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Date: 14 December, 2004

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

QSC [2004] 442

FRYBERG J

No 10326 of 2004

ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND	Applicant
and	
G	Respondent

BRISBANE

..DATE 09/12/2004

ORDER

HIS HONOUR: The Attorney-General has applied for orders pursuant to the Dangerous Prisoner's (Sexual Offenders) Act 2003 in respect of G.

G is presently serving a sentence of four years' imprisonment imposed in respect of three charges of indecent dealing with a girl under 14 years of age. That imprisonment was imposed in the District Court on the 11th of January 1994 and it was ordered to be served cumulatively upon sentences of 12 years imposed at the same time in respect of two rape charges. Also on that day the respondent was sentenced to a number of terms of imprisonment to be served concurrently with the 12 year sentences in respect of a considerable number of sexual offences involving young children - I think 5 young children altogether.

The conduct giving rise to those convictions occurred between 1984 and 1992. For part of that period, however, the respondent was in prison because in April 1990 he was sentenced to imprisonment for two years on three charges of indecent dealing. He has a criminal history for offences of this type dating back in Queensland to 1979 and earlier in Victoria.

The prisoner's sentence of 12 years' imprisonment was subject to remission which was granted so that his liability to be detained expired in January 2001, hence the commencement date of the present sentence. His entitlement to release on the

31st of January will be upon the expiry of the four-year term, remission having been refused in respect of that sentence.

In the hearing today the Attorney has sought relief under section 8 of the Act. That relief extends to both of the remedies provided by that section. That is to say the Attorney wishes to have the respondent examined by two psychiatrists and also to have him detained in custody until the balance of the application is determined. That necessarily occurs after the two psychiatrists have reported.

It is unnecessary for me to set out the terms of section 5 of the Act since it is conceded that in all respect but one the preconditions necessary for the making of the application have been satisfied. The exception is the requirement that the application be made during the last six months of the prisoner's period of imprisonment as required by paragraph 2(c) of that section. "Period of imprisonment" is defined in the Act to have the same meaning as the term has in the Penalties and Sentences Act. In the latter Act its meaning is, to paraphrase it, the unbroken duration of imprisonment which an offender must serve for two or more terms of imprisonment.

A series of cases involving the meaning of that expression has been heard by the Court at the level of the Court of Appeal in connection with applications for parole, post prison community based release and remission. Those cases include the four

relied upon by Mr Shepherd in his submission on behalf of the respondent, namely, Smith v Queensland Community Corrections Board [2002] 1 QdR 448, R v Fefita [2004] QCA 201, R v Walton ex parte Attorney-General, COA 338 of 1997, and Swan v Chief Executive [2004] QCA 159.

The submission which has been advanced on behalf of the respondent says a great deal for the ingenuity of counsel although, if it is correct, very little for the competence of Parliamentary counsel. The argument is that on the authorities mentioned the term refers to the full duration of imprisonment imposed by the sentencing Judge. In the present case, that was 16 years. It does not refer, on counsel's submission, to the amount of imprisonment actually served which, in the circumstances of the present case, is a little under 12 years.

The consequence of this argument is that the period of imprisonment would not expire until 25th of March 2009. That being so, the requirement of section 5(2)(c) of the Act for the application to be made during the last six months of the period of imprisonment would not have been met. The result on the submission would have to be that the prisoner would be released at the end of January next year when he ceased to be liable to detention but the application for his continued detention could not be made until some years into the future.

That is such an improbable result, having regard to the structure and purposes of the Act, as to cause one to question seriously the theoretical underpinning of it.

In my judgment, the cases cited in supported of it do not, upon a proper analysis, provide that support. There is one clear reason and another perhaps less certain reason why I think this. The clear reason is that they were cases decided in an entirely different context, that is, the context of parole or post-prison community-based release or remission, and in the first of them and perhaps the strongest of them, the decision in Smith, the Court of Appeal expressly referred to the fact that what was then said was context-based (see page 449, paragraph [1] per McPherson JA and 450, paragraph [8] per Davies JA).

What was required in the context in that case and also in Swan is not what is required in the present context. That being so, I need not finally determine the second point, which is whether in fact in all contexts a sentence comes to an end when the prisoner ceases to be liable to serve it having been granted remission. The various alternatives which may bear upon this question were discussed in Kelliher v Parole Board of New South Wales (1984) 156 CLR 364 where the position at common law was contrasted with the position which arises by statute under the legislation of various States.

In Smith's case only Thomas JA considered when a sentence expired and his Honour expressed the view that a remission does not produce a shortening of a sentence. The same view was expressed by Ambrose J in Day v Queensland Community Corrections Board, file number 269 of 1998, where on an application for judicial review of a decision refusing parole, his Honour made observations similar to those of Thomas J.

For myself I am not persuaded of the correctness of those views but it is unnecessary to enter into this debate at the present time. I am quite satisfied that the result contended for by the respondent is so absurd that the construction sought to be applied is inappropriate in this context. It is not a construction which can be taken out of the context in which it was applied. In my view, the application was made within the time prescribed by the Act.

I would also point out that in the present case the date of 2009 might be hard to sustain given that the four year sentence will expire in January next year and will expire at its full term.

The question then becomes one of exercising the discretion under section 8 of the Act. To make a risk assessment order as defined in that section I must be satisfied that there are reasonable grounds for believing the respondent is a serious danger to the community in the absence of either a supervision order or a continuing detention order.

Serious danger to the community is defined to mean an unacceptable risk that the prisoner will commit a serious sexual offence if released from custody or released without a supervision order being made. In this context a serious sexual offence is one which means an offence of a sexual nature either involving violence or against children. There is no significant argument about violence in the present case. The debate has ranged around the risk to children.

For the applicant it is submitted that the reasonable grounds for submission are to be found primarily in the report of a psychologist, Mrs Rowland, made in September 2003. That report is slightly dated but can, I think, reasonably be referred to for the purposes of the preliminary hearing envisaged by section 8. It was made with a view to identifying the respondent's risk of recidivism in the context of considering whether the four year sentence should be the subject of remission. In it Mrs Rowland concluded that the respondent's assessed risk of sexual recidivism was moderate to high.

Reliance was also placed by the applicant on a report made in 1999 on the respondent's completion of the sexual offenders treatment program in the prison. I must say I find that report of much less weight having regard to the time which has elapsed since it was prepared.

Mrs Rowland's report, it seems to me, does touch upon a number of the factors which are relevant to the existence of the

belief required by the Act. That is not to say that everything in her report must be accepted at face value. There are some weaknesses in the report and they were made the more apparent by cross-examination of her today.

The risk assessment was carried out by reference to guidelines which have not been verified as applicable in Australia although they are widely used. Mrs Rowland explained that they were simply the best that was available, not a very convincing foundation for their use.

The guidelines themselves were not produced or shown to me nor was Mrs Rowland's own working assessment. On the other hand the assessment was in Court and cross-examining counsel could have referred to it had it been thought to contain anything of importance.

Counsel for the respondent placed particular reliance on a number of factors to diminish the force of the report. He elicited from Mrs Rowland the concession that a reassessment would be necessary in the light of two medical reports provided by a medical practitioner employed by the Department of Corrective Services who reported in October and November this year on the respondent's medical condition. In short he has diabetes with early neuropathy, hypertension and angina, advanced osteoarthritis of the right hip and both knees, emphysema and adrenal insufficiency.

Mrs Rowland thought that these conditions would tend to reduce the risk. To what extent they reduced the risk was not made apparent by the evidence. Looking at them as best I can, it does not seem to me that they would have much impact except in respect of any tendency towards full sexual intercourse or activities involving mobility of a significant degree. I am not persuaded that they detract in any major way from what is set out in Mrs Rowland's report.

Second counsel relied upon the age of the respondent as diminishing the risk. There is some force in that submission. I for one would be quite prepared to accept that as people grow older their desire for sexual activity would likely decrease. That of course says nothing about how strong the desire is in any individual.

Mrs Rowland conceded that age tends to produce reduced libido and that was a factor which she took into account in her report. The respondent is now 15 months older that he was then. He is now 69 and to that extent her report may need to be reconsidered but it does not seem to me that 15 months would be likely to produce a great deal of change.

Of course his age does impact on the weight which one gives to the amount of offending, that is, to his criminal history. He was aged from 49 to 57 at the time of his offences in Queensland. Counsel for the Attorney-General sought to put what his opponent described as "negative spin" on the age factor by relying on the accompanying failing memory as a

danger factor. It was submitted that because of this failing memory the capacity of the respondent to use interpersonal measures such as cognitive challenging to prevent reoffending was reduced.

It seems to me that that is speculative. It is just as likely that declining memory would reduce the risk of reoffending particularly having regard to the concrete steps which the respondent has learned and proposes to adopt to prevent his reoffending. Those steps and other matters were the product of the successful completion by the respondent of rehabilitation courses while in custody. He has it seems been well behaved while in custody and cooperative and has sought to overcome his problem.

This successful completion of courses was the third of the factors relied on by his counsel in the present application. I agree that these matters are factors which diminish the risk which the respondent poses. I have however come to the conclusion that in the circumstances of the case they do not diminish it to such an extent that it can be said that there is not an unacceptable risk that the prisoner will commit a further offence. In saying that I also take into the account the prisoner's conduct generally while in custody.

Finally, counsel submitted that in any event he will be subject to an order made under section 19 of the Criminal Law Amendment Act 1945. That requires that he reports his address and any change of address to police. It seems to me that that

is a very minimal factor having regard to the long term release of the prisoner which is proposed.

I also take into account the absence of any evidence of the prisoner's plans for living after his release. It might have been different had there been evidence showing where he proposed to live, with whom he proposed to live and in what circumstances. The circumstances might have been persuasive of absence of risk or at least reduction of risk. However, not only has the prisoner not put forward any evidence on these topics, the decision not to do so has been one consciously made and deliberately made and in these circumstances increases my concern as to the level of risk.

Taking all these matters into account, I am satisfied that the applicant has shown that there are reasonable grounds for believing that the respondent is a serious danger to the community in the absence of a Division 3 order. That requires that I set a date for the hearing of the application. No material has been placed before me to indicate when time is available in the Court calendar.

...

I certainly do not have the capacity to pronounce a date without knowledge of how long the case will take and without knowledge of the exigencies of the civil list. It appears from what I have that sittings in January and February have been fully allocated but I am unsure about that. I therefore

would propose, before making a final order, to stand the matter down to enable inquiries to be made.

It seems to me that having regard to the fact that there is to be an application for a Division 3 order, it is desirable that there be a risk assessment order made.

Counsel for the respondent did not submit otherwise.

The question whether there should also be an interim detention order was much more controversial. For the Attorney it was submitted that he had, by contacting medical practitioners and arranging for their reports to be obtained in good time, sought to avoid the need for the order but that the circumstances had, in effect, conspired to produce the need.

It was further submitted that it would be paradoxical to release the respondent in the teeth of a conclusion that release from custody without a supervision order would lead to reasonable grounds for belief that he is a serious danger to the community.

There was a hint in the submissions that the respondent might, if released, go interstate. The respondent will, if released at the end of January next year, be at large for a relatively short time, perhaps two weeks, perhaps two months. I would be inclined to think that if the period were as long as two months there would be some risk to the community in letting him out, however it seems to me that in exercising my

discretion in this regard I must also have regard to what has transpired in relation to bringing the application.

I reject the applicant's submission that he has done what ought to have been done to avoid the need for an interim detention order. There is, in my judgment, very substantial unexplained delay in the bringing of this application. The application was filed on the 25th of November of this year. That was nearly four months after it could have been filed.

I take into account that for the first week of that period there was pending another charge brought against the respondent in respect of events dating back to the same period as those which gave rise to his original sentencing. Why that charge was not brought forward at the time of the other sentencing was not fully explained although it seems to have been asserted on behalf of the Crown that no complaint was made by the victim until the year 2000. In August this year when the charges in respect of that complainant were dealt with the respondent was sentenced to the rising of the Court. In the result his period of imprisonment was not extended.

Once that became apparent there was no reason why the Attorney-General could not have made the application forthwith except, presumably, that it was not ready.

It was submitted that although there was no affidavit to explain why the delay occurred I could infer from the volume of documents that time was taken up in assembling the

necessary material. There is some evidence that letters were written to gather material although this does not seem to have happened with any great promptness.

Be that as it may the obligation of disclosure imposed by section 25 does not relate to the preliminary hearing under section 8 but only to the division 3 hearing. No doubt there is a duty on the Attorney both to prepare thoroughly any application of this nature and to disclose to the respondent any documents which might be helpful to him, but it is not necessary to wait until the six month period begins to run for this preparatory work to be undertaken. Preparation could have begun in terms of document assembly a year ago. Why this did not happen simply has not been explained.

There may be a good explanation for it. It may involve human fallibility, and understandable fallibility, in a bureaucratic setting. It may be that had an explanation been given I would, in weighing up the position regarding an interim detention order, have been prepared to accept the explanation and make the order.

However, in the absence of any serious attempt to explain the delay it seems to me that the requirements of justice favour on balance the refusal of such an order.

The period of delay will be relatively short. The police will know where the respondent is living and I would infer can keep an eye on him and in any event one would expect that with a

division 3 application pending there would be every attempt made by the applicant to gather evidence of any further offending.

Likewise one would expect that the respondent would know full well the likelihood that he will be watched for further evidence and would be very careful at least until after the hearing of the division 3 application to abstain from any misconduct.

In the exercise of my discretion the application for an interim detention order is refused.

I shall stand the matter down to enable inquiries to be made as to a suitable date.

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HIS HONOUR: I will make no order as to costs.
