SUPREME COURT OF QUEENSLAND

CITATION:	*A-G Qld v Watego* [2003] QCA 512
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant/appellant) **v** **DAVID GREGORY WATEGO (AKA DAGLEY)** (respondent)
FILE NO/S:	Appeal No 9828 of 2003 SC No 8811 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	17 November 2003
DELIVERED AT:	Brisbane
HEARING DATE:	11 November 2003
JUDGES:	McPherson and Davies JJA and Mullins J Judgment of the Court
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – IN GENERAL – GENERAL PRINCIPLES – FUNCTIONS OF APPELLATE COURT – GENERALLY – primary function to hear appeals not to determine questions of fact as court sitting at first instance – whether hearing evidence as primary court deprives parties of ordinary right of appeal – whether risk of special leave adequate right of appeal STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – ACTS AND CLAUSES – PARTICULAR ACTS – QLD – application made to detain prisoner for risk assessment under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) - allowed one clear day to prepare for hearing – whether disability repaired by time before appeal heard – whether lack of time denial of natural justice – whether requirements of Act must be strictly complied with *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 5, s 6, s 7, s 8(2), s 8(2)(a), s 8(2)(b), s 13(5), s 41(2), s 43, s 44

Supreme Court of Queensland Act 1991 (Qld), s 68(3)

Attorney-General v Fardon [2003] QCA 416; Appeal No 6596 of 2003, 23 September 2003, referred to
Deputy Commissioner of Taxation v Ahern (No 2) [1988] 2 Qd R 158, followed
Director of Public Prosecutions v Ferguson [2003] QSC 1, SC No 11803 of 2002, 8 January 2003, considered
Steffen v Ruban (1966) 84 WN (Pt 1) (NSW) 264, followed

COUNSEL: G C Martin SC, with B Thomas for the applicant/appellant
D S Perkins for the respondent

SOLICITORS: Crown Solicitor (Queensland) for the applicant/appellant
Lawsons Lawyers for the respondent

[1] **THE COURT:** On 28 July 1994, the respondent was convicted on his own plea in the District Court at Brisbane of raping a nine year old girl in 1990, and sentenced to a term of imprisonment for 10 years. Having served his sentence with the benefit of some remissions, he was due for release from prison on 31 October 2003, when on 24 October 2003 the Attorney-General applied* pursuant to s 5(1) of the *Dangerous Prisoners (Sexual Offenders) Act 2003* for orders under s 8(2) of that Act. The Act, which commenced on 6 June 2003, provides in s 13(5) subject to certain conditions for the making of a continuing detention order or a supervision order in respect of a prisoner who is about to be released from prison at the end of his term of imprisonment. The Act contemplates a two-stage process, in the first of which the court at a preliminary hearing under s 8(2) may make either or both of the following orders:

(a) a risk assessment order that the prisoner undergo examinations by two named psychiatrists, who are to prepare independent reports;
(b) an interim detention order that the prisoner be detained in custody for the period stated in that order.

[2] In the present instance, the Attorney's application to the Supreme Court sought both of those forms of order, while seeking to limit the duration of the second order to detention in custody until the Court was able to determine the application for a third form of order that, pursuant to s 13(5)(a) of the Act, the respondent be detained in custody for an indefinite term for care, control and treatment. An order in the third of these forms is called a Division 3 order. It is not necessary to examine its implications or effects, or the statutory provisions regulating the procedure for obtaining it, which were considered in detail by this Court in *Attorney-General v Fardon* [2003] QCA 416, delivered on 23 September 2003.

[3] The subject application came before a Judge of the Supreme Court, who heard it on 30 October 2003 and dismissed it on the following day, which was the date on which the respondent was due for discharge under his 1994 sentence. Although, as has now been said more than once, the application was dismissed, the court is, by s

* The Attorney-General by that title sufficiently represents the State of Queensland in the courts, without incorporating his personal name in the title to the proceeding: see *Australian Alliance Assurance Co Ltd v Attorney- General* [1916] St R Qd 135.

41(2) of the Act authorised in the event of an appeal to order detention of the prisoner in custody for a period stated in that order. In the present case, his Honour on 31 October 2003 stayed his decision dismissing the application until the hearing of this appeal by the Attorney-General and, until then or earlier order, ordered that the respondent be detained in custody. At the conclusion of the appeal hearing on 11 November, this Court extended the detention order until the appeal is determined.

[4] Section 8(1) of the Act makes it a prerequisite to a risk assessment order under s 8(2)(a) or an interim detention order under s 8(2)(b) that the court conducting a preliminary hearing of an application for such an order be 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 for continuing detention or supervision. There were essentially two reasons why in this instance his Honour was not so satisfied. The first concerned the evidence that was tendered by the applicant at the hearing; the second the extent of the opportunity afforded to the respondent to prepare his opposition to the application. As to the latter, it is for the present enough to say that the application was filed on 24 October but was not served until 5 pm on that day. It was a Friday, so that technically service at or immediately after that time took it over the week-end to the following Monday. The respondent is in penurious circumstances, and it was not until midday on Tuesday 28 October that legal aid funding was approved to enable solicitors acting on his behalf to take instructions from him in prison at 3 pm on that day. Mr Perkins of counsel was briefed to appear at the preliminary hearing, and a Dr De Leacey, a psychiatric expert, was engaged on his behalf. As his Honour observed, this meant that the respondent had approximately one clear day in which to deal with issues of considerable scope and complexity, with the handicap of being in custody and, it appears, the disadvantage of some degree of intellectual disability on his part.

[5] The difficulties of effectively opposing the application and orders in circumstances like those have been only partly offset by the time which has elapsed between service of the application and the hearing of this appeal. The shortness of the time available meant that Dr De Leacey's report was necessarily limited to commenting on the report of the opinion of the consulting psychiatrist Dr Kar relied on by the Attorney, and of doing so without the benefit of having interviewed the respondent personally. Before this Court, the appellant stressed that s 44(1) of the Act enables the court to decide whether it is satisfied, as required under s 8(1), from a consideration of the documents filed and without the prisoner or witnesses appearing, or the prisoner consenting to, or being heard on, the matter being decided in that way. But s 44(1) confers on the court a discretion so to decide ("the court *may* decide . . ."), and in this instance the court did not decide to do so. It can, in any event, make no difference to say that the application might have been conducted *ex parte*, when, as in this case, the applicant chose not to proceed in that way. Once the respondent was served with the application and supporting materials, he was entitled to expect the benefit of a hearing for which he had adequate time to prepare.

[6] What is not explained anywhere is why, knowing that the respondent was due to be released on 31 October 2003 and having almost four months from 6 June within which to do so, the application was not instituted until 24 October 2003 or served until 27 October 2003, which was only four business days before it was heard. Section 5(5) provides for the application and any affidavit relied on by the applicant to be given to the prisoner within two business days after being filed; but it scarcely,

if at all, allowed time for compliance with s 6(2) requiring the prisoner to give a copy of his affidavits to the Attorney-General three business days before the day set down for the preliminary hearing on 30 October. Why the decision to institute the proceedings was left as late as the last week before the respondent's release is not accounted for; which is all the more surprising in view of the strictures on that subject that were delivered by Mackenzie J in the earlier case of *Director of Public Prosecutions v Ferguson* (no 11803 of 2002) in January of this year. When these and other consequences of the delay are included, it is difficult to escape the judge's conclusion in this case that there was a denial of natural justice.

[7] On appeal, however, the real problem confronting the appellant is that there is simply no affirmative finding by the Judge of satisfaction that there were reasonable grounds for believing that the respondent was or would be a serious danger to the community in the absence of a Division 3 order. The prerequisite for an order or orders under ss 8(1) and 8(2) was therefore not fulfilled. At the hearing on 30 October, the applicant Attorney relied primarily on an affidavit from Dr Kar, a consulting psychiatrist, who had based the report of his opinion to that effect on an interview lasting 1 ½ hours with the respondent and his criminal history, together with a vast collection of reports, observations and comments of the respondent's behaviour in prison from some of those in the corrective services system who have had responsibility for him in the course of his sentence. Material of this character was exhibited to an affidavit of Eli Sky, who is the Senior Psychologist at the Wolston Correctional Centre, and to an affidavit from Ms Julie Steel, who exhibits the "entire file" held by the Community Corrections Board relating to this respondent. Altogether the material in question extends over 1,000 or more pages of the five volume record now before the Court, which it would have been virtually impossible for anyone to absorb and analyse in the time before the hearing of the application on this appeal.

[8] His Honour declined to admit this mass of undigested material in evidence in the proceedings. He specifically excluded from evidence the affidavit of Eli Sky. It was submitted on appeal that, although an affidavit under the Act must by s 7(1) be confined to the evidence which the person making it could give if giving evidence orally, s 7(2) provides that 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. The limits to admission of evidence in that form are well settled, and were discussed by Thomas J in *Deputy Commissioner of Taxation v Ahern (No. 2)* [1998] 2 QdR 158, 160-163. In matters which, like this, threaten the liberty of the subject, the requirements of s 7(2) must be strictly complied with. The only basis for the "information" in Eli Sky's affidavit are the files maintained by the Corrective Services Commission concerning the respondent's participation, or lack of it, in the Sex Offenders Treatment Program since 2000. One is simply left to draw the inference that Eli Sky has been "informed" of every item in all of the material in the file or its contents by the individuals who generated the reports and records that go to make it up, and that Sky believed what was contained in them. In point of fact, the terse statement in paragraph 7 of Sky's affidavit does not state that the deponent believes any of it, but only that the deponent's "means of knowledge and sources of information appear on the face of this my affidavit". Nothing is said at all about the state of Sky's belief in any of the matters of which the court is asked to infer Sky was informed, if at all, by

those persons. His Honour was correct in declining to admit the affidavit and exhibits under s 7(2).

[9] It was presumably at least partly on this material that Dr Kar based his opinion or assessment of the respondent as presenting a serious danger to the community. The position is stated here in this indefinite way because, as his Honour remarked in his reasons, Dr Kar's report was based both on his own interview with the respondent and on information contained in a letter dated 11 September 2003 from the Director of Legal Services in the Department of Corrective Services, together with "a package of material"; "various attached reports from psychologists and other staff"; and the respondent's criminal history. Neither the contents of the package nor the reports were identified in the affidavit, and the letter of 11 September 2003 was not exhibited.

[10] It is a truism of the law of evidence, if not of common sense, that an expert's opinion is only as good as the facts on which it is founded. It would have been open to Dr Kar to base his opinion on facts of which he himself had been informed and believed. Otherwise his opinion was based on factual assumptions about which there was, in the end, no admissible evidence. Alternatively, it was open to some other deponent to prove those facts from information and belief, and so provide the foundation for Dr Kar's opinion. No doubt that was the intended function of Sky's affidavit; but, for the reasons given, it failed to comply with s 7(2). Except to the extent that the facts on which Dr Kar's opinion was based were proved in some such way, the opinion was inadmissible, which was the view that his Honour took of it. In our view, this conclusion was correct.

[11] To fill this gap in the applicant's proof under s 8(1), Mr Thomas of counsel was given leave to call Dr Kar to give evidence orally at the hearing. His Honour reserved his decision on the question whether permitting that course was consistent with the demands of natural justice to the respondent, and he ultimately decided that it was not. In his oral testimony, Dr Kar identified a number of documents on which, together with his interview of the respondent and the latter's criminal record, he said he had based his assessment of the respondent as a person suffering from anti-social personality disorder and as being a "serious danger" in terms of the Act. In evidence, Dr Kar recounted details of the material he had received and what he had relied on in forming his opinion. It included the material in the files exhibited to Eli Sky's affidavit, which, as we have seen, was not proved in accordance with s 7(2). Dr Kar said, however, that even without that material, he would, as his Honour expressed it in his reasons, have arrived at the same opinion, although with less certainty, merely on the basis of his interview with the respondent, together with the information obtained in that interview, and the respondent's criminal history. In fairness to Dr Kar, it should perhaps be emphasised that it was, of course, no part of his function to determine whether material provided to him was or would be presented in admissible form at the hearing.

[12] His Honour's finding about the oral evidence of Dr Kar is contained in §34 of his reasons, where he said:

> "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."

In other words, it was something that affected the weight to be allowed to Dr Kar's assessment of the respondent: cf *Steffen v Ruban* (1966) 84 WN (Pt 1) (NSW) 264, 268-269. Later in his reasons for judgment, the learned judge returned to the question, saying in §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."

In that, his Honour was referring to the state of satisfaction prescribed by s 8(1) that there be reasonable grounds for believing the respondent prisoner was a serious danger to the community in the absence of a Division 3 order. For this and other reasons associated with Dr Kar's opinion, the learned Judge dismissed the application.

[13] Section 31 confers on the Attorney a right of appeal against a decision under the Act. Section 43 provides that it is to be an appeal by way of rehearing, in which the Court of Appeal has all the powers and duties of the court that made the decision appealed from. It may draw inferences of fact not inconsistent with the findings of that court, and may "on special grounds" receive further evidence as to questions of fact, either orally or in any other way: s 43(2). The problem for the Attorney on this appeal is that the primary judge made no finding of satisfaction with respect to the matters prescribed in s 8(1). Without a finding that there are reasonable grounds for believing the prisoner to be a serious danger to the community, this Court has no more power than the primary court of making orders under s 8(1) and s 8(2). To do so, we would first have to be persuaded not only that the learned judge was wrong in his conclusion on this question, but that this Court should substitute a conclusion to the opposite effect. It would not be enough to say that his Honour's decision was incorrect without ourselves being satisfied that there were reasonable grounds for forming the requisite belief under s 8(1). In the present case, his Honour formed his impression to the contrary partly from seeing and hearing Dr Kar give evidence in the witness box in examination in chief and under cross-examination. Without having seen or heard Dr Kar, or for that matter Dr De Leacey, give evidence, we in this Court are not in a position to say whether or not we are or would be persuaded to the level of satisfaction required by the Act. We are not prepared to do so simply from a reading of the material in the appeal record.

[14] In an ordinary appeal on the civil side of this Court's jurisdiction, we would, if satisfied that the trial judge had reached an erroneous conclusion on a matter of credibility, allow the appeal and, under the powers conferred by s 68(3) of the *Supreme Court of Queensland Act* 1991 or under the general law governing appeals, remit the proceeding for re-hearing to another judge. It is not perhaps completely clear, in view of the express provisions of s 43 of the Act, that this Court is intended to be invested with all of the powers exercisable in other appeals. But even if it is, it is clear from s 41 that the authority of the Court of Appeal to order that a prisoner be detained in custody is limited to the period "before the appeal is finally decided." If then, this appeal is dismissed without making an order under s 8, it will be "fully decided". The power under s 41(2) to order that the respondent be detained in

custody will then be at an end. At that point the respondent would cease to be a prisoner and the jurisdiction (together perhaps with the constitutional authority) to make orders under the Act with respect to him would be exhausted.

[15] The Court was not asked at the hearing to receive further evidence on appeal, whether from Dr Kar or anyone else. In view of the requirement of s 41(3) that there be "special grounds" for doing so, it is not difficult to see why such leave was not sought here. One reason that would militate against such a course, except perhaps in extreme cases, is that the primary function of this Court is to decide appeals and not to hear and determine questions of fact as a court sitting at first instance. To do so would deprive the parties of their ordinary right of appeal to this Court, leaving them only with the speculative alternative of applying to the High Court for special leave to appeal on a question of fact.

[16] In addition to the time, inconvenience and general expense of adopting the course of hearing evidence before three judges of this Court instead of one, there are therefore compelling reasons of principle for not involving the Court of Appeal in extensive fact-finding inquiries in appeals of this kind turning on issues of credibility or weight. It was in any event, not something that we were asked to undertake on this appeal, and it does not call for further consideration.

[17] The result is that, since the learned judge is on the admissible evidence before him not shown to have been wrong, or if he were, that we would be in a position to substitute our own opinion of the evidence of Dr Kar for his, the appeal must in our view be dismissed with costs. That outcome may be thought to demonstrate once again the need for applications of this kind to be commenced well before the respondent prisoner is due to be discharged from his sentence, and not, as in this instance, in the week before his imminent release.

[18] The operation of the Act having been exhausted, the respondent is now entitled to be released as he was or would have been had the application not intervened.