SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General (Qld) v Guy* [2018] QSC 179
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **EDWIN ARTHUR GUY** (respondent)
FILE NO:	SC No 11336 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	9 August 2018
DELIVERED AT:	Brisbane
HEARING DATE:	6 August 2018
JUDGE:	Davis J
ORDER:	**1. Pursuant to s 30(3)(a) of the Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), the respondent continue to be subject to the continuing detention order made by Holmes CJ on 27 March 2017.**
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 respondent has been subject to a continuing detention order for one year – where psychiatrists giving evidence for the purposes of a yearly review hold the view that the respondent presents a similar risk of committing a serious sexual offence – where the respondent has high care needs – whether the respondent continues to present a serious danger to the community and should continue to be subject to the continuing detention order *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) s 5, s 8, s 13, s 30 *Attorney-General for the State of Queensland v Fisher* [2018]

QSC 74, cited
Attorney-General for the State of Queensland v Guy [2017] QSC 105, followed
Attorney-General for the State of Queensland v Newman [2018] QSC 156, cited

COUNSEL: J Rolls for the applicant
K Prskalo for the respondent

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

[1] The respondent is subject to a continuing detention order under s 13(5)(a) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) (the *DPSOA*) made by Holmes CJ on 27 March 2017.[1] As required by Part 3 of the *DPSOA*, the Attorney-General applies for review of that order.

[2] An order is sought by the Attorney-General under s 30 of the *DPSOA* that the respondent continue to be subject to the continuing detention order. That course is not opposed by the respondent, but ultimately the discretion to make orders under s 30 vests in the Court.

Statutory scheme

[3] The continuing detention order was made under s 13, contained in Division 3 of Part 2 of the *DPSOA*. Section 5 of the *DPSOA* provides that the Attorney-General may make application for orders against a "prisoner". By the joint operation of ss 5, 8 and 13 of the *DPSOA*, a "prisoner" against whom a s 13 order may be made is one who is serving a period of imprisonment (whether in actual custody or not) for a "serious sexual offence".[2]

[4] There is no doubt that the respondent is such a prisoner, but the term "serious sexual offence" is pivotal to the scheme of the *DPSOA* and it is defined as:

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1 *Attorney-General for the State of Queensland v Guy* [2017] QSC 105.

2 The interaction of the different definitions of "prisoner" is explained in *Attorney-General for the State of Queensland v Newman* [2018] QSC 156 at [10]–[23].

serious sexual offence means an offence of a sexual nature, whether committed in Queensland or outside Queensland—

(a) involving violence; or

(b) against children."

[5] By s 13 of the *DPSOA*:

"**13 Division 3 orders**

(1) This section applies if, on the hearing of an application for a division 3 order, the court is satisfied the prisoner is a serious danger to the community in the absence of a division 3 order (a ***serious danger to the community***).

(2) A prisoner is a serious danger to the community as mentioned in subsection (1) if there is an unacceptable risk that the prisoner will commit a serious sexual offence—

(a) if the prisoner is released from custody; or

(b) if the prisoner is released from custody without a supervision order being made.

(3) On hearing the application, the court may decide that it is satisfied as required under subsection (1) only if it is satisfied—

(a) by acceptable, cogent evidence; and

(b) to a high degree of probability;

that the evidence is of sufficient weight to justify the decision.

(4) In deciding whether a prisoner is a serious danger to the community as mentioned in subsection (1), the court must have regard to the following—

(a) the reports prepared by the psychiatrists under section 11 and the extent to which the prisoner cooperated in the examinations by the psychiatrists;

(b) any other medical, psychiatric, psychological or other assessment relating to the prisoner;

(c) information indicating whether or not there is a propensity on the part of the prisoner to commit serious sexual offences in the future;

(d) whether or not there is any pattern of offending behaviour on the part of the prisoner;

(e) efforts by the prisoner to address the cause or causes of the prisoner's offending behaviour, including whether the prisoner participated in rehabilitation programs;

(f) whether or not the prisoner's participation in rehabilitation programs has had a positive effect on the prisoner;

(g) the prisoner's antecedents and criminal history;

(h) the risk that the prisoner will commit another serious sexual offence if released into the community;

(i) the need to protect members of the community from that risk;

(j) any other relevant matter.

(5) If the court is satisfied as required under subsection (1), the court may order—

(a) that the prisoner be detained in custody for an indefinite term for control, care or treatment (***continuing detention order***); or

(b) that the prisoner be released from custody subject to the conditions it considers appropriate that are stated in the order (***supervision order***).

(6) In deciding whether to make an order under subsection (5)(a) or (b), the paramount consideration is to be the need to ensure adequate protection of the community.

(7) The Attorney-General has the onus of proving that a prisoner is a serious danger to the community as mentioned in subsection (1)."[3]

[6] Importantly, it is not the risk of the commission of any offence which renders a respondent a serious danger to the community and which enlivens the discretion to make an order. The unacceptable risk must be of committing a "serious sexual offence" as defined.[4]

[7] In the respondent's case, a continuing detention order was made which then engages Part 3 of the *DPSOA*. Part 3 provides for annual reviews by the Court of the continuing detention of the prisoner under a continuing detention order.

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[3] Footnotes omitted.

[4] *Attorney-General for the State of Queensland v Fisher* [2018] QSC 74 at [19].

[8] Section 27 prescribes the intervals at which there must be a review by the Court. Section 28 gives the prisoner a right to apply for review in exceptional circumstances. Sections 28A and 29 are procedural, and Section 30 provides as follows:

> "**30 Review hearing**
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> (1) This section applies if, on the hearing of a review under section 27 or 28 and having regard to the matters mentioned in section 13(4), the court affirms a decision that the prisoner is a serious danger to the community in the absence of a division 3 order.
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> (2) On the hearing of the review, the court may affirm the decision only if it is satisfied—
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> (a) by acceptable, cogent evidence; and
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> (b) to a high degree of probability;
>
> that the evidence is of sufficient weight to affirm the decision.
>
> (3) If the court affirms the decision, the court may order that the prisoner—
>
> (a) continue to be subject to the continuing detention order; or
>
> (b) be released from custody subject to a supervision order.
>
> (4) In deciding whether to make an order under subsection (3)(a) or (b), the paramount consideration is to be the need to ensure adequate protection of the community.
>
> (5) If the court does not make the order under subsection (3)(a), the court must rescind the continuing detention order."[5]

[9] Section 30, in many ways, mirrors s 13. It incorporates the concepts of "serious danger to the community in the absence of a Division 3 order"[6] and "adequate protection of the community",[7] and provides that the continuing detention order may only be affirmed if justified by "acceptable, cogent evidence" and "to a high degree of probability".[8]

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5 Footnotes omitted.

6 Sections 13(1) and 30(1) and (2).

7 Sections 13(6) and 30(4).

8 Sections 13(3) and 30(2).

[10] Section 30 operates in this way:

1. Firstly, the Court must consider whether the respondent is "a serious danger to the community in the absence of a Division 3 order";[9]

2. If the answer to that question is in the affirmative, then consideration must be given to whether "adequate protection of the community" can be ensured by release of the respondent on a supervision order;[10]

3. If the answer to that question is in the negative, then generally (subject to any discretion to make no order) a continuing detention order should be made.[11]

The respondent's history

[11] The respondent was born on 5 November 1952. He is now 65 years of age. At the time the continuing detention order was made against him, he was serving a sentence of nine years' imprisonment for two counts of incest and two charges of breach of reporting conditions under the *Child Protection (Offender Reporting) Act* 2014. The respondent had been previously convicted in February 1998. In making the continuing detention order last year, the Chief Justice described the respondent's criminal history as follows:

> "The respondent is a 64 year old man. The applicant seeks an order for his detention in custody pursuant to section 13(5)(a) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003. In 1998, he was sentenced to 10 years' imprisonment for 34 sexual offences against children. One complainant was a young female relative with whom he maintained an unlawful sexual relationship over a six year period, beginning when the child was nine years old. The offences included 16 counts of rape. He was also charged with one count of rape and one count of indecent assault in the form of digital penetration, in respect of a 16 year old who lived in the same caravan park as him. He served most of that sentence before release on parole. Towards the end of the parole period, he committed incest with a young woman who was of extremely low intelligence. He was sentenced to nine years' imprisonment, and at the same time, was sentenced for failing to

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9 Section 30(1) and (2).

10 Section 30(3).

11 Section 30(4).

comply with reporting conditions imposed under the *Child Protection (Offender Reporting) Act* 2014."[12]

[12] In making the continuing detention order the Chief Justice considered the following matters:

1. The evidence of three psychiatrists, Dr Beech, Dr Grant and Dr Arthur who all assessed the respondent as being of above average risk of committing a serious sexual offence; Dr Beech considered the risk "high", Dr Grant as "above average" and Dr Arthur as "moderately high";

2. The risk of re-offending was identified to be impulsive sexual offending with the risk exacerbated by a lack of insight by the respondent into his offending behaviour;

3. Due to the respondent's low intelligence and the fact that he was suffering from Parkinson's disease and other medical conditions, any alternative accommodation to prison would have to offer a high level of support to him. His risk could not be managed in a nursing home and there were no alternative facilities;

4. In the absence of any accommodation which would provide care and cope with the risk of the respondent committing a serious sexual offence, only continuing detention provided adequate protection of the community.

The evidence before me

[13] Both Dr Grant and Dr Arthur interviewed the respondent for the purposes of the review under Part 3 of *DPSOA* and prepared reports which were before me.

[14] Dr Grant opined that the respondent represented a moderate or above average risk of sexually re-offending if released into the community. Dr Grant thought that there had been little change in the risk which the respondent posed in late 2016 when Dr Grant assessed him for the purposes of the initial application under s 13.

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[12] *Attorney-General for the State of Queensland v Guy* [2017] QSC 105 at [1].

[15] Dr Grant thought that the respondent was "clearly institutionalised" and may actually deliberately re-offend in order to return to custody. Importantly, Dr Grant thought that any release into the community would be problematic given the respondent's need for care. Dr Grant opined:

> "Mr Guy's physical condition is a major factor in terms of suitable placement. He is not able to care for himself and would not be able to live in any precinct accommodation. He would, in effect, require a nursing home style of accommodation and that would need to be an institution where he had contact only with male residents and male carers. The barriers to his satisfactory placement in the community are therefore very significant."

[16] Dr Arthur expressed the view that the respondent's risk profile had not changed over the last 18 months. He thought the respondent's risk of sexual offending was in the category of moderate to high. Dr Arthur also thought that if the respondent was released but was having difficulties coping in the community it was "not inconceivable" that the respondent may re-offend with an aim to being returned to custody.

[17] Dr Arthur, like Dr Grant, recognised that there were problems with finding appropriate accommodation for the respondent if he were to be released from custody. Because of the level of care required, a nursing home-type facility was needed. However, as Dr Arthur observed, a conventional nursing home environment would provide the respondent easy access to victims. Dr Arthur concluded:

> "Ultimately, prisoner Guy requires placement in a facility which can meet his medical and emotional dependency needs, whilst also restricting victim access."

Conclusions

[18] I am satisfied to a high degree of probability upon the evidence before me which I regard as acceptable and cogent that the respondent remains a serious danger to the community in the absence of a Division 3 order. There is no facility outside of prison which can provide the medical care which the respondent requires but at the same time providing the security necessary to ensure adequate protection of the community against the commission by the respondent of serious sexual offences.

[19] Therefore, I will order that the respondent continue to be subject to the continuing detention order.

[20] When making the continuing detention order, the Chief Justice said this:

> "It seems to me that a time will come when there are enough offenders in the respondent's category of age and debility falling within the compass of the *Dangerous Prisoners (Sexual Offenders) Act* to require the setting up of supported accommodation for them. It is deeply troubling to think that people who could be managed and rendered relatively risk-free with appropriate support and accommodation, must instead, be imprisoned as the only option."[13]

[21] I respectfully endorse her Honour's comments. I specifically raised her Honour's comments with Mr Rolls who appeared for the Attorney-General on the present application. Mr Rolls told me that her Honour's comments had been brought to the attention of the Attorney-General but that in the respondent's case particular difficulties arose because of his special needs. The state of affairs is nonetheless deeply troubling, as the Chief Justice observed.

[22] THE ORDER OF THE COURT IS THAT:

1. Pursuant to s 30(3)(a) of the *Dangerous Prisoners (Sexual Offenders)* Act 2003 (Qld), the respondent continue to be subject to the continuing detention order made by Holmes CJ on 27 March 2017.

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[13] At [7].