SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General (Qld) v Bottomley* [2018] QSC 57
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **MARK DANIEL BOTTOMLEY** (respondent)
FILE NO:	BS12166 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application for a division 3 order
DELIVERED ON:	12 March 2018 (ex tempore)
DELIVERED AT:	Brisbane
HEARING DATE:	12 March 2018
JUDGE:	Mullins J
ORDER:	**As per the draft order initialled by Mullins J and placed with the file**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – DANGEROUS SEXUAL OFFENDER – GENERALLY – where respondent served sentence of imprisonment for one attempted rape – where applicant seeks orders pursuant to s 13 of *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) – whether the unproven sexual allegations can be considered in the risk assessment process – whether the assault is of a sexual nature and can therefore be considered in the risk assessment process – whether there is an unacceptable risk to the community that the respondent will commit a serious sexual offence – where supervision order made *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 13
COUNSEL:	J Tate for the applicant K M Hillard for the respondent
SOLICITORS:	G R Cooper, Crown Solicitor for the applicant Anderson Frederick Turner Lawyers for the respondent

HER HONOUR: The Attorney-General who is the applicant concedes appropriately that the psychiatric evidence supports the finding that Mr Bottomley is a serious danger to the community in the absence of a division 3 order and that adequate protection of the community can be ensured by the making of a supervision order under section 13, subsection (5), paragraph (b) of the Dangerous Prisoners (Sexual Offenders) Act 2003 (the Act).

Mr Bottomley concedes that a supervision order under the Act is open to be made on the basis of the index offence which is the offence for which he is currently imprisoned of attempted rape committed on 8 August 2012 in respect of which he was found guilty after trial before a jury on 10 April 2014. Mr Bottomley was sentenced to four years imprisonment. His full-time discharge date is 8 April 2018.

At the outset of this application there were some factual matters to be resolved. Mr Bottomley was seeking a ruling on whether certain matters in his history can be relied on by the psychiatrists to express their opinions about his risk of violent sexual reoffending. There were three matters which were raised in the submissions of Ms Hillard of counsel on behalf of Mr Bottomley.

The first was whether the 2006/2007 unproven sexual allegations made against Mr Bottomley were of adequate cogency that they can properly be considered in the risk assessment process. The alleged incidents were in respect of a complainant who was aged between seven and nine years over the period of some 18 months in which it was alleged that two incidents occurred involving Mr Bottomley. He was himself a child at the time aged between 12 and 14 years. In respect of one incident, no charge was pursued.

In respect of the other incident, a nolle prosequi was entered by the DPP after an indictment had been presented in the Children's Court in relation to one count of indecent treatment of a child under 16 with the circumstance of aggravation the child was under 12 years. The circumstances as to why the matter did not proceed persuaded me that it was properly raised on Mr Bottomley's behalf that this was not a matter that should be treated as part of his history of sexual offences. There was real doubt about the identification of the offender.

In relation to the other two matters, I concluded that both circumstances could be taken into account. The 2008 assault which occurred when Mr Bottomley was 15 years old and heavily intoxicated was of a woman in a toilet. The assault was interrupted and so there was no indication that there was any sexual offending. Mr Bottomley was dealt with for assault occasioning bodily harm and that matter proceeded in the Children's Court. I accept that it was not a conviction for a sexual offence and should be taken into account as part of his history. It seemed to me that it was relevant, as it involved violent offending against a woman in a public toilet. I indicated that it was a matter for the psychiatrists to express their professional opinion as to what they would infer form the circumstances of the offence.

There was one other matter. That was an incident in 7 May 2010 where Mr Bottomley was charged and found guilty of one count of entering premises with the intent to commit an indictable offence for which he was convicted and fined. The event occurred on 7 May 2010 when he was 17 years old.

He was charged with other offences of assault occasioning bodily harm and sexual assault, but they were dismissed as the complainant did not appear. There was evidence that Mr Bottomley's fingerprints were on the vehicle in question, which were the premises the subject of the entry. There was a hearsay statement recorded by a witness to the effect the complainant who was inside the car who was assaulted said that she had been the victim of someone who had tried to rape her. That statement should be completely ignored. At most, the incident can be treated as another assault on a woman and, again, it is a matter for the psychiatrists as to what they infer from the circumstances.

Mr Bottomley's criminal history commenced as a child in 2005. There is an extensive record of property offending, burglary, drug offences and assaults, culminating in the index offence which was committed when he was 19 years old. It can be observed that the use of alcohol and illicit substances, particularly cannabis sativa, underpins the index offence and the other violent assaults that have relevance in his history. The index offence was against an 18 year old complainant when Mr Bottomley was very intoxicated and upset about what he believed was infidelity of his girlfriend. Mr Bottomley pleaded not guilty at trial and this was treated by the sentencing judge as a lack of remorse. This is how the sentencing judge described the offence:

> *Your violence included forcibly grabbing the complainant around the neck and dragging her from the street to the footpath and forcing her to the ground. The complainant estimates that the attack lasted about 10 minutes. In the course of it, you pulled down her jeans and ripped off her underpants. You took down or took off your pants and had your penis out attempting to penetrate the complainant. She resisted the whole time. The complainant threatened that her boyfriend was nearby and that her father and brother would track you down. You desisted, stood up, shook her hand and apologised and told the complainant that you would turn yourself in to the police and you then left.*

Mr Bottomley did not turn himself in to the police, but it appears the complainant ultimately made a complaint, as a result of which Mr Bottomley was charged. It appears that the complainant may have been known to Mr Bottomley. This has relevance as two of the psychiatrists who have provided expert reports for the purpose of this application have scored Mr Bottomley on the instruments of assessment used by psychiatrists as offending against a person known to him. Dr Sundin indicated that she scored Mr Bottomley on the basis that the complainant was a stranger, as that was consistent with the information that she was provided, and noted in her evidence that her assessment on at least one of the instruments would have been slightly different, but that, overall, the risk of sexual reoffending that she estimated in respect of Mr Bottomley did not change.

Each of the psychiatrists gave short evidence today in order to explain whether there was any difference in their assessments as a result of my indication that they should ignore as part of Mr Bottomley's history of sexual offending the incidents alleged to have been committed by him as a child in 2006 or 2007. Each of the psychiatrists gave evidence that, overall, their risk assessments did not alter as a result of the indications that I gave at the outset of hearing as to how the matters that were in issue in respect of the 2006, 2007 history and the subsequent violent offences in 2008 and 2010, even though the latter incident did not result in a conviction for assault, should be considered.

Dr Sundin may have reduced her assessment on the Static-99R as a result of the indications that I conveyed at the outset of the hearing, but her reduction of a 7 to a 6 still was consistent with the risk of sexual reoffending by Mr Bottomley being high. Dr Sundin diagnosed Mr Bottomley as meeting the criteria for mixed personality disorder, antisocial and borderline personality traits, substance use disorder (alcohol and cannabis) in sustained remission in prison, and conduct disorder in childhood.

Relevantly, whilst in prison, Mr Bottomley has participated in the Getting Started Preparatory Program, which he completed in August 2015, which qualified him, then, to undertake a more intensive sex offender treatment program. In 2015 to 2016, he also completed the substance abuse program known as LISI. He then undertook the High Intensity Sex Offender Treatment Program, HISOP, between March 2016 and March 2017. It involved 129 sessions. Mr Bottomley completed that satisfactorily.

It is also relevant that prior to the commencement of HISOP, for the first time he admitted guilt in relation to the index offence. All of the evidence indicates that it has been during the latter two years of Mr Bottomley's imprisonment that he has shown signs of maturation which, no doubt, will be able to be built upon under a supervision order with the assistance of his supervising case manager. Dr Sundin is of the opinion that Mr Bottomley should undertake a sexual offender maintenance program in the community and, also, a substance abstinence maintenance program. She opines that:

> *Future victims are likely to be adult females and that offences are likely to occur in a setting of intoxication and are more likely to be opportunistic than planned.*

Dr Sundin considers that Mr Bottomley represents an unacceptable risk to the community for future sexual recidivism, but that if he were placed on a supervision order, the risk of future sexual reoffending in a violent way would be reduced from moderate to low.

Dr Aboud made similar diagnoses to Dr Sundin. As a result of excluding the incidents of 2006/2007, Dr Aboud would re-score the Static-99R from seven to six but still considers that Mr Bottomley is at a high risk of sexually violent reoffending. In fact, Dr Aboud considers that the overall unmodified risk would be moderate to high in respect of sexual violence. Dr Aboud is of the opinion that:

> *That risk would be reduced to below moderate and approaching low in the context of a supervision order in which there is access to stable accommodation and, if possible, close support of family members, abstinence from alcohol and substances, enhancement of prosocial personal support networks, management of associations with peers who tend to engage in criminal activity or who misuse alcohol and substances, efforts to enhance structured daily activities and routine that have positive social consequences such as employment, and provision of professional support from a psychologist who can assist Mr Bottomley in coping in the community by assisting him in developing problem-solving skills, regulating his emotions and learning to deal with relationship difficulties, and addressing his alcohol and substance use vulnerabilities.*

Dr Aboud also strongly supports participation in the sexual offender maintenance program. Dr Grant has made a similar diagnoses in respect of Mr Bottomley and also has assessed risk in a similar way. All the psychiatrists were supportive of the conditions in the supervision order that were included to achieve abstinence on Mr Bottomley's behalf from the consumption of alcohol and illicit drugs for the duration of the supervision order.

There was some debate about whether it was necessary for clause 25 to be in the terms in which it is proposed – that Mr Bottomley not visit premises licensed to supply or serve alcohol without the prior written approval of a corrective services officer – when so many premises in the community are licensed to supply or serve alcohol, such as cafes, cinemas and football grounds.

Both Dr Aboud and Dr Grant expressed the view that the supervising case manager should keep the clause under review and, as Mr Bottomley shows himself able to abstain from alcohol and illicit drugs, that there may be room to give him permission to attend at premises where there may be incidental supply of alcohol, but that, in the first instance, which may be the first year or so, he should not go to premises where alcohol is served.

Once he shows himself able to restrain from using alcohol or other illicit substances, then there will be room for the case manager to exercise the discretion that is implicit in clause 25 of the order to give permission to go to premises licensed to supply or serve alcohol for purposes that are legitimate for Mr Bottomley's enjoyment of his life in the community, provided it does not extend to using alcohol. I am, therefore, persuaded that clause 25 can stay in the order in the terms in which it currently stands.

The evidence of the psychiatrists persuades me to the degree of satisfaction that I am required to have under the Act that Mr Bottomley's risk of sexual reoffending, which is at least moderate, can be managed in the community under a supervision order. The evidence of the psychiatrists persuades me that without a division 3 order, Mr Bottomley would be an unacceptable risk of further sexual reoffending. These are the reasons as to why I am prepared to make the supervision in the terms which are proposed by the applicant. I make an order in terms of the draft initialled by me and placed with the file.

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