SUPREME COURT OF QUEENSLAND

CITATION:	*Harvey v Attorney-General for the State of Queensland* [2011] QCA 256
PARTIES:	**SHANE EDWARD HARVEY** (appellant) **v** **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (respondent)
FILE NO/S:	Appeal No 3917 of 2011 SC No 1736 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	27 September 2011
DELIVERED AT:	Brisbane
HEARING DATE:	9 August 2011
JUDGES:	Margaret McMurdo P, White JA and Boddice J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – GENERALLY – where the appellant was a declared dangerous prisoner subject to a supervision order which contained a condition that the appellant not commit an indictable offence during the period of the order – where the appellant was charged on indictment for a number of offences including doing grievous bodily harm with intent – where the respondent applied to rescind the supervision order on the basis that the appellant had contravened its requirements – where the prosecution subsequently discontinued the criminal proceedings against the appellant – where the appellant applied for an order that he be released from custody pending the courts determination of the respondent's application and that the respondent's application be dismissed – where the trial judge dismissed the appellant's application – where the appellant argues that the primary judge erred in failing to determine whether as a matter of law the appellant breached the condition of his

supervision order and that the appellant did not breach this condition so that there were exceptional circumstances justifying his release – where the respondent contended that the primary judge's decision should be affirmed on the ground that it was open to prove the contravention of the condition by demonstrating that the appellant had committed an indictable offence on the balance of probabilities – whether the primary judge erred in dismissing the appellant's application

Criminal Code 1899 (Qld), s 2, s 3
Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s 13(3), s 13(5)(b), s 21, s 22
Justices Act 1886 (Qld), s 111
Penalties and Sentences Act 1992 (Qld), s 93(1)(a), s 146

Attorney-General for the State of Queensland v Dugdale [2009] QSC 358, cited
Attorney-General for the State of Queensland v Fardon [2011] QSC 18, cited
Attorney-General for the State of Queensland v Fardon [2011] QCA 155, cited
Attorney-General for the State of Qld v Harvey [2011] QSC 82, considered
Attorney-General (Qld) and Anor v Francis (2008) 250 ALR 555; [2008] QCA 243, cited
Attorney-General (Qld) v Francis [2007] 1 Qd R 396; [2006] QCA 324, cited
Briginshaw v Briginshaw (1938) 60 CLR 336; [1938] HCA 34, cited
Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd (2003) 216 CLR 161; [2003] HCA 49, cited
Fardon v Attorney-General (Qld) (2004) 223 CLR 575; [2004] HCA 46, cited
Helton v Allen (1940) 63 CLR 691; [1940] HCA 20, cited
R v Kelly (Edward) [2000] 1 QB 198; [1998] EWCA Crim 3517, cited

COUNSEL: P E Smith, with L P Burrow, for the appellant
P J Davis SC, with A Scott, for the respondent

SOLICITORS: Ryan & Bosscher Lawyers for the appellant
Crown Law for the respondent

[1] **MARGARET McMURDO P:** I agree with Boddice J that the appeal should be dismissed. Boddice J has set out the relevant issues, facts and statutory provisions.

[2] On 17 July 2006, the appellant, Shane Edward Harvey, was found to be a serious danger to the community in the absence of an order under Pt 2, Div 3 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) and he was detained in custody. On 3 December 2007, he was released subject to the requirements of a supervision

order under s 13(5)(b) of the Act. That order was subject to conditions including condition 12 which required that the appellant "[n]ot commit an indictable offence during the period of the order".

[3] On 28 March 2008 he was arrested and charged with offences including the attempted murder of Dianne Hawkins. On 31 March 2008, the respondent, the Attorney-General for the State of Queensland, applied under s 22 of the Act (contained in Pt 2 Div 5 of the Act (s 20 – s 22A)) to rescind the supervision order on the basis that the appellant had contravened its requirements in a number of ways.[1] I will refer to this as the respondent's application. The most serious of the contraventions was that on 28 March 2008 he assaulted Ms Hawkins causing her grievous bodily harm in breach of condition 12.

[4] The appellant has been in custody since 28 March 2008. He was committed for trial on 27 February 2009 on charges including that he unlawfully did grievous bodily harm to Ms Hawkins on 28 March 2008. He was charged on indictment in the Brisbane District Court in July 2009 with doing grievous bodily harm with intent; common assault and stealing. He was alleged to have committed all three offences against Ms Hawkins on 28 March 2008.

[5] Ms Hawkins died on 16 June 2010. The prosecution successfully applied for an order that a transcript of her evidence at the committal proceedings be admitted into evidence under s 111 *Justices Act* 1886 (Qld) at the appellant's criminal trial. The primary judge noted that further evidence was then obtained which cast significant doubt on Ms Hawkins' evidence.[2] The appellant successfully applied to the District Court for an order excluding her evidence at his pending criminal trial. On 24 November 2010 the prosecution discontinued the criminal proceedings against him. The appellant remained in custody under the Act pending the determination of the respondent's application.

[6] The appellant applied for an order under s 21 of the Act[3] that he be released from custody pending the court's final decision under s 22[4], and an order that the respondent's application, in so far as it alleged a breach of condition 12 of his supervision order, be dismissed. I will refer to this as the appellant's application. It was heard in the Trial Division of this Court on 24 December 2010.

[7] On 13 April 2011, the primary judge gave his decision. His Honour found that it was not appropriate to proceed piecemeal.[5] Further, his Honour was not persuaded that the appellant had demonstrated exceptional circumstances warranting his release into the community under s 21(4) pending the determination of the respondent's application under s 22. The appellant's criminal history showed he had committed sexual offences whilst on bail for other sexual offences. In the absence of any psychiatric reports concerning the appellant since 2007, his current level of risk to the community was unclear. [6] The question for the court's determination in the respondent's application under s 22 required all alleged contraventions of the supervision order (not just condition 12) to be placed before the court, together with

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1 There are set out in Boddice J's reasons at [21].
2 *Attorney-General for the State of Qld v Harvey* [2011] QSC 82 at [6] – [7].
3 Set out in Boddice J's reasons at [31].
4 Set out in Boddice J's reasons at [31].
5 *Attorney-General for the State of Qld v Harvey* [2011] QSC 82 at [13].
6 *Attorney-General for the State of Qld v Harvey* [2011] QSC 82 at [15].

such other psychiatric or other evidence which was relevant and current.[7] For those reasons the judge ordered that the appellant's application be dismissed.

[8] The appellant appeals from that order contending that his Honour erred in failing to determine whether as a matter of law the appellant breached condition 12, and further that the judge should have determined the appellant did not breach condition 12 so that there were exceptional circumstances justifying his release from detention under s 21(4) of the Act.

[9] The respondent has filed a notice of contention in which he submits that the primary judge's decision should be affirmed on the ground that it was open to the respondent to prove the contravention of condition 12 by demonstrating that the appellant in fact committed an indictable offence, proof of which was not dependent upon him being convicted of the indictable offence.

Conclusion

[10] In the present case, the respondent would succeed in his application under s 22 if he established a breach of condition 12 on the balance of probabilities. In the light of s 2 *Criminal Code* 1899 (Qld)[8] he could do that by demonstrating on the balance of probabilities that the appellant had done an act (assaulting Ms Hawkins and causing her bodily harm) which rendered him liable to punishment. Contrary to the appellant's contentions, a court could be satisfied on balance of those matters, even though the prosecution has accepted it cannot prove beyond reasonable doubt that the appellant assaulted Ms Hawkins and caused her grievous bodily harm: see *Helton v Allen*[9]. Unlike in a criminal proceeding, the respondent must satisfy the court of the contravention of the supervision order only on the balance of probabilities. But there are serious consequences to a prisoner under the Act upon such a finding. The court would have to rescind the appellant's supervision order and make a continuing detention order (s 22(2)(a)), unless he satisfied the court on the balance of probabilities that the adequate protection of the community, despite the contravention, could be assured by the existing order as amended under s 22(7). A court would be satisfied under s 22(1) that the appellant had contravened the order only on the basis of cogent evidence established to a high degree of probability: cf s 13(3) of the Act and *Briginshaw v Briginshaw*[10].

[11] In my view, the respondent's notice of contention must be upheld. It was open to the respondent to prove the contravention of condition 12 by demonstrating on the balance of probabilities that the appellant in fact assaulted Ms Hawkins and caused her grievous bodily harm, even though he had not been convicted of that offence.

[12] I note that the primary judge was concerned about the absence of current psychiatric evidence relating to the appellant. Psychiatric evidence will often be useful in deciding applications under both s 21(4) and s 22. Indeed, it will frequently be determinative. But the resolution of these issues is not one to be determined by experts. The issues are for the judge to resolve after reviewing all relevant evidence. There is no reason to conclude the primary judge was not cognisant of this principle, or failed to act upon it. In the circumstances of this case, his Honour

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7 *Attorney-General for the State of Qld v Harvey* [2011] QSC 82 at [16].

8 Set out in Boddice J's reasons at [26].

9 (1940) 63 CLR 691, 710; [1940] HCA 20.

10 (1938) 60 CLR 336, Dixon J 368-369; [1938] HCA 34.

was entitled to conclude that, in the absence of psychiatric evidence more recent than 2007 addressing the appellant's risk to the community, he could not be satisfied under s 21(4) that the appellant's detention in custody was not justified because of exceptional circumstances. As I have explained, the fact that the prosecution was not proceeding on the criminal charges on which the alleged breach of condition 12 was based, did not preclude the respondent from attempting to prove the breach of condition 12 on the balance of probabilities under s 22. The judge was not compelled to consider that the prosecutor's withdrawal of the charges on which the alleged breach of condition 12 was based amounted to an exceptional circumstance demonstrating that the appellant's detention in custody was not justified.

[13] It follows that the primary judge's decision to refuse the appellant's application under s 21(4) has not been shown to be a result of error. The judge was also right in refusing the appellant's application to dismiss the respondent's pending application under s 22 in so far as it alleged a breach of condition 12. For these reasons, as well as those given by Boddice J, the appeal must be dismissed.

[14] The appellant has been in custody since late March 2008, a period of three and half years. During that time he has not been serving a sentence and for almost 12 months now he has not been on remand for any criminal charges. As Boddice J observes,[11] it is imperative that the respondent's application under s 22 proceed with the utmost priority.

[15] I agree with the order proposed by Boddice J.

[16] **WHITE JA:** I have read the reasons for judgment of Boddice J and I agree with those reasons that the appellant has not identified any appellable error by the primary judge. I endorse his Honour's observations that it is essential that the contravention proceedings be determined as soon as may be arranged.

[17] I agree with the order proposed by his Honour.

[18] **BODDICE J:** The appellant, a declared dangerous prisoner, is alleged to have contravened a supervision order made in 2007. On 24 December 2010, he made application to be released from custody pending the Court's final determination of the alleged contravention. He also sought an order that part of the contravention application be dismissed. On 13 April 2011, the appellant's application was dismissed. He appeals the dismissal of that application.

Background

[19] On 3 December 2007, the appellant was declared a "serious danger to the community" under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 ("the DPSO Act"), and ordered to be subject to a supervision order until 3 December 2014.

[20] Relevantly, the supervision order contained conditions requiring the appellant:

> "12. Not commit an indictable offence during the period of the order.
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> …
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> 17. Abstain from illicit drugs for the duration of this order.

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11 See Boddice J's reasons at [48].

…

20. Attend upon and submit to assessment and/or treatment by a psychiatrist, psychologist, social worker, counsellor, or other mental health professional as directed by an authorised corrective services officer at a frequency and duration which shall be recommended by the treating intervention specialist, the expense of which is to be met Queensland Corrective Services.

…

23. Comply with a curfew direction or monitoring direction."

[21] On 28 March 2008, the appellant was arrested and charged with several offences, including attempting to murder Dianne Hawkins. On 31 March 2008, the respondent filed an application seeking orders that the supervision order made on 3 December 2007 be rescinded on the basis the appellant had contravened the requirements of the supervision order in the following respects:

"1. On 24 January 2008 the respondent provided a urine sample which tested positive to Tetrahydrocannoabinol - 9 - carboxylic acid and thereby breached Clause 17 of the order …

2. On 4 December 2007 the respondent was directed by a Corrective Services Officer to abide by a curfew and to be in and remain at his Wacol residence between the hours of 10pm and 6am. On 5 January 2008 the respondent did not return to his residence until 10.08pm and was in breach of Clause 23 of the order …

3. On 4 December 2007 the respondent was directed by a Corrective Services Officer to abide by a curfew and be in and remain at his Wacol residence between the hours of 10pm and 6am. On 14 February 2008 the respondent did not return to his residence until 10.04pm in breach of Clause 23 of the order …

4. On 24 January 2008 the respondent was directed by a Corrective Services Officer not to have a person under the age 18 years at his residence at Wacol. On 20 February 2008 the respondent had a male child 2 years of age at his residence contrary to that direction in breach of Clause 13 of the order …

5. On 22 February 2008 the respondent failed to attend the appointment of a psychologist, Lars Madsen, as directed and was in breach of Clause 20 of the order …

6. On 28 March 2008 the respondent attended premises at 1/53 Heel Street, New Farm and assaulted Dianne Hawkins causing her grievous bodily harm in breach of Clause 12 of the order …". [errors as in original]

The appellant was remanded in custody pending determination of the application.

[22] In relation to the alleged contravention on 28 March 2008, the appellant was committed for trial on a charge of grievous bodily harm.[12] An indictment was presented in the District Court in July 2009. The trial was due in 2010. However, on 16 June 2010, the complainant, Dianne Hawkins, was found dead. Her death ultimately resulted in a successful application for the exclusion of her evidence at trial. As a consequence, on 24 November 2010, the Director of Public Prosecutions discontinued the proceeding against the appellant by entering a *nolle prosequi* on all charges against him relating to Dianne Hawkins.

[23] On 24 December 2010, the appellant brought this application, arguing that as a consequence of the discontinuance of the criminal proceedings, the respondent could not establish there had been a breach of condition 12 of the supervision order. The appellant contended that to establish a breach of condition 12, there must be a conviction by a court of an indictable offence.[13] The appellant further argued there were exceptional circumstances justifying his release pending a final determination of the balance of the contravention proceeding.

Primary decision

[24] The primary judge did not make any finding in relation to the appellant's contention that the respondent could not prove a contravention of condition 12 of the supervision order. Instead, the primary judge found that it was not appropriate to proceed with the matter in a piecemeal fashion.[14] Further, the primary judge held that to determine that a set of circumstances is exceptional within the meaning of s 21 "requires, at least, a conclusion that the associated risks arising from the alleged contravention and subsequent release are not such as to justify the continuing detention".[15] The primary judge held he was unable to arrive at that conclusion in the absence of any contemporary psychiatric reports.

[25] The primary judge found that in considering whether the Court could be satisfied that adequate protection of the community could, despite the contraventions which had been proved, be ensured by this existing order, as was required by s 22 of the Act, it was important "that all alleged contraventions are placed before the court along with such other psychiatric or other evidence which is relevant and current".[16] The primary judge found the appellant had not demonstrated that exceptional circumstances existed as required under s 21(4) of the DPSO Act. The primary judge therefore dismissed the appellant's application.

Appellant's submissions

[26] The appellant submits that the primary judge erred in not dismissing the respondent's application insofar as a breach of condition 12 was alleged as the respondent "has not committed any indictable offence as he has not been convicted by a Court". Further, on the available evidence, it could not be determined he had committed an indictable offence. In support of those contentions, the appellant relies on the definition of "offence" in s 2 of the *Criminal Code* 1899 (Qld). That section provides:

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12 AB 648/15.
13 AB 433 at [9].
14 AB 435 at [13].
15 AB 435 at [14].
16 AB 436 at [16].

> "An act or omission which renders the person doing the act or making the omission liable to punishment is called an *offence*."

The appellant submits that as the criminal charges have now been discontinued against him, he is not liable to punishment and therefore it cannot be established he has committed an indictable offence.

[27] The appellant further submits the primary judge erred in not finding that the appellant had established exceptional circumstances, as once the alleged breach of condition 12 was dismissed, the remaining breaches were of a minor nature.

Respondent's submissions

[28] The respondent submits the primary judge correctly dismissed the appellant's application as it was not appropriate to proceed with the determination of the alleged contraventions "in a piecemeal fashion". The respondent also seeks to support the primary judge's decision on a further basis,[17] namely that it was open to the respondent to prove a contravention of condition 12 "by proving that the appellant in fact 'committed' an indictable offence", and that proof of that fact was not dependent upon the appellant being convicted of an indictable offence. A court can find a person has committed a criminal offence in civil proceedings, notwithstanding that the person may have been acquitted of that offence.[18]

[29] The respondent also contended the primary judge had not erred as to whether exceptional circumstances existed as that determination necessarily involves an examination as to whether, pending the final determination of the alleged contravention, adequate protection of the community was able to be ensured by a supervision order.[19] The conclusion that any determination of the adequate protection of the public required a current psychiatric assessment was open.

The legislative scheme

[30] The DPSO Act provides a statutory scheme for the continued detention of offenders in specified circumstances. Relevantly, those circumstances require that an application be brought for orders that an offender be detained in custody for an indefinite period for control, care or treatment, or that the offender be the subject of a supervision order.[20] If the provisions of the DPSO Act are satisfied, a court may either order the offender's continued detention, or the offender's release upon supervision.[21]

[31] The DPSO Act also provides that if there is a reasonable suspicion that the offender has contravened a requirement of any supervision order made under the Act, the offender may be brought back before the court.[22] In that event, sections 21 and 22 of the Act apply:

> "**21 Interim order concerning custody generally**

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17 See Notice of Contention.

18 *Helton v Allen* (1940) 63 CLR 691 at 710.

19 *Attorney-General for the State of Queensland v Fardon* [2011] QSC 18 at [27]-[29]; *Attorney-General for the State of Queensland v Dugdale* [2009] QSC 358; *Attorney-General (Qld) v Francis* [2006] QCA 324 at [39]-[40].

20 See s 3 of the Act.

21 Section 13(5) of the Act.

22 Section 20 of the Act.

(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 the 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.

…

22 Court may make further order

(1) The following subsections apply if the court is satisfied, on the balance of probabilities, that the released prisoner is likely to contravene, is contravening, or has contravened, a requirement of the supervision order or interim supervision order (each the existing order).

(2) Unless the released prisoner satisfies the court, on the balance of probabilities, that the adequate protection of the

community can, despite the contravention or likely contravention of the existing order, be ensured by the existing order as amended under subsection (7), the court must –

(a) if the existing order is a supervision order, rescind it and make a continuing detention order; or

(b) if the existing order is an interim supervision order, rescind it and make an order that the released prisoner be detained in custody for the period stated in the order.

(3) For the purpose of deciding whether to make a continuing detention order as mentioned in subsection (2)(a), the court may do any or all of the following –

(a) act on any evidence before it or that was before the court when the existing order was made;

(b) make any order necessary to enable evidence of a kind mentioned in section 13(4) to be brought before it, including, for example, an order –

(i) in the nature of a risk assessment order, subject to the restriction under section 8(2); or

(ii) for the revision of a report about the released prisoner produced under section 8A;

(c) consider any further report or revised report in the nature of a report of a type mentioned in section 8A.

(4) To remove any doubt, it is declared that the court need not make an order in the nature of a risk assessment order if the court is satisfied that the evidence otherwise available under subsection (3) is sufficient to make a decision under subsection (2)(a).

(5) If the court makes an order in the nature of a risk assessment order, the psychiatrist or each psychiatrist examining the released prisoner must prepare a report about the released prisoner and, for that purpose, section 11 applies.

(6) For applying section 11 to the preparation of the report –

(a) section 11(2) applies with the necessary changes; and

(b) section 11(3) only applies to the extent that a report or information mentioned in the subsection has not previously been given to the psychiatrist.

> (7) If the released prisoner satisfies the court, on the balance of probabilities, that the adequate protection of the community can, despite the contravention or likely contravention of the existing order, be ensured by a supervision order or interim supervision order, the court –
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> (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
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> (b) may otherwise amend the existing order in a way the court considers appropriate –
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> (i) to ensure adequate protection of the community; or
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> (ii) for the prisoner's rehabilitation or care or treatment.
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> (8) The existing order may not be amended under subsection (7)(b) so as to remove any requirements mentioned in section 16(1)."

Discussion

Breach of condition 12

[32] A party to civil proceedings may prove in those proceedings that the other party was guilty of a crime, even where that other party has been acquitted of the criminal offence in prior criminal proceedings.[23] The respondent contends that, similarly, it may prove a breach of condition 12 in contravention proceedings notwithstanding that the Director of Public Prosecutions has determined that criminal proceedings against the appellant for the offence said to constitute the breach of condition 12 will not proceed. Whether that contention is correct requires a consideration of whether proof that the appellant has "committed an indictable offence" requires proof that the appellant has been convicted of an indictable offence.

[33] Central to the determination of any contravention of condition 12 is a consideration of the words "commit an indictable offence". Neither the appellant nor the respondent has been able to identify any occasion when these words have been the subject of judicial interpretation in the context of corresponding legislation.

[34] Condition 12 required that the appellant "not commit an indictable offence". The word "commit" means, in context, to "perpetrate, do".[24] An "indictable offence" is an offence prosecuted upon indictment.[25] An "offence" is an act or omission which renders the person doing that act or making the omission "liable for punishment".[26] Considered together, the words "not commit an indictable offence" suggest a requirement that the appellant not perpetrate or do any act or omission which would render him liable to punishment under the criminal law.

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23 *Helton v Allen* (1940) 63 CLR 691 at 710.

24 *The Australian Concise Oxford Dictionary (4th edition)*.

25 *Criminal Code*, s 3.

26 *Criminal Code*, s 2.

[35] Such a conclusion suggests that for there to be a breach of condition 12, it must be proven that the appellant perpetrated or did an act or omission which amounts to a criminal offence prosecutable on indictment. However, s 22 of the Act expressly provides that in contravention proceedings, it is only necessary for the respondent to establish a contravention of the supervision order "on the balance of probabilities". Accordingly, a court may make orders in respect of an alleged contravention of condition 12 if satisfied, on the balance of probabilities, that the appellant has committed the indictable offence of assaulting Dianne Hawkins, causing her grievous bodily harm. It is not necessary, in order to establish a breach of condition 12, to prove that the appellant has been convicted of an indictable offence. A conviction of an indictable offence would require proof beyond reasonable doubt.[27]

[36] That a breach of condition 12, properly understood, does not require proof of a conviction of an indictable offence, is made plain by a consideration of other aspects of s 22 of the DPSO Act. That section empowers the Court to make further orders if the Court is satisfied, on the balance of probabilities, that the released prisoner "is likely to contravene, is contravening, or has contravened, a requirement of the supervision order …" The distinction between "likely to contravene", "is contravening" or "has contravened" indicates the legislation covers present contraventions, past contraventions and potential future contraventions. The words "likely to contravene" envisage the Court's jurisdiction may be invoked in circumstances where there is evidence that a dangerous prisoner is, by reason of his or her conduct, "likely" to commit an indictable offence. Such a scenario is inconsistent with a conclusion that the words "commit an indictable offence" requires proof of a conviction for an indictable offence.

[37] The appellant submits such a conclusion is not open as the appellant, unless convicted of the criminal offence, is not liable to punishment and thereby could not have committed "an indictable offence". He points, by analogy, to the provisions of the *Penalties and Sentences Act* 1992 (Qld) ("the PS Act"). For example, the general requirements of a probation order, that the offender "must not commit another offence during the period of the order".[28] A breach of a probation order has always required proof of conviction of another offence. Similarly, a suspended sentence may only be breached upon proof of a conviction of an offence punishable by indictment.[29] However, that submission fails to recognise a fundamental distinction between the PS Act and the DPSO Act. The PS Act is a statute dealing with the sentencing of offenders and operates within the criminal jurisdiction. The DPSO Act is protective not punitive. It operates within the civil jurisdiction, and specifically provides that proof of a contravention of a supervision order is on the balance of probabilities. The provisions of the PS Act are not analogous.

[38] The appellant further submitted that a strict or narrow interpretation of the legislation ought to be adopted having regard to the presumption of innocence. He points to the strictness of the requirements of proof in contempt proceedings in support of that submission. However, the purpose and object of the DPSO Act is to provide for the protection of the community, not to punish.[30] Its operation is dependent upon the prisoner being a serious danger, or an unacceptable risk to the

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27 See, generally, *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161; [2003] HCA 49.

28 *Penalties and Sentences Act* 1992 (Qld), s 93(1)(a).

29 Section 146 of the PS Act.

30 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [216]-[217].

community. Its provisions specifically allow for the continued detention of dangerous offenders notwithstanding expiry of the offender's sentence of imprisonment. It allows continued detention upon proof, on the balance of probabilities, that the offender is likely to contravene the conditions of a supervision order. Such a regime is not consistent with the presumption of innocence being a paramount consideration.

[39] Alternatively, the appellant contended that the contravention proceeding, insofar as condition 12 was concerned, ought to have been dismissed as "on the available evidence", it could not be determined he had committed an indictable offence. Whether the respondent is able to establish, on the balance of probabilities, that the appellant has contravened condition 12 will depend on the evidence led at the hearing. The evidence led will depend on any rulings by the trial judge. That task has yet to be undertaken. As such, it is inappropriate to consider whether there is sufficient evidence, in the present case, to establish a breach of condition 12.

[40] The primary purpose of contravention proceedings is a determination of whether the dangerous prisoner should have his or her supervision order revoked. That requires a consideration of risk. Risk can only be determined having regard to the current psychiatric evidence, and having regard to all of the circumstances of the case.

[41] The primary judge correctly held that it was inappropriate to determine whether condition 12 had been contravened, and that proceedings ought not be determined in a piecemeal manner.

Exceptional circumstances

[42] Once contravention proceedings had been instituted, the appellant was required to be detained in custody unless he satisfied the Court on the balance of probabilities that his detention in custody pending the final decision is not justified "because exceptional circumstances exist". The word "exceptional" is an ordinary, familiar English adjective. It "describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special or uncommon". It need not be "unique, or unprecedented, or very rare", but it cannot be a circumstance that is "regularly, or routinely, or normally encountered".[31]

[43] Whether exceptional circumstances are shown to exist will depend on the facts and circumstances of a particular case. A breach that is trivial or accidental may well present little difficulty for a released prisoner to show "exceptional circumstances".[32] However, exceptional circumstances require a conclusion the associated risks from any release pending determination of the contravention proceedings are not such as to justify continuing detention.[33]

[44] The appellant submits that exceptional circumstances were established as the alleged contraventions of conditions other than condition 12 were relatively minor in nature, and he had spent over 2.5 years in custody. Whilst each alleged contravention, considered in isolation, may be viewed as "minor", any contravention must be viewed against the background of a supervision order being a "compact" between the dangerous prisoner and the community.[34] A course of

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31 *Attorney-General (Qld) and Anor v Francis* [2008] QCA 243 at [41], approving *R v Kelly (Edward)* [2000] QB 198 at 208.

32 *Francis* at [45].

33 *Attorney-General for the State of Queensland v Dugdale* [2009] QSC 358.

34 *Attorney-General for the State of Queensland v Fardon* [2011] QCA 155 at [29].

failing to comply with a supervision order may evidence an unwillingness by the dangerous prisoner to submit to a regime of tight control. Such a conclusion, when considered against the background of up to date psychiatric evidence as to risk factors, may justify a conclusion that the supervision order is properly to be rescinded in order to protect the community.

[45] The primary judge concluded that in the absence of up to date psychiatric evidence, exceptional circumstances were not established by the respondent as to determine whether a set of circumstances was exceptional requires a conclusion "that the associated risks arising from the alleged contravention and subsequent release are not such as to justify the continuing detention".[35] That finding was plainly open. The focus of proceedings under the Act is the protection of the community.

Conclusion

[46] The appellant has not identified any error by the primary judge.

[47] I would dismiss the appeal.

[48] The appellant has now spent almost three and a half years in custody (albeit mostly on remand for the alleged offences against Ms Hawkins). It is essential the contravention proceeding be determined forthwith.

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35 *Attorney-General for the State of Queensland v Harvey* [2010] QSC 82 at [14].