

The Queen v Doolan [2009] NTSC 60

PARTIES: THE QUEEN
v
DOOLAN, Kerry

TITLE OF COURT: SUPREME COURT OF THE NORTHERN
TERRITORY

JURISDICTION: SUPREME COURT OF THE TERRITORY
EXERCISING TERRITORY APPELLATE
JURISDICTION

FILE NO: 20822131

DELIVERED: 19 NOVEMBER 2009

HEARING DATES: 28-29 OCTOBER and 19 NOVEMBER
2009

JUDGMENT OF: MARTIN (BR) CJ

CATCHWORDS:

Unfit to stand trial – not guilty by reason of mental impairment - moderate to severe intellectual disability – offending was impulsive and directly related to cognitive deficits – offending serious – Custodial Supervision Order installed with conditions aimed at the protection of the public whilst providing necessary therapeutic services.

Criminal Code 1984 (NT), ss 43R, 43T, 43X, 43Z, 43ZA, 43ZG, 43ZM, 43ZN; *Sentencing Act 1995* (NT).

REPRESENTATION:

Counsel:

Crown: N Rogers SC
Defendant: T Collins
Chief Executive Officer
Department of Health and
Families: D Farquhar
Chief Executive Officer
Department of Correctional
Services: G Macdonald

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Defendant:	Central Australian Aboriginal Legal Aid Service
Chief Executive Officer Department of Health and Families:	Cridlands MB
Chief Executive Officer Department of Correctional Services:	Solicitor General
Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Doolan [2009] NTSC
No. 20822131

BETWEEN:

THE QUEEN
Plaintiff

AND:

KERRY DOOLAN
Defendant

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered 19 November 2009)

Introduction

- [1] Mr Kerry Doolan was presented in the Supreme Court on an Indictment dated 8 October 2008 charging him with two criminal offences. First, that on 14 August 2008 he unlawfully assaulted the male victim in the circumstance of aggravation that the victim was threatened with an offensive weapon, namely, a shard of glass. Secondly, that on the same day he unlawfully damaged property in the circumstance of aggravation that the loss caused by such damage was greater than \$5000, namely, approximately \$5261.

- [2] On 21 May 2009, acting with the consent of both counsel for the Director of Public Prosecutions and Mr Doolan, pursuant to s 43T of the *Criminal Code* a Judge found that the accused was unfit to stand trial. In addition, pursuant to s 43R(3) the Judge also found that Mr Doolan was not likely to become fit for trial within the next 12 months.
- [3] As required by the Code, the Judge then conducted a special hearing before a jury for determination by the jury as to whether Mr Doolan was not guilty of the offences or not guilty of the offences by reason of mental impairment or committed the offences with which he was charged. The jury returned verdicts of not guilty of each offence by reason of mental impairment.
- [4] Pursuant to s 43X of the Code, the Judge was required to determine whether he should declare that Mr Doolan was liable to supervision or order that Mr Doolan be released unconditionally. His Honour made a formal declaration that Mr Doolan was liable to supervision. Mr Doolan was remanded in custody for determination as to the appropriate order of supervision.
- [5] Section 43Z requires that where a person has been declared liable to supervision, the court must make a supervision order in respect of that person. Section 43ZA directs that the court make either a custodial supervision order or a non-custodial supervision order.
- [6] The purpose of the hearing before me was to determine whether a custodial or non-custodial supervision order should be made and the terms of the

order. At the conclusion of evidence and submissions I determined that a custodial supervision order was appropriate and made that order. I now set out my reasons for making the order and its terms.

Principles

- [7] Section 43ZA of the Code directs that a court “must not” make a custodial supervision order committing a person to custody in prison “unless it is satisfied that there is no practicable alternative given the circumstances of the person”. The principle by which the court is to be guided is set out in s 43ZM:

“In determining whether to make an order under this Part, the court must apply the principle that restrictions on a supervised person’s freedom and personal autonomy are to be kept to the minimum that is consistent with maintaining and protecting the safety of the community.”

- [8] Section 43ZN(1) specifies the matters which the court must take into account when making a supervision order:

- “(a) whether the supervised person concerned is likely to, or would if released be likely to, endanger himself or herself or another person because of his or her mental impairment, condition or disability;
- (b) the need to protect people from danger;
- (c) the nature of the mental impairment, condition or disability;
- (d) the relationship between the mental impairment, condition or disability and the offending conduct;

- (e) whether there are adequate resources available for the treatment and support of the supervised person in the community;
- (f) whether the supervised person is complying or is likely to comply with the conditions of the supervision order;
- (g) any other matters the court considers relevant.”

Background

[9] Mr Doolan is now aged 20 years. Aged and Disability Services have been involved with the management of Mr Doolan since he was 11. It is clear that Mr Doolan suffers from a moderate to severe intellectual disability and it appears likely that he suffers from foetal alcohol effects. In addition to impairments of intellectual function, one psychiatrist has reported that Mr Doolan possesses an “Organic Personality Disorder with impulsive and very explosive behaviours”.

[10] A psychologist has reported that Mr Doolan suffers from Autistic Disorder, but a psychiatrist found no obvious autistic features. It is unnecessary to resolve this difference of opinion. It is common ground that there exists moderate to severe cognitive impairment and that Mr Doolan requires intensive full time care.

[11] The reports prepared for the assistance of the Court demonstrate that significant efforts have been made over a number of years to support Mr Doolan within the community, but behavioural issues involving risks of significant harm both to Mr Doolan and to members of the community,

including children, have posed ongoing difficulties in achieving appropriate management of his behaviour. It is unnecessary to canvass the details as the difficulties are summarised in a risk assessment and risk management plan dated 24 June 2008 prepared by Mr Daryl Murdock, Manager of the Disability Support Team for the Aged and Disability Program in Central Australia. This report was prepared before the conduct that resulted in the finding of not guilty by reason of mental impairment and, unfortunately, the risk assessment made by Mr Murdock proved to be accurate. Mr Doolan's history of conduct is marked by dangerous impulsive and aggressive behaviour including attacking support staff with a chair and kicking them on 2 June 2008 and, on 6 June 2008, threatening to kill support staff while wielding a shovel. Other assaultative behaviour is summarised in the material provided to the Court. Incidents of self harm are also recorded.

[12] It is against this background that the events of 14 August 2008 occurred. The victim was a carer working under the supervision and guidance of Mr Murdock. He had been caring for Mr Doolan and had developed a rapport with him. The victim described that rapport as a "close bond" with Mr Doolan.

[13] On the day in question, the victim was accompanied by another health worker to whom Mr Doolan had reacted positively in a friendly and welcoming manner. In an agreed statement presented to the jury, the victim described the relevant events in the following terms:

“This afternoon Troy, Manuway [Mr Doolan] and I spent the afternoon at unit 10/50 South Terrace. Manuway has a short attention span, he would sit with us for a short time watching television, and then he would disappear upstairs to his room and listen to music.

I cooked him chicken and vegetables for dinner and we ate our evening meal together in the lounge. Manuway is pretty quiet when he is eating; he just likes to feed so isn't that talkative at meal times.

At about 7.00pm I went upstairs to check on Manuway. He was in his bedroom listening to music and singing. I asked him if he was ok, and he didn't answer me, but that's not unusual.

I went back downstairs to do up my notes (any interaction with Manuway is recorded) and then watched television. Troy was sitting down in the lounge room with me.

All of a sudden I heard a noise coming from outside. I could hear it from the window on the bottom floor. The noise sounded like things getting broken. I could hear what sounded like CD discs being snapped. I looked out the window and I saw things being thrown down from the upper level from Manuway's bedroom window.

I said to Troy, 'Look you just stay in the room; I am just going up to see if Manuway is ok.' Troy remained downstairs and I went to Manuway's room. I recall hearing what sounded like a female laughing somewhere outside the unit. I am not sure where, it could have been a neighbour.

I walked into Manuway's room and said, 'What's going on, are you all right?'

Manuway said, 'Them mother fucking half cast girls, they teasing me. They just run down the road.' Manuway was standing looking out of his bedroom window. His window faces in a westerly direction towards Mahomed Street.

I said, 'Manuway, there is no-one there, it's all ok.' I looked out the window but couldn't see anyone.

Just to show Manuway that I believed what he was saying and to calm him down, I yelled in a loud voice out the window, 'Leave Manuway alone, he's a good bloke.'

Manuway then started to swear loudly and he got very upset, he was clenching his fists and breathing heavily.

I then saw Manuway backhand the window with his right fist. I saw the window pane of glass break and fracture onto the bedroom floor and out the window, there was glass everywhere.

I said to him, 'Come on Manuway, you mustn't break stuff here, it's not your place. I am going to have to give Daryl (Daryl Murdock) a call'.

Manuway then picked up a 20cm shard of glass up from the floor with his left hand and held it above his head, looking at me and saying, 'Go-on, go-on.' (I think he was edging me to phone Daryl, threatening me with that glass). I looked at Manuway's eyes, he was very angry; his eyes were full of intent. I had never seen him this way before.

I was feeling quite shaken; I was backed up against the wall trying to get out of the room, to get past him. I managed to move around him. I kept talking calmly to him, trying to get him to drop the glass. I said, 'Manu, Manu put that glass down, come on Manu.' Inside I was pretty shaky but I didn't want Manuway to know I was frightened.

I managed to get out of the room, but as I backed away through his bedroom door, he lunged at me in a thrusting motion holding the glass up above his head and moving towards me.

I raced downstairs and told Troy to go out the back. The unit has a safe room at the back, one we can lock ourselves in so Troy and I went into the room and locked the door. I told Troy to get outside, to exit through the safe room door into the rear yard.

By this time Manuway was downstairs too, trying to open the safe room door. I could hear him banging the door; he banged it once, a loud bang.

Then everything went silent for about 30 seconds. I opened the door into the lounge room to have a look. I saw Manuway standing up in the middle of the lounge with no glass/weapons in his hands.

I said, 'Come on Manu, come talk to me.' At this point, I was still in the safe room, but had my head out the doorway so I could see Manu.

I then saw Manuway pick up a coffee table from the lounge area and throw it through the main lounge room window. The lounge room window faces out onto the front patio towards South Terrace. It is a floor to ceiling size window, quite large. The impact smashed all the glass panels, there was a huge crash. During this time Manuway was swearing in a loud voice, screaming at the top of his lungs really. He seemed uncontrollable. I wasn't game to go near him.

I then closed the door and locked the safe room and went out the back with Troy. Before leaving the safe room, I took all the knives stored in the cupboards in that room because I thought if Manuway kicked in the door, he might grab one of those knives.

From the back yard, we could hear things getting smashed, it seemed to be coming from out the front of the unit.

I then phoned Daryl Murdock and told him what was happening. I told him to get over to the unit that Manuway was smashing the place up.

Troy and I waited out the back, the smashing sounds continued.

Shortly after that Daryl turned up. Troy and I could hear him trying to talk to Manuway. By this time things went quiet. The police arrived soon after."

[14] After the victim retreated into the locked room, Mr Doolan threw a coffee table through lounge rooms windows. He then went outside and caused extensive damage to a vehicle, smashing the windscreen and the rear and passenger side windows.

[15] Mr Murdock gave evidence. He explained that strategies that have worked in the past were not working and Mr Doolan's behaviour had been deteriorating with the onset of more assaultative behaviours. He had been very concerned by the behaviour of Mr Doolan in June 2008 while a patient in the Alice Springs Hospital when he had taken a chair to a nurse two days before he was discharged. Difficulties were being experienced with finding a placement for Mr Doolan because of his violent behaviour. On the night in question, when Mr Murdock arrived he was able to exercise a calming influence because he knew Mr Doolan so well.

[16] A psychiatrist, Dr Kevin Smith, also gave evidence before the jury. He said that Mr Doolan has "some sort of congenital impairment" which is stable at "pretty much the same level throughout his life". It is not improving and not deteriorating. He classified the degree of impairment as moderate to severe which he translated to something like the mental capacity of a child aged about seven or eight. In addition, Mr Doolan has suffered from psychotic episodes in which he lost touch with reality and experienced delusional beliefs, particularly believing that the television and radio were somehow trying to upset or disturb him. Mr Doolan has experienced a particularly frequent belief that people are trying to tease him. Dr Smith described the condition as a "low grade psychotic disorder" upon which he was unable to place an exact label. He described it as a disorder "probably precipitated by using substances" and said he thought it was a "phenomenon that happens when he's under stress". Dr Smith went on to note, however,

that there was nothing in the account by the victim to suggest that Mr Doolan was under any stress on the day of the offending behaviour and expressed the view that the psychotic disorder seemed “to have a life of its own” and appeared to “smoulder on to a persistent degree”. In the view of Dr Smith, at the time of the conduct in question Mr Doolan was so agitated he did not know the nature and quality of his act and was not able to control his actions of threatening the victim with the shard of glass and smashing the windows and vehicle.

[17] At the conclusion of hearing the evidence, I was satisfied that a custodial supervision order was the only appropriate order that could be made and that custody should be in a correctional institution under the control of the Director of Correctional Services. This was the unanimous recommendation of everyone involved and counsel for Mr Doolan did not suggest otherwise. Currently there is no realistic and safe alternative. Mr Doolan requires intensive and constant care 24 hours a day in a secure environment from which he is not able to abscond. Construction of a secure care facility independent of a correctional centre is planned to commence in July 2010 and it is hoped that it will be in practical operation nine months later. Such a facility would be a suitable residential facility for Mr Doolan. However, in the present circumstances, the only practical solution is for Mr Doolan to reside in a correctional centre.

[18] Section 43ZG of the *Criminal Code* requires that when I make a supervision order, I must fix a term that is appropriate for the offence concerned and

specify the term in the order. I am directed by s 43ZG(2) to fix a term that is the equivalent to the period of imprisonment that would, in my opinion, have been the appropriate sentence to impose if Mr Doolan had been guilty of the offences charged.

[19] Viewed objectively and without regard to the cognitive deficits from which Mr Doolan suffers, the offences were serious. There was no provocation and there was a potential for serious injury to be caused.

[20] On the other hand, the behaviour was impulsive and no physical harm was caused. In addition Mr Doolan responded to the efforts of Mr Murdock to calm him down. Importantly, Mr Doolan had not previously offended against the criminal law.

[21] In all the circumstances, if I had been sentencing Mr Doolan under the *Sentencing Act*, after making allowance for the plea of guilty I would have imposed a sentence of 9 months imprisonment for the offence of assault and 6 months imprisonment for the offence of unlawfully damaging property. I would have ordered three months of the sentence of six months be served cumulatively on the sentence of nine months making a total period to be served of 12 months.

[22] As to the terms of the custodial supervision order, it is recognised that residence in a correctional centre is not the ideal locality for Mr Doolan and others like him. He is not on remand and he is not a convicted offender. He requires special assistance. I have heard evidence that within the constraints

that accompany residence in a correctional setting, in the past special arrangements have been made for people in the position of Mr Doolan to receive assistance from Correctional Services officers and Aged and Disability Services personnel. One Correctional Services officer has received special training while others have received “on the job training” when volunteering to assist. This additional help will be available to Mr Doolan. The efforts of these Correctional Services officers and the Aged and Disability Services personnel within the correctional setting are to be commended and their work is to be actively encouraged.

Future Plans

[23] Given that Mr Doolan must continue to reside in a correctional centre, I requested that consideration be given to creating an improved environment within the correctional setting which would enable greater access by Health and Disability workers to Mr Doolan and improved opportunities for therapeutic activities. It was apparent from the evidence that without special arrangements Mr Doolan would not receive the optimum therapeutic intervention. I invited the Department of Health to provide submissions as to the conditions of the supervision order which the Department believes would provide the best opportunity for future rehabilitative services to be provided to Mr Doolan. I also invited the Department of Justice to respond to those submissions.

[24] The Department of Health submitted that the supervision order should include the following conditions which identify a role for staff of the Aged and Disability Services Program and provide opportunities for such staff to remove Mr Doolan from the correctional setting from time to time in order to bring him into contact with family and the community. It is this contact and limited freedom that those treating Mr Doolan believe will provide the best therapy for him, provided he is willing to engage and cooperate with personnel and to comply with the necessary restrictions. The particular orders sought were as follows:

- “4. In respect of his mental impairment, Mr Doolan will be managed by staff of the Aged and Disability Services Program and other persons authorised by the Chief Executive Officer of the Department of Health and Families (‘the Disability Management Team’).
5. The management of Mr Doolan’s mental impairment will be consistent with the Recommended Goal Summary and Management Plan, dated 20 April 2009, including that the Disability Management Team intend that a member of that team will have face to face contact with Mr Doolan on an average of three times per week.
6. The Director and the Superintendent of ASCC are authorised to permit Mr Doolan to participate in the Management Plan, including:
 - (a) by ensuring that the Disability Management Team has access to Mr Doolan in ASCC, as requested, during ordinary business hours, Monday to Friday;
 - (b) by granting Mr Doolan leave of absence from ASCC, as recommended by the Disability Management Team, for the purposes consistent with the Management Plan.

7. While participating in the Management Plan including while on leave of absence from ASCC pursuant to it, Mr Doolan shall:
 - (a) be under the supervision and care of the Disability Management Team for all times he is outside ASCC;
 - (b) comply with lawful directions given by the Disability Management Team; and
 - (c) maintain a complete abstinence from alcohol, cannabis and non-prescribed drugs.

8. When Mr Doolan is outside ASCC on an authorised leave of absence:
 - (a) the Disability Management Team may utilise and direct security personnel for the purposes of ensuring Mr Doolan's compliance with the terms of his leave; and
 - (b) in the event of Mr Doolan failing to comply with a direction of the Disability Management Team, the security personnel are authorised to take all reasonable action to contain Mr Doolan, in order to maintain the safety of Mr Doolan and the community, until such time as:
 - (i) Mr Doolan's behaviour and/or actions no longer represent a risk to himself or others and he can be safely returned to ASCC; or
 - (ii) Police apprehend Mr Doolan for failing to comply with a term of this Order.

9. In the event of Mr Doolan failing to comply with a term of this Order, the Police are hereby authorised to apprehend him as soon as practicable and bring him before this Court.”

[25] The Department of Justice consented to these conditions. Counsel for

Mr Doolan submitted that cl 5 should be more prescriptive and require face

to face contact on a minimum average of three times per week, but in my view such a condition would have been inappropriate. Mr Doolan is a patient with significant cognitive impairments and those treating him should be left with a discretion as to the extent of contact appropriate from time to time. The Court should be slow to “micro-manage” in these circumstances and the case for such management was not made out.

[26] The proposals were sensible and beneficial to Mr Doolan. They achieved the correct balance between maintaining the safety of the public while endeavouring to provide the necessary therapeutic services for Mr Doolan that are possible within the constraints necessary to ensure protection of the public. Importantly, as the submissions of the Department of Health noted, these terms sought “to reinforce that Mr Doolan has a special status as a supervised person, and must not be treated as a convicted prisoner”.

[27] For these reasons a custodial supervision order was made which incorporated the proposed terms to which I have referred and the Recommended Goal Summary and Management Plan dated 20 April 2009. I ordered that a review take place on 15 June 2010.
