SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General (Qld) v Brown* [2020] QSC 57
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **TROY JIMMY CHARLES BROWN** (respondent)
FILE NO/S:	BS No 422 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	1 April 2020
DELIVERED AT:	Brisbane
HEARING DATE:	2 March 2020
JUDGE:	Burns J
ORDER:	**Being satisfied that the respondent, Troy Jimmy Charles Brown, has contravened a requirement of a supervision order made by this court on 28 April 2014, the order of the court is that:** **1. The supervision order made on 28 April 2014 is rescinded; and** **2. The respondent is detained in custody for an indefinite term for control, care or 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 a supervision order was made with respect to the respondent under Division 3 of Part 2 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) – where it was alleged that the respondent contravened a requirement of the supervision order – where a warrant was issued for the arrest of the respondent pursuant to the Act and the respondent was

detained in custody – where the applicant sought orders with respect to the respondent under s 22 of the Act – where the contravention was admitted by the respondent – where the respondent had previously contravened the supervision order but not committed any further serious sexual offences – whether the adequate protection of the community could, despite the contravention of the order, be ensured by the existing supervision order

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

Attorney-General for the State of Queensland v Brown [2014] QSC 84, cited
Attorney-General for the State of Queensland v Ellis [2012] QCA 182, cited
Attorney-General for the State of Queensland v Sutherland [2006] QSC 268, cited
Attorney-General for the State of Queensland v Waghorn [2006] QSC 171, cited
Attorney-General for the State of Queensland v WW [2007] QCA 334, cited
Kynuna v Attorney-General for the State of Queensland [2016] QCA 172, cited

COUNSEL: J Rolls for the applicant
C Reid for the respondent

SOLICITORS: Crown Solicitor for the applicant
Legal Aid (Qld) for the respondent

[1] This is a contravention hearing pursuant to s 22 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld).

[2] On 28 April 2014, Lyons SJA ordered that the respondent be released from custody subject to a supervision order made under s 13(5)(b) of the Act.[1] One of the requirements of that order obliged the respondent to abstain from the consumption of illicit drugs for the duration of the order. The applicant alleges that this requirement was contravened on more than one occasion in May, June and July 2019. If the court is satisfied of that on the balance of probabilities then, unless the respondent satisfies the court, again on the balance of probabilities, that the adequate protection of the community can, despite the contraventions, be ensured, the court must rescind the supervision order and make a continuing detention order.

[3] On the hearing of the application, it was conceded on behalf of the respondent that he contravened his supervision order as alleged but the submission was made that

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1 See *A-G for the State of Queensland v Brown* [2014] QSC 84.

the court ought be satisfied that the adequate protection of the community can, despite those contraventions, be ensured by his return to supervision on the terms of the existing order, or on such further or other terms that the court considers appropriate. On the other hand, counsel for the applicant submitted that the court could not be satisfied on the whole of the evidence that the respondent has discharged the onus on him and, as such, the supervision order ought to be rescinded and a continuing detention order made in its place.

Background

[4] The respondent is 39 years of age. He has an extensive criminal history stretching back to September 1994 when he was still a teenager. His sexual offending commenced in July 1995 when he committed an indecent assault and then, 10 days later, gained entry to a room in a retirement village in Cairns and raped an 86 year old woman. This was shortly before his fifteenth birthday. He was detained for a period of five years. After his release, and in between bouts of other, street-level offending, he was again convicted on 1 November 1999 of indecent assault and sentenced to another period of detention, this time, for six months.

[5] On 6 February 2003, the respondent was convicted in the District Court at Cairns of rape and robbery with actual violence. These offences were committed on 27 June 2002. The victim was a 26 year old female who had left a Cairns nightclub in the early hours of the morning. She entered a public toilet cubicle and closed the door. The respondent forced his way in, pushed her against the wall, punched her, and digitally penetrated her vagina. He was under the influence of alcohol, cannabis and amphetamines. The respondent received an effective head sentence of seven years imprisonment and a serious violent offence declaration was made with respect to both offences. It was these offences which ultimately led to an order being made under Division 3 of Part 2 of the Act.

[6] In that regard, on 16 June 2009, Martin J ordered that the respondent be detained in custody for an indefinite term for care, control or treatment. When making that order, his Honour observed that "the respondent's problems may have developed in part from serious dependence problems he had with respect to alcohol, cannabis and petrol". On 22 June 2011, Daubney J affirmed that order and, on 12 November 2012, Henry J did the same. Both judges referred to the respondent's problems with alcohol and drugs and their causal relationship to his offending.

[7] Then, as earlier mentioned, on 28 April 2014, Lyons SJA ordered that the respondent be released from custody subject to a supervision order for a period of 10 years. Condition 22 of that order required the respondent to abstain from the consumption of illicit drugs, and condition 24 required him to, relevantly, submit to drug testing. When making that order, her Honour stated:

> "On this review there are very real concerns in relation to the respondent's motivation to be involved in his ongoing rehabilitation, and the rehabilitation courses are important and clearly go to addressing the risk factors. It is clear that the minimisation of those risk factors lies in Mr Brown's hands. It is important that Mr Brown understands that he must not take any

> substances or use any alcohol and that the concern about his relapse is in relation to the resumption of his use of substances and alcohol. It is clear that if those factors can be addressed then the risk to the community can be managed to an appropriate degree."[2]

[8] Unfortunately, the respondent does not seem to have developed the understanding urged on him by her Honour. In October 2014, it was alleged that he had breached the supervision order by consuming alcohol and illicit drugs and he was returned to custody. That breach was found to be proven by Daubney J who, on 27 January 2015, ordered that the respondent be released back on supervision. In July 2015, the respondent was again returned to custody. A number of contraventions of the supervision order were alleged, including a breach of condition 22. On 2 December 2015, Applegarth J found that each of the contraventions had been made out but ordered that the respondent be released back to supervision. Thereafter, he remained in the community until 3 August 2017 when he was returned to custody after having again allegedly breached condition 22. On 15 November 2017, Davis J found that the respondent had returned urine tests that were positive for cannabis in April and May 2017. Although his Honour ordered that the respondent continue to be subject to the supervision order, it was amended by the addition of a requirement that he attend on, and submit to examination by, a psychiatrist to assess the "appropriateness of the respondent being prescribed anti-androgen medication". On 15 July 2019, the respondent was returned to custody after it was alleged he had again breached condition 22 by the ingestion of cannabis. On 4 March 2019, Jackson J upheld that allegation, finding that the respondent had returned samples of urine positive for cannabis in February, March, May, June and July 2018. Furthermore, it was found that, on 28 September 2018, the respondent breached condition 24 by refusing to provide a urine sample for testing. His Honour was satisfied that the adequate protection of the community could still be ensured by the respondent's release on supervision and orders were made accordingly.

Was the supervision order contravened?

[9] After being released from custody on 4 March 2019, the respondent returned urine samples on six occasions that tested positive for cannabis: 27 May 2019, 14 June 2019, 22 June 2019, 26 June 2019, 3 July 2019 and 8 July 2019.

[10] A warrant for the respondent's arrest issued on 10 July 2019. It was executed five days later and the respondent returned to custody, and there he has remained.

[11] As earlier mentioned, the respondent has conceded through his counsel that he contravened condition 22 of the supervision order. I am otherwise satisfied on the evidence before the court that is so, and I formally find the contraventions to be proven.

Has the respondent discharged the onus?

[12] It follows that, unless the respondent satisfies the court, on the balance of

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[2] Ibid, [18].

probabilities, that the adequate protection of the community can, despite the contraventions, be ensured by the existing supervision order, or a supervision order amended pursuant to s 22(7), the court must rescind that order and make a continuing detention order; s 22(2)(a).

[13] The expression "adequate protection of the community" in s 22(2) and s 22(7) takes its meaning from s 13, that is to say, it connotes the adequate protection of the community from an unacceptable risk that the prisoner will commit a serious sexual offence,[3] that is to say, an offence of a sexual nature involving violence or against children.

[14] It is important to keep in mind that the risk in relation to which the community requires protection is the risk that the respondent, if released, will commit a serious sexual offence. Even then, the existence of *some* risk of reoffending is not sufficient; the risk must be of an unacceptable order.[4] Furthermore, "adequate protection" is a relative concept, as is "unacceptable risk". As such, the Act recognises that some level of risk can be acceptable consistently with the adequate protection of the community.[5] However, where the conduct which might be engaged in is the consumption of illicit substances which, if consumed, may result in an escalation of the risk of reoffending, it is necessary to look closely at the question whether the supervision order will be effective to prevent an escalation in risk to such a degree that this risk is unacceptable. Each case will turn on its own facts.[6]

[15] A progress report was provided by the respondent's treating psychologist, Ms Richards, on 20 February 2020. This related to treatment provided to the respondent from March to July 2019. Although the respondent attended all treatment sessions, his motivation and participation in therapy was influenced by his fluctuating mood and mental state. Keeping focused on his sexual offending treatment needs was described by Ms Richards as "very difficult". In fact, she did not think that the respondent was motivated to change any of his problematic behaviours. After returning positive test samples for cannabis, he would "create some highly unlikely story to justify his behaviour". Her impression was that the respondent seemed almost "unperturbed" that he was smoking cannabis or that this would increase his risk of returning to custody. Indeed, at times, the respondent expressed the desire to return to custody, stating that living in the community was "too stressful". He was not, however, interested in identifying and implementing coping strategies to help deal with any such stress. Overall, she considered the respondent to be in the "pre-contemplation stage of change".

[16] Another feature of the respondent's behaviour that was discussed by Ms Richards was his anger. At times, the respondent had been very hostile towards Corrective

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3 See *Kynuna v Attorney-General for the State of Queensland* [2016] QCA 172, [60].

4 See *Attorney-General for the State of Queensland v Waghorn* [2006] QSC 171, [24].

5 See *Attorney-General for the State of Queensland v Sutherland* [2006] QSC 268, [29].

6 See *Attorney-General for the State of Queensland v WW* [2007] QCA 334; *Attorney-General for the State of Queensland v Ellis* [2012] QCA 182.

Services officers. He did not like people telling him what to do or questioning him about what he had been doing or whom he had been talking to. He did, however, have some insight into this issue, recognising that such outbursts were inappropriate. Otherwise, he had only a minimal relapse prevention plan and few, if any, goals to motivate him. When discussing employment or undertaking other activities, the respondent would decline assistance, stating a preference to be "on 24 hour curfew and get everything done for him". In Ms Richards' opinion, the respondent presented with a "couldn't be bothered" attitude during most of the treatment sessions. Although he was prepared to discuss his behaviour during the sessions and strategies to improve, he would not follow through with any of them.

[17] The respondent was examined by two psychiatrists for the purposes of this hearing, Drs Sundin and Aboud. Each gave evidence in person at the hearing and was cross-examined.

[18] Dr Sundin first reported with respect to the respondent in 2009. She subsequently provided reports in 2010, 2012, 2014, 2015, 2017 and 2019. For the purpose of this hearing, she assessed the respondent on 12 December 2019 and provided a report dated 20 January 2020. She subsequently provided a supplementary report on 24 February 2020.

[19] In her January report, Dr Sundin expressed the view that the respondent continued to meet the diagnostic criteria for mixed personality disorder with antisocial, narcissistic and borderline personality traits; cannabis use disorder, ongoing; alcohol use disorder, in remission; and psychopathy. She considered that his overall unmodified risk for sexual violence was high. She noted that he continued to disregard elements of the supervision order which did not suit him and, concerningly, considered his continuing use of cannabis to not be relevant to his risk. He was actively resentful of the requirements of the supervision order and at times, aggressive to supervising officers. He exhibited emotional dysregulation in the community. On a more positive note, she observed that the respondent had not abused alcohol, something she described as the "primary risk factor for sexual recidivism". Although she readily accepted that the respondent posed a "management challenge", she did not believe the respondent was not able to be managed on the existing order.

[20] Subsequently, Dr Sundin was provided with a copy of text messages that had been exchanged between the respondent and a woman whom I shall refer to as TF, as well as call charge records between the two. She was also supplied with a copy of records from the Townsville Hospital relating to an episode when the respondent engaged in self-harm on 28 June 2019 as well as the Integrated Offender Management System records relating to the respondent. Amongst these records was a note of a conversation between a senior case manager and TF during which TF alleged that the respondent had assaulted her in a toilet cubicle during an attempt to force her to agree to intercourse, but TF did not wish to make a complaint to police about the incident.

[21] After considering this further material, Dr Sundin reported that she was "less sanguine in my original opinion". In her view, the material evidenced a significant level of sexual preoccupation on the part of the respondent prior to being returned to

custody in the middle of July. It was also revealing of a relationship between the respondent and TF that had become, to say the least, volatile. In contrast to the conclusions expressed in her January report, Dr Sundin opined that "greater effort needs to be made to address [the respondent's] sexual preoccupation and his attitudes towards cannabis prior to [him] being re-released". In her opinion, this would need to be done in order to "contain the potential risk he poses to members of the community". She recommended that the respondent be detained and, further, be required to undertake the Medium Intensity Substance Intervention Program. A referral to the prison mental health services regarding treatment options – including a low dose antipsychotic/mood stabilising medication, a trial of SSRI medication – was also recommended. Dr Sundin otherwise identified a need for the respondent to attend more intensive pre-release treatment sessions with Ms Richards". She expressed the opinion that, if the respondent was released back on supervision, the "current cycle of breach and re-incarceration will continue" and that "while it does, there is unlikely to be much reduction in the overall risk of recidivism he poses".

[22] When Dr Sundin was called to give evidence at the hearing, she recalled that, when she interviewed the respondent in December 2019, he was asked about TF. The respondent denied that there was any sexual relationship or that he had assaulted her. Dr Sundin considered that the respondent was "frankly deceptive". She believed that the material considered by her revealed that the respondent was preoccupied with TF and that this led to the assault on her. This, Dr Sundin said, was "very relevant because [it] parallels [the respondent's] earlier sexual offending" and also because it occurred "at a time [when] we know that he tested positive for cannabis". Her concern with the respondent was that his risk factors for sexual recidivism "appear to be chronic and unchanging". Apart from being abstinent from alcohol, she did not think that the respondent had put "a lot of effort into modifying his behaviour". It was concerning that the respondent had become more combative, verbally aggressive and deceptive.

[23] When cross-examined, Dr Sundin was asked what weight she placed on the text message exchange between the respondent and TF on 8 July 2019, as well as the telephone calls made (or attempted) around the time of that exchange. She said that, without more, she would have "placed very little weight on it" but when it was combined with the other material examined by her, including Ms Richard's progress report, there exists a body of "collateral information" to support the view that there was some sort of relationship between the respondent and TF, that there had "probably been an assault", and that there was concern on the part of the respondent that TF was going to make a complaint to the police. The point was made to Dr Sundin that TF's complaint was only an allegation, and had neither been investigated nor proved. However, Dr Sundin said that, if in fact there had not been any assault, her opinion would be unchanged, especially "given the flags of concern raised by Ms Richards who was seeing [the respondent] regularly and who was concerned by his rising sexual preoccupation". She added that if, on the other hand the assault did occur, that would provide clear evidence that the supervision order was not working.

[24] Dr Aboud previously reported on the respondent in 2017. He assessed him for the purpose of this hearing on 3 January 2020, and provided a report regarding that assessment on 7 February 2020.

[25] He considered that the respondent met the diagnostic criteria for alcohol dependence, cannabis dependence and other substance abuse, along with a mixed personality disorder (with predominantly antisocial, paranoid and borderline traits), psychopathic features and borderline mental retardation. He did not think that the respondent presented with any features of mental illness although he could not discount the possibility that the use of illicit substance had such an effect on his mood that it became more elevated and might have contributed to his increased sexual preoccupation. He did not think that the respondent met the diagnostic criteria for a paraphilia.

[26] Overall, Dr Aboud regarded the respondent's current unmodified risk in respect of sexual and violent reoffending as high. Should the respondent reoffend sexually, it would take the form of opportunistic sexual violence, possibly in the course of a robbery or a break and enter. The victim was likely to be a stranger, and an adult of any age. Alcohol and/or illicit substances such as cannabis might be directly implicated, leading to disinhibition and reduced behavioural control, perhaps also accompanied by mood elevation and associated sexual preoccupation. However, it was possible that his drive to offend might occur in the absence of substance abuse. Labile emotional states, especially anger, "might be channelled into offending that represents a maladaptive coping behaviour". Dr Aboud considered that any future offending was likely to be impulsive. In his opinion, the respondent would be at a higher risk of offending if he was feeling bored, angry, despondent, stressed or highly sexually preoccupied.

[27] Dr Aboud also expressed the opinion that, at the time when the respondent returned to custody in July 2019, his risk of sexual reoffending was escalating. In this regard, he took into account what he considered to be the respondent's argumentative and belligerent disposition, his lack of respect, dismissive attitude, occasional aggression towards Correctional staff, repeated telephone communications with TF despite not having permission to do so, possible in-person contact with TF, the allegation that he sexually propositioned TF and assaulted her in a toilet cubicle, his increased sexual preoccupation as reported by Ms Richards and the positive urine test for cannabis in May, June and July. He then wrote:

> "Since 2014, when he was first released to a supervision order, he has been returned to custody on five occasions due to contraventions of the order. The circumstances of his breaches have followed a familiar pattern, and are associated with repeated issues, mainly surrounding his propensity to abuse, and become stabilised by, illicit drugs (it would seem specifically cannabis), and his propensity to pursue relationships in a covert/clandestine manner. If he is released back to the community, subject to the supervision order in the same circumstances as before, I do not believe that it will be very long before all the above (or similar) concerns repeat. At that point he will again require return to custody in order to ensure public safety from the risk of sexually offending that he presents."

[28] By way of recommendations for future treatment, Dr Aboud recommended that the

respondent be engaged in motivational work by a psychologist and consider the benefits of taking antilibidinal medication and SSRI antidepressants. He then expressed the "tentative view" that should one or more of these recommendations be implemented, the respondent's risk of sexual reoffending would be reduced to below moderate in the context of stringent monitoring and supervision in the community and that a supervision order of 10 years would be required.

[29] In a telephone conference held on 25 February 2020, Dr Aboud expressed the opinion that, under a supervision order, he was "reasonably confident that breaches would be picked up" because his case managers would "notice irritability and change in behaviour" and "this would precede a serious sexual offence". In this sense, he thought the supervision order had been "working", although he conceded that he was "thinking longer-term". He also made the point that the respondent had never received motivational counselling before.

[30] When he was called to give evidence at the hearing, Dr Aboud explained that the use of cannabis by the respondent tended to impair his judgment, emotional control and ability to manage his sexual preoccupation. At the time when he was taken back into custody, the risk of offending was escalating. The respondent was "behaving in a more deceptive, covert, clandestine way" and communicating with a female. Dr Aboud considered that his risk was at that time "unmanageable", and that was of course when he was still subject to a supervision order. The supervision order was not "working" to reduce the high risk that he represented because he was breaching it by smoking cannabis and "telling lies about his communications with TF". If he was to be released back into the community on supervision now, there will be a repeat of the same behaviour including not properly engaging with Ms Richards. To the point, Dr Aboud said:

> "He's not going to take seriously his engagement with his psychologist. He's not going to take seriously the condition that he shouldn't use substances. He's not going to take seriously that he should be open and transparent around communications or contact, even personal direct contact with females, and **he will be running a chronic high risk in the community because he's effectively not being managed by the supervision order because he's choosing to circumvent it**." [Emphasis added]

[31] Asked whether his "tentative view" would be affected if there had not in fact been an assault on TF, Dr Aboud agreed that it would be but said there were "multiple other risk factors that were in place" as summarised by Dr Sundin, and he agreed with the opinions which Dr Sundin had expressed in that regard. Like Dr Sundin, Dr Aboud said that, if an assault had occurred, that would be "most worrying behaviour" because it represented "the actual manifestation of violence closely associated with a sexual proposition". That would speak to "the immediacy of the risk" in the sense that the respondent was "right on the brink of committing a sexual offence".

[32] In cross-examination, Dr Aboud was taken to the note of the telephone conference referred to above (at [29]) and, after reviewing the propositions contained in it, agreed that the "supervision order is working perhaps more clearly than we might

otherwise understand". He also agreed that, even if the assault on TF occurred, that assault had not escalated to the commission of a serious sexual offence. Dr Aboud accepted that the Corrections staff have "done as well as they could be expected" to do in frequently checking the respondent's urine for illicit drugs, ensuring that he attended appointments with his psychologist, regularly meeting with him in the form of case management, checking his telephone, counselling him and giving him directions about his relationship with TF as well as other behaviour. To some extent also, the respondent allowed his case manager to monitor his relationship with TF. However, Dr Aboud stated that although there were times when the respondent sought permission to have a relationship with TF, there were also times when he was told that he could not have any contact, "but he did anyway". Likewise, there were times when the respondent chose to be honest about his intentions and times when he was dishonest. In the end, Dr Aboud considered the respondent to be "quite unreliable and changeable". Regarding his substance abuse, the respondent's abstinence from alcohol was "praiseworthy" but he was "wholly dismissive of any link … between cannabis and sexual reoffending". Similarly, although "some favourable weight" could be placed on the fact that the respondent had not committed a sexual offence whilst on supervision, this must be considered in the context of "a man being managed on a supervision order who has been sailing very close to the edge on different occasions and is starting to become acclimatised to sailing close to the edge, and it's becoming for him … the new normal".

[33] As earlier stated, the onus is on the respondent to satisfy the court, on the balance of probabilities, that the adequate protection of the community can, despite the contraventions, be ensured by the existing supervision order, or a supervision order amended pursuant to s 22(7) of the Act, but I am far from satisfied about that.

[34] Despite the concessions made by Dr Aboud in cross-examination as to the apparent efficacy of the supervision order, I am by no means persuaded that it has been "working", to use that shorthand term. The escalation in the respondent's risk profile whilst under the strictures of the order strongly suggest that, despite the best efforts of his case managers, the respondent is one impulse away from acting on his sexual preoccupations, and in a serious way. This is due to a number of reasons, not the least of which is his unremitting cannabis use. As to that, not only does cannabis serve to disinhibit the respondent, he appears to have developed no (or very little) genuine insight into the indisputable link between the abuse of that drug and the accompanying elevation in the risk that he will commit a serious sexual offence. For some time leading up to the contraventions that are the subject of this application, the respondent actively attempted to circumvent the order and cannot, in my view, be relied on to comply with critical directions that are given to him. He has unmet treatment needs and should follow the recommendations made by both psychiatrists in their evidence, including the need to properly engage with a psychologist to obtain motivational counselling, participating in the MISIP and considering the benefits of taking antilibidinal and/or antidepressant medication, if he is to have any hope in the relatively short-term of addressing his offending behaviour and thereby reducing the risk he would constitute if released on supervision.

[35] I make it clear that, in coming to this view, the effect of which is that the respondent has not discharged the onus, I have proceeded on the basis that the alleged assault on TF has not been proved and, further, that the text message exchange and

associated telephone calls (or attempted telephone calls) may be more revealing of TF's attempts to contact the respondent rather than the other way around. Instead, like Dr Sundin and Dr Aboud, I placed considerable reliance on the observations and opinions expressed by his treating psychologist, Ms Richards, as well as the contents of the IOMS as supporting the opinions ultimately expressed by the psychiatrists to the effect that, if the respondent was released on supervision today, there would be an unacceptable risk that he will commit a serious sexual offence. In short, I am not satisfied that the adequate protection of the community can, despite the contraventions, be ensured by the existing supervision order or an order amended pursuant to s 22(7) of the Act.

Disposition

[36] The supervision order made on 28 April 2014 will be rescinded and the respondent detained in custody for an indefinite term for control, care or treatment.