SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v Nemo* [2020] QSC 140
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **WINSTON JOHN NEMO** (respondent)
FILE NO:	BS No 2341 of 2018
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	Orders made on 22 May 2020, reasons delivered on 29 May 2020
DELIVERED AT:	Brisbane
HEARING DATE:	22 May 2020
JUDGE:	Davis J
ORDER:	**The court, being satisfied to the requisite standard that the respondent, Winston John Nemo, has contravened a requirement of the supervision order made by Bowskill J on 16 July 2018, orders that:** **1. The respondent, Winston John Nemo, be released from custody on 22 May 2020 and continues to be subject to the supervision order made by Bowskill J on 16 July 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 contravened the supervision order made on 16 July 2018 under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 by consuming and possessing illicit drugs – where the respondent pleaded guilty in the Magistrates Court to possessing Suboxone – where the respondent has not committed a serious sexual offence while subject to the supervision order – where the evidence of the psychiatrists is that the risk the respondent poses to the community while subject to the existing supervision order is low – whether the respondent should be released subject to the requirements of

the existing supervision order

Dangerous Prisoners (Sexual Offenders) Act 2003, s 8, s 11, s 13, s 16, s 20, s 22
Drugs Misuse Act 1986

Attorney-General for the State of Queensland v Fardon [2011] QCA 111, considered
Attorney-General for the State of Queensland v Fardon [2011] QCA 155, considered
Attorney-General for the State of Queensland v Fardon [2013] QCA 299, followed
Attorney-General for the State of Queensland v Fardon [2018] QSC 193, followed
Attorney-General v Fardon [2019] 2 Qd R 487, cited
Attorney-General for the State of Queensland v Francis [2007] 1 Qd R 396, followed
Attorney-General v Phineasa [2013] 1 Qd R 305, cited
Kynuna v Attorney-General (Qld) [2016] QCA 172, cited
Turnbull v Attorney-General [2015] QCA 54, followed

COUNSEL: J Tate for the applicant
K Bichel for the respondent

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

[1] The respondent is a prisoner the subject of a supervision order made under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (the DPSOA) by Bowskill J on 16 July 2018.

[2] The applicant alleged that the respondent breached the terms of the supervision order and she sought orders under s 22 of the DPSOA as a consequence.

[3] On 22 May 2020, I made the following orders and reserved my reasons for so doing:

> "The court, being satisfied to the requisite standard that the respondent, Winston John Nemo, has contravened a requirement of the supervision order made by Bowskill J on 16 July 2018, orders that:
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> 1. The respondent, Winston John Nemo, be released from custody on 22 May 2020 and continues to be subject to the supervision order made by Bowskill J on 16 July 2018."

[4] These are my reasons for making the orders which I did.

History

[5] The respondent is a young Indigenous man born in May 1997. He has just turned 23 years of age.

[6] In making the supervision order on 16 July 2018, Bowskill J described the respondent's criminal history in these terms:

> "He was first convicted of assault occasioning bodily harm in January 2012, when aged 14, and he was given probation and community service at that time. This offence occurred when a group of youths, including Mr Nemo, were throwing rocks at the victim, who had attempted to stop the group committing other offences; and one of the youths, but not Mr Nemo, had also used a baseball bat in the assault. It appears that Mr Nemo spent some period of time in the youth detention centre in Townsville in January 2012 on remand for this offence.
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> His history also includes multiple entries for burglary, trespass, wilful damage and possessing utensils, as well as entries for breaching various orders.
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> His second assault occasioning bodily harm conviction was in January 2015, when Mr Nemo punched a disabled man. He was disabled in the sense that he was deaf and unable to speak. This was said to have been because the man had earlier chased Mr Nemo's brothers. He was sentenced to one month in prison, which was suspended for 12 months.
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> The offence which has resulted in Mr Nemo being the subject of this application was committed on 27 July 2015, so whilst he was the subject of that suspended sentence. He was 18 years old. He was convicted on 7 September 2015, following a plea of guilty.
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> The victim was a 34 year old woman, unknown to Mr Nemo. She was out for her morning run, setting off at 5.15 am. She had seen Mr Nemo directly behind her, and increased her speed to get away from him, later seeing him walking some distance away from her, and then in another street appearing to be heading away from her.
>
> However, later, she looked over her shoulder and saw him running towards her. He grabbed her from behind in a kind of bear-hug, and forced her to the ground, face down. He lay on top of her and used his body weight to hold her down. She struggled with him. He pulled her running shirt over her head and rubbed dirt over her face and into her mouth. He then pulled her to her feet and pushed her towards the opposite side of the footpath, into a bushy area. He again forced her to the ground. He told her he would not hurt her if she gave him what he wanted. During the assault, the victim felt him put his hand inside her running pants and underwear, and she felt his fingers near her anus, and felt him rubbing his groin against her backside. She struggled and screamed, and was eventually able to get free and run to a man who was walking nearby.
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> According to the police material, Mr Nemo was arrested a few hours later, and made some admissions, including that he had seen the victim and followed her and shoulder-barged her, causing her to fall to the ground, and had used his hand to touch her on her leg and squeeze her buttock. It was said that he had been drinking, and did

not have a complete recall of the events. He was charged with assault with intent to commit rape, sexual assault, and assault occasioning bodily harm. He was sentenced, as I have mentioned, to three years' imprisonment.

To each of the psychiatrists who have interviewed him, Mr Nemo denied this offending. However, in an affidavit filed in this Court, Mr Nemo says he accepts he has been convicted of these offences, and says he does not intend to take any steps to disturb the convictions. That is the only instance of sexual offending in his criminal history."[1]

[7] The supervision order contained a condition that the respondent …:

"(20) abstain from the consumption of alcohol and illicit drugs for the duration of this order."

[8] The factual basis of the contravention alleged by the applicant is as follows:

"Since release to the Supervision Order made by Bowskill J on 16 July 2018, the respondent has demonstrated varied compliance.

As per condition (21), namely 'submit to any form of drug and alcohol testing including both random urinalysis and breath testing as directed by a Corrective Services officer,' the respondent has been required to engage in urinalysis testing. Since 9 October 2018, he has provided 29 urinalysis tests, returning confirmatory results positive to cannabis. The most recent confirmed test was on 24 February 2020 at a level of 401ug/L. Confirmatory results are still pending for a urinalysis test conducted on 3 March 2020 which returned presumptive positive results to cannabis. The respondent's ongoing substance [consumption] is in contravention of condition (20), namely 'abstain from the consumption of alcohol and illicit drugs for the duration of this order.' To date contravention action for these positive urinalysis tests have included verbal and written warnings, and curfew restrictions.

Noting the respondent's young age of 22 years, Queensland Corrective Services ('QCS') has tailored case management accordingly in order to maximise his engagement for the purpose of assisting with his reintegration into the community. This has included but not limited to the implementation of an age appropriate positive behaviour reward system.

Between January 2019 and April 2019, the respondent engaged in the Substance Abuse Maintenance Intervention program delivered by QCS. His program completion report noted the respondent participated with marginal effort. From his responses during the program it was uncertain if the respondent considers substances a concern for him. The respondent reported his goal was to not use cannabis and comply with his Order conditions. During the course of the program the respondent maintained clear urinalysis results.

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1 *Attorney-General (Qld) v Nemo*, Bowskill J, unreported 16 July 2018, pp 2-3.

However, due to the respondent commencing use of cannabis again in May 2019 he was referred to engage with the Queensland Injectors Health Network. He attended his first session on 5 June 2019; he attended regular appointments up until 18 November 2019.

On 12 November 2019, the respondent participated in a disciplinary interview with a QCS manager due to ongoing positive urinalysis tests. During this interview it was explicitly communicated to the respondent that if he continued to engage in the use of illicit substances he would likely be returned to custody. During this interview the respondent reported that he did not wish to return to custody. As such a discussion was had around his reasons for using cannabis, strategies to stop using and his goal.

Due to the respondent's aboriginal culture, he has been encouraged to engage with culturally appropriate programs/services. Since release, the respondent has engaged in Uncle Alfred's Men's Group. He has also engaged with Headspace Young Men's Healing group. On 14 January 2020, the respondent was approved to commence cultural mentoring sessions with Uncle Alfred, once per week; his attendance has been sporadic.

Due to the respondent reporting feeling isolated, QCS officers have also promoted communication with his family. Additionally he was offered an opportunity to engage with a local football club to increase his pro-social network. The respondent also participated in study at TAFE QLD however this was cancelled in February 2020 due to his lack of attendance.

Between November 2019 and January 2020, during case management meetings, it was identified that the respondent was presenting in a state suggestive of depression. With support of his treating psychologist, the respondent was engaged with a general practitioner and on 31 January 2020 was prescribed anti-depressant medication. The respondent has reported feeling happier alongside the use of this medication however this has not transpired into improved supervision order compliance.

The respondent has engaged with treating psychologist, Tracy Richards since his release from custody. On 21 February 2020, Ms Richards noted 'Winston has little to no motivation to address any of his treatment needs.'

In February 2020, due to ongoing cannabis use, attempts were made to have the respondent engage in a youth residential rehabilitation facility with Salvation Army. On 4 March 2020, information was received from Salvation Army that the respondent had not been accepted to participate in the 'Salvos Therapeutic Adolescent Intensive Recovery Service' (STAIRS) due to his sexual offending history.

In her report, Dr Sundin (2018), psychiatrist, notes 'Mr Nemo is represented as a moderate risk for sexual offending into the future

> with risk escalating to high if he relapses into using intoxicants.' In her report, Dr McVie (2018), psychiatrist opined that 'a further offence would likely occur in the context of significant alcohol or substance abuse.'
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> Despite the extensive support provided to him, the respondent continues to demonstrate a disregard for his order and no commitment to improving his compliance or engagement; He has verbalised having no intentions to cease using cannabis."[2]

[9] The respondent was arrested on 5 March 2020 pursuant to a warrant issued under s 20 of the DPSOA and remained in custody until the hearing of the application.

[10] On 10 March 2020, the respondent pleaded guilty to one charge against the *Drugs Misuse Act* 1986, namely being in possession of a schedule 2 drug, Suboxone. On that day, he was convicted and fined $200 in the Magistrates Court at Townsville.

[11] The respondent admits the contravention of the supervision order and accepts the factual basis of the contravention as alleged by the applicant.

Statutory context

[12] Section 13 of the DPSOA is contained within Division 3 of Part 2. It provides, relevantly, 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***).
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> (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—
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> (a) if the prisoner is released from custody; or
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> (b) if the prisoner is released from custody without a supervision order being made.
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> (3) On hearing the application, the court may decide that it is satisfied as required under subsection (1) only if it is satisfied—
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> (a) by acceptable, cogent evidence; and
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> (b) to a high degree of probability;
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> that the evidence is of sufficient weight to justify the decision.

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2 Applicant's written submissions, pp 2-4.

(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).

[13] That section introduces the notion "serious sexual offence" which is defined, relevantly, as "…an offence of a sexual nature…involving violence; …"[3]

[14] By s 13(1), the jurisdiction to make orders is enlivened once "…the court is satisfied the prisoner is a serious danger to the community in the absence of a Division 3 order".[4] Where, as here, such a finding was made, the question then is whether a continuing detention order,[5] or a supervision order[6] is made. Where a supervision order will ensure the adequate protection of the community from the commission by a respondent of a "serious sexual offence", then the making of a supervision order[7] ought to be preferred to the making of a continuing detention order.[8] Having been satisfied that the adequate protection of the community could be assured by a supervision order, Bowskill J made such an order.

[15] Sections 20 and 22 of the DPSOA concern breaches of a supervision order. They provide, relevantly, 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.

(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.

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3 Schedule to the DPSOA. As to the notion of "violence" under the definition of "serious sexual offence", see *Attorney-General v Phineasa* [2013] 1 Qd R 305.

4 Section 13(1). As to "serious danger to the community", see s 13(2).

5 Section 13(5)(a).

6 Section 13(5)(b).

7 Section 16.

8 *Attorney-General for the State of Queensland v Francis* [2007] 1 Qd R 396 at 405.

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

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[9] 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)."

[16] Where the breach has been proved (as here, by the admission of the respondent), s 22(7) casts an onus upon the respondent to prove that "… the adequate protection of the community can … be ensured by a supervision order". It is well-settled that the term "the adequate protection of the community" as it appears in s 22(7) bears the same meaning as it bears in s 13 of the DPSOA.[10] The relevant "protection" is not protection from any offending, or indeed from any sexual offending. The relevant "protection" is from the commission of a "serious sexual offence". As explained in *Turnbull v Attorney-General*:[11]

> "[36] The consideration required under s 13(6)(b)(i) is whether adequate protection of the community can be reasonably and practicably managed by a supervision order. The risk which leads to the need to protect the community is because, under s 13(1) and (2), there is an unacceptable risk that Mr Turnbull will commit a serious sexual offence if released without such

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9 Section 11 governs the preparation of reports by psychiatrists for the purposes of applications under Part 2, Division 3 of the DPSOA.

10 *Kynuna v Attorney-General (Qld)* [2016] QCA 162 at [60].

11 [2015] QCA 54.

> an order. The means of providing the protection, and avoiding that risk, is a supervision order. When a court is assessing whether a supervision order can reasonably and practically manage the adequate protection of the community, it is necessarily assessing the protection the order can provide against that risk. Before making the order the court has to reach a positive conclusion that the supervision order will provide the adequate protection."

[17] Consequently, the question under s 22(7) is whether the respondent has satisfied the court on the balance of probabilities that his release back into the community on a supervision order provides "adequate protection of the community" in the sense that he is an acceptable risk of not committing a serious sexual offence.

[18] Here the respondent has breached the supervision order on numerous occasions. The breaches have been committed by the ingestion of substances contrary to condition 20. The respondent has not committed a sexual offence which would have constituted a breach of the condition which appears in all supervision orders by force of s 16(1)(f). He has not committed a "serious sexual offence", so the purpose of the supervision order being to protect the community against the commission of such offences, has been fulfilled to date.

[19] Questions arise as to the significance of persistent breaches of the supervision order to a determination under s 20(7).

[20] In *Attorney-General for the State of Queensland v Fardon*,[12] the Court of Appeal described a supervision order as a "compact". It was said:

> "[29] These orders have the character of a compact between the prisoner and the community: the prisoner is accorded a measure of personal freedom, but only provided he is willing to, and does, submit to a regime of tight control. Of substantial present concern is the respondent's demonstrated unwillingness to submit fully to that regime, hence Dr Grant's conclusion that 'there must be considerable doubt therefore about the prospect of successful management in the community under such a supervision order'."

[21] In *Attorney-General for the State of Queensland v Fardon*,[13] which concerned an application to extend the term of Mr Fardon's supervision order, Jackson J observed:

> "[76] In oral submissions, the applicant made the further submission that at a final hearing of an application under s 13 as altered, it would be relevant for there to be a closer analysis of how much the cooperation and assistance of the respondent has been what it ought to be. In my view, that question would only be relevant if it went to the ultimate critical question on such an application, namely whether the respondent is a serious danger to the community.

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12 [2011] QCA 155.

13 [2018] QSC 193; on appeal on another point *Attorney-General v Fardon* [2019] 2 Qd R 487.

> [77] Although it was said in one of the cases involving the applicant that a supervision order has 'the character of a compact between the prisoner and the community: the prisoner is accorded a measure of personal freedom, but only provided he is willing to, and does, submit to a regime of tight control',[14] there is no undertaking or agreement by a prisoner that forms any part of a relevant 'compact' provided for by the Act, unlike a bail undertaking or a probation order. A supervision order does impose a tight regime of control, but there is nothing consensual about it under the Act.
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> [78] In any event, there is no evidence identified on the hearing of this application that the respondent has failed to cooperate in some relevant way that goes to whether the applicant has shown there are reasonable grounds for thinking that the respondent is a serious danger to the community in the absence of a further supervision order."

[22] The point made by his Honour is that the statute requires consideration of whether the supervision order reduces the risk of the commission of a serious sexual offence to an acceptable level and the fact that there might be a likelihood of a breach of the supervision order is but one fact to consider in that determination.[15]

[23] His Honour's views are, with respect, supported by another passage of the Court of Appeal's decision in *Attorney-General for the State of Queensland v Fardon*:[16]

> "[28] While in some respects the respondent has adhered to important conditions, such as abstention from alcohol and illicit drugs, returning negative results on random testing, it is his present unwillingness fully to commit to the supervision regime, manifested in his disregarding and circumventing it, which precluded the conclusion that releasing him under a supervision order would ensure adequate community protection. It was not reasonably open, on all of this evidence, to conclude that a supervision order would be 'efficacious in constraining the respondent's behaviour by preventing the opportunity for the commission of sexual offences' (*Attorney-General for the State of Queensland v Fardon* [2011] QCA 111 per Chesterman JA at para 29)."

[24] The decision of Chesterman JA referred to in the passage above was his Honour's judgment in granting a stay of an order rescinding Mr Fardon's continuing detention order and making a supervision order.[17] His Honour said:

> "[29] The concern which the psychiatric evidence raises is whether the supervision order will be efficacious in constraining the respondent's behaviour by preventing the opportunity for the commission of sexual offences. The risk of those offences is

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14 *Attorney-General (Qld) v Fardon* [2011] QCA 155, [29].
15 See also paragraph [60] of his Honour's reasons.
16 [2011] QCA 155.
17 *Attorney-General for the State of Queensland v Fardon* [2011] QCA 111.

> rated 'low to moderate' with the intervention of the supervision order, but whether that order will perform as intended, given the respondent's stated attitude to it, and his inclination to disregard it or circumvent it, was not the subject of consideration by the primary judge. Accordingly there may be doubt about the conclusion that the adequate protection of the community can be ensured by release on a supervision order."

[25] In yet another decision involving Mr Fardon,[18] Morrison JA referred to the often quoted passage in *Attorney-General for the State of Queensland v Francis*:[19]

> "[39] … The Act does not contemplate that arrangements to prevent such a risk must be 'watertight'; otherwise orders under s 13(5)(b) would never be made. The question is whether the protection of the community is adequately ensured. If supervision of the prisoner is apt to ensure adequate protection, having regard to the risk to the community posed by the prisoner, then an order for supervised release should, in principle, be preferred to a continuing detention order on the basis that the intrusions of the Act upon the liberty of the subject are exceptional, and the liberty of the subject should be constrained to no greater extent than is warranted by the statute which authorised such constraint."[20]

And then observed:

> "There can be no doubt that the respondent's willingness to submit to the supervision regime is a relevant factor. In some cases it will be determinative."[21]

[26] As observed by Jackson J, consideration of future compliance with the supervision order is only useful to the extent that it is relevant to the statutorily prescribed tests.[22] Any risk of future breach of the supervision order must be considered in the light of its relevance to the protection of the community from the commission by the respondent of a "serious sexual offence".

The psychiatric evidence

[27] Psychiatrist Dr Sundin prepared the initial assessment of the respondent before an application was filed under Part 2 of the DPSOA.

[28] Doctor Sundin's diagnosis recorded in her report of 5 May 2017, was:

> "In my opinion, Mr Nemo meets the DSM-V criteria for Major Depressive Disorder.

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18 *Attorney-General for the State of Queensland v Fardon* [2013] QCA 299.
19 [2007] 1 Qd R 396.
20 At 405.
21 At [22]; then citing *Attorney-General for the State of Queensland v Fardon* [2011] QCA 155 at [29].
22 *Attorney-General for the State of Queensland v Fardon* [2018] QSC 193 at [76].

> The primary differential diagnosis Adjustment Disorder with Depressed Mood.
>
> By his description, he has a history of binge Alcohol Abuse but not to the point of dependence. He appears to have been using cannabis consistently and heavily prior to his incarceration.
>
> He meets the criteria for Conduct Disorder but is too young to attract a diagnosis of Anti-Social Personality Disorder.
>
> There is no evidence to suggest that he suffers from a sexual paraphilia."[23]

[29] Doctor Sundin reviewed her diagnosis against further material that was provided by Queensland Corrective Services and in her letter of 28 August 2017 she withdrew the diagnoses of "Major Depressive Episode". She considered that the respondent's "risk for future sexual violence is in the moderate to high range" and thought that intoxicants were a risk factor.

[30] On 30 April 2018, Martin J ordered, pursuant to s 8(2)(a) of the DPSOA that the respondent undergo examinations by psychiatrists, Doctors McVie and Beech. That occurred.

[31] Doctor Beech, in his report of 22 June 2018, diagnosed the respondent as follows:

> "In my opinion, Mr Nemo developed a childhood conduct disorder with severe disruptive and delinquent behaviours. He also developed a substance use disorder. It is difficult to assess his intelligence but I would think that he has borderline intellectual functioning or probably low average intelligence. It is difficult to get an account from him but there is nothing that I can see that suggests a sexual paraphilia."[24]

[32] Doctor Beech thought the respondent to be a moderate to moderate high risk of violent sexual reoffending and while that risk may be lowered by a supervision order, Dr Beech expressed concerns about risk elevating in the presence of substance abuse.

[33] Doctor McVie, in her report of 22 June 2018, diagnosed "conduct disorder, adolescent onset type" but excluded major mental illness psychopathy or paraphilia.[25] She opined that risk of sexual recidivism is "at least moderate" but on supervision "low".[26]

[34] All three doctors, Sundin, Beech and McVie, observed intellectual limitations in the respondent.

[35] For the purposes of the breach proceedings, the respondent was examined by Dr Sundin and Dr McVie.

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23 Page 12 of her report.
24 Page 11 of his report.
25 Page 12 of her report.
26 Page 13 of her report.

[36] Doctor Sundin, in her report of 22 March 2020, opined as follows:

> "In my opinion, he represents a moderate unmodified risk for sexual offending into the future; with the risk escalating to high if he relapses into abuse of alcohol. The presence of a supervision order reduces his level of risk to low.
>
> He is an intellectually dull young man, who is keen to find a girlfriend and move home to his parents in Mt Isa. Beyond this he has few plans.
>
> He likes the effect cannabis has on him and he does not want to discontinue its use. While alcohol is clearly correlated with escalation of risk in this man, I am less certain of the correlation with cannabis use. It appears to cause him to be generally more passive and demotivated rather than aggravating aggressive impulses.
>
> His deceptiveness and general disengagement with community supervisors is unhelpful and arises from a combination of anti-authoritarian attitudes, resentment of the current supervision order, resentment of white authority figures and the belief that cannabis does him no harm. In his dull passive way, he has simply followed his own wishes in relation to using cannabis and having sex with his girlfriend.
>
> I consider the supervision order is serving its purpose in protecting the community and respectfully recommend that Mr Nemo can be released back into the community under the auspices of the current order. I do not recommend an extension of his order."

[37] Doctor McVie, in her report of 10 May 2020, thought:

> "Based on the nature of the index offence, his past criminal history and dynamic risk factors identified above, I would consider Mr Nemo's risk of sexual recidivism on release from custody on 26 July 2018, with no further supervision, would be at least moderate.
>
> The supervision order would reduce this risk to low.
>
> The reports of his behaviour on the order from July 2018, and his continued abstinence from alcohol, would suggest his current risk is now low.
>
> I recommend he be released back on his supervision order. He needs to remain abstinent from alcohol and illicit substances. His current treatment needs include stress management, cognitive problems solving skills, and impulsivity."[27]

The submissions of the parties

[38] The respondent admitted the breach of the supervision order but submitted that he had discharged the onus under s 22(7) of the DPSOA, namely that his release on the

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27 Page 11 of her report.

supervision order without amendment provided adequate protection of the community from the commission by him of a serious sexual offence.

[39] The applicant conceded that the respondent had showed cause under s 22(7) and ought to be released back into the community on the supervision order.

Consideration and determination

[40] As the respondent admitted the breach of the supervision order, the issue is whether he had shown cause under s 22(7) of the DPSOA.

[41] As previously explained, the question is not whether there is an unacceptable risk the respondent will in the future breach the supervision order. The issue is whether there is an unacceptable risk that he will commit a serious sexual offence.

[42] I accept the evidence of Doctors Sundin and McVie which, in my view, gains some support from the earlier report of Dr Beech.

[43] While the respondent has been in the community on supervision, he has not committed a serious sexual offence and I accept that, notwithstanding his breach of the supervision order, his risk of committing a serious sexual offence while on supervision is low.

[44] No variation of the conditions or an extension of the supervision order is warranted.

[45] For those reasons, I made the orders which I did.