SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v Fisher* [2009] QSC 104
PARTIES:	**Attorney-General for the State of Queensland (applicant)** **v** **FISHER, Traven Lee (respondent)**
FILE NO:	BS 5070 of 2007
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Brisbane
DELIVERED EX TEMPORE ON:	15 April 2009
DELIVERED AT:	Brisbane
HEARING DATE:	15 April 2009
JUDGE:	Applegarth J
ORDER:	**Pursuant to s 21(6) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 that the respondent be released subject to the terms of the supervision order made by Justice Mackenzie on 22 November 2007.**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – OTHER MATTERS – Dangerous Prisoners (Sexual Offenders) Act 2003 – application for release pursuant to s 21(3) pending final determination of proceedings for an alleged breach of a supervision order – whether there were "exceptional circumstances" under s 21(4) to justify releasing the respondent *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) s 21 *Attorney-General v Francis* (2008) 250 ALR 555; [2008] QCA 243, applied *Attorney-General v Francis* [2008] QSC 69, applied *R v Kelly (Edward)* [2000] 1 QB 198, considered
COUNSEL:	J M Horton for the applicant B H Mumford for the respondent
SOLICITORS:	Crown Law for the applicant AW Bale & Son for the respondent

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

APPLEGARTH J

No 5070 of 2007

ATTORNEY GENERAL FOR THE STATE OF QUEENSLAND	Applicant
and	
TRAVEN LEE FISHER	Respondent

BRISBANE

..DATE 15/04/2009

ORDER

HIS HONOUR: This is the adjourned hearing of an application by the respondent to be released pursuant to s 21(3) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003.

The respondent is subject to a supervision order made by Mackenzie J on 22 November 2007. His Honour imposed certain requirements upon the respondent for a period of ten years after his release: see *Attorney General v. Fisher* [2007] QSC 341. They include conditions that the respondent comply with monitoring directions pursuant to which he has been required to wear a monitoring device. They include a condition that he not commit an indictable offence.

It is appropriate to note the circumstances under which Mackenzie J came to make that order. His Honour said that the psychiatrist's evidence presented a concern that the respondent had not benefited to the full extent from programs which would enable him to confront and understand that serious sexual offences ought not be committed. His Honour concluded that until that degree of insight was obtained there was a risk that the respondent would opportunistically commit such offences if released into the community without a supervision order.

In short, His Honour reached the conclusion that a supervision order was appropriate because of the respondent's then inadequate understanding of the seriousness of his offences. He thought that the risk might be reduced to an acceptable

level; but at the time he made that order in 2007 he thought that the risk was unacceptable. His Honour said,

> "There are two things that emerge from the expert evidence about the offender. The first is that it is accepted that he is not in the category of offenders who appear to be intractable. The second is that he is a young man whose process of maturation and better understanding of the issues may result in his requiring less restraint than is currently appropriate. That is the tenor of the evidence of the psychiatrists. However, I am satisfied that as the matter stands, a Division 3 order should be made [para 28]".

The immediate background to this application is that on 2 March, 2009, the respondent telephoned the co-ordinator of the electronic monitoring surveillance unit and apparently informed him that his electronic monitoring bracelet had come off his leg. An examination on the computer system revealed that the tamper alert had been activated, and an inspection of the device revealed that one end of the strap was severed with the securing clip still inside and the other end of the strap was stretched and twisted. Photographs of the device in that state appear as "Exhibit RW5" of the affidavit of Mr Waldin, filed by leave on 3 March, 2009.

The matter came before me on 3 March, and an application was made pursuant to s 21(3) to release the respondent pending a

final decision. On that occasion I considered that there was insufficient evidence to enable me to determine whether exceptional circumstances existed, proved on the balance of probabilities, to permit the release of the respondent pending a s 22 hearing. I made directions including directions for the respondent to be interviewed and examined by Dr Lawrence and Dr Harden.

Under s 21 of the Act, it is for the respondent to satisfy me, on the balance of probabilities, that his detention in custody pending the final determination is not justified because exceptional circumstances exist.

In *Attorney General v Francis* [2008] QSC 69, at [7], McMurdo J addressed the requirement of exceptional circumstances in s.21(3) of the Act and referred to the authority *R v Kelly (Edward)* [2000] 1 QB 198 that 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. In that case, which has some different circumstances to this one, His Honour concluded that Mr Francis had demonstrated that there were exceptional circumstances justifying his release pending a hearing in a few weeks time. That involved an assessment of risk and the fact that over the following period of a few weeks that risk would be less than over a longer period, and because, in that case, Mr Francis was said to have to have the strongest incentive not to breach any of the conditions of his order.

In that case, there was a concern about Mr Francis' use of cannabis which was regarded as a serious breach. However, his Honour considered that was only one matter to be considered in the overall assessment of whether there were exceptional circumstances. In that case Mr Francis was required to undergo testing as directed by the Corrective Services officer and McMurdo J observed that it was possible for him to be tested say every few days in a way that would be sure to detect any use of drugs.

As I have said, the circumstances here do not involve a breach by the use of cannabis, and the applicant's background and circumstances are different from Francis, but McMurdo J's treatment of the issue is relevant in terms of the proper approach to applications under s 21(3).

McMurdo J's definition of what constituted exceptional circumstances was adopted in a later case involving Mr Francis, *Attorney-General of Queensland v Francis* (2008) 250 ALR 555 at 566 [41] in which Muir JA also found the definition that had been given by Lord Bingham in *R v Kelly* useful for the purpose of s 21(4). Muir JA continued at [45]-[46]:

> "...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".

It is of significance that a released prisoner arrested under s 20 must be brought before the Supreme Court. 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." (citations omitted)

Mackenzie AJA at 577 [92] said it would be fruitless to attempt to define what exceptional circumstances might be, but a practical working approach was to be found in the test from *Kelly*. Fryberg J agreed with the other two members of the Court and added this point at 581 [110]:

> "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 the supervision order which is a trivial contravention would often amount to such circumstances".

I too regard it as a fruitless exercise to attempt to define what might be exceptional circumstances, but I am guided by what is said in those cases. Many factors will be relevant to an assessment of whether exceptional circumstances exist, being circumstances that one could say are not regular or routine or normally encountered.

As indicated by the two decisions involving Mr Francis, one matter of course is the seriousness of the alleged breach, and the example is given of a trivial breach constituting exceptional circumstances. An example of a trivial breach constituting exceptional circumstances does not mean that the existence of a breach or an alleged breach which is not trivial precludes an applicant from establishing exceptional circumstances. All must depend upon the circumstances, but the more serious the alleged breach, the less likely it is that exceptional circumstances will be established.

The allegation of breach carries with it the consideration of whether the breach is indicative of a risk of further

breaches. A further factor is the relationship between the alleged breach and the risk of a serious sexual offence being committed.

The Court is required to consider whether the circumstances are exceptional and this requires an assessment to be made of the risk of re-offending. That needs to take account of the matters that led to making the original supervision order, the evidence that is before the Court on the occasion of the s 21(3) hearing, the nature and likelihood of any risk of any re-offending, and whether the alleged breach is indicative of an increased risk of re-offending beyond that which led to the making of the order in the first place.

I accept the submission made by Mr Horton of counsel on behalf of the Attorney-General that in a case like this it is not incumbent upon the Attorney-General to show that there necessarily is an elevation of risk. However, it seems to me that although it is not necessarily incumbent upon the Attorney-General to prove that there has been an elevation of risk, a critical issue is whether the circumstances of the alleged breach do indicate an increased risk of re-offending, and whether the conditions of the supervision order and the general circumstances are apt to address that level of risk.

Finally, and in accordance with what was said by McMurdo J in *Francis' case*, the duration of the period until the s 22 hearing clearly is relevant to any assessment of risk. Where the final hearing is only a few weeks away, and one might

expect the respondent to have a strong incentive not to breach the conditions during that period, a different calculus is involved to the assessment of risk over a much longer period.

I am not required today, nor am I in a position today, to reach any confident conclusion concerning the circumstances of the alleged breach. They are a matter for determination in other proceedings, both proceedings for breach and in the pending hearing under s 22. It is clear, however, that the evidence establishes that there is a serious question to be tried concerning deliberate interference with the monitoring device.

Dr Lawrence's recent report (Exhibit 1 at paragraphs 7.1 to 7.9) gives the respondent's account of the event. I will not set it out in this judgment. In essence, it gives an account of circumstances in which the respondent encountered difficulty with the device in bed, tried to straighten out his leg, some how got his leg under the bed frame and it was in that circumstance that the device was interfered with.

It is important to note that it appears that however the device came to be damaged, the respondent telephoned the electronic monitoring surveillance unit.

There is sufficient evidence to indicate that one distinct possibility is that, contrary to the account given by the respondent, he impulsively and intentionally interfered with the device. Quite properly, Dr Lawrence did not attempt to

reach any conclusion on the circumstance under which the monitor came to be broken in March 2009, but I agree with her observation that the respondent's account of the breaking of the monitor would appear to be unusual. Although Dr Lawrence did not comment further, she observed at paragraph 10.9:

> "however, it would be consistent with his personality and limitations for him to tinker with a device he obviously finds troublesome".

In this case a supervision order was made which included a condition that the respondent not commit an indictable offence. In other cases Judges of this Court have taken the view that the inclusion of such a general condition is inappropriate given the range of matters which might constitute an indictable offence. For instance, wilful damage to property when an individual jumps on the bonnet of a car and damages it, might bespeak lawlessness but may not always be indicative of a course of re-offending that is likely to escalate into serious sexual offending. That said, in this case, there was a condition that the respondent not commit an indictable offence, and the indictable offence alleged here was not simply one of wilful damage to the bonnet of a car. It involved wilful damage to a monitoring device, and that, in my opinion, puts it into a different category to a simple case of wilful damage.

As Dr Lawrence has indicated, one might conclude that the respondent's account of events, whilst unusual, did occur. Another possibility is that he interfered with the monitoring

device in early March 2009 because of his frustrations with the device and his lack of maturity and capacity for reflection as to the consequences of interfering with it. That said, as was submitted by Mr Mumford of counsel on behalf of the respondent, if it be the case that the respondent did wilfully damage the device, soon afterwards he realised the error of his ways and contacted the authorities. This would tend to suggest that he did not embark upon a pre-meditated course of events whereby he intended to abscond. However, the possibility exists that he interfered with it because he stupidly and without adequate reflection thought that he might travel with a relative to Townsville.

The March episode comes against the background of another incident involving alleged interference with the device in September 2008, and that incident places the matter into a different light than one isolated incident of alleged tampering.

The respondent is alleged to have breached one of his conditions by consuming beer in January 2009. The history of compliance with the supervision order is documented in the material that is under Mr Waldin's affidavit. It is helpfully discussed and summarised in Dr Harden's report.

There have been circumstances in which the respondent has come into conflict with those who supervise him. However, he does not have a history of repeated breaches. As I have indicated, there is one alleged breach by consuming alcohol in January

2009. The breach is addressed in the material, particularly an entry on the 5th of January, 2009, where the respondent explained to the authorities the circumstances in which a girlfriend who came over for the night brought some alcohol. He was upset about a nephew's arrest and he decided to have a drink. I would not regard that one episode as indicative of anything other than what appears in that report. There does not appear to have been any other circumstances of use of alcohol.

The alleged breaches are consistent with the immaturity which Mackenzie J observed in November 2007, and the personality traits about which Dr Lawrence and Dr Harden report. He has difficulty in coming to terms with his circumstances and in adopting an attitude of compliance with the terms of the supervision order that has been imposed upon him, and the administration of it by officers who understandably arrive at his home in order to check his compliance.

The respondent notes that Dr Lawrence has reported that the respondent appears to have been compliant with the requirement of abstinence from alcohol and other drugs, and that these would appear to be a major risk factor in relation to recidivism. Reliance is placed upon Dr Lawrence's opinion at paragraph 10.11 of her report that:

> "In my opinion, a second apparent breach of alleged tampering or interference with the monitor, did not necessarily increase the risk of re-offending."

Reliance is also placed upon paragraph 10.12 of Dr Lawrence's report where she says:

> "In my opinion, a breach through the use of alcohol and drugs would be a more significant breach of supervisory orders, and one that could increase the risk of possible re-offending at that time."

The submissions by the respondent note that Dr Harden makes a number of recommendations as to further treatment, but does not make any assessment as to whether the alleged breaches by the respondent are such as to potentially increase the risk of re-offending. Dr Harden, like Dr Lawrence, is of the view that the respondent should be closely monitored by means of a supervision order if he is to be released into the community. It is said on behalf of the respondent that neither Dr Lawrence nor Dr Harden addressed the notion that the alleged contraventions could give rise to a risk of further breaches.

I have already quoted what Dr Lawrence has had to say. She does not in terms say that the alleged breaches do not increase his risk of re-offending, only that they do not *necessarily* increase his risk of re-offending.

Ultimately the respondent's counsel submits that the alleged breach is not of the same character that led to the offending behaviour, nor is it of a type that may give rise to concerns about his conduct escalating into concerning behaviour that

may lead to re-offending sexually and/or violently. The submission is made that the alleged breaches can properly be characterised as trivial, and that in circumstances in which there is a short space of time, some six weeks, between today's application and the final hearing, the extent of the risk must surely be less. Finally it is submitted that the respondent having spent about six weeks in custody already will doubtless have the strongest incentive not to breach any of the conditions of the order.

I am not in a position to make any finding concerning the precise circumstances of the alleged breaches. If the alleged breaches are proven, I would not regard the circumstances as trivial. They are not a trivial breach of the kind that could be imagined in a case, for example, where someone is five minutes late back on a curfew. My conclusion that the alleged breaches, if established, would not amount to trivial breaches does not conclude the matter. The circumstances of alleged breach is consistent, as Dr Lawrence says, with someone whose personality and limitations on him, prompted him on 2 March 2009 to tinker with a device that he obviously found troublesome. The fact that the respondent promptly contacted the authorities tends to indicate that the breach was not one that arose from some premeditated plan to interfere with the device and abscond, although that possibility cannot be excluded. As Dr Lawrence says, it may be that he hoped to travel with his brother who was due to leave for Townsville that morning.

On the present state of the material though, his contacting the authorities seems inconsistent with a premeditated plan to abscond. It indicates someone who may have acted stupidly and impulsively out of frustration, but, having done so, quickly realised the error of his ways.

The protection of the community is the key consideration under the Act, and is an important consideration in deciding whether the circumstances are such as to qualify as exceptional.

As has been said by Dr Lawrence, the alleged breach in this case is not as significant or serious as a breach involving the use of alcohol or drugs, which would be a much more significant breach of supervisory orders, and one that could increase the risk of possible re-offending.

The submission is made by the Attorney-General that exceptional circumstances are not established for three main reasons. The first is that the circumstances need to be such as to take the case outside the ordinary course. Here it is said that the respondent is alleged to have contravened his supervision order and there is nothing to take them outside the ordinary course. Secondly, it is said that there is only six weeks until the matter has to be heard substantively, meaning that the respondent does not have to wait long until the decision is made by the Court on the available material. Thirdly, the submission is that neither of the psychiatrist's reports suggest the recent alleged contraventions are immaterial. It is noted that Dr Harden seems to suggest that

the conduct forms part of a concerning pattern of behaviour by the respondent who sees the supervision restrictions which he sees as an unnecessary intrusion upon him.

I turn to Dr Harden's report. After a detailed discussion of the information and the history of the matter and assessment of risk, Dr Harden at page 19 says:

> "the underlying psychological constructs associated with his prior sexual offending continue to be unknown probably because of a combination of concrete thinking on his part, extreme minimisation and denial and disavow of sexual content and sexual matters."

Dr Harden later says that the respondent:

> "... maintains that he has a strong desire not to offend again, however his planning around managing situations of high risk is in general superficial or non-existent, and he has continuously struggled against the need for significant restrictions on his lifestyle when in the community in order to decrease the risk of future offences. This has brought him into conflict with the monitoring authorities to the extent that he has allegedly breached a supervision order and has been reincarcerated."

Dr Harden opines that on the basis of the tests which he administered and his professional judgment, the respondent has a high risk of sexual re-offence. He says that if he were to re-offend sexually or violently based on his past behaviour, he would most likely be impulsive and opportunistic, so victims would be hard to predict. Dr Harden is of the view that this risk would be increased if the respondent were to be released from custody without a stringent supervision order being continued, and that attempts to reduce the risk should take the form of continued close monitoring and continued attempts to address ongoing criminogenic needs via appropriate sexual offender treatment involvement.

In conclusion, at page 21 Dr Harden says the respondent has,

> "ongoing problems with being compliant with restrictions required of him in the community, and these difficulties are likely to continue".

The respondent's history which led to his incarceration and the making of the supervision order, included an incident of digital rape of a two year old. This incident was not preceded by any outward warning signs which places this in a different category of case to certain cases in which less opportunistic and more planned offences occur which permit authorities to counter such planning.

Accordingly, the picture of risk that emerges is one in which the respondent, unless he matures and addresses his past offending behaviour, is at risk of re-offending unless a

stringent supervision order is in place. If a stringent supervision order is not complied with, there is the risk that he will undertake acts of an impulsive and opportunistic kind.

The critical issue is whether exceptional circumstances have been established in this matter. As I have said, that requires consideration of the nature of the alleged breach, whether there is a risk of further breaches and the possible relationship between any such breach and the risk of serious sexual re-offending. It also includes consideration of the duration of any risk.

I proceed on the basis I have indicated earlier, that although it is possible that the episode in early March involved accidental damage to the device, it is more likely than not that the device was interfered with deliberately. That said, as I have indicated, the respondent soon realised his. It is likely that his behaviour on that occasion (and if it be established on the occasion in September), was behaviour which was consistent with his personality and a preparedness to interfere with a device that he found troublesome without adequate reflection upon the consequences. Although it is not necessary to resist an application of this kind for the Attorney-General to show that there has been an elevation of risk, it must be said that neither Dr Lawrence nor Dr Hardin say that the alleged breaches have increased the level of risk.

I also accept Dr Lawrence's opinion that a breach through the use of alcohol and drugs would be a more significant breach of supervisory orders, and one that could increase the risk of possible re-offending at that time. Although the facts of this case are different to those in *Francis* the essential principles are the same. What is required is a consideration of whether the present circumstances are unusual or not normal, and that requires an assessment of the extent of the risk, and in particular the extent of the risk of further breaches and re-offending over the next month.

The Judge who hears the s 22 application will make an informed assessment of the level of risk that will exist if a supervision order of the kind made by Mackenzie J continues for a period of years. My task is to assess the extent of risk over a period of six weeks which obviously and necessarily poses a reduced risk. It also is incumbent upon me to consider whether it is likely in the circumstances that the respondent will have the insight and incentive not to breach any of the conditions of his order over the next six weeks.

The respondent has been incarcerated since he was taken into custody in early March, that is a period of about six weeks. The material indicates to me that he is someone with intellectual deficits. It has been said that he has borderline to low average intelligence. However it seems to me likely that even someone with those intellectual limitations who has been incarcerated for six weeks, must have

reflected upon what caused his incarceration and have an incentive not to breach the supervision order in the same way again. His incarceration in recent weeks has taken him away from contact with a female with whom he's established a relationship, and surely has reintroduced him to the problems associated with incarceration.

I accept that his past conduct has shown, both through his immaturity and other factors, that he has difficulty in coming to terms with compliance with the orders, and that point is well made by Dr Harden. However, it seems to me that exceptional circumstances are shown in this case because of the limited risk of further breaches and re-offending. In circumstances in which the breaches themselves are not said to necessarily increase his risk of re-offending, I consider that exceptional circumstances have been shown. It seems likely that the respondent will be subject to close supervision between now and the hearing at the end of May, and that further reduces the risk of re-offending.

Needless to say over the next six weeks the respondent's attitude towards compliance with these orders will be closely monitored. If over that time he continues to show the kind of indifference which he has in the past to the need for supervision, and if he was so stupid as to interfere with the monitoring device, that may be decisive in the Court's determination of matters at the end of May. My task is not to predict what the outcome of that hearing will be, even if he does not further breach the supervision order, but I consider

that it is likely that the respondent has learned a lesson from his last six weeks in incarceration and will have a strong incentive not to breach any conditions of the supervision order over the next six weeks.

I conclude that his alleged breach in early March 2009 was not a precursor to further sexual re-offending, as serious as that breach may be. The alleged breach is not of the same character as the kind of offending behaviour that led to the supervision order. It is a matter of obvious concern. However, in all the circumstances I consider that his risk of re-offending over the period of six weeks is one that is acceptable in all the circumstances for that period. In circumstances where he has not breached the order by the consumption of alcohol or drugs, there is an acceptable risk. In the circumstances, although this is not an alleged trivial breach, he has established exceptional circumstances.

Accordingly, I order pursuant to s 21(6) of the Act that the respondent be released subject to the terms of the supervision order made by Mackenzie J on 22 November 2007.
