SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v Gizu* [2020] QSC 178
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **JOHNWILL SWAIN MIRAWINZE GIZU** (respondent)
FILE NO:	BS No 6114 of 2020
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	16 June 2020
DELIVERED AT:	Brisbane
HEARING DATE:	12 June 2020
JUDGE:	Davis J
ORDER:	**The court, being satisfied that there are reasonable grounds for believing that the respondent, Johnwill Swain Marawinze Gizu, is a serious danger to the community in the absence of an order made under Division 3 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (the Act), orders that:** **1. The application for a Division 3 order be set for final hearing on 28 August 2020.** **2. Pursuant to s 8(2)(a) of the Act, the respondent undergo examinations by two psychiatrists, being Dr Scott Harden and Dr Evelyn Timmins, who are to prepare reports in accordance with s 11 of the Act.** **3. Pursuant to s 8(2)(b)(i) of the Act, the respondent be released from custody subject to the requirements stated in the order attached as Schedule A to these reasons until 4.00 pm on 28 August 2020.** **4. The affidavits of Amanda McLean sworn on 5 June 2020 and 12 June 2020 and the affidavit of Alisha Ann Radford affirmed on 12 June 2020 be placed in a sealed envelope and not opened without an order of a Judge of this court.** **5. Pursuant to s 39PB(3) of the *Evidence Act* 1977,**

Dr Josephine Sundin, Dr Scott Harden and Dr Evelyn Timmins give oral evidence to the court other than by audio visual link or audio link.

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 applicant applies for orders under s 8 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (the DPSOA) – where the respondent was sentenced to a period of detention pursuant to the *Youth Justice Act* 1992 for the offence of rape – where the sentence for rape expired on 1 November 2019 – where the respondent is presently in custody by force of sentences later imposed and none of those sentences relate to a "serious sexual offence" as defined by the DPSOA – where the respondent submits that he is not a prisoner for the purposes of s 5 of the DPSOA – where the respondent submits that ss 5(6)(b) and (c) of the DPSOA catch only persons who are serving a sentence for a serious sexual offence at the time the application is filed under s 5 of the DPSOA – whether a term of detention which is being served in a correctional facility because of a transfer under s 276B of the *Youth Justice Act* is part of a "period of imprisonment" such that the application under s 5 of the DPSOA must be made within six months of the end of the period of imprisonment – whether there are reasonable grounds for believing the respondent is a serious danger to the community in the absence of an order under Division 3 of the DPSOA – whether an interim supervision order ought to be made

Criminal Code s 349, s 352, s 355, s 421
Criminal Law Amendment Act 1945, s 18
Dangerous Prisoners (Sexual Offenders) Act 2003, s 5, s 8, s 13, Dictionary
Evidence Act 1977, s 39PB(3)
Penalties and Sentences Act 1992, s 4, s 163, Part 10
Youth Justice Act 1992, s 276B, s 276C, s 276D, s 276E

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT) (2009) 239 CLR 27, cited
Al-Kateb v Godwin (2004) 219 CLR 562, applied
Attorney-General v Kanaveilomani [2015] 2 Qd R 509, considered
Attorney-General v Fardon [2019] 2 Qd R 487, cited
Attorney-General v Newman [2019] 2 Qd R 1, cited
Attorney-General v Phineasa [2013] 1 Qd R 305, cited
Dilworth v Commissioner of Stamps [1899] AC 99, cited
Federal Commissioner of Taxation v Consolidated Media Holdings (2012) 250 CLR 503, cited
Owen v Menzies [2013] 2 Qd R 327, cited

Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476, applied
R v Leach [2018] 1 Qd R 459, cited
R v SCU [2017] QCA 198, cited
SAS Trustee Corporation v Miles (2018) 265 CLR 137, cited
SZTAL v Minister for Immigration and Border Protection (2017) 262 CLR 362, cited
X7 v Australian Crime Commission (2013) 248 CLR 92, applied
YZ Finance Company Pty Limited v Cummings (1964) 109 CLR 395, cited

COUNSEL: J Rolls for the applicant
T Ryan for the respondent

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

[1] The applicant made an application pursuant of s 5 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (the DPSOA) seeking orders under s 8[1] and s 13.[2]

[2] The respondent opposes the application submitting that he is not a "prisoner" as relevantly defined. If that submission is correct, there is no jurisdiction to make orders against him under the DPSOA.

History

[3] The respondent is an Indigenous young man born in March 2000. He is presently 20 years of age. His criminal history began with convictions in the Cairns Childrens Court on 6 May 2014 when he was 14 years of age. On that day, he was placed on probation for offences of entering premises and committing indictable offences[3] and various offences of dishonesty.

[4] On each of 25 July 2014 and 18 March 2015, the respondent was convicted again in the Childrens Court at Cairns and placed on probation. None of the offences had a sexual element.

[5] On 7 November 2016, the respondent was again convicted in the Childrens Court at Cairns. There were a large number of charges, but importantly for present purposes, one was rape.[4] Other offences arising out of the same incident were deprivation of liberty[5] and sexual assault.[6] The offences were committed on 1 November 2015 when the respondent was 15 years of age. Various periods of detention were imposed under the provisions of the *Youth Justice Act* 1992 (the YJA) and the effect was that the respondent was sentenced to detention for a period of four years to be released after serving 65 per cent of the detention period.

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1 Preliminary hearing and appointment of psychiatrists.
2 Final orders; continuing detention order or supervision order.
3 *Code* s 421(2) and (3).
4 *Code* s 349(1).
5 *Code* s 355.
6 *Code* s 352(1).

[6] The young woman who was raped by the respondent was 24 years of age and was attempting to hail a taxi after leaving a nightclub. The respondent accosted her and forced her into a nearby carpark. He held her to the ground to prevent her escape and then penetrated her vagina with his penis.

[7] On 7 September 2017, the respondent was convicted of various offences which occurred while in detention. Some of these arose from a riot and one was a sexual assault.[7] The sexual assault was committed on 13 June 2016.

[8] The victim of the sexual assault worked as a detention youth worker at the youth detention centre where the respondent was held. She was walking with the respondent who put his hand on her buttock and squeezed her.

[9] In relation to the riot and the various associated offences, the respondent was sentenced to three years' detention. He was sentenced to six months' detention in relation to the sexual assault and lesser terms of detention in relation to other offences. All were ordered to be served concurrently.

[10] On 31 January 2018, the respondent was given notice of an intention to transfer him to an adult prison pursuant to s 276C of the YJA. He turned 18 years of age on 13 March 2018 and was to be transferred on 14 March 2018. He made an application to delay the transfer pursuant to s 276D(4) of the YJA, but that application was unsuccessful.[8] He was subsequently transferred.

[11] On 14 December 2018, the respondent was released on parole but breached his parole virtually immediately and was returned to custody on 17 December 2018. His parole was suspended on 17 December 2018 and cancelled on 5 September 2019.

[12] During his passage through the youth justice and criminal justice systems, the respondent has been the subject of various psychological reports. It is unnecessary to analyse this evidence in detail. It is sufficient to note that treatment of the respondent was difficult. Treating psychologist, Dr Jeff Nelson, withdrew from treating the respondent. Psychological risk assessments identified significant risk factors for violent sexual reoffending.

[13] Doctor Josephine Sundin, Clinical Psychiatrist, was engaged to prepare a risk assessment in anticipation of an application under s 5 of the DPSOA. Doctor Sundin did not interview the respondent but performed an assessment based on various materials that were supplied to her.

[14] Doctor Sundin diagnosed conduct disorder in adolescence and anti-social personality disorder in early adulthood. She identified emerging psychopathic traits and concluded that the respondent represents an unacceptable, unmodified high risk for future sexual violence.

[15] On 8 June 2020, the applicant filed an application pursuant to s 5 of the DPSOA.

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7 *Code* s 352(1)(A).

8 Unreported, 12 April 2018, Childrens Court of Queensland, Judge Clare SC.

The position of the respective parties

[16] Both parties accepted that the sentences imposed on 7 November 2016 for the offences of rape and sexual assaults which occurred on 1 November 2015, expired on 1 November 2019[9] and were sentences for "serious sexual offence(s)".[10] Both parties accepted that the sexual assault committed on 13 June 2016 for which the respondent was sentenced on 7 September 2017, was not an offence of a sexual nature "involving violence" as that term was explained by Muir JA in *Attorney-General v Phineasa*,[11] and therefore not a "serious sexual offence".

[17] Both parties accepted that the respondent is presently in custody by force of the sentences imposed on 7 September 2017 and that none of those sentences relate to a "serious sexual offence" as defined by the DPSOA.

[18] As explained below, orders under s 5 of the DPSOA may be made against a "prisoner" if "the court is satisfied there are reasonable grounds for believing the prisoner is a serious danger to the community in the absence of [an order under the DPSOA]".[12] As explained in *Attorney-General v Fardon*,[13] the question for the court is not whether such a finding will ultimately be made, but whether there are reasonable grounds upon which such a finding could be made.

[19] Mr Ryan of Counsel, who appeared for the respondent, sensibly, in my opinion, conceded that if the respondent was a "prisoner" amenable to the DPSOA under s 5, then there are reasonable grounds for the belief that the respondent is a serious danger to the community in the absence of an order under the DPSOA. There is a significant body of evidence culminating in Dr Sundin's risk report which supports the concession made by Mr Ryan and I find that there are reasonable grounds to believe the respondent is a serious danger to the community in the absence of an order under the DPSOA.

[20] Mr Rolls, who appeared for the Attorney-General, submitted that on a proper construction of s 5 of the DPSOA, the respondent is a "prisoner" and he seeks:

(a) an order setting the application for final hearing on 28 August 2020;[14]

(b) the appointment of Dr Scott Harden and Dr Evelyn Timmins, psychiatrists, to examine the respondent and prepare risk assessment reports;[15]

(c) the release of the respondent on an interim supervision order.[16]

[21] The court can accommodate the hearing of the application on 28 August 2020.

[22] Doctors Harden and Timmins are experienced psychiatrists in the field of forensic risk assessment and there is no reason not to appoint them if there is jurisdiction to make orders.

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9 That included the calculation of time served before sentence.
10 *Dangerous Prisoners (Sexual Offenders) Act* 2003, s 5, Dictionary.
11 [2013] 1 Qd R 305.
12 Section 8(1).
13 [2019] 2 Qd R 487 at 499, [48].
14 *Dangerous Prisoners (Sexual Offenders) Act* 2003, s 8(1).
15 *Dangerous Prisoners (Sexual Offenders) Act* 2003, s 8(2)(a).
16 *Dangerous Prisoners (Sexual Offenders) Act* 2003, s 8(2)(b)(i); and other ancillary orders.

[23] There is jurisdiction to release the respondent on an interim supervision order if an order under s 5 is made and, as later explained, the material supports the making of such an order.

[24] Mr Ryan accepts that if his client is a "prisoner", then the orders sought by the applicant are appropriate.

[25] That then leaves one live issue, namely whether the respondent is a "prisoner" to which the DPSOA applies.

Statutory context

[26] The DPSOA provides a scheme for preventative detention and control of prisoners who have completed their terms of imprisonment. Section 3 provides:

> "**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."

[27] Schemes of preventative detention existed in Queensland before the DPSOA. The *Criminal Law Amendment Act* 1945 and Part 10 of the *Penalties and Sentences Act* 1992 (the P&SA) both contain provisions which operate to detain prisoners beyond the expiry of their sentences.

[28] Although all three schemes require judicial assessment of risk of reoffending, the two earlier schemes are fundamentally different to that established by the DPSOA. The two earlier schemes require assessment of risk at the time of sentence.[17] The DPSOA operates upon an assessment of risk at a time close to the expiry of a prisoner's sentence.[18]

[29] Section 5 has been recently amended. Both parties accept that it is the section as amended which is relevant to the present application.

[30] Section 5 provides:

> "**5 Attorney-General may apply for orders**
>
> (1) The Attorney-General may apply to the court for an order or orders under section 8 and a division 3 order in relation to a prisoner.
>
> (2) The application must—
>
> (a) state the orders sought; and

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17 *Penalties and Sentences Act* 1992, s 163, *Criminal Law Amendment Act* 1945, s 18.

18 *Dangerous Prisoners (Sexual Offenders) Act* 2003, s 5(2)(c).

(b) be accompanied by any affidavits to be relied on by the Attorney-General for the purpose of seeking an order or orders under section 8; and

(c) be made during the last 6 months of the prisoner's period of imprisonment.

(3) On the filing of the application, the registrar must record a return date for the matter to come before the court for a hearing (preliminary hearing) to decide whether the court is satisfied that there are reasonable grounds for believing the prisoner is a serious danger to the community in the absence of a division 3 order.

(4) The return date for the preliminary hearing must be within 28 business days after the filing.

(5) A copy of the application and any affidavit to be relied on by the Attorney-General must be given to the prisoner within 2 business days after the filing.

(6) In this section—

parole order means—

(a) a parole order under the *Corrective Services Act* 2006; or

(b) a statutory parole order under the *Youth Justice Act* 1992.

period of imprisonment includes—

(a) a period of detention mentioned in the definition prisoner, paragraph (b); and

(b) a term of imprisonment a person is liable to serve as mentioned in the definition prisoner, paragraph (c)(iii); and

(c) a period a person is kept in a prison during a suspension period of a parole order as mentioned in the definition prisoner, paragraph (d)(iii).

prison see the *Corrective Services Act* 2006, schedule 4.

prisoner—

(a) means a prisoner detained in custody who is serving a period of imprisonment for a serious sexual offence, or is serving a period of imprisonment that includes a term of imprisonment for a serious sexual offence, whether the person was sentenced to the term or period of imprisonment before or after the commencement of this section; and

(b) includes a person who, as mentioned in the *Youth Justice Act* 1992, section 138(3), is serving a period of detention, and is being held in custody in a corrective services facility, for a child offence that is a serious sexual offence; and

(c) includes a person who—

(i) was serving a period of detention, in a detention centre under the *Youth Justice Act* 1992, for a serious sexual offence; and

(ii) under part 8, division 2A, subdivision 1 of that Act, has been transferred to a corrective services facility and is being held in custody in the facility; and

(iii) is liable, under section 276E of that Act, to serve a term of imprisonment for the offence equal to the period of detention the person remains liable to serve for the offence; and

(d) includes a person who—

(i) was serving a period of imprisonment mentioned in paragraph (a) or a period of detention mentioned in paragraph (b) or (c)(i); and

(ii) is the subject of a parole order that has been suspended under the *Corrective Services Act* 2006; and

(iii) is being kept in a prison during the suspension period."

[31] Section 5 introduces the concept of a "serious sexual offence". That is defined as:

"***serious sexual offence*** means an offence of a sexual nature, whether committed in Queensland or outside Queensland—

(a) involving violence; or

(b) against a child; or

(c) against a person, including a fictitious person represented to the prisoner as a real person, whom the prisoner believed to be a child under the age of 16 years."

[32] In *Attorney-General v Phineasa*,[19] the respondent to an application had committed minor sexual assaults. The Attorney-General argued that any physical contact constituted "violence" for the purposes of the definition of "serious violence offence". That submission was rejected. Muir JA explained:

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19 [2013] 1 Qd R 305.

> "38 As I trust emerges from earlier discussion, the 'violence' referred to in the definition of serious sexual offence is force significantly greater in degree than mere physical contact or even, at least as a general proposition, acts such as pawing, grasping, groping or stroking. The language of sections 8 and 13, in particular, is inconsistent with the application of the Act to sexual offences other than of a very serious kind where offending against adults is concerned. Those sections are addressing conduct of such a nature, that the risk that a prisoner, assumed to be a member of a particular class, might engage in it and harm a member or members of the public if released from custody or if released without a supervision order, is regarded as unacceptable. Consequently, the 'violence' contemplated by the Act (excluding for present purposes threats and intimidation) would normally involve the use of force against a person to facilitate the "rape" of that person within the meaning of s 349 of the *Criminal Code* or which caused (or in the case of predicted conduct would be likely to cause) that person significant physical injury or significant psychological harm."

[33] As already observed, the applicant does not submit that the sexual offence committed against the detention youth worker was a "serious sexual offence".

[34] The DPSOA defines "period of imprisonment" as:

> "***period of imprisonment***—
>
> (a) generally—see the *Penalties and Sentences Act* 1992, section 4; and
>
> (b) for part 2, division 1, 3, 3A or 5—see also section 5(6)."

[35] The P&SA defines "period of imprisonment" as:

> "***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."

[36] The term "term of imprisonment" is defined in the DPSOA as:

> "***term of imprisonment*** see the *Penalties and Sentences Act* 1992, section 4."

[37] The term "term of imprisonment" is defined in s 4 of the P&SA as:

> "***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

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

[38] The dictionary to the DPSOA defines "prisoner" for purposes other than s 5[20] as:

"***prisoner*** means a prisoner within the meaning of the *Corrective Services Act* 2006.

Note—

Also see section 43A."

[39] The term "prisoner" defined in the *Corrective Services Act* 2006 is:

"***prisoner***—

1 Prisoner—

(a) means a person who is in the chief executive's custody, including a person who is released on parole; and

(b) for chapter 5, part 1, includes a classified patient under the *Mental Health Act* 2016 who is serving a period of imprisonment.

2 However, prisoner does not include a person who is released on parole, or a supervised dangerous prisoner (sexual offender), for the following provisions—

- sections 12 to 24, 28 to 40 and 43
- chapter 2, part 2, divisions 4 to 9A
- chapter 3, parts 1 and 2
- chapter 4, parts 2 and 4
- chapter 6, parts 5, 6 and 11.

3 Also, prisoner does not include a detained dangerous prisoner (sexual offender) for the following provisions—

- chapter 2, part 2, division 10 or 11
- chapter 5"

[40] That definition differs from the definition of "prisoner" in s 5(6). The definition in s 5(6) applies to s 5. Section 5 concerns the making of an application and the application may only be made against a "prisoner" as defined by s 5(6).

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20 See *Attorney-General v Newman* [2019] 2 Qd R 1 at 7, [20].

[41] Once the application is filed, a preliminary hearing under s 8 is heard. Section 8 provides:

> "**8 Preliminary hearing**
>
> (1) If the court is satisfied there are reasonable grounds for believing the prisoner is a serious danger to the community in the absence of a division 3 order, the court must set a date for the hearing of the application for a division 3 order.
>
> (2) If the court is satisfied as required under subsection (1), it may make—
>
> (a) an order that the prisoner undergo examinations by 2 psychiatrists named by the court who are to prepare independent reports; and
>
> (b) if the court is satisfied the application may not be finally decided until after the prisoner's release day—
>
> (i) an order that the prisoner's release from custody be supervised; or
>
> (ii) an order that the prisoner be detained in custody for the period stated in the order.
>
> *Note—*
>
> If the court makes an order under subsection (2)(b)(i), the order must contain the requirements for the prisoner stated in section 16(1).

[42] The definition of "prisoner" in the Schedule to the DPSOA, which picks up the definition in the *Corrective Services Act* 2006, applies to the preliminary hearing. In other words, an application may be made under s 5 only against a "prisoner" defined in s 5(6), but provided the respondent is a "prisoner" for the purposes of that subsection at the time of the making of the application, orders can be made under s 8 if the respondent is in the custody of the Chief Executive of Corrective Services.[21]

[43] Here, there is no doubt that the respondent is a "prisoner" for the purposes of s 8. The issue though is whether he was a "prisoner" for the purposes of s 5(6) at the time of the making of the application under s 5.

[44] The YJA establishes a system for criminal justice separate to the system established under the P&SA. For instance, adults are sentenced to terms of imprisonment but children are not. They are detained. An adult offender is under the control of the Chief Executive of Corrective Services. Children in detention are not. Different considerations arise in the sentencing of children as opposed to the sentencing of adults.[22]

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21 *Attorney-General v Newman* [2019] 2 Qd R 1 at [20].

22 *R v SCU* [2017] QCA 198.

[45] It is a policy reflected in the YJA that children who are detained but then reach the age of 18 years and six months should not be held in detention but should be held in a corrective services facility. Section 276F of the YJA provides:

> "**276F Persons over 18 years and 6 months should not serve period of detention at detention centre**
>
> (1) This Act is subject to the overriding principle that it is in the best interests of the welfare of all detainees at a detention centre that persons who are 18 years and 6 months or older are not detained at the centre.
>
> (2) To give effect to the principle—
>
> (a) a person who is 18 years and 6 months or older must not—
>
> (i) enter a detention centre to begin serving a period of detention; or
>
> (ii) return to a detention centre to continue or complete a period of detention, including, for example, returning because of a contravention of a conditional release order or supervised release order; and
>
> (b) an application for a temporary delay of a transfer is of no effect if the applicant is 18 years and 6 months or older; and
>
> (c) an application for a temporary delay of a transfer lapses when the applicant turns 18 years and 6 months; and
>
> (d) a temporary delay of a transfer under section 276D is of no effect to the extent it delays the transfer of a person for any period after the person turns 18 years and 6 months.
>
> (3) If the application of subsection (2)(a) prevents a person from being detained at a detention centre, the person must instead be held at a corrective services facility.
>
> (4) For holding the person at a corrective services facility—
>
> (a) the person is liable to serve a term of imprisonment equal to the period of detention the person remains liable to serve when the person would otherwise enter or return to a detention centre; and
>
> (b) the person is taken to be a prisoner subject to the *Corrective Services Act* 2006; and

(c) any rights, liberties or immunities of the person as a detainee are not preserved, transferred or otherwise applicable for the person as a prisoner; and

(d) the day the person would otherwise have been released under section 227, for the period of detention, is the day the person is to be released on parole under the *Corrective Services Act* 2006.

(5) However, the release is subject to the *Corrective Services Act* 2006 as if granted under a court ordered parole order (the ***statutory parole order***) and the provisions of that Act applying to parole orders also apply to the statutory parole order.

(6) This section applies despite anything else in this Act.

(7) In this section—

application for a temporary delay of a transfer means an application made under section 276D(1) or (2)."

[46] Other provisions concern the transfer of detainees to a corrective services facility.[23] A notice of intended transfer is given to the detainee[24] who may then make an application for a temporary delay of the transfer.[25] That is what occurred here but the application was refused.

[47] Once the transfer is effected, s 276E applies. It provides:

"**276E Transferee subject to Corrective Services Act 2006 from transfer**

(1) This section applies if a person is transferred to a corrective services facility under this subdivision.

(2) From the transfer—

(a) the person is liable to serve a term of imprisonment equal to the period of detention the person remains liable to serve at the transfer; and

(b) the person is taken to be a prisoner subject to the *Corrective Services Act* 2006; and

(c) any rights, liberties or immunities of the person as a detainee end and are not preserved, transferred or otherwise applicable for the person as a prisoner; and

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23 Sections 276B, 276C, 276D and 276E.
24 Section 276C(1).
25 Section 276D.

(d) the day the person would otherwise have been released under section 227, for the period of detention, is the day the person is to be released on parole under the *Corrective Services Act* 2006.

(3) However, the release is subject to the *Corrective Services Act* 2006 as if granted under a court ordered parole order (the ***statutory parole order***) and the provisions of that Act applying to parole orders also apply to the statutory parole order." (emphasis added)

Consideration

[48] Mr Ryan submits that:

(a) section 5 of the DPSOA defines "prisoner" as including some persons who have been sentenced under the YJA;

(b) by subparagraphs (b) and (c) of the definition of "prisoner", the only persons caught are those who are serving a period of imprisonment (converted from a term of detention by s 276E of the YJA) at the time of the making of the application under s 5 of the DPSOA;

(c) as the sentences for the rape and the sexual assaults committed on the same day as the rape offence have expired, the respondent is not a "prisoner".

[49] Mr Ryan's submission relies on the fact that in paragraph (b) of the definition of "prisoner" in s 5(6), the reference is to a person who "… is serving a period of detention", and paragraph (c)(iii) of the definition refers to a person who "is liable" to serve a term of imprisonment and "the person remains liable to serve [the term of imprisonment] for the offence". Mr Ryan submits that paragraphs (b) and (c) catch only persons who are serving the sentence for the serious sexual offence at the time the application is filed under s 5 of the DPSOA. Mr Ryan submits that paragraph (c)(iii) does not catch the respondent because "the offence" must be the "serious sexual offence" and the respondent is not presently liable to serve any sentence in relation to the rape offence (or the sexual assaults committed on the same day) because the sentences have expired.

[50] Mr Ryan submits that the provisions should be read strictly and he relies upon the principle of legality. That principle dictates that in construing legislation, the intention of the legislature to abrogate or curtail human rights or freedoms will not be imputed except by clear unambiguous language.[26] The principle applies to the construction of the DPSOA.[27]

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[26] *Al-Kateb v Godwin* (2004) 219 CLR 562 at 577, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492, *X7 v Australian Crime Commission* (2013) 248 CLR 92 and *R v Leach* [2018] 1 Qd R 459.

[27] *Attorney-General v Phineasa* [2013] 1 Qd R 305 at 315-316, [40]-[45].

[51] The task of construction is to ascertain the meaning of the words actually used in the provision by having regard to not only the usual grammatical meaning of the words, but also the context of the provision and its purpose.[28]

[52] Mr Rolls submits that the present issue is determined by the Court of Appeal's decision in *Attorney-General v Kanaveilomani*.[29] That case does not resolve the present issue but it is of great assistance.

[53] In *Kanaveilomani*, the prisoner was serving a term of imprisonment for serious sexual offences. He was released on parole and while on parole he committed offences which were not "serious sexual offences". An application for orders under the DPSOA was filed in the last six months of the term of imprisonment being served for the serious sexual offences. Before the DPSOA application was heard, the term of imprisonment for the serious sexual offences expired and the prisoner was sentenced to 13 years' imprisonment for the offences that were not serious sexual offences, to be served cumulatively on the ones that were. The sentencing judge declared time served from the expiry of the first sentence to the date of imposition of the second sentence as time served on the second sentence.

[54] The Court of Appeal held that the two unbroken terms of imprisonment were a "period of imprisonment" and held that the application under s 5 of the DPSOA was premature. The application ought to be made within six months of the end of the 13 year term being the end of the "period of imprisonment" which included a "term of imprisonment" for a "serious sexual offence".

[55] *Kanaveilomani* is distinguishable from the present case. The issue here is whether a term of detention which is being served in a correctional facility because of a transfer under s 276B of the YJA is part of a "period of imprisonment" such that the application under s 5 of the DPSOA must be made within six months of the end of the period of imprisonment, not six months from the end of the term of imprisonment for a serious sexual offence. *Kanaveilomani* did not involve consideration of any of the provisions of the YJA.

[56] Mr Ryan's submissions rely heavily on paragraphs (b) and (c) of the definition of "prisoner" in s 5 of the DPSOA. The structure of the various paragraphs in s 5(6) is important. Paragraph (a) defines "prisoner" for the purpose of s 5. Paragraphs (b), (c) and (d) are all provisions which appear to be designed to widen, not limit, the definition in paragraph (a). They all begin with the words "<u>includes</u> a person who …".

[57] Where the word "including" or "includes" is used in a statutory definition, the words which follow usually widen the scope of the words which precede it.[30]

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28 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at 46-47, [47] followed in *Federal Commissioner of Taxation v Consolidated Media Holdings* (2012) 250 CLR 503, *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 368, [14] and 374-375, [35]-[40] and *SAS Trustee Corporation v Miles* (2018) 265 CLR 137 at 149, [20] and 157, [41].

29 [2015] 2 Qd R 509.

30 *Dilworth v Commissioner of Stamps* [1899] AC 99 at 105-106 and *Owen v Menzies* [2013] 2 Qd R 327 at 358, [106].

However, that is not always the case and sometimes the list of matters specified in the definition are an exhaustive list.[31]

[58] Here, there is a complicated scheme whereby child offenders, upon turning 18 years of age, are transferred from the youth justice system into the corrective services system. As appears below, the young adult then is serving a "term of imprisonment". That is the term used in s 5(6), in particular, paragraph (a) of the definition of "prisoner". There is no reason to suppose that the identification of particular prisoners in paragraphs (b), (c) and (d) of the definition limit the meaning of the defined terms in paragraph (a).

[59] To be a "prisoner" as defined by s 5(a), a prisoner must:

(a) be detained in custody;

(b) be serving a "period of imprisonment for a serious sexual offence"; or

(c) be serving a "period of imprisonment" that includes a "term of imprisonment" for a serious sexual offence.

[60] There is no doubt here that the respondent is detained in custody.

[61] There is also no doubt that he is not serving a "period of imprisonment for a serious sexual offence". The period of detention to which he was sentenced for serious sexual offences, and which became a term of imprisonment upon his transfer to a corrective services facility has expired.

[62] He is though "serving a period of imprisonment that includes a term of imprisonment for a serious sexual offence". The definition of "period of imprisonment" in s 5(6) is inclusory. It widens, not narrows, the definition of "period of imprisonment" in the Dictionary to the DPSOA. That explains why the DPSOA Dictionary definition of "period of imprisonment" refers to s 4 of the P&SA and then says "for Part 2, Division 1 … - see <u>also</u> s 5(6)". The definition in s 5(6) does not exclude the definition in the Dictionary.

[63] Therefore, the question is whether there are two "unbroken", "terms of imprisonment", one of which being a term of imprisonment for a "serious sexual offence".[32]

[64] By s 276E(2)(a) of the YJA, the respondent was, from the time he was transferred to a correctional facility, liable to serve a "term of imprisonment". In fact, he was liable to serve two terms of imprisonment: one for the serious sexual offence and one for the 2017 convictions. He was, by s 276E(b) "taken to be a prisoner subject to the *Corrective Services Act* 2006". There were, therefore, two terms of imprisonment which together formed a "period of imprisonment" which "includes a term of imprisonment for a serious sexual offence". On the plain construction of paragraph (a) of the definition of "prisoner" and s 5(6) of the DPSOA and the various provisions which are adopted by that definition, the respondent is a "prisoner" as defined in s 5(6).

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31 *YZ Finance Company Pty Limited v Cummings* (1964) 109 CLR 395.

32 Properly, no party suggested that the short period during which the respondent was on parole broke the period of imprisonment.

[65] That construction is, in my view, both clear, and also accords with the purpose and structure of the DPSOA. As already observed, in *Kanaveilomani*, the question arose as to whether s 5 of the DPSOA operated so as to require an assessment of risk being made at the time close to expiration of the term of imprisonment imposed for the serious sexual offence or whether the assessment of risk was to be made 13 years later, close to the time of the prisoner's release. All three judges on appeal agreed with the orders made but gave separate reasons. Morrison JA observed:

> "[116] In a matter that affects the liberty of the prisoner as dramatically as the *DPSO Act* does, 'rigorous adherence to legislative time requirements is essential'.[33] Thus the Act contemplates that an application will be brought towards the end of the period of imprisonment, and dealt with in as expeditiously as is possible, balancing the competing interests revealed by the objects of the Act (including adequate protection of the community) and the rights of the prisoner. The benefits of having the application heard in such a way were referred to by Williams JA in *Yeo v Attorney-General for the State of Queensland*[34] in these terms:
>
> > 'Under the Act the order for continuing detention, or release subject to a supervision order, is made at about the end of the penalty imposed by way of imprisonment. At that time an evaluation is made of the risk to the community of the offender being released. As pointed out in my reasons in upholding the validity of the Act in *Attorney-General v Fardon* [2003] QCA 416, the Court at that stage is not 'second guessing' what might be the effect of imprisonment on the rehabilitation of the offender, but is basing its decision on cogent evidence obtained towards the expiration of the period of imprisonment when possible rehabilitation can be evaluated.'"

[66] The observations of Morrison JA in *Kanaveilomani* and Williams JA in *Yeo v Attorney-General for the State of Queensland*[35] highlight a fundamental feature of the DPSOA. The assessment of risk is made close to the time of release of a prisoner, not at the time of sentence[36] and not partway through cumulative sentences only some of which were imposed for a "serious sexual offence".

[67] As the respondent is a "prisoner" for the purpose of s 5 of the DPSOA, it is appropriate to order, pursuant to s 8(2)(a), that Doctors Scott Harden and Evelyn Timmins examine the respondent and prepare reports.

[68] There is power to release the respondent on supervision pending the finalisation of the application under s 8.[37] As already observed, the parties urge the making of such an order. The respondent has been in custody for about four and a half years.

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33 *Attorney-General (Qld) v Francis* [2006] QCA 324 at [44], fn 32.
34 *Yeo v Attorney-General for the State of Queensland* [2007] QCA 32 at [9].
35 [2007] QCA 32 at [9].
36 Like the *Criminal Law Amendment Act* 1945, s 18 or the *Penalties and Sentences Act* 1992, Part 10.
37 Section 8(b)(i).

The serious sexual offences were committed when he was 15 years of age. While he was convicted of sexually assaulting a detention youth worker, that was not a "serious sexual assault". The psychological and psychiatric evidence is somewhat mixed on the prospects of rehabilitation but it seems highly unlikely that a continuing detention order will be the result of the application.

[69] In the circumstances, an order for interim supervision ought to be made. The parties produced a draft and agreed on all but condition 10 which is as follows:

> "10. You must not break the law by committing an indictable offence."

[70] There is no evidence to suggest that breaches of the law by commission of offences other than offences of a sexual nature are relevant to risk of the respondent committing an offence of a sexual nature which is the relevant risk. Otherwise the conditions in the draft order are appropriate and I will make an order in terms as appear in Schedule A to these reasons.

[71] The affidavits of Amanda McLean sworn on 5 June 2020 and 12 June 2020 and the affidavit of Alisha Ann Radford affirmed on 12 June 2020 contain material that ought not be the subject of publication so I will order that the affidavits be placed in a sealed envelope and not to be opened except by order of a judge.

[72] The parties urge for an order under s 39PB(3) of the *Evidence Act* 1977 to enable Doctors Sundin, Harden and Timmins to give evidence in person rather than by audio-visual link or audio link. In the ordinary course, such an order would be made where the evidence is likely to be complicated (as it is here). Social distancing can be maintained in court to avoid COVID-19 concerns. An order should be made under s 39PB(3) of the *Evidence Act*.

Orders

[73] The orders are:

The court, being satisfied that there are reasonable grounds for believing that the respondent, Johnwill Swain Marawinze Gizu, is a serious danger to the community in the absence of an order made under Division 3 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (the Act), orders that:

1. The application for a Division 3 order be set for final hearing on 28 August 2020.

2. Pursuant to s 8(2)(a) of the Act, the respondent undergo examinations by two psychiatrists, being Dr Scott Harden and Dr Evelyn Timmins, who are to prepare reports in accordance with s 11 of the Act.

3. Pursuant to s 8(2)(b)(i) of the Act, the respondent be released from custody subject to the requirements stated in the order attached as Schedule A to these reasons until 4.00 pm on 28 August 2020.

4. The affidavits of Amanda McLean sworn on 5 June 2020 and 12 June 2020 and the affidavit of Alisha Ann Radford affirmed on 12 June 2020 be placed in a sealed envelope and not opened without an order of a Judge of this court.

5. Pursuant to s 39PB(3) of the *Evidence Act* 1977, Dr Josephine Sundin, Dr Scott Harden and Dr Evelyn Timmins give oral evidence to the court other than by audio visual link or audio link.

"SCHEDULE A"

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: BS 6114/20

Applicant	**ATTORNEY-GENERAL OF THE STATE OF QUEENSLAND**
	AND
Respondent	**JOHNWILL SWAIN MARAWINZE GIZU**

INTERIM SUPERVISION ORDER

Before:	Davis J
Date:	16 June 2020
Initiating document:	Originating Application filed 8 June 2020 (CFI 1)

THE COURT ORDERS THAT, on release from custody, Johnwill Swain Marawinze Gizu must follow the rules in this interim supervision order until 4pm on 28 August 2020. The rules in this order are made according to the *Dangerous Prisoners (Sexual Offenders) Act 2003*.

TO Johnwill Swain Marawinze Gizu:

1. You are being released from prison but only if you obey the rules in this supervision order.
2. If you break any of the rules in this supervision order, the police or Queensland Corrective Services have the power to arrest you. Then the Court might order that you go back to prison.
3. You must obey these rules until 4pm on 28 August 2020.

Reporting

4. On the day you are released from prison, you must report before 4 pm to a corrective services officer at the Community Corrections office closest to where you will live.

You must tell the corrective services officer your name and the address where you will live.

5. A corrective services office will tell you the times and dates when you must report to them. You must report to them at the times they tell you to report. A corrective services officer might visit you at your home. You must let the corrective services officer come into your house.

   To "report" means to visit a corrective services officer and talk to them face to face.

Supervision

6. A corrective services officer will supervise you until this order is finished. This means you must obey any reasonable direction that a corrective services officer gives you about:

   (i) Where you are allowed to live; and

   (ii) Rehabilitation, care or treatment programs; and

   (iii) Using drugs and alcohol;

   (iv) who you may and may not have contact with; and

   (v) Anything else, expect for instructions that mean you will break the rules in this supervision order.

   A "reasonable direction" is an instruction about what you must do, or what you must not do, that is reasonable in that situation.

   If you are not sure about a direction, you can ask a corrective services officer for more information, or talk to your lawyer about it.

7. You must answer and tell the truth if a corrective services officer asks you about where you are, what you have been doing or what you are planning to do, and who you are spending time with.

8. If you change your name, where you live or any employment, you must tell a corrective services officer at least two business days before the change will happen.

   A "business day" is a week day (Monday, Tuesday, Wednesday, Thursday and Friday) that is not a public holiday.

No [sexual] offences

9. You must not break the law by committing a sexual offence.

Where you must live

10. You must live at a place approved by a corrective services officer. You must obey any rules that are made about people who live there.

11. You must not live at another place. If you want to live at another place, you must tell a corrective services officer the address of the place you want to live. The corrective services officer will decide if you are allowed to live at that place. You are allowed to change the place you live only when you get written permission from a corrective services officer to live at another place.

    This also means you must get written permission from a corrective services officer before you are allowed to stay overnight, or for a few days, or for a few weeks, at another place.

12. You must not leave Queensland. If you want to leave Queensland, you must ask for written permission from a corrective services officer. You are allowed to leave Queensland only after you get written permission from a corrective services officer.

Curfew direction

13. A corrective services officer has power to tell you to stay at a place (for example, the place you live) at particular times. This is called a curfew direction. You must obey a curfew direction.

Monitoring direction

14. A corrective services officer has power to tell you to:

    (i) Wear a device that tracks your location; and

    (ii) Let them install a device or equipment at the place you live. This will monitor if you are there.

    This is called a monitoring direction. You must obey a monitoring direction.

Employment or study

15. You must get written permission from a corrective services officer before you are allowed to start a job, start studying or start volunteer work.

16. When you ask for permission, you must tell the corrective services officer these things:

    (i) What the job is;

    (ii) Who you will work for;

    (iii) What hours you will work each day;

    (iv) The place or places where you will work; and

    (v) (if it is study) where you want to study and what you want to study.

17. If a corrective services officer tells you to stop working or studying you must obey what they tell you.

Motor vehicles

18. You must tell a corrective services officer the details (make, model, colour and registration number) about any vehicle you own, borrow or hire. You must tell the corrective services officer these details immediately (on the same day) you get the vehicle.

    A vehicle includes a car, motorbike, ute or truck.

Mobile phone

19. You are only allowed to own or have (even if you down not own it) one mobile phone. You must tell a corrective services officer the details (make, model, phone number and service provider) about any mobile phone you own or have within 24 hours of when you get the phone.

20. You must give a corrective services officer all passwords and passcodes for any mobile phones you own or have. You must let a corrective services officer look at the phone and everything on the phone.

Computers and internet

21. You must get written permission from a corrective services officer before you are allowed to use a computer, phone or other device to access the internet.

22. You must give a corrective services officer any password or other access code you know for the computer, phone or other device. You must do this within 24 hours of

when you start using the computer, phone or other device. You must let a corrective services officer look at the computer, phone or other device and everything on it.

23. You must give a corrective services officer details (including user names and passwords) about any email address, instant messaging service, chat rooms, or social networking sites that you use. You must do this within 24 hours of when you start using any of these things.

No contact within any victim

24. You must not contact or try to contact any victim(s) of a sexual offence committed by you. You must not ask someone else to do this for you.

    "Contact" means any type of communication, including things like talking, texting, sending letters or emails, posting pictures or chatting. You must not do any of these things in person, by telephone, computer, social media or in any other way.

Rules about alcohol and drugs

25. You are not allowed to take (for example, swallow, eat, inject, or sniff) any alcohol. You are also not allowed to have with you or be in control of any alcohol.

26. You are not allowed to take (for example, swallow, eat, inject, smoke or sniff) any illegal drugs. You are also not allowed to have with you or be in control of any illegal drugs.

27. A corrective services officer has the power to tell you to take a drug test or alcohol test. You must take the drug test or alcohol test when they tell you to. You must give them some of your breath, spit (saliva), pee (urine) or blood when they tell you to do this.

28. You are not allowed to go to pubs, clubs, hotels or nightclubs which are licensed to supply or serve alcohol. If you want to go to one of these places, you must first get written permission from a corrective services officer. If you do not get written permission, you are not allowed to go.

29. You are not allowed to visit a public park. If you want to go to a public park, you must first get written permission from a corrective services officer. If you do not get written permission, you are not allowed to go.

Rules about medicine

30. You must tell a corrective services officer about any medicine that a doctor prescribes (tells you to buy). You must also tell a corrective services officer about any over the counter medicine that you buy or have with you. You must do this within 24 hours of seeing the doctor or buying the medicine.

31. You must take prescribed medicine only as directed by a doctor. You must not take any medicine (other than over the counter medicine) which has not been prescribed for you by a doctor.

Rules about rehabilitation and counselling

32. You must obey any direction a corrective services officer gives you about seeing a doctor, psychiatrist, psychologist, social worker or other counsellor.

33. You must obey any direction a corrective services officer gives you about participating in any treatment or rehabilitation program.

34. You must let corrective services officers get information about you from any treatment or from any rehabilitation program.

Speaking to corrective services about what you plan to do

35. Each week, you must talk to a corrective services officer about what you plan to do that week. A corrective services officer will tell you how to do this (for example, face to face or in writing).

36. Each week, you must also tell a corrective services officer the name of any person you associate with.

    "Associate with" includes: spend time with, make friends with, see or speak to (including by using social media or the internet) regularly.

37. You may need to tell new contacts about your supervision order and offending history. The corrective services officer will instruct you to tell those persons and the corrective services officer may speak to them to make sure you have given them all the information.

Offence Specific Conditions

38. You must develop a management plan with your psychologist or psychiatrist to address any risk of sexual re-offence. You must talk about this with a corrective services officer when asked.

You must advise your case manager of any personal relationships you have started.