SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General v W* [2004] QSC 262
PARTIES:	**RODNEY JON WELFORD, ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) v **W** (respondent)
FILE NO:	BS6668 of 2004
DIVISION:	Trial
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	10 August 2004
DELIVERED AT:	Brisbane
HEARING DATE:	6 August 2004
JUDGE:	Douglas J
ORDER:	**Further submissions invited**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – OTHER – SEXUAL OFFENDERS – where applicant sought preliminary order under s 8 of the *Dangerous Prisoners' (Sexual Offenders)* Act 2003 (Qld) – whether there are reasonable grounds for believing that the respondent remains a serious danger to the community – whether interim detention order appropriate *Dangerous Prisoners (Sexual Offenders) Act* (Qld) 2003, ss 8 & 13 *Attorney-General v Fardon* [2003] QSC 331, followed *Attorney-General v Francis* [2004] QSC 128, followed
COUNSEL:	A J Horneman-Wren for the applicant D R Lynch for the respondent
SOLICITORS:	C W Lohe, Crown Solicitor for the applicant Legal Aid Queensland for the respondent

[1] **DOUGLAS J**: In this application under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 ("the Act") the Attorney-General wishes to have W examined by two psychiatrists and to be detained in custody until this Court determines his

application that W be released from custody subject to conditions that the Court considers appropriate. W would otherwise be eligible for release in two days' time, on 12 August 2004, after serving a sentence of 3 years and 6 months imprisonment imposed in the Mackay District Court on 13 February 2001 for the offence of maintaining an unlawful relationship with a child and two counts of indecently dealing with the same child.

[2] That was the third occasion on which he had been imprisoned for similar offences involving young children dating back to 1989. On 5 November 1991 he was convicted for maintaining an unlawful relationship with a child under 12 and for indecent dealing and he was sentenced to 3 years' imprisonment with a recommendation for parole after 12 months. Subsequently he was convicted on 11 February 1994 of indecently dealing with a child under the age of 12 and of exposing the child to an indecent act with circumstances of aggravation for which he was sentenced to 18 months' imprisonment suspended for a period of 3 years and placed on probation for 2 years with a condition that he receive psychiatric and psychological treatment.

[3] The first offence for which he was convicted in 1991 involved his step daughter aged 10. The next offences committed in July 1993 involved his own son while the last offences for which he is still in prison were committed against his step son who was aged 6 at the time. He has pleaded guilty to each of those sets of offences and sought medical treatment including psychiatric treatment and counselling. He has also been granted the advantage of parole, probation and suspended sentences over the years and has continued to reoffend, including while he was the subject of Court orders.

[4] During the last sentence of imprisonment he took part in a sexual offenders' intervention program which appears to have had positive effects for him. He was unable, however, to take part in another program known as the sexual offenders' treatment program because, when he was referred to it, he had less than 15 months left until his remitted release date and less than 15 months between his remitted release and fulltime discharge dates. Under that program's administrative protocols a prisoner must have a minium of 15 months to undertake the program, either before his remitted release date or after it. That inability of the prison system to provide treatment for W during his incarceration was submitted to be relevant to my decision by his counsel, Mr Lynch, on the basis that an application of this nature should not be used as another method of supervising or treating W instead of admitting him to a program while he was in prison.

[5] At this stage of the application the main relevant issue that I have to consider, however, is whether there are reasonable grounds for believing he is a serious danger to the community in the absence of an order preventing him being released from custody without a supervision order being made. The nature of the legislation and the role of the Court at this stage have been analysed extensively by Atkinson J in *Attorney-General v Fardon* [2003] QSC 331 in terms with which I agree; see in particular [29]-[34] and [72].

Risk assessment order

[6] Before his participation in the sexual offenders' intervention program, the conclusion about the risk he posed would have been relatively straightforward. The

psychologists who assessed him in prison before he underwent that program believed that his risk of reoffending was "quite high" or "high"; see the report of Mr Swarbrick on 16 June 2003 and that of Ms McCarthy on 24 May 2002.

[7] Since his participation in the intervention program, however, his prognosis has changed. Professor Basil James concluded that, without support mechanisms in place for him when released, the risk of him reoffending was moderate but, if such support systems were in place, the risk would be low; see p. 13 of his report of 13 February 2004. Similarly Ms Ranee Wheat concluded in her report of 14 May 2004 that his risk of reoffending on one measure associated with recidivism was high, but, on another test, and probably because of his participation in the sexual offenders' intervention program and his attention to the factors which were high risk situations for him, she considered that overall he remained a moderate risk of reoffending sexually. She goes on to say:

> "The high risk factors identified in the program for W include:
>
> Relationship difficulties
> Depression and feeling helpless, particularly in relationships
> Anger, in particular, passivity in intimate relationships
> Involvement in children at any level
> Use of pornography
>
> The factors which moderate his risk include:
>
> - He has undertaken suitable intervention to address his offending behaviour, and is able to recognise the above issues as high risk situations
> - He has developed an understanding of how his offending cycle, high risk factors and situations can lead to reoffending
> - He has gained insight into his offending pattern and displays an acceptable level of victim remorse
> - He is an open security classification and has demonstrated ability to function successfully in an open custody environment for a significant period of time.
>
> It is recommended that if he is granted conditional release the following conditions should also apply.
>
> - At a minimum, W would benefit from completing the Community based relapse program which will continue increase his social skills and allow him to practice assertiveness and give him support in re-establishing himself in the community.
> - [W] would also benefit from ongoing involvement with a professional who would need to be provided details on his current treatment needs and assist him with models of appropriate responses to stressful interactions as he re-establishes himself.

- It is recommended that his support people be adequately briefed on the specific and possible different requirements of personal and spiritual support and being a support person for relapse prevention."

[8] The report of Professor James is also significant in addressing the balance between the risks associated with W's release with and without contact with and the ready availability of a mental health professional. He says at pp. 12-13 –

> "Based on these consideration, then, my statements of risk factors regarding [W's] future can be stated as follows:
>
> 1. [W] does not suffer from any psychiatric illness of a psychotic or biological kind; he is thus not at all at risk in terms of delusional or hallucinatory phenomena.
>
> 2. He is, however, prone to depressive episodes in reaction to certain adverse life circumstances.
>
> 3. The precipitants appear to comprise a constellation of circumstances, the essence of which is that [W] perceives himself to be demeaned, devalued and rejected. These appear [to] replicate sensitising experiences in his developmental years.
>
> 4. [W] has, from his history, been demonstrably inept in his choice of his partner; indeed there may be some unconscious dynamic which leads him to become involved with persons who are for him actually unsuitable – perhaps a sense of empathic identification.
>
> 5. The depressive state has in the past led to a form of regression, in which he has felt infantilised, and from which he sought solace or escape through sexualised interactions with those he then feels his equal – that is to say, children. His conduct on those occasions appears to have been driven by a state of mixed emotions including helplessness and despair comparable to that which not infrequently leads other persons to "attempt suicide". (So called "para suicidal behaviour").
>
> 6. [W] appears to have actively availed himself of the quite significant therapeutic opportunities which have been extended to him during his most recent periods of imprisonment, and to have worked hard at understanding his problem.
>
> 7. He has developed, as a result, what I consider to be good insight into the dynamics of his offending; and I consider that his professed intentions to avoid further offending were genuine.

> 8. His insights, his motivation, his thoughts with regard to the structure and balance of his future life, and his intention actively to seek and use the support and assistance of others, all appear appropriate However the necessity for his intended external supports, to which he will require ready access, and which will need to provide continuity over an extended period of time, appears to me to be an important component of the management of risk.
>
> 9. The development of [W] in the future of enduring intimate relationships likely, and if these relationships are appropriate and successful, they can be expected to inject a positive dimension into his life; on the other hand, should they prove inappropriate, or be badly managed, then they would be identifiable as major risk points, when [W] would require more intense support. The presence of young children within the relationship would, needless to say, intensify the risk.
>
> As noted, contact with, and the ready availability of, a mental health professional with whom [W] relates well would be a major factor in reducing [the] risk of [W] re-offending. With such support systems in place, I consider the risk of recidivism to be low.
>
> Without such support mechanisms in place, I consider the risk to be moderate."

[9] W's expectation on his release is that he will move to Brisbane and receive support from a church group there. That may well be beneficial to him although he has been involved in a church community in the past and that did not stop him from reoffending. It seems clear that he also needs professional help to cope with his psychiatric problems.

[10] Section 13 of the Act defines when a prisoner is a serious danger to the community by referring to whether there is an unacceptable risk that the prisoner will commit a serious sexual offence, in this case, if the prisoner is released from custody without a supervision order being made.

[11] Mr Lynch points to the language used by Ms Wheat and Professor James in their reports in submitting that W's risk of reoffending can be described as moderate, as a cogent reason for concluding that the risk posed by his release is acceptable, or not unacceptable, to use the statutory language. Ms Wheat's conclusions, however, point to the continuing existence of high risk factors even though her view was that the risk was moderate overall. Professor James and she agreed on the need for the ready availability of a mental health professional as a major factor in reducing the risk of W reoffending. This satisfies me to the necessary high degree of probability that, without a supervision order containing such a condition, there are reasonable grounds for concluding that the risk that he would commit further serious sexual offences remains significant and, in my view, unacceptable. When one considers his history, the psychiatric and psychological assessments made of him so far and the need expressed in s. 13(4)(i) of the Act to protect members of the community from that risk that conclusion seems to me to be appropriate.

[12] For those reasons it is my view that the Attorney-General has established that there are reasonable grounds for believing that W would remain a serious danger to the community if he were released from custody without a supervision order being made. That is the only test that is required to be met at this stage of the proceedings. For those reasons I would order that W undergo examination by Dr Joan Lawrence and Dr Rob Moyle who are able to prepare reports pursuant to s. 8(2)(a) of the Act.

Interim detention order

[13] The next issue is whether he should be detained in custody pending the preparation of those reports and the hearing of the application under s. 13 of the Act to determine whether the Court is satisfied that W is a serious danger to the community if he were released from custody without a supervision order being made. That will be a hearing seeking final orders.

[14] This is a hearing to determine whether there is, in effect, a prima facie case for the relief sought by the Attorney-General. There is no provision in the Act for the making of interim supervision orders. It would be paradoxical to release W at this stage on the basis of my conclusion that his release from custody without a supervision order would lead to reasonable grounds for belief that he is a serious danger to the community; see Atkinson J in *Attorney-General v Fardon* at [72] and Mackenzie J in *Attorney-General v Francis* [2004] QSC 128 at [5]. If I could frame an acceptable interim order the situation would be different. It was submitted to me by Mr Horneman-Wren, who appeared for the Attorney-General, that this is not necessarily a gap in the legislation because it is inappropriate to speculate at this stage as to the content of any supervision order that may be made after a full hearing. On the evidence here, however, I expect that it would not have been too difficult to establish an effective supervisory regime pending the final hearing. In the absence of such a power, however, and where W himself is limited in the nature of any undertakings that he might be able to make, and did not offer any, it would not be appropriate to release him.

[15] It is also the case that this Court should be able to provide an early date for the final hearing of the matter. If that were not able to be done this gap in the provisions made by the Act could lead to unnecessarily onerous consequences for a prisoner whose normal term has expired, especially where the final relief sought by the Attorney-General does not include the continued detention of the prisoner but merely his release from custody subject to conditions. In such circumstances it seems to me that it is incumbent upon the Attorney-General to make an application of this nature significantly in advance of the scheduled release date of the prisoner; see the observations of Mackenzie J in *Attorney-General v Francis* at [6] and those of Atkinson J in *Attorney-General v Fardon* at [19]-[24] dealing with the importance of the right to personal liberty.

[16] I shall make the orders sought in paragraphs 1 and 2 of the originating application and invite further submissions as to their form.