SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v Perkins* [2020] QSC 100
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **RAYMOND KEITH PERKINS** (respondent)
FILE NO:	BS No 12056 of 2008
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 May 2020
DELIVERED AT:	Brisbane
HEARING DATE:	1 May 2020
JUDGE:	Davis J
ORDER:	**It is declared that the supervision order made on 5 May 2010 and commencing on 6 May 2010 under provisions of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 expires at midnight on 6 May 2020.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – DANGEROUS SEXUAL OFFENDER – GENERALLY – where there is a dispute about whether the respondent's supervision order has been extended by operation of Division 6 of Part 2 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (the DPSOA) – where the respondent has been on supervision for 10 years – where the respondent was in custody during the currency of the supervision order – where the respondent was sentenced to imprisonment to the rising of the court – whether a sentence of imprisonment to the rising of the court is a term of imprisonment for the purposes of Division 6 of the DPSOA – whether the supervision order has been extended by force of s 24 of the DPSOA *Acts Interpretation Act* 1954, s 14A, s 14B *Child Protection (Offender Reporting and Offender Prohibition Order) Act* 2004, s 50 *Dangerous Prisoners (Sexual Offenders) Act* 2003, s 3, s 5, s

8, s 13, s 13A, s 16, s 20, s 22, s 23, s 24, 30
Penalties and Sentences Act 1992, s 4, s 159A
Road Safety (Alcohol and Drugs) Act 1970 (Tas)
Sentencing Act 1995 (NT)

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT) (2009) 239 CLR 27, followed
Al-Kateb v Godwin (2004) 219 CLR 562, followed
Attorney-General for the State of Queensland v Bielefeld [2020] QSC 69, cited
Attorney-General v Fardon [2019] 2 Qd R 487, cited
Attorney-General v Francis [2007] 1 Qd R 396, cited
Attorney-General for the State of Queensland v Fardon [2019] QSC 2, cited
Attorney-General v KAH [2019] 3 Qd R 329, cited
Attorney-General for the State of Queensland v Perkins [2009] QSC 53, cited
Attorney-General v Phineasa [2013] 1 Qd R 305, followed
Attorney-General for the State of Queensland v Ruhland [2020] QSC 33, followed
Fardon v Attorney-General for the State of Queensland (2004) 223 CLR 575, cited
Federal Commissioner of Taxation v Consolidated Media Holdings Limited (2012) 250 CLR 503, followed
Harris v Walker (1996) 89 A Crim R 257, considered
Ledsom v Taylor (2010) 349 FLR 184, considered
Mamarika v Chambers [2007] NTSC 13, considered
Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476, followed
R v Pritchard (1999) 107 A Crim R 88, considered
Saga v Reid [2010] ATSC 59, cited
SAS Trustee Corporation v Miles (2018) 92 ALJR 1064, followed
SZTAL v Minister for Immigration and Border Protection (2017) 91 ALJR 936, followed
White v Brown (2003) 13 NTLR 50, considered
X7 v Australian Crime Commission (2013) 248 CLR 92, cited

COUNSEL: R Berry for the applicant
S Robb for the respondent

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

[1] The respondent is the subject of a supervision order made under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (the DPSOA). By force of the provisions in Division 6 of Part 2 of the DPSOA, the duration of a supervision order is extended where a person who is the subject of an order is imprisoned in certain circumstances during the order's currency.

[2] Dispute has arisen as to:

(a) whether the supervision order has been extended at all by operation of Part 2, Division 6 of the DPSOA and, if so;

(b) by how long it has been extended.

Background

[3] The respondent is a person who was sentenced to a term of imprisonment upon conviction of a "serious sexual offence".[1] Those offences were committed in 1999 and involved sexual acts committed against a child. On 14 April 2000, the respondent was sentenced to an effective sentence of nine years' imprisonment. On 13 March 2009, an order was made under s 13(5)(a) of the DPSOA that the respondent be detained indefinitely for his control, care and treatment.[2] On 6 May 2010, the respondent was released on a supervision order made under s 30(3)(b) of the DPSOA for a period of ten years expiring on 6 May 2020.[3]

[4] On 30 May 2013, the respondent was taken into custody having been charged with an offence against the *Child Protection (Offender Reporting and Offender Prohibition Order) Act* 2004.[4] The breach consisted of a failure to report that he had obtained employment. He remained in custody on remand until 4 June 2013 when he came before the Magistrates Court at Brisbane and he entered a plea of guilty. On that day, Magistrate Herlihy:

(a) convicted the respondent of the offence; and

(b) sentenced him to imprisonment to the rising of the court in these terms: "sentenced to the rising of court". The Verdict and Judgment Record records this as: "order that the offender be imprisoned for a period of imprisonment to the rising of the court".

[5] Upon sentence being passed, the court was adjourned. It is not possible from the transcript of sentencing to ascertain exactly how much time elapsed from the

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1 *Dangerous Prisoners (Sexual Offenders) Act* 2003, s 5(6).
2 *Attorney-General for the State of Queensland v Perkins* [2009] QSC 53.
3 The order was made by Fryberg J on 5 May 2010 on a review of the continuing detention order under provisions to Part 3 of the DPSOA.
4 Section 50(1).

pronouncement of the sentence to the rising of the court but it must be a few minutes, at most.

[6] From the time of his arrest to the date he was convicted (and counting the day he was convicted), the respondent was in custody for a total of six days. The applicant submits that the supervision order has been extended by six days. The respondent submits that the supervision order has not been extended at all, and in the alternative, submits that it has only been extended by five days as the date of conviction ought not be counted.

Statutory context

[7] The DPSOA is a scheme of preventative detention. Its stated objects appear in s 3 as:

> "**3 Objects of this Act**
>
> The objects of this Act are—
>
> (a) to provide for the continued detention in custody or supervised release of a particular class of prisoner to ensure adequate protection of the community; and
>
> (b) to provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation."

[8] The objects of the DPSOA are not only the control and detention of prisoners but also their treatment and rehabilitation.

[9] The DPSOA establishes a scheme whereby the Attorney-General may apply for orders detaining prisoners who have been convicted of a "serious sexual offence" beyond the expiry of their sentences (a continuing detention order or a "CDO") or, alternatively, orders releasing such prisoners to the community subject to supervision.[5]

[10] By s 13, the jurisdiction to make either a CDO or a supervision order arises upon a finding that a prisoner is an unacceptable risk of committing a serious sexual offence in the absence of an order. Relevantly here, s 13 provides:

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5 *Dangerous Prisoners (Sexual Offenders) Act* 2003, ss 3, 5, 8, 13 and 16.

"**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.

…

(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."

[11] By s 13(6), a court, which is satisfied that an order under s 13[6] is necessary, must, when considering whether to make a CDO or a supervision order,[7] regard the adequate protection of the community from the risk posed by the prisoner as "the paramount consideration".[8] In practical terms, that means that if a supervision order

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6 A continuing detention order or a supervision order.

7 Or no order, see *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575 at [34] per McHugh J.

8 Sections 13(6)(a), 30(4)(a).

will not ensure the adequate protection of the community, then a CDO should be made. However, if a supervision order will render the protection adequate, then a supervision order should be preferred to a CDO.[9]

[12] If a supervision order is made, then its terms are prescribed by s 16. That provides:

> "**16 Requirements for orders**
>
> (1) If the court or a relevant appeal court orders that a prisoner's release from custody be supervised under a supervision order or interim supervision order, the order must contain requirements that the prisoner—
>
> (a) report to a corrective services officer at the place, and within the time, stated in the order and advise the officer of the prisoner's current name and address; and
>
> (b) report to, and receive visits from, a corrective services officer as directed by the court or a relevant appeal court; and
>
> (c) notify a corrective services officer of every change of the prisoner's name, place of residence or employment at least 2 business days before the change happens; and
>
> (d) be under the supervision of a corrective services officer; and
>
> (da) comply with a curfew direction or monitoring direction; and
>
> (daa) comply with any reasonable direction under section 16B given to the prisoner; and
>
> (db) comply with every reasonable direction of a corrective services officer that is not directly inconsistent with a requirement of the order; and
>
> (e) not leave or stay out of Queensland without the permission of a corrective services officer; and
>
> (f) <u>not commit an offence of a sexual nature during the period of the order</u>.
>
> (2) The order may contain any other requirement the court or a relevant appeal court considers appropriate—
>
> (a) to ensure adequate protection of the community; or

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9 *Attorney-General v Francis* [2007] 1 Qd R 396.

(b) for the prisoner's rehabilitation or care or treatment." (emphasis added, notes omitted)

[13] Where a CDO is made, there must be annual reviews of the order.[10] A supervision order may be made, like here, at an annual review of a CDO. The supervision order is then made under s 30(3)(b). For present purposes, there is no practical distinction between a supervision order made under s 13(5)(b) and one made under s 30(3)(b).

[14] By s 13A, the term of the supervision order must be set by the court. Section 13A is in these terms:

"**13A Fixing of period of supervision order**

(1) If the court makes a supervision order, the order must state the period for which it is to have effect.

(2) In fixing the period, the court must not have regard to whether or not the prisoner may become the subject of—

(a) an application for a further supervision order; or

(b) a further supervision order.

(3) The period can not end before 5 years after the making of the order or the end of the prisoner's period of imprisonment, whichever is the later."

[15] Risk, and the adequate protection of the community from the risk posed by the prisoner, are the primary considerations under the DPSOA. The term of a supervision order should be set so as to expire at a time when the prisoner is an acceptable risk without being under supervision.[11]

[16] There are various provisions in the DPSOA whereby the period of supervision may be extended.

[17] Division 4A of Part 2 is headed "Extending supervised release". To the extent that the heading to the division suggests that the provisions authorise the extension of an existing supervision order, it is misleading. The sections authorise the making of a new supervision order to operate beyond the period of the supervision order made under s 13(5)(b).[12] It is unnecessary to analyse these provisions in detail. They

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10 Part 3 of the DPSOA.
11 *Attorney-General v KAH* [2019] 3 Qd R 329 at [60].
12 Section 30(3)(b).

were considered by the Court of Appeal in *Attorney-General v Fardon*[13] and following that appeal, by Bowskill J in the rehearing of the Attorney-General's application under Division 4A.[14] It is sufficient to observe that:

1. the further supervision order is made in exercise of judicial power; and

2. the further supervision order is made upon a finding that the prisoner still poses an unacceptable risk of committing a serious sexual offence if not subject to further supervision.

[18] Division 5 of Part 2 contains provisions which operate upon a breach or likely breach of a supervision order. Sections 20 and 22 are the relevant provisions which provide, relevantly here:

> "**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

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13 [2019] 2 Qd R 487.

14 *Attorney-General for the State of Queensland v Fardon* [2019] QSC 2.

(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 these provisions, a supervised prisoner may be taken into custody. Upon proof of a breach or likely breach, the court may amend the supervision order, including by extending its term. By these provisions, the legislature has vested judicial power to extend the term of the supervision order and any extension is effected by exercise of that power.

[20] Sections 23 and 24, which are critical to the present dispute, together constitute Division 6 of Part 2. Division 6 has a different function to Divisions 4A and 5. The provisions of this division operate where a supervised prisoner is in custody as a result of committing offences other than an "offence of a sexual nature". The sections provide:

"**23 Application of division**

This division applies if, after being released from custody under a supervision order or interim supervision order, a released prisoner is sentenced to a term or period of imprisonment for any offence, other than an offence of a sexual nature.

> **24 Period in custody not counted**
>
> (1) The released prisoner's supervision order or interim supervision order is suspended for any period the released prisoner is detained in custody on remand or serving the term of imprisonment.
>
> (2) The period for which the released prisoner's supervision order or interim supervision order has effect as stated in the order is extended by any period the released prisoner is detained in custody."

[21] By these provisions, an extension of a supervision order occurs by force of the DPSOA once the circumstances defined in s 23 occur, namely if the prisoner is sentenced to a period or term of imprisonment for any offence other than one "of a sexual nature". By force of s 24, the supervision order is extended by a period equivalent to the time the prisoner is in custody. The extension occurs by force of ss 23 and 24 and not upon any exercise of judicial power.[15]

[22] The terms "term of imprisonment" and "period of imprisonment" are defined for the DPSOA as they are defined in s 4 of the *Penalties and Sentences Act* 1992 (the PSA). That section provides:

> "**4 Definitions**
>
> In this Act—
>
> …
>
> ***period of imprisonment*** means the unbroken duration of imprisonment that an offender is to serve for 2 or more terms of imprisonment, whether—
>
> (a) ordered to be served concurrently or cumulatively; or
>
> (b) imposed at the same time or different times;
>
> and includes a term of imprisonment.
>
> …
>
> ***term of imprisonment*** means the duration of imprisonment imposed for a single offence and includes—
>
> (a) the imprisonment an offender is serving, or is liable to serve—
>
> (i) for default in payment of a single fine; or
>
> (ii) for failing to comply with a single order of a court; and

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15 *Attorney-General for the State of Queensland v Ruhland* [2020] QSC 33.

(b) for an offender on whom a finite sentence has been imposed, any extension under section 174B(6) of the offender's finite term."

The parties' contentions

[23] Ms Berry of counsel for the applicant submitted that when the respondent was sentenced to the rising of the court on 4 June 2013, he was sentenced "to a term of imprisonment" for the purposes of s 23. It did not matter, she submitted, that the term of imprisonment may only have been a few moments (i.e. until the court rose). That was sufficient, she submitted, to trigger s 24(2). As the respondent was in custody for at least part of the day upon which he was sentenced, the supervision order was, she submitted, extended by that one day, together with the five days on which the respondent was on remand.

[24] Ms Robb of counsel advanced two arguments. Firstly, she submitted that an undefined and nominal sentence of imprisonment such as "to the rising of the court" was not a "term of imprisonment" for the purposes of ss 23 and 24. It did not matter, she submitted, that the time on remand may form part of a period of imprisonment as the remand period was only picked up if the respondent was sentenced to a "term of imprisonment" for the offence. He was not, for instance, sentenced to a period of six days imprisonment with the five days on remand declared as time served.[16] Therefore, she submitted, the supervision order was not extended by any of the six days identified by the applicant.

[25] Ms Robb's second submission was made in the alternative to the first. She submitted that if the respondent's sentence to the rising of the court was a sentence to a term of imprisonment, the respondent was released virtually immediately. He did not serve the day he was sentenced in custody, so the supervision order was extended by the five days spent on remand but not the sixth day being the day the respondent was sentenced.

[26] For the reasons which follow, I accept Ms Robb's first submission so her second does not arise for determination, although her second submission supports her first.

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16 *Penalties and Sentences Act* 1992, s 159A.

[27] Declaratory relief, as sought by the applicant, is discretionary. Both parties referred to my recent decision in *Attorney-General for the State of Queensland v Ruhland*[17] and submitted that the status of the supervision order ought to be declared for the reasons there explained.

Consideration and determination

[28] The notion of a sentence to the rising of the court appears nowhere in the DPSOA. It also does not appear in the PSA from where the DPSOA draws some definitions. The definition of "period of imprisonment" in the PSA is of no relevance here. There are not two "terms of imprisonment".[18] That is because the phrase "term of imprisonment" means "the duration of imprisonment imposed for a single offence".[19] Therefore, the time on remand cannot be a different "term of imprisonment" to the "term of imprisonment" allegedly imposed on the day of sentence.

[29] There is only one issue here. That is whether on a proper construction of ss 23 and 24 of the DPSOA a sentence of imprisonment to the rising of the court is a "term of imprisonment" for the purpose of Division 6, Part 2. If it is, then both of Ms Robb's submissions should be rejected. That is because the sentence would trigger s 24(2), and if the sentence imposed was a "term of imprisonment", then that term must surely include the day of sentence. The remand period would then be picked up and the supervision order extended for a period of six days. If the sentence imposed is not "a term of imprisonment", then Ms Robb's first submission must be accepted and it would follow that none of the six days is added to the period of the supervision order.

[30] I was referred to cases which have considered the effect of a sentence of imprisonment to the rising of the court.

[31] In *White v Brown*,[20] Mildren J, sitting in the Northern Territory Supreme Court, considered provisions of the *Sentencing Act* 1995 (NT). That Act required that where an offender had a previous conviction for assault upon a female,[21] a

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17 [2020] QSC 33.
18 *Penalties and Sentences Act* 1992, s 4.
19 *Penalties and Sentences Act* 1992, s 4.
20 (2003) 13 NTLR 50.
21 Against s 188 of the *Criminal Code* (NT).

magistrate sentencing the offender for a subsequent offence of a similar kind, must impose a sentence which required the offender to serve "a term of actual imprisonment" or a sentence which imposed "a term of imprisonment that is suspended partly but not wholly".

[32] The sentence imposed was described by Mildren J as a "term of imprisonment for three months to be suspended from 11.15am on the date upon which that sentence was imposed, subject to a number of conditions including an operational period of three years from that date".[22] That was not, at least in form, a sentence to the rising of the court. However, Mildren J thought that was the effect of the sentence and in dismissing the appeal said this:

> "[19] There is no doubt that the learned Magistrate imposed a term of imprisonment. Clearly a sentence in effect to the rising of the Court is a sentence to a term of imprisonment: see *Harriss v Walker* (1996) 89 A Crim R 257 at 261-262; *Reg v Cutbush* LR 2QB 379; *Rex v Martin* [1911] 2 KB 450; *R v Harrop* [1979] VR 549 at 552-553. There is no doubt also that the learned Magistrate did not wholly suspend the term of imprisonment that he imposed. Therefore, so far as the argument based on ground 1 of the notice of appeal is concerned, I find against the appellant."

[33] In *Mamarika v Chambers*,[23] another case from the Northern Territory, a magistrate imposed a sentence of imprisonment of one month for an offence of assault against a police officer. The *Sentencing Act* 1995 (NT) required a sentencing court to impose "a term of imprisonment" for such an offence. On appeal it was argued that the sentence of one month was manifestly excessive and that one of the options which ought to have been adopted by the magistrate was to impose a sentence to the rising of the court. Southwood J dismissed the appeal, but in so doing accepted *White v Brown* as authority for the proposition "that a sentence of imprisonment to the rising of the court is a sentence to a term of imprisonment".[24]

[34] *Harris v Walker*[25] is a decision of Cox J given in the Supreme Court of Tasmania and which, like *White v Brown*, was an appeal by the prosecution who submitted that an error had been made in the application of mandatory sentencing provisions.

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22 At [5].
23 [2007] NTSC 13.
24 At [7].
25 (1996) 89 A Crim R 257.

A magistrate had sentenced the offender to imprisonment to the rising of the court upon a charge of driving a vehicle whilst under the influence of alcohol contrary to the provisions of the *Road Safety (Alcohol and Drugs) Act* 1970 (Tas). The magistrate also disqualified the offender from holding a licence for a period but had not imposed a fine.

[35] The *Road Safety (Alcohol and Drugs) Act* 1970 (Tas) provided that upon conviction of a relevant offence:

> "(3) Subject to subsection (5), a court that convicts a person of an offence specified in column I of the Table -
>
> (a) must-
>
> (i) impose a fine of an amount not less than the minimum amount shown in the Table and not more than the maximum amount shown in the Table; or
>
> (ii) impose a term of imprisonment for a term not exceeding the term shown in the Table; or
>
> (iii) impose both that fine and that term of imprisonment; and
>
> (b) must, in addition, disqualify the person from holding or obtaining a driver's licence for a period of not less than the minimum period shown in the Table and not more than the maximum period shown in the Table."

[36] On appeal, it was argued that the magistrate had no power to sentence the offender to the rising of the court. Alternatively, it was submitted that if the magistrate did have that power, then the sentence was not one of "a term of imprisonment" and therefore a fine had to be imposed. Thirdly, it was argued that the sentence was manifestly inadequate.

[37] Cox J held that the magistrate did have the power to impose a sentence of imprisonment to the rising of the court. His Honour thought that such a sentence was probably a sentence to a "term of imprisonment" but that he need not decide that issue finally because the sentence was, in his judgment, manifestly inadequate. The appeal was allowed and the offender was fined. In the course of the judgment, his Honour said:

"In *Winsor v Boaden* (1953) 90 CLR 345 at 347, Dixon CJ, delivering the judgment of the court, said:

> 'The word 'sentence' connotes a judicial judgment or pronouncement fixing a term of imprisonment. A term of imprisonment is the period fixed by the judgment as the punishment for the offence.'

The ordinary meaning of the word 'term' is a limit in space, duration, etc; that which limits the extent of anything; a limit, extremity, boundary or bound (The Shorter Oxford English Dictionary). The fact that the limit of the period fixed by the judgment is fluid and dependent upon the happening of some inevitable event other than the passage of a given period of time does not deprive it of the character of being a 'term'. Thus a sentence of imprisonment until the death of the offender is a sentence fixing a term of imprisonment which coincides with the term of the offender's natural life, although its duration will be unknown at the time sentence is pronounced. The *Criminal Code* (Tas), s 158 now provides that any person who commits murder is guilty of a crime and is liable to imprisonment for the term of the person's natural life, or for such other term as the court determines. In my view, therefore, the fact that the sentence was limited in duration to the rising of the court does not mean that a term of detention was not imposed. The real difficulty is whether such a sentence imposes a term of imprisonment. Resort to the dictionary shows that the ordinary meaning of the verb 'to imprison' is to put in prison; to detain in custody and to confine (ibid). The tort of false imprisonment is not confined to cases of incarceration, but includes any deprivation of liberty (*Clerk and Lindsell On Torts* (16th ed, para 17-15)). When Parliament uses the expression 'term of imprisonment' in the context of a choice of punishments, one of which must be inflicted by a court for the purposes of deterrence, I must confess to some difficulty in contemplating that Parliament was intending some form of temporary deprivation of liberty which completely bypasses the regime of incarceration within a prison contemplated by the *Prison Act*. Nevertheless, 'prison' is defined broadly by that Act as including 'a gaol or place of detention irrespective of the title by which it is known'. A sentence 'to the rising of the court' is by no means unknown. It is a nominal punishment, almost never appropriate for serious offences (*Knight v Birch* (1992) 106 FLR 109 at 119). If a magistrate orders a convicted person by way of sentence to be detained until the rising of the court, it cannot be said that such a punishment is inherently unlawful. Equally, in my view, as presently advised, it cannot be said not to be a *term of imprisonment*. I am not persuaded, therefore, that the appellant succeeds on either of the first two grounds, but, interesting though the point is, it is unnecessary to express a final opinion upon it because I am quite satisfied that ground 3 has been made out."

[38] In *Ledsom v Taylor*,[26] there was an appeal against various sentences imposed upon convictions for numerous offences. One of those sentences was "to the rising of the court". There was no challenge to that sentence so what Refshauge J said about it was *obiter dicta*. However, his Honour did say:

> "56. I also note that on the cannabis charge, Mr Ledson was sentenced to the rising of the Court. This has been defined by the *Encyclopaedic Australian Legal Dictionary* (LexisNexis) as:
>
> > A sentence of imprisonment imposed on an offender for the period of the sitting of the court in which the sentence has been passed. Very often after imposing the sentence the court indicates that for the purpose of the sentence it shall be taken as having risen and thereby the offender is immediately released from the custody of the court.
>
> 57. It is a sentence of imprisonment: *White v Brown* [2003] NTSC 51 (at [19]). It is a nominal punishment, almost never appropriate for serious offences: *Knight v Birch* (1992) 106 FLR 109 (at 119).
>
> 58. Such sentences have to be treated with some care. In *Rowley v Hollis* [1977] WAR 42, the Court there held that there was no power to make such an order in the particular statutory context there relevant.
>
> 59. In this Territory, however, s 63(3) of the *Crimes (Sentencing) Act* 2005 (ACT) suggests that such an order is within power. It certainly has high authority as being an available sentence in this Territory: *R v Griggs* [2006] ACTCA 3. Nevertheless, the court must be clear about when it rises. As was said in Schurr, B, *Criminal Procedure* (NSW) (Thomson LBC Information Services: Sydney, 1996), looseleaf, at 28-2051 [28.630]:
>
> > A court may sentence an offender to the rising of the court. This is a common law power used in 3 per cent of local court cases and 1 per cent of higher court cases: New South Wales Law Reform Commission, Sentencing: Community Based Sentences, Discussion Paper (Sydney, 1996). The sentence usually only lasts seconds – until the words are pronounced that "You are sentenced to the rising of the court and for that purpose the court has now risen".
>
> 60. Here, the court did adjourn at the end of the sentencing and this is to be taken as the "rising of the court". In some cases, however, this could be some hours of custody: *Harriss v*

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26 (2010) 349 FLR 184.

> *Walker* (1996) 89 A Crim R 257 (at 260). The adjournment at lunch may or may not be regarded as the 'rising of the court'; it may be constituted by the adjournment at the end of the day. Even that is not always so regarded. In *State v Weaver* 11 Neb. 163 at 165; 8 NW 385, the rising of the court was said to be the court's final adjournment on the last day of the court's term. That, however, does not seem to be an interpretation that has ever been applied in Australia. The approach of actually specifying the time of rising, as in B Schurr, *op cit*, (at [59]) is to be preferred."[27]

[39] In *The Queen v Pritchard*,[28] the Court of Appeal of New South Wales considered the effect of the abolition of an offence upon a sentence imposed for commission of the offence before it was abolished. Abadee J clearly, by way of *obiter*, said:

> "Indeed, as I have already indicated it is difficult to conceive how, putting aside an express statutory provision there could be a conviction for an offence without a penalty at all. Even Mr Byrne's[29] suggestion of a nominal sentence for such an offence or a rising of the court sentence still involves a sentence, which is in a technical sense, a form of imprisonment even though the restraint on liberty may operate in fact, only for but a short moment in time."[30]

[40] As none of the cases cited concern the DPSOA, they are all of limited use in determining the question of construction which arises here. Previous decisions which have considered Division 6 of Part 2 of the DPSOA have not dealt with the present issue.[31] Ultimately, the task of construction is to ascertain the meaning of the words appearing in the sections by consideration of the statute as a whole and consideration of the purposes of the statute and the particular provisions and the mischief sought to be remedied.[32]

[41] The DPSOA operates such to abrogate or limit fundamental rights through the imposition of detention or supervision. As held by Muir JA in *Attorney-General v*

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27 See also *Saga v Reid* [2010] ATSC 59 at [95].

28 *R v Pritchard* (1999) 107 A Crim R 88.

29 Byrne SC, counsel for the appellant.

30 At 98.

31 *Attorney-General for the State of Queensland v Ruhland* [2020] QSC 33 and *Attorney-General for the State of Queensland v Bielefeld* [2020] QSC 69.

32 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, *Federal Commissioner of Taxation v Consolidated Media Holdings Limited* (2012) 250 CLR 503, *SZTAL v Minister for Immigration and Border Protection* (2017) 91 ALJR 936 at [14], [35]-[40], *SAS Trustee Corporation v Miles* (2018) 92 ALJR 1064 at [20] and [41], *Acts Interpretation Act* 1954, ss 14A and 14B.

Phineasa[33] the DPSOA is legislation which is to be construed by reference to the principle of legality so that citizens' rights ought not be compromised by the legislation unless by unmistakable and unambiguous language.[34]

[42] The provisions of each of Divisions 4A, 5 and 6 of Part 2 all may lead to an extension of supervision, however, all those divisions operate differently.

[43] Division 4A empowers the court to assess risk towards the end of the term of a supervision order and impose further supervision if the risk subsists. Division 5 empowers the court to impose further supervision where there has been a breach of the supervision order.

[44] As already observed, Division 6 is clearly designed to operate independently of any breach of a supervision order. That is why the section operates when a released prisoner serves a term or period of imprisonment for an offence "other than an offence of a sexual nature". The term "offence of a sexual nature" is the term used in s 16(1)(f) so it is a condition of every supervision order that the supervised person not commit an offence of a sexual nature. If a supervised person is sentenced to a term of imprisonment for an offence of a sexual nature, then Division 5 is engaged rather than Division 6.

[45] Division 6 covers a situation not covered by either Divisions 4A or 5; namely, where there has been no breach and no concerns warranting a Division 4A application, but the supervision order has been frustrated by intervening incarceration. Division 6, by force of the provisions themselves, and independently of any exercise of judicial power, extends the supervision order by the time spent in custody for an offence "other than of a sexual nature" so that the prisoner spends the full term of the supervision order in the community and under supervision. This promotes the objects of rehabilitation identified in s 3 of the DPSOA.

[46] The legislature has chosen to select, as the trigger to Division 6, the sentence which is imposed for "any offence, other than an offence of a sexual nature". What is required, relevantly here, is that the prisoner is "sentenced to a term … of

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33 [2013] 1 Qd R 305 at [40]-[41]; and with whom White JA and Philippides J (as her Honour then was) agreed.

34 See also *Al-Kateb v Godwin* (2004) 219 CLR 562 at 577 and *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492 and *X7 v Australian Crime Commission* (2013) 248 CLR 92.

imprisonment". In determining whether that has occurred, time spent on remand is irrelevant. However, remand time may, in certain circumstances, form part of the "term of imprisonment" if there is a declaration pursuant to s 159A of the PSA that the remand time is time served on the sentence.

[47] Ms Robb's second submission was that the day of sentence ought not to be counted as extending the supervision order as the respondent did not spend the entire day in custody. That submission, in reality, supports Ms Robb's first submission, namely that a sentence to the rising of the court, being a sentence of imprisonment only in a fleeting, temporary and undefined way, is not a "term of imprisonment" for the purposes of ss 23 and 24 of the DPSOA.

[48] Here there was no "term of imprisonment" imposed, as understood by Division 6. Upon being sentenced, the respondent has not been incarcerated so that the operation of the supervision order to which he is subject is frustrated. He was, within minutes, released. As already observed, when the scheme of Division 6 is looked at in the broader scheme of the DPSOA, including Divisions 4A and 5, the period of the "term of imprisonment" is to be added to the supervision order so that the supervised prisoner spends the time equivalent to the whole term of the supervision order in the community. Here that period is neither defined nor discernible. It surely cannot be contemplated that a few minutes, or even an hour or two, will be added to the supervision order to represent the time between the respondent being sentenced and the court rising. It cannot be contemplated that Division 6 operates so that rather than the supervision order ending at midnight on its last day, it ends in the early hours of the next morning (but that need not be finally determined).

[49] What is contemplated by Division 6 is that there is some time that can be truly identified as a "term" which is added (together with any remand time) to the period of supervision set by the supervision order. This is not the occasion to explore the limits of Division 6 (i.e. whether a specified period of imprisonment, less than a whole day but expiring at a specified hour (as in *White v Brown*),[35] could constitute a "term of imprisonment" for Division 6). The sentence here was one of imprisonment in only the most artificial ways. Such an order for "imprisonment"

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35 (2003) 13 NTLR 50.

for some undefined period such as "the rising of the court" is not, when one has regard to the purposes of Division 6 and the principle of legality, a "term of imprisonment" for the division.

[50] It follows that neither the date of the sentence nor any of the five days of remand are picked up by s 24 and added to the term of the supervision order.

[51] There is no suggestion of any other factor which may extend the period of supervision so it is appropriate to declare that the supervision order expires at midnight on 6 May 2020.

Orders

[52] It is declared that the supervision order made on 5 May 2010 and commencing on 6 May 2010 under provisions of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 expires at midnight on 6 May 2020.