

*The Attorney-General of the NT v EE* [2014] NTCA 1

**PARTIES:** **THE ATTORNEY-GENERAL OF  
THE NORTHERN TERRITORY**

v

**EE**

**TITLE OF COURT:** COURT OF APPEAL OF THE  
NORTHERN TERRITORY

**JURISDICTION:** CIVIL APPEAL FROM THE SUPREME  
COURT EXERCISING TERRITORY  
JURISDICTION

**FILE NO:** AP 10 of 2013 (21328402)

**DELIVERED:** 31 January 2014

**HEARING DATES:** 31 January 2014

**JUDGMENT OF:** RILEY CJ, SOUTHWOOD  
and KELLY JJ

**APPEALED FROM:** BLOKLAND J in proceedings No 62 of  
2013

**REPRESENTATION:**

*Counsel:*

Appellant: Mr T Anderson  
Respondent: Mr R Wild QC  
Mr J Hunyor

*Solicitors:*

Appellant: Solicitor for the Northern Territory  
Respondent: North Australian Aboriginal Justice  
Agency

Judgment category classification: B  
Judgment ID Number: Ri11402  
Number of pages: 8

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

*The Attorney-General of the NT v EE* [2014] NTCA 1  
No AP 10 of 2013 (21328402)

BETWEEN:

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

AND:

**EE**  
Respondent

CORAM: RILEY CJ, SOUTHWOOD and KELLY JJ

EX TEMPORE

REASONS FOR JUDGMENT

(Delivered 31 January 2014)

**The Court:**

**Introduction**

- [1] This is an application by the appellant pursuant to the terms of the *Serious Sex Offenders Act* for an interim continuing detention order in relation to the respondent pending determination of the appellant's appeal and the respondent's cross-appeal.
- [2] The *Serious Sex Offenders Act* commenced on 1 July 2013. On 4 July 2013 the Attorney-General sought orders for a final continuing detention order or,

alternatively, a final supervision order pursuant to the terms of that Act in relation to the respondent. The matter was heard in the Supreme Court and reasons for decision were published on 21 October 2013.<sup>1</sup> The trial judge ordered that the respondent be subject to a final supervision order commencing that day.

- [3] By notice dated 13 November 2013 the appellant sought a review of the decision pursuant to ss 102 and 104 of the Act. The respondent has filed a notice of cross-appeal. The appeal and cross-appeal have been listed for hearing in the April sittings of the Court.
- [4] Section 103 of the Act provides that an appeal against the decision does not stay the operation of the original decision unless the Court of Appeal orders otherwise. By summons dated 4 December 2013, pursuant to s 105 of the Act, the appellant sought an interim continuing detention order in relation to the respondent pending determination of the appellant's appeal and the respondent's cross-appeal.
- [5] The primary object of the Act is to “enhance the protection and safety of victims of serious sex offences and the community generally by allowing for the control, by continued detention or supervised release, of offenders who have committed serious sex offences and pose a serious danger to the community”.<sup>2</sup> Section 31(1) of the Act provides:

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<sup>1</sup> *Attorney-General of the Northern Territory v EE* (No 2) [2013] NTSC 68.

<sup>2</sup> *Serious Sex Offenders Act* s 3.

(1) On hearing an application made under section 23, the Supreme Court may make a final continuing detention order or final supervision order in relation to the qualifying offender if satisfied that the qualifying offender is a serious danger to the community.

- [6] Under the terms of the Act 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.<sup>3</sup> At the conclusion of the hearing in the Supreme Court the trial judge determined that the respondent was a qualifying offender who is a serious danger to the community within the meaning of that provision in the Act.
- [7] The trial judge then considered whether to impose a final continuing detention order or a final supervision order in relation to the respondent. A continuing detention order is an order that the person be detained in custody and if it is a final continuing detention order, the person is to be detained indefinitely.<sup>4</sup> The order remains in force until it is revoked.<sup>5</sup> The terms of a final supervision order may include such requirements as the court considers appropriate but must include the compulsory requirements set out in s 18 of the Act. Such an order must state the date upon which it will expire and the expiry date must be at least five years after the date on which the order came into force.<sup>6</sup> The duration of the order may be extended if the court is

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<sup>3</sup> *Serious Sex Offenders Act* s 6.

<sup>4</sup> *Serious Sex Offenders Act* s 8.

<sup>5</sup> *Serious Sex Offenders Act* s 10.

<sup>6</sup> *Serious Sex Offenders Act* s 17.

satisfied that the supervised person is still a serious danger to the community.<sup>7</sup>

[8] In deciding whether to make a continuing detention order the court is required to regard the need to protect victims of serious sex offences committed, or likely to be committed, by the person, the victim's family and members of the community generally as the "paramount consideration". A secondary consideration is the desirability of providing rehabilitation, care and treatment to the person. The court must have regard to the likelihood of the person committing another serious sex offence and whether "adequate protection could reasonably be provided by making a supervision order in relation to the person".<sup>8</sup>

[9] In determining whether to make a supervision order the court must have regard to the same considerations of protection but must also consider:<sup>9</sup>

(W)hether it will be reasonably practicable for the Director of Correctional Services to ensure that the person is appropriately managed and supervised as mentioned in section 63.

[10] The Director of Correctional Services provided a report regarding the respondent to the Attorney-General pursuant to s 88 of the Act. The report was produced to the Court as required by s 99 of the Act. In that report the Director expressed the view that the level of supervision necessary to manage the risk posed by the respondent and ensure the safety of the

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<sup>7</sup> *Serious Sex Offenders Act* s 38.

<sup>8</sup> *Serious Sex Offenders Act* s 9.

<sup>9</sup> *Serious Sex Offenders Act* s 14(3)(b).

community pursuant to the proposed supervision order was not reasonably practicable. That view was expressed in light of the resources available to the Department of Correctional Services to provide supervision for the respondent.

[11] At the time of the report, the respondent was under an interim supervision order and was residing in a caravan purchased by the Department of Correctional Services and located in the Agriculture Area of Berrimah Prison. Extensive efforts had been made to obtain suitable accommodation outside of the prison but without success. The respondent was subject to a high level of surveillance and monitoring in light of the assessed risk of serious sexual offending in the community. The Director regarded 24 hour supervision as a necessary response to the risk identified. The opinion was expressed that the Department did not have sufficient resources to meet the attendant costs.

[12] The trial judge considered the report of the Director and observed:

It seems to me there are options available, but at a cost. Given the particular situation of this respondent and the evidence that if he spends an extended period in prison it will reduce the likelihood of assimilation back into the community, it is reasonable in my opinion that a form of intensive supervision be ordered, even if that will mean a readjustment of resource distribution within Correctional Services. In the longer term, a supervision order supports the primary object of protection under the Act and is preferable to detention. I do not characterise what is being ordered as “the impossible, or even the impracticable” as was said in *Attorney-General for the State of Queensland v Sybenga*.

[13] Her Honour noted that the legislative regime “is sourced in its preventive and protective operation” and is not punitive and then observed:

To make a final continuing detention order in circumstances where intensive supervision would meet the objectives of the Act, albeit with some extra cost, it would be permitting the Act to operate punitively. That is to be avoided as it is not the objective of the Act.

[14] The Director has provided an affidavit to this Court for the purposes of this application. Since the making of the continuing supervision order the respondent has continued to reside in the caravan. He is not permitted to leave the general surrounds of the caravan unescorted. He is the subject of a curfew. Once a week he is taken by two surveillance officers to meet his Specialist Case Manager. He is randomly checked by a surveillance officer between five and seven times per week. Since 30 October 2013 he has been fitted with an electronic monitoring bracelet. There have been some difficulties with the operation of the bracelet and it has been noted that the bracelet is “not very difficult to remove”. The current cost of supervising the respondent is said to be \$402.16 per day. That figure is challenged by the respondent. At the time of the hearing in September 2013 the average cost of keeping a person in custody per day was said to be \$203. Much depends on the method of costing. The higher the level of security of an individual prisoner the higher is the cost in relation to that prisoner. The actual cost of implementing the supervision order is in dispute. In any event counsel for the appellant made it clear that, for the purposes of this application, the concern is not one of cost but rather adequate supervision.

[15] The affidavit reveals that since the making of the order in the Supreme Court, and contrary to the then expressed expectations of the Director, electronic monitoring has become available and is now being employed as part of the surveillance of the respondent. The affidavit does not suggest that there has been any incident regarding the respondent in the intervening period which would give rise to any increased concern over that considered at the time the order was made. There is no suggestion that the respondent has failed to comply with any of the requirements of his supervision. In addition it is to be noted that the trial judge found that the respondent does not have a compulsion to commit sexual offences which may lead him to abscond or such that, if he were to abscond, there would be a high probability of him reoffending before he could be returned to custody. The respondent has not absconded or attempted to abscond at any time including since being placed under supervision. The regime of supervision must remain at the discretion of the Director. Thus far the regime has worked well and there is no reason presented to us which would suggest that this will not continue to be the case.

[16] It is important to bear in mind that we are here dealing with an application for an interim order pending determination of the appeal and cross-appeal. Those matters are to come before the Court on 16 April 2014, a period of around 10 weeks. The existing arrangements have been in place at least since 21 October 2013, a period of around 14 weeks. Earlier hearing dates for the matter were offered by the Court to the parties but those dates were

said not to be suitable. Given the delays on the part of the appellant in bringing this application and the relatively short time until the matter is before the Court for final determination it seems to us that the status quo should remain. The additional cost referred to by the Director of maintaining appropriate supervision for that finite period is, in the scheme of things, modest. We note that the measure of that cost remains in dispute. All of the relevant issues can be aired and dealt with by the Court in April.

[17] The application is dismissed.

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