SUPREME COURT OF QUEENSLAND

CITATION:	*A-G v Nash* [2003] QSC 377
PARTIES:	**RODNEY JON WELFORD, ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) v **WAYNE MICHAEL NASH** (respondent)
FILE NO/S:	SC No 9776 of 2003
DIVISION:	Supreme Court at Brisbane
PROCEEDING:	Application
DELIVERED ON:	5 November 2003
DELIVERED AT:	Brisbane
HEARING DATE:	4 November 2003
JUDGE:	P D McMurdo J
ORDER:	**Application dismissed.**
CATCHWORDS:	CRIMINAL LAW – JUDGMENT AND PUNISHMENT – OTHER MATTERS – where application for certain orders concerning the respondent pursuant to section 8 *Dangerous Prisoners'(Sexual Offenders) Act* – where respondent submits has been inadequate notice of the application – whether respondent has been denied natural justice – whether application should be dismissed *Dangerous Prisoners'(Sexual Offenders) Act* 2003 (Qld), s5, s8, s6, s13, s44, s49 *A-G v Watego* [2003] QSC 367, considered
COUNSEL:	B Thomas for the applicant P Keyzer for the respondent
SOLICITORS:	Crown Solicitor for the applicant Prisoners' Legal Service for the respondent

[1] **McMURDO J:** On 30 October 2003, the Attorney-General filed this application seeking orders under s 8 and Division 3 of Part 2 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003. The return date for the application for orders under s 8, which the Act calls the preliminary hearing, was yesterday, 4 November. The originating application seeks both a "risk assessment order" pursuant to s 8 (2)(b) and an "interim detention order" pursuant to s 8 (2)(b). In the course of yesterday's hearing, counsel for the Attorney submitted that one course open to the court upon this preliminary hearing was to set a date for hearing of the application for a

Division 3 order (pursuant to s 8 (1)) and to make a risk assessment order without making an interim detention order. But he made it clear that the Attorney was not thereby abandoning his application for an interim detention order. Absent an interim order, the respondent will be released tomorrow, 6 November.

[2] The Division 3 order sought by the originating application, at least in its present terms, is a "supervision order" pursuant to s 13 (5)(b). The Attorney's case is that the respondent could be released if subject to appropriate orders for supervision and treatment. The evidence relied upon is to the effect that with appropriate supervision and treatment after release, the respondent would represent no more than a "moderate" risk of re-offending.

[3] The essential question for determination upon a preliminary hearing is 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. If the court is so satisfied it must set a date for the hearing of the application for a Division 3 order and it may make either or both a risk assessment order and an interim detention order. An application for any order under this Act, including orders under s 8, can be made only "in relation to a prisoner": s 5(1). The Act provides for a situation where the respondent is released from custody before a final decision is made upon the application for a Division 3 order. It does so by s 8 (4) which provides as follows:

> "s 8 Preliminary hearing
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> . . .
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> (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 finally 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."

Accordingly, if in this case a date was set for the hearing of the application for a division 3 order, but no interim detention order was made, then by s 8 (4) the respondent would remain susceptible to the operation of the Act. It would remain open to the court to make orders under s 13, either by what is presently sought which is a supervision order, or possibly, subject to leave being given to amend the originating application, by a "continuing detention order" which would result in the respondent going back to prison. A supervision order also carries a potential for further imprisonment.

[4] Whilst it is clear that a division 3 order can be made in some circumstances where the respondent is no longer in custody, it is common ground that an order under s 8 can be made only whilst the respondent is in custody. This results from the terms of s 5(1) and, in the context of a preliminary hearing, the absence of a deeming provision to the same effect as that in s 8 (4). That provision is expressly premised upon the court having set a date for the hearing of the application for a division 3 order. In consequence, any order under s 8 upon this application must be made before the respondent's release. He is presently entitled to be released tomorrow.

[5] At the commencement of yesterday's hearing, the respondent's counsel read two affidavits, one of the respondent and one of his instructing solicitor, which are relevant to a submission he then made that the respondent had not been given sufficient notice of this application to provide the respondent with an appropriate

opportunity to present his case. But for the respondent's due release date tomorrow, any unfairness to the respondent could have been avoided by an adjournment. In the circumstances outlined by the respondent's counsel, the respondent would not be able to fairly meet this application by an adjournment of but one or two days. The respondent's submission was that as he has been denied natural justice by inadequate notice, the court could not be duly satisfied as to the threshold question under s 8 (1) and it should dismiss the application.

[6] After I heard submissions in relation to this natural justice question, I indicated that I intended to reserve that question overnight and to give a decision upon it this morning to the end of then embarking upon a hearing of the merits of the s 8 application if I was satisfied that could be done with fairness to the respondent. However the respondent's counsel, who does not ordinarily practice in Brisbane, informed that he was unable to appear this morning and that the respondent would thereby be disadvantaged if I proceeded to consider the merits without the respondent's counsel having had some opportunity to at least cross-examine as best he could in the circumstances. Accordingly I agreed to allow Mr Thomas to read his affidavits, subject to the objection to the entirety of the evidence upon the natural justice ground, and to permit Mr Keyzer to cross examine some of those deponents on the basis that I would reserve the question of whether the proceedings should be dismissed on the natural justice ground. There was then a cross-examination of some expert witnesses, in the course of which it was apparent that Mr Keyzer was under some difficulties because of short preparation. Mr Keyzer also called oral evidence, by telephone, from Dr Smallbone, a psychologist, who has not assessed the respondent and for that reason at least was limited in the evidence he could give. That provided one example of the difficulties for a respondent to an application such as this if it has not been served in sufficient time for the respondent to procure relevant evidence in support of his response. Of course, upon this preliminary hearing, the question is whether there are reasonable grounds for believing that the prisoner is a serious danger to the community. But in some cases the determination of that question will be affected not only by the applicant's evidence in chief but also by evidence for the respondent and by the cross-examination of the applicant's witnesses. The Act specifically contemplates that the prisoner will file material in response, and requires him to do so "at least three business days before the day set down for the preliminary hearing": s 6(2). Needless to say, it was impossible for the prisoner to comply with that requirement where the originating application itself was filed only two business days before the day set down for hearing.

[7] I should record that those acting for the Attorney sought to have the matter set down for hearing not yesterday, but for today, in correspondence with my Associate last week asking for permission to file the application. They required permission to file the originating application because other matters in the applications list for any day this week had already filled more than the time available and the list had closed. I was not prepared to allow the preliminary hearing to be set down for today, 5 November because I was concerned that this could allow insufficient time for a proper hearing and determination in advance of the 6 November deadline. For that reason the applicant was allowed to file the application returnable yesterday. In any case, the extra day would not have affected the respondent's position.

[8] As Muir J observed in the context of the preliminary hearing in the *A-G v Watego* [2003] QSC 367 a basic requirement of procedural fairness in court proceedings is

that the 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, and such an opportunity will not be afforded where the party has inadequate time in which to prepare his case.[1]

[9] The content of the requirements of procedural fairness to some extent varies according to the context including the consequences of the potential outcome and, of course, the terms of the relevant legislation or rules. Clear legislative language is required to deny a party against whom an order is sought in court proceedings an appropriate opportunity to present his case especially where that party's liberty is at stake. I did not understand Mr Thomas for the Attorney to challenge any of those propositions. But he did submit that this Act somewhat qualifies a respondent's right to an adequate time to prepare his case by the terms of s 44 which provides:

"44 Hearings on the papers

> (1) The court may decide whether it is satisfied as required under section (8) (1) or 18[2] entirely or partly from a consideration of the documents filed, without the prisoner or witnesses appearing or the prisoner consenting to, or being heard on, the matter being decided in that way.
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> (2) In making its decision, the court may receive in evidence the following documents –
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> (a) the prisoner's antecedents and criminal history;
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> (b) anything relevant to the issue contained in the certified transcription of, or any medical, psychiatric, psychological or other report tendered in, any proceeding against the prisoner for a serious sexual offence."

This provision is in contrast with s 49 which provides that "the prisoner is entitled to appear at a hearing under s 13, 21, 27 or 28", and with s 39, which provides that "if a prisoner indicates on the Notice of Appeal that the prisoner wants to be present at the hearing of the appeal, the Notice is taken also to be an application for leave to be present at the appeal". The submission was to the effect that s 44 permits a court to decide an application for an order under s 8 upon an ex parte basis. In my view, that is not the effect of s 44. The meaning of "appearing" is revealed by its reference to both the prisoner and to witnesses: it refers to the appearance at court of a witness or the prisoner. That section must of course be read with s 5(5) which provides:

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

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[1] At [39] citing Mahoney JA in *Lisafa Holdings Pty Ltd v Gaming* Tribunal (1992) 26 NSWLR 391 at 406-407

[2] Section 8 (Preliminary hearing) or 18 (Application for amendment)

It must also be read with the provision already mentioned permitting a prisoner to file affidavits in response on the preliminary hearing. In my view, s 44 does not permit the court to relieve the Attorney of the apparently mandatory requirement within s 5 to give notice of his application. I accept that it might in some cases affect a respondent's right to cross-examine the applicant's deponents upon the preliminary hearing. But that is not to deny the respondent his right to procedural fairness by being given adequate notice of the application and of the evidence in support of it. Any doubt as to the effect of s 44 is answered by the Explanatory Note, which said that it "provides that the court may decide the preliminary hearing entirely or partly from a consideration of the documents filed".

[10] An application under this Act must be made during the last six months of the prisoner's period of imprisonment: s 5(2)(c). The return date for the preliminary hearing must be within 14 business days after the filing: s 5(4). The evident intent of that requirement is to expedite not only the preliminary hearing but the final hearing. The respondent has been in custody since November 2000 serving a three year sentence for which the release date, at any material time since the enactment of this legislation, has been 6 November 2003. The application could have been brought at any time from the Act coming into force on 6 June 2003. Had it been brought earlier, but with a return date which provided insufficient time for a fair response, the preliminary hearing could have been adjourned to a date comfortably within the respondent's existing term of imprisonment. Instead, this application was not filed until 30 October. The reasons for the delay are completely unexplained. There is no suggestion that there is any matter which has recently arisen which has prompted this application.

[11] The application was served on the respondent last Friday afternoon. The steps taken on the respondent's side since then have been at least reasonable. Only on Monday was Legal Aid approval able to be obtained. Counsel was then briefed but was able to confer with the respondent for only about 10 minutes on the night before the hearing, speaking by telephone. He and his solicitor were able to confer for about the same period, again by telephone, on the morning of the hearing. The respondent is in custody in central Queensland. The evidence in support of this application refers to, amongst other things, what are alleged as the respondent's present and previous attitudes to participating in programs such as the Sexual Offenders' Treatment program. The fact that he has not participated in such a program seems to be relevant on the applicant's case. There is a factual issue as to his attitude to those matters. That is an example of a matter on which it has been difficult for the respondent to prepare his case. There has been no realistic opportunity to prepare any professional opinion against the extensive expert evidence of the applicant. Mr Keyzer was able to conduct some relevant cross-examination. But that does not demonstrate that he was able to do so as effectively as if the respondent had been given adequate notice. He told me and I accept that he has been under a particular difficulty in that respect.

[12] It was urged upon me by Mr Thomas that I should be concerned with the public interest and the need for the community to be adequately protected by appropriate orders under this Act. I accept that is so, but the operation of the Act must be in the context of the provision of natural justice, and in particular the requirement for adequate notice of this application. The making of a finding in terms of s 8 (1), even absent the making of orders under s 8 (2), has substantial consequences for a prisoner. It subjects him to a further and perhaps extensive hearing, at which he is

at risk of orders which would or could affect his liberty. In my view, he has not been given adequate notice of this application and to consider whether the evidence establishes the matter required by s 8 (1) would be to deny him natural justice. It follows that I am not satisfied in terms of s 8 (1) and that this application should be dismissed.