SUPREME COURT OF QUEENSLAND

CITATION:	*A-G v Watego* [2003] QSC 367
PARTIES:	**RODNEY JON WELFORD, ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **DAVID GREGORY WATEGO** (respondent)
FILE NO:	8811 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	31 October 2003
DELIVERED AT:	Brisbane
HEARING DATE:	30 October 2003
JUDGE:	Muir J
ORDER:	**Application dismissed**
CATCHWORDS:	CRIMINAL LAW – JUDGMENT AND PUNISHMENT – Other Matters – Queensland – where the applicant sought preliminary orders under s 8(2)(a) and (b) of the *Dangerous Prisoners' (Sexual Offenders) Act* 2003 – whether in the circumstances such orders should be made EVIDENCE – AFFIDAVITS AND STATUTORY DECLARATIONS – AFFIDAVITS – Other Matters – where s 7 of the Act specifies the circumstances in which affidavit material can be relied on in an application brought under the Act – where affidavit material relied on by the applicant did not conform with s 7 of the Act – whether in the circumstances the affidavit materials can be relied on by the applicant PROCEDURE – COURTS AND JUDGES GENERALLY – COURTS – Other Matters – where the applicant sought to rely on written materials at the hearing of its application and the respondent had limited time within which to consider and respond to those materials – whether the respondent would be denied natural justice if not allowed further time to consider the materials

Dangerous Prisoners' (Sexual Offenders) Act 2003 (Qld), s 5(4), s 7, s 8, s 13(1), s 13(2), s 13(5)(a), s 13 (6), s 13(7)
Evidence Act 1977 (Qld), s 92

Deputy Commission of Taxation v Ahern [1988] 2 Qd R 158
Lisafa Holdings Pty Ltd v Gaming Tribunal (1992) 26 NSWLR 391
Pownall v Conlan Management Pty Ltd (1995) 12 WAR 370
R v Turner [1975] QB 834
Steffen v Ruban [1966] 2 NSWR 622

COUNSEL: B Thomas for the applicant
D S Perkins for the respondent

SOLICITORS: C W Lohe Crown Solicitor for the applicant
Lawson Lawyers for the respondent

MUIR J:

The nature of the application and the relevant legislation

[1] By an originating application filed on 24 October 2003, the applicant Attorney-General seeks an order pursuant to s 13(5)(a) of the *Dangerous Prisoners' (Sexual Offenders) Act* 2003 ("the Act") that the respondent be detained in custody for an indefinite term for care, control and treatment. That substantive relief is not a matter for determination on this hearing.

[2] The matter for determination is whether interim orders should be made requiring that –

(a) Pursuant to s 8(2)(a) of the Act, the respondent undergo psychiatric examination by two psychiatrists named by the court with a view to their preparing independent reports;

(b) Pursuant to s 8(2)(b) of the Act, the respondent be retained in custody until such as the court is able to determine the application under s 13(5)(a).

[3] The applicant is an inmate of the Palen Creek Correctional Centre and is entitled to release from prison on 31 October 2003.

[4] Section 8 of the Act provides as follows –

"**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 either or both of the following orders-

(a) an order that the prisoner undergo examinations by 2 psychiatrists named by the court who are to prepare independent reports (a "**risk assessment order**");

(b) if the court is satisfied that the prisoner may be released from custody before the application is finally decided, an order that the prisoner be detained in custody for the period stated in the order (an "**interim detention order**")

(3) If the prisoner is ordered to be detained in custody after the prisoner's period of imprisonment ends, the person remains a prisoner, including for all purposes in relation to an application under this Act.

(4) If the court sets a date for the hearing of the application for a division 3 order but the prisoner is released from custody before the application is fully decided, for all purposes in relation to deciding the application this Act continues to apply to the person as if the person were a prisoner.

[5] Subsections (1), (2), (5), (6) and (7) of s 13 provide as follows –

"(1) This section applies if, on the hearing of an application for a division 3 order, the court is satisfied the prisoner is a serious danger to the community in the absence of a division 3 order (a **"serious danger to the community"**).

(2) A prisoner is a serious danger to the community as mentioned in subsection (1) if there is an unacceptable risk that the prisoner will commit a serious sexual offence –

(a) if the prisoner is released from custody; or
(b) if the prisoner is released from custody without a supervision order being made."

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

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

(b) that the prisoner be released from custody subject to the conditions 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), the paramount consideration is to be the need to ensure adequate protection of the community.

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

A "serious sexual offence" is defined as an offence of a sexual nature, whether committed in Queensland or outside Queensland –

(a) involving violence; or
(b) against children.

The applicant's previous criminal history

[6] The applicant has the following convictions for sexual offences –

Court	**Date**	**Offence**	**Penalty**
Brisbane District Court	14/12/81	Assault with intent to rape on 31 May 1981	Two years' probation
Brisbane District Court	13/05/83	Entering Dwelling House in the night time with intent on 18 September 1982 Indecent assault on a female on 18 September 1992	On each charge, six months' imprisonment to be served concurrently
Byron Bay Local court	14/02/85	Sexual assault	Sentence deferred on the entering into of self-recognisance of $250. Bound over to be of good behaviour for two years
Glen Innes Local Court	28/05/85	Unlawful assault	Four months' imprisonment
Lismore District Court	9/04/86	Attempted sexual intercourse without consent Indecent assault	Four years' imprisonment One year's imprisonment
Brisbane District Court	28/7/89	Found in premises in the night time without lawful excuse on 26 March 1989 Indecent assault on 26 March 1989	Two months' imprisonment on each count and three years' probation
Brisbane District Court	28/7/94	Rape (between 1 January and 31 December 1990) Indecent dealing with a child under 12 years between 1 January and 31 December 1990	10 years' imprisonment Two years' imprisonment (the sentences to be served concurrently)

[7] He also has a history of non-sexual criminal convictions as appears from the following table –

Court	**Date**	**Offence**	**Penalty**
Beenleigh Magistrates Court	14/10/81	Wilful and unlawful destruction of property	One year's probation
Brisbane Supreme Court	25/6/82	Found in premises in the night time without lawful excuse on 21 November 1981	Three years' probation.
H.M. Prison Brisbane	29/11/83	Wilful damage to property	Three months' imprisonment
Byron Bay Local Court	28/2/85	Driving whilst unlicensed Driving under the influence Stealing a motor vehicle	Fined $100 Fined $400 with a disqualification Six months' imprisonment
Glen Innes Local Court	28/5/85	Unlawful assault	Four months' imprisonment
Cooma Local Court	21/6/88	Assault occasioning bodily harm	18 months' imprisonment
Lismore Local Court	17/10/90	Illegal use of a conveyance Unlicensed driver	Four months' imprisonment Fined $100
Brisbane Magistrates Court	8/7/91	Assaulting a police officer Resisting police	Two months' imprisonment Fined $50
Southport Magistrates Court	4/2/92	Supplying a dangerous drug on 17 January 1992 Possession of property obtained directly from the commission of an offence Possession of a dangerous drug	Fined $1000 Fined $200 Fined $300
Tweed Heads Local Court	27/4/92	Malicious damage	Fined $500
Ballina Local Court	11/6/92	Stealing	Fined $300
Southport Magistrates Court	22/9/92	Producing a dangerous drug Possession of a dangerous drug	Fined $600 Fined $200

[8] Searches have failed to locate records from which the details of many of the above offences can be ascertained. There are, however, sentencing remarks in respect of the 9 April 1986 and 28 July 1994 convictions. In the former case, the sentencing remarks disclose that the respondent accosted a young female visitor to Byron Bay when she was alone taking photographs from a public pathway. The respondent

took hold of the complainant who kneed him in the groin. The learned sentencing judge remarked –

> "That, however, on her version, which I accept, did not totally dissuade him. It was only after she screamed for help that she was finally released after being told by the prisoner that she was not to say anything to anybody."

[9] The victim of the respondent's 1994 offences was a nine year old girl. The sentencing remarks refer to the "prolonged penetration of her by the respondent". Unfortunately, little else is said about the circumstances surrounding the offences. I infer from what is said that there was little, if any, violence extraneous to the acts of penetration. A document relied on by the applicant asserts that the respondent informed prison authorities that the victim was the step-daughter of his cousin, that he was drunk at the time and had been using amphetamines and marijuana and that "he was mixed up" and "shattered after a broken relationship with his girlfriend".

The psychiatric evidence

[10] Dr Prabal Kar, consultant psychiatrist, prepared a report dated 25 September 2003 on the basis of information provided to him by the Department of Corrective Services and after a personal assessment of the respondent. The respondent was aware at the time he was interviewed by Dr Kar that he was being assessed for the purposes of a report to the Department. In his report, Dr Kar states that he found "no evidence of serious mental illness". In his opinion the respondent is dependent on alcohol, marijuana and amphetamines and "appears to have" an attention deficit hyperactivity disorder. He notes that he "… formed the impression that his preference of victims is predominantly adult women. However, he sexualises pre-pubescent girls, and as they are physically and psychologically more vulnerable, he is more likely to commit more serious sexual offences against this group". Dr Kar considered that the more recent denial by the respondent that he had committed the 1994 offence, having earlier admitted it, was "a dangerous sign".

[11] On page 6 of his report, Dr Kar observes –

> "I believe that Mr Watego (has) little internal control to prevent re-offending. He is highly impulsive and aggressive, and also has an extremely high sexual drive along with his Antisocial Personality Disorder. His dangerousness is further multiplied by his vulnerability to drugs and alcohol. … though other external controls (ie such as medications like Depo Provera) can be tried, such as strict and controlled supervision, and control of his access to victims, even with such supervision I would consider him a very high risk of re-offending due to his history and current state of denial.
>
> Without supervision his risk of re-offending would be extremely high as he is likely to have used substances and will probably sexually re-offend within the next one to two years.
>
> In my opinion his risk of sexual offences against a child is high. …
> I feel the only sure way to prevent Mr Watego from re-offending is continued incarceration.

> I believe a medicine such as Depo Provera and close monitoring and supervision plus steps to prevent access to victims in the community is the next best option from continued incarceration to reduce the risk to the community. From his history it appears that all his offences have been associated with the abuse of drugs and alcohol."

[12] Dr De Leacy, a psychiatrist retained by the respondent's solicitors, swore an affidavit appending a report dated 29 October 2003. He has not yet had an opportunity to interview the respondent and his report was prepared by reference to Dr Kar's report and other unspecified material supplied to him by the respondent's legal advisors.

[13] The report advances a number of opinions which I now summarise –

- Dr Kar's conclusion about the respondent's overactive sexual drive appears to be based on the respondent's own statements. There is doubt about the reliability of the respondent's accounts and about any "interpretation" based on those account;
- "Hyperactive disorder" is a controversial diagnosis for an adult and the signs of the disorder are unreliable;
- Predicting the likelihood of re-offending is a notoriously difficult task and the risk of re-offending against a young person "would be highly situationally dependent";
- Dr Kar's diagnoses polysubstance dependence but presumably this is now in remission, having regard to the duration of the respondent's imprisonment;
- He doubts the diagnosis of paedophilia, pointing out that only one of the respondent's victims has been a child;
- He concludes that Dr Kar "has too readily assumed that (the respondent) would re-offend against minors"; and
- He concludes that "addressing the respondent's substance problems would go a long way to reduce his re-offending".

The report concludes as follows –

> "In summary I believe that adequate supervision can be organised on release to minimise the risk of this prisoner reoffending after the completion of his sentence and consider that continuing incarceration overly restrictive unless stronger evidence than the current reports is presented. I would like to be given the opportunity to interview this prisoner to enable the completion of a more comprehensive report based on my own observations."

[14] Ms Eli Sky, the senior psychologist at the Walston Correctional Centre and coordinator of the Sex Offenders' Treatment Program, informed the respondent by memorandum dated 15 June 2000 that he had been expelled from the program on grounds that he had not "complied with SOTP group rules" which required him to behave cooperatively with other members of his treatment group and refrain from abusive and/or violent behaviour towards other persons. The memorandum records that following a violation of such rules in September 1999, the respondent signed "a

second contract in which (he) undertook to conduct (himself) in a polite, courteous manner towards facilitators and other group members". It further records that following a violation of this second contract he signed a third behavioural contract in March 2000 but had since "repeatedly become aggressive and abusive towards facilitators" and in particular, towards one of them. Ms Sky swears that when she delivered the memorandum to Mr Watego she was subjected to "heavy verbal abuse, such that (she) feared for (her) safety". In a memorandum in relation to this incident which she prepared on 16 June 2000 she refers to other verbal abuse being offered by the respondent to another person on the occasion in question.

[15] Together with another psychologist she prepared an extensive "psychologists' report for sentence management review" dated 21 November 2000.

[16] That report expresses the opinion that the respondent is no longer suitable for participation in the program due to his inability to manage his anger and frustration. It also refers to "several breaches and incidents", most of which are unspecified, and concludes "Mr Watego's control over his anger has been demonstrated to be limited. Further management of his anger would require intensive intervention".

[17] Ms Sky prepared a report dated 27 June 2000 at the request of the sentence management coordinator of the Moreton Correction Centre in relation to the respondent's application for consideration of remission of sentence. It states –

> "Information contained in this report was obtained through Mr Watego's self-report during group-based and individual contact as well as through the Sentence Management process (including the current Remission Submission), and the Detention, Professional Management, Psychological and SOTP Files. Consultation with other psychologists and counsellors who have worked with Mr Watego during his participation in the Sex Offender's Treatment Program has occurred to obtain a more comprehensive picture of his progress throughout the program."

[18] The report concluded with the opinion that the respondent's inability to curb emotional reactivity and continued reliance on the tactics of aggression made him an unsuitable candidate for a group-based pre-release program. It was said that the respondent posed a high risk of re-offending and it was recommended that he remain under strict supervision for his own safety and the safety of others.

The admissibility of evidence

[19] No objection was taken to the admissibility of the evidence relied on by the applicant but, having regard to the nature for the application and the Act's own evidentiary requirements, I thought it appropriate, at the commencement of the hearing, to draw to counsels' attention the evidentiary difficulties which I am about to discuss.

[20] Section 7 of the Act provides –

> "**Contents of affidavit**
>
> (1) An affidavit must be confined to the evidence the person making it could give if giving evidence orally.
>
> (2) However, an affidavit for use in a preliminary hearing may contain statements based on information and belief if the person

> making it states the sources of the information and the grounds for the belief."

[21] It is a well settled principle that expert opinion based on unproven facts or assumptions is inadmissible[1] unless the facts or assumptions are proved by admissible evidence.

[22] Expert opinion based on a combination of admissible and inadmissible evidence is also inadmissible if it is impossible to determine the conclusions which are based on admissible evidence and those which are not.[2]

[23] Dr Kar's report is based on his interview with the respondent and on the information contained in: a letter to him of 11 September 203 from the Director, Legal Services of the Department of Corrective Services, "a package of material"; "various attached reports from psychologists and other staff" and the respondent's criminal history.

[24] The contents of "the package" are not identified in the report and nor are the reports to which reference is made. The letter of 11 September 2003 was not exhibited to any affidavit.

[25] Section 7(1) of the Act requires affidavits to be relied on in this hearing to be confined to the evidence the person making it could give if giving evidence orally. That requirement is qualified by subsection (2) which permits the giving of evidence based on information and belief if the deponent "states the sources of information and the grounds for the belief".

[26] The requirements of subsection (2) are not met by a broad reference to unspecified documents and classes of documents. The object of the requirement to disclose the deponent's sources is to provide identification of those sources sufficient to enable the party against whom the evidence is adduced to investigate, assess and, where appropriate, challenge the evidence.[3]

[27] To allow evidence of the nature of that contained in Dr Kar's report, to use the words of Thomas J in *Deputy Commission of Taxation v Ahern*,[4] "would virtually permit trial by assertion in circumstances where no real check was available upon facile or erroneous assertion".

[28] Mr Thomas, who appears for the applicant, argues that Dr Kar's report is admissible as his opinion has been formed on the basis of the interview and other material. He submits that the opinion should be received as evidence of relevant facts and that it is for the respondent to challenge its reliability by cross-examination. The cross-examination may show that part of the factual basis for the opinion is erroneous but that would go to weight rather than admissibility. I do not accept these submissions. They are inconsistent with the authorities earlier discussed.

[29] The evidence of Ms Sky is similarly deficient. Her affidavit consists of 7 paragraphs. Two of those paragraphs deal briefly with the expulsion of the

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1 *R v Turner* [1975] QB 834 at 840 and *Pownall v Conlan Management Pty Ltd* (1995) 12 WAR 370.

2 *Steffen v Ruban* [1966] 2 NSWR 622 and *Pownall v Conlan Management Pty Ltd* at 378.

3 Cf the observations of Thomas J, with whose reasons Ryan and de Jersey JJ agreed, in *Deputy Commission of Taxation v Ahern* [1988] 2 Qd R 158 at 163.

4 *(supra)* at 164.

respondent from the Sex Offenders' Treatment Program. One of them states that she was subjected to verbal abuse such that she feared for her safety and refers to an exhibited memorandum prepared by her in relation to the incident. Although she does not swear that the facts set out in the memorandum are correct, it is probably admissible under s 92 of the *Evidence Act* 1977.

[30] The great bulk of her evidence, however, is contained in reports exhibited to her affidavit. One is a joint report. All rely in part on unproven hearsay evidence and it is impossible to establish whether the relevant opinions would have been formed if Ms Sky relied only on admissible evidence.

[31] For the above reasons, I find Dr Kar's affidavit and Ms Sky's reports, including her joint report, inadmissible.

[32] In the course of the hearing, Mr Thomas sought leave to call Dr Kar to enable him to depose to the material he had considered in order to form his opinion. The giving of such leave was opposed by Mr Perkins on the basis that he would not be in a position to cross-examine effectively. I gave leave for Dr Kar to be called as it seemed to me to be desirable, having regard to the gravity of the matter, that his evidence be on record in case one or other of the parties took this matter further. In giving leave, however, I queried whether the result of allowing further evidence might be to deny natural justice to the respondent. Consideration of that matter was then deferred until after the evidence was given.

[33] In his oral evidence Dr Kar identified the material on which he relied to arrive at his opinion and said that he would have arrived at the same opinion, although with less certainty, merely on the basis of his interview with the respondent, the information obtained in that interview and the respondent's previous criminal history.

[34] At the end of Dr Kar's fairly extensive evidence I was doubtful that Dr Kar, having formed his opinion on the basis of a considerable body of material, had been able to fully disentangle what he had been told by the respondent from what he had read in reports and memoranda.

Prejudice to the respondent – denial of natural justice

[35] The application was filed on 24 October and served on the respondent at about 5am that day. Legal aid was sought and it was not until midday on Tuesday, 28 October that funding was approved to enable the respondent's solicitors to be instructed. A solicitor in the employ of the respondent's solicitors attended the Wolston Correctional Centre at 3pm on 28 October in order to take instructions from the respondent. Mr Perkins, who appears for the respondent, submits that there has been inadequate time within which to take appropriate instructions and to consider the large volume of material filed. Dr De Leacy, as I have already noted, has not been able to interview the respondent and has been able address relevant issues only in a limited way.

[36] Effectively, the respondent has had about one clear day in which to deal with issues of considerable scope and complexity. He is further handicapped in his ability to provide an effectual response to the applicant's case by his limited intellectual capacity and the constraints imposed by his incarceration.

[37] His legal representatives did not apply to have the application adjourned to enable them to prepare adequately for the hearing, seemingly labouring under the misapprehension that as the respondent was due for release on 31 October the matter would have to proceed on 30 October irrespective of whether this would result in a denial of natural justice to the respondent. So immersed were they in their attempts to master the applicant's material that obvious problems with the applicant's case, such as the question of natural justice and the inadmissibility of the bulk of the evidence, were overlooked.

[38] The Act does not specify a duration of service for the applicant's material on a preliminary hearing beyond requiring that the preliminary hearing must be within 14 business days after filing.[5]

[39] The maximum duration of notice is thus 10 business days. Section 6(2) however requires the respondent to give a copy of any affidavits to be relied on by the respondent on the hearing to the applicant at least three business days before the date of the hearing. It is necessarily implicit in sections 5 and 6, and the rules of natural justice require, that a respondent have a reasonable time within which to consider and, if necessary, respond to the applicant's material. It is an essential principle inherent in the concept of natural justice that there be procedural fairness. A basic requirement of procedural fairness in court proceedings is that a party against whom an order is sought should have an appropriate opportunity to present to the court the reasons advanced by him against the making of such an order. Such an opportunity will not be afforded where a party has inadequate time in which to prepare his case.[6]

[40] Although the subject hearing is described in the Act as a "preliminary hearing" and is a precursor to a final hearing under s 13, s 8 contemplates that the hearing may be contested. The potential consequences for the respondent of an adverse outcome of the hearing are grave. He may be held in prison until the s 13 determination. That determination might result in his indefinite detention. If he succeeds on the preliminary hearing there will be no s 13 hearing and his liberty will not be in question.

[41] There is nothing in the Act which suggests that on any hearing under it natural justice might be denied to a respondent. The contrary is the case. The extent to which strict proof of matters may be departed from on a preliminary hearing is addressed in s 7. Section 8(1) specifies the standard of proof on preliminary hearings. A different standard of proof on a s 13 hearing is prescribed by s 13(3).

[42] Having regard to those considerations, I do not consider that I should act on the oral evidence adduced on the hearing. It does not merely clarify or supplement the affidavit evidence. It is substantially different in that it puts forward a psychiatric opinion arrived at on quite limited material. If the opinion given in oral evidence and its factual basis had been the subject of an affidavit served in a timely way, the respondent may well have been able to provide a more focussed and effective response. The respondent's legal representatives had to deal with the fresh evidence "on the run" and were incapable of doing so. Apart from the requirements of natural justice, in my view, it would be quite inconsistent with the Act's requirements in

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5 *Dangerous Prisoners' (Sexual Offenders) Act* 2003 s 5(4).

6 See eg, the observations of Mahoney JA in *Lisafa Holdings Pty Ltd v Gaming Tribunal* (1992) 26 NSWLR 391 at 406-407.

relation to the evidenced to be adduced on a preliminary hearing for the substance of the applicant's case to be presented by oral evidence.

[43] I am of the view also that, putting aside questions relating to the oral evidence, the principles of natural justice require the application to be dismissed. The respondent has been given inadequate opportunity to respond to the applicant's case and to present his own.

The merits of the application having regard to the admissible evidence

[44] Because of the limited time available to me, it is necessary that any discussion of the evidence be briefer than would ordinarily be the case. Once the evidence of Dr Kar and Ms Sky are excluded there remains no basis on which I am able to be satisfied that there are "reasonable grounds for believing the (respondent) is a serious danger to the community".

[45] Even on the basis of Dr Kar's oral evidence, coupled with the limited admissible evidence such as the applicant's prior criminal history and sentencing remarks, I would have difficulty in reaching the requisite state of satisfaction.

[46] Dr De Leacy, in his report casts doubt on the validity of some of the views expressed by Dr Kar. Dr De Leacy was not cross-examined. Dr De Leacy challenges Dr Kar's opinion that the respondent would re-offend against minors. He notes the respondent's criminal history which suggests that he is "predominantly attracted to mature women".

[47] Dr Kar appears to place considerable reliance on what he discerns to be "a clear trend towards increasing dangerousness with time in his offending pattern". I doubt that such a trend can be discerned. In 1983 and 1985, judging from the sentences imposed, relatively minor sexual offences were committed. The 1986 offence at Byron Bay was more serious but was short in duration and the force used was relatively minor. The next sexual offence, in 1989, reverted to the old pattern. Again the sentence was light. The 1994 offence was quite different to the previous offences in that it involved sexual penetration and was perpetrated on a minor.

[48] I mention also that although Dr Kar places reliance on polysubstance dependence, it is not apparent that such a condition survived the respondent's long period of incarceration.

Conclusion

[49] For the above reasons, the application is dismissed.