

*The Queen v Forscutt* [2004] NTSC 8

PARTIES: THE QUEEN

v

FORSCUTT, Alan Edward

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE  
TERRITORY EXERCISING  
TERRITORY JURISDICTION

FILE NO: SCC/8707846

DELIVERED: 5 March 2004

HEARING DATES: 26 February and 3 March 2004

JUDGMENT OF: MARTIN (BR) CJ

**CATCHWORDS:**

CRIMINAL LAW – MENTAL IMPAIRMENT – SUPERVISION ORDER –  
SUPPRESSION OF

*Criminal Code (Mental Impairment and Unfitness to be Tried) Act 2002,*  
s 43ZM

**REPRESENTATION:**

*Counsel for:*

Alan Edward Forscutt:	S Cox (NTLAC)
DPP:	J Karczewski QC
Dept Health & Community Services:	D Farquhar (Cridlands)

Judgment category classification: B

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

*The Queen v Forscutt* [2004] NTSC 8  
No. SCC/8707846

BETWEEN:

**THE QUEEN**  
Plaintiff

AND:

**ALAN EDWARD FORSCUTT**  
Defendant

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered 5 March 2004)

- [1] This is an application by Mr Forscutt for a variation of a suppression order made by the former Chief Justice, Martin CJ, on 27 June 2003.
- [2] On 21 October 1986 Mr Forscutt shot and killed a neighbour, Mr William Caldwell. In 1987 Mr Forscutt was acquitted of the charge of murder on the basis of insanity. At that time, s 382(2) of the Criminal Code required that Mr Forscutt be kept in strict custody in such place and in such manner as the court thought fit until the Administrator's pleasure was known.
- [3] After an initial period at the Royal Darwin Hospital, Mr Forscutt was held in custody under the control of the Director of Correctional Services. In

substance, from January 1991 Mr Forscutt was held in custody in prisons in the Northern Territory as if he was undergoing a sentence of imprisonment.

- [4] On 15 June 2002 Part IIA of the Criminal Code came into operation. It was enacted by the Criminal Code Amendment (Mental Impairment and Unfitness to be Tried) Act 2002. The amendment had the effect of creating an entirely new regime for dealing with persons who are unfit to be tried or were suffering from a mental impairment at the time that the acts constituting an offence were committed. The new regime included provision for the making of supervision orders in respect of persons found not guilty of offences by reason of mental impairment.
- [5] The amending Act contained transitional provisions to cater for Mr Forscutt and others who had been acquitted of crimes by reason of insanity prior to the commencement of the amending Act. Those transitional provisions directed that such persons be treated as supervised persons held in custody.
- [6] The amending legislation brought about a significant change in the way people found not guilty of a crime by reason of insanity or some other mental impairment are to be treated. In the case of Mr Forscutt, in substance the court was required to consider the circumstances of the killing and the personal circumstances of Mr Forscutt, including his mental impairment, and to make a supervision order with such conditions as the court considered appropriate.

- [7] As directed by the amending legislation, in June 2003 a review of the position of Mr Forscutt commenced before Martin CJ. After considering all the material placed before him, on 27 June 2003 his Honour made a custodial supervision order which required that Mr Forscutt be kept in custody and treated in accordance with a treatment plan which had been put before his Honour. The order directed that the treatment plan be implemented as soon as possible.
- [8] During the review proceedings evidence was presented to Martin CJ that if the proceedings or Mr Forscutt became the subject of publicity, the future rehabilitation of Mr Forscutt would be seriously compromised. His Honour ordered that any publication of any part of the proceedings, including the terms of the custodial supervision order, be prohibited. His Honour also suppressed from publication his reasons for ordering suppression. In substance, there was a complete prohibition on reporting the fact or content of the proceedings and orders as well as the fact of the suppression orders.
- [9] On 21 February 2004 the Northern Territory News reported that Mr Forscutt was being allowed to take day trips out of prison. That report was followed by an editorial on 24 February 2004 which was heavily critical of the conduct of the authorities in permitting Mr Forscutt to leave the confines of the prison. As a consequence of that publicity an application was made for a variation of the existing suppression orders with a view to suppressing publication of further material concerning any occasions on which Mr Forscutt is permitted to leave the confines of the prison. It was

submitted that such publicity does not sit well with the spirit of the reasons for the suppression orders and would seriously compromise the prospects of successful rehabilitation.

[10] The circumstances of this matter raise a number of difficulties and conflicting interests. It must not be overlooked that Mr Forscutt has not been convicted of any offence. He was found not guilty of the charge of murder. The jury was satisfied that at the time of the killing Mr Forscutt was insane.

[11] Mr Forscutt obviously has an interest in his own successful rehabilitation. But the community also has an interest in that successful rehabilitation. Obviously it would be to the benefit of the community if Mr Forscutt could be successfully rehabilitated and reintegrated into the community. The Legislature had this public interest in mind when the Criminal Code was amended to provide for the court to make supervision orders. The legislation clearly envisages the desirability of reintegration into the community if that reintegration can be achieved safely. Section 43ZM of the Code directs the court to 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.”

[12] Bearing in mind the public interest in the successful rehabilitation of persons who are not guilty of crimes by reason of mental impairment, where

possible a court should endeavour to ensure that treatment plans or rehabilitation programmes are not adversely affected by outside influences. Any influence which would seriously compromise future rehabilitative efforts jeopardises this aspect of the public interest.

[13] On the other hand, there is the fundamental principle that proceedings before a court of law should be conducted in public unless the interests of the administration of justice require otherwise. There is a strong public interest to be served by proceedings being conducted in public. This interest includes the community being informed of orders made by the courts when dealing with persons convicted of crimes or found not guilty of crimes by reason of mental impairment. It might be said with some force that it is in the interests of the community to know when offenders are to be released from custody and when those acquitted on the ground of mental impairment are permitted to move about the community whether supervised or unsupervised.

[14] There is an added difficulty that has arisen in the particular circumstances of the matter under consideration. The fact that Mr Forscutt killed a neighbour and was subsequently found not guilty on the ground of insanity has been the subject of extensive publicity. However, as a consequence of the suppression orders made in 2003, thus far the wider community has not been permitted to know that as a consequence of the change in the law this court, as it was required to do, undertook a review of Mr Forscutt's case and made a custodial supervision order which included directions as to his future

treatment. The public has not been permitted to know that the Judge ordered that the treatment plan be implemented as soon as possible and that Mr Forscutt be permitted to participate in the treatment plan, including being granted leave of absence from the prison for purposes consistent with the treatment plan. When publicity was given to the fact that Mr Forscutt was permitted to leave the confines of the prison, no-one was permitted to inform the public that such leaves of absence had been authorised by this court provided they were for purposes consistent with the treatment plan.

[15] In my opinion, notwithstanding the possibility of an adverse impact upon the progress of Mr Forscutt's rehabilitation, it is important that the community be informed of the change in the law and the history of this matter to which I have referred. The community should be aware that with the knowledge of the circumstances of the killing, this court received evidence as to the mental state of Mr Forscutt and as to his future treatment and possible reintegration into the community. The evidence included guidance from medical experts who were able to present a treatment plan which, in their opinion, would best serve the prospects of rehabilitating Mr Forscutt. That plan contemplated leaves of absence from the prison for purposes consistent with the treatment plan.

[16] As Martin CJ observed, what was before his Honour was not an issue of a criminal sanction under the criminal law, but a plan for the rehabilitation of a person who had been found not guilty of a crime by reason of a mental impairment, and who had spent many years in the confines of a prison under

normal prison discipline. It must also be stressed that underlying the court's consideration of Mr Forscutt's case and similar cases is the protection of the public. That protection is also of primary importance to those in whose custodial supervision Mr Forscutt has been placed.

[17] Whether the custodial supervision order was in appropriate terms or otherwise, and whether leaves of absence are appropriate or otherwise, may well be matters on which opinions will differ. In my view, however, for present purposes it is essential that the community be informed of the history of this matter and of the orders made by Martin CJ in June 2003. The material and submissions put before his Honour in June 2003 should remain suppressed, but subject to suppression of a few specific matters, the order prohibiting publication of the fact of the review, the content of the supervision orders and his Honour's reasons for making the orders should be revoked. Similarly, the order suppressing the reasons for making the suppression orders should be revoked.

[18] The effect of the orders that I propose will be to release for publication the content of the custodial supervision orders which encompass the order that Mr Forscutt be permitted to participate in a treatment plan, including being granted leave of absence from the prison for purposes consistent with the treatment plan. However, it would be inappropriate to permit publication of other contents of the treatment plan. Other details of that plan will remain suppressed.

[19] As to the future, it is unknown whether those who have the duty of supervising Mr Forscutt will permit him to leave the confines of the prison on leave of absence. Similarly, if leave of absence is permitted, it is unknown what conditions will be attached to such leave. It is clear that if publicity is given to the fact of future leave occurring that publicity will have a significant adverse effect upon the progress of Mr Forscutt's rehabilitation. In turn, that adverse impact will tend to undermine the efficacy and purpose of the court orders.

[20] As I have said, there are tensions between competing public interests. Bearing in mind the information that will now become available to the public concerning the history of this matter and the orders made by the Judge following the supervision review, on balance I have reached the opinion that future releases of Mr Forscutt from custody should be protected from publicity. To that end, in my opinion it is appropriate to suppress from publication the name, identity or image of Mr Forscutt in relation to the implementation of the conditions of the custodial supervision order, including the treatment plan. This will have the effect of prohibiting from publication any reference to a future release from custody of Mr Forscutt for the purposes of the treatment plan.

[21] I will hear counsel further as to the precise terms of the orders.

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