SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Qld v Friend* [2012] QSC 108
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **ROY FRIEND** (respondent)
FILE NO/S:	BS883/06
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	27 April 2012
DELIVERED AT:	Brisbane
HEARING DATE:	20 April 2012
JUDGE:	Martin J
ORDER:	**Application dismissed.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – DANGEROUS SEXUAL OFFENDER – GENERALLY – where risk assessment reports support the view that the applicant has a moderate risk of reoffending – where the trial of the offences constituting the alleged contraventions has not taken place – where there has been a delay in the trial of the alleged contraventions – whether these factors amount to exceptional circumstances sufficient to justify the applicant's interim release *Dangerous Prisoners (Sexual Offenders) Act* 2003, s 21(4) *Attorney-General for the State of Queensland v Friend* [2011] QCA 357, cited *Harvey v Attorney-General for the State of Queensland* [2011] QCA 256, cited
COUNSEL:	S Crofton for the applicant/respondent A Scott for the respondent/Attorney-General

SOLICITORS: Legal Aid Queensland for the applicant/respondent
G R Cooper, Crown Solicitor for the respondent/Attorney-General

[1] The respondent (Mr Friend) applies for an order under s 21(4) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 ("the Act") that he be released from custody pending the hearing of an alleged contravention of a supervision order made by Mullins J on 1 November 2010.

[2] For such an order to be made the provisions of s 21(4) of the Act must be satisfied. It provides:

> "(4) The court may order the release of the released prisoner only if the prisoner satisfies the court, on the balance of probabilities, that his or her detention in custody pending the final decision is not justified because exceptional circumstances exist."

[3] The exceptional circumstances relied on by Mr Friend are:

(a) Two recent risk assessment reports supporting the view that, subject to an appropriate supervision order, his risk of re-offending is moderate;
(b) That the trial of the offences constituting the alleged contraventions has not yet taken place;
(c) That there has been a delay in the trial of the alleged contraventions.

[4] Mr Friend has been before the court on a number of occasions and was, most recently, the subject of an order in *Attorney-General for the State of Queensland v Friend.*[1] In that decision, White JA set out the history and chronology of relevant events. For the sake of completeness, I set them out below:

> "[4] The respondent is now aged 58. His relevant criminal history was set out in the reasons for judgment of Skoien AJ hearing an application to rescind a supervision order in 2008 as follows:
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> > '[4] First, Mr Friend was convicted in 1991 at Townsville of the offences of indecent dealing with a boy under 17 (5 charges) and indecent assault (16 charges). The offences occurred in 1987 and 1988. He was sentenced to 2 years' imprisonment.
> >
> > [5] The second set of offences was for possession of child abuse photographs in August 1997. Mr Friend was convicted and sentenced to 6 months imprisonment (suspended for three years).
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> > [6] The third set of offences concerned indecent treatment of a boy under 16. They were committed while Mr Friend was in the company of another child sex offender. In December 1997 they took the boy for a drive. The other man began sexually abusing the boy and insisted that Mr Friend do so also. Mr Friend briefly touched the boy twice on the genitals. The sentence imposed was 12 months imprisonment which was reduced on appeal to 3 months

[1] [2011] QCA 357.

> imprisonment. The sentencing Judge (Wall DCJ) recommended that Mr Friend undertake psychiatric and psychological treatment as considered appropriate and that he participate in the sexual offenders treatment program.
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> [7] The fourth set of offences in April 2003 concerned indecent treatment of a boy under 16 (13 charges) and indecent treatment of a boy under 12 (2 charges). They occurred after Mr Friend had become acquainted with boys, generally between the ages of 14 and 16. He met and befriended them as part of his employment. His behaviour would normally involve brushing up against the boys and touching their genitals through their clothes, but pretending the contact was accidental. Later, he took some of the boys home and showed them pornographic videos and masturbated himself in their presence. He touched the penis of the boy under 12 by putting his hands inside the boy's pants."

[5] The respondent was released from prison on 10 July 2006 under a supervision order imposed by Moynihan SJA on 2 June 2006. He contravened the supervision order, not, as found by Skoien AJ, by being convicted of any offence which would constitute a contravention of the order but by virtue of admissions made to examining psychiatrists which were conceded to amount to admissions of breach of conditions (s) and (t) of his then supervision order, namely, that he not:

> "(s) … have any unsupervised contact with male children under 16 years of age except with the supervising corrective services officer's prior written approval;
>
> (t) … establish and maintain contact with non-related children under 16 years of age."

[6] Because of the nature of the allegations of breach in the present proceedings it is fruitful to consider the breaches considered by Skoien AJ. In the course of an interview with Dr Michael Beech, a psychiatrist, the respondent said that in November 2007 he had spoken to a young male person at his place of work. He did not know if the boy was under age but he spoke to this boy about going to the beach, being naked and showering. The next day he returned to the shopping centre, saw the boy again but realised that he was not comfortable. The boy was aged 16. The respondent told Dr Beech that he was not actually sexually interested in the boy and did not intend to meet him clandestinely but had approached him as a ruse to get police involved so that he could kill himself. The respondent did make serious attempts to do so. Part of the stimulus for the suicide attempts arose when the respondent began to recall the sexual abuse he had suffered as a child during the sex offender treatment program in the prison. That history as set out by Skoien AJ was as follows:

> "The sexual abuse which he detailed involved frequent, regular, abuse of a particularly degrading, sadistic and

> violent nature, perpetrated by a detective. It made him fear that he would be shot. He was then aged between 7 and 10. There is no reason to doubt his account of these events."

[7] Before Skoien AJ the respondent expressed the desire to be given professional assistance and counselling in prison to manage his emotional disturbances. The respondent was diagnosed by Dr Beech as meeting the criteria for the disorder of Paedophilia of a non-exclusive kind. Dr Beech also believed that as a result of his own abuse the respondent had developed a severe Post-Traumatic Stress Disorder which had affected his personality development and suffered a mixed personality disorder in the realm of a Borderline Personality Disorder.

[8] His Honour noted as a possible explanation for this breaching behaviour:

> "…having initially approached the boy, Mr Friend realised he had breached the order or had offended and this led to his suicidal ideation …. Nonetheless Dr Beech believes that it has increased his risk of re-offending. It highlights his emotional disturbance, his severe PTSD and his perception of limited support."

On 27 February 2008 Skoien AJ rescinded the supervision order made on 2 June 2006 and made a continuing detention order with a particular focus on the respondent receiving structured treatment whilst detained.

[9] The respondent's continuing detention came before the court for periodic review as required by s 27 of the Act on 14 April 2009 before Daubney J. The management plan for the respondent which had been anticipated at the hearing before Skoien AJ had failed to eventuate in any worthwhile fashion. It is unnecessary now to review the impediments which were placed in the way of the respondent receiving treatment in the prison which is discussed by Daubney J. His Honour concluded that it was necessary for the treatment to take place in prison:

> "… the evidence both of Mr Whittingham and Dr James, and also to some extent of Dr Nurcombe, paints a picture of a man for whom there are clear prospects of rehabilitation (in the sense of significantly lessening the risk of recidivism), but who needs to undergo a properly monitored and administered course of treatment in order to achieve that result. Regrettably, lapses in the treatment regime to date have meant that this level of rehabilitation has not yet been able to be achieved. The rehabilitation treatment, however, also clearly carries further risks of trauma or destabilisation for the respondent such that, in my view, the administration of this further treatment, which is clearly necessary to ensure adequate protection to the community, is likely to be effective only while the prisoner remains in detention."

His Honour ordered that the respondent continue to be subject to the continuing detention order.

[10] The next review of the order for continuing detention came before Mullins J on 29 April 2010. However, as related by her Honour, Professor James recommended in a report dated 20 March 2010 that the treatment should continue in prison for a further six months. The respondent accepted that recommendation and, accordingly, the review hearing was adjourned until 1 November 2010 when it again came on before Mullins J. Her Honour had the benefit of reports which had been prepared for the April review as well as updated reports from psychiatrists, Professor Basil James and Dr Scott Harden, and a detailed report from Mr Whittingham, a psychologist who had been treating the respondent within the prison system.

[11] Mr Whittingham described the respondent's treatment as continuing to be "challenging" due to the respondent's "long-term risk, personality disturbance and vulnerability for developing depressive illness and post-traumatic symptoms." Her Honour said:

> "Mr Whittingham identified that the respondent will likely continue to require long-term multi-disciplinary treatment, including psychological treatment and support and psychiatric treatment and support, to assist with ongoing management of his complex mental health and sexual offending needs and risks."

[12] Professor James was of the opinion

> 'that the main risk for the respondent in acting out his paedophilic tendencies was inversely related to the degree to which he attained stable improvement in his personality disorder.'

Her Honour noted that in his report of 15 October 2010 Professor James had expressed the opinion that the respondent's treatment in prison was no longer necessary and it was reasonable to recommend that the risk of re-offending could be managed in the community:

> '… provided there was a supervision order that restricted the respondent's contact with young males …'

Professor James said the respondent's risk of re-offending was moderate within the first year to 18 months and if the respondent successfully rehabilitated "including strict adherence to the terms of the supervision order, then the risk of re-offending [would] decrease progressively."

[13] Dr Harden considered that the respondent could be released from prison but was of the opinion that his 'future risk of sexual reoffence continues to be high if released into the community

without appropriate monitoring support and therapeutic intervention'.

[14] Before Mullins J the Attorney-General accepted that the respondent could be released into the community on a supervision order and her Honour ordered accordingly.

[15] On 24 May 2011 Mullins J amended the supervision order by deleting requirement (xlv) that the respondent "not knowingly associate or have contact with anyone convicted of a sexual offence against children, except for incidental conduct with others …" That came about because of the respondent's living arrangements at the Wacol Precinct and because corrective services officers requested the respondent to transport another sex offender in his motor vehicle. Dr Harden expressed reservations about this change noting that previous offending had occurred in the company of another sex offender.

[16] On 24 June 2011 the respondent was brought before Fryberg J pursuant to a warrant issued under s 20 of the Act. The evidence was uncontested that the respondent had contravened the terms of the supervision order insofar as he had failed to advise an authorised corrective services officer of repeated contact with the parents of a child under the age of 16, condition (xxix).

[17] Because of the reliance placed on his Honour's remarks by the primary judge I propose referring to them and the circumstances of the breach in some detail. The respondent visited a couple who had three children under the age of 15 in the company of another man known to them who was subject to a supervision order under the Act. Although they understood the men had been in prison they did not know that they were subject to supervision orders. The visit concerned a discussion about swapping some furniture. On a subsequent occasion the respondent went to the house by himself to further the deal about the furniture. He spoke to the parents outside the residence, did not speak to the children and did not enter the residence. There was to be some further contact about the furniture but the respondent was apprehended for breach of the order before it could take place. It was accepted before Fryberg J that the respondent's account, in an affidavit, of what had occurred was consistent with the account of the parents and he was not subjected to cross-examination.

[18] In the course of his ex tempore reasons his Honour said:
'There is nothing in the material to suggest that the conduct was, in any way, grooming and the two occasions to which I have referred were the only two occasions where there was contact.'

His Honour observed:

> 'It is, however, of concern that he should have breached the order. He says in his affidavit that he did not report his contact with the two parents because it was a limited contact

> and not ongoing and was of a business-like nature. It was not a matter of friendship. He says he did not realise he was obliged to report contact of that nature. I find that a very suspicious proposition.
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> …
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> Be that as it may, it is a story that will work only once. He must realise that these orders are extensive, they have a lot of paragraphs, and everyone of them is important. Every one of them must be complied with and complied with strictly. The breaches which have been committed are not trivial breaches …'

His Honour did not regard those breaches as sufficient to warrant the continued detention of the respondent and concluded:

> 'It must, however, be realised that because of the requirement to strictly adhere to these conditions, any further breach is likely to engender a different belief in any judge of this Court. It is most unlikely a further breach of any sort would be treated as other than evidence, when combined with the evidence of this breach, of a willingness to treat the order as something that is only optional. Such an attitude would be one in this prisoner which would mean inevitably that the Court could not be satisfied that he should not be detained, that is that the supervision order should not be rescinded. In other words, the outcome this time is unlikely to happen again if there is any further breach.'

Circumstance of subject alleged contravention

[19] On 22 August 2011 Task Force Argos informed members of the Queensland Police Service that an informant (a person subject to a supervision order) had reported that the respondent had engaged in conduct in breach of his supervision order. On 20 September 2011 detectives attended a shop at Goodna and spoke with the manager. He identified that the most likely person, the subject of interest, was an ex-employee aged 15 years at the time of the alleged breach. Another employee positively identified the respondent from a photo board indicating that he had frequented the store in the past. Detectives contacted the child's mother and interviewed the boy at home. He positively identified the respondent and said that he had regularly attended at the store where he worked. On two specific occasions, once in December 2010 and the other in January 2011 the respondent had engaged the boy in conversation "that was not incidental to the customer/sales person relationship". In December 2010 the respondent asked the boy about his personal relationships and whether he had a boyfriend or a girlfriend. He was described by the boy as being "over friendly and had crossed the line when two people first meet". On the second occasion in January 2011 the respondent provided the boy with his contact number and told him to contact him. The boy felt uneasy and discarded the telephone number.

> [20] In April 2011 the respondent was driving a silver hatchback motor vehicle and stopped and spoke to the boy as he walked along the road. The court brief describes the encounter as follows:
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> > 'The [respondent] got out and showed him [the child] a stab wound near his ribs. He stated that he was stabbed by another person and that he was currently helping Detectives with the investigation. The [respondent] asked the child if he wanted a lift home. The child said no…'
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> The boy had recently turned 16. It appears that the respondent had stabbed himself in the torso with a knife sometime earlier.
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> [21] On 21 September 2011 detectives attended at the Wacol Precinct and questioned the respondent. He admitted attending the store at the relevant time but denied breaching his supervision order. The respondent was arrested pursuant to a warrant. He was refused bail and brought before the Supreme Court on 22 September 2011. An oral application was made on his behalf that he be released on the existing supervision order pending the final determination of the alleged breach under s 22. The determination of the breach is due to be heard in the Trial Division on 20 April 2012. Justice Mullins remanded the respondent in custody as required by s 21(5) until 30 September when his application for release could be heard."
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> **(footnotes omitted)**

[5] When the matter came before Mullins J on 30 September she found that Mr Friend had discharged the onus placed upon him by s 21(4) on the basis of his compliance since June 2011. Her Honour's orders were then the subject of the appeal which led to the order being made that Mr Friend continue to be detained in custody pending the hearing and determination of the breach proceeding.[2]

Exceptional circumstances

[6] The Court of Appeal had to consider the requirements contained within s 21(4), in particular, a requirement that an applicant demonstrate that his or her detention is not justified because exceptional circumstances exist. Reference was made to the analysis of Boddice J in *Harvey v Attorney-General for the State of Queensland*[3] where his Honour said:

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

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2 *Attorney-General for the State of Queensland v Friend* [2011] QCA 357 at [63]-[65].

3 [2011] QCA 256.

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

[7] Later in her Honour's reasons, White JA referred to that and said:[4]

> "[55] The analysis of the expression "exceptional circumstances" in *Harvey* quoted above derived from statements of Lord Bingham of Cornhill CJ in *R v Kelly (Edward)* quoted with approval by Callinan J in *Baker v The Queen* and this court in *A-G (Qld) v Francis.* In *Baker* the High Court was considering the expression "special reasons" which had to be shown before the court could impose a determinate sentence in respect of a prisoner serving an indeterminate sentence under the *Sentencing Act* 1989 (NSW). Gleeson CJ commented that such or similar verbal formulae are "commonly used where it is intended that judicial discretion should not be confined by precise definition, or where the circumstances of potential relevance are so various as to defy precise definition. That which makes reasons or circumstances special in a particular case might flow from their weight as well as their quality, and from a combination of factors."
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> [56] The expression "exceptional circumstances" is used in ch 5 of the *Corrective Services Act* 2001 (Qld). A prisoner may apply for an exceptional circumstances parole order. A parole board may release a prisoner on parole (at any time) "if satisfied that exceptional circumstances exist". There is no definition of "exceptional circumstances" but the Explanatory Note to the *Corrective Services Bill* 2006 provides examples, namely,
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> > '… a prisoner who develops a terminal illness with a short life expectancy or who is the sole carer of a spouse who contracts a chronic disease requiring constant attention may be granted an exceptional circumstances parole order.'
>
> At the same time, the Note is clear that the discretion is unconfined. Although the *Corrective Services Act* is allied legislation it serves only to demonstrate that content will be given to the expression by reference to the purpose of the provision in which it appears.
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> [57] What is clear in the case of the Act is that a released prisoner must demonstrate to the requisite standard that the circumstances are not ordinary. On one view the expression "exceptional" is not apt to cover the situation of minor breaches of the conditions. To prove that the breach is "trivial" is not at all the

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4 *Attorney-General for the State of Queensland v Friend* [2011] QCA 357.

> same as proving that exceptional circumstances exist. But, as *Harvey* suggests, the associated risks from any release must not be such as to justify continuing detention. Considering the centrality of the requirement to avoid males under the age of 16 her Honour, with respect, ought to have required something more tangible from the respondent. The alleged conduct went to the heart of the assessment of the risk he posed."
>
> **(footnotes omitted)**

Have exceptional circumstances been shown?

[8] Mr Crofton relied upon two reports – one from Professor James[5] and one from Dr Harden.[6]

[9] Professor James formed the view that, provided the recommended supervision order and the arrangements for treatment of Mr Friend by a psychotherapist similar to those which existed prior to his recent incarceration remained in place, the risk of Mr Friend's reoffending was no more than moderate and could be managed adequately in the community. He said that it should be made clear to Mr Friend that he must adhere strictly and unequivocally to the provisions and any supervision order made by the court.

[10] Dr Harden said:

> "In the past the actuarial and structured professional judgment measures I administered suggested that his **future risk of sexual reoffence continued to be high**.
>
> He has now had two releases into the community while being provided with a high level of supervision although the level of therapeutic input is less clear.
>
> **…**
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> It is my opinion based on the current information that I have available **that it is still likely that his risk of sexual reoffence will be decreased** if he were to be released from custody with a high level of compulsory supervision, support and treatment consistent with a supervision order being made. He may continue to struggle emotionally in the community."
>
> **(original emphasis)**

[11] It is said on Mr Friend's behalf that the opinions of the expert doctors lead to the view that Mr Friend is now, provided he is subjected to a strict supervision order, only a moderate risk of reoffending. That may be sufficient to satisfy one of the requirements identified in *Harvey*, namely, that the associated risks from any release must not be such as to justify continuing detention, but it does not demonstrate that the circumstances are not ordinary. There was no material before me which suggested that what has occurred with Mr Friend as described by Professor James and Dr Harden was exceptional. As was said in *Harvey*: "Whether exceptional

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5 Exhibit BJ-2 of the Affidavit of Basil James sworn 30 March 2012.

6 Exhibit SH-2 of the Affidavit of Scott Harden sworn 2 April 2012.

circumstances are shown to exist will depend on the facts and circumstances of a particular case."[7]

[12] Mr Crofton submitted that those new evaluations together with the delay in the trial of the alleged contraventions satisfied s 21(4). It is a regrettable fact of life that, in litigation and in prosecutions, there will be delays which may not be the fault of one or either party. That appears to be the case here. The contravention hearing is now listed in the Magistrates Court for 13 July 2012. While there has been a delay that, of itself, is not an exceptional circumstance. Even when taken with the latest reports and opinions of Professor James and Dr Harden, those circumstances do not amount to anything exceptional.

[13] The onus on Mr Friend in this application is to demonstrate to the requisite standard that the circumstances surrounding his continued incarceration and other relevant matters are not ordinary. In this case the alleged contraventions are, if proved, not minor or trivial breaches, but breaches which are central to Mr Friend's capacity to live in the community without offending.

[14] There is no evidence which suggests, let alone establishes, that the apparent change in his risk profile is not ordinary. That is a matter upon which evidence might have been called but was not.

[15] Although the expert medical reports have been formulated on the assumption that the contraventions will be proved, the opinions which they contain (either alone or in combination with the delay) do not go so far as to satisfactorily discharge the burden of demonstrating that there are exceptional circumstances applying in this case.

[16] The application is dismissed.

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[7] [2011] QCA 256 at [43].