

# SUPREME COURT OF QUEENSLAND

CITATION: *A-G for the State of Queensland v Sands* [2011] QSC 397

PARTIES: **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND**  
(applicant)  
v  
**ERIC SANDS**  
(respondent)

FILE NO/S: SC No 11025 of 2010

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: Delivered ex tempore 5 December 2011

DELIVERED AT: Brisbane

HEARING DATE: 21 November 2011, 5 December 2011

JUDGE: Atkinson J

ORDERS: **The respondent be released from custody on 6 December 2011 subject to the following conditions until 16 January 2021.**  
**The respondent must:**

- 1. report to a Corrective Services officer at the Queensland Corrective Services Probation and Parole Office closest to his place of residence between 9am and 4pm on the day following his release from custody and at that time advise the officer of his current name and address;**
- 2. report to, and receive visits from, an authorised Corrective Services officer no less than once a week;**
- 3. notify an authorised Corrective Services officer of every change of his name, place of residence or employment at least two business days before the change occurs;**
- 4. be under the supervision of a Corrective Services officer for the duration of the order;**
- 5. comply with a curfew direction or monitoring direction;**
- 6. comply with any reasonable direction under s 16B of the Act given to him in relation to, but not limited to, the prisoner's accommodation, rehabilitation, care, treatment or drug or alcohol use;**
- 7. comply with every reasonable direction of a**

- Corrective Services officer that is not directly inconsistent with a requirement of this order;
8. not leave or stay out of Queensland without the permission of a Corrective Services officer;
  9. not commit an offence of a sexual nature during the period of this order;
  10. respond truthfully to enquiries by an authorised Corrective Services officer about his whereabouts and movements generally;
  11. attend upon and submit to assessment, treatment and/or medical testing by a psychiatrist, psychologist, social worker, counsellor or other mental health professional as directed by the authorised Corrective Services officer at a frequency and duration which shall be recommended by the treating practitioner. That treatment shall initially include treatment by Dr Moyle, or a similarly qualified psychiatrist, and will include sessions with Mark Conway, Social Worker, or a similarly qualified and culturally appropriate practitioner;
  12. permit any medical, psychiatrist, psychologist, social worker, counsellor or other mental health professional to disclose details of treatment, results, intervention and opinions relating to any increased risk of re-offending and compliance with the previous paragraph and following two paragraphs to Queensland Corrective Services if such a request is made for the purposes of ensuring compliance with this order;
  13. abstain from the consumption of alcohol and illicit drugs for the duration of this order;
  14. take prescribed drugs only as directed by a medical practitioner;
  15. not visit hotels, bars or nightclubs licensed to supply or serve alcohol without the prior permission of an authorised Corrective Services officer; and
  16. submit to any form of drug and alcohol testing including both random urinalysis and breath testing as directed by an authorised Corrective Services officer.

The court directs that:

1. Counsel file and serve submissions on the appropriateness of a case stated to the Court of Appeal on the constitutional validity of all or any part of the *Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)* and the form of any such case stated, given the amendments that have been made to that Act after the decision of the High Court in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, to be

**provided by 6 February 2012.**

CATCHWORDS: CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – DANGEROUS SEXUAL OFFENDER – GENERALLY – where the respondent was released on a supervision order pursuant to the *Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)* – where contravention proceedings were brought against the respondent and he was detained in custody – where the respondent brought an application that he be released on a continuing supervision order as amended – whether the respondent should be released on a supervision order or detained in custody

PROCEDURE – SUPREME COURT PROCEDURE – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – OTHER MATTERS – where concerns were raised during submissions about the constitutional validity of certain parts of the *Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)* – whether directions should be made for the parties to file submissions on the appropriateness of a case stated to the Court of Appeal with respect to those matters

*Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)*,  
s 11, s 13, s 16, s 20, s 21, s 22

*Uniform Civil Procedure Rules 1999 (Qld)*, r 483(2)

*Fardon v Attorney-General (Qld)* (2004) 223 CLR 575,  
considered

COUNSEL: J M Sharp for the applicant  
B Mumford for the respondent

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

HER HONOUR: Eric Sands, also known as Eric Kynuna, was made subject to orders under the *Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)* ("the Act") in 2010. On 22 October 2010 a preliminary hearing was conducted, and orders were made for his examination by two psychiatrists with a view to the matter being the subject of a hearing under section 13 of the Act.

That final hearing was held on 10 January 2011 when Byrne SJA made a supervision order. It appears that a contravention of that supervision order was alleged, and Mr Sands was brought before the Court on 15 June 2011, pursuant to sections 20 and 21 of the Act, when orders were made by Byrne SJA that he be detained in custody until the final decision of the Court, and that he undergo examination by two psychiatrists, being Professor Nurcombe and Dr McVie, who were to prepare reports in accordance with section 11 of the Act.

This matter first came before me on 21 November 2011, where a number of documents were read, including reports by those named psychiatrists. Included in the documentation before the Court were a number of documents which, it was fairly conceded by counsel for the applicant, were not relevant to the decision I had to make, and she said she would refer me to any of that material that it was necessary for me to read.

When the psychiatric material was read, two matters arose that caused me some concern. The first was the suggestion that because of the Aboriginal English dialect spoken by Mr Sands,

he found it difficult to understand or explain himself to the psychiatrists and I was concerned that the same might be true of the Court proceedings. That has been remedied today by a field officer from the Aboriginal and Torres Strait Islander Legal Service, Mr Wake, attending and assisting Mr Sands whenever there was anything he did not understand that was being said, and I thank the field officer for doing that. It is very important that someone in Mr Sands' position is not disadvantaged linguistically in Court.

The second matter which caused me some concern was found in the original report by Professor Nurcombe, and then in his supplementary report, where he recommended that a conference be held between representatives of the Department of Corrections, the Aboriginal and Torres Strait Islander Legal Service, a psychological counsellor with experience with Indigenous people, an Aboriginal elder and himself with regard to a treatment plan for Mr Sands. No such conference had been convened and so no treatment plan put in place.

Mr Sands has a long criminal history, however the only entries on his criminal history which relate directly to sexual offending are found on 6 December 2001, when he was convicted of an indecent act in any place to which the public are permitted access, committed on 16 February 2001; a conviction on 12 December 2002 for an indecent act in any place with an intent to insult or offend any person, committed on 14 June 2002; an offence of indecent act in any place with intent to insult or offend any person committed on 30 October 2007, of

which he was convicted on 18 February 2008; three counts of indecent act in any place to which the public are permitted access, of which he was convicted on 22 September 2008, together with a conviction for indecent treatment of a child under 16 (expose). He was also dealt with on that date for a summary count of wilful exposure, which was committed on 23 April 2006.

It should, therefore, be noted that Mr Sands' sexual offending, while persistent, is at a relatively low level. It involves exposure and/or masturbation to post-pubescent women. As Dr McVie said, he is not a paedophile. If he offends against women under the age of 18, it is because of his difficulty in telling the difference between adult post-pubescent females and post-pubescent females who are not yet adults.

The proposal made by Professor Nurcombe was, as a result of his giving evidence in this Court on the first date for hearing, followed up, and a meeting was convened. It has been extremely useful in determining what should happen with Mr Sands.

Those in attendance were Sarah Cuskelly from Corrective Services, Professor Nurcombe, a very experienced psychiatrist, Alec Jones, a psychologist, Mark Conway, an experienced social worker from the Aboriginal and Torres Strait Islander Legal Service, Lynley Milne, a psychologist from the Wolston Correctional Centre, and Jan Davis, a representative from

Prison Fellowship.

As a result of that meeting a treatment plan was agreed. There are a number of aspects of that treatment plan that are important. They include that those who treat Mr Sands, in particular, the psychiatrist and the social worker, be experienced in dealing with Indigenous men, so that they are culturally appropriate to deal with Mr Sands' difficulties, and that the psychiatrist have experience in treating men who have similar problems to Mr Sands, both medically and psychologically.

Professor Nurcombe recommended that Dr Moyle was the person best able to treat Mr Sands, and Dr Moyle has expressed his willingness to do that, so long as Mr Sands is treated in the community with his care being managed primarily by a community mental health service.

Mr Conway has filed an affidavit deposing to his experience and qualifications as a social worker, and his agreement to work with Mr Sands by way of conducting face-to-face interviews with him twice a week of up to three hours per session for three months, and to collaborate with Alec Jones, the psychologist, Dr Nurcombe and community agencies in establishing appropriate ongoing support for Mr Sands in the community in meeting any conditions on which the Court may impose upon him.

It appears that Mr Conway has already spoken to Mr Sands and established some rapport with Mr Sands. It is important that

there is a degree of trust between Mr Sands and his therapists. It appears, from what Mr Sands said to Mr Conway, that Mr Sands understands that he had behaved badly in sexually exposing himself, and they had further conversations about what he should do in the future.

My jurisdiction to deal with this matter arises under section 22 of the Act, which provides that it applies if I am satisfied, on the balance of probabilities, that the released prisoner has contravened a requirement of the supervision order. That is not contested, however, it appears that Mr Sands' breaches were relatively minor and perhaps understandable. Dr McVie, for example, said certain conditions which were imposed were not necessary for his proper reintegration and rehabilitation in the community. If too many conditions are imposed it is likely to be counter-productive. Only those conditions that are necessary to achieve the aims of the Act should be imposed.

The next matter I have to consider is under section 22(2) of the Act which provides that, "Unless the released prisoner satisfies the court, on the balance of probabilities, that the adequate protection of the community can, despite the contravention ... of the existing order, be ensured by the existing order as amended under subsection (7), the court must ... [in the case of] a supervision order, rescind it and make a continuing detention order."

I am satisfied on the balance of probabilities that the adequate protection of the community can, despite the contraventions, be ensured by the order, as amended, under subsection (7). So, I do not propose to rescind it and make a continuing detention order; rather, I shall amend the order in accordance with subsection (7) which provides:

"If the released prisoner satisfies the court, on the balance of probabilities, that the adequate protection of the community can, despite the contravention ... of the existing order, be ensured by a supervision order ... the court -

- (a) must amend the existing order to include all of the requirements in section 16(1) if the order does not already include all of those requirements; and
- (b) may otherwise amend the existing order in a way that the court considers appropriate -
  - (i) to ensure adequate protection of the community;
  - or
  - (ii) for the prisoner's rehabilitation or care or treatment."

That section means that I must include all the requirements provided under section 16(1) of the Act whether or not I consider them appropriate to ensure the adequate protection of the community or for the prisoner's rehabilitation or care or treatment so I need say nothing more about them other than

they must be imposed. During submissions I expressed concern about whether the amendments made to the Act since the decision of the High Court in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 are constitutionally valid given the manner in which they constrain judicial discretion. Section 16(1) (da) and s 16A(2) (a) for example require the court to impose upon the prisoner a "curfew direction" which appears to require the court to delegate to a corrective services officer power to direct a prisoner to remain at a certain place at a certain time. This direction is apparently being administered according to departmental policies which apparently require or enable a "released" prisoner to be detained at all times. Accordingly, pursuant to r 483(2) of the *Uniform Civil Procedure Rules 1999 (Qld)*, I directed the parties to file and serve submissions on the appropriateness of a case stated to the Court of Appeal on the constitutional validity of all or any part of the Act and the form of any such case stated, to be provided by 6 February 2012.

Assuming the constitutional validity of the Act, the order will be as follows:

The court, being satisfied, on the balance of probabilities that Eric Sands has contravened a requirement of the supervision order, made pursuant to Division 3 of the *Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)* -----

RESPONDENT: Yes, your Honour.

I order that Eric Sands be released from custody on 6 December 2011 subject to the following conditions until 16 January 2021.

RESPONDENT: Yes, your Honour.

HER HONOUR: The respondent must:

1. report to a Corrective Services Officer at the Queensland Corrective Services Probation and Parole office closest to his place of residence between 9 a.m. and 4 p.m. on the day following his release from custody and at that time advise the officer of his current name and address.

RESPONDENT: Yes, your Honour.

2. report to and receive visits from an authorised Corrective Services officer no less than once a week.

RESPONDENT: Yes, your Honour.

HER HONOUR: Now this means you have to see a Corrective Services Officer at least once a week, possibly more. You can see the Corrective Services officer more than that but you have got to see them at least once every week.

RESPONDENT: Yes, your Honour.

HER HONOUR: Okay. So, if they want to see you more than once, you still have to see them at least once every week.

RESPONDENT: Yes, your Honour.

3. notify an authorised Corrective Services Officer of every change of his name, place of residence or employment at least two business days before the change occurs.

RESPONDENT: Yes, your Honour.

4. be under the supervision of a Corrective Services Officer for the duration of the order.

RESPONDENT: Yes, your Honour.

5. comply with a curfew direction or monitoring direction.

RESPONDENT: Yes, your Honour.

HER HONOUR: Okay. Now, a curfew direction is a direction that you might have to stay at a particular place for a particular period of time, okay?

RESPONDENT: Yes, your Honour.

HER HONOUR: And a monitoring direction is a direction that you might have to wear a particular device to monitor your movements.

RESPONDENT: Yes.

HER HONOUR: And you would have to permit that to be installed at the place where you live.

RESPONDENT: Yes.

6. comply with any reasonable direction under section 16B of the Act given to him, including directions in relation to his accommodation, rehabilitation, care, treatment or drug or alcohol use.

RESPONDENT: Yes, your Honour.

HER HONOUR: Section 16B of the Act deals with accommodation, rehabilitation, care, treatment and drug and alcohol use, you understand?

RESPONDENT: Yes, your Honour. I understand.

7. comply with every reasonable direction of a Corrective Services Officer that is not directly inconsistent with a requirement of this order.

Mr Mumford, you might like to assist with that.

MR MUMFORD: Yes. Thank you, your Honour.

RESPONDENT: Yes, your Honour. I understand.

8. not leave or stay out of Queensland without the permission of a Corrective Services Officer.

9. not commit an offence of a sexual nature during the period of this order.

RESPONDENT: Yes, I understand that, your Honour.

HER HONOUR: Good. That is a very important one.

10. respond truthfully to inquiries by an authorised Corrective Services Officer about his whereabouts and movements generally.

RESPONDENT: Yes, I understand that.

11. attend upon and submit to assessment, treatment and/or medical testing by a psychiatrist, a psychologist, social worker, counsellor or other mental health professional as directed by the authorised Corrective Services Officer at a frequency and duration which shall be recommended by the treating practitioner.

RESPONDENT: Yes, your Honour. I understand.

HER HONOUR: That treatment shall initially include treatment by Dr Moyle or a similarly qualified psychiatrist and include sessions with Mark Conway, social worker, or a similarly qualified and culturally appropriate practitioner.

12. Permit any medical psychiatrist, psychologist, social worker, counsellor or other mental health professional to disclose details of treatment, results,

intervention and opinions relating to any increased risk of re-offending, and compliance with the previous paragraph and the following two paragraphs of this order to Queensland Corrective Services, if such a request is made for the purposes of ensuring compliance with this order.

RESPONDENT: Yes, you Honour. I understand.

13. abstain from the consumption of alcohol and illicit drugs for the duration of this order.

DEFENDANT: Yes, I am.

14. take prescribed drugs only as directed by a medical practitioner.

DEFENDANT: Yes, your Honour.

15. not visit hotels, bars or nightclubs licensed to supply or serve alcohol without the prior permission of an authorised Corrective Services Officer.

DEFENDANT: Yes, your Honour.

16. submit to any form of drug or alcohol testing, including both random urinalysis and breath-testing, as directed by an authorised Corrective Services Officer.

DEFENDANT: Yes, your Honour.

HER HONOUR: Okay. Now, I am satisfied with those conditions in place the adequate protection of the community can be met, despite the contravention of a supervision order.

DEFENDANT: Yes, your Honour.

HER HONOUR: Now, Mr Sands, it is your job to make sure you comply with all these orders and you do the treatment that particularly the psychiatrist and the social worker want to do with you. Do you understand?

DEFENDANT: Yes, your Honour.

HER HONOUR: Because I do not want to see you back here. I am sure you do not want to come back here. All right. Those will be the orders.

I would particularly like to note the important role played by Mr Wake in interpreting and explaining each of the terms of the order to Mr Sands so that he understood them. I think the time taken by Mr Wake to explain each of the conditions to Mr Sands shows the desirability of having someone with Mr Wake's skills present in Court to help, and I thank Mr Wake very much for his role.

-----