

SUPREME COURT OF QUEENSLAND

CITATION: *A-G for the State of Qld v Fardon* [2011] QSC 18

PARTIES: **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND**
(applicant)
v
ROBERT JOHN FARDON
(respondent)

FILE NO/S: BS5346/03

DIVISION: Trial

PROCEEDING: Application

DELIVERED ON: 16 February 2011

DELIVERED AT: Supreme Court at Brisbane

HEARING DATE: 11 February 2011

JUDGE: Ann Lyons J

ORDER: **1. The application pursuant to section 21(4) of the *Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)* is refused.**

CATCHWORDS: CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – OTHER MATTERS – where applicant released from prison under a Supervision Order – where applicant charged with rape while under that Supervision Order – where applicant found guilty in the District Court – where applicant subsequently acquitted by the Court of Appeal – where a contravention application brought by the respondent is yet to be heard – where by this application the applicant seeks a dismissal of the contravention application or alternatively an order that he be released pending determination of the application – whether the applicant’s detention is not justified because exceptional circumstances exist pursuant to s 21(4) *Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)*.
Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)

COUNSEL: D O’Gorman SC with M Nolan for the applicant
P Davis SC with A Scott for the respondent

SOLICITORS: Patrick Murphy Solicitor for the applicant
Crown Solicitor for the respondent

ANN LYONS J:

Background to this application

- [1] Robert John Fardon is currently 62 years old. He has been in prison for much of his adult life for sexual offences. On 8 November 2006, was released subject to a Supervision Order pursuant to the *Dangerous Prisoners (Sexual Offenders) Act* (“DPSOA”). That order, which was amended on 19 October 2007, contained 38 conditions which included the following:

“(xviii)Not go unsupervised to a place that houses children, intellectually disabled persons, mentally ill persons or persons with drug misuse difficulties.
- [2] On 3 April 2008 a 61 year old intellectually impaired woman made a complaint of rape against Mr Fardon and on that date an arrest warrant was issued alleging there were reasonable grounds for suspecting that Mr Fardon had contravened the Supervision Order.
- [3] On 4 April 2008 the Attorney General made an application under s 22 of the Act that the Supervision Order be rescinded and that he be detained in custody for an indefinite period. On that date orders were made adjourning the application to a date to be fixed. Further orders were made that Mr Fardon be detained in custody until the final determination of the contravention proceedings.
- [4] On 14 May 2010 Mr Fardon was found guilty of rape following a two day trial in the District Court in Southport and sentenced to ten years imprisonment. Mr Fardon appealed against his sentence and conviction and the appeal was heard by the Court of Appeal on 4 November 2010.
- [5] On 12 November 2010 the Court of Appeal allowed the appeal and ordered that the conviction be set aside and a verdict of acquittal entered. Whilst it was clear that Mr Fardon and the complainant had engaged in sexual intercourse and that the complainant had some degree of intellectual disability, the complainant’s evidence was the subject to criticism by the Court of Appeal because there was a lack of coherence in the narratives she provided to police at interview.

This application

- [6] On 25 November 2010 Mr Fardon filed the present application seeking a dismissal of the contravention application filed on 4 April 2008 or alternatively an order that he be released pending determination of the application.
- [7] The current basis of the contravention application is that he breached condition (xviii) and went to the home of an intellectually disabled woman without supervision as the condition required.
- [8] On 2 December 2010 an order was made that the contravention hearing pursuant to s 22 of the Act be adjourned to a date to be fixed. It was further ordered that Mr Fardon undergo examination by two psychiatrists pursuant to s 22 (3)(b) of the Act. Orders were also made that the psychiatrists were to prepare independent reports in accordance with s 11 of the Act.

The reports of the psychiatrists

- [9] Those two psychiatrists appointed to prepare reports were Dr Donald Grant and Dr Scott Harden. Dr Harden's report is dated 4 February 2011 and Dr Grant's report is dated 17 January 2011

Dr Grant's report

- [10] In his 17 January 2011 report, Dr Grant assesses Mr Fardon:

- (a) As a high risk of reoffending according to **STATIC-99**.
- (b) As having very significant psychopathic personality traits according to the **HARE PCLR**.
- (c) As a high risk of violent reoffending (both sexual and non-sexual) according to the **HCR-20**.
- (d) As a moderate to high risk of future sexual violence according to the **RSVP**, which might be reduced by the application of an order which monitors relationships, mandated abstinences from alcohol and drugs and provided social support and rehabilitation.

- [11] Dr Grant also says in relation to the current contravention:

'If Mr Fardon's current charge regarding contravention of his supervision order is the only criterion on which to assess any change in risk, then it would be difficult to argue that his risk has changed since my last assessment. The context of that alleged breach was that he visited a woman he had known for 45 years at her private residence as part of an ongoing sexual relationship with her. Whilst he knew her to have limited literacy and to be somewhat 'slow' he did not regard her as being an intellectually handicapped person and did not regard her home as relevant to his supervision order criteria. However, he freely admits that he did not really think about the particular clause, the contravention of which he is currently charged. His attitude to the supervision order in general was clearly somewhat contemptuous and his behaviour in general since release from prison has not been indicative of good insight, good behaviour control or of good potential to adjust to life outside prison. Rather, his behaviour has been imbued with his experience of prison culture and negative attitudes to authority. This is consistent with his very long prison experience, incarceration for much of adult life and also consistent with his psychopathic personality traits.

In his relationship with [] Mr Fardon has demonstrated some ongoing difficulties respecting the rights of women to not participate in particular sexual activities if they so choose. There was an evident problem with him respecting boundaries and the rights of his sexual partner in terms of her sexual preferences. Whilst he has not been convicted of rape or any other new sexual offence, his attitudes in regard to anal sex within the relationship with [] does indicate a lack of concern for her preferences. This does raise some concerns about the possibility of any future sexual offending within a relationship.'

42. Dr Grant expresses doubts about Mr Fardon's assertions that he currently lacks interest in sexual behaviour or in any future relationships. He reports that:

'In my opinion the risk of re-offending in Mr Fardon's case arises from his personality disorder/psychopathy along with the effects of long term institutionalization to prison life and culture rather than arising from any specific sexual disorder or paraphilia.

Mr Fardon's behaviour on his supervision order whilst in the community indicates that there is a high likelihood of future contraventions of any supervision order and his behaviour undermines confidence that he can be safely managed in the community. He admits that he has paid scant attention to the requirements of his supervision order in the past, but rather has approached the order with the attitude derived from his prison life; that is, how he can get around the requirements of his supervision order or escape detection from breaches rather than how he can live productively with the prescribed conditions of the order. The breaches of the order which he has committed indicate a general lack of respect for the order rather than seeking specifically to sexually re-offend.

...

In my opinion the risks of future contraventions of a supervision order are high. The risks are higher for general offending rather than for sexually offending. Whether or not he should be released on a supervision order will depend on the court's assessment in regard to the severity of the alleged contravention and its significance for re-offending. In my opinion the precise wording of the specific alleged contravention and the clause allegedly breached does not provide strong evidence for increased risk of future re-offending. Of more concern, however, would be Mr Fardon's reported lack of concern for his sexual partner's wishes or preferences which would be consistent with the egocentric attitudes of someone suffering from psychopathy rather than being indicative of any sexual disorder.

Overall my risk assessment would be that Mr Fardon represented a **moderate to high risk of re-offending, with non-sexual re-offending being more likely than sexual re-offending**. I believe there would be a **high risk of contravention of any future supervision order** arising from Mr Fardon's attitudes to authority and control, along with his institutionalization and difficulties adjusting to life in the community. Given the high risk of breaching a supervision order I consider the likelihood of him returning to incarceration if released would be high and there must be considerable doubt therefore about the prospect of successful management in the community under such a supervision order."

Dr Harden's report

- [12] It is clear that Dr Harden agrees that there is no compelling evidence that Mr Fardon suffers from any deviant sexual interest or paraphilia. He also doubts Mr Fardon's denial of any interest in sexual matters since incarcerated. Dr Harden also considers that Mr Fardon meets a diagnosis of Antisocial Personality Disorder under the DSM

IV TR criteria and that he also has a psychopathic personality with a strong history of polysubstance abuse.

- [13] Dr Harden considers that Mr Fardon's sexual offences derive from his antisocial personality and attitudes which lead to him seeing no difficulty, with the use of force or coercion to obtain sexual gratification if he wished and little empathy for the harm this might cause other people. Dr Harden also considers that Mr Fardon's risk of sexual re-offence is high but that there are some mitigating factors in that there should be a gradual lessening of his antisocial personality characteristics with time and with the ability to reflect and with some empathy which develops with increasing age.
- [14] Dr Harden's conclusion was that he considered Mr Fardon was a moderate to high risk of re-offending sexually within the community with no constraints on his behaviour and that the risk could be decreased to low to moderate if he were released with stringent supervision particularly if he maintained his abstinence from alcohol and drug use. Dr Harden recommended close monitoring in the community by means of a Supervision Order. He stated;

‘To summarise it is my opinion that he is at **moderate to high risk of reoffending sexually** in the community with no constraints on his behaviour. If he were to reoffend based on his past behaviour it would most likely be in the context of substance intoxication and would be opportunistic rather than planned.

It is my opinion that this risk can be decreased to **low to moderate** if he were to be released from custody with a stringent supervision order being continued particularly if this maintained his abstinence from alcohol and drug use.

Recommendations

I would recommend that he be closely monitored in the community by means of a supervision order.

I would recommend that he continue to be required to be abstinent from alcohol and drug use and undergo an appropriate random testing regime.

I would recommend that he engage in individual combined sex offender treatment and anxiety treatment with an appropriate skilled psychological therapist.

I would recommend that he be provided with appropriate practical supports to aid and support his transition into the community if he were released on a supervision order.’

Relevant legislation

- [15] If a released prisoner is brought before the court under a warrant issued under s 20 of the Act, s 21 of the Act provides as follows:

’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 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 all of the requirements under section 16(1) if the order does not already include all of those requirements; and
 - (b) may amend the existing order to include any other requirements the court considers appropriate to ensure adequate protection of the community.” (Emphasis added)

Do exceptional circumstances exist?

- [16] Counsel for Mr Fardon submits that the Court should order the release of the applicant pending the final decision because his detention is “not justified” because exceptional circumstances exist as required by s 21(4) of the Act.
- [17] Counsel for Mr Fardon submits that the requirement of exceptional circumstances does not necessitate that his circumstances be unique or unprecedented but they must be more than regularly or routinely or normally encountered.
- [18] Counsel submits that the exceptional circumstances in this case are as follows.
- (a) The respondent does not concede that the complainant is an ‘intellectually disabled person’.
 - (b) Even if there has been a breach of the Supervision Order, the circumstances pertaining to that breach means that it is a technical and/or minor technical breach;

- (c) The alleged breach must be viewed in the light of the alleged 'intellectually disabled person' was in a relationship with the respondent and has been known to the respondent for some 50 years, which casts doubt on whether the applicant has contravened his Supervision Order;
- (d) The contravention case is weak.
- (e) The respondent has already spent some 34 months in custody since the applicant's Application was filed;
- (f) The commencement date for the hearing of the Application filed by the applicant on 4 April 2008 is June 2011;
- (g) The respondent has not been convicted of any criminal offence while the subject of the Supervision Order;
- (h) The respondent is now a 62 year old man;
- (j) Dr Grant states that there are no programs within the prison environment which are likely to assist him.
- (j) The opinion of Dr Scott Harden is that the risk of the respondent reoffending sexually is merely low to moderate if he is released from custody subject to a 'stringent' Supervision Order, and close monitoring in the community.
- (k) The Supervision Order relating to the respondent that was in place prior to 4 April 2008 constitutes a 'stringent' Supervision Order;
- (l) While Dr Grant's overall risk assessment is that the risk of future contraventions of a supervision order are high, his opinion is somewhat equivocal in that he also states:
 - (i) The risk assessment instruments used by Dr Grant '...should be interpreted with caution as part of an overall risk assessment';
 - (ii) If the respondent's current 'charge' regarding contraventions of his supervision order is the only criterion on which to assess any change on risk, then it would be difficult to argue that his risk has changed since Dr Grant's last assessment;
 - (iii) The risk of the respondent reoffending arises from his personality disorder/psychopathy along with the effects of long term institutionalisation to prison life and culture '...rather than arising from any specific sexual disorder or paraphilia';
 - (iv) The respondent does not currently suffer from any psychiatric disorder requiring specific treatment;

- (v) The respondent's risk of reoffending are higher for general offending rather than for sexual offending;
 - (vi) Whether the respondent should be released on a supervision order will depend on the court's assessment in regard to the severity of the alleged contravention and its significance for reoffending;
 - (vii) The precise wording of the specific alleged contravention of the Supervision Order and the clause allegedly breached does not provide strong evidence for increased risk of future reoffending;
- (m) The terms of the Supervision Order are such that the respondent will be closely supervised and monitored between the present and the proceedings commencing on 28 June 2011;
 - (n) The respondent has every reason to adhere to the terms of the Supervision Order because if he does not do so his chances of succeeding in the proceedings on 28 June 2011 will be considerably less;
 - (o) There are no programs within the prison environment that are likely to assist the respondent.

[19] Counsel for Mr Fardon also submitted that there was no evidence that Mr Fardon was intoxicated at the time the alleged offence took place and that whilst there are no current arrangements in place for his accommodation if he were released he would be required to live at a place approved by a Corrective Services Officer. Furthermore the affidavit material indicates that if he were released he would be accommodated at the Wacol precinct.

[20] Counsel also indicated that Mr Fardon was prepared to adhere to any conditions of a Supervision Order including those conditions which were contained in the Order in force as at 3 April 2008. Counsel submits that a combination of all of the circumstances indicates that they are not regularly or routinely or normally encountered and therefore constitutes exceptional circumstances under the Act.

Should Mr Fardon be released pending final determination of the application?

[21] Mr Fardon is currently 62 years of age. He has a criminal history involving serious sexual offending over a 44 year period. The 1978 and 1988 offences were violent sexual offences.

[22] I accept that there are some unusual aspects to this case. Mr Fardon has been in custody since April 2008 and he has continued to be held in custody since the decision of the Court of Appeal on 12 November 2010 which is some four months ago. The final hearing may not occur for another four months.

[23] I accept that there is strong evidence that Mr Fardon does not currently suffer from any psychiatric disorder requiring specific treatment. I also accept that there are no programs within the prison environment which are likely to assist him. It is also clear that Mr Fardon has not been convicted of any criminal offence whilst subject to the Supervision Order.

- [24] It is uncontroversial however that Mr Fardon has strong characteristics of an Antisocial Personality Disorder together with indications of psychopathic personality traits. It would also seem to me from a reading of the two psychiatrists' reports that there is a serious contest as to whether Mr Fardon can ever really be appropriately supervised in the community.
- [25] Dr Harden in his report suggests that Mr Fardon could be supervised subject to stringent conditions. However on my reading of Dr Grant's report he raises serious issues as to whether there is any prospect of Mr Fardon being successfully managed in the community under a Supervision Order. Dr Grant's view is that Mr Fardon's attitude to the Supervision Order has been somewhat contemptuous and that his behaviour since release has not been indicative of good insight, good behavioural control or a potential to adjust to life outside prison.
- [26] Furthermore Dr Grant considers that Mr Fardon's approach to Supervision Orders is about how he can get around the requirements of his Supervision Order or escape detection from breaches rather than how he can live productively with the prescribed conditions of the Order.
- [27] The objects of the Act are to provide for the continued detention in custody or the supervised release of a particular class of prisoner "to ensure adequate protection of the community" and to provide continuing control, care or treatment to facilitate rehabilitation of the particular class of prisoner.
- [28] Section 21(4) provides that 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.
- [29] In my view given the clear requirements in the Act, that the adequate protection of the community is one of the objects of the legislation, a determination as to whether a case of 'exceptional circumstances' exists would necessarily involve an examination as to whether, pending the final determination of the Attorney General's application, the adequate protection of the community was able to be ensured by the conditions in the Supervision Order.
- [30] I am not able to be so satisfied given Dr Grant's considerable concern about the prospect of Mr Fardon being able to be successfully managed in the community given his attitude to such orders is how he can get around the requirements of the order or escape detection from breaches rather than how he can live with the conditions set out in the Supervision Order. I consider that Mr Fardon has not, at this point in time, established that he could be appropriately managed in the community subject to a Supervision Order given that unresolved controversy. That controversy will be determined at the final hearing but there has not as yet been a full exploration of all those issues raised by Dr Grant in his report. I therefore consider that pending the determination of that controversy, Mr Fardon has not satisfied me that he has fulfilled the onus on him to establish that exceptional circumstances exist.
- [31] I therefore do not consider that Mr Fardon has satisfied me, on the balance of probabilities, that his continued detention in custody pending the final determination

is not justified because exceptional circumstances exist. I consider therefore that his application pursuant to s 21(4) the application should be refused.

[32] I consider that there should be orders in relation to directions for the future conduct of the proceedings in particular in relation to the provision of a joint report and the serving of the affidavit material.

[33] I will hear from Counsel as to the form of those orders.