

SUPREME COURT OF QUEENSLAND

CITATION: *Attorney-General for the State of Queensland v Kynuna*
[2018] QSC 90

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

FILE NO/S: BS No 3832 of 2010

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 1 May 2018

DELIVERED AT: Brisbane

HEARING DATE: 1 May 2018

JUDGE: Lyons SJA

ORDER: **Pursuant to s.22(7) of the *Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)* the respondent be released from custody and remain subject to the supervision order made on 6 April 2011, as amended on 10 December 2015 and as further amended on 14 February 2018, until 19 June 2020.**

CATCHWORDS: CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT SEXUAL OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – DANGEROUS SEXUAL OFFENDER – GENERALLY – where the respondent contravened a condition of a supervision order to abstain from the consumption of illicit drugs – where the contravention is proved – where the contravention is conceded by counsel for the respondent - where the applicant applies for relief pursuant to s 22 of the *Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)* – whether the respondent has satisfied the onus in s 22(7) of the *Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)* – whether the supervision order should be rescinded and a continuing detention order made or whether the adequate protection of the community can be insured with the existing supervision order – whether

the existing supervision order should be extended

Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld) s 13, s 22, s 27

COUNSEL: Mr J. Rolls for the Applicant
Ms K. McMahon for the Respondent

SOLICITORS: Crown Law for the Applicant
Legal Aid Queensland for the Respondent

This Application

- [1] This is an application by the Attorney-General for the State of Queensland for an order pursuant to s 22 of the *Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)* ('the Act'). Section 22 provides that if the court is satisfied on the balance of probabilities that the respondent has contravened a supervision order then unless the respondent satisfies the court on the balance of probabilities that adequate protection to the community, despite the contravention, can be ensured the court must rescind the supervision order and make a continuing detention order.

Background

- [2] The respondent is a 36 year old Indigenous man who was sentenced on 15 October 2002 in the District Court at Cairns for an offence of rape and two offences of indecent treatment of a child under 16. He was sentenced to a period of eight years imprisonment and having had a period of pre-sentence custody declared, his full-time discharge date was 15 August 2010.
- [3] On 6 April 2011 he was placed on a supervision order pursuant to an order by PD McMurdo J. That order was to remain in force until 6 April 2016. The respondent has however contravened his order on five occasions. The first contravention in 2011 related to the use of cannabis. The second contravention in 2012 occurred when the respondent committed an indictable offence by damaging property belonging to Queensland Corrective Services. The third contravention in 2014 occurred when the respondent consumed alcohol. The fourth contravention occurred in 2015 when the respondent consumed cannabis. The fifth contravention occurred in 2016 when the respondent again consumed cannabis.
- [4] On 15 May 2017, the respondent was released from custody after he had satisfied the onus cast upon him pursuant to s 22 of the Act. It has been found that he had breached his supervision order. On 13, 14 & 15 January 2018, the respondent was once again asked to provide urine samples by a Corrective Services officer. The samples indicated a positive result for the presence of a Schedule 4 drug Pregabalin which is also known by the name of Lyrica. The respondent has not been prescribed that medication nor disclosed the fact that he had taken that drug. Condition 18 of his supervision order required him to abstain from the consumption of illicit drugs.
- [5] Having considered the evidence before me, I am satisfied pursuant to s 22 of the Act that the released prisoner has contravened a requirement of his supervision order. In

this regard I also note that Counsel for the respondent has conceded that the respondent accepts the contravention. Section 22 provides as follows:

“22 Court may make further order

- (1) If the court is satisfied, on the balance of probabilities, that the released prisoner is likely to contravene, is contravening, or has contravened, the supervision order or interim supervision order, the court may—
 - (a) amend the conditions of the supervision order or interim supervision order; or
 - (b) if the order is a supervision order and the court is satisfied as required under section 13(1), rescind the order and make a continuing detention order; or
 - (c) if the order is an interim supervision order, rescind the order and make an order that the released prisoner be detained in custody for the period stated in the order; or
 - (d) make any other order the court considers appropriate—
 - (i) to achieve compliance with the supervision order or interim supervision order; or
 - (ii) to ensure adequate protection of the community.
- (2) Subject to subsection (3), for the purpose of subsection (1)(b), section 13 applies as if the application under this section were an application for a division 3 order under that section.
- (3) For the purpose of deciding whether to make a continuing detention order under subsection (1)(b), the court may do any or all of the following—
 - (a) act on any evidence before it;
 - (b) make any order necessary to enable evidence of a kind needed to support an application for a division 3 order to be brought before it, including an order in the nature of a risk assessment order;
 - (c) suspend the supervision order and make an order that the released prisoner be detained in custody for the period stated in the order.
- (4) For subsections (1)(c) and (3)(c), the court may make an order that the released prisoner be detained in custody for the period stated in the order if it is satisfied as required under section 8(1).
- (5) If the court makes an order in the nature of a risk assessment order, the psychiatrist or each psychiatrist examining the released prisoner must prepare a report about the released prisoner and, for that purpose, section 11 applies.
- (6) For applying section 11 to the preparation of the report—

- (a) section 11 (2) applies with the necessary changes; and
- (b) section 11 (3) only applies to the extent that a report or information mentioned in the subsection has not previously been given to the psychiatrist.

(7) If the released prisoner satisfies the court, on the balance of probabilities, that the adequate protection of the community can, despite the contravention or likely contravention of the existing order, be ensured by a supervision order or interim supervision order, the court—

- (a) must amend the existing order to include all of the requirements under section 16 (1) if the order does not already include all of those requirements; and

- (b) may otherwise amend the existing order in a way the court considers appropriate—

- (i) to ensure adequate protection of the community; or

- (ii) for the prisoner's rehabilitation or care or treatment.

(8) The existing order may not be amended under subsection (7) (b) so as to remove any requirements mentioned in section 16 (1).”

- [6] Section 22(2) of the Act provides that unless the released prisoner satisfies the court on the balance of probabilities, that the adequate protection of the community can, despite the contravention, be ensured by the existing order, the court must rescind it and make a continuing detention order. The onus is therefore on the respondent to satisfy me that the adequate protection of the community can, despite the contravention, be ensured. As the Court of Appeal has stated on many occasions, the adequate protection of the community is a reference to that term as explained in s 13 of the Act. That is, that the adequate protection of the community is from the unacceptable risk that a respondent will commit a serious sexual offence, namely one involving serious violence of the kind which causes or is likely to cause significant physical injury or significant psychological harm.
- [7] Section 22(3) of the Act provides that in deciding whether to make a continuing detention order the court may act on evidence that was before the court when the existing order was made. Accordingly, it is clear that if the respondent is to be released, he must demonstrate on the balance of probabilities that the adequate protection of the community can, despite the contravention be ensured by the continuation of the supervision order. In this regard the court is required to consider that the means of providing protection and avoiding the risk is a supervision order. In this regard when assessing whether a supervision order can provide the adequate protection, the court is required to assess whether a supervision order can reasonably and practicably manage the adequate protection of the community. Before making an order, the court has to reach a positive conclusion that the supervision order will provide adequate protection.
- [8] The Court must therefore be satisfied that the supervision order would be efficacious in constraining the respondent's behaviour by preventing the opportunity for the commission of sexual offences. The onus is clearly on the respondent to demonstrate

that he has satisfied the court that the adequate protection of the community can be ensured despite the contravention.

- [9] Further psychiatric reports have been obtained for the purposes of this hearing, and I have had regard to the report of Dr Scott Harden dated 16 April 2018 and the report of Dr Josephine Sundin dated 25 April 2018.

Dr Harden's report

- [10] Dr Harden did not interview the respondent for the purpose of the report but rather reviewed the material which had been previously available. Dr Harden considered that the respondent still meets the diagnosis of anti-social personality disorder and also suffers from the alcohol abuse and probable dependence, which is currently in remission. He also considered that there was a strong history of polysubstance abuse namely marijuana.
- [11] Dr Harden considered that the current contravention is a continuation of the same pattern of substance use which the respondent uses to deal with emotional issues. Dr Harden noted that the respondent's past offending had been strongly associated with alcohol intoxication rather than the use of substances like cannabis. He has largely been able to remain abstinent from alcohol except for the consumption in 2014. In this regard Dr Harden noted that the respondent had taken part in a "further intensive group treatment program for substance abuse, that seemed to improve his attitude and insight into substance use, particularly alcohol, and the link to his continued freedom."¹
- [12] Whilst there has been a contravention, Dr Harden does not consider that this alters the respondent's risk profile and does not recommend any alterations to the supervision order. Dr Harden considered that the overall risk of re-offence in the absence of a supervision order was likely to be in the moderate range and there has been a reduction in the risk given the period of time he has been in the community. He considers that the supervision order further reduces the risk from moderate to low to moderate.
- [13] Dr Harden has previously considered whether the supervision order should be extended and in this regard had noted that there had been persistent difficulties with the respondent's supervision in the community, which were particularly associated with his ability to manage negative emotions and his poor problem solving skills. This inevitably led to anger with supervision staff and the use of marijuana. As previously indicated, most of the contraventions had been associated with the use of cannabinoids rather than alcohol. He has not been breached for consumption of alcohol since February 2014. Dr Harden also referred to the fact that the respondent has spent long periods in the community since his supervision order was first made in 2011, although it has been punctuated by contraventions. Dr Harden considered it significant however that the respondent's most recent sexual offence was more than 15 years ago. He also noted in his 2017 Report that he had coped better with a range of negative life events in more recent times.²
- [14] Dr Harden did express some concern that the respondent had not obtained employment, or have close relationships and therefore considered that he had made limited progress

¹ Report dated 16 April 2018 at p 5: 32 – 34.

² Report dated 20 October 2017 p 48: 25 - 26.

in relation to his integration in the community. He noted however those limitations having part been the consequence of curfews which had been imposed on him. In this regard he stated that “I still recommend that every effort should be made to place him in a community, non-precinct setting with reduced curfew, access to employment and opportunities to form external prosocial relationships.”³

- [15] Ultimately however Dr Harden concluded that the respondent’s reintegration had not yet progressed to a stage where risk reduction could be maintained in the absence of a supervision order.

Dr Sundin’s report dated 25 April 2018

- [16] Dr Sundin had previously interviewed the respondent in March 2017 and accordingly provided an updated report based on her previous interview and the material currently on the respondent’s file. Dr Sundin indicated that the respondent has a diagnosis of anti-social personality disorder with prominent psychopathic traits, as well as a polysubstance abuse disorder. She considered that the previous reports indicated that the respondent’s risk was moderated by the presence of a supervision order and that his major risk of sexual recidivism was the use of alcohol. She concluded that the respondent’s ongoing difficulties with the supervision order include his use of intoxicating substances, his difficulty in achieving and sustaining relationship stability, difficulty with emotional self-regulation, as well as impulsiveness and poor problem solving skills. Dr Sundin stated that her previous assessments were that the respondent’s risk of sexual recidivism was in the moderate to high range, but that this had been moderated over the time by the supervision order.
- [17] Dr Sundin also considered that there has been a degree of maturing as well as participation in therapy and programs and abstinence from alcohol. Dr Sundin considers that the respondent’s risk with the supervision order is reduced to low. She considers however that without a supervision order the respondent would abuse intoxicants, especially in the setting of emotional dysregulation and that the victims would be likely to be teenagers or young women. She also noted that the respondent had demonstrated a passive aggressive attitude towards supervision and continued to complain about his supervision order. In this regard I note Dr Sundin’s view:

“If a short trip to north Queensland for a catch up with his family could be organised it would reinforce the benefits of developing and practicing pro-social skills. Such a visit could be part of a positive behavioural programme to be initiated that rewards activities such as continued engagement with the indigenous men’s group, job seeking, attendance at AODS, disengagement from gambling and development of budgeting skills. I think it would be beneficial to move Mr Kynuna out of the precinct as fast as possible to emphasise the importance of personal responsibility and to reduce the focus of his frustration.”⁴

- [18] As the respondent’s Counsel submitted at the hearing, the respondent is an Indigenous man who has been located at the Wacol precinct away from his home and family and he wants some contact with them. Such visits could indeed be an incentive.

³ Report dated 16 April 2018 at p 6:36 - 38.

⁴ Report dated 25 April 2018 at p 12: 456 – 463.

- [19] Dr Sundin noted the respondent had not offended for some 16 years and that he had completed all treatment programs and has continued to engage in sessions with a psychologist. However all of those gains had occurred within a context of a high level of supervision. Dr Sundin noted that the respondent still had ongoing treatment needs, particularly psychological therapy and has been aggressive and volatile and is still not able to adequately self-regulate his emotions.
- [20] Dr Sundin considers that an extension of the current supervision order for a further two years would be appropriate. Dr Harden agreed that an extension for two years would be appropriate.

Submissions of the Attorney-General

- [21] Counsel for the Attorney-General submitted that the current supervision order is due to expire on 19 June 2018 however the psychiatric evidence was that it should be extended for a further two years. The submission therefore was that the order ought to be amended pursuant to s 22(7) of the Act so that it now expires on 19 June 2020.

Respondent's Submission

- [22] The respondent accepts the contravention and counsel for the respondent submits that the evidence demonstrates on the balance of probabilities that despite the contravention, the existing supervision order will ensure the adequate protection of the community.
- [23] Counsel noted that Dr Sundin's risk assessment was that the respondent's risk of sexually violent behaviour is reduced to low by the supervision order and that Dr Harden's assessment is that the risk of sexual re-offending is low to moderate with the supervision order.

Conclusions

- [24] Accordingly on the basis of the evidence before me I am satisfied that the respondent has satisfied the onus on him and accept Counsel for the respondent's submission that there is evidence to support the finding that despite the contravention, the existing supervision order will ensure the adequate protection of the community.
- [25] Counsel for the respondent stated that the respondent does not contest an extension of the supervision order for a period of two years. I am satisfied that the psychiatric evidence indicates that the supervision order should be continued for a further two years.
- [26] The orders are that pursuant to s 22(7) of the *Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)* the respondent be released from custody and remain subject to the supervision order made on 6 April 2011, as amended on 10 December 2015 and as further amended on 14 February 2018, until 19 June 2020.
- [27] Clearly the way in which the supervision order is administered is a matter for the highly experienced Corrective Service Officers but I would support Dr Harden's view that every effort should be made to place the respondent in a community setting with a reduced curfew so that he can have access to employment and have more opportunities to form friendships outside of the precinct. As Dr Sundin notes the key issue is whether the supervision order has served its purpose and to answer this question the respondent

really needs to try and integrate into the community which is difficult to achieve in his current setting. I also note the benefit a visit to his family might have in terms of encouragement to comply with the conditions of his supervision order.