# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Attorney-General for the State of Queensland v DBK* [2020] QSC 90 |
| PARTIES: | **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND**<br>(applicant)<br>**v**<br>**DBK**<br>(respondent) |
| FILE NO/S: | BS No 2870 of 2016 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 24 April 2020 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 20 April 2020 |
| JUDGE: | Davis J |
| ORDER: | **The Court, being satisfied to the requisite standard, that the respondent has contravened requirements 5, 7, 17, 37, 39 and 42 of the supervision order made by Holmes CJ on 23 May 2016, orders that:**<br>**1. The respondent be released from custody on 24 April 2020 and continue to be subject to the supervision order made by Holmes CJ on 23 May 2016.** |
| 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 contravened the supervision order made on 23 May 2016 under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (the Act) – where the contraventions are admitted – where the evidence of the psychiatrists is that the risk the respondent poses to the community can be adequately managed under the existing supervision order – where there is no evidence to suggest that the supervision order should either be extended or amended – whether the respondent should be released subject to the requirements of the existing supervision order |

*Criminal Code* (Cth), s 474.19
*Crimes Act* 1914, s 20(1)(b)
*Dangerous Prisoners (Sexual Offenders) Act* 2003, s 5, s 8, s 13, s 20, s 22, s 43AA

*Attorney-General for the State of Queensland v Francis* [2007] 1 Qd R 396

COUNSEL: J Tate for the applicant
S Bain for the respondent

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

[1] The respondent has been the subject of a supervision order made under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (the Act) since 23 May 2016.

[2] The applicant alleges that the respondent has breached requirements of the supervision order and seeks orders under s 22 of the Act.

**Background**

[3] The respondent was born in 1969. He is almost 51 years of age.

[4] The respondent has a criminal history dating back to 1982. There were various sexual offences and two episodes of some significance where the complainants were children, the second of which is the basis of the application which resulted in the supervision order.

[5] On 27 June 1997, the respondent was convicted in the District Court at Ipswich of exposing a child to an indecent photograph. The child was a 13 year old girl known to the respondent. At the time of that conviction, the respondent was 28 years of age.

[6] In July 2002, again in the District Court at Ipswich, he was convicted of a sexual offence against his four year old daughter. He pleaded not guilty to raping her but was convicted. The child suffered significant vaginal injuries and, of course, suffered psychological damage as well. He was sentenced to 14 years' imprisonment. At the time of sentence, he was 33 years of age. It was this sentence that triggered the provisions of the Act.

[7] On 12 September 2003, the respondent pleaded guilty, again in the District Court at Ipswich, of being in possession of child abuse computer games. Those games came into his possession on 3 May 2002 before he was sentenced in relation to the rape of his daughter.

[8] In due course, the applicant applied for orders under s 13 of the Act and a supervision order was made on 23 May 2016.

[9] The relevant requirements of the order were that the respondent:

> "(5) Comply with any curfew direction or monitoring direction;
>
> (7) Comply with every reasonable direction of a Corrective Services office that is not directly inconsistent with a requirement of this order;
>
> (17) Respond truthfully to enquiries by a Corrective Services officer about his activities, whereabouts and movements generally;
>
> (37) Obtain the prior written approval of a Corrective Services officer before accessing a computer or the internet;
>
> (39) Supply to a Corrective Services officer details of any email address, instant messaging service, chat rooms, or social networking sites including user names and passwords;
>
> (42) Advise a Corrective Services officer of the make, model and telephone number of any mobile telephone owned, possessed or regularly utilised by him within 24 hours of connection or commencement of use, and this includes reporting any changes to mobile telephone details."

[10] The particulars of the breaches of the supervision order were alleged as follows:

> "On 21 August 2018, the respondent was given a reasonable direction not to have contact with JF. JF is a female known to the respondent who is currently pregnant. She is significantly younger than the respondent. QCS have been advised that she has an intellectual impairment. QCS have also been advised that the respondent sought a sexual relationship with JF which she declined. This caused him to become angry and upset.
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> On 24 August 2018, the QCS officers within the Monitoring Room, which is responsible for overseeing the electronic monitoring devices worn by offenders subject to supervision orders, noted that the respondent was uncontactable on three occasions (23:10, 23:15 and 23:20) and may have left his inclusion zone. The respondent was asked about this during a meeting with his Senior Case Manager. He stated that he was sleeping and did not hear his phone. He denied leaving his residence. The Senior Case Manager queried this further with the respondent and advised that his GPS monitoring device indicated that he was moving at the time and not asleep. The respondent eventually admitted that he had left his unit late at night to have a pizza with his neighbour and did not take his phone. He was advised that while on Stage 1 curfew he was not permitted to go and attend any other units and that if he left his own unit he must take his mobile phone and remain contactable. The respondent agreed and said that he had made a poor choice. He was also told that being dishonest about the situation was not appropriate.

On 30 August 2018, the respondent told his SCM[1] Emma Jefferson, that he possessed a laptop computer which he had not been given approval to have. On the same day, SCM Jefferson and another Senior Case Manager, SCM Helen Spagnolo, transported the respondent to his residence to obtain the laptop. The respondent provided access to his unit and obtained a laptop power cord which he provided to SCM Jefferson. He then took SCM Jefferson and SCM Spagnolo to the back of his unit and attempted to take a laptop out of a bag. SCM Jefferson saw other devices in the bag and asked the respondent about these. He stated that he was only bringing the laptop and that the other devices did not belong to him. He was asked to bring the entire bag which he agreed to do. The bag contained three mobile telephones, two tablet devices, a laptop computer and a number of compact discs. The respondent commented that he had viewed bestiality material with his neighbour. He said that he had not previously disclosed possession of these devices in accordance with the requirements of his supervision order.

The respondent was transported to the High Risk Offender Management Unit, Townsville Office. The Queensland Police Service (QPS) was contacted. QPS officers attended the High Risk Offender Management Office and searched the devices in the presence of the respondent. Initial examination indicated that the respondent had been accessing the internet including the social networking site, Facebook Messenger. The respondent had not previously disclosed use of Facebook Messenger and had not obtained permission to access the internet. The devices were seized by QPS for further examination.

Further, earlier the same day (30 August 2018), SCM Jefferson and QCS surveillance officers attended the respondent's residence and heard him on the telephone. He was heard by surveillance officers to be talking on loud speaker with a female. The respondent immediately moved the QCS officers away from his unit to his vehicle in the carport and put his telephone inside. SCM Jefferson attempted to walk to the respondent's unit at which time he commented that she had already been to the unit.

SCM Jefferson located the respondent's telephone in the unit and examined it. She noted that an application linked to 'phone blocking' was on it. She asked the respondent about it but he provided a minimal response, advising that he was unsure as it had always been on his telephone. He then walked away from SCM Jefferson.

QCS officers left the unit and discussed the matter. The decision was made to question the respondent further about it.

QCS officers returned to the unit and spoke with him about being heard speaking with an adult female when they arrived. The

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1 Senior Case Manager.

> respondent argued for a period of time that this did not occur and that officers could check his telephone log. SCM Jefferson queried why there were no telephone calls on his call log but that he was heard on the phone talking with a female so therefore something wasn't right. After a further period of time, the respondent admitted that he was on the telephone to 'JF' through a telephone blocking application.
>
> The respondent was transported to the High Risk Offender Management Unit, Townsville Office, where he attended a meeting with SCM Jefferson and QCS Officer Thomas. He admitted that he had downloaded the telephone blocking application about three months earlier which was linked to his attempting to hide his contact with JF. The telephone blocking application hides telephone logs and SMS messages. The respondent had made all telephone calls and sent all short-message-service messages to divert through the application. There is internet access through the application; however, preliminary inquiries indicate that application only uses the internet to search numbers/contacts and may be able to hide internet history."

[11] The respondent was returned to custody on 30 August 2018. As a result of examination of the electronic devices, the respondent was charged with an offence against s 474.19 of the Commonwealth *Criminal Code*, namely using a carriage service to access child pornography. He pleaded guilty in the District Court to that offence on 25 November 2019 and on 26 November 2019 he pleaded guilty to 13 charges under s 43AA of the Act alleging contraventions of the supervision order. By the time he was dealt with for the various criminal charges, the respondent had been back in custody for about 15 months.

[12] In the District Court he was sentenced to two years' imprisonment with immediate release on a bond to be on good behaviour for five years[2] and, in the Magistrates Court, he was sentenced to three months' imprisonment wholly suspended for an operational period of nine months.

[13] An application was filed pursuant to s 22 of the Act. The respondent has now been in custody for about 20 months.

**Statutory context**

[14] Section 5 of the Act authorises the applicant to apply for orders against a prisoner who is serving a period of imprisonment "for a serious sexual offence". That term is defined, relevantly here, as "an offence of a sexual nature, whether committed in Queensland or outside Queensland - (a) involving violence; or (b) against a child …".

[15] By s 8, there must be a preliminary hearing to determine whether "there are reasonable grounds for believing the prisoner is a serious danger to the community in the absence of [an order under the Act]". By s 8, the court is empowered to order that a respondent undergo psychiatric examination by two psychiatrists.

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2 *Crimes Act* 1914, s 20(1)(b).

[16] Although the term "serious danger to the community" appears in s 8, it is s 13(2) which defines that term. Section 13 is a pivotal section in the Act and is as follows:

> "**13 Division 3 orders**
>
> (1) This section applies if, on the hearing of an application for a division 3 order, the court is satisfied the prisoner is a serious danger to the community in the absence of a division 3 order (a ***serious danger to the community***).
>
> (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.
>
> (3) On hearing the application, the court may decide that it is satisfied as required under subsection (1) only if it is satisfied—
>
> (a) by acceptable, cogent evidence; and
>
> (b) to a high degree of probability;
>
> that the evidence is of sufficient weight to justify the decision.
>
> (4) In deciding whether a prisoner is a serious danger to the community as mentioned in subsection (1), the court must have regard to the following—
>
> (aa) any report produced under section 8A;
>
> (a) the reports prepared by the psychiatrists under section 11 and the extent to which the prisoner cooperated in the examinations by the psychiatrists;
>
> (b) any other medical, psychiatric, psychological or other assessment relating to the prisoner;
>
> (c) information indicating whether or not there is a propensity on the part of the prisoner to commit serious sexual offences in the future;
>
> (d) whether or not there is any pattern of offending behaviour on the part of the prisoner;
>
> (e) efforts by the prisoner to address the cause or causes of the prisoner's offending behaviour,

including whether the prisoner participated in rehabilitation programs;

(f) whether or not the prisoner's participation in rehabilitation programs has had a positive effect on the prisoner;

(g) the prisoner's antecedents and criminal history;

(h) the risk that the prisoner will commit another serious sexual offence if released into the community;

(i) the need to protect members of the community from that risk;

(j) any other relevant matter.

(5) If the court is satisfied as required under subsection (1), the court may order—

(a) that the prisoner be detained in custody for an indefinite term for control, care or treatment (***continuing detention order***); or

(b) that the prisoner be released from custody subject to the requirements it considers appropriate that are stated in the order (***supervision order***).

(6) In deciding whether to make an order under subsection (5)(a) or (b)—

(a) the paramount consideration is to be the need to ensure adequate protection of the community; and

(b) the court must consider whether—

(i) adequate protection of the community can be reasonably and practicably managed by a supervision order; and

(ii) requirements under section 16 can be reasonably and practicably managed by corrective services officers.

(7) The Attorney-General has the onus of proving that a prisoner is a serious danger to the community as mentioned in subsection (1)."

[17] Once, under s 13, there is a finding that a respondent "is a serious danger to the community in the absence of [an order under the Act]", then the effect of s 13(5) is that a continuing detention order will be made unless the adequate protection of the community can be ensured by a supervision order. If that is so, then a supervision order should be preferred to the making of a continuing detention order.[3]

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3 *Attorney-General for the State of Queensland v Francis* [2007] 1 Qd R 396 at [39].

[18] Where, as here, it is alleged that a supervision order has been contravened, ss 20 and 22 come into play. They are, relevantly:

> "**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.
>
> (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.
>
> …
>
> **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.
>
> …
>
> (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)."

[19] 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; or

(d) release the prisoner on the supervision order.

[20] That discretion arises once, relevantly here, it is found that the respondent contravened the supervision order. Here, the contraventions are admitted and the discretion arises.

**The psychiatric evidence**

[21] As is often the case, a psychiatrist examined the respondent for the purposes of the preliminary hearing which was conducted pursuant to s 8 of the Act. Two further psychiatrists were appointed in the s 8 hearing, so that when the matter came before Holmes CJ on 23 May 2016, her Honour received evidence from three psychiatrists who had assessed risk of the respondent reoffending. Her Honour described the evidence on risk of sexual recidivism in these terms:

> "The respondent has been examined by three psychiatrists for the purposes of the Act. Their views are relatively uniform. Doctors Harden and Sundin assess him as being in the moderate range for sexual recidivism, while Dr Aboud considers that he poses a moderate to high risk of sexual violence. All consider that the imposition of a supervision order with appropriate terms would lower that risk to low or between low and moderate. Essentially, they accept that he has made some progress in sex offender treatment, but there are a number of risk factors: his paraphilia, or possibly paraphilia in Dr Harden's view; his interest in pre-pubertal girls; his possible resort to sexual offending at a time of relationship instability; and his use of alcohol with its disinhibiting effects. All are in agreement that those factors can be managed by an order which controls his access to underage girls, requires him to abstain

> from alcohol use, ensures his engagement with further psychological therapy and requires his disclosure of his activities."

[22] Doctors Sundin and Aboud examined the respondent for the purposes of the proceedings in 2016 and also examined the respondent for the present breach proceedings.

[23] In both her 2016 report and her current assessment, Dr Sundin diagnosed the respondent as suffering from:

- Paedophilic Disorder (non-exclusive, not limited to incest);
- Mixed Personality Disorder (with avoidant and anti-social personality traits); and
- Conduct Disorder (as a juvenile).

[24] Doctor Aboud's diagnosis has also not materially changed since 2016. He presently diagnoses the respondent as suffering from:

- Paedophilia (non-exclusive, sexually attracted to females); and
- Mixed Personality Disorder (with antisocial and avoidant traits).

[25] On the question of risk, Dr Sundin opined:

> "[The Respondent's] high-risk factors pertain to his longstanding sexually deviant cognitions, his pre- occupation with sex and reliance upon sex as a coping strategy, his difficulty with intimate partner relationships, his distrust of women and feelings of hostility towards them.
>
> His avoidant behaviour poses a challenge to his management within the community and case managers will need to maintain a high degree of alertness to his potential for less than fulsome disclosures.
>
> I have previously considered that [the respondent] was understating the level of his paraphilic interest in prepubescent females. The details of the CEM indicate that he does have an ongoing paraphilic interest around sexual access to pre-pubescent and pubescent females:
>
> The relevant paragraphs from my 21 March 2019 report when it comes to the conviction pertaining to the use of a carriage service to access child exploitation material is:
>
> > 'Whilst at times there have been breaches with respect to his disclosures and his exclusion zones, these have not led to any behaviours which have caused QCS concern that he might be seeking to access young children.
> >
> > Concerns have been raised by his case managers as to the honesty of his disclosure and his pattern of deceptiveness. This seems to be most likely a product of his avoidant and anti-social personality traits.

> He appears to be continuing to rely on sex as coping and he has continued to access pornography on a very regular basis.'
>
> His deviant sexual cognitions and associated behaviours will need ongoing intervention from an experienced psychologist when he is released from prison.
>
> In my opinion, [the respondent's] unmodified risk for the general community is unsatisfactory and is in the moderate range. His most likely victim would be a pre-pubescent female and he is likely to exploit a position of trust in order to gain access to the child. Sexual offending may involve significant harm to the victim and is likely to be associated with intoxication and/or occurring at a time of relationship or economic instability.
>
> Alcohol was part of his index offence.[4] Through its disinhibiting effect it enabled him to act on pre-existing sexually deviant cognitions. He should be subject to abstinence clauses.
>
> I consider that the risk he poses to the community can be adequately managed under the auspices of a supervision order. The clauses of the order as set out by Chief Justice Holmes in May 2016 reduce his risk from moderate to moderate to low. His supervision order is in place till 2026."

[26] Doctor Aboud's views as to the respondent's risk of sexual recidivism were expressed by the doctor in this way:

> "The actuarial assessments of sexual recidivism, such as Static-99R and Risk Matrix 2000s, indicate that [the respondent] presents a high risk. The dynamic assessments, such as components of the HCR-20 and RSVP, indicate that his risk is moderate. Taking into consideration the various actuarial and dynamic assessments of future general and sexual violence risk that have been applied, it is my view that [the respondent's] unmodified risk would currently be moderate to high in respect of sexual violence and low in respect of general (non-sexual) violence.
>
> In coming to this conclusion I take into account the chronicity and diversity of his sexual offending, his sexual deviance, his avoidant and antisocial personality structure, and his broad psycho-social vulnerabilities. I also take into account the progress he has previously made in sex offender treatment. However, I also take into account his somewhat incongruent presentation, where he claims to take responsibility and yet has maintained prolonged elements of denial. He remains vulnerable to distorted thinking and a maladaptive coping style. His tendency has been toward: low self-worth; emotional suppression; avoidant coping, such as via alcohol use; confusing intimacy with sex; sexual entitlement, causing anger and jealousy; regulation of emotions using sexual behaviour. Ultimately this leads me to believe that his risk of reoffending is likely to persist in the longer term, and that he will continue to

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4 The rape of his daughter.

present a risk of sexual offending in the absence of the external structure of monitoring and supervision and support imposed on him by a supervision order.

At the time of his return to prison, on 30 August 2018, he was leading a secret life, having acquired various contraband devices and in ongoing communication with a rather vulnerable woman in spite of direction to cease. It is my view that his risk of sexually reoffending was escalating at that time, and that his return to custody was an appropriate and necessary risk management intervention. One acknowledges, however, that while in the community, he did not access children, he did not consume alcohol and he did not reoffend. In my opinion his risk of reoffending would be reduced to between low and moderate in the context of a supervision order."

**Findings and conclusions**

[27] The respondent has pleaded guilty to charges laid under s 43AA of the Act. That section is as follows:

"**43AA Contravention of relevant order**

(1) A released prisoner who contravenes the relevant order for the released prisoner without a reasonable excuse commits a misdemeanour.

Maximum penalty—2 years imprisonment.

(2) If a released prisoner commits an offence against subsection (1) by removing or tampering with a stated device for the purpose of preventing the location of the released prisoner to be monitored, the released prisoner commits a crime.

Minimum penalty—1 year's imprisonment served wholly in a corrective services facility.

Maximum penalty—5 years imprisonment.

(3) In this section—

***corrective services facility*** see the *Corrective Services Act* 2006, schedule 4.

***stated device*** means a device a released prisoner is required to wear under the relevant order or a monitoring direction made under the relevant order."

[28] The charges which were laid under s 43AA effectively contain the allegations the subject of the breaches alleged by the applicant to found the applicant's right to seek orders under s 22. There is no contest here that the respondent has contravened the requirements of the supervision order as alleged by the applicant and I so find for the purposes of s 22(1).

[29] The onus then falls upon the respondent under s 22(7) to prove on the balance of probabilities that despite the contraventions which I have found, the adequate protection of the community can be ensured by his release on the supervision order, either in its existing terms or as amended.

[30] I accept the evidence of the psychiatrists that the risk the respondent poses to the community can be adequately managed under the supervision order.

[31] There is no evidence to suggest that the supervision order should, at this stage, either be extended or otherwise amended.

**Orders**

[32] The Court, being satisfied to the requisite standard, that the respondent has contravened requirements 5, 7, 17, 37, 39 and 42 of the supervision order made by Holmes CJ on 23 May 2016, orders that:

1. The respondent be released from custody on 24 April 2020 and continue to be subject to the supervision order made by Holmes CJ on 23 May 2016.