Attorney General of the Northern Territory v EE (No.3)
[2016] NTSC 35

PARTIES:	ATTORNEY GENERAL OF THE NORTHERN TERRITORY v EE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	62 of 2013 (21328402)
DELIVERED:	30 June 2016
HEARING DATES:	30 May 2016
JUDGMENT OF:	BLOKLAND J

CATCHWORDS:

SERIOUS SEX OFFENDERS ACT – whether appropriate to revoke a final supervision order – the Court must revoke the order unless 'satisfied it would not be appropriate to do so' - preventive and protective purpose of the *Serious Sex Offenders Act* – cumulative effect of the contraventions– respondent's low level of insight – current risks cannot be appropriately managed under the final supervision order – final continuing detention order imposed

Serious Sex Offenders Act s 9, s 14 (2) (3), s 46 (1), s 49 (1)(b), s 51, s 52, s 58 (b) (ii), s 60, s 62 (2)(a), s 63 (2)(a), s 79, s 88.

Attorney General of the Northern Territory v EE (2013) 33 NTLR 102; *Attorney General of the Northern Territory v EE (no 2)* (2013) 280 FLR 35; *The Attorney General of the Northern Territory v EE* [2014] NTCA 1; *The Queen v EE*, 29 November 2012, Riley CJ, referred to.

REPRESENTATION:

Counsel:

Applicant:	T Anderson
Respondent:	J Hunyor

Solicitors:

Applicant:	Solicitor for the Northern Territory
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 (No. 3)
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No. 62 of 2013 (21328402)

BETWEEN:

ATTORNEY GENERAL OF THE NORTHERN TERRITORY
Applicant

AND:

EE
Respondent

CORAM: BLOKLAND J

REASONS FOR ORDERS

(Delivered 30 June 2016)

[1] These are the reasons for determining that it is appropriate to revoke a final supervision order made on 21 October 2013 under to the *Serious Sex Offenders Act* ('the Act'). A final continuing detention order will be made pursuant to s58 (b) (ii) of the Act.

Background

[2] On 21 October 2013 the respondent was made the subject of a final supervision order under the Act. The final supervision order followed an interim supervision order that was imposed on 16 July 2013. Reasons have

previously been published for making those orders.[1] I will not here repeat all of the relevant factors and considerations relevant to making the previous orders.

[3] The current contraventions concern the respondent consuming alcohol and cannabis on 26 January 2016 and using a mobile telephone with internet capabilities to access internet sites for the purposes of social networking and obtaining access to pornography. Prior to the current matters, there had been one single breach of a condition of the final supervision order.

[4] The previous (first) contravention of the final supervision order was dealt with on 17 December 2015. That contravention was for returning a positive test for cannabis. The respondent was summonsed for that breach. He was not taken into custody. The respondent admitted the contravention. The contravention was noted on the Court file. The applicant did not oppose the continuation of the supervision order. On that occasion it was found it would not be appropriate to revoke the final supervision order.

The Current Contraventions of Conditions 3 (c), 3 (d) and 3 (i) of the Final Supervision Order

[5] As the respondent was arrested in respect of the current breaches, the Commissioner of Correctional Services (Acting Commissioner Payne)

[1] *Attorney General of the Northern Territory v EE* (2013) 33 NTLR 102; *Attorney General of the Northern Territory v EE (no 2)* (2013) 280 FLR 35. An appeal by the applicant and cross appeal by the respondent against the interim supervision order were dismissed: *The Attorney General of the Northern Territory v EE* [2014] NTCA 1

prepared a supervision report pursuant to s 56 and 88 of the Act.[2] Acting Commissioner Payne's report sets out the relevant history and facts concerning the current alleged contraventions. He also gives his opinion as required under the Act,[3] on the question of whether continuing supervision is reasonably practicable in the context of the Act. He concludes supervision is no longer reasonably practicable to meet the paramount consideration set out in s 63 (2) (a) of the Act.

[6] The contents of Acting Commissioner Payne's report are not contentious in the sense that the respondent admits the current contraventions but argues it remains reasonably practicable for the Commissioner of Correctional Services to ensure his appropriate management and supervision.

[7] Condition 3 (c) of the final supervision order provides the respondent is not to purchase or consume alcohol and submit to testing as directed by a parole officer or police officer. Condition 3 (d) provides the respondent is not to consume an illicit drug. Condition 3 (i) provides that the respondent is not to use in any manner a computer or a mobile telephone with internet capabilities to access or view internet sites for the purpose of social networking or obtaining access to pornography sites.

[8] On 27 January 2016, the respondent admitted to consuming cannabis and alcohol on 26 January 2016. He submitted to a urinalysis which tested

[2] Acting Commissioner Payne's report is annexure MP1 to the affidavit of Maria Pikoulos made on 11 March 2016.
[3] Sections 88 and 63 *Serious Sex Offenders Act*.

positive for cannabis. A summons was issued on 8 February 2016 pursuant to s 49 (1) (b) of the Act.

[9] On 15 February 2016, the respondent's partner admitted to buying the respondent a mobile phone with internet capabilities using the respondent's Basics Card. She advised that the respondent had been viewing pornography sites on the phone. Her statutory declaration made on 15 February 2016, as well as a transcript of a record of interview dated 25 February 2016 setting out her claims, is attached to Acting Commissioner Payne's report.

[10] On 19 February 2016, the mobile phone was seized at the respondent's residence. He admitted his partner purchased the phone on his behalf on his Basics Card, that he used the mobile phone to listen to music and social networking, and that he had created a Facebook account under the name of William Brayden.

[11] Following seizure of the phone and the respondent's admissions, a warrant of arrest was issued under s 51 of the Act. The respondent was taken into custody on 19 February 2016.

[12] The seized phone has since been forensically examined. It has been found to be internet enabled and the webpage history indicates the phone has been

used to access 122 adult pornography websites.[4] The respondent accepts the facts that form the basis of the contraventions.

[13] Pursuant to s 79 of the Act, an order was made for medical assessments. Assessments were obtained from Dr Lester Walton and Dr Mark Hall. Dr Walton was one of two psychiatrists who provided an opinion when the final supervision order was made in October 2013.

[14] As a result of the contraventions the respondent has been subject to an interim continuing detention order pursuant to s 52 of the Act since 22 February 2016.

Considerations Pursuant to Section 58 the Act

[15] Section 58 of the Act requires the Court to revoke the final supervision order and make a final continuing detention order unless "satisfied it would not be appropriate to do so."

[16] Once a contravention is proven, s 60 provides the respondent bears the onus of satisfying the Court that it would not be appropriate to revoke the supervision order and make a final continuing detention order.

[17] In broad terms, counsel on behalf of the respondent argued that despite the recent contraventions, the risk posed by the respondent has not changed since the making of the final supervision order, hence there should be no revocation and no continuing detention order should be made. Broadly, it is

[4] Statutory Declaration of Detective Sergeant Johnathan Beer made 1 March 2016; Statutory Declaration of Detective Acting Sergeant Kate Macmichael made 7 March 2016, attached to Acting Commissioner Payne's report.

put that the same risk can be managed reasonably in the community by supervision. Counsel for the applicant argues the issue or problem with the respondent, if the final supervision order is to continue, is that there has been no change or improvement and it is no longer reasonably practicable that he remain in the community.

[18] When considering revoking a final supervision order, the Court must have regard as the paramount consideration, the need to protect victims or potential victims, their families and members of the community generally.[5] As a secondary consideration, the Court is required to consider the desirability of providing rehabilitation, care and treatment for a person subject to an application or order. In considering the need for protection, the Court must have regard to the likelihood of a respondent committing another serious sex offence; whether it will be reasonably practicable for the Commissioner of Correctional Services to ensure that a respondent is appropriately managed and supervised in accordance with s 63; and whether adequate protection could only reasonably be provided by making a continuing detention order.[6]

[19] In relation to whether a continuing detention order should be made, the same paramount considerations of protection apply.[7] Rehabilitation, care and treatment are secondary considerations. In terms of the need for protection, the Court must have regard to the likelihood of a respondent committing

[5] Section 14(2) *Serious Sex Offenders Act*.
[6] Section 14(3) *Serious Sex Offenders Act.*
[7] Section 9 *Serious Sex Offenders Act.*

another serious sex offence and whether adequate protection could reasonably be provided by making a supervision order in relation to the person.

[20] In making determinations under the Act, it is also acknowledged this is not a punitive regime and should not be allowed to operate in a manner that is punitive. The validity of legislation of this kind is sourced in its preventive and protective operation.[8]

[21] The cumulative effect of the current contraventions, including the nature of the contraventions committed shortly after the respondent was dealt with for a less significant breach, lead me to conclude that it is no longer reasonably practicable for the respondent to be appropriately managed in the community. As a practical matter I conclude the risk may be regarded as elevated because the respondent has now demonstrated that he is prepared to breach orders designed to protect the community from any further sexual offending by him. This is illustrated particularly in relation to the steps the respondent was prepared to engage in to obtain a mobile phone with internet access and to use that phone to view adult pornography. This demonstrates preparedness on the respondent's part to engage in conduct that undermines the protective regime designed to manage the already existing high risk of him committing another serious sex offence.

[8] *Attorney General of the Northern Territory v EE* (No. 2) (2013) 280 FLR 35, [66] – [67]

[22] The respondent was found to be at an unacceptable risk of committing a serious sex offence at the time of making the final supervision order. A final supervision order, rather than a detention order, was made as the risk could be appropriately managed by direct and intensive supervision. The respondent's conduct evident in the current contraventions has eroded the basis on which a supervision order rather than a custody order could be justified under the Act.

[23] I accept that up until late 2015, the respondent was compliant with a very strict regime of supervision and monitoring. Although the breach involving use of cannabis dealt with on 17 December 2015 was of some concern, in the context of his explanation and his otherwise excellent compliance, as a single breach, the conclusion of any elevated risk or a lessening ability to reasonably manage that risk could not be readily made. However, the further contraventions involving the consumption of alcohol and cannabis, obtaining a prohibited form of mobile phone, and using it in a prohibited manner, all point to a conclusion that the unacceptable risk cannot be reasonably managed in the community.

[24] It is appreciated that the respondent, over the life of the interim order and the final supervision order, had complied for over two years. He had for example complied with all reporting obligations. His level of engagement was considered to be satisfactory and he complied with electronic monitoring. Prior to November 2015, there were 20 consecutive negative urinalysis tests and 528 negative breath tests. Nothing untoward was found

in respect of his mobile phone and place of residence up until the current breaches. To his credit the respondent has also made frank disclosures in respect of aspects of the breaches to correctional services officers, and to both psychiatrists who have provided assessments. He also cooperated with police who seized the phone. The consumption of cannabis towards the end of 2015 coincided with commencing a relationship. That relationship initially at least, was considered by his supervisors to be supportive of his overall rehabilitation.

[25] On his behalf and to the respondent's credit it has been pointed out that during a period of two years and seven months supervision he has not absconded or attempted to abscond, he has not failed to comply with reporting, interfered or attempted to interfere with the electronic monitoring system, engaged in any violent conduct or committed or attempted to commit any other sexual offence. All of that is accepted. His generally sound compliance may be taken into account at a future review. The respondent's willingness however to engage in conduct that involved concealing for some time that he had a mobile phone with internet access, and using it in the manner subsequently discovered, in my view demonstrates the risk of offending cannot be appropriately managed. The respondent's continued limited insight into his circumstances unfortunately means he may conduct himself in such a way as to compromise the very protections that are in place to minimise the risk of any further serious sexual offending.

[26] A further consideration underlining the importance of the conditions the respondent has to contravene is that some of the prior sexual offending was committed when the respondent was heavily intoxicated with alcohol and cannabis. Although much of the offending that formed the basis of the original application under the Act was some time ago, intoxicants remain connected with the respondent's history of offending. His most recent offending committed in July 2012, was not associated with alcohol or cannabis use however, it was associated with pornography on a mobile phone. It is evident from the sentencing remarks,[9] the responded showed a pornographic video that was on his mobile phone to his two young nieces. He then attempted to remove the pants of one of the girls. She resisted preventing this and became scared. Both young girls ran away.

[27] It is appreciated here that the viewing of pornography the subject of the contravention was not associated with showing the pornography to any child, however one of the reasons for the relevant condition is to minimise the risk of conduct of that kind occurring.

[28] A number of medical assessments have noted the respondent has poor awareness or insight in respect of the impact of his behaviours. Dr Hall's medical assessment describes the respondent as having no insight into his motivation for offending, including hypersexuality or using sex as a coping mechanism. [10] In my opinion the combination of past problems with

[9] *The Queen v EE*, 29 November 2012, Riley CJ
[10] 29 April 2016, annexure MP6 of the Affidavit of Maria Pikoulos made 3 May 2016.

substance abuse that was connected with his offending, the continued hypersexuality coupled with his recent lack of compliance in respect of the orders made to assist in managing those issues and the inherent risks are all relevant factors that make a compelling case in favour of revoking the supervision order. The paramount consideration of protection of the community can no longer be said to be genuinely met by the supervision order.

[29] Dr Hall's recent medical assessment is particularly relevant. The following parts demonstrate that not a great deal has changed with respect to the respondent's awareness:

> 77. In the domain of ***psychological adjustment***, EE may possess *attitudes that support of condone sexual violence*. Although no cognitive distortions were elicited during the current interview, there was evidence of a sense of male entitlement. In addition, past assessments have noted a degree of sexual entitlement as well as a belief that non-consensual sex may be acceptable in extreme cases. EE clearly possesses *problems with self-awareness*. He has poor awareness of the impact of events in his own early life and on his psychological and emotional development, whereby he lacks an understanding not just of the nature of the impact but that there has been any impact at all. He displays so called 'alexithymia', whereby despite his good command of the English language he is unable to observe or meaningfully describe his inner emotional states, which in effect he keeps hidden from his own view as a kind of unconscious psychological defence mechanism. Furthermore, EE has no insight into his motivation for offending, including hypersexuality or using sex as a coping mechanism. He possesses the risk factor of *problems with stress or coping*. He acts out impulsively and fails to consider the consequences. He uses substances and sex to cope emotionally and may be to some extent institutionalised. There are *problems resulting from child abuse* whereby EE has sealed over events that have been a source of shame for him and as yet remain unprocessed. The role of this in his psychosexual development and sexual offending remains unclear.

> 78. In the domain of *mental disorder*, EE is considered to have an appetitive motivation to offend stemming from hypersexuality. Whilst this is not a classic form of sexual deviance such as paraphilia, it is relevant to the assessment and management of his risk of further serious sexual offending. EE does not have a psychopathic personality disorder. However, his score of 22 on the instrument reflects problems with his lifestyle and behavioural controls, which is also a significant issue going forward. EE possesses the risk factor of *problems with substance use* as previously described.

[30] Dr Hall's conclusion is EE is at high risk of committing a further serious sexual offence if not subject to a continuing detention or supervision order. The relevant factors he sets out are:

- Appetitive motivation to offend stemming from hypersexaulity and sexual preoccupation;
- Poor emotional awareness particularly with respect to anger and sadness;
- Vulnerability to impulsive acting out;
- Use of sex as an emotional coping mechanism;
- Vulnerability to the reinstatement of substance abuse and dependence with associated escalation in anger and/or disinhibitory effects.

[31] Dr Hall's opinion is that risk management of the respondent under a supervision order would involve mitigation of the risk through approaches informed by individualised assessment of the dynamic factors that might influence his behaviour, with a view to protecting the community to a degree that is adequate. In his opinion however it is not possible to reliably quantify any reduction in risk that might be achieved with tailored intervention. Dr Hall also stresses the importance of the respondent's sustained cooperation for the success of a future management plan.

[32] Notwithstanding the respondent's cooperation until relatively recently, given the two contraventions of the order now before the Court, his cooperation in terms of compliance with a supervision regime can no longer be considered sufficient to maintain the level of protection of the community that is required.

[33] It was argued on the respondent's behalf that Dr Hall was not suggesting that only a continuing detention order could reasonably provide adequate protection. My interpretation of Dr Hall's report is that he acknowledges the final decision lies with the Court and therefore gives an alternative should the Court decide to release the respondent on a supervision order. It is the case that neither Dr Walton nor Dr Hall asserts any significant change in the risk posed by the respondent. The supervision order was for some time effective in regulating the respondent's conduct, but to ensure the protection required by the Act requires the respondent's cooperation and compliance. This last point was stressed in Dr Hall's report. Unfortunately the respondent engaged in an activity that had the effect of sabotaging an important part of the Order designed to protect the community.

[34] Dr Walton's opinion has not changed since his original report of 11 September 2013. In confirming his previous opinion, Dr Walton states: "It is outside my area of expertise to make any specific comment about the appropriate duration of any further period of incarceration, if that is deemed necessary, except to state that, unless [the respondent] is made the subject of an indefinite prison sentence, the same challenges will arise in relation to

releasing him to the community at a later date. I do not see further incarceration, per se, as enhancing the prospects of successful assimilation back into the community."

[35] Counsel for the respondent drew my attention to the fact that as a result of the current breaches the respondent was charged with two offences of engaging in conduct that resulted in the contravention of a supervision order, contrary to s 46 (1) of the Act. He pleaded guilty to those two offences in the Local Court and was sentenced to seven days imprisonment with respect to the first contravention, and two days imprisonment with respect to the second.

[36] It is acknowledged that the respondent has now been in custody awaiting the outcome of these proceedings since 19 February 2016. He has been dealt with for the offences covering the same conduct. I accept however the conclusion of Acting Commissioner Payne that it is not reasonably practicable to continue to provide the level of supervision required to meet the protection objects of the Act.[11]

[37] Acting Commissioner Robert Steer gave brief evidence at the hearing following an affidavit made by him on 26 May 2016. As a result of the reports of Dr Hall and Dr Lester and the report of Acting Commissioner Payne, Deputy Commissioner Steer agreed with the conclusion that it was no longer reasonably practicable to continue to provide the level of direct

[11] Section 62(2)(a) *Serious Sex Offenders Act.*

supervision required by the Act. Deputy Commissioner Steer pointed out that should the respondent be released, the management strategy suggested by Dr Hall was similar to a number of the requirements of the final supervision order. These included the respondent being subject to random drug screening, breath testing, GPS monitoring, a prohibition from having unsupervised access to children under the age of 16, being prohibited from accessing pornographic material, and accessing the internet at a private residence or on any mobile phone.

[38] In cross examination Deputy Commissioner Steer agreed that in the event of a further supervision order it was reasonably practicable that random urinalysis and breath testing could be done and that the respondent could be subject to daily testing. He agreed this could mitigate the risk of the respondent consuming drugs or alcohol. He said he could not guarantee the respondent would not again obtain a phone and use it to access pornography. He agreed collateral checks could continue in respect of possession of any phone, however on the large block of land where the respondent was residing, to search the area and hiding places would be almost impossible.

[39] It may be that some further protections could be put in place, but given the respondent's attitude at the time of the breaches and his low level of insight, I cannot be satisfied that the respondent would not undermine any further checks and conditions imposed. I am not sure the respondent understands the issues associated with substance abuse or the need to access available

treatments. From Dr Hall's report, his insight appears to be mixed, but there are some positive signs:

> 58. EE believed that there was no risk that he would take up smoking cannabis again and that he would avoid anyone who smoked cannabis. On specific enquiry, he said that he believed cannabis did him no harm but that he would avoid it even if not subject to a supervision order because "*I need to be mentally sharp to do my course and run my business*." He said that going out drinking with a group would be bad, but believed that he would be okay to have a drink after work or on a weekend in his own home.
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> 59. EE believed that the benefits of sex offender treatment had been to help him see that he was "*not showing people respect*" and putting his gratification needs first. He said that in individual sex offender treatment, he was trying to work on "r*especting people's boundaries*" and "*not crossing them*", but found it uncomfortable talking to a woman about men's feelings and would prefer to have a male therapist. He spoke positively of his sessions with Mr Laming, and said that he would attend more frequently if it were possible. In relation to antilibidinal medication, he said that he was initially interested in hormonal treatment but was now opposed to it on the basis of the side effects. He initially said that he did not even want to consider the non-hormonal option of selective serotonin reuptake inhibitor (SSRI) antidepressants to attenuate his sexual drive, but by the end of the interview said that he was willing to trial it.

[40] In terms of the respondent's rehabilitation it would appear there has been some, but not significant progress. It is understood the respondent has instructed his counsel he will accept antidepressant treatment. I will not address all of the issues in respect of the Sex Offender Treatment Programme and his varying levels of engagement in these reasons. The respondent commenced the Sex Offenders Treatment Programme in a group setting on 28 November 2013. He also received individual sexual offender treatment since 10 February 2015. An issue was previously raised about

whether some of the respondent's lack of engagement with the programme may be through being uncomfortable in respect of speaking to a female psychologist. I am unsure about the strength and reliability of this concern raised by the respondent, however it is a matter in any event being addressed by correctional services. The respondent had 45 three hour group sessions of the Sex Offenders Treatment Programme. He also attended 22 individual sessions of the programme. Limited progress is said to have been made in respect of addressing sexual offending behaviours. On 8 February 2016, it is reported that he refused to engage and advised the psychologist delivering the programme that he no longer wished to participate.

[41] It is a positive development that Mr Laming, with whom the respondent has developed therapeutic relationship, will be engaged further to assist the respondent. Deputy Commissioner Steer indicated this counselling is available in detention or in the community. Deputy Commissioner Steer confirmed Mr Laming could be engaged to work with the respondent on the issues identified by Dr Hall: addressing the respondent's own childhood sexual abuse; psychological counselling to develop an emotional vocabulary; counselling in relation to coping with stress and managing relationships, as well as substance abuse counselling. This counselling could occur in custody or in the community.

[42] The gravity of the order to be made is acknowledged, however the risks cannot at this time be appropriately managed in accordance with the Act. I

am not satisfied it would not be appropriate to revoke the final supervision order and will order a final continuing detention order.

[43] It is also acknowledged that the respondent has been in custody on an interim continuing detention order since 22 February 2016. He has been subject to supervision orders for over two years. In those circumstances I will order the review pursuant to s 65 of the Act in one years' time rather than two years, subject to hearing the views of counsel.

Orders

1. The final supervision order of 21 October 2013 is revoked.

2. The respondent is subject to a final continuing detention order.

3. The review pursuant to s 65 of the Act is to be conducted in one years' time.
