SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v Holroyd* [2020] QSC 187
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **JEFFREY CHARLES HOLROYD** (respondent)
FILE NO:	BS No 10567 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	Orders made on 15 June 2020, reasons delivered on 22 June 2020
DELIVERED AT:	Brisbane
HEARING DATE:	15 June 2020
JUDGE:	Davis J
ORDERS:	**1. Order (2) of the order of North J made on 27 November 2019 be rescinded.** **2. Pursuant to ss 21(2)(b) and 21(4) and 21(6) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003, the respondent be released from custody subject to the supervision order of Flanagan J made 20 February 2017, as amended, until the application filed 27 November 2019 is finally decided.**
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 20 February 2017 under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (the DPSOA) by consuming cannabis – where both psychiatrists assess the respondent's risk on the existing supervision order as low to moderate and manageable – where neither psychiatrist gives an opinion which would justify the continuing detention of the respondent – where the only issue remaining in contention is whether the supervision order ought to be extended – where the final hearing of the application is set for 23 June 2020 –

whether there are "exceptional circumstances" pursuant to s 21(4) of the DPSOA justifying release of the respondent pending final hearing of the application

Dangerous Prisoners (Sexual Offenders) Act 2003, s 3, s 13, s 16, s 16C, s 19, s 19A, s 20, s 21, s 22, s 30

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT) (2009) 239 CLR 27, applied
Attorney-General for the State of Queensland v Dugdale [2009] QSC 358, cited
Attorney-General for the State of Queensland v Fisher [2009] QSC 104, cited
Attorney-General (Qld) & Another v Francis [2008] 187 A Crim R 124, cited
Attorney-General for the State of Queensland v Francis [2008] QSC 69, cited
Attorney-General for the State of Queensland v Friend [2011] QCA 357, followed
Attorney-General for the State of Queensland v Holroyd [2019] QSC 39, cited
Attorney-General (Qld) v Sands [2016] QSC 225, cited
Federal Commissioner of Taxation v Consolidated Media Holdings (2012) 250 CLR 503, cited
Harvey v Attorney-General for the State of Queensland [2011] QCA 256, followed
R v Kelly [2000] QB 198, followed
SAS Trustee Corporation v Miles (2018) 265 CLR 137, cited
SZTAL v Minister for Immigration and Border Protection (2017) 262 CLR 362, cited

COUNSEL: M Maloney for the applicant
C Smith 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 orders under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (the DPSOA) since 20 February 2017 when he was placed on a supervision order by Flanagan J.[1] Breaches of the supervision order are alleged against him and that application is set for hearing on 23 June 2020.

[2] On 15 June 2020, I made the following orders:

> "1. order (2) of the order of North J made on 27 November 2019 be rescinded;
>
> 2. pursuant to ss 21(2)(b) and 21(4) and 21(6) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003, the respondent be released from custody subject to the supervision order of

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1 *Dangerous Prisoners (Sexual Offenders) Act* 2003, s 13(5)(b).

> Flanagan J made 20 February 2017, as amended, until the application filed 27 November 2019 is finally decided."

[3] These are my reasons for making those orders.

History

[4] The respondent was born on 14 March 1975 and is now 45 years of age. He is an Indigenous man.

[5] The respondent lived in the community of Pormpuraaw on the coast of the Gulf of Carpentaria.

[6] In 2012, the respondent was convicted in the Cairns District Court of rape and common assault.[2] It was that offending which led to an application being made under the DPSOA.

[7] As already observed, the respondent was released on a supervision order in February 2017 but there have been contraventions. They are explained in detail in *Attorney-General for the State of Queensland v Holroyd*,[3] a decision which resulted in the respondent being released back into the community on 19 February 2019 after a period in custody. That decision also resulted in the respondent's supervision order being extended until 19 February 2024.

[8] One of the conditions of the supervision order is:

> "24. Abstain from the consumption of alcohol and illicit drugs for the duration of this order."

[9] That condition is of some importance to the management of risk of the respondent. He was intoxicated when he committed the rape and common assault for which he was convicted in 2012. Condition 24 was breached in September 2017 which led to the respondent being detained from 25 September 2017 to 11 June 2018 when Atkinson J ordered his release back into the community on the supervision order. Section 24 was also contravened in October 2018 which led to the respondent being detained from 11 October 2018 until I made an order on 19 February 2019 releasing him back to the community on the supervision order.

[10] It is the practice of the applicant to file an application seeking orders under s 22 of the DPSOA upon an allegation of breach of a supervision order. The filing of an application is not necessary to grant jurisdiction to the court to make orders[4] but the procedure was approved as a sensible one by Burns J in *Attorney-General (Qld) v Sands*.[5] That has occurred here. What is alleged are breaches of condition 24 as follows:

> "The respondent is subject to a supervision order under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 ('the Act') made

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2 The particulars of that offending are explained in *Attorney-General for the State of Queensland v Holroyd* [2019] QSC 39 at [16].

3 [2019] QSC 39 at [18]-[21].

4 The jurisdiction arises upon the presentation of the prisoner pursuant to the warrant; see ss 20 and 22.

5 [2016] QSC 225 at [4].

by Justice Flanagan on 20 November 2017, as amended by Justice Davis on 29 February 2019 ('the supervision order').

The supervision order contains requirement (24) which requires the respondent to abstain from the consumption of alcohol and illicit drugs for the duration of the supervision order.

On 10 June 2019, 18 June 2019, 27 June 2019, 2 July 2019 and 10 July 2019, the respondent provided urine samples for testing. Confirmatory results were received which indicated cannabis was detected at a level of 111ug/L, 157ug/L, 50ug/L, 97ug/L and 379ug/L respectively. The respondent was subsequently charged under s 43AA of the Act, and was convicted in Townsville Magistrates Court on 8 August 2019 and ordered to perform 80 hours of community service.

On 18 July 2019 and 24 July 2019, the respondent provided urine samples for testing. Confirmatory results were received which indicated cannabis was detected at a level of 212ug/L and 55ug/L respectively. Due to the reduction in levels since test completed on 10 July 2019, no further action was taken by Queensland Corrective Services ('QCS').

On 31 July 2019, 9 August 2019, 12 August 2019 and 22 August 2019, the respondent provided urine samples for testing. Confirmatory results were received which indicated cannabis was detected at a level of 65ug/L, 45ug/L, 107ug/L and 436ug/L.

On 27 August 2019, the respondent was directed to Show Cause to QCS as to why he should be permitted-to remain in the community. On 3 September 2019, the respondent provided his Show Cause Letter as directed. The Director, High Risk Offender Management Unit responded on 6 September 2019 advising of an intention to review his case management by 4 October 2019 and that if he continued to use illicit substances contravention action would be taken which could result in his return to custody.

During the period of Show Cause, the respondent provided three further urine samples which were positive to cannabis, namely on 3 September 2019, 12 September 2019 and 19 September 2019, however the confirmatory results demonstrated a decrease in levels of cannabis.

On 3 October 2019, 8 October 2019 and 15 October 2019, the respondent provided urine samples for testing. Confirmatory results were received which indicated cannabis was detected at a level of 518ug/L, 54ug/L and 27ug/L respectively.

On 15 October 2019, the respondent was subject to a Disciplinary Interview with the District Manager in relation to his continued substance use. It was made explicitly clear that any further non-compliance with the supervision order would result in a return to custody. The respondent verbalised his understanding of this

> warning and articulated his goals, both short and long term to maintain his supervision in the community.
>
> On 30 October 2019, the respondent was subject to a urinalysis test and provided a sample which was presumptive positive to cannabis. Confirmatory reports confirmed the presence of cannabis with a level of 63ug/L. The respondent did not make admissions to smoking cannabis.
>
> On 12 November 2019, the respondent was subject to a urinalysis test and provided a sample which was presumptive positive to cannabis. It is noted that whilst the sample was valid, it appeared to be diluted and watery in appearance. Confirmatory reports confirmed the presence of Cannabis with a level of 17ug/L. The respondent did not make admissions to smoking cannabis.
>
> The respondent has been afforded opportunities to engage in treatment regarding his illicit substance use. He has attended Alcohol, Tobacco and Other Drugs Service ('ATODS') on a weekly basis since 2 July 2019. He also engaged with attend Queensland Injectors Health Network ('QuIHN') and attended sessions from March 2019 through to July 2019. The respondent was referred again to QuIHN and attended his appointment as directed on 13 November 2019.
>
> Despite the respondent being provided the opportunities to address his chronic substance use he has repeatedly breached requirement 24 of the supervision order. Given the ongoing misuse of illicit substances and his history of offending behaviour whilst under the influence of an intoxicating substance, it is assessed by QCS that he can no longer be managed in the community."[6]

[11] The respondent was arrested on a warrant issued on 22 November 2019 under s 20 of the DPSOA. He then came before North J sitting in Townsville on 27 November 2019. His Honour ordered the respondent to be detained pending final hearing of the contravention application.[7]

[12] The respondent has admitted the contraventions as alleged in the application.

[13] The applicant engaged two psychiatrists, Dr Scott Harden and Dr Karen Brown to prepare risk assessment reports for the purpose of the current contravention proceedings. Both doctors are very experienced in the field of forensic psychiatry and appear as witnesses in this court regularly. Doctor Harden's report was received by the applicant on 8 June 2020 and Dr Brown's on 11 June 2020.

[14] The matter came before me for review on 15 June 2020 in anticipation of the hearing of the contravention on 23 June 2020. As already observed, I made orders releasing the respondent on supervision pending final determination of the contravention application.

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6 Application filed 27 November 2019.

7 *Dangerous Prisoners (Sexual Offenders) Act* 2003, s 21(2)(a).

Statutory context

[15] Where "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 …", a warrant may issue for the arrest of the released prisoner[8] and the released prisoner is then brought before the court.

[16] Section 21 of the DPSOA deals with custody of the released prisoner between the time of arrest and determination of the contravention proceedings. It provides:

> "**21 Interim order concerning custody generally**
>
> (1) This section applies if a released prisoner is brought before the court under a warrant issued under section 20.
>
> (2) The court must—
>
> (a) order that the released prisoner be detained in custody until the final decision of the court under section 22; or
>
> (b) release the prisoner under subsection (4).
>
> (3) The released prisoner may, when the issue of his or her custody is raised under subsection (2), or at any time after the court makes an order under that subsection detaining the prisoner, apply to the court to be released pending the final decision.
>
> (4) The court may order the release of the released prisoner only if the prisoner satisfies the court, on the balance of probabilities, that his or her detention in custody pending the final decision is not justified because exceptional circumstances exist.
>
> (5) If the court adjourns an application under subsection (3), the court must order that the released prisoner remain in custody pending the decision on the application.
>
> (6) If the court orders the released prisoner's release, the court must order that the prisoner be released subject to the existing supervision order or existing interim supervision order (each the existing order) as amended under subsection (7).
>
> (7) For subsection (6), 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 amend the existing order to include any other requirements the court considers appropriate to ensure adequate protection of the community."

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8 *Dangerous Prisoners (Sexual Offenders) Act* 2003, s 20.

[17] Final determination of the contravention proceedings is governed by s 22 which provides:

> "**22 Court may make further order**
>
> (1) The following subsections apply if the court is satisfied, on the balance of probabilities, that the released prisoner is likely to contravene, is contravening, or has contravened, a requirement of the supervision order or interim supervision order (each the existing order).
>
> (2) Unless the released prisoner satisfies the court, on the balance of probabilities, that the adequate protection of the community can, despite the contravention or likely contravention of the existing order, be ensured by the existing order as amended under subsection (7), the court must—
>
> (a) if the existing order is a supervision order, rescind it and make a continuing detention order; or
>
> (b) if the existing order is an interim supervision order, rescind it and make an order that the released prisoner be detained in custody for the period stated in the order.
>
> (3) For the purpose of deciding whether to make a continuing detention order as mentioned in subsection (2)(a), the court may do any or all of the following—
>
> (a) act on any evidence before it or that was before the court when the existing order was made;
>
> (b) make any order necessary to enable evidence of a kind mentioned in section 13(4) to be brought before it, including, for example, an order—
>
> (i) in the nature of a risk assessment order, subject to the restriction under section 8(2); or
>
> (ii) for the revision of a report about the released prisoner produced under section 8A;
>
> (c) consider any further report or revised report in the nature of a report of a type mentioned in section 8A.
>
> (4) To remove any doubt, it is declared that the court need not make an order in the nature of a risk assessment order if the court is satisfied that the evidence otherwise available under subsection (3) is sufficient to make a decision under subsection (2)(a).

(5) If the court makes an order in the nature of a risk assessment order, the psychiatrist or each psychiatrist examining the released prisoner must prepare a report about the released prisoner and, for that purpose, section 11 applies.

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

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

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

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

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

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

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

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

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

[18] Section 22 refers to "the adequate protection of the community".[9] That is a concept which first appears in the DPSOA in Division 3 of Part 2 which concerns final orders made on an initial application for orders under the DPSOA. The pivotal section in Division 3 is s 13, which provides:

"**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

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9 Section 22(2) and (7).

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)."

[19] Section 13 operates in this way:

(a) the test under s 13 is whether the prisoner is "a serious danger to the community";[10]

(b) that initial question is answered by determining whether there is an "unacceptable risk that the prisoner will commit a serious sexual offence"[11] if no order is made;

(c) if that conclusion is reached, then a supervision order (as opposed to a continuing detention order) can only be made where the adequate protection of the community can be ensured by the making of a supervision order;[12]

(d) where "adequate protection of the community" can be ensured by a supervision order, then the making of a supervision order ought to be preferred to the making of a continuing detention order.[13]

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10 Section 13(1).
11 Section 13(1) and (2).
12 Section 13(6).
13 *Attorney-General v Francis* [2007] 1 Qd R 396 at [39]; *Attorney-General (Qld) v Yeo* [2008] QCA 115; *Attorney-General v Lawrence* [2010] 1 Qd R 505; *LAB v Attorney-General* [2011] QCA 230; *Attorney-General for the State of Queensland v Ellis* [2012] QCA 182; *Attorney-General (Qld) v Fardon* [2013] QCA 64.

[20] On the final hearing of the contravention application, the issue will be whether the respondent satisfies the onus cast upon him by s 22(7). On 15 June 2020, I found that "exceptional circumstances" existed and released the respondent back on the supervision order under s 21(4) of the DPSOA.

Reasons for making the order

[21] Doctor Harden has diagnosed the respondent in these terms:

> "In my opinion he meets criteria for Alcohol Abuse and Dependence In Remission Because Of Incarceration. He has now engaged in marijuana abuse as well.
>
> It is still my opinion that he has a Personality Disorder Not Otherwise Specified with antisocial features."

[22] Doctor Brown's diagnoses are:

> "Mr Holroyd meets criteria for a diagnosis of mixed antisocial and emotionally unstable personality disorder as evidenced by his profound disregard for rules, lack of empathy, irresponsible attitude (particularly with regards to the criminal justice system), low tolerance to frustration (associated in the past with impulsive violence), tendency to externalise blame for his situation onto others and inability to profit from punishment or rehabilitation. He presents with longstanding anxious dysphoric and angry affect, feelings of emptiness, impulsive engagement in idealised but superficial relationships (which are subsequently devalued), and a tendency to use substances in order to seek immediate reward and to relieve the aforementioned symptoms with associated disinhibition and violent behaviours.
>
> He also has a diagnosis of substance use disorder (alcohol and cannabis) which is currently in enforced remission in a custodial environment.
>
> I do not consider that he meets criteria for sexual sadism disorder or any other paraphilic disorder."

[23] As to risk and recommendations, Dr Harden:

> "The actuarial and structured professional judgement measures I administered would suggest that his future risk of sexual reoffence is Moderate to High.
>
> My assessment of this risk is based on the combined clinical and actuarial assessment. This assessment takes into account all information made available to myself.
>
> The critical issues in this man are substance intoxication (particularly alcohol), his poor problem-solving, negative emotional reactions, failure to cooperate with supervision and lack of stable accommodation and pro-social networks.

His risk would still be decreased significantly by guaranteeing abstinence from alcohol use. I am most concerned about alcohol use, although he should abstain from all intoxicating substances.

In my opinion a supervision order would still reduce his risk of sexual reoffending in the community to moderate to low.

Recommendations

If he is released on a supervision order I recommend that the current conditions be maintained.

I recommend that he continue to have individual psychological treatment focusing on his sexual offending and substance misuse.

I recommend that he continue to be required to be abstinent from alcohol and drug use and undergo an appropriate random testing regime if he is on a supervision order.

He should have support in obtaining further training or employment."

[24] On the same topic, Dr Brown:

> "His sexual offending risk is complicated by his impulsive involvement in relationships which he tends to initially idealise, but then devalues over time when his partner is unable to meet his expectations. In these circumstances there is a risk that he would engage in controlling, jealous behaviours and potentially violent or sexual violent behaviours. Although he appears to have understood the basic principles of a successful relationship (eg honestly, openness etc), he remains insightless into his personality vulnerabilities and the cycle of impulsive involvement in relationships to which he is prone.
>
> Despite psychological support, Mr Holroyd has very little ability to self manage and utilise internal risk reduction strategies. As such, almost all of his current risk management is external and secondary to the supervision order, which he has now breached on three occasions (and twice breached when on parole). On this occasion he breached repeatedly by using cannabis and did not cease, despite clear and repeated warnings that he would be returned to custody. Overall he appears to view the order as an inconvenience that he must endure, rather than a genuine opportunity to learn skills that will allow him to reduce his risks to others and stay out of jail.
>
> Whilst Mr Holroyd may not have made much progress in recent psychology sessions I consider that individual therapy remains a useful tool to explore risk and provide opportunity for his improvement in a range of identified areas. I particularly recommend that therapeutic work should address his borderline personality vulnerabilities, specifically his history of disrupted and insecure attachment, the death of his mother, his low self esteem and dysphoric affect, his proneness to feelings of emptiness and boredom, his impulsive engagement in idealised relationships and

his repeated use of substances in order to manage these personality difficulties. Future claims that he has used substances because of external circumstances should be robustly viewed in therapy as externalising blame and a failure to take responsibility for his actions, secondary to his personality disturbance.

I do note however, that despite the contraventions, Mr Holroyd has not been convicted of a sexual (or violent) offence since the supervision order was made in 2017. It could therefore be reasonably argued that the order is working as it should and serves to manage the identified risks adequately.

Overall in my opinion, the detention of Mr Holroyd in custody for long periods serves very little purpose other than removing him from the community, to which he will eventually return, arguably even more deskilled, disengaged and institutionalised. However, particularly give his long period of cannabis use, I am inclined to suggest that it would be preferable (although not essential) if Mr Holroyd were to be engaged by his psychologist and case manager to a satisfactory standard prior to his release.

Ultimately a return to the community with restrictions, appropriate monitoring and offender treatment would reduce Mr Holroyd's risk to a low-moderate and manageable level. Progress through the various stages of supervision should be linked to his achievement of clear goals and full compliance with the order (including zero tolerance of substance use) as anything less than this is taken by Mr Holroyd as implied consent to continue his contravening behaviour/s.

His sexual preoccupations and relationship seeking behaviour should be monitored in more detail, recognising that he tends to minimise and underreport. If available, a more intensive substance misuse group program may also be of use, although I suspect that the individual therapy will be more successful in addressing his various cognitive distortions about his substance use and his risks to others.

It may be helpful to refer Mr Holroyd to a psychiatrist for further assessment of his persistent dysphoria, personality difficulties and ongoing substance misuse. He may respond to antidepressant medication and there may be a role for other medications to manage his cravings or limit his use of substances.

I therefore respectfully recommended that the Supervision Order is inclusive of the following.

1 Electronic monitoring.

2 Referral to a forensic psychiatrist.

3 Therapy with a forensic psychologist.

4 Abstinence from alcohol and illicit drugs and regular urine drug testing.

> 5 Monitoring of relationships and appropriate disclosure of offending history to potential sexual partners.
>
> 6 Development of a daily routine and support to find work (or other structured activity).
>
> With regard to the length of the supervision order, I agree with Dr Moyle that, given Mr Holroyd's high score on the PCL-R and his longstanding treatment resistance, a change in his core understanding about relationships, substance use and his risks to others will take a considerable period of time. I also note Dr Harden's view in 2018, that should Mr Holroyd contravene the order again he may need a longer period of supervision. As supervision is currently the only risk reduction strategy that is effective, I recommend that the supervision order is extended to a period of five years from the date of release."

[25] The psychiatric evidence clearly supports the release of the respondent back into the community on the supervision order. The only real difference of opinion between the two psychiatrists is as to whether the duration of the order ought to be extended. While, naturally, it is for the court to determine whether the adequate protection of the community can be ensured by releasing the respondent back onto the supervision order, it is difficult to see any justification for rejecting the evidence of the psychiatrists. This is appreciated by the applicant who submits as follows:

> "43. The psychiatric evidence in these proceedings is clear and supports the contention that the respondent's risk of sexual recidivism can be managed by the existing supervision order. However, the evidence on the issue of the duration of the supervision order varies. Dr Harden does not discuss the term of the supervision order however from the judgment of the previous contravention before Davis J where a period of 5 years from that hearing was put in place, Dr Harden provided an addendum report which canvassed the possibility of a further period of the respondent further contravened by the use of alcohol. The alleged contravention is not for the consumption of alcohol but for a prolonged period of cannabis use despite warnings from his supervising officers. Dr Harden, in his current report, also has concerns for the use of any illicit substances. Dr Brown is of the view in her final paragraph of her report that the supervision order should be in place for a period of 5 years from the date of the respondent's release back to the supervision order.
>
> 44. It is submitted that the supervision order should be in place for a period of 5 years from the determination of the contravention proceedings and the respondent's release back on the order. The respondent has been unable to demonstrate a period of 5 years contravention free since his most recent contravention proceedings before Justice Davis."

[26] As already observed, North J made an order under s 21(2) of the DPSOA. By s 21(3), a released prisoner may seek an order for his interim release at any time.

The interlocutory nature of the power to release a prisoner pending final determination under s 22 is reminiscent of the power to grant bail. By s 21(3), an order made under s 21(2)(a) for a prisoner's detention does not exclude an application for release under s 21(2)(b) and 21(4).

[27] What must be shown by the respondent to secure interim release are "special circumstances". In *R v Kelly*,[14] Lord Bingham observed:

> "[249] We must construe 'exceptional' as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered."

[28] Lord Bingham's explanation of "exceptional circumstances" has been held to be relevant in defining the scope of the power under ss 21(2)(b) and 21(4) of the DPSOA.[15] However, the construction of the subsections and the exercise of discretion must be informed by the context and purpose of the DPSOA and the mischief sought to be addressed.[16]

[29] A principal purpose of the DPSOA is the management of risk of sexual offenders to ensure the adequate protection of the community.[17] The discretion in s 21 must be exercised in that light. This is how McMurdo J (as his Honour then was) approached the exercise of discretion in *Attorney-General for the State of Queensland v Francis*:[18]

> "[10] What must then be assessed is the extent of the risk that those set of circumstances will come together and create the particular risk in his case of re-offending, within the next month pending his hearing. The judge who conducts that hearing will have a different question which is the level of risk that will exist over several years. But the extent of the risk for the next few weeks must surely be less because it is such a short period and because he will have the strongest incentive not to breach any of the conditions of his order."

[30] Boddice J, sitting in the Court of Appeal in *Harvey v Attorney-General for the State of Queensland*[19] said this about "exceptional circumstances" for the purposes of s 21(4) of the DPSOA:

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14 [2000] QB 198.

15 *Attorney-General for the State of Queensland v Friend* [2011] QCA 357 at [55] and *Attorney-General (Qld) & Another v Francis* [2008] 187 A Crim R 124.

16 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at 46, [47] followed in *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 368, [14] and 375-375, [35]-[40] and *SAS Trustee Corporation v Miles* (2018) 265 CLR 137 at 150, [20] and 157, [41].

17 See, for example, ss 3, 13(5), 13(6), 16(2), 16C, 19, 19A, 21, 22 and 30.

18 [2008] QSC 69 at [4]. See also *Attorney-General for the State of Queensland v Fisher* [2009] QSC 104 and *Attorney-General for the State of Queensland v Dugdale* [2009] QSC 358.

19 [2011] QCA 256.

> "[43] Whether exceptional circumstances are shown to exist will depend on the facts and circumstances of a particular case. A breach that is trivial or accidental may well present little difficulty for a released prisoner to show 'exceptional circumstances'. However, exceptional circumstances require a conclusion the associated risks from any release pending determination of the contravention proceedings are not such as to justify continuing detention."[20]

[31] That statement was then followed by White JA[21] in *Attorney-General for the State of Queensland v Friend*.[22] There, her Honour said:

> "[57] What is clear in the case of the Act is that a released prisoner must demonstrate to the requisite standard that the circumstances are not ordinary. On one view the expression 'exceptional' is not apt to cover the situation of minor breaches of the conditions. To prove that the breach is "trivial" is not at all the same as proving that exceptional circumstances exist. But, as *Harvey* suggests, the associated risks from any release must not be such as to justify continuing detention. Considering the centrality of the requirement to avoid males under the age of 16 her Honour, with respect, ought to have required something more tangible from the respondent. The alleged conduct went to the heart of the assessment of the risk he posed."

[32] "Exceptional circumstances" justifying interim release will usually be demonstrated where the court can be satisfied that the adequate protection of the community can be ensured by the release of the prisoner notwithstanding that the issues relevant to the contravention have not been fully ventilated at a final hearing. That is, of course, not an exhaustive statement of the circumstances where "exceptional circumstances" will exist.

[33] Here, exceptional circumstances exist. They are:

(a) The contravention of the supervision order does not involve the commission of a sexual offence.

(b) Previous contraventions of the supervision order have not involved the commission of a sexual offence.

(c) The application is being made at a time when all evidence to be relied upon at the final contravention hearing has been prepared and filed.[23]

(d) Two well-qualified and very experienced forensic psychiatrists have prepared risk assessments concerning the respondent and neither give opinions which would justify the continuing detention of the respondent.

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20 With whom White JA agreed with McMurdo P giving a separate but consistent judgment.
21 With whom Margaret Wilson AJA and Douglas J agreed.
22 [2011] QCA 357.
23 Apart from the usual updated material from Corrective Services.

(e) Both psychiatrists assess risk on supervision as low-moderate and manageable.

(f) The applicant has had the opportunity to consider and assess the evidence in the case and concedes that at the final hearing the respondent should be released back into the community on the supervision order.

(g) The only question in contention is whether the period of the supervision order ought to be extended.

[34] Given those features of the case, I found that exceptional circumstances existed which enlivened the discretion to release the respondent on supervision pending final hearing of the contravention proceedings.