*Attorney-General of the Northern Territory v EE* [2013] NTSC 35

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| PARTIES: | Attorney-General of the Northern Territory<br><br>v<br><br>EE |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION |
| FILE NO: | 21328402 |
| DELIVERED: | 16 JULY 2013 |
| HEARING DATES: | 12 JULY 2013 |
| JUDGMENT OF: | BLOKLAND J |

**CATCHWORDS:**

Statutory Interpretation - Application by Attorney General for interim detention order or interim supervision order pending final hearing - Preliminary hearing not merely perfunctory – court to determine whether it "would" if allegation proven be satisfied respondent is a "serious danger" to the community – requires assumption of later proof – requires absolute positive conclusion.

Statutory interpretation – interim supervision ordered until final hearing – adequate protection reasonably provided by making supervision order – option of supervision to be provided to Court - *Serious Sex Offenders Act* ss 9, 18, 24, 25, 30, 63, 91 and 95.

*Attorney General of Queensland v Watego* [2003] QSC 367; *NZ Conference of Seventh Day Adventist v Registrar of Companies* [1997] 1 NZLR 751 *WA v Latimer* [2006] WASC 235; *Director of Public Prosecutions (WA) v Mangolamara* [2007] WASC 71, referred to

Second reading speech for the Serious Sex Offenders Act – dated 14 February 2013.

**REPRESENTATION:**

*Counsel:*

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| Applicant: | T Anderson |
| Respondent: | R Wild QC |

*Solicitors:*

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| Applicant: | Department of Attorney-General |
| Respondent: | North Australian Aboriginal Justice Agency |

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

*Attorney-General of the Northern Territory v EE* [2013] NTSC 35
No. 21328402

BETWEEN:

**ATTORNEY-GENERAL OF THE NORTHERN TERRITORY**
Applicant

AND:

**EE**
Respondent

CORAM: BLOKLAND J

RULING ON PRELIMINARY HEARING

(Delivered 16 July 2013)

**Introduction**

[1] This is a ruling made under s 25 of the *Serious Sex Offenders Act* (NT) after concluding a preliminary hearing. The application is brought by the Attorney-General of the Northern Territory under the recently passed *Serious Sex Offenders Act* (NT), seeking an interim continuing detention order or an interim supervision order in relation to the respondent pursuant to s 30 of the Act. The substantive relief sought, that the respondent be subject to a final continuing detention order or a supervision order under the Act, is not a matter for determination at this hearing.

[2] The procedure under the Act requires essentially a two stage process. First, this Court must decide at a *preliminary hearing* pursuant to s 25 of the Act whether the matters alleged in the application *would*, if proved, satisfy the Court that a respondent is a *serious danger* to the community as defined by the Act. If the Court decides that it *would not* be satisfied, it must dismiss the application pursuant to s 25(3) of the Act.

[3] The *Serious Sex Offenders Act* (NT) commenced on 1 July 2013. This application was filed on the same day. The principal affidavit in support of the application was affirmed prior to the commencement of the Act, on 28 June 2013. The respondent was served on 1 July 2013 and, I understand the respondent's lawyers were notified the following day. Under s 24 of the Act the Supreme Court must set a date for a preliminary hearing not more than 28 days after the application is filed. As the respondent is due for release from prison on 18 July 2013, the preliminary hearing was heard expeditiously within 12 days of filing, however, this has not been an ideal environment in which to ensure all relevant issues touching on new and fundamentally important legislation have been dealt with comprehensively. Nevertheless, I commend the efforts of the representatives of both parties to put forward the material and arguments relevant to the application and the defence of it at this first preliminary hearing in somewhat constrained circumstances.

[4] It may be noted that a lack of procedural fairness due to inadequate time being given to a respondent's legal representative to prepare for a

preliminary hearing has been held under the comparable Queensland legislation to provide grounds to dismiss an application.[1] Senior Counsel for the respondent does not go so far as to press for dismissal on this basis but rather emphasises that careful consideration must be given to the nature of the enquiry when issues of natural justice arise.

**Section 25 of the Serious Sex Offenders Act**

[5] Section 25 provides as follows:

> (1) At the preliminary hearing the Supreme Court must decide whether the matters alleged in the application would, if proved, satisfy the Court that the qualifying offender is a serious danger to the community.
>
> (2) If the Court decides that it would be satisfied, it must:
>
> (a) Set a date for the hearing of the application; and
>
> (b) Make a medical assessment order in relation to the offender naming two medical experts.
>
> (3) If the Court decides that it would not be satisfied, it must dismiss the application.

[6] Although the proceeding is a "preliminary hearing", not productive of a final order, it is a significant procedure capable of fundamentally altering, by way of extending the amount of time served in custody (in detention) by a respondent beyond the release date set by the sentencing court. A positive

[1] *Attorney-General of Queensland v Watego* [2003] QSC 367, Muir J at [35]-[43].

finding at a preliminary hearing means a respondent will become subject to further hearings and their custody status challenged in the interim, or they may be susceptible to supervision. In relation to this particular respondent; the legislation was not in force at the time of his offending, nor when he was sentenced. There is no doubt the Act applies to him but his case illustrates the fundamental impact of the Act on strongly held legal principles such as the rule against double jeopardy and certainty of sentences passed according to law. These principles are well recognised in the Second Reading Speech when the Bill for the Act was introduced by the Attorney-General.[2]

[7] On the other hand, the Act requires the Court to examine whether certain persons are a serious danger to the community, such that the community needs to be protected from an unacceptable risk of the person committing a serious sex offence in the future. Four other Australian jurisdictions now have similar schemes, although some caution must be applied to resist over-reliance on interstate interpretations given the differences between the broadly comparable legislation.

[8] The preliminary hearing under s 25 of the Act is not merely perfunctory. As recognised in the Attorney-General's second reading speech:

> "The threshold test is also an important aspect of the legislation as it defines the offenders who may potentially be the subject of an application by the Attorney-General. As I have said, this legislation is not aimed at all sex offenders, only those offenders who are likely to commit further sexual offences at the most serious end of the scale. In general terms, the threshold test in the bill is that it only

[2] Serious Sex Offenders Bill, Second Reading Speech dated 14 February 2013.

> captures prisoners who have been convicted of an offence of a sexual nature which is punishable by seven years or more of imprisonment."

[9] The rules of interpretation of statutes that fundamentally affect liberty are clear. Strict interpretation is required. The clear words of the statute must be given full effect; but any ambiguity is resolved in favour of the liberty of the subject. The statute is not to be read in a way that expands its reach beyond that which is produced by a strict reading.

[10] It is clear the respondent is a "qualifying offender" as defined in s 22 of the Act; he has been convicted of a "serious sex offence" and is under sentence of imprisonment for two counts against s 132(2)(e) and (4) of the Criminal Code, an offence listed in Schedule 1. The two offences he was convicted of were for intentionally exposing a child under 16 years to an indecent film; aggravated by the circumstance that the victims were under the age of 10 years.

[11] The matters alleged in the application are that there is a high or significant risk that the respondent will commit a serious sexual offence unless he remains in custody or is made subject to a supervision order. In substance the applicant relies on the sentencing remarks of his Honour the Chief Justice when sentencing the respondent on 29 November 2012 and the report of the counselling psychologist Mr Phillip Ward, also relied on by his Honour when sentencing the respondent.

[12] Section 25 requires "matters" to be considered by the Court. Given the context of the type of material that would be expected in an application of this kind, in my view a broad range of material is anticipated; both evidence in the strict sense and other cogent material such as sentencing remarks, criminal history, reports on efforts at and results of rehabilitation and associated reports. The Act clearly anticipates there may be affidavits filed by a respondent who is the subject of a preliminary hearing (s 91). None have been filed in this matter; in a practical sense there was no real possibility to do so given the time constraints. The structure of the Act points to the necessity of a genuine evaluation of the available material at the time of the preliminary hearing. The Court is required to consider whether it would be satisfied that the person is a serious danger to the community based on the material provided at the preliminary hearing with the assumption that the allegations will later be proven.

[13] By use of the word "would", it is common ground, (or almost so), that what is required is a positive absolute conclusion that the order "would" be made on the balance of probabilities (s 95(2)).[3]

[14] A positive finding can only be made on the ground that it will be proven that a person is a "serious danger to the community". A person is a "serious danger to the community" if there is an "unacceptable risk" that he will commit a serious sex offence unless he is in custody or subject to a supervision order. An unacceptable risk has been held to be "a real risk of

[3] *NZ Conference of Seventh Day Adventists v Registrar of Companies* [1997] 1 NZLR 751 at 759.

substance, not merely a remote possibility".[4] Use of the word "would" signifies that the Court is to satisfy itself that at the later anticipated hearing it will find the respondent to be a "serious danger to the community". The finding that a person is a "serious danger to the community" cannot be made unless proven to the standard of a "high degree of probability, that there is acceptable and cogent evidence of sufficient weight to justify the decision" (s 7(1)).

[15] Although the Act requires an assumption of later proof of the matters alleged, the preliminary hearing still requires, in my view an evaluation of the material both in support of, and contrary to the application, as a basic safeguard to determine whether in real terms an order "would" be made. It seems to me that is what is intended.

[16] I have approached this task by assessing the material in the senior clinician's affidavit. In particular I have assessed Mr Ward's report and his Honour the Chief Justice's sentencing remarks coupled with an assumption, at this stage, that the allegation that there is an unacceptable risk the respondent will commit a serious sex offence unless in custody or under supervision will be made out at a later hearing; notwithstanding that the evidence is yet to be produced.

[4] *WA v Latimer* [2006] WASC 235 at [16].

**Particular Matters Concerning the Respondent**

[17] Obviously the applicant relies on the previous criminal history as well as the schedule 1 offences already referred to. The applicant has a serious history. I will set out the history of convictions involving offences of a sexual nature only; noting a number are *not* schedule 1 offences for the purpose of the Act. Nevertheless, they are relevant.

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| 24 March 1997<br>(Offence date 29 August 1996) | Convicted and sentenced to six years imprisonment. Non parole period of three years. (Dealt with for six offences – two were offences of a sexual nature – aggravated assault m/f; indecent; weapon; committed in the course of unlawful entries). |
| 14 May 2001<br>(Offence date 5 October 2000) | Have sexual intercourse without consent. Sentenced to five years imprisonment. Non parole period of three years and six months. |
| 29 November 2012<br>(Offence date 16 July 2012) | Two counts of aggravated intentionally expose a child to an indecent film. One count of aggravated assault. Total of one year imprisonment. Non parole period of ten months (current sentence due to be released on 18 July 2013). |

[18] Although there are a significant number of other classes of previous offences, the focus of this hearing is on serious sexual offences. There are also a significant number of breaches of bonds and other orders. This is of course a serious record of sexual offending, however, it may be noted the most recent offending, effectively triggering this application, attracted a penalty of 12 months imprisonment, reflecting, it seems to me, less

objectively serious offending than the earlier offending. It is however in the context of the previous offending, that the latest offending assumes significance in terms of this application.

[19] It may also be noted that there is a significant "gap" in offending of a sexual nature. I am mindful that during much of this time the respondent was in custody. It has been pointed out that the most recent offending occurred shortly after the respondent was released from prison for the sentence imposed in 2001. The period of incarceration immediately prior, comprised sentences for other (non-sexual) offences, the commission of which resulted in the restoration of the unserved portion of the parole for the sexual offence for which the respondent was sentenced in May 2001.

[20] Without repeating all of Mr Ward's report prepared for sentencing purposes, the following matters may be noted: the respondent was 33 years of age at the time of assessment and is a Western Arrante man; he was willing to take responsibility for his offending behaviour; he did not use cognitive distortions in a self serving way as is often the case for sexual offenders; although sober when he committed the most recent offences, there is a significant history of alcohol, drug and inhalant use; there is a history of sexual abuse perpetrated on him at a young age; testing suggests he suffers anxiety and depression including suicidal ideation; he is in a high risk category of recidivism, (both in relation to violence generally and sexual offending), relative to other adult male offenders; effective supervision within the community is particularly challenging. If incarcerated,

participation in a sex offender programme was recommended. Mr Ward was, at the time of writing the report, willing to provide extensive sex offender relapse prevention therapy specific to his risks, if the Court recommended it.

[21] His Honour the Chief Justice noted in sentencing remarks that the respondent had been assessed as being at a high risk of reoffending. After consideration, his Honour set a non parole period, noting there would need to be a dramatic change for a successful application for parole and that it would be prudent for rehabilitation to occur whilst in prison.

[22] It is common ground the respondent did not complete a sex offender programme while in custody. Evidence before me from the Senior Clinician[5] indicates the programme was not available to the respondent as he did not have enough time to participate in it and it was not his fault that he could not participate in it. The evidence is, that if the respondent were detained under the Act, he would be given priority now to complete the programme.

[23] The respondent has a poor record in terms of supervision on parole and other court based orders.

**Conclusion**

[24] Generally speaking, applications under the Act should be reserved for the worst of repeat sexual offenders. So much is recognised in the Attorney-

[5] T at 10.

General's Second Reading speech.[6] The offending triggering the application, resulting in a sentence of 12 months in total for schedule 1 offending, would not have, by itself been sufficient to justify an order under the Act. With the history of offending, however, coupled with the risk assessment currently available from Mr Ward, I would make the order sought. If at the final hearing I am provided with acceptable and cogent evidence that there is a high or significant risk that the respondent will commit a serious sex offence unless he remains in custody or is made subject to a supervision order, I would make the appropriate order. I will make the order under s 25. I intend to set a hearing date under s 25(2)(a) and order medical assessments under s 25(2)(b).

**Interim Continuing Detention Order or Interim Supervision Order**

[25] Pursuant to s 30 the Court may make an interim continuing detention order or interim supervision order pending determination of the application. It is clearly the applicant's preference that an interim detention order rather than a supervision order is made.

[26] I am not satisfied that an interim detention order is the appropriate order. Although I have the evidence of past serious sexual offending, there is not sufficient cogent evidence for me to find that there is such urgency that any risk of future offending will be realised between the release of the respondent and the final hearing of the matter. Although the history is serious, it does not permit a conclusion of an identified risk of serious

[6] At 1, para 6.

sexual offending being realised in the short term. The evidence does not in my view support that conclusion. Section 9 requires the Court to have regard to the likelihood of the person committing another serious sexual offence and whether adequate protection could reasonably be provided by making a supervision order in relation to the person. It seems more likely the respondent may commit other types of offences, but that does not permit an order under the Act. The need to protect the community and victims is the paramount consideration. The provision of rehabilitation and treatment is a secondary consideration.

[27] The Act empowers the Court to make an interim supervision order. It is the alternative, (albeit by no means the preferred), order on the applicant's case. Section 63 directs that the Director of Correctional Services ensure that a supervisee is managed and supervised by parole officers in a way that is appropriate. The Court must have regard to whether it will be reasonably practicable for the Director of Correctional Services to ensure that the person is appropriately managed.

[28] The Senior Clinician's evidence is that supervision is not appropriate in the circumstances as the conditions of supervision would require residential rehabilitation with a high level of supervision, with monitoring, treatment and strict conditions around movements. Such a facility is not currently available but may be in the future; perhaps in purpose built cottages,

external to the new prison.[7] In cross-examination the Senior Clinician agreed that 'supervised freedom' (as it was put to her), was not available "at this time".[8]

[29] It may be that the type of supervision envisaged by the Senior Clinician is not available, but the Act empowers the Court to make an interim supervision order. There must be some option provided to the Court. Not to provide an option has the potential to impact on the impartiality of the Court to determine the application. This problem has been confronted in other jurisdictions.

[30] In *Director of Public Prosecutions (WA) v Mangolamara*,[9] (concerning an application for a final order), an application for a detention order was held to be flawed because the applicant had not persuasively ruled out the possibility of a suitable supervision order being made. I understand the need for caution concerning interstate schemes, however, the following from Hasluck J is relevant to this question:

> "200 It follows from this view of the matter that an application made by the DPP should not be treated as analogous to an application made by an offender for a community order or for parole in which the offender must satisfy the Court that he is fit to be released. An approach of that kind would have the effect of reversing the onus of proof. It is for the DPP to satisfy the Court that restrictive orders are necessary after the offender would otherwise have been released due to the completion of his fixed term of imprisonment. Courts are conscious that imprisonment is not usually used as punishment

[7] T 5-6.
[8] T 12.
[9] [2007] WASC 71.

in advance for crimes feared, anticipated or predicted. Further, in a case of this kind there is clearly a risk that a continuing detention order might be perceived as a further or double round of punishment for the original offence.

201 In my opinion, it follows from this view of the matter also that it is not sufficient, as in the present case, for the DPP simply to apply for a continuing detention order or a supervision order, and leave it to the Court to come up with various terms and conditions if the latter is thought to be appropriate. An approach of that kind would leave the Court in the untenable position of assisting the applicant to make out its case, for a Court is always required to act impartially, and, in this context, must be vigilant to ensure that basic principles of freedom are not being eroded."

[31] Unlike *Mangolamara*, I do not think it appropriate to dismiss the application for a supervision plan not being provided as these proceedings are at the preliminary stage only. I am well aware 'supervision' in the usual case can take many forms from relatively restricted and intensive supervision to mild restrictions. In the usual sentencing setting those options may include all manner of conditions and restrictions appropriate to the circumstances.

[32] The compulsory requirements of a supervision order are set out in s 18 of the Act; the supervisee must not commit a serious sex offence; or an offence of a sexual nature; must report to a parole officer as directed; must receive visits and accept communications as directed; must give to a parole officer information about their place of residence, employment, or education; must not leave, or stay out of, the Territory without permission and must comply with any directions given under s 20 of the Act.

[33] Pursuant to s 20 of the Act a parole officer may give the supervisee any direction the officer believes on reasonable grounds is appropriate, including reporting; wearing an approved monitoring device; giving a sample of voice for voice identification; allowing monitoring devices to be installed; reside at specified places; remain or leave specified places; participate in rehabilitation, care or treatment (it is important to note the type of relapse prevention treatment for example, that can be provided by Mr Ward); do anything reasonably necessary to enable management under s 63. A parole officer may also direct a supervisee *not* to do certain things, including importantly not to consume alcohol or drugs.

[34] It seems to me the powers granted under the Act are extensive in respect of monitoring supervisees. If supervision is not complied with, the supervision may be revoked. In determining whether supervision is appropriate, it is important to distinguish the features of this Act from other situations such as bail and community supervision after sentence. The respondent faces no charges. In these circumstances when the evidence does not point to an immediate risk of serious sexual offending there should be supervision. It should in my view be reasonably intensive.

[35] Prior to publication of these reasons there will be an opportunity for the parties to make submissions on appropriate conditions of supervision, particularly in relation to possible orders under s 19 (optional requirements) and s 15 (compatibility, if relevant, with *Child Protection (Offender Reporting and Registration) Act*).

**Orders**

(1) A hearing date will be set for the hearing of the application.

(2) Medical assessment orders will be made.

(3) The respondent will be subject to an interim supervision order.

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