SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION [2005] QSC 314

ATKINSON J

No S1523 of 2005

ATTORNEY-GENERAL OF THE STATE OF QUEENSLAND	Applicant
and	
JESSE SPENCER PEARCE	Respondent

BRISBANE

..DATE 16/08/2005

RULING

HER HONOUR: On 25 February 2005 an originating application was filed in this Court seeking the following orders:

1. that pursuant to section 8(2)(a) of the Dangerous Prisoners (Sexual Offenders) Act 2003 the respondent, Jesse Spencer Pearce, undergo examinations by two psychiatrists named by this Honourable Court who are to prepare independent reports, which reports are to be prepared in accordance with section 11 of the Dangerous Prisoners (Sexual Offenders) Act 2003;

2. that pursuant to section 13(5)(a) of the Dangerous Prisoners (Sexual Offenders) Act 2003 the respondent Jesse Spencer Pearce be detained in custody for an indefinite term for care, control or treatment;

3. in the alternative that pursuant to section 13(5)(b) of the Dangerous Prisoners (Sexual Offenders) Act 2003 the respondent Jesse Spencer Pearce be released from custody subject to such conditions as the Honourable Court considers appropriate and that are stated in the order.

On the 10th of March 2005 the Chief Justice made orders pursuant to section 8(2)(a) appointing Dr Moyle and Dr Joan Lawrence as the psychiatrists to prepare independent reports in accordance with section 11 of the Dangerous Prisoners (Sexual Offenders) Act. Those reports were prepared and sent to the Court. The matter came on for hearing before me on the

date set down for hearing by the Chief Justice, on the 3rd and 4th of May 2005.

On that occasion the very experienced senior counsel who appeared for the respondent throughout this application applied for an adjournment on two bases: the first was to get proper instructions from his client, and the second was so that an assessment could be made of his client by a psychiatrist retained by the respondent. I granted an adjournment for those reasons, and made an order for the respondent's detention until the determination of this matter.

Mr Pearce was seen by Dr Ian Colls, a psychiatrist, who also prepared a report as to Mr Pearce. The reports are all remarkably consistent. Before turning to them and to the matters of which I have to consider, I should mention his criminal history.

Mr Pearce was sentenced on 1 May 1997 to a total of 9 years' imprisonment after pleading guilty to 38 sexual offences against children. Those offences were four counts of indecent dealing with a boy under 14 years of age for which he received four years' imprisonment; two counts of indecent dealing with a girl under 14 years of age for which he received four years' imprisonment; 10 counts of indecent dealing with a boy under 16 years of age for which he received four years' imprisonment; 9 counts of sodomy for which he received 9 years' imprisonment with a non-parole period of four years; two counts of permitting sodomy for which he received 9 years'

imprisonment with a non-parole period of four years; one count of attempting sodomy for which he received 8 years' imprisonment with a non-parole period of four years; 2 counts of stupefying to commit an offence for which he received four years' imprisonment; two counts of indecent dealing with a child between the ages of 12 to 16 for which he received four years' imprisonment; two counts of committing an act of indecency for which he received 8 years of imprisonment with a non-parole period of four years, and four counts of possession of child photographs for which he received 9 months' imprisonment.

The learned sentencing judge, Healy DCJ, observed:

> "Your history of exploiting children over many years is an appalling one. In sentencing you I am taking into account the fact that you cooperated with the authorities, that you readily admitted your own crimes and that you gave some assistance to the authorities relating to other persons who committed offences of this kind. These matters should be taken into account in your favour. I cannot ignore the fact that you are suffering from a fatal illness and that you are 76 years of age. In deciding the sentence which I should impose, however, your offences are so serious that the sentence I impose on you must reflect the concern that the community fears about sexual exploitation of children."

An application was made for leave to appeal against the sentence by the respondent. That application was unsuccessful. The leading judgment of the Court of Appeal was given by Justice White who outlined the circumstances in which the offences came to light. It seems almost fortuitous that the offences came to light in the circumstances set out by her

Honour. It was only because a complaint was made by a 14 year old boy who was approached by the respondent and who told his father what had been said to him that led the police to the respondent who warned him about his behaviour which, taken in isolation, did not seem particularly serious; however, the police officer found certain items in his bag at his accommodation at Byron Bay and made further inquiries of his daughter-in-law at her home in a Brisbane suburb where a number of his belongings were kept. When those belongings were searched it was found amongst them a small photograph album containing a number of photographs of Asian children. Behind some of those photographs were the four photographs which were the subject of charges against him. Two of them depicted the respondent engaging in a sexual act with an Asian child which he admitted was attempted sexual intercourse which he was unable to effect.

As her Honour said, the applicant had come to Australia in 1996 from Thailand where he had been living for a number of years teaching at a school for deaf children. He admitted when interviewed by the police that he had frequently gone to Thailand for the purpose of engaging in sexual activity with children, and also admitted that he was HIV positive and had been so diagnosed in about September 1993. Accordingly he was convicted of indecent acts with children that had occurred after he knew that he was HIV positive.

In the course of the police interviews he admitted he had been a pedophile since he was about 22 years old. He gave the

names of three children to the police. They were interviewed by the police. They, in turn, gave the names of other children. Those offences dated back from the late 1960s to early 1970s. Her Honour talks about the corruption and debauchery of a great number of boys all around 13, 14 and 15 years of age and Mr Pearce's involvement in a ring of pedophile men who preyed on these boys who introduced other boys into the group. His modus operandi was to groom these boys and to give them alcoholic liquor so that they became stupefied and more amenable to his advances.

Four of the counts involved a particular complainant who was 16. He was made so drunk that he was violently ill, and after lying down at the applicant's residence was in effect raped. The last counts on the indictment concerned events that occurred in 1990 when the applicant indecently dealt with two young people who were cousins of one of the earlier victims. As her Honour said, this outline of the offences shows a lifetime of depravity and corruption. However, it is true that without his cooperation with the police it is unlikely that this long history of criminal conduct would ever have come to light.

The application for criminal compensation which is before me made by one of the victims of these crimes shows the very extensive permanent psychological and emotional damage suffered by young people who are sexually abused in this way; a matter which the respondent currently, to this day, does not understand.

The respondent is by now a very old man. He was born on the 20th of September 1920 and so is 84 years of age. He has been HIV positive, as I have said, for a very long period, but he has received what is described on all accounts as optimum care in custody. In fact it would appear that his present good physical condition is almost entirely attributable to the excellent care he has been receiving in custody. There is no dispute that he needs nursing home care were he to be released from custody given his variety of medical conditions, but particularly his HIV status. He also has other conditions which seem to require a high degree of nursing home care, for example, he has faecal incontinence from time to time; however, that seems to be related to his excessive use of laxatives. When he is discouraged from doing that it is apparently not a problem; however, he does have urinary incontinence, although if he has ready access to toilet facilities his incontinence is not a problem.

He has a carer for virtually all the time. He has been at Wolston Correctional Centre and that level of care could only possibly be replicated in a nursing home in the community and, in fact, it seems from the evidence that there be such a high level of care is unusual in any event anywhere in the community.

I have previously set out in Attorney-General v. Fardon (2003) QSC 331 delivered 2 October 2003 the legislative scheme of the Act and the matters which are required to be addressed. The courts essential task on a final hearing is set out in section

13 which provides that this section applies if on the hearing of an application for a division 3 order the Court is satisfied that the prisoner is a serious danger to the community in the absence of a division 3 order. What represents a serious danger to the community is set out in section 13(2), and that is, if there is an unacceptable risk that prisoners will commit a serious sexual offence if released from custody or released from custody without a supervision order being made.

There is no dispute in this case that if Mr Pearce were released without a supervision order being made he would be an unacceptable risk to the community. There is overwhelming evidence of that in each of the psychiatric reports and all of the material before me unequivocally would lead one to reach that conclusion. However the question remains as to whether a supervised release order should be made. The respondent's advisors, which includes charitable helpers who have been endeavouring to assist him as well as the Legal Aid Commission who has done a sterling job in this case, and as I have said, his very experienced counsel have endeavoured to find a place, a nursing home placement for Mr Pearce. That has not been possible. One was seriously looked at and might have been suitable were it not for the fact that it adjoined a primary school. Another was assessed in a preliminary way as being suitable; however, each and every of the psychiatrists was of the view that it was imperative that the staff of any nursing home know about Mr Pearce's criminal history so that they could ensure that he had no unsupervised access to young

people. It appeared from the report from the nursing home that was suggested that those in charge of it were not intending to disclose that information to the staff. In that circumstance it was an unsuitable placement.

The difficulty for the Court in trying to make any order for supervised release is to try and envisage any situation which would not represent an unacceptable risk to the children in the community. As I have said, it is common ground that nursing home care is needed, and yet it is obvious, and it was the subject of evidence, that children visit nursing homes and that is not something that should ever be discouraged. Children visit in school groups to do concerts for old people or to befriend them, and children visit in family groups without necessarily close supervision every moment that they are there for fear that they might fall victim to a pedophile.

It is particularly important that old people who are in nursing homes are not denied the company, companionship, love, care and affection of their extended families. It has not been possible for anyone to come up with a place where Mr Pearce could be in a nursing home and for it to be able to be ensured that he not have unsupervised access to children, and when one considers the nature of nursing homes, the staffing ratios, the qualifications of staff in nursing homes and the prevalence of visitors, one can see why it has not been possible to come up with a suitable supervised release order.

Section 13(4) sets out the matters the Court must have regard to in deciding whether the prisoner is a serious danger to the community. Any evidence must be acceptable and cogent and the Court must be satisfied to a high degree of probability. The first thing that the Court must have regard to is the reports prepared by the psychiatrists under section 11. Those are the reports of Dr Moyle and Dr Lawrence. I have had regard to those reports. In addition I have had regard to their oral evidence and the written report of Dr Colls and his oral evidence. I am satisfied from their evidence that Mr Pearce represents such an unacceptable risk of re-offending that he is a serious danger to the community in the absence of a division 3 order.

The next matter the Court must have regard to is any other medical psychiatric, psychological or other assessment relating to the prisoner. There is other psychological evidence in this case which again points in the same direction. In addition there is the medical evidence by the physician, Dr John Douglas, whose affidavit was filed and who also gave oral evidence. The effect of his evidence, together with the evidence of the psychiatrists satisfied me that he is still capable of instigating and maintaining relationships with other people including children, and his devious manner means that he would still be capable of grooming children with a view to establishing a sexual relationship with him.

The third category is information indicating whether or not there is a propensity on the part of the prisoner to commit

serious sexual offences in future. There is no doubt that there is that propensity.

The fourth is whether or not there is any pattern of offending behaviour on the part of the prisoner. The pattern of offending behaviour in the case of Mr Pearce is a lifelong pattern of sexually offending against children.

The fifth matter concerns efforts made by the prisoner to address the cause or causes of his offending behaviour including whether or not he has participated in rehabilitation programs is the next matter. Mr Pearce has not undertaken the sexual offenders' course in prison, but that may be understandable given his physical conditions.

However of more concern is the insight gained from what he said to Dr Colls who said that, "His risk of re-offending had been reduced by his adoption of a religious perspective that prohibited a repeat of his offending behaviour, his lack of libido and his physical frailty." The physical frailty, as I said, was dealt with by Dr Douglas and does not appear, would not appear to be such as to prevent him from re-offending.

His religious perspective appears to be that he now believes homosexuality to be sinful, but, of course, it is his paedophilia rather than any homosexual tendency that is the cause of the likelihood of reoffending.

As to his lack of libido, that did not appear in what he told Dr Moyle, and given his deviousness, I am more inclined to accept what he told Dr Moyle. He appears to have had no insight into his offending behaviour, believing more that society's view of paedophilia is a social construct rather than something inherently wrong.

He reported to Dr Colls that he saw his sexual partners as "commodities". Dr Colls said,

> "He was aware that his behaviour was illegal, but continues to assert that this represents a cultural and legislative peculiarity, that is activities are acceptable elsewhere in the world and that they caused no harm to his victims. He asserts that any claim to the contrary is a put up job driven by financial or other considerations."

That lack of insight underscores the danger that he poses in the community.

The next matter the Court is required to consider is the prisoner's antecedents and criminal history. I have already dealt with that matter.

The next matter is the risk that the prisoner will commit another serious sexual offence if released in the community. That risk, as I have said, is, in my view, unacceptably high.

Mr Hinson for the applicant has helpfully excerpted some of the matters from the reports of the psychiatrists which amply demonstrate that. As he submits, Dr Lawrence's evidence shows that the risk of the respondent's reoffending sexually if

released from prison is high. He has a lifelong history of paedophilia involving both boys and girls. His offences are consistent with the DSM 4 diagnosis of paedophilia of both sexes with some versatility of approach. He still does not acknowledge responsibility for his sexual behaviour and has achieved no change in his lifelong attitudes and sexual orientation. He was intent on providing Dr Lawrence with a very sanitised and unreliable account of his sexual offending and she has formed the strong impression that his memory was very conveniently self-serving. He continued to engage in sexual activity with children after he knew he was HIS positive. He displayed no empathy for his victims and no evidence of remorse or feelings of guilt about his sexual offending. Any attempts at remediation in prison have been totally unproductive. He has a glib, facile approach and is capable of considerable manipulation and while his physical limitations may moderate the risk of reoffending his age alone will not necessarily abolish his sexual interest.

Dr Moyle's evidence was that there was a 45 per cent chance of sexual reoffending within seven years if released without significant constraints to modify his behaviour. It was highly likely that he had an entrenched non-exclusive paedophilia which had existed for over 60 years and was highly unlikely to have been stopped by going to prison for eight or nine years. It was highly unlikely that he had overcome his sexual interests in children. He was able to be glib and manipulating and had a lifetime of practice in deception. Again, Dr Moyle remarked that on the respondent

continuing to engage in sexual activities with children after being diagnosed with the AIDS virus and observed that he was relatively insightless as to the abnormal nature of his sexual interests and the potential danger he poses to children and is resistance to offers of treatment.

The next matter is the need to protect members of the community from that risk. It hardly needs to be said, after all the matters that I have recited, that children should be protected from the risk of this man offending against them, given the vulnerability of children and the need of the community to protect them.

It was urged upon me by Mr Byrne, in submissions that were well expressed, that I should give thought to making a supervision order which cannot be currently acted upon but may be able to be acted upon in the future. There is, however, as was submitted by Mr Hinson, no utility or justice in making an order that cannot be complied with. There is no supervised release order which I can make which could be complied with at present, nor can I see any real prospect of any order being capable of being complied with.

Accordingly, I am not inclined to make a supervision order that would, in fact, be a continuing detention order because the conditions of a supervision order would not be able to be complied with.

In the circumstances, I make the order sought in paragraph 2

of the application, that pursuant to section 13(5)(a) that of the Dangerous Prisoners Sexual (Offenders Act) 2003, that the respondent, Jesse Spencer Pearce, be detained in custody for an indefinite term for controlled care and treatment.
