R v ND [2014] NTSC 11

PARTIES:	THE QUEEN
	v
	ND
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21120087
DELIVERED:	4 April 2014
HEARING DATES:	5 July 2012, 19 March 2013
JUDGMENT OF:	BARR J

CATCHWORDS:

CRIMINAL LAW – Gross indecency involving child under 16 years – child under the age of 10 years – youth offender – required to comply with reporting obligations under s 13(2) of *Child Protection (Offender Reporting and Registration) Act* – underwent psychological treatment – risk of similar re-offending remained significant – satisfied that offender posed a risk to the sexual safety of children in any community where he might reside, and children generally

CRIMINAL LAW – Standard of proof – inappropriate to attach a standard of satisfaction to the decision that a person poses a risk of the kind referred to in s 13(3) of *Child Protection (Offender Reporting and Registration) Act*

CRIMINAL LAW – Standard of proof – facts upon which court's satisfaction for the purposes of a decision under s 13(3) of *Child Protection (Offender Reporting and Registration) Act* depends – order is protective and preventative – civil standard, balance of probabilities apply

Child Protection (Offender Reporting and Registration) Act (NT) s 11(1)(a), s 12(1)(a), s 13(1), s 13(2), s 13(3), s 13(4), s 14(5), s 14(6), s 16(1), s 37(2)(a), s38(6), s 72(1)

Criminal Code (NT) s 127

Fardon v Attorney-General for the State of Queensland (2004) 223 CLR 575; *Leach v The Queen* (2005) 16 NTLR 117; *R v Leach* (2004) 14 NTLR 44; *R v Olbrich* (1999-2000) 199 CLR 279; *Woods v The Queen* [2012] NTCCA 8, referred to

REPRESENTATION:

Counsel:

Applicant:	P Usher
Respondent:	D Woodroffe

Solicitors:

Applicant:	Office of the Director of Public Prosecutions
Respondent:	North Australia Aboriginal Justice Agency

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

R v ND [2013] NTSC 11
No. 21120887

BETWEEN:

THE QUEEN
Applicant

AND:

ND
Respondent

CORAM: BARR J

REASONS FOR DECISION

(Delivered 4 April 2014)

[1] On 19 March 2013, I made an order that ND, a youth offender, comply with reporting obligations under s 13(2) *Child Protection (Offender Reporting and Registration) Act* ("the Act"). These are my reasons.

[2] On 26 June 2011, while residing with his parents and family members in a small community near Ngukurr, ND (who was then almost 14 years old) committed an act of gross indecency upon a three-year-old female child. He took the child into hills near the community, removed his clothes and the child's clothes, and then rubbed his erect penis on the outside of the child's vagina. He was caught in the act by the child's mother and ran away.

[3] After being charged, ND pleaded guilty in the Supreme Court to committing an act of gross indecency upon the child, contrary to s 127 of the *Criminal Code*, with the admitted circumstance of aggravation that the child was under the age of 10 years.

[4] On 5 July 2012, ND was convicted and sentenced to detention for two years and eight months. The sentence was backdated to 17 August 2011 to reflect time spent by him in detention on remand. A non-parole period of 16 months was fixed, to run from 17 August 2011. At the time of sentencing, ND had just turned 15 years old. In an interview with the author of the Pre-Sentence Report provided to the Court, he frankly admitted "raping the baby", to use his words. When questioned as to why, he stated that he was a virgin and that he wanted to have sex. He also said that he had consumed four cans of VB prior to committing the offence.

[5] ND's sentencing was complicated by a number of difficult issues. At the age of 9 or 10 he had suffered a head injury when he fell from school playground equipment. He was diagnosed with a seizure disorder after suffering a seizure in 2008, and was then prescribed anti-epileptic medication. His medication generally controlled his active seizures.

[6] However, from the age of 11 he started to have behavioural difficulties. He smoked cigarettes and consumed alcohol and cannabis. He also inhaled volatile substances such as petrol and deodorants. He started to engage in auto-asphyxiation: he would choke himself with his hands to the stage where

he would lose consciousness. His auto-asphyxiation continued and escalated over time. While on remand in detention at the Don Dale Centre, some 15 or 16 separate incidents of self-asphyxiation were reported in the period from 21 August 2011 up to 23 June 2012. He received regular psychological treatment for his self-asphyxiating behaviour during that time.

[7] ND was assessed by a neuropsychologist in September 2011. He was found to be of average intelligence, but he suffered gross deficits in auditory attention, that is, in his ability to listen to and focus on what was said to him and to sustain his attention for an age-appropriate length of time. A mild hearing loss was a possible contributing factor. ND also had gross deficits in verbal memory, that is, he would rapidly forget information given to him verbally. The identified deficits rendered it difficult for him to understand and retain complex instructions and/or instructions involving multiple contingencies.

[8] Significantly, ND was also found to have had gross deficits in inhibition; he found it more difficult than most young people to suppress inappropriate responses to given stimuli.

[9] Psychologist Dr Diane Szarkowicz interviewed ND with an interpreter on 12 June 2012 and thought that he may have had attention deficit hyperactivity disorder (ADHD):-

> "The social and emotional immaturity, difficulties with arousal management, impulsivity, poor working memory and low attention all associated with ADHD were all observed during the current

> assessment … The impulsivity and poor arousal control common in ADHD may be characteristics that have heightened Master D's self-harm behaviours. These combined with Maser D's poor knowledge of coping skills and alternative sources of stimulation appear to have been major factors."

[10] Dr Szarkowicz considered that ND was a high risk for recidivism. She recommended that he receive specific sex offender treatment in a custodial environment, with a focus on age appropriate sexuality, victim empathy, relationship skills and urge and impulsivity management. She said this should be followed by close monitoring in an environment where any risk to children through unmonitored contact could be controlled. Dr Szarkowicz recommended that there be no contact without supervision with children until ND successfully met all treatment requirements and proved his ability to "address the core triggers for sexual offending outside a controlled environment".

[11] At the time of sentencing, ND was being medicated with fluoxetine (Prozac) which he told his Pediatrician made him feel less impulsive and "calmer on the inside."

[12] Prior to the sentencing of ND, the Crown made application that this Court order the offender to comply with the reporting obligations contained in the *Child Protection (Offender Reporting and Registration) Act*. After sentence was pronounced, the application was adjourned from time to time, so that the Court might assess the progress of rehabilitation.

[13] After sentencing, ND underwent 24 sessions of treatment by Dr Diane Szarkowicz, carried out weekly at the Don Dale Juvenile Detention Centre. Treatment was based on the HOPE program for juvenile sex offenders utilized by the NSW Department of Juvenile Justice, specially adapted for ND's specific cognitive needs. In a report dated 26 February 2013, Dr Szarkowicz referred to the 26 completed treatment sessions and wrote as follows:

> …. it is important to note that decisions about ND's long term risk in uncontrolled environments in relation to offending of a sexual nature are difficult to make at this point in time. While Master D has always readily engaged in treatment sessions, his progress has been slow due to his developmental concerns. ND is immature, functioning well below his chronological age in a range of areas. Some aspects of functioning have been within the early childhood age range, such as being able to read faces for age and emotion, and impulse control when under stress. Other developmental aspects are only slightly delayed such as his academic functioning. These delays in ability have meant that additional skills and understandings to the HOPE program are required to be taught to ND. … Master D still has significant therapy to engage in as part of his rehabilitation.
>
> Given this progress to date, the long term recidivism risk posed by Master D in relation to sexual offending with children cannot be accurately determined at this point in time. He requires further engagement with his therapy program before decisions about his long term risk … can be made in an informed manner.

[14] I concluded, at a point in time seven months or more post-sentencing, that the risk of similar re-offending by ND remained significant, notwithstanding his participation in the many therapy sessions referred to.

Reporting obligations

[15] The Act requires offenders who commit sexual offences against children to keep police informed of their whereabouts and other personal details for a period of time "in order to reduce the likelihood that they will reoffend and in order to facilitate the investigation and prosecution of any future offences that they may commit."

[16] Under s 14(6) of the Act, a "Territory reportable offender" must (relevantly in the case of ND) report his or her personal details to the Commissioner within seven days after ceasing to be in Government custody in the Territory.

[17] The matters which must be the subject of the report are set out in comprehensive detail in s 16(1) of the Act. The matters include full details of employment, details of affiliation with any club or organisation, details of motor vehicles owned or generally driven by the offender, details of tattoos or other permanent distinguishing marks, telephone numbers, including mobile numbers, email addresses and so on.

[18] Personal details must be reported to the Commissioner each year. Changes must be notified within seven days after any change occurs.

[19] Intended travel must be reported and any changes to travel plans must be notified.

[20] An adult who is a reportable offender in respect of a single Class 1 offence must comply with the reporting obligations for fifteen years – see s 37(2)(a) of the Act. In the case of a reportable offender who was a child at the time of commission of the reportable offence, the reporting period is reduced to seven and a half years – see s 38(b) of the Act. The difference in the case of youth offenders no doubt reflects legislative concern that reporting obligations should not disrupt or adversely affect a young person's life for a longer period than is assumed to be the minimum necessary in the interests of protection of the community.[1]

[21] The offence of which ND was found guilty is characterised as a Class 1 offence within Schedule 1 of the Act.[2]

[22] Under s 13(2) of the Act, if a Court finds a person guilty of a Class 1 offence committed as a child, it *may* order that the offender comply with the reporting obligations contained in the Act. This is in contrast with adults: if an adult commits such an offence the court *must* make such an order. This distinction is another example of legislative concern in relation to youth offenders. Under s 13(3) of the Act, the Court may make the s 13(2) order only if it is satisfied that the person poses a risk to the lives or the sexual safety of one or more children or children generally.

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1 A further indication of such concern is that a youth, unlike an adult, does not become a "reportable offender" under s 6(1) of the Act on the basis that he is a person who has been sentenced by a Territory court for a "reportable offence" and hence a "Territory reportable offender" – see s 11(1)(a) of the Act which negates s 6(1).

2 s 12(2) and Schedule 1 of the Act. It is also a "reportable offence" under s 12(1)(a) of the Act.

[23] I concluded that the principal object of the Act was to protect the community. It was not to (further) punish an offender. I considered that it was comparable in that respect to the legislation[3] considered in *Fardon v Attorney-General for the State of Queensland*,[4] which made provision for the continued detention in custody (or release under supervision) of serious sexual offenders who were shown to constitute a serious danger to the community.

[24] Because of the nature of ND's offending, and the matters referred to in [4], [8], [10], [13] and [14], I was satisfied that ND posed a risk to the sexual safety of one or more children, being the children in any community where he might reside, and children generally. Accordingly I made the order referred to in [1] that ND comply with reporting obligations under s 13(2) of the Act.

Additional matter

[25] There is one further matter I should mention. Counsel for ND argued that the standard of proof for the purposes of s 13(3) of the Act is not the civil standard of proof but rather to "a high degree of probability", or beyond reasonable doubt.[5]

[26] The Act itself is silent as to the standard of proof required. However, the Act suggests that the court's consideration of matters relevant to s 13 of the

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3 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld).
4 *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575.
5 Respondent's written submissions dated 13 March 2013.

Act is part of the sentencing process,[6] and a well-established principle, in determining the facts for sentencing, is that matters adverse to the offender must be established beyond reasonable doubt whereas matters favourable need be proven on the balance of probabilities.[7] Counsel for the respondent referred also to s 72(1) of the Act, under which a court may make a 'child protection order', which provides specifically for the court to be satisfied on the balance of probabilities that the person against whom the order is made poses a risk to the lives or sexual safety of one or children or children generally. Counsel for the respondent argued that the omission of an express warrant for the court to proceed on the balance of probabilities in deciding an application for an order under s 13 strongly suggests that the standard of proof is therefore proof beyond reasonable doubt.

[27] In my opinion, there is no authority or principle which would require the court to be satisfied according to a particular standard of proof that a person poses a risk of the kind referred to in s 13(3) of the Act. Either the court is satisfied or it is not, and it is inappropriate to attach a standard of satisfaction to the decision.[8]

[28] A separate issue is the standard of proof of the facts upon which the court's satisfaction depends. My reading of subsections 13(3) and 13(4) led me to conclude that such facts need to be established on the balance of

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6 For example, s 13(5) of the Act provides that the court may make an order under s 13(2) only if it imposes a sentence in relation to the offence and that it must make the order "concurrently with that sentence".

7 *R v Olbrich* (1999-2000) 199 CLR 270 at [27]; *Woods v The Queen* [2012] NTCCA 8 at [18].

8 See, for example, *R v Leach* (2004) 14 NTLR 44 at [30] to [37]; and (on appeal) *Leach v The Queen* (2005) 16 NTLR 117 at [9].

probabilities. I noted that s 13(4) states: “it is not necessary that the court be able to identify a risk to a particular child, particular children or a particular class of children”. That is not consistent with the level of precision usually required where the standard of proof is proof beyond reasonable doubt. I considered that a risk may be very significant but not able to be established beyond reasonable doubt. Moreover, although an order under s 13(1) of the Act involves some restrictions on a person’s civil liberties, privacy and personal freedom, the purpose of such an order is to protect children in the community, and not to punish an offender. Such an order is protective and preventative. It is therefore appropriate that the civil standard rather than the criminal standard apply to the proof of the facts upon which the court’s satisfaction depends.

[29] Notwithstanding my conclusion in [28], it may be noted that the facts summarized in [2] were admitted facts for the sentencing of ND and hence proven beyond reasonable doubt.
