SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v Fardon* [2011] QCA 111
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **ROBERT JOHN FARDON** (respondent)
FILE NO/S:	Appeal No 4240 of 2011 SC No 5346 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Application for Stay of Execution
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	3 June 2011
DELIVERED AT:	Brisbane
HEARING DATE:	30 May 2011
JUDGE:	Chesterman JA
ORDER:	**Order that the order of Dick AJ made on 20 May 2011 not take effect until the determination of appeal 4240 of 2011, or earlier order**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – STAY OF PROCEEDINGS – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL – where the applicant has appealed against the order of Dick AJ releasing the respondent from custody subject to a supervision order – where the applicant claims the community can only be adequately protected against the risk of the respondent re-offending by being detained in custody – where the applicant seeks a stay of the order of Dick AJ made on 20 May 2011 until the appeal is heard – whether a stay of the order should be granted *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 3, Part 2 Div 3, s 17, s 22 *Uniform Civil Procedure Rules* 1999 (Qld), r 761(2) *Alexander v Cambridge Credit Corporation Ltd* (1985) 2 NSWLR 685, applied *Attorney-General v Francis* [2007] 1 Qd R 396; [2006] QCA 324, considered *Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd* [2008] 2 Qd R 453; [2008] QCA 322, applied

Fardon v Attorney-General (Qld) (2004) 223 CLR 575; [2004] HCA 46, considered
Norbis v Norbis (1986) 161 CLR 513; [1986] HCA 17, considered

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

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

[1] **CHESTERMAN JA:** On 30 June 1989 the respondent was convicted of rape, sodomy and assault occasioning bodily harm, and sentenced to 14 years' imprisonment. The offences were committed on 4 October 1988, only a few months after he had been released from prison after serving a sentence of 13 years for offences of rape, indecent dealing and unlawful wounding. In June 2003, shortly before the expiration of the 14 year term of imprisonment the Attorney-General applied for orders pursuant to the *Dangerous Prisoners (Sexual Offenders) Act* 2003 ("the Act") that the respondent be detained in custody for an indefinite term for care, control and treatment.

[2] By s 3 of the Act its objects are:

> "(a) to provide for the continued detention in custody or supervised release of a particular class of prisoner to ensure adequate protection of the community; and
>
> (b) to provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation."

[3] Gleeson CJ explained the purpose and operation of the Act in *Fardon v Attorney-General* (Qld) (2004) 223 CLR 575 at 587-8:

> "… the Supreme Court may order, in respect of a prisoner serving imprisonment for a serious sexual offence, that the prisoner be detained in custody for an indefinite term, or that, upon release, the prisoner be subject to continuing supervision. Any continuing detention order is subject to periodic review. The Court may make such an order only if satisfied that the person would constitute a serious danger to the community, the danger taking the form of "an unacceptable risk that the prisoner [would] commit a serious sexual offence" (s 13(2)). The onus of establishing the serious danger to the community rests on the Attorney-General. It can only be discharged by acceptable, cogent evidence which satisfies the Court to a high degree of probability (s 13(3)). Detailed reasons must be given for any order (s 17). There is an appeal to the Court of Appeal. Provision for interim orders is made (s 8)."

[4] On 6 November 2003 an order was made that the respondent be detained in custody for an indefinite term for control, care and treatment. The first annual review of the order occurred in accordance with the Act on 11 May 2005 when the order of 6 November 2003 was renewed. The second annual review was concluded on 8 November 2006 when the continuing detention order made on 6 November 2003

was rescinded and replaced by an order that the respondent be released subject to a supervision order. An appeal against that order was dismissed on 4 December 2006.

[5] In May and July 2007 the respondent contravened some of the conditions of the supervision order. He was returned briefly to prison but again released on the supervision order in October 2007.

[6] In April 2008 a 61 year old woman with an intellectual disability complained that the respondent had raped her. The complaint was of an act of sodomy committed during a sustained bout of otherwise consensual sexual intercourse. The couple had known each other for many years. The respondent was arrested and returned to prison. On 14 May 2010 he was convicted of rape and sentenced to a lengthy term of imprisonment. On 12 November 2010 the conviction was set aside and a verdict of acquittal entered on the basis that there was no coherent evidence to support the conviction.

[7] The respondent was not released from custody after his successful appeal. Instead he was detained pending the determination of proceedings against him for contraventions of the supervision order. They occurred in the course of the events which led to the allegation of rape. The conditions of the supervision which were contravened were those forbidding him to attend premises licensed to serve alcohol without the consent of a Corrective Services Officer, and of going unsupervised to the house of an intellectually disabled person.

[8] Section 22 of the Act applies if the court is satisfied that a released prisoner has contravened a requirement of his supervision order. In that case the court must rescind the supervision order and order the prisoner's continuing detention unless the prisoner satisfies the court that the community can be adequately protected, despite the contravention. If the prisoner does satisfy the court that the community can be adequately protected without his continuing detention the supervision order pursuant to which he is released must contain requirements which the court considers appropriate to ensure the adequate protection of the community, and the prisoner's rehabilitation, care or treatment.

[9] On 25 November 2010 the respondent applied for the dismissal of the contravention proceeding or, alternatively, for an order that he be released pending the determination of those proceedings. His application was unsuccessful and he remained in custody. The contravention proceedings brought by the Attorney-General eventually came on for hearing on 20 May 2011 before a judge of the Trial Division who found that the contraventions alleged had been proved, and that they were not trivial in nature, but was satisfied that the adequate protection of the community could be ensured by the respondent being released from custody subject to a supervision order. The order made is onerous in its term and imposes far reaching restrictions on the respondent's freedom and independence.

[10] The Attorney-General has appealed against the order releasing the respondent subject to supervision. He contends that the community can only be adequately protected against the risk that the respondent might commit another serious sexual offence by being detained in custody. The Attorney-General has separately applied for a stay of the primary judgment, releasing the respondent on supervision, pending the hearing of his appeal.

[11] The application for the stay was brought pursuant to s 41 of the Act. That section does not apply to an appeal against the kind of order made by the primary judge. Rule 761(2) of the *UCPR* is, however, a sufficient source of power for the Court to make the order the Attorney-General asks for. The articulation of the principles on which the court should act to determine whether to stay an order that a prisoner, to whom Part 2 Div 3 of the Act applies, should be released from custody subject to a supervision order is more difficult. The Act says nothing on the topic. I was not referred to any case in which the point has been considered.

[12] It is obvious that the case is very different from those involving claims for civil remedies with respect to which the courts have developed principles for determining whether execution of a judgment should be stayed pending appeal. Nevertheless some of the statements in those cases afford guidance as to the appropriate outcome of this application.

[13] Keane JA pointed out in *Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd* [2008] 2 Qd R 453 at 455:

> "… it will not be appropriate to grant a stay unless a sufficient basis is shown to outweigh the considerations that judgments of the Trial Division should not be treated as merely provisional, and that a successful party in litigation is entitled to the fruits of its judgment. Generally speaking, courts should not be disposed to delay the enforcement of court orders. The fundamental justification for staying judicial orders pending appeal is to ensure that the orders which might ultimately be made by the courts are fully effective … ."

[14] Two principles commonly resorted to on stay applications are also relevant.

> "The first is that where there is a risk that the appeal will prove abortive if the appellant succeeds and a stay is not granted, courts will normally exercise their discretion in favour of granting a stay … . Secondly, although courts approaching applications for a stay will not generally speculate about the appellant's prospects of success, given that argument concerning the substance of the appeal is typically and necessarily attenuated, this does not prevent them … making some preliminary assessment about whether the appellant has an arguable case."

The passage is from *Alexander v Cambridge Credit Corporation Ltd* (1985) 2 NSWLR 685 at 695.

[15] Applying these criteria to the present application the result is that the respondent's release on supervision should not be delayed pending appeal unless the applicant shows that his appeal is arguable on substantial grounds *and that* the appellant may well lose the benefit of a successful appeal if the primary judgment is not stayed. In applications under the Act the Attorney-General is only likely to lose the benefit of a successful appeal if the prisoner commits a serious sexual offence in the period between judgment at first instance and on appeal. If that should happen the community would not have been adequately protected and the means of ensuring that protection will have been lost.

[16] The magnitude of the risk that a prisoner might commit a serious sexual offence before an appeal against his release on supervision can be heard is therefore the critical factor on an application for a stay of judgment.

[17] Also relevant is the consideration that the respondent has the benefit of a judgment ordering his release on supervision made after a contested hearing in which all the relevant evidence the parties wished to adduce was tendered. While the order severely limits the respondent's liberty and independence of living, he prefers that limited freedom to incarceration. In addition the principle of individual liberty, of even the meanest citizen, is basic and important in a democratic society underpinned by the rule of law, and is not to be taken away without good cause.

[18] The determination of the application for the stay must balance these competing considerations. The greater the risk the less important is the right to freedom. The converse is true.

[19] Mr O'Gorman SC who appeared for the respondent conceded that it is fairly arguable that the primary judgment is wrong. However, the nature of the determination required by the Act poses difficulties for an appeal. This Court pointed out in *Attorney-General v Francis* [2007] 1 Qd R 396 at 402, citing *Norbis v Norbis* (1986) 161 CLR 513 at 518-9:

> "[34] It is to be emphasised here that the primary judge's assessment "call[s] for value judgments in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right". It follows that it would be wrong for:
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> > "a court of appeal to set aside a judgment at first instance merely because there exists just such a difference of opinion between the judges on appeal and the judge at first instance. In conformity with the dictates of principled decision-making, it would be wrong to determine the parties' rights by reference to a mere preference for a different result over that favoured by the judge at first instance, in the absence of error on his part. According to our conception of the appellate process, the existence of an error, whether of law or fact, on the part of the court at first instance is an indispensable condition of a successful appeal." (Footnotes omitted)

[20] Orders made pursuant to s 22 of the Act are predicated upon it having been previously found that the prisoner is a serious danger to the community because of an unacceptable risk that he will commit a serious sexual offence. Against that background the court can only release the prisoner on a supervision order if satisfied that the order will provide adequate protection to the community. These terms, "adequate protection", and "unacceptable risk" are necessarily imprecise. The assessment of the risk that a prisoner will commit a sexual offence, and the determination of what is unacceptable by way of risk and what is adequate protection call for a value judgment formed upon inexact data and by reference to imprecise terms. These are the sorts of judgments which appellate courts have traditionally been reluctant to overturn.

[21] In practical terms, in order to justify the stay, the Attorney-General must demonstrate a degree of likelihood that the order appealed against will not adequately protect the public and that a greater degree of protection than that provided by the order appealed from is necessary pending the appeal. The relevant risk against which the community is to be protected is that of the respondent committing serious sexual offences. For the purposes of the Act and this application the risk of committing other offences, or of breaking the terms of the supervision order, is irrelevant, save to the extent that that risk indicates an increased risk of sexual re-offending.

[22] The respondent was examined by two psychiatrists for the purposes of the contravention proceedings. Dr Grant reported on 17 January 2011:

> "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 for 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 sexual 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 represents 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."

[23] Dr Harden reported on 4 February 2011:

> "… **his future risk of sexual reoffence is high**. My assessment of this risk is based on the combined clinical and actuarial assessment. In my opinion there are some mitigating factors in that he and a number of other observers describe the gradual lessening of his antisocial personality characteristics with time and perhaps the development of some ability to reflect and some empathy for other people with increasing age. This is a pattern that is described in people with antisocial and psychopathic personalities and probably does lead to some decrease in their risk to other people.
>
> To summarise it is my opinion that he is at **moderate to high risk of reoffence 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."

[24] In the report prepared at the direction of the court the doctors expressed their joint opinion:

> "Robert FARDON meets criteria for a diagnosis of **Antisocial Personality Disorder** … .
>
> He also has a **Psychopathic Personality**.
>
> He has a past history of **Polysubstance Abuse**.
>
> He has a number of **anxiety symptoms**.
>
> There is no evidence that he suffers from any deviant sexual interest or paraphilia.
>
> He is at **moderate to high risk of reoffence sexually** in the community with no constraints on his behaviour.
>
> This risk can be reduced if he is released on a supervision order, particularly as this relates to abstinence from alcohol and drug use.
>
> Due to his antisocial personality and institutionalisation there is a significant chance of him breaching conditions on a supervision order at some point in the future.

> His behaviour while on a supervision order to date suggests that breaches are less likely to be sexually violent in nature than some other kind of rule breaking behaviour."

[25] Mr O'Gorman submitted:

- That the psychiatric opinion should satisfy the appellate court, as it did the primary judge, that adequate protection of the community can be ensured by the respondent's release from custody subject to the terms of the supervision order.
- The respondent does not suffer a sexual perversion or paraphilia such as paedophilia. His tendency to commit criminal offences, especially those of a sexual nature, in the past is the result of his antisocial personality disorder and psychopathic personality which are now somewhat diminished in their effect on his behaviour.
- The contraventions of the earlier supervision order which led to the respondent's arrest and the bringing of the present proceedings do not indicate that the respondent's risk of re-offending is any higher now than it was when he was initially released on a supervision order.
- The likely cause of any re-offending will be intoxication. It is for this reason the psychiatrists stressed the need for the respondent to remain abstinent from alcohol and drugs. In the relatively brief period the respondent was released on a supervision order he was subjected to 76 tests, between November 2007 and April 2008, and all results were negative.

[26] These are powerful arguments and if there were no more in the case I would have refused the application. They indicate that the risk that the respondent might commit a serious sexual offence before the appeal can be heard is not unacceptably high. But in the end I am persuaded that the order of the primary judge should not take effect until the determination of the appeal. There are two reasons. The first is that the court can hear the appeal on 23 June, three weeks hence, so that the period the respondent will spend in detention pursuant to the stay will be brief. This is relevant to the balancing exercise I mentioned earlier. The deprivation of liberty does not weigh so heavily against the order.

[27] The second reason is that the primary judgment does not appear to deal with the point of concern expressed in Dr Grant's report which calls into question the efficacy of the supervision order as a means of reducing the risk of re-offending to acceptable limits. For that reason there may not have been a proper assessment of whether the supervision order will adequately protect the community.

[28] The primary judge said:

> "[64] I am satisfied that the alleged contraventions have been proved.
>
> [65] On the basis of the circumstances of the breaches and the evidence of Doctors Grant and Harden, I am satisfied on the balance of probabilities that the adequate protection of the community can be ensured by the Respondent being released from custody subject to a supervision order.

> [66] I have been concerned that Dr Grant has assessed that, arising from the Respondents [sic] attitude to authority, there is a high likelihood of future contraventions of any supervision order.
>
> [67] However, the Act does not contemplate the arrangements to prevent any risk must be "water tight" otherwise orders would never be made. In *Attorney-General (Qld) v Francis*, it was said:
>
> > "The (Act) does not contemplate that arrangements to prevent such a risk must be 'water tight'; otherwise orders under s 13(5)(b) would never be made. The question is whether the protection of the community is adequately ensured. If supervision of the prisoner is apt to ensure adequate protection, having regard to the risk to the community posed by the prisoner, an order for supervised release should, in principle, be preferred to a continuing detention order on the basis that the intrusions of the Act upon the liberty of the subject are exceptional, and the liberty of the subject should be constrained to no greater extent than is warranted by the statute which authorised such constraint."
>
> [68] The Respondent has discharged the onus upon him imposed by s 22(7) of the Act."

[29] The concern which the psychiatric evidence raises is whether the supervision order will be efficacious in constraining the respondent's behaviour by preventing the opportunity for the commission of sexual offences. The risk of those offences is rated "low to moderate" with the intervention of the supervision order, but whether that order will perform as intended, given the respondent's stated attitude to it, and his inclination to disregard it or circumvent it, was not the subject of consideration by the primary judge. Accordingly there may be doubt about the conclusion that the adequate protection of the community can be ensured by release on a supervision order.

[30] The primary judge did not give detailed reasons for the conclusion expressed in paragraphs [65] and [68] of her judgment as required by s 17 of the Act. While this may give rise to a separate ground of appeal the present concern is that there is no stated, reasoned, basis for the conclusion. The basis for confidence that the order will adequately protect the community is therefore not apparent.

[31] Accordingly, the balance between the competing interests discussed earlier is, in this case, struck by requiring the respondent to remain in custody pending the outcome of the appeal. There is a finding that he is a serious danger to the community as defined by the Act. There appears to be an incomplete assessment of the magnitude of the risk that he might commit a serious sexual office if released. The consideration which favours respecting the respondent's liberty is lessened by the fact that the deprivation of liberty will be brief.

[32] I order that the order of Dick AJ made on 20 May 2011 not take effect until the determination of appeal 4240 of 2011.