SUPREME COURT OF QUEENSLAND

CITATION:	*A-G (Qld) v Francis* [2008] QCA 243
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant/first respondent) **JOEL BRADY SMITH** (second respondent) **v** **DARREN ANTHONY FRANCIS** (respondent/appellant)
FILE NO/S:	Appeal No 3283 of 2008 SC No 3069 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 August 2008
DELIVERED AT:	Brisbane
HEARING DATE:	20 June 2008
JUDGES:	Muir JA, Mackenzie AJA and Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	STATUTES – ACTS OF PARLIAMENT – STATUTORY POWERS AND DUTIES – EXERCISE – GENERAL MATTERS – where the appellant was released under a supervision order made under Part 2, Division 3 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) ("the Act") – where the second respondent procured a warrant for the arrest of the appellant pursuant to s 20 of the Act on an *ex parte* application to a Magistrate – where the basis for the arrest was a suspected breach of the supervision order by the appellant using an illicit drug – where the appellant was brought before the primary judge who ordered pursuant to s 21(5) of the Act that the appellant be detained in custody pending the hearing of his application – where s 21(2) and s 21(5) of the Act states that the court must order that the prisoner be detained pending the final hearing unless exceptional circumstances exist – whether Part 2, Division 5 of the Act is unconstitutional insofar as it concerns contraventions of supervision orders

MAGISTRATES – JURISDICTION AND PROCEDURE GENERALLY – PROCEDURE – ORDERS AND CONVICTIONS – ORDERS GENERALLY – where the appellant was released under a supervision order made under Part 2, Division 3 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) ("the Act") – where the second respondent procured a warrant for the arrest of the appellant pursuant to s 20 of the Act on an *ex parte* application to a Magistrate – where the basis for the arrest was a suspected breach of the supervision order by the appellant using an illicit drug – whether the warrant was invalid as a result of inadequate disclosure or misleading conduct by the applicant for the warrant – whether there was a denial of natural justice by the appellant not being afforded an opportunity to be heard in front of the Magistrate before the warrant was issued

Acts Interpretation Act 1954 (Qld), s 9
Bail Act 1980 (Qld), s 13, s 16
Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s 13, s 16, s 20, s 21, s 22
Justices Act 1886 (Qld), s 57

Annetts v McCann (1990) 170 CLR 596; [1990] HCA 57, cited
Baker v The Queen (2005) 223 CLR 513; [2004] HCA 45, applied
Bank of NSW v The Commonwealth (1948) 76 CLR 1; [1948] HCA 7, applied
Bertran v Vanstone (2000) 173 ALR 63, cited
Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1; [1992] HCA 64, cited
Fardon v Attorney-General (Qld) (2004) 223 CLR 575; [2004] HCA 46, applied
Forge v ASIC (2006) 228 CLR 45; [2006] HCA 44, considered
George v Rockett (1990) 170 CLR 104; [1990] HCA 26, cited
Gypsy Jokers Motor Cycle Club Incorporated v Commissioner of Police [2008] HCA 4, applied
Grech v Featherstone (1991) 33 FCR 63, applied
Haoucher v Minister of State for Immigration and Ethnic Affairs (1990) 169 CLR 648; [1990] HCA 22, cited
Kable v Director of Public Prosecutions (NSW) (1995) 189 CLR 51; [1996] HCA 24, applied
Kruger v The Commonwealth (1996) 190 CLR 1; [1997] HCA 27, considered
Kioa v West (1985) 159 CLR 550; [1985] HCA 81, cited
Lego Australia Pty Ltd v Paraggio (1994) 52 FCR 542, applied
McArthur v Williams (1936) 55 CLR 324; [1936] HCA 10, considered
Nguyen v Critchlow & Anor [2000] NSWSC 1145, cited

Nth Australian Aboriginal Legal Aid Services Inc v Bradley (2004) 218 CLR 146; [2004] HCA 31, cited
Polyukhovich v The Commonwealth (1991) 172 CLR 501; [1991] HCA 32, cited
Price v Elder (2000) 97 FCR 218, cited
Re Criminal Proceeds Confiscation Act (2002) (Qld) [2004] 1 Qd R 40; [2003] QCA 249, applied
R v Kelly (Edward) [2000] QB 198, applied

COUNSEL: N M Cooke QC, with J W J Fenton, for the appellant
W Sofronoff QC, with B W Farr SC and J M Horton, for the first and second respondent

SOLICITORS: Aboriginal and Torres Strait Islander Legal Service for the appellant
Crown Law for the first and second respondent

[1] **MUIR JA: Introduction**
This is an appeal against the order of Byrne SJA of 25 March 2008 ordering that the appellant be detained under s 21(3) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) ("the Act") and the order of McMurdo J of 4 April 2008 dismissing the appellant's application to quash a warrant issued for his arrest under s 20 of the Act.

[2] The appellant was sentenced to imprisonment in January 1999 for multiple sexual and other offences committed over a period of about three months against a 20 year old woman with whom he resided. On 13 August 2004 Byrne J, as his Honour then was, made an order under s 13(5)(a) of the Act that the appellant be detained in custody for an indefinite term for care, control and treatment.

[3] On 26 September 2006, in consequence of an appeal made from an order on an annual review pursuant to the Act, the Court of Appeal made a supervision order under s 13(5)(b) of the Act ordering that the appellant be released from custody on 28 September 2006 subject to various conditions.[1]

[4] On 14 March 2007 a summons was issued under s 20 of the Act requiring the appellant to appear to answer a complaint that he had contravened a condition of the supervision order.[2] A warrant for the appellant's arrest was issued later under s 20 of the Act on a complaint alleging contravention of other conditions of the supervision order.

[5] A trial in relation to the alleged breaches took place before Philippides J who, on 7 November 2007, found that the appellant had contravened the supervision order made by the Court of Appeal on 26 September 2006. Her Honour amended the supervision order in a number of respects and the appellant was released subject to the terms of the amended order. One of the terms of the order was that the appellant "abstain from the use of illicit drugs".

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1 *A-G (Qld) v Francis* [2006] QCA 372

2 *Darren Anthony Francis v Attorney-General for the State of Queensland* [2008] QSC 62

[6] The subsequent history of the matter is summarised in the following passage from the reasons of McMurdo J delivered on 4 April 2008:[3]

> "[2] The Attorney-General claims that Mr Francis has breached that condition by using cannabis, and has filed an application that his supervision order be rescinded and that he be sent back to prison. On 25 March 2008, a Corrective Services officer procured a warrant for his arrest, purportedly pursuant to s 20 of the Act. He was arrested that evening and brought before this Court on the next day. He made an oral application to be released under s 21(3) which was adjourned until 28 March. At the same time it was ordered, as s 21(5) required, that he remain in custody pending the decision on his application to be released. On 28 March his application was adjourned until 2 April when it came before me.
>
> [3] At the same time there was a further application by Mr Francis for an order to set aside the warrant for his arrest. By then of course he had been arrested and he was in custody pursuant to the court's order made on 26 March. But it is argued that the validity of the warrant is an essential pre-condition of the court's jurisdiction under s 21. If this warrant was invalid, it is argued for Mr Francis that the order made last week for his detention must be set aside and that he must be released pending the hearing of the Attorney-General's application for the rescission of the supervision order." (footnote deleted)

[7] McMurdo J held that the warrant was valid and dismissed the application. The Attorney-General filed an application for the rescission of the supervision order and for a continuing detention order to be substituted for it. Pending the hearing of that matter, the appellant applied, pursuant to s 21(3) for an order that he be released pending the final decision on the Attorney-General's application. That application was heard by McMurdo J on 11 April 2008. His Honour found that there were "exceptional circumstances" which made the appellant's continued detention unjustified and he ordered his release subject to the 7 November 2007 supervision order.

The appellant's contentions in relation to Part 2, Division 5 of the Act

[8] Division 5 is unconstitutional, as it requires a court, to which Chapter III of the Constitution applies, to:

(a) imprison a person without a trial;
(b) perform an executive rather than a judicial function;
(c) imprison a person at the behest of the legislature and the executive without independently considering the merits of that imprisonment;
(d) order a punitive imprisonment independent of the criminal process.

[9] State Parliaments cannot confer on Supreme Courts powers that are repugnant to, and inconsistent with, the exercise of the judicial power of the Commonwealth by

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3 *Darren Anthony Francis v Attorney-General for the State of Queensland* [2008] QSC 62

those courts.[4] It is implied in the terms of Chapter III of the Constitution and necessary for the preservation of that structure, that a court capable of exercising the judicial power of the Commonwealth be and appears to be an independent and impartial tribunal.[5] The administration of justice by courts is inconsistent with some forms of external control of those courts appropriate to the exercise of authority by public officials and administrators.[6]

[10] The following aspects of Division 5 are repugnant to or inconsistent with the exercise of the judicial powers. A warrant under s 20 can be procured on an *ex parte* basis. Except in exceptional circumstances the released prisoner will not have time to prepare for and make an application for his release before coming before the Court. Consequently, a hearing under s 21 "inevitably results in a detention order being made under either ss 21(2) or 21(5)." A decision under s 21, in the circumstances, involves no discretion. There is no need to meet a specified standard of proof or to comply with the rules of evidence. Nor is there a requirement to give reasons. Such a process may be contrasted with the application of the relevant law to facts found in proceedings conducted in a court in a conventional way in which the parties have an opportunity to present evidence and to challenge the evidence led against them.[7]

[11] Section 21 not only prevents the Supreme Court from carrying out its traditional role of determining the legality of detention, but "enlists the … Court to carry out a plan by the executive to imprison a person fraudulently".[8] Section 21(5), which requires a court which adjourns an application under subsection (3) to order that the released prisoner remain in custody pending the decision on the application, is the antithesis of the judicial process. Under subsection (5) the judge makes no assessment of the evidence before the Magistrate, there is no deliberation or justiciable controversy: the function is executive or administrative rather than judicial.[9] Section 21, by directing the Court as to the order it must make in the exercise of its jurisdiction, impermissibly impairs the character of the Court as an independent and impartial tribunal.[10]

[12] The fundamental aspect of the nature of judicial power is that the rules of natural justice must be observed.[11] An essential aspect of judicial power is the quelling of controversies by ascertainment of the facts, by application of the law, and by the

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4 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 103, 106 per Gaudron J and *Fardon v Attorney-General* (2004) 223 CLR 575 at 600 per McHugh J; at 617 per Gummow J and at 647 per Hayne J

5 *Nth Australian Aboriginal Legal Aid Services Inc v Bradley* (2004) 218 CLR 146 at 163 per McHugh, Gummow, Kirby, Hayne and Heydon JJ; and *Gypsy Jokers Motor Cycle Club Incorporated v Commissioner of Police* [2008] HCA 4, 7 February 2008 at para [10]

6 *Nth Australian Aboriginal Legal Aid Services Inc v Bradley (supra)* at 163 and *Gypsy Jokers* at para [10]

7 *Bass v Permanent Trustee Co* (1999) 198 CLR 334 at 359

8 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27

9 *Re Criminal Proceeds Confiscation Act* (2002) (Qld) [2003] QCA 249 at [6]

10 *Gypsy Jokers* at [39]; *Chu* at [36], [37]; *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 669, 670; *Re Criminal Proceeds Confiscation Act* (2000) (Qld) at [11]

11 *Re Nolan; ex parte Young* (1991) 172 CLR 460 and 496 per Gaudron J; *Fardon* at 615 per Gummow J; at 617 per Heydon J

exercise, where appropriate, of judicial discretion.[12] They are lacking in the processes envisaged by s 20 and s 21.

[13] Chapter III of the Constitution implicitly excludes the power to pass legislative enactments which inflict punishment without a trial.[13] Division 5, in permitting punitive imprisonment without trial, is unconstitutional. The ordering of interim detention is purely punitive. Even the most insignificant or trivial breach of an order will result in detention and the Court has no discretion to release the detainee pending the hearing of his "exceptional circumstance". There is no correlation between the gravity of the breach and the time to be spent in custody.

The Scheme of the Act

[14] The statutory scheme was explained as follows in the reasons of Callinan and Heydon JJ in *Fardon v Attorney-General* (Qld)[14]:

> "**[209]** The purpose of the Act is to enable the 'Supreme Court to order the post-sentence preventative detention of sex offenders who pose a serious danger to the community.'
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> **[210]** In outline, the Act applies to persons imprisoned for a 'serious sexual offence' which is defined in the schedule to the Act as 'an offence of a sexual nature, whether committed in Queensland or outside Queensland involving violence or against children'. The Attorney-General may apply to the Court for orders requiring such a person to submit to psychiatric assessment (s 5). Upon an application, the Court may order that the person undergo a risk assessment by two qualified psychiatrists, who must prepare an assessment of the risk of the person re-offending (s 8). If the Court is satisfied that the person would, if released, pose a serious danger to the community, it is empowered to order the prisoner's detention (a continuing detention order) or supervision subject to conditions imposed by the Court (a supervision order) (s 13). In determining which order to make, the paramount consideration is to be the need to protect the community (s 13(6)). A continuing detention order is to remain in effect until revoked by order of the court. In the meantime, the person subject to the order is to remain a prisoner (s 14). Supervision orders are to be made for a definite term (s 15)." (footnote deleted)

[15] Division 5 of Part 2 of the Act deals with the contravention of supervision orders and interim supervision orders. Section 20 of the Act applies where a police officer or corrective services officer reasonably suspects that a released prisoner is likely to contravene, is contravening, or has contravened, a requirement of his supervision order or interim supervision order. In such event, the officer may, by a complaint to a Magistrate, apply for a warrant for the arrest of the released prisoner. The

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12 *Re Criminal Proceeds Confiscation Act 2002* (Qld) [2003] QCA 249 at [41]

13 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 535 – 536, 646, 685 – 686, 719 – 721; *Fardon* at 654 – 5 per Callinan and Heydon JJ; *Chu* at 69, 70 per McHugh J

14 (2004) 223 CLR 575 at 650 - 652

complaint founding the warrant must be under oath and must state the suspected contravention in general terms. The Magistrate must issue the warrant, in the appropriate form, if satisfied that grounds for issuing a warrant exist.

[16] Section 21 and 22 of the Act provides:

"**21 Interim order concerning custody generally**

(1) This section applies if a released prisoner is brought before the court under a warrant issued under section 20.

(2) The court must—

(a) order that the released prisoner be detained in custody until the final decision of the court under section 22; or

(b) release the prisoner under subsection (4).

(3) The released prisoner may, when the issue of his or her custody is raised under subsection (2), or at any time after the court makes an order under that subsection detaining the prisoner, apply to the court to be released pending the final decision.

(4) The court may order the release of the released prisoner only if the prisoner satisfies the court, on the balance of probabilities, that his or her detention in custody pending the final decision is not justified because exceptional circumstances exist.

(5) If the court adjourns an application under subsection (3), the court must order that the released prisoner remain in custody pending the decision on the application.

(6) If the court orders the released prisoner's release, the court must order that the prisoner be released subject to the existing supervision order or existing interim supervision order (each the ***existing order***) as amended under subsection (7).

(7) For subsection (6), the court—

(a) must amend the existing order to include the requirements mentioned in section 16(1)(da) and (db), if the existing order does not already include the requirements; and

(b) may amend the existing order to include any other requirements the court considers appropriate to ensure adequate protection of the community.

…

22 Court may make further order

(1) The following subsections apply if the court is satisfied, on the balance of probabilities, that the released prisoner is likely to contravene, is contravening, or has contravened, a requirement of the supervision order or interim supervision order (each the ***existing order***).

(2) Unless the released prisoner satisfies the court, on the balance of probabilities, that the adequate protection of the community can, despite the contravention or likely contravention of the existing order, be ensured by the existing order as amended under subsection (7), the court must—

(a) if the existing order is a supervision order, rescind it and make a continuing detention order; or

(b) if the existing order is an interim supervision order, rescind it and make an order that the released prisoner be detained in custody for the period stated in the order.

(3) For the purpose of deciding whether to make a continuing detention order as mentioned in subsection (2)(a), the court may do any or all of the following—

(a) act on any evidence before it or that was before the court when the existing order was made;

(b) make any order necessary to enable evidence of a kind mentioned in section 13(4) to be brought before it, including an order in the nature of a risk assessment order.

…

(7) If the released prisoner satisfies the court, on the balance of probabilities, that the adequate protection of the community can, despite the contravention or likely contravention of the existing order, be ensured by a supervision order or interim supervision order, the court—

(a) must amend the existing order to include the requirements mentioned in section 16(1)(da) and (db), if the existing order does not already include the requirements; and

(b) may otherwise amend the existing order in a way the court considers appropriate—

(i) to ensure adequate protection of the community; or

(ii) for the prisoner's rehabilitation or care or treatment.

..."

Discussion

[17] In the course of the hearing, it was confirmed that the only basis upon which the appellant's constitutional challenge was mounted was that Division 5 infringed the principle for which *Kable* is authority. That principle was identified by Gleeson CJ in *Fardon*[15] as follows:

> "[15] The decision in *Kable* established the principle that, since the *Constitution* established an integrated Australian court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, State legislation which purports to confer upon such a court a function which substantially impairs its institutional integrity, and which is therefore incompatible with its role as a repository of federal jurisdiction, is invalid."

[18] Gummow J said of the issue for determination by the Court[16]:

> "[66] . . . It concerns the recruitment by the Act of the Supreme Court of Queensland to exercise powers and functions which are said to be repugnant to a particular character of that State court given it by the *Constitution.* Precisely, the issue is whether s 13 of the Act confers a jurisdiction upon the Supreme Court which is repugnant to, or incompatible with, its character under the *Constitution* of a State court available for investment with federal jurisdiction by federal law made under s 77(iii)."

[19] His Honour later observed[17]:

> "[102] . . . However, although in some of the cases considering the application of *Kable*, institutional integrity and public confidence perhaps may have appeared as distinct and separately sufficient considerations, that is not so. Perception as to the undermining of public confidence is an indicator, but not the touchstone, of invalidity; the touchstone concerns institutional integrity." (footnote deleted)

[20] Hayne J, who, except in one irrelevant respect, agreed with the reasons of Gummow J said of the principle in *Kable*[18]:

> "[198] . . . the principle for which *Kable v Director of Public Prosecutions (NSW)* stands requires for its application that the Act in question be repugnant to, or incompatible with, that institutional integrity which the exercise of federal jurisdiction conferred upon the Supreme Court of Queensland requires. . ." (footnote deleted)

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15 (2004) 223 CLR 575; [2004] HCA 46 at paragraph [15]

16 Para [66]

17 Para [102]

18 Para [198]

[21] Callinan and Heydon JJ's formulation of the *Kable* principle is contained in the following passage from their joint reasons:[19]

> "[219] . . . It is necessary to keep in mind the issues with which *Kable* was concerned and the true nature of the decision which the Court made there. Despite the differing formulations of the Justices in the majority, the primary issue remained whether the process which the legislation required the Supreme Court of New South Wales to undertake, was so far removed from a truly judicial process that the Court, by undertaking it, would be so tainted or polluted that it would no longer be a suitable receptacle for the exercise of Federal judicial power under Ch III of the *Constitution*. This Court did not in *Kable* hold however that in all respects, a Supreme Court of a State was the same, and subject to the same constraints, as a federal court established under Ch III of the *Constitution*. Federal judicial power is not identical with State judicial power. Although the test, whether, if the State enactment were a federal enactment, it would infringe Ch III of the *Constitution*, is a useful one, it is not the exclusive test of validity. It is possible that a State legislative conferral of power which, if it were federal legislation, would infringe Ch III of the *Constitution*, may nonetheless be valid. Not everything by way of decision-making denied to a federal judge is denied to a judge of a State. So long as the State court, in applying legislation, is not called upon to act and decide, effectively as the alter ego of the legislature or the executive, so long as it is to undertake a genuine adjudicative process and so long as its integrity and independence as a court are not compromised, then the legislation in question will not infringe Ch III of the *Constitution*."

[22] Gleeson CJ in *Forge v ASIC*[20] said that for a State Supreme Court to answer the description of a "Court" in Ch III of the Constitution:

> "[41] . . . it must satisfy minimum requirements of independence and impartiality. That is a stable principle founded on the text of the *Constitution*. It is the principle that governs the outcome of the present case. If State legislation attempted to alter the character of a State Supreme Court in such a manner that it no longer satisfied those minimum requirements, then the legislation would be contrary to Ch III and invalid."

[23] In *Forge* Gummow, Hayne and Crennan JJ in their joint reasons[21] summarised the result in *Kable* and discussed the concept of "institutional integrity" as follows:

> "[63] . . . The legislation in *Kable* was held to be repugnant to, or incompatible with, the institutional integrity of the Supreme Court of New South Wales because of the nature of the task

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19 Para [219]

20 (2006) 228 CLR 45 at 67, 68

21 Para [63] - [64]

> the relevant legislation required the Court to perform. At the risk of undue abbreviation, and consequent inaccuracy, the task given to the Supreme Court was identified as a task where the Court acted as an instrument of the Executive. The consequence was that the Court, if required to perform the task, would not be an appropriate recipient of invested federal jurisdiction. But as is recognised in *Kable, Fardon v Attorney-General (Qld)* and *North Australian Aboriginal Legal Aid Service Inc v Bradley*, the relevant principle is one which hinges upon maintenance of the defining characteristics of a 'court', or in cases concerning a Supreme Court, the defining characteristics of a State Supreme Court. It is to those characteristics that the reference to 'institutional integrity' alludes. That is, if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies.
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> [64] It is neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court. The cases concerning identification of judicial power reveal why that is so. An important element, however, in the institutional characteristics of courts in Australia is their capacity to administer the common law system of adversarial trial. Essential to that system is the conduct of trial by an independent and impartial tribunal." (footnotes deleted)

[24] In *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police*[22] Gummow, Hayne, Heydon and Kiefel JJ in their joint reasons noted the acceptance in the joint judgment in *Nth Australian Aboriginal Legal Service Inc v Bradley*[23] of the proposition that:

> ". . . it is implicit in the terms of Ch III of the Constitution and necessary for the preservation of that structure, that a court capable of exercising the judicial power of the Commonwealth be and appear to be an independent and impartial tribunal."

[25] After referring to the observation in the joint reasons in *Bradley* to the effect that it was impossible to make an exhaustive statement as to the minimum characteristics of "such an independent and impartial tribunal" their Honours said[24]:

> "But it may be said that the conditions which must exist for courts in this country to administer justice according to law are inconsistent with some forms of external control of those courts appropriate to the exercise of authority by public officials and administrators."

[26] Later in the joint reasons[25] it is observed:

> "As a general proposition, it may be accepted that legislation which purported to direct the courts as to the manner and outcome of the

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22 [2008] HCA 4 para [10]
23 (2004) 218 CLR 146 at 163
24 Para [10]
25 Para [39]

> exercise of their jurisdiction would be apt impermissibly to impair the character of the courts as independent and impartial tribunals."

[27] Their Honours added the caution that the displacement of a common law evidentiary formulation by a "significant evidentiary" legislative provision need not constitute an "impermissible interference with the exercise of judicial power."

[28] Part of the argument advanced by counsel for the appellant was by way of comparing and contrasting the role of the Court under Division 5 with the exercise of the Court's normal judicial function. But that process is apposite only to the extent that it shows that the function of the Court under Division 5 is incompatible with the institutional integrity of the Court. The point being made by Callinan and Heydon JJ in paragraph [219] of their joint reasons in *Fardon*, is not that the *Kable* principle is attracted where a State court performs a function which is "far removed from a truly judicial process" but that the principle will apply where, by undertaking such a process the Court, "would be so tainted or polluted that it would no longer be a suitable receptacle for the exercise of Federal judicial power."

[29] In his reasons in *Fardon*, McHugh J quoted, with approval, the following passage from the reasons of Gaudron J in *Kable*:[26]

> "[T]here is nothing to prevent the Parliaments of the States from conferring powers on their courts which are wholly non-judicial, so long as they are not repugnant to or inconsistent with the exercise by those courts of the judicial power of the Commonwealth." (footnote deleted)

[30] Later in his reasons McHugh J observed:[27]

> "[42] … State legislation that requires State courts to act in ways inconsistent with the traditional judicial process will be invalid only when it leads to the conclusion that reasonable persons might think that the legislation compromises the capacity of State courts to administer invested federal jurisdiction impartially according to federal law. That conclusion is likely to be reached only when other provisions of the legislation or the surrounding circumstances *as well as* the departure from the traditional judicial process indicate that the State court might not be an impartial tribunal that is independent of the legislative and the executive arms of government."

[31] As the submissions of counsel for the respondents point out, the validity of Division 5 can be determined only by considering its provisions as part of the whole Act. Those provisions operate only where a prisoner has been released under a supervision order or an interim supervision order. Before a supervision order is made there will have been a trial at the conclusion of which the Court will have been satisfied that the prisoner was a "serious danger to the community."[28] A prisoner is a serious danger to the community only if there is an unacceptable risk that the prisoner will commit a serious sexual offence if released from custody or if

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26 (1996) 189 CLR 51 at 106

27 *Fardon* para [42]

28 Section 13(1)

released from custody without a supervision order being made.[29] In order to make such a finding, the Court must be satisfied "by acceptable, cogent evidence" and "to a high degree of probability that the evidence is of sufficient weight to justify the decision."[30]

[32] Where a prisoner is ordered to be released under supervision, the order must contain the requirements specified in s 16(1)(a) to (f) of the Act and:

> "… may contain any other requirement the judicial authority considers appropriate –
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> (a) to ensure adequate protection of the community; or
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> …
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> (d) for the prisoner's rehabilitation or care or treatment."[31]

[33] A court making a supervision order or an interim supervision order must, at the time of making the order, "give detailed reasons for making the order".[32]

[34] The validity of sections 8 and 13 of the Act were upheld in *Fardon*. In *Fardon*, however, the provisions of Division 5 were not expressly considered and those provisions have since been amended substantially. Nevertheless it is significant that the provisions dealing with the contravention of supervision orders are a logical and obvious extension of provisions, upheld in *Fardon,* which governed the making of supervision orders.

[35] A principal focus of the appellant's criticism was on the ability to issue a warrant for the arrest of a released prisoner on mere suspicion without giving the released prisoner an opportunity to be heard and on the "inevitable" detention of the released prisoner pursuant to s 21 pending a determination by the Court under s 22. The particular vice identified in s 21 is the requirement imposed by s 21(5) that the Court must order that the released prisoner remain in custody pending a decision under s 21(4), no matter how trivial the alleged breach of the subject supervision order.

[36] Contravention of a supervision order without reasonable excuse constitutes an offence punishable by two years imprisonment[33] and the procedure established by s 20 follows that laid down in the *Justices Act* 1886 (Qld) for the issuing of warrants for the arrest of persons suspected of having committed an indictable offence.[34] Section 57 of the *Justices Act* 1886 relevantly provides:

> "If a complaint is made before a justice –
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> (a) that a person is suspected of having committed an indictable offence within the justice's jurisdiction; …
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> the justice may issue a warrant –
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> (d) to apprehend the person; and
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> (e) to have the person brought before justices to answer the complaint and to be further dealt with according to law."

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29 Section 13(2)
30 Section 13(3)
31 Section 16(2)
32 Section 17
33 Section 43B
34 *Justices Act* 1886 (Qld) s 57

[37] The complaint must be in writing and on oath.[35] It is apparent from s 57 that a complaint may be founded upon a suspicion. Other Queensland Statutes have permitted the making of complaints on suspicion.[36] In that respect there is nothing idiosyncratic in the Queensland approach.[37] Counsel for the respondents point out in their written submissions that s 57 of the *Justices Act* was first enacted in 1886 based on s 1 of the *Indictable Offences Act* 1848 (Imp). They submit, accurately, that the procedure mandated by s 20 is an "orthodox and entrenched part of the Australian legal system."

[38] Section 20, however, is asserted to be wanting because the released prisoner has no entitlement to be heard by the Magistrate before the warrant is issued. No such right exists under the provisions of the *Justices Act* 1886 or under other similar statutory provisions conferring a power of arrest. The point has no merit[38] but is discussed in more detail later.

[39] The contention on behalf of the appellant that a hearing under s 21 "inevitably results in a detention order being made under either ss 21(2) or 21(5)" is unsustainable. A released prisoner brought before the Court under the authority of a warrant issued under s 20 may be released under subsection (4). The released prisoner may apply to the Court under subsection (3) to be released pending "the final decision". Under subsection (4) the released prisoner may be ordered to be released only if the Court is satisfied, on the balance of probabilities, that the released prisoner's detention in custody pending the final decision "is not justified because exceptional circumstances exist."

[40] In his reasons of 11 April 2008 McMurdo J, in considering whether there were "exceptional circumstances" which made the appellant's detention "for the next month unjustified" applied the following definition of "exceptional" by Lord Bingham of Cornhill CJ in *R v Kelly (Edward)*,[39] referred to with approval by Callinan J in *Baker v The Queen.*[40]

> "[249] We must construe "exceptional" as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered."

[41] Like McMurdo J, I find Lord Bingham's definition useful for the purposes of s 21(4). Section 21 thus fetters the discretion vested in the Court in relation to the release of the released prisoner pending a final hearing. But courts' discretions are commonly confined by legislation. The *Bail Act* 1980 (Qld) provides examples of

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35 *Justices Act* 1886 (Qld) s 51

36 *Vagrants, Gaming and Other Offences Act* 1931 (Qld) s 25; *Children's Protection Act* 1896 (Qld) s 5

37 See eg., *Justices of the Peace Act* 1927 (NZ) S 131; *Justices Act* 1902 (NSW); Blackstone, 21st ed. (1844), Vol iv., pp 290, 291 and *Hale, Pleas of the Crown* (1800) Vol 2, p 109 referred to by Latham CJ in *McArthur v Williams* (1936) 55 CLR 324 at 334, 335 and the *Magistrates' Courts Act* 1980 (U.K.) s 1 (1), (8) discussed in 11(1) *Halsbury's Laws of England* 4th ed., para 695

38 See eg. *Grech v Featherstone* (1991) 33 FCR 63 at 67 and *Nguyen v Critchlow* [2000] NSWSC 1145

39 [2000] QB 198 at 208

40 (2005) 223 CLR 513 at 573

such legislative fetters. *The Penalties and Sentences Act* 1992 (Qld) contains others.

[42] The requirements of s 20 are generally similar to those which apply, at least in some circumstances, where a person is arrested upon complaint. If a hearing must be adjourned by the Magistrate before whom the arrested person appears, the Magistrate may adjourn the hearing and remand the arrested person in custody.[41]

[43] Where the sentence which may be imposed on conviction is imprisonment for life or an indefinite sentence under the *Penalties and Sentences Act* 1992 (Qld), only a judge of the Supreme Court may grant bail.[42] In such a case the defendant must remain in custody until a hearing in the Supreme Court can take place and until bail is granted. Under s 16 of the *Bail Act* a court must refuse bail if there is "an unacceptable risk that the defendant if released on bail" would fail to appear and surrender into custody; commit an offence; endanger the safety or welfare of a person claimed to be a victim of the offence with which the defendant is charged, or anyone else's safety or welfare, or interfere with a witness. Where it is not practicable to obtain sufficient information for the purposes of a decision under s 16(1) due to lack of time, s 16(1A) requires the defendant to be remanded in custody "with a view to having further information obtained for that purpose."

[44] In certain circumstances, including where the defendant is charged with an offence referred to in s 13 of the *Bail Act*, bail must be refused "unless the defendant shows cause why the defendant's detention in custody is not justified":[43] The onus is on the defendant.

[45] Returning to the contention that the requirements of s 21 are such that mandatory detention for a period of days, if not weeks, is inevitable or nearly so, it is obvious that breaches of supervision orders may occur in a great many ways. For example, there may be a requirement for the released prisoner not to go within a stated distance of a school, not to drink alcohol, not to breach a curfew, or not to contact a specified person or persons. In respect of breaches of conditions such as these, the existence or non-existence of the breach and the circumstances in which it occurred, if it is found to exist, may be determined promptly, even on the day of arrest. No doubt, there will be many occasions on which the Court will need to adjourn the matter. But, in some of those cases, the released prisoner may well be able to establish the existence of "exceptional circumstances" on the day of his arrest. Where a breach is trivial or plainly accidental, it may not be difficult for the released prisoner to show "exceptional circumstances".

[46] It is of significance that a released prisoner arrested under s 20 must be brought before the Supreme Court.[44] Once seized of the matter, the Supreme Court is able to make orders and directions calculated to ensure that the final determination under s 22 and any application for release pending such determination is dealt with expeditiously.

[47] As is the case with s 20, the procedure under s 21 is not substantially different from that which applies under the criminal law generally. Any conditions of a

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41 *Justices Act* 1886 (Qld) s 84
42 *Bail Act* 1980 (Qld) s 13
43 *Bail Act* 1980 (Qld) s 16(3)
44 Section 20(2)

supervision order alleged to have been breached, other than those required by s 16(1)(a) to (f) inclusive, will be conditions imposed under s 16(2) either to ensure "adequate protection of the community" or "for the prisoner's rehabilitation or care or treatment." Breach of conditions required by s 16(1) or imposed under s 16(2) to ensure "adequate protection of the community" will normally be serious in nature, given the existence of a finding that, absent the conditions, the released prisoner would be a serious danger to the community.

[48] It is contended also that s 20 and s 21 are provisions which sanction punitive imprisonment without trial attracting the operation of Ch III of the Constitution so that the provisions would have been invalid if enacted by the Commonwealth Parliament. In *Fardon* Callinan and Heydon JJ referred with approval to the following passage from the reasons of Gummow J in *Kruger v The Commonwealth*[45]:

> "The question whether a power to detain persons or to take them into custody is to be characterised as punitive in nature, so as to attract the operation of Ch III, depends upon whether those activities are reasonably capable of being seen as necessary for a legitimate non-punitive objective. The categories of non-punitive involuntary detention are not closed."

[49] Their Honours then proceeded to consider whether the detention for which the Act provided was to be characterised as punitive. In that regard, they said[46]:

> "[216] Several features of the Act indicate that the purpose of the detention in question is to protect the community and not to punish. Its objects are stated to be to ensure protection of the community and to facilitate rehabilitation. The focus of the inquiry in determining whether to make an order under ss 8 or 13 is on whether the prisoner is a serious danger, or an unacceptable risk to the community. Annual reviews of continuing detention orders are obligatory.
>
> [217] In our opinion, the Act, as the respondent submits, is intended to protect the community from predatory sexual offenders. It is a protective law authorizing involuntary detention in the interests of public safety. Its proper characterization is as a protective rather than a punitive enactment. It is not unique in this respect. Other categories of non-punitive, involuntary detention include: by reason of mental infirmity; public safety concerning chemical, biological and radiological emergencies; migration; indefinite sentencing; contagious diseases and drug treatment. This is not to say however that this Court should not be vigilant in ensuring that the occasions for non-punitive detention are not abused or extended for illegitimate purposes." (footnotes deleted)

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45 (1996) 190 CLR 1 at 162

46 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 654

[50] The provisions of ss 20, 21 and 22 are ancillary to the power to order detention under s 8 and s 13. It is thus unlikely that the nature of detention contemplated by s 20, s 21 and s 22 should be categorised differently from that provided for under s 8 or s 13. The considerations discussed in paragraph [46] hereof also indicate that detention under s 21 has a non-punitive purpose.[47]

[51] As has been discussed already, the nature of the detention for which s 21 provides is similar to that provided for in the *Justices Act* 1886 and the *Bail Act* 1980. Its temporary duration, pending a determination on the merits under s 22 or release under s 21(3) pending final decision, further identifies its character as non-punitive. Even if such detention were to be categorised as punitive it would not follow, necessarily, that the exercise by the Court of the powers conferred by s 21 would impugn the Court's institutional integrity.

[52] As the foregoing discussion demonstrates, there is nothing about s 20 or s 21 which: is antithetical to the normal role of a court; adversely impacts on the Court's impartiality or independence; involves the performance of acts at the direction of the executive; compromises the Court's institutional integrity; or is apt to undermine public confidence. Proceedings under s 20 and s 21 are to be conducted by courts in the normal way and in accordance with "the ordinary judicial process".[48] There is no impermissible or, even unusual, interference with the exercise of judicial discretions. Each application must be determined on its merits and there is nothing to suggest that the Court is to act as a mere instrument of government policy.[49] This ground of appeal has not been made out.

The ground of appeal that the primary judge erred in not holding that the appellant had the right to be heard on the application to the Magistrate under s 20 of the Act for a warrant for the appellant's arrest and that the warrant was invalid as a result of inadequate disclosure or misleading conduct by the applicant for the warrant

[53] The argument advanced by counsel for the appellant may be summarised as follows. There is an implied legislative intent that administrative and/or judicial decisions will be subject to the common law rules of natural justice, except where excluded by clear and express words.[50]

[54] The appellant should have been given the right to participate in the hearing before the Magistrate as:

(a) the Magistrate's decision could cause a loss of the appellant's liberty;
(b) the alleged breach was trivial in comparison with the crimes for which the appellant was sentenced;
(c) the appellant was closely monitored by Corrective Services officers who had the power to place him under house arrest under the terms of the supervision order;
(d) there was no evidence that the appellant would flee; and

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47 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) s 21(3)

48 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 592

49 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 592

50 *Kioa v West* (1985) 159 CLR 550 at 563 per Gibbs CJ, 594 – 5 per Mason J, 593 per Wilson J, 609 and 612 per Brennan CJ, 632 per Deane J; *Ainsworth v CJC* (1992) 175 CLR 564; *Annetts v McCann* (1990) 170 CLR 596 at 598; and *Haoucher v Minister of State for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 653

(e) being given a right to be heard would not have impaired the efficacy of the Magistrate's decision or the administration of the supervision order.

[55] The primary judge erred in comparing a warrant under s 20 with an ordinary arrest warrant. A warrant under s 20 will inevitably result in a loss of liberty and is not merely a warrant to procure attendance at court. It is in practical terms, a warrant for detention. The primary judge erred in failing to find that there had been an abuse of process resulting from the failure on the part of the officer applying for the warrant to disclose all information available to him relevant to the Magistrate's determination. The officer informed the Magistrate that a sample of the appellant's urine had shown a positive result and that it had shown the presence of "Tetrahydrocannabinol–9 –Carboxylic Acid at 66 ng/ ml" but he did not disclose notations on the analyst's reports. Those notations seriously limited or qualified the evidentiary value of the tests.

Discussion

[56] The appellant's contention that failure to make full disclosure by the applicant for the warrant for the appellant's arrest resulted in the warrant's invalidity is unsupported by authority. Counsel for the respondent referred to *Lego Australia Pty Ltd v Paraggio,*[51] which is the authority for the contrary proposition.

[57] In that case, Beaumont and Whitlam JJ,[52] after discussing matters including the consequences of obtaining an *ex parte* court order without making full or proper disclosure, said:

> "… the practice in equitable jurisdictions in the grant of discretionary relief, ex parte, in private civil litigation does not, in our opinion, provide an appropriate analogy here. That is to say, in our opinion, the instant matter is to be decided in accordance with the terms, express and implied, of the provisions of s 10(1) of the *Crimes Act*, properly construed. Those terms are relevantly explained in propositions (1) to (5) extracted above from *Rockett's* case. Nothing there suggests the existence of a 'duty' of disclosure in the informant, breach of which would invalidate the warrant. Indeed the existence of such a principle would be inconsistent with the approach taken in *Rockett's* case. Under that approach, attention is focused upon the role of the magistrate or justice as the administrative decision-maker in accordance with principles of administrative law. This may be contrasted with the position in private civil litigation where, if ex parte relief is sought, the conduct or misconduct of the party obtaining the relief, rather than the decision-maker, is the relevant consideration. Put differently, the present question is one of public or administrative law; its resolution depends upon the characteristics of the action of the decision-maker, including the processes adopted by him or her and, in the extreme case of 'unreasonableness', the nature of the outcome if perverse.
>
> It is true that, in an exceptional case, an administrative decision may be vitiated by fraud or misrepresentation even at common law (see, eg Sir William Wade, *Administrative Law* (6th ed, 1988), p 257).

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51 (1994) 52 FCR 542 (F.C.)

52 At 555

> … it may be one thing to apply the principles discussed in *Edison v Bullock* in ordinary civil litigation. It is another to seek to apply them in an application for judicial review of a decision to grant a warrant where the statutory authority to grant the warrant contemplates that the application for it will, necessarily, be made ex parte, yet where the statute also requires, in order to protect the legitimate interests of members of the community, that certain conditions be fulfilled before the warrant may be granted.
>
> It follows, in our view, that there is no general, in the sense of abstract, 'duty' of disclosure here. This is not to say that a warrant should not be set aside, as other administrative decisions can be, where there has been fraud or misrepresentation. For this purpose, a statement which was a half-truth and thus misleading (see eg *R v Kylsant* [1932] 1 KB 442) would be treated, in this, as in other contexts, as a misrepresentation."

[58] There is no reason to doubt the correctness of the principle stated in *Lego*. It is consistent with the view expressed in the following passage from the joint reasons of Dixon, Evatt and McTiernan JJ in *McArthur v Williams*:[53]

> "But it has never been considered that the validity of the warrant could depend on the nature or sufficiency of the materials upon which a Magistrate granted the warrant if there was an information on oath before him which, however irregular, was not a nullity."

[59] McMurdo J found that there were two reports of the testing of the urine sample provided by the appellant on 18 March 2008, one dated 19 March and the other 25 March. His Honour also found, inferentially, that copies of the reports had not been provided to the Magistrate.

[60] The reports showed a level of cannabinoids above the level considered by the relevant Australian standard to constitute a positive result. They thus provided a basis for a reasonable suspicion that the appellant had contravened a requirement of his supervision order by using illicit drugs. Indeed, it was conceded before McMurdo J on 11 April 2008, on the hearing of an application for the appellant's release under s 21(4), that there existed a *prima facie* case that the appellant had used illicit drugs.

[61] There is no substance in the contention that the appellant was denied natural justice by not being afforded an opportunity to be heard before the warrant issued. The nature of the process for issuing warrants for the arrest of persons suspected of having committed an offence is inconsistent with a right on the part of the suspect to a right to be heard prior to the issue of the warrant. In *Grech v Featherstone*,[54] Heerey J explained:

> "Although it is by now trite law that the content of the rules of natural justice vary according to the nature of the particular power being considered, it seems to me that any recognisable form of natural justice is totally inconsistent with a statutory power of arrest. No authority was cited to me in which such a power had been held to

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53 (1936) 55 CLR 324 at 366

54 (1991) 33 FCR 63 at 67

> attract the rules of natural justice. This is hardly surprising. The whole point of arrest is that the person arrested is brought within the judicial system, there to be dealt with according to law. Statute and common law will then ensure the determination of the person's liberty by an impartial court with the arrested person being given the right to be heard. But it would be quite fanciful to suggest that such rights existed prior to arrest. Is the arrester to give the potential arrestee a summary of the evidence against him and afford him the opportunity to be heard? Is it to be assumed that the arrester, totally convinced of a miscreant's guilt is to be debarred from arrest because he has made a pre-judgment?"

[62] *Grech v Featherstone* has been followed in a number of subsequent decisions.[55]

[63] The principles expressed in *Grech* also derive support from *McArthur v Williams.*[56] In that case it was contended that a New Zealand Magistrate who had issued a warrant for the arrest of the applicant under s 13 of the *Fugitive Offenders Act*[57] acted unlawfully through having failed to hold a hearing in order to establish the truth of the facts relied on to support the suspicion that the applicant had committed an indictable offence. The contention was based in part on a footnote to the statutory form of "information in writing prescribed under the *Justices of the Peace Act*."[58] The footnote was as follows:

> "If the facts on which the information is founded are not within the personal knowledge of the informant, add – the matter of the above information is now substantiated before me by the oath of , of . J.S."

[64] Latham CJ observed:[59]

> "A magistrate need not conduct a preliminary trial before he issues a warrant. He should act responsibly, but the footnote would not be construed reasonably if it were interpreted as meaning that, before issuing an information, the magistrate must, as a condition precedent, require the oath of persons with personal knowledge of the facts upon which the charge is based. The result of such an interpretation would be that the magistrate in all except the simplest cases would have to examine a number of witnesses who would have to be brought before him for the purpose of being so examined. There is, however, no method provided by law for compelling the attendance of witnesses for the purpose of such an inquiry being made. It is therefore prima facie unlikely that the construction for which the applicant contends is correct. "

Conclusion

[65] None of the grounds of appeal have been made out.

[66] For the above reasons I would order that the appeal be dismissed with costs.

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55 *Price v Elder* (2000) 97 FCR 218 at [7]; *Bertran v Vanstone* (2000) 173 ALR 63 at [151]; *Tasmania v Crane* [2004] TASSC 80 at [14]; *Nguyen v Critchlow* [2000] NSWSC 1145

56 (1936) 55 CLR 324

57 1881 (NZ)

58 1927 (NZ)

59 At 334, 335

[67] **MACKENZIE AJA:** When the challenge to the constitutional validity of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) in *Fardon v Attorney General (Queensland)* (2004) 223 CLR 575 was considered and dismissed by the High Court, the particular focus was on s 13 and, to the extent that it related to the process, s 8 of the Act. The present appeal is concerned with the constitutional validity of Pt 2 Div 5 and related issues.

Analysis of Relevant Sections

[68] In the original form of the Act, s 20 provided that if a police officer or a corrective services officer reasonably suspected a released prisoner was likely to contravene, was contravening, or had contravened a condition of a supervision order, the officer could, by complaint to a magistrate, apply for either:

(a) a summons requiring the released prisoner to appear before the Supreme Court; or

(b) a warrant for the arrest of the released prisoner directed toward police officers and corrective services officers to arrest the released prisoner and bring that person before the Supreme Court to be dealt with according to law.

[69] Section 20(3) provided that the magistrate must issue the summons or warrant if the magistrate was satisfied that the ground for issuing the summons or warrant existed. However, a warrant could be issued only if the complaint was under oath and the magistrate was satisfied that the released prisoner would not appear in answer to a summons (s 20(3) and s 20(4)). The summons or warrant could state the suspected contravention in general terms.

[70] Section 21 permitted the Attorney-General to apply for orders of the kind listed in s 22 if a released prisoner was brought before the court under a summons or warrant issued under s 20. Section 22 permitted the court to make a continuing detention order, to amend the conditions of the supervision order to which the released prisoner was subject, or make any other order the court considered appropriate to achieve compliance with the supervision order or that was necessary to ensure adequate protection of the community.

[71] At all times material to the present matter, Pt 2 Div 5 was in a substantially amended form. In the following discussion, I will use the term "supervision order" as if it also included an interim supervision order, which is an order that may be made in various circumstances where a hearing under the Act may not be finally decided until after the person's release day, that is, the day when the person would otherwise be entitled to unconditional release. (Section 2 and Schedule “Dictionary”).

[72] As the Act stood at times relevant to the present matter, the following was the situation:

(a) A warrant had become the only means by which a released prisoner could be brought before the Supreme Court (s 20(2)).

(b) The requirements for the complaint to be under oath and the obligation of the magistrate to issue the warrant if satisfied that the ground for issuing it existed remained (s 20(3) and (4)).

(c) Because the alternative means of issuing a summons had been repealed, the residual discretion to refuse to issue a warrant because the magistrate considered it would be unjust to do so was repealed.

(d) There was an obligation (s 21(7)) for the Commissioner of Police or the Chief Executive of the Department of Corrective Services to give a copy of the warrant to the Attorney-General within 24 hours after the warrant was issued. However, failure to do so did not affect the court's ability to make a further order under s 22 (s 21(9)).

[73] If the released prisoner is brought before the Supreme Court under such a warrant, the court's options are to:

(a) order that the released prisoner be detained in custody until the final decision of the court under s 22; or

(b) release the prisoner under s 22(4). Such release may only be ordered if the prisoner satisfies the court, on the balance of probabilities, that the detention in custody pending the final decision is not justified because exceptional circumstances exist.

(c) If an application that the prisoner be released pending the final decision is made and the court adjourns that application, the court must also order that the prisoner remain in custody pending the decision on the application for release (s 21(5)).

[74] If release pending the final decision is ordered, the terms of the existing order must be amended to include terms relating to compliance with a curfew or monitoring direction and compliance with every reasonable direction of a corrective services officer, and may be amended to include any other requirement the court considers appropriate to ensure adequate protection of the community (s 21(7)).

The facts

[75] The relevant facts may be stated briefly. On 7 November 2007 the applicant was released under a supervision order made under Pt 2 Div 3 of the Act. On 25 March 2008, the second respondent, a corrective services officer, obtained a warrant from a magistrate on an ex parte application. The applicant was arrested on the same day. On 26 March 2008 the applicant was brought before Byrne SJA, who ordered that he be detained in custody pending the hearing of his application.

[76] On 4 April 2008, McMurdo J refused the appellant's application to quash the warrant issued under s 20 of the Act. The grounds advanced in support of the invalidity of the warrant were, firstly, that the rules of natural justice applied to the application for the issue of the warrant. It was said that the appellant should have been informed of the application and given an opportunity to resist it. Secondly, the officer applying for the warrant was obliged to disclose everything which would be relevant to the magistrate and the officer did not do so. It will be necessary to return to these issues later. Then, on 11 April 2008, McMurdo J ordered the applicant's release under s 21(4) pending the hearing regarding the alleged breach of the supervision order.

[77] The appellant became a prisoner in consequence of his conviction of a serious sexual offence and is therefore in the category of prisoner to which the Act applies. His further engagement with the Act after being released on a supervision order occurred because it was reasonably suspected that he had contravened a condition of the supervision order under which he was released pursuant to a judicial

determination that the terms of the order ensured adequate protection of the community (s 13(6)).

The appeals

[78] There are two appeals, one against the order of 26 March 2008 and the other against the order of 4 April 2008. The constitutional issues, as expressed on the applicant's behalf in the written submissions, were grouped under the following headings:

(a) that Pt 2 Div 5 of the Act was constitutionally invalid because it was incompatible with judicial power;
(b) Pt 2 Div 5 was an impermissible legislative direction to the court to imprison the appellant;
(c) Pt 2 Div 5 permits punitive imprisonment without trial; and
(d) Pt 2 Div 5 requires the Supreme Court to order imprisonment without hearing from the appellant.

The appeal against the order of 4 April 2008 focused on the same two issues raised at the hearing before McMurdo J (see paragraph [76] above).

[79] The submissions in (a) to (c) in the preceding paragraph are all facets of the same issue and can conveniently be dealt with together. Paragraph (d) has some affinity with what may be non-constitutional issues raised in the appeal against the order of 4 April 2008, and can conveniently be addressed in conjunction with them.

Legal Principles

[80] Before dealing specifically with the points raised by the appellant, it is convenient to set out some statements of principle. *Fardon* established the constitutional validity of a scheme of preventive detention of a class of offenders described in the Act who are considered to be a potential ongoing danger to the community. Pt 2 Div 5 is concerned with persons in that category who are reasonably suspected of being likely to contravene, presently contravening or having contravened the terms of a supervision order to which they are already subject.

[81] The objective of the appellant is to demonstrate that there are factors of the process set out in Pt 2 Div 5 that contravene the principle in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51. The principle is conveniently summarised by Gleeson CJ in *Fardon* at paragraph [15] in the following terms:

> "The decision in *Kable* established the principle that, since the Constitution established an integrated Australian court system, and contemplates the exercise of Federal jurisdiction by State Supreme Courts, State legislation which purports to confer upon such a court a function which substantially impairs its institutional integrity, and which is therefore incompatible with its role as a repository of federal jurisdiction, is invalid."

See also Hayne J at [198].

[82] Callinan and Heydon JJ said in *Fardon* at [219]:

> "So long as the State court, in applying legislation, is not called upon to act and decide, effectively as the alter ego of the legislature or the executive, so long as it is to undertake a genuine adjudicative process and so long as its integrity and independence as a court are not

> compromised, then the legislation in question will not infringe Ch III of the Constitution."

[83] It is also pertinent to note that McHugh J adopted in *Fardon* at [41] the words of Gaudron J in *Kable* that:

> "The bare fact that particular State legislation invests a State court with powers that are or jurisdiction that is repugnant to the traditional judicial process will seldom, if ever, compromise the institutional integrity of that court to the extent that it affects that court's capacity to exercise federal jurisdiction impartially and according to federal law. State legislation may alter the burden of proof and the rules of evidence and procedure in civil and criminal courts in ways that are repugnant to the traditional judicial process without compromising the institutional integrity of the courts that must administer that legislation."

[84] At the conclusion of their reasons in *Fardon* at [233], Callinan and Heydon JJ mentioned the attention paid in drafting the Act to the need for full and proper legal process in the making of decisions under it as one of the number of factors that supported the constitutional validity of the Act. From the other perspective, Gummow, Hayne, Heydon and Kiefel JJ said the following in *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* [2008] HCA 4:

> "As a general proposition it may be accepted that legislation which purported to direct the courts as to the manner and outcome of the exercise of their jurisdiction would be apt impermissibly to impair the character of the courts as independent and impartial tribunals."

Issues (a) to (c)

[85] Mr Cooke QC on behalf of the appellant distilled from *Fardon* what he described as a check list of safeguards in the 2003 Act that made the exercise of powers conferred by Pt 2 Div 1 to 3 a "valid exercise of judicial power". They were:

- Disclosure of all information held by the Attorney-General;
- A substantial discretion as to whether an order was made;
- A substantial discretion as to what type of order was made;
- The discretion is exercised by reference to the criterion of 'serious danger to the community';
- The onus of proof is on the Attorney-General;
- The standard of proof was to a high degree of probability;
- The rules of evidence apply;
- Hearings are conducted in accordance with the ordinary judicial process;
- There is nothing to suggest that the Supreme Court is to act as a mere instrument of government policy or a disguised substitute for executive action;
- The purpose of Division 3 was preventative and not punitive; and
- Reasons are required to be given.

[86] He submitted that all of those elements were absent from the determination under s 21(2) and/or s 21(5). Even if that proposition was made out, which I do not accept, it would not necessarily be decisive. Some of them may be of general

importance, but the impugned provisions must be considered in context and there may be other features than those that were identifiable in *Fardon* that bear on the question of validity of the particular provisions attacked on this occasion.

[87] The structure of s 20 and s 21 is designed to achieve a number of things in aid of promoting the protection of the community from a particular class of previously convicted offender. First, it provides a procedure, initiated by sworn complaint, to allow a released prisoner who is reasonably suspected of potential or actual contravention of a supervision order to be brought before the Supreme Court. As will be addressed in the part of the reasons concerning the validity of the warrants, the procedure is not dissimilar to that ordinarily used to apprehend offenders, save that the option of using a notice to appear or summons and allowing the person to remain at large until obliged to appear to answer it is not available. Once the person is apprehended, he or she is brought before the Supreme Court and the matter is thereafter within the control of the Supreme Court.

[88] At the initial appearance, the court has a choice of three orders to make. One is to order the prisoner to be detained in custody until the final decision of the court under s 22. Another is to order the prisoner's release, if the prisoner satisfies the court on the balance of probabilities that detention in custody pending the final decision is not justified because exceptional circumstances exist. The third is to adjourn any application for release pending final decision. If that option is employed, there must be a further order that the prisoner remain in custody pending a decision on that application. The length of any such adjournment is under the control of and within the discretion of the Supreme Court. Further, if the application for release were to be refused on the merits on the first occasion the prisoner was brought before the Supreme Court after arrest, there is provision for a further application for release to be made.

[89] That legislative framework does not offend the relevant constitutional principles. The supervision order was made on the basis of a judicial determination that its terms would achieve the legislative purpose of ensuring adequate protection of the community from the unacceptable risk that he would commit a serious sexual offence. The finding of unacceptable risk must have been established by acceptable cogent evidence to a high degree of probability in antecedent proceedings. Before the released prisoner's liberty pursuant to the supervision order can be affected, there must be a sworn complaint that the prisoner is reasonably suspected of contravention of the supervision order. Before a warrant is issued, the magistrate must be satisfied that the ground for issuing the warrant exists. A final decision under s 22 is dependent on a judicial determination that, on the balance of probabilities, the released prisoner is likely to contravene, is contravening or has contravened the requirement of the supervision order. Given the protective purpose of the legislative scheme and prima facie reason to suspect non-compliance, actual or apprehended, with a supervision order, casting an onus on a released prisoner to show exceptional circumstances justifying his release until the final decision under s 22 is made, in my view, is neither surprising nor objectionable. Overall, there are ample discretions built into the procedure, and it cannot be maintained that the institutional integrity of the Supreme Court is impaired, that the Court is being directed in a constitutionally impermissible way how to exercise its jurisdiction or to act in a way inconsistent with the character of a court as an independent or impartial tribunal.

[90] Nor is it correct to characterise the provisions as depriving a Supreme Court judge of any "power to do anything other than what the legislature told him to do", rendering the hearing executive rather than judicial. Nor is the ordering of detention pending the final determination of the application under s 22 "purely punitive"; it has a clear protective character, given the findings as to prior conduct and the serious danger from future similar conduct which is the basis of the legislative scheme.

[91] The example given on the appellant's behalf, in support of his characterisation of the provisions, of an insignificant or trivial breach of an order resulting in detention without the Supreme Court having discretion to release pending the hearing of his exceptional circumstances application for release pending final determination is not cogent. If that were the factual situation, there is no reason why an application might not be made on the first occasion when the person appeared in the Supreme Court following apprehension on the warrant. While Mr Cooke's point that, in many cases, it will not be practical to finalise the application immediately is no doubt valid, what happened in this case was that he sought a two to three week adjournment to consider scientific evidence issues relating to his instructions that his client had passively inhaled cannabis smoke which led to the positive test for the drug. The delay in organising material for an application for release pending final decision will not always, and perhaps infrequently will be, as long as that. As it turned out, McMurdo J heard the challenge to the validity of the warrant six days after the appellant's initial appearance, with the reserved decision being given two days after that. It appears that further directions were then given. At a hearing seven days later, he was satisfied that the applicant had established exceptional circumstances without needing to determine the underlying scientific issues.

[92] The issue of what are exceptional circumstances in a particular case is one that depends on judicial determination. It is fruitless to attempt to define what exceptional circumstances might be but a practical working approach to it is to be found in the following passage from *R v Kelly (Edward)* [2000] QB 198 at 208, where Lord Bingham of Cornhill CJ had to construe the term in a statutory context. He said:

> "We must construe 'exceptional' as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered."

The warrant: constitutional validity and natural justice

[93] The appellant's argument under this heading has several strands. The starting point is that one of the general features of judicial power is the application of the rules of natural justice and a requirement that the parties be given opportunity to present their evidence and challenge the evidence against them. The issue taken was that the initial order under s 21 that the appellant be detained in custody until the final decision of the court had been made without the appellant being able to be heard on any of the substantive issues. He was imprisoned without a fair opportunity to answer the charge against him without the legislature expressly excluding natural justice. It was also submitted that the appellant did not receive a hearing when the warrant was issued under s 20. There is a further argument that the whole of s 20

was constitutionally invalid, based on the observation by Gummow J in *Fardon* at [84] as follows:

> "But detention by reason of apprehended conduct, even by judicial determination on a quia timet basis, is of a different character and is at odds with the central constitutional conception of detention as a consequence of judicial determination of engagement in past conduct."

[94] The issue of detention on the basis of apprehended conduct is not enlivened by the facts of this case. The warrant was obtained on a complaint that the second respondent had a reasonable belief that the appellant had contravened the terms of his supervision order by consuming a drug, contrary to a condition that he abstain from use of dangerous drugs. A submission that, in a section structured by reference to alternative categories of apprehended, current, or past conduct, the whole of the section is necessarily invalid if one category is invalid would be an unlikely result. Section 9 of the *Acts Interpretation Act* 1954 (Qld) imports a statutory presumption in the following terms:

> "**9 Act to be interpreted not to exceed Parliament's legislative power**
>
> (1) An Act is to be interpreted as operating—
>
> (a) to the full extent of, but not to exceed, Parliament's legislative power; and
>
> (b) distributively.
>
> (2) Without limiting subsection (1), if a provision of an Act would, apart from this section, be interpreted as exceeding power—
>
> (a) the provision is valid to the extent to which it does not exceed power; and
>
> (b) the remainder of the Act is not affected.
>
> (3) Without limiting subsection (1), if the application of a provision of an Act to a person, matter or circumstance would, apart from this section, be interpreted as exceeding power, the provision's application to other persons, matters or circumstances is not affected.
>
> (4) This section applies to an Act in addition to, and without limiting, any provision of the Act."

[95] In *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 371 it was said:

> "To displace the application of this … presumption to any given situation arising under the statute by reason of the invalidation of part, it must sufficiently appear that the invalid provision forms part of an inseparable context."

It is unnecessary to say more than that application of the presumption to the facts of this case leads to the conclusion that the warrant is not affected by invalidity; even if fixing on an apprehended breach were to be objectionable, (which is unnecessary to decide), severance would inevitably occur, ensuring that the exercise of the power to order detention in respect of past conduct would be valid.

[96] The conclusion that the warrant is not invalid is, of course, subject to the other arguments addressed by the appellant attacking its validity on other grounds. They are concerned with the refusal of the application to McMurdo J to quash the warrant because it was issued without the appellant being afforded natural justice during the process leading to its being issued.

[97] The first submission in this regard is that the appellant should have been given the opportunity to be heard by the Magistrate before he issued the warrant. The reasons for this were said to be the following:

"(a) the decision involved a loss of the respondent's liberty;
(b) the alleged breach was trivial in comparison to the crimes for which the respondent was sentenced;
(c) the respondent was closely monitored by corrective services officers who had the power to place him under house arrest under the terms of the supervision order;
(d) there was no evidence that the respondent would flee; and
(e) being given a right to be heard would not have impaired the efficacy of the Magistrate's decision or the administration of the supervision order."

[98] The submission is rather novel. As the respondent pointed out, the procedure in s 20 is orthodox and similar to entrenched parts of the Australian legal system. In Queensland law there had been provision of a similar kind in relation to the issue of warrants under the *Justices Act* 1886 (s 57). The *Children's Protection Act* 1896 (s 5) was another early example as was the *Vagrants, Gaming and Other Offences Act* 1931 (s 25). Currently, the *Police Powers and Responsibilities Act* 2000 (s 370) contains a similar provision.

[99] There is recent authority that demonstrates that the appellant's proposition is untenable. In *Grech v Featherstone* (1991) 33 FCR 63 at 67, Heerey J said the following:

> "Although it is by now trite law that the content of the rules of natural justice vary according to the nature of the particular power being considered, it seems to me that any recognisable form of natural justice is totally inconsistent with a statutory power of arrest. No authority was cited to me in which such a power had been held to attract the rules of natural justice. This is hardly surprising. The whole point of arrest is that the person arrested is brought within the judicial system, there to be dealt with according to law. Statute and common law will then ensure the determination of the person's liberty by an impartial court with the arrested person being given the right to be heard. But it would be quite fanciful to suggest that such rights existed prior to arrest. Is the arrester to give the potential arrestee a summary of the evidence against him and afford him the opportunity to be heard? Is it to be assumed that the arrester, totally

> convinced of a miscreant's guilt is to be debarred from arrest because he has made a pre-judgment?"

[100] In the course of finding that a submission that failure of a justice issuing a warrant to keep a record of what had been placed before him denied the person subject to the warrant of procedural fairness and vitiated the warrant was untenable, Ireland AJ, in *Nguyen v Critchlow & Anor* [2000] NSWSC 1145 at paragraph [82], applied *Grech*, saying:

> "This is illustrated by the simple proposition which needs only to be stated in order to be accepted that the Parliamentary intention could never be that the warrant for the apprehension of a suspected person should not be issued until that suspect has been accorded natural justice or procedural fairness."

[101] In any event, the criteria for issuing a warrant would make any such right of very limited assistance, as McMurdo J illustrated in the hearing before him ([2008] QSC 62 at [14]). On the facts of this case, the relevant question under s 20 was whether the corrective services officer reasonably suspected that the appellant had contravened a requirement of his supervision order. If the existence of such a suspicion was established to the satisfaction of the Magistrate, the Magistrate was obliged to issue the warrant. The issue for the Magistrate in doing so was not whether there was a case as to whether the prisoner had breached his supervision order.

[102] The second submission under this heading is that the corrective services officer who sought the warrant from the Magistrate had not made full disclosure. Underlying this is a factual issue. There were relevantly two samples of the applicant's urine tested. The first was taken on 18 March 2008 and was positive to the active ingredient of cannabis. A screening test was done first and then the level was quantified as 66 nanograms per millilitre. However, the creatinine level, which is measured to provide an indication of whether there has been any dilution of the urine sample, was below the indicative threshold of 200 milligrams per litre. The following comment was appended to the certificate:

> "Creatinine levels less than 200 mg/L are below the normal range of levels observed in urine. Levels below 200 mg/L could indicate dilution of urine and a repeat sample should be obtained."

[103] Another urine sample was taken on 20 March 2008 and not analysed, apparently, until 25 March 2008. It showed 24 nanograms per millilitre of the drug and a creatinine level of 213 milligrams per litre, within the normal range. No qualification or comment was appended to that report. That report was not referred to in the complaint used as the foundation for the warrant. In his sworn complaint, the second respondent referred to the fact that the appellant had returned a positive test for the active component of cannabis as the ground for his reasonable suspicion. That degree of detail complied with the requirement that the sworn complaint should contain sufficient facts to found a reasonable suspicion (*George v Rockett* (1990) 170 CLR 104; *Lego Australia Pty Ltd v Paraggio* (1994) 52 FCR 542).

[104] The qualification on the test only related to possible dilution of the test sample. A scientist was called to explain the comment on the certificate. He said that "dilution" referred to additional fluid in the sample. There need not have been actual dilution and there need not have been deliberate dilution if there was;

drinking of additional quantities of water could achieve that result. In cross-examination Mr Cooke sought to redefine the concept as adulteration but, read as a whole, the effect of the scientist's evidence was that the extra fluid would not relevantly interfere with the sample apart from lowering the concentration of the active component in it.

[105] In his submissions, Mr Cooke relied on the principles applicable to civil cases in which a duty of full disclosure upon an ex parte application applies (e.g. *Siporex Trade SA v Comdel Commodities* [1986] 2 Lloyd's Rep 428 at 437; *Thomas A Edison Ltd v Bullock* (1912) 15 CLR 679 at 680-682). Those and other authorities of a similar kind were distinguished in *Lego* at 553.

[106] As *Lego* also said at 555, having referred to *George v Rockett*:

> "Nothing there suggests the existence of a "duty" of disclosure in the informant, breach of which would invalidate the warrant. Indeed the existence of such a principle would be inconsistent with the approach taken in *Rockett's* case. Under that approach, attention is focused upon the role of the magistrate or justice as the administrative decision-maker in accordance with principles of administrative law. This may be contrasted with the position in private civil litigation where, if ex parte relief is sought, the conduct or misconduct of the party obtaining the relief, rather than the decision-maker, is the relevant consideration. Put differently, the present question is one of public or administrative law; its resolution depends upon the characteristics of the action of the decision-maker, including the processes adopted by him or her and, in the extreme case of "unreasonableness", the nature of the outcome if perverse."

[107] This case is one where the evidence is that, if the sample relied on to found the suspicion of the corrective services officer was diluted, the only practical effect was to lower the concentration of the drug in it. That, if disclosed, could have given no assistance to the applicant. In any event, I am not persuaded that there was any non-disclosure of a material kind.

Conclusion

[108] I am satisfied that none of the grounds of appeal are made out. Each of the grounds of appeal should be dismissed with costs.

[109] **FRYBERG J:** This appeal should be dismissed for the reasons stated by Mackenzie AJA, with which I agree.

[110] I add one point. While it is fruitless to attempt to define what are "exceptional circumstances" within the meaning of s 21(4) of the Act, one could confidently expect that a weak case on behalf of the Attorney-General or a contravention of a supervision order which is a trivial contravention would often amount to such circumstances.