[2009] QSC 217

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

P LYONS J

No 7354 of 2009

ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND	Applicant
and	
CHRISTOPHER EDMONSTON FERNEAUZ LUMLEY	Respondent

BRISBANE

..DATE 22/07/2009

ORDER

HIS HONOUR: On the 4th of April 2003, the Respondent was convicted of one count of rape and one count of torture. He was sentenced to terms of imprisonment of eight years and five years, to be served concurrently. His full-time discharge date is 24 September of this year.

The Attorney-General has made an application under section 8 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* seeking an order setting a date of hearing and a consequential order relating to examination of the Respondent by two psychiatrists.

Section 8(1) provides that if the Court is satisfied there are reasonable grounds for believing that the Respondent is a serious danger to the community in the absence of a Division 3 order under that Act, the Court must set a date for the hearing of the application for such an order.

A Division 3 order is an order either that the person, the subject of the order, be detained in custody for an indefinite term for control, care or treatment; or that that person be released from custody, subject to the requirements the Court considers appropriate: see section 13(5).

Section 8 does not define the expression "serious danger to the community." In the context of the Act, reference should be made to section 13, which regulates the hearing contemplated by section 8. Section 13(2) provides that a prisoner is a serious danger to the community if there is an

unacceptable risk that the prisoner will commit a serious sexual offence either if the prisoner is released from custody or if the prisoner is released from custody without a supervision order being made. A supervision order is one of the two kinds of orders referred to in section 13(5), being an order that the prisoner be released from custody, subject to the requirements the Court considers appropriate.

The provisions of section 8 were considered by Atkinson J in *Attorney-General of Queensland v Fardon* [2003] QSC 331 where her Honour, at paragraph 33, expressed the view that, on an application under section 8, the Court is not required to have the belief set out in the section, but only to determine that there are reasonable grounds for the Court which hears the final application to have that belief. Her Honour also noted the similarity between an application under section 8 and committal proceedings.

However, in *Attorney-General of Queensland v Nash* [2003] QSC 377, P D McMurdo J noted with respect to section 8 that a finding under section (1) has substantial consequences for a prisoner that subjects him to a further and perhaps extensive hearing at which he is at risk of orders which would or could affect his liberty: see para 12.

For that reason, Mr Allen, who appears for the Respondent, submits that nothing less than the test of high probability set out in section 13(3) should be applied in determining whether the test set out in section 8(1) is satisfied.

The test set out in section 13(3) relates to an application for Division 3 orders. The orders can be made only if the Court is satisfied that the prisoner is a serious danger to the community in the absence of such orders; and sub-section (3) requires that the Court may decide that it is so satisfied only if it is satisfied by acceptable, cogent evidence and to a high degree of probability that the evidence is of sufficient weight to justify the decision.

It is difficult, in my view, literally, to apply section 13(3) to an application made under section 8(1). A hearing under section 8(1) is preliminary in nature. On the view adopted by Atkinson J, what one attempts to do on an application under section 8 is form a view about the final hearing and the sufficiency of grounds for the belief required to be achieved then. However, it is to be done at a time prior to the obtaining of the reports envisaged by section 8(2), which section 13(4) specifically requires the Court to consider on the hearing of an application under section 13.

Having said that, I accept that because of the consequences of reaching the conclusion identified in section 8(1) for the Respondent, it is not a view to which the Court should come lightly.

There are, in my view, a number of matters revealed by the evidence potentially relevant to the application under section 8. I will first mention the following:

(a) the Respondent has a narcissistic personality disorder;

(b) the Respondent has, in the past, suffered a major depressive episode which is now in remission;

(c) the Respondent has been diagnosed as suffering from a generalised anxiety disorder.

Professor Grant is a psychiatrist employed by Queensland Health as the director of the Queensland Forensic Mental Health Services. He has provided a report in relation to the Respondent. In respect of the three matters mentioned above, he has expressed the view that these matters are not of particular significance when considering the risk that the Respondent might re-offend.

There is in the material before me the results of an assessment referred to as "Static-99" carried out on the 12th of May, 2006, by a Ms Sally McGuire, which assesses the risk of the Respondent's re-offending as moderate to high.

Mr Allen points out that a notation in the results states that "The purpose of the administration of this test is not as a measure of an offender's overall risk of sexual recidivism, but is for program allocation reasons only". He also notes that Professor Grant administered a “Static-99” test in July 2008, the result of which was to assess the risk of the Respondent's re-offending as being at the low or perhaps low to moderate level. He also points out that the qualifications

of Ms McGuire are not identified and it may be that she is a psychologist, not as well qualified as Professor Grant.

It seems to me, therefore, that not a great deal of weight should be put on the results from the “Static-99” test recorded by Ms McGuire.

Having said those things, the following matters remain for consideration:

(a) The offence of which the Respondent was convicted was a sexual offence involving a significant level of violence with significant adverse consequences for the victim;

(b) There has been no suggestion of any remorse on the part of the Respondent;

(c) The Respondent has, in his time in prison, refused to undergo treatment;

(d) Professor Grant assesses the Respondent's risk of re-offending as being mild to moderate.

It is to be noted that Professor Grant's conclusion refers to some other matters relating to the Respondent. The offences for which the Respondent was convicted were the result of an interest in bondage and discipline in connection with sexual activity. Professor Grant notes that the Respondent maintains a prominent interest in bondage and discipline.

Professor Grant also notes that, in the past, alcohol abuse has affected the Respondent's conduct. He considers that the

Respondent, on release from prison, may well again be prone to abusing alcohol, which would produce disinhibition and increase the risk of re-offending. Professor Grant also notes that it is likely that the Respondent will be very vulnerable to destabilising situations when he leaves prison. Those matters, however, are no doubt reflected in Professor Grant's overall assessment of the risk of re-offending.

The question which remains is whether I am satisfied there are reasonable grounds for believing that there is an unacceptable risk that, if the Respondent is released from custody without a supervision order, he would commit a serious sexual offence.

As I have said, this is not a conclusion to which I should come lightly. Taking together the matters that I have identified above, and notwithstanding the helpful submissions advanced by Mr Allen, I am so satisfied.

I order accordingly.
