SUPREME COURT OF QUEENSLAND

CITATION:	*A-G (Qld) v Lawrence* [2011] QCA 347
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (appellant) **v** **MARK RICHARD LAWRENCE** (respondent)
FILE NO/S:	Appeal No 9609 of 2011 SC No 7468 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	2 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	4 November 2011
JUDGES:	Muir, Fraser and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	1. **The appeal be allowed.** 2. **The order of Peter Lyons J at first instance be set aside.** 3. **The decision of Fryberg J that the respondent is a serious danger to the community in the absence of an order under division 3 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) be affirmed.** 4. **The respondent continues to be subject to the continuing detention order made by Fryberg J.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – GENERALLY – where the primary judge rescinded the respondent's continuing detention order and made a supervision order against him – where a psychiatrist gave evidence that the respondent's statements concerning his mental condition were unreliable – where there was other psychiatric evidence that the respondent would be at a high risk of re-offending upon release if his condition was presently dormant – whether the primary judge erred in accepting the respondent's statements concerning his condition – whether the exercise of

the primary judge's discretion under s 30(4) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) miscarried in failing to take into account the qualified nature of the other psychiatric evidence – whether the primary judge sufficiently balanced the extent of the risk of the respondent re-offending with the serious consequences brought about should the risk materialise – whether a supervision order would ensure adequate protection of the community

Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), Div 3, s 13(5), s 27, s 29, s 30, s 43

A-G (Qld) v Beattie [2007] QCA 96, considered
A-G (Qld) v Francis [2007] 1 Qd R 396; [2006] QCA 324, cited
Devries v Australian National Railways Commission (1993) 177 CLR 472; [1993] HCA 78, considered
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, considered
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited

COUNSEL: P J Davis SC, with J Rolls, for the appellant
P E Smith for the respondent

SOLICITORS: Crown Law for the appellant
Legal Aid Queensland for the respondent

[1] **MUIR JA**: **Introduction** On 3 October 2008, Fryberg J ordered that the respondent be detained in custody for an indefinite term for control under s 13(5) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) ("the Act"). The first review of the respondent's continuing detention order, pursuant to s 27 of the Act, resulted in an order by the primary judge rescinding the continuing detention order and the making of a supervision order under division 3 of the Act, the primary judge being satisfied that the respondent was a serious danger to the community in the absence of such an order. The appellant attorney-General appeals against the orders.

[2] The Notice of Appeal has four grounds of appeal but the grounds advanced on the hearing of the appeal were limited to the following:

- Ground 1 – the primary judge erred in giving undue credence to the respondent's evidence and in concluding that Dr Lawrence (a psychiatrist who gave evidence at first instance) had not provided any convincing basis for her view that the respondent's statements concerning his condition could not be relied upon and, in consequence of that finding, not relying on that opinion by Dr Lawrence in making his determination.
- Ground 2 – the exercise of the primary judge's discretion under s 30(4) of the Act miscarried in that the primary judge failed to take into account, in determining whether the community could be adequately protected by the respondent's release under a supervision order, Professor Nurcombe's opinion as to the uncertainty of the permanency of the changes in the respondent's sexual and sadistic urges which he claimed to have occurred.
- Ground 3 – the primary judge erred in failing to consider or give due weight to the seriousness of the offending conduct in which the respondent may

engage in determining whether a supervision release order would "ensure adequate protection of the community".

The history of the respondent's offending

[3] In his reasons in *A-G (Qld) v Lawrence*,[1] delivered on 22 May 2009, with which Wilson J and I agreed, Chesterman JA set out the following history:[2]

> "[5] The appellant is 48 years of age. He has been continuously in gaol since December 1983, more than 25 years.
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> [6] His criminal history begins with an appearance in the Ipswich Children's Court on 9 May 1978 when he was charged with the aggravated assault on a male child under the age of 14 on 4 May 1978. The appellant was admonished and discharged. He next appeared on 2 November 1978 in the Ipswich Magistrates Court charged with another aggravated assault of a male child under the age of 14. He was sentenced to two years' probation. (The date given for the offence was 20 December 1978 which must be incorrect given the date of his appearance.) He appeared again in the Ipswich Magistrates Court on 23 February 1979, this time charged with the aggravated assault of a female child under the age of 17, the day before, 22 February. He was sentenced to three years' probation and ordered to undergo any psychiatric treatment which the probation officer might direct including treatment as an inmate of a psychiatric hospital. On 23 December 1980 he appeared for a third time in the Ipswich Magistrates Court. The charge this time was aggravated assault on a male child under the age of 14 on 21 December. He was fined $75.
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> [7] On 3 September 1981 he appeared before the Brisbane District Court charged with conspiracy to commit a crime and assault with intent to steal with the threatened use of violence whilst armed and in company. The offences were committed on 11 April 1981. At the time the appellant was an involuntary patient in Wolston Park Hospital from which he absconded with three other patients. They caught a taxi and decided to rob the driver. One of them held a knife to the driver's throat. He was not harmed and refused to give up his takings. The appellant was sentenced to four months' imprisonment and required to undergo a further three years' probation.
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> [8] Having served the imprisonment he was returned to Wolston Park Hospital where, on 26 December 1983, he and another patient killed a fellow patient, a woman. On 7 February 1985 the appellant was sentenced to 15 years' imprisonment for manslaughter. That verdict rather than one for murder was returned on the basis of diminished responsibility. The appellant had compelling sexual fantasies about rape and

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1 [2009] QCA 136.

2 At paras [5]-[11].

murder. The young woman was killed as an enactment of the fantasies.

[9] In August 1991 the appellant escaped from custody. He had been allowed to leave the gaol to attend a tennis competition and did not return. He was found after a few days and on 3 September 1991 sentenced to one year's imprisonment, cumulative upon the 15 years, for escaping lawful custody.

[10] On 4 April 2002 in the Brisbane District Court he was convicted of rape and sexual assault with a circumstance of aggravation on 14 October 1999. It was a sodomitic attack on a fellow prisoner. He was sentenced to seven years' imprisonment for the rape and three years for the assault, to be served concurrently. An earlier conviction had been quashed and the appellant was retried in 2002. By the time he was convicted and sentenced the second time his previous sentences had expired. He was, however, kept in gaol and remanded in custody. That time, from 7 February 2001 until 4 April 2002, was declared to be time served under the sentence.

[11] The term of imprisonment imposed for the manslaughter expired on 6 February 2000. The year's imprisonment for escaping expired 12 months later. The seven years imposed for rape expired on 7 February 2008. The appellant's confinement since then has been pursuant to the Act."

[4] The above reasons were given in an unsuccessful appeal against Fryberg J's order of 3 October 2008.

The hearing at first instance

[5] Three psychiatrists gave expert opinion evidence at first instance: Professor Nurcombe and Dr Lawrence, who each examined the respondent pursuant to s 29 of the Act, and Professor Morris who was called on the respondent's behalf.

[6] A considerable body of other material was received in evidence as part of or in connection with the psychiatrists' reports. That material included prison records and histories given to and opinions expressed by other psychiatrists and psychologists. Dr Lawrence, Professor Nurcombe and Professor Morris gave oral evidence as did the respondent. Before going to the grounds of appeal it is useful to provide a brief summary of the psychiatric evidence.

The psychiatric evidence

[7] All three psychiatrists diagnosed the respondent as suffering from paraphilia (sexual sadism) and antisocial personality disorder. In his principal report dated 21 October 2009, Professor Nurcombe gave the following histories and opinions of the respondent:[3]

"36. By the time he was sixteen years of age, he was entertaining fantasies of raping and killing people. The targets of his fantasies were indiscriminate, and acted out toward young people and adults of both sexes; but he preferred scantily dressed young women. ...

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3 R275.

> 37. [The respondent] has some of the characteristics of Psychopathic Personality: shallow affect; limited capacity for remorse and empathy; poor behavioural controls; early behaviour problems; lack of realistic and long-term goals; failure to accept responsibility for his own actions; juvenile delinquency; and revocation of conditional release. What he lacks is the glibness, superficial charm and grandiosity characteristic of Psychopathic Personality Disorder. He has struggled to improve his capacity for remorse, deepen his affect, improve his capacity for empathy, and enhance his behavioural controls. Given the limitations of his personality and low average intelligence, he has worked hard to make these changes.
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> ...
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> 38. If [the respondent] were to reoffend, the reoffending would be likely to involve the sadistic rape or sexual assault of male or female adults or children. His targets would be indiscriminate, but probably preferentially toward young females. The physical and psychological harm to victims would be great. There is a chance that a re-offence could escalate to a life-threatening level. In contrast to my previous opinion, I do not think that the risk of reoffending is imminent. However, the risk of violence is chronic, and particularly likely to occur if he experiences rejection, loneliness or boredom. [The respondent] has made genuine attempts to change the psychological basis of these offences, particularly by suppressing sadistic sexual fantasy and struggling hard to enhance his limited capacity for remorse and empathy; however it is likely that sadistic urges are dormant rather than defunct."

[8] In his oral evidence, Professor Nurcombe explained his diagnosis in this way: [4]

> "...paraphilia refers to a sexual disorder in which the individual gains pleasure from sexual activity that is really outside the normal behaviour which would be part of reproductive behaviour and that's paraphilia but sexual sadism refers to the fact that the individual gains sexual satisfaction from harming or hurting other people.
>
> And is that a paraphilia, sexual sadism?--Yes."

[9] His explanation of antisocial personality disorder was: [5]

> "...that is a condition ... the rudiments [of] which are apparent in childhood and adolescence which continues into a adulthood and it involves a long and persistent history of rule breaking and failure to follow conventional rules, tendency to break those rules in the sexual area or in terms of acquisition of other people's property."

[10] Professor Nurcombe said with reference to the amenability to treatment of paraphilia (sexual sadism): [6]

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4 R7.
5 R8.
6 R11.

> "I know of no scientific evidence that treatment for that condition works but it's never really been fully examined because, as I say, many sexual sadists do not disclose or are unwilling to discuss the offence or receive treatment for it...Unlike, I should say, [the respondent] who has been very open about his sexual sadism and his background."

[11] In his opinion there was no scientific evidence that antiandrogenic medication would ameliorate the respondent's condition. Asked about the role of sexual fantasies in the manifestation of sexual sadism, he responded: [7]

> "...prior to the offence or the recidivism the individual has insistent and compulsive fantasies about hurting somebody else."

[12] Professor Nurcombe conducted risk analysis tests on the respondent, including Static 99 Revised and Stable 2000. His scoring of the respondent on the former test associated "him with a group of prisoners whose likelihood of reoffending in 5, 10 and 15 years [was] at least .39, .45, and .52 respectively." He said that this indicated a high likelihood of sexual reoffending.

[13] Dr Nurcombe reported:[8]

> "44. If the STATIC 99 and STABLE scores are combined, he can be classified with a group of prisoners whose overall risk of sexual reoffending is ***moderate***.
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> …
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> 50. If static, historical risk factors alone are considered, [the respondent] must be regarded as at **high** risk of violent sexual reoffending. If so, the risk to the community would be very great. When recent dynamic factors are considered, he is at **moderate** risk of reoffending. How much reliance can be placed on improvements professed by the offender, and how much improvement would be possible in treatment given [the respondent's] personality, his difficulty coping with concepts of relapse prevention, and his low average intelligence? Questions have been raised whether offenders high in psychopathic traits are capable of benefiting from sex offender treatment. Although I think that [the respondent] has been genuine in his attempts to address his problems, reason suggests the need for caution.
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> 51. There is no purpose other than for control to retain him in prison. If the following supervisory conditions could be instituted, I consider the overall risk of reoffending would be **moderate** or lower:
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> - Supervised accommodation
> - Close probationary supervision
> - Assistance with obtaining employment
> - Continued counselling following release
> - Participation in the Sexual Offender Maintenance Program

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7 R12.

8 R276-278.

- Antiandrogenic treatment under psychiatric supervision
- A curfew with electronic monitoring
- The maintenance of distance from places where children congregate, schools, and families with young children."

[14] In her report dated 2 November 2009, Dr Lawrence set out the following history:[9]

"5.1 **Professor Barry Nurcombe** ***(Ref: Item C BN-3)*** in his report dated 4 December 2006 and **Dr Michael Beech** ***(Ref: Item E)*** in his report dated 27 December 2007 were given a personal history that he had no knowledge of his biological mother and that he was raised by his grandmother from birth to about age 7, having no contact with biological parents during that time. He reported a kind, loving, caring, good grandmother. He appears to have been a loner, not mixing much with other children.

5.1.1 He said that when his grandmother died and he was alone, he spent days fending for himself in the bush before being found by authorities and placed in Stuart House in Sydney, where he remained, he says, until the age of 14. He describes being bashed and raped by both staff and other inmates, treated violently, neglectfully, receiving little or no schooling and being so disturbed as to attempt suicide by intending to jump off a cliff, though someone grabbed him.

5.1.2 He said that his father claimed him at age 14 and he then spent the rest of his adolescence in the care of his father and stepmother and that he had some 6 or 7 stepsiblings. Both father and stepmother are now dead and he has no contact with any of the siblings.

5.1.3 I note that Dr Beech comments (p. 22) that there is some discrepancy in the accounts of [the respondent's] personal history, particularly related to his upbringing by his father and stepmother. Dr Beech recounts (p. 114>118) psychiatric and psychological reports covering the period to 1984, subsequent to the killing of the female co-patient in Wolston Park. These reports indicate the likelihood of earlier sexual offending as a juvenile, not documented in the adult criminal file. For instance, reports that at the age of 15, he took a large carving knife to a public park and looked for someone to kill. He reports seeing a group of women playing netball and waiting nearby with the intention of killing one of them. He was apprehended by the Police who took him home. He reports assaulting and attempting to rape a girl at school some months after that episode.

5.1.4 At 17 years of age, he reportedly took out his frustrations on a young boy he had seen at a railway station. At age 19, it was reported that he told a Psychologist that he chose to sexually assault children because they are vulnerable, can't fight back and it is exciting to sexually assault them so that

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9 R294.

he does so when possible. He also masturbated to fantasies which included sexual intercourse with young, usually male, children and also fantasies of rape and killing.

5.1.5 His stepmother confirmed the history during a home assessment report. There are also reports that his parents had been worried about his sexual disinhibition since the age of 15. He was described as stubborn and defiant towards his parents, especially as he grew older. He deceived them and lied openly from an early age. Their efforts to deal with this had had little effect. They were considered to be thoughtful people who admitted that they were unsure of how to handle his problems. They worked together to try to decide the best way but felt unsure of how to handle him."

[15] A little later in her report Dr Lawrence set out the following history obtained by her from the respondent:[10]

"5.3.1 I obtained the following story. *'He was the only child of his father and a natural mother whom he believes left him with his grandmother at the age of 3 months. He says that he was subsequently collected by his father after he married his stepmother. He thinks that this was "pre-school age," though reports indicate that it was about 12 months of age. He was then reared as their own child by the father and stepmother. He had a stepbrother and 6 half-brothers and sisters.*

5.3.2 *By 1973, at the age of 12, he had only reached Grade 4 in normal school and thereafter was transferred for 3 years, from 1973 to 1976, to Ipswich Opportunity School.*

5.3.3 *From 1976 till he was admitted to Barrett Psychiatric Centre under Section 18 of the Mental Health Act, at the age of 17½ in February 1979, he had a job in a Butter Factory at Ipswich. During this time he was convicted of 3 offences of a sexual kind.*

5.3.4 *Since 23 February 1979, he had been virtually constantly either legally detained in Wolston Park Hospital or the Security Patients' Hospital under the Mental Health Acts or in prison in Brisbane. However, in the period from early November 1979 until 26 December 1980, he was apparently on leave form the hospital, being returned from leave after further charges of a sexual nature involving children.*

...

5.3.6 *Sometime between 1974 and 1976 and thus before the age of 15, there is a report of his attempted rape of a young girl at the Opportunity School he attended.*

5.3.7 *At the age of 15½ to 16, there are reports of sexual approaches to younger siblings in his family.*

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10 R295-297.

> 5.3.8 *He told me that he tried to kill his sister M aged 12, one night – he had a teatowel over her mouth. He went into her bedroom, having turned off the power in the house so that she would not see him as he did it. She woke and screamed and his parents came in and he was* ***returned*** *to Wolston Park Hospital at that stage. His sister L confirmed that there was an incident like this known to the family.*
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> …
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> 5.3.16 *[The respondent] reports that he ... continues to have the sexual fantasies always with a good dealt of violence. He reports that a female Psychologist who had attempted some work with his sexual deviations with him, was the subject of one of his fantasies. He also reports that a female Charge Nurse at Wolston Park Hospital has figured in another fantasy which involves, not only his possible rape and murder of her, but that he dismembers and cooks her up in his oven. He says that such a fantasy occurred quite recently during his time in prison.*"

[16] Paragraphs 5.3.1 to 5.3.16 appear to have been extracted by Dr Lawrence from her report dated 31 January 1985.

[17] Dr Lawrence concluded this historical account with the observation:

> "In summary, the current accounts of his personal background and childhood and family upbringing are grossly incorrect and unreliable."

[18] The report then discussed the content of other psychiatric reports:

> "5.5 [Dr Beech, Psychiatrist] reports on **Dr Christopher Alroe, Psychiatrist**, in 1992 who reported on [the respondent's] account of his actions in regards to the unlawful killing but commented that the accounts could be given little credence because he distorted the truth and lied on every occasion.
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> 5.6 **Dr Robert Moyle, Psychiatrist,** in 1995, reported that [the respondent] disclosed assaults on people of both sexes aged from 3 to 13. He indicated sexual arousal by both girls and boys, including adolescents of both sexes. He also reported sexually sadistic fantasies including fantasies of cutting his victims' throats (as he had slashed the throat of his actual female victim).
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> 5.7 [The respondent] had been placed on a sexually suppressant drug in prison about 1992 because of his reports of extreme difficulty controlling sexual impulses. It was considered this was a threat to the female staff."

[19] Dealing with the jail rape offences, Dr Lawrence explained in paragraphs 13.1 to 13.4 of her report, that although the respondent had pleaded guilty to the offence of rape he maintained his innocence.[11]

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11 R301.

[20] In paragraph 14.1 of her report, Dr Lawrence noted that the respondent "asserted that he has had no [rape and sexual killing] fantasies for 3 years." Her report continued:[12]

> "14.2 He acknowledged masturbating currently but points out that the frequency of masturbation has decreased significantly. He said initially in prison he masturbated 6-7 times a day but this was now reduced to once a week. He said that the frequency had decreased after a period of being on the antiandrogen drugs, even though these had been stopped some years previously. He attributed the decreased masturbatory frequency to increasing age. *He went on to say then that he also tends to avoid the fantasies; if he gets fantasies of rape and killing, he makes a conscious effort to distract himself and avoids following through with masturbation to those particular fantasies.*" (emphasis added)

[21] Dr Lawrence queried a statement made to her by the respondent that he would prefer females to males as sexual partners, if any were available:[13]

> "15.3 Pointing out that, of his child victims, 3 had been male and only 1 female. **To this, he vigorously denied that the attacks on the children were sexual at all.** He said that they were aggravated assault, by which he means that he would *'just push the child'*. He denies absolutely any sexual involvement with those children or sexual intent and sought to defend his statement and argue his case, on the grounds of the wording of the charges in the criminal history."
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> 15.4 He went further in his refutation of guilt about the children charges saying that they had happened because he was wanted to go back to hospital at that time. He claimed that he felt safer in hospital (Wolston Park). He claimed that he wanted to get away from his father who was raping him at home. He agrees that he did not, at the time, reveal or indicate any hint of sexual abuse from his father, saying that that was because he didn't open up to people at that time.
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> …
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> 19.8 **My overall assessment is that [the respondent], as assessed on actuarial scales, remains at a HIGH RISK of recidivism**."

[22] "Actuarial scales" in paragraph 19.8 is a reference to a number of "Risk Assessment tools" including:[14]

> "...The **PCL-R Scale** for Psychopathy, the **HCR-20**, a recognised Risk Management Assessment Scale, the **VRAG** (Violence Risk Appraisal Guide) and **SORAG** (Sex Offender Risk Appraisal Guide), the **SVR 20** (Sexual Violence Risk-20) ... the **RSVP** (Risk for Sexual Violence Protocol) [and] ... [t]he **Static-99** ... a widely used basic score utilising past 'static' or historical factors to predict risk of re-offending."

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12 R302.

13 R302-309.

14 R307.

[23] Dr Lawrence rated the respondent a high risk of re-offending, applying the Violent Risk Appraisal guide (VRAG), the Sexual Violence Risk-20 (SVR-20) and the Static-99 test and a very high risk by applying the Sex Offender Risk Appraisal Guide (SORAG).

[24] In her concluding summary, Dr Lawrence stated:[15]

> "20.1 [The respondent] is a now 48 year old man who has spent the last 26 years in prison and had spent a number of years in adolescence and possibly childhood in institutions. He had prejudicial early circumstances but had always displayed behaviours which could earn the diagnosis of Conduct Disorder in childhood and adolescence and would probably have warranted a diagnosis of Psychopathic Personality using the PCLR Rating Scale, had it been available at that time. Certainly he was described, at the age of 23, as suffering from a Sociopathic Personality Disorder, or Antisocial Personality Disorder and certainly showed significant psychopathic traits in association with his Antisocial Personality Disorder.
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> …
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> 20.6 He has acknowledged sexual fantasy which he now claims have reduced in frequency and gives information suggesting that, even if he had occasional fantasies (which he denies), he does not obtain sexual satisfaction through masturbation in response to the fantasies. There is no way of obtaining objective corroborative evidence about these statements. Regrettably there is considerable evidence to indicate that [the respondent's] credibility is very questionable. There is evidence of current ongoing lying and denial in other previously corroborated information so that relying on his uncorroborated statements is unwise.
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> 20.7 [The respondent] has successfully completed Sex Offender Treatment Programmes during his incarceration including the High Intensity Sexual Offender Programme (HISOP) with exit reports indicating satisfactory participation. [The respondent] is able to recount and claims benefit of concepts imparted as a result of the HlSOP programme. The manner in which these are recounted suggest an acquisition of jargon rather than a true acquisition of the underlying empathic and emotional understanding and acceptance of these concepts. *Thus one cannot be assured that really significant change is likely to have occurred in this man's inner psychic life, particularly as it relates to his sexuality and sexual fantasies*. (emphasis added)
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> 20.8 He has also voluntarily received treatment with anti androgenic hormones during his period in prison. After a satisfactory period on treatment it seems that the treating Psychiatrist at the time, Dr Robert Moyle, did not consider that there was sufficient benefit to warrant continuing treatment.

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15 R294/295/296/297/302/309/310/311.

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20.11 In my opinion the risk factors which would have to be addressed in order to reduce the risk to acceptable levels would involve:

- virtually constant close surveillance,
- intensive efforts at re-socialising

This man has not lived for any length of time as an independent person in a social community at any time in his adult life. He would therefore be exposed to a very large range of potential destabilising factors.

- He has no family or close personal supports and
- no ready access to reliable replacements other than of a professional kind.

20.12 *Exposure to these destabilising factors is likely to increase the risk of a retreat into self gratification [and is] likely to mean the reactivation and possible acting on sexual sadistic fantasies of rape and killing*. (emphasis added)

20.13 His past history also involves escape attempts and failure to comply with conditional release. Whilst it may be that maturity has mellowed his personality and he may have modified, in a positive way, his rebelliousness and non compliance (he has apparently functioned well in the structured environment of prison for nearly a decade). *However the ongoing evidence of denial, his lack of empathy, the ongoing presence, even at decreased frequency of his dangerous sadistic fantasies mean that a Supervision Order is unlikely to be constructed in a practical fashion sufficient to decrease the risk of re-offending*. (emphasis added)

20.14 I consider [the respondent] to be a Dangerous Sexual Offender who, in my opinion, represents a **High Risk** of re-offending if released. I do not believe that a Supervision Order could be formulated with conditions that could manage the multiple and complex risk factors that this man presents."

[25] In his report of 15 December 2010, Dr Morris stated:[16]

"Over the past 22 months he has had no sexual relations with other prisoners. He says that he has had offers of sexual activity but he has declined them. *He has had no rape fantasies and no fantasies about violence. He no longer has his earlier deviant fantasies.* If he sees something violent on television he switches it off or turns to another station to get away from this type of content.

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[The respondent] no longer acknowledges experiencing deviant sexual fantasies and denies having violent sexual fantasies. He has

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16 R543,546,547.

> been able to avoid sexual contact with other male prisoners. He now masturbates using sexual fantasy content of an unobjectionable nature. He has participated in prison life in a positive way by undertaking regular weekly employment and having no breaches. There has been an improvement in his psychiatric condition. He has maintained contact with support systems, both personal and through chaplaincy and church contacts. He has realistic future plans if released from prison. There have been small improvements in the formal risk rating instruments that I have used. On the basis of all this information, there has been an improvement in his condition and his risk of return to violent sexual offending has declined. I would now rate his overall risk as in the moderate category. When describing his risk as moderate I use the term in a way that defines moderate as that the individual is at moderate or somewhat elevated risk for sexual violence. A moderate risk suggests that a risk management plan should be developed for the individual and that the plan should at least include a mechanism for systematic reassessment of risk. These descriptions of risk are taken from the SVR-20 documentation. My assessment of him as a moderate risk indicates that I believe he could be released from prison under an intense supervision plan." (emphasis added)

[26] Professor Morris used three risk assessment instruments in evaluating the respondent: the Hare Psychopathy Checklist Revised 2nd ed (PCL-R) which provides a general assessment of antisocial personality qualities; Historical Clinical Risk-20 (HCR-20) which assesses the risk of violent recidivism and Sexual Violent Risk-20 (SVR-20) which assesses the risk of violent recidivism. Professor Morris concluded from the scores obtained that the respondent posed a moderate risk of violent recidivism and of sexually violent recidivism.

Applicable principles of law

[27] This is an appeal from orders made in the exercise of a discretion by a judge based on findings of fact made by the judge. An appellate court is not empowered to set aside such orders merely because they were not ones the appellate court would have made had it been exercising the discretion. Before an appellate court can interfere it must be shown that the primary judge acted on a wrong principle, failed to take a material consideration into account, took into account an immaterial consideration or that the result "is unreasonable or plainly unjust."[17]

[28] In considering the validity of the primary judge's findings it is necessary for this Court to make due allowance for the benefits enjoyed by the primary judge in seeing the witnesses and in presiding over a trial in which the evidence, both oral and written, unfolded over time and was subjected to contemporaneous scrutiny and analysis.

[29] In *Fox v Percy*,[18] Gleeson CJ, Gummow and Kirby JJ, discussing the circumstances in which an appellate court should interfere with a trial judge's findings of fact, said:

> "… the mere fact that a trial judge necessarily reached a conclusion favouring the witnesses of one party over those of another does not, and cannot, prevent the performance by a court of appeal of the

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17 *House v The King* (1936) 55 CLR 499 at 505.

18 (2003) 214 CLR 118 at 128.

> functions imposed on it by statute. In particular cases incontrovertible facts or uncontested testimony will demonstrate that the trial judge's conclusions are erroneous, even when they appear to be, or are stated to be, based on credibility findings.[19]
>
> … In some, quite rare, cases, although the facts fall short of being 'incontrovertible', an appellate conclusion may be reached that the decision at trial is 'glaringly improbable'[20] or 'contrary to compelling inferences' in the case[21]. In such circumstances, the appellate court is not relieved of its statutory functions by the fact that the trial judge has, expressly or implicitly, reached a conclusion influenced by an opinion concerning the credibility of witnesses. In such a case, making all due allowances for the advantages available to the trial judge, the appellate court must 'not shrink from giving effect to' its own conclusion."

[30] After referring to the nature of an appeal by way of re-hearing, their Honours said:

> "The foregoing procedure shapes the requirements, and limitations, of such an appeal. On the one hand, the appellate court is obliged to 'give the judgment which in its opinion ought to have been given in the first instance'. On the other, it must, of necessity, observe the 'natural limitations' that exist in the case of any appellate court proceeding wholly or substantially on the record. These limitations include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses' credibility and of the 'feeling' of a case which an appellate court, reading the transcript, cannot always fully share. Furthermore, the appellate court does not typically get taken to, or read, all of the evidence taken at the trial. Commonly, the trial judge therefore has advantages that derive from the obligation at trial to receive and consider the entirety of the evidence and the opportunity, normally over a longer interval, to reflect upon that evidence and to draw conclusions from it, viewed as a whole."

[31] In *Devries v Australian National Railways Commission*,[22] Brennan, Gaudron and McHugh JJ said:

> "More than once in recent years, this Court has pointed out that a finding of fact by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against – even strongly against – that finding of fact.[23] If the trial judge's finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial judge 'has failed to use or

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19 Eg, *Voulis v Kozary* (1975) 180 CLR 177; *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306; 160 ALR 599; cf *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd* (1992) 27 NSWLR 326 at 349-351.

20 *Brunskill v Sovereign Marine & General Insurance Co Pty Ltd* (1985) 59 ALJR 842 at 844; 62 ALR 53 at 57.

21 *Chambers v Jobling* (1986) 7 NSWLR 1 at 10.

22 (1993) 177 CLR 472 at 479.

23 See *Brunskill* (1985) ALJR 842; 62 ALR 53; *Jones v Hyde* (1989) 63 ALJR 349; 84 ALR 23; *Abalos v Australian Postal Commission* (1990) 171 CLR 167.

> has palpably misused his advantage'[24] or has acted on evidence which was 'inconsistent with facts incontrovertibly established by the evidence' or which was 'glaringly improbable'[25]."

[32] Gleeson CJ, Gummow and Kirby JJ, in their reasons in *Fox v Percy*, referred to *Devries* as one of three cases in which the High Court had reiterated:[26]

> "... its earlier statements concerning the need for appellate respect for the advantages of trial judges, and especially where their decisions might be affected by their impression about the credibility of witnesses whom the trial judge sees but the appellate court does not."

[33] Their Honours observed that those three decisions "were simply a reminder of the limits under which appellate judges typically operate when compared with trial judges."[27]

Ground 1 – The appellant's contentions

[34] The appellant's argument in respect of this ground may be summarised as follows. The reliability and honesty of the respondent's accounts and assertions to the psychiatrists and reflected in materials relied on by the psychiatrists was of material significance to the validity of, or weight attaching to, the psychiatrists' respective opinions. The psychiatrists' opinions and the respondent's own evidence of his condition were central to the primary judge's determination. In this regard, reliance was placed on the following passage from the primary judge's reasons:[28]

> "I am conscious that [the respondent] continues to maintain that he is innocent of the 1999 offences. While there is always a prospect that the guilty verdicts were arrived at erroneously, it seems to me that I should proceed on the basis that they are correct. It follows that [the respondent's] statements of his innocence of these offences are not to be accepted. While I consider that to be a matter of some importance, it seems to me that it must be looked at in the context of his general willingness to be open about his past conduct, including conduct which has not been the subject of criminal charges. It is not sufficient to lead me to reject [the respondent's] statements about his current condition."

[35] Contrary to such findings on the part of the primary judge, the respondent's statements, made in order to persuade those in authority to release him, could not be relied on. The statements demonstrated persistence in denying personal responsibility and, at best, were an indicator of his dangerous lack of insight and, at worst, were lies designed to hide his true desires.

Ground 1 – The respondent's contentions

[36] The respondent's arguments in respect of this ground may be summarised as follows. The primary judge specifically referred to the respondent's conflicting accounts in relation to his upbringing and in relation to his assaults on children. The reference in paragraph [103] of the reasons to Dr Lawrence's not providing any convincing basis for her negative view of the respondent's honesty was "most likely" a reference to Dr Lawrence's oral evidence at first instance.

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24 *SS Hontestroom v SS Sagaporack* [1927] AC 37 at 47.
25 *Brunskill* (1985) 59 ALJR at 844; 62 ALR at 57.
26 (2003) 214 CLR 118 at 127.
27 *Fox v Percy* supra at 127.
28 *Attorney-General for the State of Queensland v Mark Richard Lawrence* [2011] QSC 291 at para [109].

[37] The holding that it "is not inevitable that, if there were such inconsistencies, they would reflect dishonesty by [the respondent]" was justified by the evidence as:

(a) The primary judge recorded that Professor Nurcombe (who had expressed a significantly adverse view about the respondent's prospects of re-offending in 2006) "noted the general consistency in the account which [the respondent] then gave of his history, with that given in 2009."

(b) The statements from the reports of Dr Beech and Professor Nurcombe extracted by Dr Lawrence are secondary evidence of their original reports (as are the statements by the respondent's sister).

(c) The inconsistencies are not overly important. The inconsistency in relation to contact with the respondent's natural mother and to being raised by his grandmother and late father, primarily relate to the age at which the respondent's father claimed him. These matters were not in issue on the trial and there was no questioning concerning them. Any inconsistency may have been adequately explained had it been tested.

As to the suggestion that there was an inconsistency regarding the nature of the assaults, no evidence was led from the unidentified psychologist referred to in paragraph 5.1.4 of Dr Lawrence's report.

The real issue in relation to the respondent's credibility was whether his condition had changed in recent times. The primary judge had the benefit in that regard of the evidence of the respondent.

[38] Having carefully considered the evidence, the primary judge found: the respondent was open as to his fantasies; the exit report from the Violence Intervention Program (VIP) and the High Intensity Sexual Offending Program (HISOP) were favourable; the respondent's lengthy history of good conduct in prison was of significance; the absence of offending was important; and that his attendance at courses in recent years showed he was making significant efforts to address his offending conduct.

[39] All of these considerations supported the respondent's current account of his condition. The better view was that there were less frequent deviant fantasies and that the respondent managed to control them. There was no error in the findings in this regard and, if there was an error, it was not material.

Ground 1 – Consideration

[40] The respondent's denials of the rape of which he was convicted support the conclusion that the history provided by the respondent ought be treated with scepticism. Apart from the 1983 killing, the rape is the most serious of the offences committed by the respondent. He also initially denied killing the victim of his 1983 crime, in respect of which he gave different stories to investigating police officers and attempted to place the blame on his co-offender.[29]

[41] The respondent's assertions to Dr Lawrence that the assault offences were ones in which he "just push[ed] the child" and were non-sexual in nature cannot be accepted. The sentences imposed for two of the offences belie that assertion. One of the assaults attracted a sentence of two years' probation, another three years' probation. The offence for which two years' probation was concerned involved an

[29] R822.

assault on a young male in a toilet block. The denial that the assaults had sexual connotations is also inconsistent with the matters referred to in paragraphs 5.1.4 and 5.1.5 and the pronounced sexuality of the respondent's conduct reported in paragraphs 5.3.6 and 5.3.7 of Dr Lawrence's 2 November 2009 report.

[42] There is evidence that the respondent deceived his parents and "lied openly" from an early age[30] and at least one other psychiatrist, whose report was perused by Dr Lawrence for the purposes of preparing her report, concluded that the respondent "distorted the truth and lied on every occasion."

[43] The respondent told Professor Nurcombe and Professor Morris on 19 October 2009 and 15 December 2009 respectively that his deviant sexual fantasies had ceased. Professor Morris recorded in his 18 March 2008 report that the respondent had told him that he was having rape fantasies about once a month.[31] He told Dr Lawrence in October 2009 that he had not had any such fantasies for three years.[32] That assertion was inconsistent with the respondent's account to Professor Morris. Dr Lawrence was sceptical. She explained her reasons for concluding it more likely that the fantasies had not ceased, although she thought it possible, or even likely, that they may have diminished in intensity with time.[33]

[44] Counsel for the respondent submitted, in effect, that little or no credence should be given to the hearsay accounts of psychiatrists and others who were not called to give evidence. However, these accounts went into evidence without objection and the appellant was and is entitled to rely on them. Dr Lawrence relied on them to some extent in forming her views as to the veracity of the respondent and his general reliability as an historian. It is significant that this aspect of her evidence was not challenged in cross-examination.

[45] The assertion that the inconsistencies in the histories given by the respondent were not in issue on the trial is incorrect. They were specifically addressed in Dr Lawrence's report. The probative value of the evidence of the inconsistencies cannot be eliminated or diminished by an election by defence counsel not to cross-examine on it. Also, the submission that the primary judge's finding that "Dr Lawrence did not provide any convincing basis" for her view of the respondent's honesty should be seen as referring only to her oral evidence must be rejected. Not only was no such limitation implicit in the primary judge's reasons but it was Dr Lawrence's report which contained the fuller discussion on the topic.

[46] The differences between the histories described in paragraphs 5.1, 5.1.1 and 5.1.2 and those described at 5.3.1 and 5.3.2 may not have borne directly on the central issues on the application but they did raise obvious concerns about the general reliability of the histories provided by the respondent. One of his versions has him being raised by his grandmother from birth until about age seven, when he was placed in a home for about seven years. In the version given to Dr Lawrence, he was cared for by his grandmother for a significantly shorter period before being raised by his father and step-mother.

[47] Professor Nurcombe accepted that, in arriving at the opinions expressed in his principal report, he did not question the accuracy of the history provided to him by

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30 Dr Lawrence's report para 5.1.5.

31 R843.

32 Dr Lawrence's report para 15.6.

33 R48.

the respondent:[34] nor did Professor Morris. Professor Nurcombe said in his oral evidence[35] that he did not know "how valid and true" were the respondent's "professions of improvement in his personality and his capacity to control deviant fantasy."

[48] Professor Morris accepted that, if what he had been told by the respondent was incorrect, his opinions may not be valid.[36] He was of the view that if the respondent was subjected to a supervision order it would be inappropriate for him to remain at large if he entertained "sexual fantasies of the deviant type".[37]

[49] The primary judge recognised that there was an inconsistency between statements by the respondent that his fantasies had not re-occurred for some years and other statements to the effect that when he had such fantasies he used coping mechanisms to bring them to an end.[38] His Honour concluded that the respondent "was attempting to say that for several years he has not positively maintained or promoted such fantasies; and though they come to him from time to time, he uses strategies which he has learnt, to bring them to an end...". It necessarily follows from that finding that the primary judge found, implicitly, that what the respondent told Professor Nurcombe and Professor Morris about his fantasies was significantly wrong.

[50] The evidence reveals the respondent to be psychiatrically disturbed and of low average intelligence. To put it mildly, the respondent's moral compass is distinctly awry. It does not necessarily follow from this that he should be regarded as untruthful, but there is nothing to suggest that, despite the respondent's moral deficiencies, he places any value on honesty or accuracy of reporting, particularly where the advancement of his own interests are concerned. The evidence is to the contrary. His criminal history reveals a dishonesty offence and, as the above discussion shows, he has lied in respect of serious matters and continues to lie about the rape offence and the sexual nature of the assaults. This is despite his active engagement in sexual offender courses and highlights the merits of Professor Nurcombe's observation that "reason suggests the need for caution." These considerations, in combination, outweigh any benefit the primary judge could have obtained observing the respondent in the witness box.

[51] In my view, the primary judge did err in concluding that the respondent's "statements about his current condition" should be accepted. In my respectful opinion, in reaching that conclusion the primary judge, although properly taking into account a number of objective matters referred to later, attached undue significance to the respondent's demeanour and his apparent frankness about his condition in the past. His Honour, in my respectful opinion, also gave insufficient weight to the matters relied on by Dr Lawrence in reaching her opinions as to the respondent's unreliability as an historian.

[52] I do not consider that historical frankness by the respondent to psychiatrists and psychologists about his condition bears significantly on whether his present evidence about his condition should be accepted. In his dealings with psychiatrists

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34 R16.
35 R100.
36 R164.
37 R170.
38 Reasons para [10].

prior to the review application before the primary judge, the respondent would have been well aware that disclosure of the continued existence of sadistic sexual fantasies and urges would materially prejudice his prospects of success on the application. As I have said, there is a significant body of evidence which supports Dr Lawrence's opinions as to his unreliability as an historian.

[53] Dr Lawrence's reasoned and unchallenged opinion was that it was unlikely that the fantasies and urges would have ceased entirely. The primary judge's findings endorse this opinion without referring to it. Professor Nurcombe, who had interviewed the respondent at length, felt unable to express a view as to reliability of the respondent's account. Significantly, it was Professor Nurcombe's opinion that even if the honesty of the respondent's statements about the changes in his condition were to be accepted, there must remain substantial doubt both as to the accuracy of the statements and as to the permanence of the changes, even if accurately reported.

[54] As the primary judge's findings now under consideration were material to his determination it follows that the exercise of the primary judge's discretion miscarried.

Ground 2 – The appellant's submissions

[55] The appellant's submissions were to the following effect. Professor Nurcombe's evidence was that even if there had been changes in the respondent's condition, it had not been shown that the changes were "durable". The primary judge did not find that if such changes did in fact exist, they would be "durable" after the respondent's release from imprisonment. Reference was made to Professor Nurcombe's evidence in cross-examination that a properly crafted supervision order was "more apt to…[ensure durability of change]…but cannot ensure it."

[56] "Ensure" means "make certain" or "make sure". The primary judge did not consider the need to "ensure" adequate protection nor the significance of the evidence of Professor Nurcombe to that issue (even considered independently of that of Dr Lawrence). The primary judge appeared to have understood that Professor Nurcombe's evidence was to the effect that a supervision order would be apt to ensure adequate protection of the community by reducing the risk of re-offending to moderate. This, however, was not Professor Nurcombe's evidence.

Ground 2 – The respondent's submissions

[57] The substance of the respondent's contentions were as follows. The appellant's argument ignores the fact that there is no requirement that a supervision order be "watertight".[39] It is for the judge, and not the psychiatrist, to determine the appropriate order.

[58] The primary judge took Dr Lawrence's evidence into account without relying on it. He discussed it at some length. After discussing the differences between the evidence of Dr Lawrence and Professor Morris, the primary judge reached a conclusion favourable to the respondent. His Honour said:

> "[112] It seems to me that the better view to be taken of the evidence is that [the respondent] experiences concerning deviant sexual fantasies less frequently and with less intensity than was the case when he committed offences in

[39] *A-G (Qld) v Francis* [2007] 1 Qd R 396 at [39].

> the past; and to the extent that he experiences them, he manages to control them with the benefit of what he learnt at courses undertaken in his time in prison, particularly the HISOP; with some support from what [the respondent] has learnt from the Violence Intervention Program. The psychopathic traits in his character have abated somewhat. He has in more recent years developed a more stable life, and is less rebellious, than was the case at the time of his offending. He has achieved some education, and developed an interest in working, and a capacity to work regularly."

[59] The primary judge, implicitly, accepted the opinions of Professor Nurcombe and Professor Morris over those of Dr Lawrence in respect of the risk of re-offending. The primary judge said in that regard:

> "[116] Consistent with views expressed by Professor Nurcombe and Professor Morris, I am satisfied that the risk that [the respondent] will reoffend has reduced. In my view, the attempts made by [the respondent] over a substantial period of time to change his conduct, and the success he has had to date, together with the support that he can expect on his release, and the imposition of appropriate requirements, are sufficient to ensure the adequate protection of the community. I therefore consider, on the evidence in the review, that subject to the imposition of appropriate conditions, an order should be made that [the respondent] be released subject to a supervision order; and that the continuing detention order to which he is at present subject should be rescinded. I stress, however, that the making of a supervision order will depend upon my satisfaction with proposed conditions, particularly relating to accommodation, monitoring of [the respondent], counselling, supervision and the undertaking of a course such as the SOMP. I also stress the necessity for the provision of support in these areas, to give the conditions utility. If such support is not provided, the risk that [the respondent] would reoffend will inevitably increase."

[60] The appellant's argument places too much emphasis on an answer given by Dr Nurcombe in cross-examination. His evidence must be looked at in total. Professor Nurcombe also gave evidence that if the respondent's changes were genuine a supervision order was feasible.[40] Further, Professor Nurcombe agreed that if a change in the respondent's condition was "fragile", a properly crafted supervision order was "more apt to build on that change to ensure there's no relapse".[41]

[61] The primary judge carefully examined the reports and evidence of Professor Nurcombe and took into account that: Professor Nurcombe expressed a more favourable view towards the respondent than he had previously; Professor Nurcombe said there was a need for caution; Professor Nurcombe's evidence was

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40 R31.

41 R33.

that the overall risk of re-offending would be moderate or lower if supervisory conditions were imposed; the respondent's release plans were reasonable; although Professor Nurcombe expressed a lack of confidence in the respondent's evidence of changes in his experiencing sexual fantasies, he generally accepted the respondent's account of the changes and of his behaviour and the risk of re-offending could be reduced to moderate by the imposition of conditions.

[62] The primary judge did not misapprehend either the legislative requirement or its application.

Ground 2 – Consideration

[63] The primary judge did not rely merely on the evidence of the psychiatrists in making his determination. He had regard to: the respondent's "lengthy history of good conduct in prison"; the QCS records which portrayed "a person who is generally stable, and is able to cope with most of the difficulties which he encounters, at least while in prison" (the 1999 offences were committed in prison and the unlawful killing occurred when the respondent was detained in Wolston Park Hospital); the respondent's participation in courses and his initiative in attempting to identify further beneficial treatment.

[64] Referring to such matters, the primary judge said:

> "[108] Taken together, these considerations, it seems to me, provide support for [the respondent's] current account of his condition. In particular, given the concerns expressed by all psychiatrists about the role of deviant sexual fantasises in future potential offending by [the respondent], it seems to me that the absence of any identified offending by [the respondent] in the past twelve years suggests a significant reduction in the frequency and strength of such fantasies, perhaps occurring spontaneously, or that [the respondent] exercises some effective control over such fantasies; or that both of these factors have played a role in [the respondent's] conduct in this period."

[65] The primary judge found that "the better view" of the evidence was that the respondent "experiences concerning deviant sexual fantasies less frequently and with less intensity than was the case when he committed offences in the past" and that the respondent manages to control those experiences. He found also that the psychopathic traits in his character had abated somewhat and that he had "achieved some education, and developed an interest in working, and a capacity to work regularly."

[66] It is apparent that, contrary to the appellant's submissions, the primary judge applied the test required by s 30(4) of the Act. His Honour said:

> "[117] In coming to the conclusion that a supervision order should be imposed, I have been particularly conscious that the paramount consideration is to be the need to ensure adequate protection of the community. The conclusion I have reached is based on the analysis of the evidence set out in these reasons. However, I consider my conclusion to be supported by the proposition adopted in Francis that, if supervision of a prisoner is apt to ensure adequate protection, having regard to the risk to the community posed by the prisoner,

> then a supervision order 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 authorise such constraint'. It might be thought that stronger support for the conclusion is to be found in *Attorney-General v Lawrence*, where the view was expressed that it is for the Attorney-General, as the applicant, to discharge the burden of proof that only a continuing detention order will provide adequate protection for the community. Although made in the context of an initial application for a division 3 order, there seems no reason in principle why that approach should not apply on a review." (citations omitted.)

[67] The evidence of Professor Nurcombe, on which particular reliance was placed by the appellant was that quoted by the primary judge in the following passage of his reasons:

> "[54] Professor Nurcombe expressed the following opinion:
>
> > 'If [the respondent] were to reoffend, the reoffending would be likely to involve the sadistic rape or sexual assault of male or female adults or children. His targets would be indiscriminate, but probably preferentially toward young females. The physical and psychological harm to victims would be great. There is a chance that a re-offence could escalate to a life-threatening level. *In contrast to my previous opinion, I do not think that the risk of reoffending is imminent. However, the risk of violence is chronic, and particularly likely to occur if he experiences rejection, loneliness or boredom.* Mr Lawrence has made genuine attempts to change the psychological basis of these offences, particularly by suppressing sadistic sexual fantasy and struggling hard to enhance his limited capacity for remorse and empathy; however it is likely that sadistic urges are dormant rather than defunct'. (*emphasis added*)" (citation omitted)

[68] This exchange occurred:[42]

> "Doctor, you say at page 11 of your report, paragraph 38 in the last line, 'However, it is likely that the sadistic urges are dormant rather than defunct.' What do you mean by that?--I don't know whether the sexual urges have dissipated or not. If they have it could mean that they're dead and defunct and will not come to light again; it could mean that they're dormant and suppressed as a result of treatment and the man's attempt to control himself or it could be that he still has these urges and has not been truthful in telling us that he has. I cannot distinguish between the three: dead urges, sleeping urges or still live urges."

[69] Professor Nurcombe had earlier reported having been informed by the respondent that he no longer had fantasies of a sadistic sexual nature and that "his sexual

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42 R13.

interest had deceased greatly over the last 10 years and that his sexual fantasies now were all of a normal heterosexual nature."[43]

[70] With reference to Dr Nurcombe's evidence about his inability to know whether the respondent's sexual urges had in fact dissipated or whether they existed or were dormant and suppressed, the following exchange occurred:[44]

> "So how reliable is your 13 out of 40 that you've - having regard to that limitation that you identified, that he's been out of the community for so long?-- It's only as reliable as the authenticity of the changes that may have occurred are.
>
> And how do you test the authenticity of those changes?-- I don't know how to do that.
>
> You accept at face value what you are told about those changes in undertaking that initial test?-- Can I expand in my answer to that?
>
> Certainly, certainly?-- I believe that [the respondent] has tried very hard to address some of the basic issues that have to do with a psychopathic personality and these may well have changed, so what he is saying may in fact be truthful and valid. However, it's also possible that he has genuinely tried to change this but - and believes that he has but the changes are in fact not valid or will be difficult to sustain under the normal stresses of life outside prison. It would maybe lastly that there is no change and that he is deceiving himself and us.
>
> All right. Well, put the last category to one side we understand that, but the second category, the stress, the notion of some - that there is a - endeavour to change but it's unrealistic having regard to the stresses that might come from release. What do you mean by that?-- Well, it's the question of the durability of change. The changes may be genuine but fragile and under certain stresses, particularly severe stress, the individual may revert back to the proclivities that he had prior to the change.
>
> When you say - what sort of stresses are you referring to?-- The stresses of exclusion, loneliness or rejection, in particular, in his case."

[71] Professor Nurcombe subsequently further acknowledged that there was no objective way of ascertaining whether or not the relevant statements made by the respondent to him were accurate and that he had accepted them at face value. It emerged also that no questions of a probing nature were asked with a view to testing the respondent's assertions.[45] Professor Nurcombe instanced relationship break ups and the publicity and pressure resulting from media and community action groups as other possible triggers for regression.[46]

[72] The following is extracted from Professor Nurcombe's evidence-in-chief of.[47]

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43 R12.
44 R14, 15.
45 R16.
46 R15.
47 R18, 19, 21.

> "HIS HONOUR: Is there a quantification associated with moderate risk or is it simply a quantitative term?-- It is a quantitative term, your Honour...
>
> MR ROLLS: In the third line you highlight moderate risk of re-offending with moderate highlighted. Then you seem to pose a question in the next four lines. Precisely what are you trying to communicate there, doctor?-- The evidence is that psychopathic offenders may appear to respond well to treatment for sex offending but … in fact in the long run do not. In some cases this may be because the offender is able to convince other people that he has acquired what needs to be acquired in treatment often by the use of phraseology, et cetera, that is introduced during treatment but where there has been no genuine change. I could not exclude that possibility.
>
> Why couldn't you exclude it?-- Because I don't have the capacity to do so.
>
> [The respondent] said the right things to you?-- Yes.
>
> And you don't know whether or not they were motivated by a genuine belief in what he was saying or whether it was something that he thought you wanted to hear?-- I do not know the difference between those possibilities.
>
> …
>
> If you accept Mr Lawrence has made some change that you identify and it is genuine, what would be - what would be the consequences of that in relation to managing Mr Lawrence if he was to be released?-- *It is based upon the possibility that those changes are genuine that I indicated a moderate risk.*
>
> Even if the changes are genuine it is still a moderate risk?-- *Yes. If the changes are not genuine the risk remains high.*
>
> …
>
> So is it true that you can't be certain whether the - the changes that you perceive are genuine?-- Yes.
>
> And until you could be certain of their genuineness, you can't have confidence in a supervisory outcome?-- Precisely.
>
> Is that - and is there any way of testing, absent placing the community at risk by letting Mr Lawrence go, is there any way of testing, before he's released, whether or not the changes are genuine?-- No." (emphasis added)

[73] The primary judge asked Professor Nurcombe about the significance of the respondent's attempts to "change his condition".[48]

> "…Do they carry much weight in view of the uncertainties that you identify? In other words, your attempt to identify his condition and to put numbers on some aspects of it are affected by the uncertainty about his responses, do those other matters I've listed assist at all in deciding whether to give more weight or less weight to what he's

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48 R23.

> manifested to you?-- At the risk of being rambling, my answer, your Honour, I would say that I - I was impressed with this man's attempt to change himself but also impressed with the very great limitations on his capacity to do so. I think he actually believes that things have changed. In other words, he's telling the truth and he believes he's changed. But it's not clear to me that these changes are durable."

[74] For present purposes, a number of significant matters emerge from Professor Nurcombe's evidence. In his opinion, even if the relevant assertions of the respondent are to be taken at face value and he is no longer experiencing sadistic sexual urges or fantasies, the risk of the respondent re-offending remains chronic although such re-offending was not likely to be imminent. In Professor Nurcombe's opinion, if the changes reported by the respondent had not in fact taken place the risk of the respondent re-offending remained high. The finding of the primary judge that the respondent continued to have fantasies which he was able to control meant that, to a significant degree, the changes reported by the respondent to Professor Nurcombe, and which were significant in his risk assessment, had not in fact taken place.

[75] Professor Nurcombe lacked confidence in the effectiveness of supervision after release. If there was a high risk of re-offending he was of the view that providing the degree of supervision required would be beyond the capacity of the system; virtually 24 hour supervision would be required.[49] Even if the risk of re-offending was regarded as moderate, Professor Nurcombe had no confidence in the efficacy of supervision because it was impossible to determine whether the changes claimed by the respondent had taken place.

[76] Another concern of Professor Nurcombe was whether the changes, if they existed, were "durable". The examples he gave of matters which could trigger a re-occurrence of sadistic urges and fantasies were of a fairly commonplace nature and by no means unlikely to be encountered or experienced by the respondent on supervised release. He accepted that a properly crafted supervision order was more apt to ensure durability of change but commented that such an order "cannot ensure it."

[77] When the foregoing matters are taken into account, there would not appear to be a great deal of difference, for practical purposes, between Dr Lawrence's opinions and those of Professor Nurcombe. Both considered the existence or re-occurrence of sadistic sexual urges and fantasies as a significant contributor to risk. Professor Nurcombe did not believe there was any way of determining whether the respondent was giving an accurate account of the changes in his urges and fantasies but plainly considered that if they had become dormant there was a substantial risk of re-activation on the respondent's release into the community. Dr Lawrence was satisfied on the evidence before her that little credence should be given to the respondent's account. She was also of the opinion that it was objectively unlikely that the sexual fantasies and urges had ceased entirely. Her evidence in this regard was unchallenged.

[78] The primary judge, in paragraphs [51] to [69] of his reasons, discussed Professor Nurcombe's evidence in considerable detail. He drew attention to the Professor's opinion that, given appropriate supervision conditions, the risk of re-offending

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49 R19.

could be reduced to moderate. The primary judge concluded that professor Nurcombe's "oral expression in April 2010 of a lack of confidence in the effectiveness of the supervisory conditions could hardly be regarded as a complete departure from [his] conclusions"[50] that the respondent was at a moderate risk of re-offending if appropriate supervision conditions were imposed and enforced.

[79] It seems to me, with respect, that the primary judge's assessment of Professor Nurcombe's evidence failed to have due regard to the basis on which the Professor's opinions were expressed. The moderate risk assessment was dependent on the acceptance of the respondent's assertions about there being no continuing sadistic sexual fantasies and impulses. It is, I think, clear that had the risk that such fantasies and impulses were in fact continuing been taken into account by Professor Nurcombe, it would have materially elevated the degree of risk assessed by him. Even if it was the case that such fantasies and impulses were no longer occurring, the question mark about the durability of this state of affairs remained. Should the fantasies and impulses be continuing or should they re-emerge, Professor Nurcombe would rate the risk of re-offending as high.

[80] Even though Professor Nurcombe accepted in cross-examination that strict supervision conditions would reduce significantly the risk of re-offending,[51] it does not appear to me that this concession substantially eroded his concerns arising from the inability to discern the true state of affairs in relation to the respondent's fantasies and impulses and the distinct risk of their re-emergence on release if presently dormant. No witness explained satisfactorily how a supervising person could discern if the respondent was experiencing fantasies which might serve as a trigger for violent sexual assault. Professor Nurcombe accepted that a therapist or supervisor would have no means of knowing whether the respondent was experiencing fantasies unless the respondent elected to make disclosure.

[81] In my respectful opinion, the appellant has demonstrated that the primary judge erred in failing to appreciate the basis on which Professor Nurcombe's opinion was expressed. A consideration of the primary judge's reasons suggests that his Honour attached considerable weight to Professor Nurcombe's opinions and that they were material to his evaluation of whether, having regard to the "paramount consideration" that the "adequate protection of the community" be ensured, a supervision order should be made. Consequently, the exercise of the primary judge's discretion miscarried in this respect also.

Ground 3 – The appellant's submissions

[82] It was submitted that the primary judge erred in failing to give due weight to the seriousness of the offending conduct in which the appellant may engage in determining whether a supervision release order would "ensure adequate protection of the community". The appellant's argument proceeded as follows.

[83] The risk of the respondent's re-offending was rated "high" by Dr Lawrence and "moderate" by each of Professor Nurcombe and Professor Morris if the respondent was released subject to certain supervision conditions. Professor Nurcombe expressed a lack of confidence in the effectiveness of supervision. Dr Lawrence and Professor Nurcombe accepted that the offending conduct, if it occurred, could be sexual violence or even killing. Professor Nurcombe said that the offending

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50 Reasons at para [68].

51 R30.

could take the form of "sadistic rape or sexual assault of male or female adults or children". He was of the view that "physical and psychological harm to victims would be great". Professor Morris identified the likely offending as sexual violence. He was not questioned about the possibility of unlawful killing.

[84] Consequently, the effect of the order is that the community will be exposed to (at worst) "quite high" or (at best) "moderate" and in any event "chronic" risk that somebody will be raped, killed or both. This cannot constitute an acceptable outcome of proceedings under the Act.

[85] Less serious offences may be accommodated by a supervision order even if the risk is described as moderate. However, "adequate protection" of the community cannot be "ensured" by releasing a person who poses a moderate risk of committing murder.

[86] The primary judge failed to measure the risk against the consequences if the risk eventuated and thus erred in law.

[87] The primary judge should have concluded on the evidence of Professor Nurcombe, which was accepted by him, that release upon supervision would not ensure adequate protection.

[88] Dr Lawrence was firmly of the view that the respondent should not be released. In her opinion, the respondent continued to have fantasies of sexual rape and killing[52] but has sought to distract himself from them.

Ground 3 – The respondent's submissions

[89] Counsel for the respondent submitted to the following effect. There is nothing in the Act which required the primary judge to measure the risk against the consequences if the risk eventuated. In any event, his Honour did analyse the risk in the judgment. He noted that: there was a chance of re-offending to a life-threatening level, although that was not imminent;[53] appropriate supervisory conditions would significantly reduce such a risk;[54] Dr Lawrence's evidence was that it was more likely that the respondent would abscond if he experienced difficulties than immediately proceed to commit a serious offence[55] and taking these matters into account he, nevertheless, determined that a supervision order should be made.

Ground 3 – Consideration

[90] The appellant's contention that the assessment of measure that will "ensure adequate protection of the community" involves an equation with two factors, namely, "the likelihood of conduct which will endanger the community and the result of such conduct if it ensues" must be accepted. The general principle expressed in it has the imprimatur of this Court. In *A-G (Qld) v Beattie*[56] Keane JA, Holmes JA and Douglas J agreeing, said:[57]

> "For the appellant, it was argued that the expert description of the risk of the appellant's re-offending as 'moderate' meant that the risk

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52 Reasons para [81].
53 Reasons at para [54].
54 Reasons at paras [64] and [68].
55 Reasons at para [88].
56 [2007] QCA 96.
57 At [19].

> fell short of 'unacceptable'. But this argument overlooks the point that whether or not a moderate risk is unacceptable must be gauged by taking into account the nature of the risk and the consequences of the risk materialising."

[91] The matters referred to by counsel for the respondent as being noted by the primary judge are all observations by the primary judge on the evidence of either Professor Nurcombe or Dr Lawrence. In that part of the reasons headed "Outcome of the Review", the primary judge does not expressly undertake an exercise of measuring the risk of offending against the consequences of that risk eventuating. It is also correct, as was submitted on behalf of the appellant, that the primary judge did not discuss the adequacy of the protection of the community from the risk of re-offending. He did make it plain, however, that he had such protection very much in mind and it is impossible to conclude that the primary judge, in this section of his reasons, had lost sight of the wealth of evidence, discussed in some detail in earlier parts of the reasons, as to the likelihood that any re-offending would involve sexual violence or killing.

[92] It is apparent from the reasons that the primary judge evaluated the evidence against the requirements of the Act with great care in a considered, insightful way. This further suggests that it was unlikely that the primary judge did not have any or any sufficient regard to the necessity to weigh the extent of the risk of re-offending against the consequences of the risk materialising.

Conclusion

[93] Counsel for the appellant submitted that if the appeal was allowed this Court should exercise the discretion under s 30 of the Act and affirm the decision of Fryberg J that the respondent is a serious danger to the community in the absence of an order under division 3 of the Act and order that the respondent continue to be subject to the continuing detention order made by Fryberg J.

[94] Under s 43 of the Act, this Court has "all the powers and duties of the court that made the decision appealed from".

[95] The decision of Fryberg J that the respondent is a serious danger to the community may be affirmed only if this Court is satisfied by acceptable, cogent evidence and to a high degree of probability that the evidence is of sufficient weight to affirm the decision.[58]

[96] The primary judge was so satisfied and I am also. Counsel for the respondent's submissions were made on the implicit premise that the requirements of s 30(2) of the Act had been satisfied: he submitted that the supervision order made by the primary judge was appropriate.

[97] I do not consider that the "paramount consideration" of "adequate protection of the community"[59] could be met by a supervision order. In so concluding, I have in mind the likely consequences of re-offending: the committing of a life threatening violent sexual offence. That risk would be substantial. Dr Lawrence regarded it as high. For the reasons discussed earlier, Professor Nurcombe's moderate risk evaluation was made on the premise that the respondent provided a generally

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58 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 30(2).

59 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 30(4).

accurate history and that, in particular, he no longer experienced fantasies of a sadistic sexual nature. As also discussed earlier, there was a substantial body of evidence which required the respondent's account to be treated with the utmost caution. I would not be prepared to accept it without more corroboration than was provided at first instance. The matters pointed to by Dr Lawrence amply illustrate the unreliability of the respondent's assertions as to his condition and none of the medical experts knew of any means of determining their accuracy.

[98] Another significant feature of Professor Nurcombe's appraisal of risk, which is relevant to the assessment under s 30 of the Act now being undertaken, is the nature and likely occurrence of the matters which Professor Nurcombe thought could trigger a return of the respondent's fantasies if they were in fact dormant. Dr Lawrence's report also points to the likelihood of significant triggers for the fantasies occurring subsequent to any release of the respondent under a supervision order.

[99] Dr Lawrence's unchallenged evidence that the respondent is probably continuing to experience fantasies and the primary judge's finding to that effect also assist my conclusion that a supervision order would not provide adequate protection of the community.

[100] For these reasons, I would order that:

(a) The appeal be allowed.

(b) The order of Peter Lyons J at first instance be set aside.

(c) The decision of Fryberg J that the respondent is a serious danger to the community in the absence of an order under division 3 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) be affirmed.

(d) The respondent continues to be subject to the continuing detention order made by Fryberg J.

[101] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Muir JA. I agree with those reasons and with the orders proposed by his Honour.

[102] **WHITE JA:** I have read the reasons for judgment of Muir JA and am grateful for his Honour's analysis of the evidence, particularly of the psychiatric witnesses. I agree, for the reasons expressed by his Honour, that the respondent is a danger to the community in the absence of an order under div 3 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 and that the adequate protection of the community cannot be ensured by a supervision order. The evidence supporting that conclusion, as discussed by his Honour, is of the kind and quality required by s 30(2) of the Act.

[103] I agree with the orders proposed by Muir JA.