.
- [28] The evidence in relation to his accommodation is really to the effect that if he is required to remain in custody, he will lose that accommodation. But according to Ms Monson, the type of accommodation that Mr Kynuna had is not such a scarce resource as sometimes arises in cases of this kind, where people require more support. According to the further affidavit of Ms Monson, the type of accommodation that Mr Kynuna is currently living in could be expected to be found again if he were to be released again following these proceedings.
- [29] I have had regard to Dr Harden's report and Dr Sundin's report, from October 2017 and April 2018, respectively, as the most recent psychiatric reports dealing with Mr Kynuna.
- [30] Dr Harden's report of October 2017 includes some detail about Mr Kynuna's response to earlier contraventions involving the use of cannabis which was detected by drug screening. I observe that there was a pattern of similarity in terms of Mr Kynuna providing explanations for the presence of cannabis on the basis of inadvertence or accidental consumption (see the report at pages 6 to 8).
- [31] In terms of the relevant principles on this application for immediate release under section 21(4), they are as follows. It is not for the Court on an application for immediate release pending a contravention hearing to finally determine whether there has been a contravention or not. Suffice to say, in this case there is a serious question to be tried whether Mr Kynuna breached the order by using amphetamine and/or methylamphetamine, but there is also an apparent argument that he did not do so voluntarily.
- [32] The question is whether there are exceptional circumstances such that Mr Kynuna's detention in custody, pending the final decision in respect of the

alleged contravention, is not justified. It is for him to satisfy the Court of this on the balance of probabilities.

- [33] In *Attorney-General v Francis* [2008] QSC 69, at [7], McMurdo J (as his Honour then was) referred to the following meaning of “exceptional” from *Baker v R* (2004) 223 CLR 513 at 573 per Callinan J, referring to *R v Kelly (Edward)* [2000] QB 198, at 208:

“We must construe ‘exceptional’ as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.”

- [34] That definition was also described as “useful” by Muir JA (at [41]) and as a “practical working approach” by Mackenzie JA (at [92]), in a later Court of Appeal decision in relation to Mr Francis reported in (2008) 250 ALR 555.

- [35] One of the factors to be taken into account is the seriousness of the alleged breach. In that regard, in *Attorney-General v Francis* (2008) 250 ALR 555, Muir JA observed that where a breach is trivial or plainly accidental, it may not be difficult for the released prisoner to show exceptional circumstances (at [45]) and Fryberg J also observed that a weak case on behalf of the Attorney-General or a trivial contravention would often amount to exceptional circumstances (at [110]). As Applegarth J said in *Attorney-General v Fisher* [2009] QSC 104, at page 7, this does not mean that a person alleged to have breached a supervision order in a manner which is not trivial, is precluded from establishing exceptional circumstances.

“All must depend on the circumstances, but the more serious the alleged breach, the less likely it is that exceptional circumstances will be established.”

- [36] It is relevant to consider whether the breach (or alleged breach) is indicative of a risk of further breaches; and the relationship between the alleged breach and the risk of a serious sexual offence being committed. As to the latter, as Applegarth J noted in *Attorney-General v Fisher*, at page 8:

“[A] critical issue is whether the circumstances of the alleged breach do indicate an increased risk of re-offending, and whether the conditions of the supervision order and the general circumstances are apt to address that level of risk.”

See also *Attorney-General v Dugdale* [2009] QCS 358 at page 3, per Applegarth J.

- [37] Finally, ensuring adequate protection of the community is the key consideration (see the statement of objects in section 3 of the Act).

- [38] Mr Kynuna is still a young man, only 37 years of age. He was convicted of the offence which has seen him come under the scope of the Act in 2002, involving the rape of a stranger committed in 2000, for which he was sentenced to eight years imprisonment. However, his criminal history includes a number of other sexual offences (see [3]-[12] of *Attorney-General v DGK* [2011] QSC 73, the reasons for making the 2011 supervision order).
- [39] As recorded in the report of Dr Harden, at page 2, Mr Kynuna sexually offended against five different women on separate occasions between 1999 and 2002. Two of the offences consisted of his breaking into the house and sexually assaulting the victim while they slept. Two other offences were committed against young adolescent females who were related to him, while they were sleeping. Three of the offences were against young adolescent but post-pubertal girls; the fourth against a 19 year old woman; and the fifth involved abducting a female adult stranger from a public place and raping her. There was also a juvenile charge of aggravated assault against a female when he was aged 15.
- [40] Since his release on the supervision order in 2011, as the chronology earlier outlined reveals, Mr Kynuna has been returned to custody six times, not including the present circumstances and not including November 2013, when it appears he was released fairly quickly.
- [41] As it appears from the reasons given at the time the supervision order was made in 2011, there was a consistent diagnosis of Mr Kynuna as suffering serious substance abuse in relation to alcohol, substance dependence in relation to cannabis, and anti-social personality disorder.
- [42] The consistent view of the psychiatrists was also that the risk of Mr Kynuna re-offending was closely linked to intoxication. The psychiatrists emphasised the need for Mr Kynuna to abstain from alcohol and cannabis as a condition of being released into the community, as intoxication had been a feature of his behaviour leading to his previous sexual offending. This was reiterated in the evidence before Lyons SJA in 2018 (see at [10]-[11] of her Honour's decision).
- [43] In the report of Dr Harden, which was in evidence before Lyons SJA, it is said Mr Kynuna's sexual offending was strongly associated with alcohol intoxication. Dr Harden also identified that attempts to reduce risk further should focus on abstinence from substance use, community integration, training and employment.
- [44] In her report of April 2018, Dr Sundin refers to earlier risk assessments by psychiatrists putting Mr Kynuna in the high range, which could be moderated by a supervision order, but that "crucial to reducing the risk of sexual recidivism was Mr Kynuna's continued abstinence from alcohol" (see page 6). Dr Sundin says there is a "very strong association between his use of intoxicating substances and his previous sexual offending behaviour". Relevantly, at page 7, Dr Sundin records that concern has been expressed as to Mr Kynuna's failure to take responsibility for his offending, displacement of

blame for his offending onto intoxication and displacement of responsibility for his behaviour in general onto others, among other things.

- [45] Dr Sundin says, in relation to the abuse by Mr Kynuna of intoxicants, that “any such abuse substantially heightens his risk for sexually violent behaviour” and “there is a risk of violence if he meets resistance when intoxicated”.
- [46] In relation to Mr Kynuna’s fairly regular contravention of the supervision order by the use of cannabis, Dr Harden’s view was that this was “unhelpful but not as clearly critical with regard to previous offending behaviour as alcohol” (see page 3). The contravention by the use of alcohol was described by the doctor as “very concerning”.
- [47] This occasion is the first time that Mr Kynuna has been alleged to have used amphetamine or methylamphetamine. In light of the connection between Mr Kynuna’s previous sexual offending and intoxication, it will be important, at the contravention hearing, to receive evidence from the psychiatrists (and possibly also from Mr Smith, the psychologist whom I understand Mr Kynuna was, or has recently been, seeing in the community), about this latest alleged contravention, in order for the Court to make an informed decision about how to proceed.
- [48] In submissions on his behalf, Mr Kynuna argues that there are exceptional circumstances, based on his evidence that he did not voluntarily ingest the amphetamine, and, further, it is noted that despite his contraventions of the supervision order, he has not committed a sexual offence for over 16 years.
- [49] That is an important point to note, and it is a substantial positive in favour of Mr Kynuna, generally, and as demonstrating that the supervision order is doing the work that it is intended to do.
- [50] As to the first argument put, as noted already, it is not for me, on the hearing of this application, to form a concluded view about the circumstances of the alleged contravention. That, in itself, in the circumstances of this case, does not lead me to be persuaded that exceptional circumstances have been shown.
- [51] More broadly, having regard to the nature of the risk posed by Mr Kynuna and the particular connection, demonstrated in the evidence, between intoxication and that offending, his history of contravention of the supervision order, and the current circumstances, all lead to the position where I am not persuaded by him that his detention in custody, pending the contravention hearing, is not justified, that finding being on the basis that I am not satisfied there are exceptional circumstances in this case.
- [52] I will hear from the parties, though, in respect of appropriate directions, because it is important that the final contravention hearing proceed in a timely way, so that Mr Kynuna is not left in custody for longer than may ultimately turn out to be considered appropriate.