SUPREME COURT OF QUEENSLAND

CITATION:	*A-G (Qld) v Gadd* [2008] QSC 247
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **MATTHEW JAMES GADD** (respondent)
FILE NO:	SC No 4467 of 2008
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	16 October 2008
DELIVERED AT:	Brisbane
HEARING DATE:	6 October 2008
JUDGE:	Mackenzie J
ORDER:	**I order that, pursuant to s 13 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), the respondent be detained under a continuing detention order**
CATCHWORDS:	STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – STATUTORY POWERS AND DUTIES – EXERCISE – GENERAL MATTERS – where the respondent was convicted of breaking and entering with intent, deprivation of liberty, assault with intent to commit sodomy and indecent assault with a circumstance of aggravation – where these offences were the first of a sexual nature in the respondent's criminal history – where the respondent had previously breached bail and a home detention order – where the respondent had failed to participate in a course addressing sexual offending while incarcerated – where the Attorney General of Queensland made application to have the respondent detained indefinitely or released subject to a continuing detention order pursuant to s 13 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) – whether the respondent is a serious danger to the community in the absence of such an order – whether a continuing detention order or supervision order should be made *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 8, s 13

Attorney-General for the State of Queensland v McLean [2006] QSC 137, cited

COUNSEL: B H P Mumford for the applicant
J D Briggs for the respondent

SOLICITORS: Crown Solicitor for the applicant
Legal Aid Queensland for the respondent

[1] **MACKENZIE J:** The respondent was sentenced on 13 June 1997 in the District Court at Townsville in respect of offences of breaking and entering with intent, deprivation of liberty, assault with intent to commit sodomy and indecent assault with a circumstance of aggravation. The offences were committed at a hotel at which the complainant was a cleaner. When she commenced work at about 3.30 am on 6 September 1996, she saw evidence of a breaking and entering of the premises. A window had been broken, and towels and a bag of coins were on the floor.

[2] Then she saw the respondent running towards her, armed with a screwdriver. He held the screwdriver to her neck and repeatedly demanded to know where the notes were. Then he forced her onto her knees and pulled down her shorts and underwear. He attempted to penetrate her anus with his penis. He continued to hold the screwdriver to her neck. The complainant pleaded with him to stop, telling him that her daughter would be arriving in a short time.

[3] The respondent then masturbated himself and ordered the complainant to put her mouth on his penis. He ejaculated into her mouth. He then picked up the bag of coins and left the premises.

[4] Because the sexual offences were committed in a way that involved violence they were serious sexual offences within the definition in the schedule to the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) ("the Act"). When the police questioned him about the offences about four months later, he admitted that he had committed them. He said that he was "pretty drunk" at the time and that the woman had scared him. His identity as the offender was confirmed by fingerprint and DNA evidence.

[5] Since it has some relevance to the opinions of the psychiatrists, it is noted that these offences were committed while the respondent was unlawfully at large. He was already in breach of conditions of a home detention order made on 12 August 1996 by the time of the events at the hotel, which occurred within a month of his release on home detention. He also had a number of breaches of bail.

[6] The respondent, who is currently 38 year of age, has a very long criminal history. There are a large number of offences of dishonesty including one of stealing with actual violence, which was committed in 1994. This was one of the offences in respect of which the home detention order was made. The most serious offence on his record is one of manslaughter, which was committed by stabbing an acquaintance with whom he had become annoyed. At the time he was only 15 years of age and was dealt with as a child for that. The unusual feature of the criminal history is that the present offences are the only ones involving sexual offending.

[7] The Attorney-General obtained an order under s 8 of the Act, based on an opinion from Dr Basil James. The psychiatrists appointed pursuant to s 8 to examine the

respondent were Drs Lawrence and Beech. Section 13 of the Act applies if the court is satisfied the prisoner is a serious danger to the community in the absence of a Division 3 order (s 13(1)). By s 13(2), a prisoner is a serious danger to the community for the purposes of s 13(1) if there is an unacceptable risk that the prisoner will commit a serious sexual offence:

(a) if the prisoner is released from custody; or

(b) if the prisoner is released from custody without a supervision order being made.

According to s 13(3), the court may only decide that it is so satisfied if it is satisfied:

(a) by acceptable cogent evidence; and

(b) to a high degree of probability;

that the evidence is of sufficient weight to justify the decision. Section 13(4) sets out a number of criteria to which the court must have regard in deciding to make an order and, if so, which order. Those relevant to this case will be apparent from the discussion that follows. Counsel proceeded on the basis that the nature of the psychiatric evidence meant that the real issue was whether a continuing detention order or a supervision order should be made.

[8] The most significant underlying question, on the unusual antecedents, is whether there is as unacceptable risk the prisoner will commit a further serious sexual offence. Without that finding, the prisoner would fall outside the scope of the Act: the fact that there was an unacceptable risk that he might commit other serious criminal acts involving violence, but not sexual violence, would be irrelevant in determining the matter.

[9] All of the psychiatrists administered the static actuarial tests commonly used in matters of this kind and also assessed the respondent's risk level by interviewing and assessing him. All were asked to comment on a passage of the reasons for judgment in *Attorney-General for the State of Queensland v McLean* [2006] QSC 137 in which evidence given by Dr Nurcombe about limitations in the static tests was reproduced. It was apparent from their reports that they had relied significantly on the dynamic factors in forming their opinions. The focus of the cross-examination was whether the static tests had limitations because the respondent was a person from an Aboriginal background who would be released into an urban environment. By way of generalisation, the thrust of their evidence was that the static tests had not been specifically validated in relation to the Australian Aboriginal population, and that their use was only to classify the person by reference to a category of person with a statistical likelihood of recidivism. The dynamic elements were important in individualising the risk factor.

[10] All the psychiatrists were of opinion that the respondent has a diagnosis of anti-social personality disorder. None of them thought that he was a psychopath. None of them found evidence that he was intrinsically sexually deviant or predatory. They all observed that his offending was generally opportunistic.

[11] The psychiatrists all thought that his unfortunate background which included institutionalisation from about the age of 13 and spending most of his life thereafter

in detention or prison, led to his having a serious deficit in his understanding of appropriate behaviour in the community. This was compounded by his consumption of alcohol and drugs which disinhibited him further, leading to the commission of offences.

[12] The psychiatrists were also all of opinion that there was a high risk, according to the actuarial tests and the diagnostic process they went through with him, that he would commit a further violent offence if released without addressing the factors that led to his offending. The position was further complicated by the respondent's unwillingness to undergo the Sexual Offenders Treatment Program in a timely way. He gave reasons why he felt anxious and uncomfortable about undertaking it while in prison in Townsville. Upon his transfer to Lotus Glen he had undertaken a preliminary course but had not been placed in the course itself. Nor had he shown any commitment to abstain from consuming alcohol. Both of those issues were of concern to the psychiatrists. There was a lingering concern that the appellant may have been prepared to undertake the courses in the knowledge that it was necessary to do so to be released rather than embracing the objectives of the courses, although getting him undertake them might result in his engaging with them.

[13] It was the uniform opinion of the psychiatrists that it was necessary for the respondent to undertake a course or courses, before he was released, which would address the two issues of his maladaption to society and his consumption of alcohol which compounded that problem by removing such inhibitions as he might otherwise have had. As Dr James said, it was more a case of habilitation than rehabilitation that was involved.

[14] The fact that there was only the one opportunistic episode of sexual offending in his record was seen as a complication in the minds of Dr Lawrence and Dr Beech with regard to the likelihood of the respondent committing further serious sexual offences. However, the overall effect of their evidence regarding the non-actuarial testing was that there was a moderately high risk. As I understand the effect of the evidence, it is that the likelihood of a further violent offence is high. The likelihood of committing a serious sexual offence is more in the moderate range. Because the range of offences of non-sexual violent offences he would be likely to commit is broader than the range of sexual offences, it is more likely that a violent non-sexual offence would be committed. However, the fact that his offending tended to be opportunistic correspondingly means that, if the opportunity does present itself to commit a further serious sexual offence while disinhibited by his consumption of alcohol, he would be likely to take advantage of the situation.

[15] The nature of the difficulties faced by the respondent is set out in the evidence of Dr James in the following passage,[1] which is reproduced as it appears in the transcript:

> "I think Mr Gadd has profound deficits which perhaps have not been sufficiently emphasised to date. He is a person who has had very little in the way of socialisation. He has very little in the way of personal identity, of group identity, of cultural identity, or any sense of rules and responsibilities within a group. And he is, as it were, alienated; he's grown up without any coherent, sustained family setting. He's run wild in the streets and he's been institutionalised

[1] T 1-56

> since the age of 13. He has these very profound deficits. Most of us incorporate these as part of our development and then end up as if it were we have maps in our heads of the rules that govern our conduct, who we are, how we relate to others. I think that this is a huge deficit for Mr Gadd and, when he's adrift in the community, he becomes extremely anxious. I've heard what's been said about alcohol use and abuse in Mr Gadd's case and I think that it's also not been emphasised sufficiently that the alcohol intake is symptomatic of what I've been describing. Alcohol consumption shouldn't be taken in isolation. There are various kinds of alcohol abuses, some come from depressive or bi-polar affected disorder. The remedy for that is to treat the underlying disorder. In Mr Gadd's case it's the kind of alienation I've just referred to that is the underlying factor for his substance abuse, his intoxicating use. If he's put out in the community at all, if he's away from strictures that he's used to in environments such as prison, he will have huge anxieties and immediately go to quell those with intoxicants. Reference has already been to the anxieties he's felt even in prison in dealing with relatively small groups. These are hugely magnified if he's outside. For most of us it takes years to get what I've referred to as this map in our heads. Often people don't get it at all. Mr Gadd hasn't got it at all. If he's outside doing a course, he's going to experience these anxieties and I think the kind of scenario that Dr Beech envisaged that he's going to break away from it, take to intoxicants in a very short period of time, that risk is very high. And I think the way to stop him drinking is to fix the anxieties that cause it."

[16] The reference to Dr Beech's evidence is to the risk that because of a demonstrated tendency on the part of the respondent to breach the requirements of orders and abscond, the same would happen if the respondent were placed on a supervision order. Dr Lawrence agreed with a question put to her in cross-examination that her conclusion was that if he was placed in similar circumstances to those around the time of commission of the sexual offences, there would be a high risk of him of similarly offending.[2] Dr Beech also agreed in fairly similar terms to essentially the same question.[3]

[17] The point that was being made by the psychiatrists essentially was that the risk that the respondent would commit further violent offences was high unless the issues concerning his capacity to function in society and the effect of alcohol as a further disinhibiting factor were adequately addressed. The concern was that because the offending was opportunistic the risk that any particular offence committed by him might be a serious sexual offence was real. Or to put it another way, there was a high risk that he would commit a further serious sexual offence if the circumstances in which he committed impulsive offences involved the presence of a vulnerable woman. It was the nature of the deficits that the respondent labours under that led them to feel that it was imperative that he undertake appropriate courses while still in prison rather than following his release subject to conditions. The substance of their opinions was that merely undergoing a course or courses with emphasis on violent offending would not be sufficient to address the issue of inappropriateness

[2] T 1-49
[3] T 1-15

of serious sexual offending. The preferred course was one that included components dealing with sexual offending and his problem with alcohol and an appropriate cultural influence. The Indigenous High Intensity Sexual Offenders Program was thought to be appropriate.

[18] It was submitted on the respondent's behalf that with adequate conditions and restraints, particularly with regard to a curfew, abstinence from consumption of intoxicating substances and a very strict regime of monitoring, it would be a case in which the respondent could be released subject to a supervision order. The psychiatrists did not subscribe to this view. The difficulty was seen to be that, until progress was shown to have been made, the conditions would have to be so onerous and intensive that the regime would not differ greatly from that which he would undergo in custody. Further, the respondent's improved conformity with the prison system generally showed that the likelihood of his undertaking the necessary regime of treatment would be far greater than it would be if he were not in custody. It was pointed out that the present offences occurred a very short time after he had, in effect, absconded while subject to a home detention order. The concern was that, given that and other evidence of unreliability about conforming to court orders, a regime which allowed him to be in the community, albeit supervised, was unlikely to be effective.

[19] I am satisfied by evidence that I consider acceptably cogent, to a high degree of probability that there is an unacceptable risk that the respondent will commit a serious sexual offence if released from custody. I am satisfied that the evidence is of sufficient weight to justify that decision. I do not consider that any order other than a continuing detention order is appropriate in the particular circumstances of the case. I therefore order that, pursuant to s 13 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003, the respondent be detained under a continuing detention order.