SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v Ellis* [2011] QCA 377
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **ANDREW CLIVE ELLIS** (respondent)
FILE NO/S:	Appeal No 10922 of 2011 SC No 4389 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Application for Stay of Execution
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	16 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	6 December 2011
JUDGES:	Chesterman JA
ORDER:	**Application for stay of execution is refused**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – STAY OF PROCEEDINGS – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL – where the applicant has appealed against the order of A Lyons J releasing the respondent from custody subject to a supervision order – where the applicant claims the community can only be adequately protected against the risk of the respondent re-offending by being detained in custody – where the applicant seeks a stay of the order of A Lyons J made on 25 October 2011 until the appeal is heard – whether a stay of the order should be granted *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 13 *Uniform Civil Procedure Rules* 1999 (Qld), r 761(2) *Attorney-General for the State of Queensland v Fardon* [2011] QCA 111, considered *Attorney-General for the State of Queensland v Fardon* [2011] QCA 155, considered *A-G (Qld) v Lawrence* [2011] QCA 347, considered
COUNSEL:	B H P Mumford for the applicant J J Allen for the respondent

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

[1] **CHESTERMAN JA:** On 24 May 2011 the Attorney-General ("the applicant") sought an order pursuant to s 13(5)(a) or (b) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) ("the Act") that the respondent be detained in custody for an indefinite term for control, care or treatment, or that he be released subject to the requirements of a supervision order. At the hearing before Ann Lyons J on 19 October 2011 the applicant submitted the court should make a continuing detention order. On 25 October Ann Lyons J ordered, instead, that the respondent be released subject to a supervision order.

[2] The applicant has appealed against that order, and by application filed 25 November 2011, sought a stay of the order of 25 October pending the determination of the appeal. The respondent is due for release from prison on 12 January 2012. The applicant's appeal can be heard on 20 February 2012.

[3] On 5 June 2006 the respondent was sentenced in the District Court to terms of imprisonment for one count of sexual assault and one count of sexual assault with a circumstance of aggravation. He was, as well, charged with the summary offence of wilful exposure. A head sentence of three years' imprisonment was imposed with parole eligibility set after the respondent had served 10 months in custody. The sentences were made cumulative upon the activation of the balance of a suspended sentence of five and a half months' imprisonment for property and drug offences.

[4] Despite having been sentenced to an effective maximum term of three and a half years in June 2006, six and a half years later the respondent remains in custody and is not due for release until 12 January next year. The reason for his extended incarceration is that he has frequently misbehaved in prison and committed further offences which have led to the imposition of additional cumulative terms of imprisonment.

[5] The offences for which the respondent was imprisoned in June 2006 were described by the primary judge:

> "[8] … just before 7.00am on 12 August 2005, the first complainant, a 17 year old High School student, was walking to the bus stop, when she noticed the respondent following her. He crossed the road, and from that side of the street, exposed his penis to the complainant and said *'do you want to suck me off, babe?'* The complainant started to walk away, but Mr Ellis ran up behind her, stood beside her, offered to walk her to school, and asked *'do you want to suck me off?'*
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> [9] The complainant continued to walk away from the respondent. He continued to follow her, touched her on the buttocks and said *'I'll spread your legs for you.'* The complainant jumped away from him and walked to the driveway of a nearby house. She swore loudly at Mr Ellis in an effort to get him to leave. After an unsuccessful attempt to use a telephone, the complainant told a school friend, and then a teacher, who called police.

> [10] Almost immediately after committing those offences, the respondent approached the second complainant, a 13 year old girl who was also on her way to school. When the respondent approached her he told her that *'she was going to do something for him or he was going to stab her.'* Mr Ellis pushed her to the ground and pulled down her tracksuit pants. He touched her in the area of her breasts, on the outside of her clothing. In the latter stages of this episode, the respondent pulled down his pants. The complainant yelled out in an effort to draw attention to the situation. Mr Ellis stopped and left the area."

[6] The power to order a stay of the supervision order in the present circumstances is conferred by *UCPR* 761(2). The parties are agreed that the relevant principles are set out in *Attorney-General for the State of Queensland v Fardon* [2011] QCA 111 at paragraphs [15], [16], [17] and [21]:

> "[15] Applying these criteria to the present application the result is that the respondent's release on supervision should not be delayed pending appeal unless the applicant shows that his appeal is arguable on substantial grounds *and that* the appellant may well lose the benefit of a successful appeal if the primary judgment is not stayed. In applications under the Act the Attorney-General is only likely to lose the benefit of a successful appeal if the prisoner commits a serious sexual offence in the period between judgment at first instance and on appeal. If that should happen the community would not have been adequately protected and the means of ensuring that protection will have been lost.
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> [16] The magnitude of the risk that a prisoner might commit a serious sexual offence before an appeal against his release on supervision can be heard is therefore the critical factor on an application for a stay of judgment.
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> [17] Also relevant is the consideration that the respondent has the benefit of a judgment ordering his release on supervision made after a contested hearing in which all the relevant evidence the parties wished to adduce was tendered. While the order severely limits the respondent's liberty and independence of living, he prefers that limited freedom to incarceration. In addition the principle of individual liberty, of even the meanest citizen, is basic and important in a democratic society underpinned by the rule of law, and is not to be taken away without good cause.
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> …
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> [21] In practical terms, in order to justify the stay, the Attorney-General must demonstrate a degree of likelihood that the order appealed against will not adequately protect the public and that a greater degree of protection than that provided by the order appealed from is necessary pending the appeal. The relevant risk against which the community is to be

> protected is that of the respondent committing serious sexual offences. For the purposes of the Act and this application the risk of committing other offences, or of breaking the terms of the supervision order, is irrelevant, save to the extent that that risk indicates an increased risk of sexual re-offending."

[7] Section 13 of the Act applies to prisoners who are considered serious dangers to the community in the absence of an order made under the Act. The primary judge considered that the respondent met the definition set out in s 13(2), but considered that the community could be adequately protected against the risk that he might commit a serious sexual offence by the terms of an appropriately formulated supervision order, which was then imposed. The primary judge said:

> "[87] Ultimately I accept the argument of counsel for the respondent that it is likely that prior to any sexual re-offending the respondent will either turn to substance use which would be detected given the strict monitoring regime or that his chaotic behaviour will mean that he would commit a property offence or some other type of offence which would mean his behaviour would be detected before he got to the point of sexual re-offending.
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> …
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> [90] However the requirements of s 13(3) must be satisfied before a division 3 order is made. The section provides:
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> > '(3) On hearing the application, the court may decide that it is satisfied as required under subsection (1) only if it is satisfied—
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> > (a) by acceptable, cogent evidence; and
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> > (b) to a high degree of probability;'
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> [91] On the evidence before me I am not satisfied to a high degree of probability that there is an unacceptable risk that the respondent will commit a serious sexual offence if released subject to the Supervision order proposed. In my view the Supervision order proposed will ameliorate the risk to an acceptable level. I consider that the risk is acceptable because his chaotic behaviour or substance abuse is likely to be detected prior to any sexual re-offending. In my view the risk of sexual re-offending will decrease to an acceptable level if the respondent were to be released from custody with a high level of compulsory supervision, support and treatment. In particular he needs to begin a psychological program to address his substance abuse and enhance his distress tolerance, prior to release into the community which is scheduled for January 2012.
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> …
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> [96] In the circumstances I am satisfied that a Supervision order will adequately address the risk posed if there is a combination of orders which ensure a substance abuse program is commenced, a therapeutic relationship is

> commenced as soon as possible in detention and then continued on his release into the community. There must also be a total abstinence from all drugs and alcohol. There should also be very strict monitoring in place as well as random drug and alcohol testing given that his greatest risk is in a situation where he is poorly supervised. He must also not have any unsupervised access with any young women under the age of 16 years. He should also not reside with any one who has the care of young women under 16. Counsel for the respondent has indicated that the respondent is prepared to undergo and take part in any course. A MISOP or HISOP course should be commenced depending on what is available."

[8] The respondent was examined, for the purposes of the application, by three psychiatrists, Dr Lawrence, Dr Harden and Professor Nurcombe. The evidence of Dr Lawrence was summarised by the learned judge:

> "[36] Dr Lawrence considers the risks of non-violent offending and sexual offending are high and the risks of violence associated with offending must also be seen as moderately high, although the harm likely to ensue is likely to be moderate.
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> [37] Dr Lawrence concluded that Mr Ellis should be required to complete a high intensity sexual offender treatment program prior to release and he should also be required to satisfactorily complete a substance abuse program and other programs based on cognitive behaviour or principles to assist him in developing strategies.
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> [38] Dr Lawrence considered that after he is released conditions should be imposed with an emphasis on ensuring abstinence from all intoxicating substances, regular monitoring for his compliance, attending an ongoing sexual offender maintenance program and attending psychiatric or other psychological services."

[9] In relation to Dr Harden's evidence the judge said:

> "[57] When asked if substance abuse was the greatest risk factor to further offending Dr Harden referred to the STATIC actuarial instrument which scored the respondent as a high risk of recidivism even in the absence of substances. Dr Harden agreed that substances and particularly intoxication would absolutely increase the risk. He also considered that the respondent's unstable personality was also a significant factor in terms of further offending. Dr Harden considered that it may well be the case that the respondent's behaviour in prison simply reflects his chaotic life outside prison. Dr Harden stated that he had not before 'someone who is so difficult to control in the highly structured environment of detention' and he did not consider

> that the respondent would necessarily behave better outside prison. Dr Harden indicated that the respondent had very few internal personality structures to support him and that usually such people do better in a structured environment.
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> [58] Dr Harden considered that the greatest risk would be to post pubertal females and that any offending would be opportunistic and would occur in a context of low supervision. Whilst Dr Harden considered that there would be a progression to sexual offending he did not agree with his colleagues that the progress would necessarily take some time. He indicated that the respondent is a very emotionally unstable individual and that his emotional state can shift suddenly. In his view … given the respondent's unstable emotional state and the fact that he would be in a heightened emotional state on release he considered that could deteriorate quite quickly. This could certainly happen within the space of a day."

[10] Professor Nurcombe's evidence was dealt with more briefly. Her Honour said:

> "[63] Professor Nurcombe stated in his report that the major risk relates to Mr Ellis' reversion to substance abuse. He considered that should he revert to substance abuse the risk of sexual re-offending would be high. However, if he was to engage in appropriate employment and engage in appropriate treatment the risk would be moderate or even lower. Professor Nurcombe considered that the community would be protected if Mr Ellis were to be classified as a dangerous prisoner under the DPSOA because that would involve him in being provided with psychological treatment and rehabilitation."

[11] The first point to consider is whether the applicant has demonstrated that the appeal is arguable on substantial grounds. The nature of the appeal in these cases was described by Muir JA in *A-G (Qld) v Lawrence* [2011] QCA 347 at [27]:

> "[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'." (footnote omitted)

[12] The task confronting the appellant is therefore difficult though not insuperable. It is noteworthy that counsel for the applicant did not identify any error of principle or mistake of fact which might be said to vitiate the primary judge's reasons. Rather, the appeal will depend upon an overall assessment of the evidence to urge a conclusion that the respondent's release on a supervision order is unreasonable. The task may not be easy given the primary judge's careful analysis of the evidence to which her Honour applied the correct statutory test.

[13] There may be an argument, which was not fully articulated on the application, that the primary judge did not give sufficient consideration to the evidence that there is a high probability that the respondent will commit breaches of the supervision order, and may commit offences against property, or misuse drugs. The likelihood comes from what was described as his "chaotic" personality, low intelligence and past history of offending even in the structured environment of a prison.

[14] Both Dr Lawrence and Dr Harden thought that the respondent should undergo a High Intensity Sexual Offender Program ("HISOP") in order to equip him with the means of controlling his behaviour on release from prison. The respondent has a poor prognosis for compliance with the numerous conditions of the supervision order and there is a risk of impetuous or drug induced sexual re-offending. HISOP has a duration of at least nine months and must be undertaken in prison. The respondent did not undertake the course during his imprisonment and does not wish to do so now because it will delay his release.

[15] One may have less confidence in the effectiveness of a supervision order because the respondent has not satisfactorily completed the HISOP. The judgment may not therefore deal sufficiently with the point discussed in *Attorney-General for the State of Queensland v Fardon* [2011] QCA 155 at [28] and [29] which is that deliberate, persistent, breaches of a supervision order "precluded the conclusion that releasing (a prisoner) under a supervision order would ensure adequate community protection" because in such circumstances the order will not be "efficacious in constraining the respondent's behaviour by preventing the opportunity for the commission of sexual offences".

[16] I am prepared to accept that the applicant has demonstrated an arguable case for appeal. To obtain the stay the applicant must also demonstrate that the degree of likelihood that the respondent would commit a serious sexual offence in the period between release and appeal is unacceptably high.

[17] Counsel for the respondent informed the court, with the concurrence of counsel for the applicant, that on release from prison the respondent would be required to reside in a house provided by the Department of Corrective Services in the Wacol precinct, adjacent to one of the prisons. A 24 hour curfew would be imposed, at least for the initial weeks after release, so that the respondent will be unable to leave the house. He will be required to wear an electronic bracelet attached to GPS technology so that his adherence to the curfew can be monitored. As well, he will have to undergo drug and alcohol testing to ensure that he remains abstinent. The curfew restrictions may be gradually relaxed if the respondent conscientiously complies with the terms of the supervision order. It is, I think, inevitable that any significant breach of the order will result in the respondent's immediate return to custody.

[18] If the regime of supervision which Corrective Services will impose on the respondent conforms to the description given by counsel he will not have the opportunity to offend against adolescent girls or young women. He will have no independence or freedom of movement. He will be confined to the Corrective Services house and will be constantly monitored. He will be permitted to leave only to the extent his behaviour shows he can be trusted not to re-offend. These conditions if insisted on will substantially reduce the risk of relevant re-offending. The risk that the applicant will lose the benefit of the appeal by reason of the respondent committing a serious sexual offence in the six week period between

release and appeal is therefore not unacceptable. It is too low to justify keeping the respondent in jail. The second condition necessary for the grant of a stay has not been made out.

[19] I therefore refuse the application and order accordingly.