SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v Sands* [2020] QSC 45
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **ERIC SANDS** (respondent)
FILE NO/S:	BS No 11025 of 2010
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	Orders made on 14 February 2020, reasons delivered on 18 March 2020
DELIVERED AT:	Brisbane
HEARING DATE:	14 February 2020
JUDGE:	Davis J
ORDER:	**The respondent be released from custody to the Secure Mental Health Rehabilitation Unit in Townsville no later than 4.00 pm on 17 February 2020 and continue to be subject to the supervision order made on 18 January 2016, as amended on 20 November 2017 and further amended on 5 September 2018.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – DANGEROUS SEXUAL OFFENDER – GENERALLY – where the respondent is subject to a supervision order under Division 3 of Part 2 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (the Act) – where a warrant was issued under s 20 of the Act alleging that the respondent was "likely to contravene" the supervision order – where no amendment of the supervision order was sought – where it was proposed that the respondent be returned to the Secure Mental Health Rehabilitation Unit (SMHRU) at Townsville – where Chief Psychiatrist of Queensland expressed the view that the respondent can be managed by a multi-disciplinary clinical team at the SMHRU at Townsville – whether it is appropriate to release the respondent back to the SHMRU (when the bed

was to become available) without the supervision order being further amended

Dangerous Prisoners (Sexual Offenders) Act 2003, s 13, s 15, s 16, s 20, s 22, s 27

Attorney-General for the State of Queensland v Downs [2014] QSC 140, followed
Attorney-General for the State of Queensland v Francis [2012] QSC 275, cited
Attorney-General for the State of Queensland v Griffin [2015] QSC 31, followed
Attorney-General for the State of Queensland v Phineasa [2013] 1 Qd R 305, cited
Attorney-General for the State of Queensland v Sands [2011] QSC 397, cited
Attorney-General for the State of Queensland v Sands [2014] QSC 189, cited
Attorney-General for the State of Queensland v Sands [2016] QSC 225, followed
Attorney-General for the State of Queensland v Sands [2017] QSC 274, cited
Kynuna v Attorney-General (Qld) [2016] QCA 172, cited
Turnbull v Attorney-General (Qld) [2015] QCA 54, cited

COUNSEL: JB Rolls for the applicant
RA East QC for the respondent

SOLICITORS: GR Cooper, Crown Solicitor for the applicant
Legal Aid Queensland for the respondent

[1] The Attorney-General sought orders under s 22 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (the Act) alleging that the respondent was likely to breach the supervision order which was made on 18 January 2016 and amended on 20 November 2017 and 5 September 2018 (the supervision order).[1]

[2] The fact that there was no allegation of an actual breach of the supervision order, and certain other circumstances, raised issues both as to the findings which should be made and the appropriate orders.

[3] On 14 February 2020, I made the following order:

> "The respondent be released from custody to the Secure Mental Health Rehabilitation Unit in Townsville no later than 4.00 pm on 17 February 2020 and continue to be subject to the supervision order made on 18 January 2016, as amended on 20 November 2017 and further amended on 5 September 2018."

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1 *Dangerous Prisoners (Sexual Offenders) Act* 2003, s 20 and s 22.

Background

[4] The respondent has a long criminal history which was examined in some detail by Atkinson J and Applegarth J in previous applications brought against the respondent alleging breaches of a previous supervision order.[2] It is unnecessary to further analyse that criminal history.

[5] The respondent's history under the Act is long and tortuous.

[6] Upon application for orders under s 13 of the Act, the respondent was found to be a serious danger to the community in the absence of an order[3] and was released on supervision on 10 January 2011.[4] That was the first supervision order to which the respondent was subject.

[7] A few months later, in June 2011, a contravention was alleged against the respondent and he was returned to custody where he remained until 5 December 2011 when the contravention was proved but he was released subject to an amended supervision order.[5]

[8] Further contraventions were alleged against the respondent in October 2013 and it was found that he contravened the orders by disregarding a direction given by a corrective services officer not to go to Yarrabah and also by having committed the offence of using a carriage service to menace and harass the Acting Director of the High Risk Offender Management Unit. On 14 July 2014, Applegarth J ordered that the supervision order be rescinded and the respondent be detained in custody for an indefinite term for care, control or treatment.[6]

[9] The continuing detention order made by Applegarth J was reviewed[7] and on 18 January 2016 the order was rescinded and the respondent was released on a supervision order.[8] That is the supervision order to which the respondent was subject at the time of the current "likely contravention".[9]

[10] After only a few months on supervision, the respondent was returned to custody on 12 April 2016. It was alleged that he was "likely to contravene" the supervision order. The evidence was that the respondent's mental state had deteriorated to the point where he could not follow directions. Burns J found that while the respondent may have been "likely to contravene" the supervision order when he was arrested and returned to custody, by the time of the hearing under s 22 of the Act his mental state had calmed such that he was no longer "likely to contravene" the supervision order. The application was dismissed.[10] The result was that on 4 October 2016 the respondent was again released on supervision.

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2 *Attorney-General for the State of Queensland v Sands* [2011] QSC 397 and *Attorney-General for the State of Queensland v Sands* [2014] QSC 189.
3 Section 13(1).
4 Sections 13(5)(b), 15 and 16; orders of Byrne SJA, 10 January 2011.
5 *Attorney-General for the State of Queensland v Sands* [2011] QSC 397.
6 *Attorney-General for the State of Queensland v Sands* [2014] QSC 189.
7 Section 27.
8 Order of Dalton J, 18 January 2016.
9 Sections 20(1), 22(1).
10 *Attorney-General for the State of Queensland v Sands* [2016] QSC 225.

[11] More problems beset the respondent on 4 November 2016 when he was again returned to custody. On 20 November 2017, Applegarth J found that the respondent had contravened the supervision order by having contact with his daughter. His Honour found though that the respondent's mental health contributed to the contravention. Having found that treatment was available to manage the respondent's mental health issues, his Honour amended the supervision order[11] and released the respondent.[12]

[12] Unfortunately the respondent was back in custody by 14 December 2017. He was again released on the supervision order (with amendments) on 5 September 2018. Of importance here, Burns J added the following requirements to the supervision order; that the respondent:

> "(i) reside at the Secure Mental Health Rehabilitation Unit, Townsville Hospital and Health Service (SMHRU), where the respondent must submit to assessment and treatment for such time as is considered necessary by his treating psychiatrist;
>
> (ii) comply with any requirements of any order made under the *Mental Health Act* 2016, or its predecessors, that are not directly inconsistent with the requirements of the supervision order;
>
> (iii) attend any appointments with a community mental health service, or associated service provider;
>
> (iv) participate in case management with a community mental health services provider, follow any recommendations made by the community mental health services provider and discuss his case management with a Corrective Services officer;
>
> (v) give authority to a community mental health services provider to disclose to a Corrective Services officer details of his treatment;
>
> (vi) permit a Corrective Services officer to disclose to his treating psychologist, psychiatrist or other treating medical professional or allied health professional details of his treatment."

[13] By late September 2018, the respondent was living in the Secure Mental Health Rehabilitation Unit (SMHRU) at the Townsville Hospital. The respondent displayed highly sexualised and threatening behaviour towards female staff members. He made threats of rape.[13] A warrant issued under s 20 of the Act alleging that the respondent was "likely to contravene" the supervision order by committing a sexual offence.[14] The effect of the execution of the warrant was to remove him from the SMHRU and he was returned to prison.

[14] It is this "likely contravention" which came before me.

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11 The details of the amendment are not relevant here.

12 *Attorney-General for the State of Queensland v Sands* [2017] QSC 274.

13 A sexual assault would contravene conditions of the supervision order.

14 Section 20(1).

Current psychiatric opinion

[15] Two psychiatrists examined the respondent for the purposes of the current proceedings: Dr Andrew Aboud and Dr Elizabeth McVie. Both Doctors Aboud and McVie had previously examined the respondent and provided reports. Dr Aboud's involvement with the respondent dates back to January 2016 and Dr McVie's to May 2010.

[16] Dr Anthony Tie is a psychiatrist who has been treating the respondent. He also provided a report.

[17] It is unnecessary to analyse the psychiatric evidence in detail. The three doctors opined that the respondent suffers from paranoid schizophrenia and an anti-social personality structure. Both of Doctors Aboud and McVie considered the risk of reoffending sexually as high.

[18] Doctor John Reilly is the Chief Psychiatrist of Queensland. He has, helpfully, directly involved himself in the respondent's case. He agrees with Doctors Aboud, McVie and Tie that the respondent suffers from schizophrenia and from a personality disorder. He also notes that the respondent is currently an involuntary patient on a treatment authority with the Townsville Authorised Mental Health Service (AMHS).[15]

[19] Doctor Reilly expressed the view that the respondent can be managed by a multi-disciplinary clinical team at the SMHRU at Townsville. He states that "[the respondent's] current condition is suitable for a return to the SMHRU at Townsville AMHS, which would provide the necessary structure and support to enable a graduated transition to the community".[16]

[20] Beds at SMHRUs are in high demand. When a bed becomes available it can, because of that demand, only be held open for a short period of time.

[21] Notification was given to the Crown Solicitor by the office of the Chief Psychiatrist on 4 February 2020 that a bed was available at the SMHRU for the respondent from Monday, 17 February 2020. That is why the matter was listed before me urgently on 14 February 2020 and the order made.

The issue under the *Dangerous Prisoners (Sexual Offenders) Act* 2003

[22] Section 20 of the Act provides as follows:

> "**20 Warrant for released prisoner suspected of contravening a supervision order or interim supervision order**
>
> (1) This section applies if a police officer or corrective services officer reasonably suspects a released prisoner is likely to contravene, is contravening, or has contravened, a requirement of the released prisoner's supervision order or interim supervision order.

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[15] Affidavit of J Reilly sworn 24 October 2019 at [4] (CFI 151).
[16] Affidavit of J Reilly sworn 24 October 2019 at [11] (CFI 151).

(2) The officer may, by a complaint to a magistrate, apply for a warrant for the arrest of the released prisoner directed to all police officers and corrective services officers to arrest the released prisoner and bring the released prisoner before the Supreme Court to be dealt with according to law.

(3) The magistrate must issue the warrant, in the approved form, if the magistrate is satisfied the grounds for issuing the warrant exist.

(4) However, the warrant may be issued only if the complaint is under oath.

(6) The warrant may state the suspected contravention in general terms.

(7) If the magistrate issues a warrant under subsection (3), the commissioner of the police service or the chief executive must give a copy of the warrant to the Attorney-General within 24 hours after the warrant is issued.

(8) The *Police Powers and Responsibilities Act* 2000, sections 800 to 802, apply to the application for the warrant—

(a) as if the warrant were a prescribed authority, within the meaning of section 800 of that Act, that could be obtained under that Act; and

(b) if the application is made by a corrective services officer, as if the corrective services officer were a police officer.

Note—

The *Police Powers and Responsibilities Act* 2000, sections 800 to 802 provide for obtaining prescribed authorities by phone, fax, radio, email or another similar facility.

(9) To remove any doubt, it is declared that a failure by the commissioner of the police service or the chief executive to comply with subsection (7) does not affect the court's ability to make a further order under section 22."

[23] A warrant may issue under s 20 where a relevant person "reasonably suspects a released prisoner is likely to contravene, is contravening or has contravened the requirement of [the supervision order]". Here, what was relied upon was the suspicion that the respondent was "likely to contravene" the supervision order. The relevant suspicion was that the respondent was (at the time the complaint which founded the warrant was sworn) "likely to contravene" the supervision order.

[24] Section 22 then provides as follows:

"**22 Court may make further order**

(1) The following subsections apply if the court is satisfied, on the balance of probabilities, that the released prisoner is likely to contravene, is contravening, or has contravened, a requirement of the supervision order or interim supervision order (each the existing order).

(2) Unless the released prisoner satisfies the court, on the balance of probabilities, that the adequate protection of the community can, despite the contravention or likely contravention of the existing order, be ensured by the existing order as amended under subsection (7), the court must—

(a) if the existing order is a supervision order, rescind it and make a continuing detention order; or

(b) if the existing order is an interim supervision order, rescind it and make an order that the released prisoner be detained in custody for the period stated in the order.

(3) For the purpose of deciding whether to make a continuing detention order as mentioned in subsection (2)(a), the court may do any or all of the following—

(a) act on any evidence before it or that was before the court when the existing order was made;

(b) make any order necessary to enable evidence of a kind mentioned in section 13(4) to be brought before it, including, for example, an order—

(i) in the nature of a risk assessment order, subject to the restriction under section 8(2); or

(ii) for the revision of a report about the released prisoner produced under section 8A;

(c) consider any further report or revised report in the nature of a report of a type mentioned in section 8A.

(4) To remove any doubt, it is declared that the court need not make an order in the nature of a risk assessment order if the court is satisfied that the evidence otherwise available under subsection (3) is sufficient to make a decision under subsection (2)(a).

(5) If the court makes an order in the nature of a risk assessment order, the psychiatrist or each psychiatrist examining the released prisoner must prepare a report

about the released prisoner and, for that purpose, section 11 applies.

(6) For applying section 11 to the preparation of the report—

(a) section 11(2) applies with the necessary changes; and

(b) section 11(3) only applies to the extent that a report or information mentioned in the subsection has not previously been given to the psychiatrist.

(7) If the released prisoner satisfies the court, on the balance of probabilities, that the adequate protection of the community can, despite the contravention or likely contravention of the existing order, be ensured by a supervision order or interim supervision order, the court—

(a) must amend the existing order to include all of the requirements under section 16(1) if the order does not already include all of those requirements; and

(b) may otherwise amend the existing order in a way the court considers appropriate—

(i) to ensure adequate protection of the community; or

(ii) for the prisoner's rehabilitation or care or treatment.

(8) The existing order may not be amended under subsection (7)(b) so as to remove any requirements mentioned in section 16(1)."

[25] Sections 20 and 22 borrow from concepts identified and defined in provisions appearing earlier in the Act.

[26] Section 13 is a pivotal section in the Act. Sections 13(1) and 13(5) provide for the making of a continuing detention order or supervision order upon a finding that the prisoner is "a serious danger to the community in the absence of [an order]".

[27] Section 13(2) defines "serious danger to the community" as:

"**13 Orders**

…

(2) A prisoner is a serious danger to the community as mentioned in subsection (1) if there is an unacceptable risk that the prisoner will commit a serious sexual offence—

(a) if the prisoner is released from custody; or

(b) if the prisoner is released from custody without a supervision order being made."

[28] The terms "serious sexual offence" is defined as "an offence of a sexual nature … involving violence" or "an offence of a sexual nature … against a child".[17]

[29] In determining whether to make a continuing detention order or a supervision order, or indeed no order, "the paramount consideration is to be the need to ensure adequate protection of the community".[18] The notion of "adequate protection of the community" means protection of the community from the commission of "serious sexual offences".[19]

[30] Section 22(7) embodies the concept of "adequate protection of the community". It is well-established that the concept of "adequate protection of the community" in s 22(7) has the same meaning as appears in s 13.[20]

[31] By s 22(2) and s 22(7), the court is vested with jurisdiction to:

(a) rescind the supervision order;

(b) make a continuing detention order;

(c) amend the supervision order;

(d) release the prisoner on the supervision order.

[32] That discretionary jurisdiction arises once it is found under s 22(1) that the released prisoner "is likely to contravene, is contravening or has contravened the supervision order".

[33] If a released prisoner "has contravened" the supervision order, then that fact justifies both the issue of the warrant and raises the jurisdiction to make orders under s 22. It may be that a different trigger exists for s 20 than s 22. For example, a released prisoner may be thought to be "likely to contravene" the supervision order thus justifying the issue of a warrant, but may have contravened or be contravening the supervision order by the time the application for orders under s 22 is heard.

[34] In a series of cases, judges of the Trial Division have found that the relevant issue under s 22(1) is whether, at the time of the hearing under s 22 the released prisoner is "likely to contravene" the supervision order.[21] I agree with those decisions and follow them.

[35] Consequently, where a released prisoner is, at the time of the issue of the warrant under s 20 of the Act "likely to contravene" the supervision order, but is not "likely to contravene" the supervision order by the time the court comes to make orders

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17 Section 2 in the Schedule (Dictionary).

18 Section 13(6).

19 *Attorney-General for the State of Queensland v Phineasa* [2013] 1 Qd R 305 at [28] and [29].

20 *Kynuna v Attorney-General (Qld)* [2016] QCA 172 at [60] and *Turnbull v Attorney-General (Qld)* [2015] QCA 54 at [36].

21 *Attorney-General for the State of Queensland v Downs* [2014] QSC 140 at [32], [37] and [38], *Attorney-General for the State of Queensland v Griffin* [2015] QSC 31 at [19], [20] and [21], and *Attorney-General for the State of Queensland v Sands* [2016] QSC 225 at [4], [5] and [6].

under s 22, no order can be made under that section unless the prisoner has since contravened the supervision order.

[36] In both *Attorney-General for the State of Queensland v Downs*[22] and *Attorney-General (Qld) v Sands*,[23] (which is a case involving the present respondent) the court, not being satisfied that the prisoner was then "likely to contravene" the supervision order, dismissed the applications which had been filed under s 22.[24] The effect of the dismissal of the applications was, in each case that the prisoner was released back onto the supervision order. In *Sands*, Burns J did not make an order releasing the respondent but said in his reasons:

> "[18] It follows that the application must be dismissed, and the respondent released from custody subject to the conditions of that supervision order."[25]

[37] Here, the applicant pressed for a finding that the respondent was at the time I heard the application "likely to contravene" the supervision order but then pressed for an order releasing the respondent on the supervision order. That may at first glance appear to be an odd approach.

[38] Release of a prisoner back on a supervision order is governed by s 22(7). That subsection on its face contemplates the release of the prisoner on the supervision order "despite the … likely contravention of the existing order". Section 22(7)(b) authorises the amendment of the order.

[39] A court may find that while the prisoner is at the time of the hearing of the application "likely to contravene" the supervision order, he is unlikely to contravene an amended order. That would be so if the amendments were such as to reduce risk of contravention.

[40] A court may find that the prisoner is at the time of the s 22 hearing "likely to contravene" the supervision order but may still release the prisoner on the same (not amended) supervision order if the risk of commission of a serious sexual offence is at a level where "the adequate protection of the community can … be ensured"[26] by the order in its existing terms. The central issue is not whether the supervision order will be contravened, but whether there is a risk of commission of a serious sexual offence.[27]

[41] Here, no amendment of the supervision order was sought. It was proposed that the respondent be returned to the SMHRU at Townsville. What has changed between the date of the issue of the warrant under s 20 and the making of the order, is the putting into place of supports to manage the respondent at the SMHRU at Townsville. If he is not living at the SMHRU, then he is "likely to contravene" the supervision order by the commission of a serious sexual offence. If he is living at

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22 [2014] QSC 140.

23 [2016] QSC 225; the published reasons in *Attorney-General for the State of Queensland v Griffin* [2015] QSC 31 do not show the orders actually made.

24 *Downs* at [38] and *Sands* at [18].

25 And similarly in *Downs*; see [38] and [39].

26 Section 22(7).

27 *Attorney-General for the State of Queensland v Francis* [2012] QSC 275 at [64]-[67].

the SMHRU, with the supports that have now been arranged, he is not "likely to contravene" the supervision order.

[42] As there was no bed available at the time I made the order on 14 February the respondent was, at that time, "likely to contravene the supervision order" and I so find. That fact gave rise to the power under s 22(7). It was appropriate though to release him back to the SHMRU on 17 February 2020 (when the bed was to become available) without the supervision order being further amended. The supervision order in its current form requires the respondent to reside at the SHMRU at Townsville so the adequate protection of the public is ensured.