SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Qld v Harvey* [2012] QSC 173
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant/respondent) **v** **SHANE EDWARD HARVEY** **(**respondent/applicant)
FILE NO/S:	BS 1736 of 2006
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 June 2012
DELIVERED AT:	Brisbane
HEARING DATES:	15 – 17 February, 2 March and 4 April 2012
JUDGE:	Martin J
ORDER:	**(1) Dismiss the respondent's application.** **(2) Adjourn the Attorney-General's application to a date to be fixed.**
CATCHWORDS:	CONSTITUTIONAL LAW – OPERATION AND EFFECT OF THE COMMONWEALTH CONSTITUTION – EXERCISE OF IMPERIAL, ETC, POWERS (CONSTITUTION, S 51(xxxviii)) – where the respondent was detained awaiting determination of the hearing – where he submits his detention was punitive and conflicts with the *Kable* principle – whether the respondent's incarceration was punitive and engaged the *Kable* principle 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 had been subject to a supervision order on 3 December 2007 – where the respondent was arrested and charged with several offences on 28 March 2008 – where the Attorney-General alleges the respondent contravened the requirements of the supervision order in a number of respects

– where the Attorney-General seeks that the supervision order be rescinded and a continuing detention order be imposed – where the respondent cross-applies to dismiss the Attorney-General's application alleging a breach of condition 12 – whether the respondent breached condition 12

EVIDENCE – STATUTORY PROVISIONS AS TO STATEMENTS IN DOCUMENTS WHERE DIRECT ORAL EVIDENCE ADMISSIBLE – WHERE MAKER OF STATEMENT NOT ATTENDING AS WITNESS – where the complainant gave evidence at the committal hearing and was tape recorded – where the complainant is now deceased – where the Attorney-General seeks to tender the complainant's written statement and committal evidence – where the respondent objects to the reception of evidence – whether the deceased complainant's evidence should be admitted

Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)
Evidence Act 1977 (Qld), s 92, s 98

Briginshaw v Briginshaw (1938) 60 CLR 336, applied
Fardon v Attorney-General for the State of Queensland (2004) 223 CLR 575, applied
Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (2007) 33 WAR 245, considered
Harvey v Attorney-General for the State of Queensland [2011] QCA 256, considered
Kable v Director of Public Prosections (NSW) (1996) 189 CLR 51, considered
Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) 110 ALR 449, considered
R v D [2003] QCA 151, considered

COUNSEL: P J Davis SC with B Mumford for the applicant/respondent
P E Smith with K Hillard for the respondent/applicant

SOLICITORS: G R Cooper Crown Solicitor for applicant/respondent
Peter Shields & Associates for the respondent/applicant

[1] The applicant Attorney-General alleges that a supervision order made under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 ("the Act") has been breached and seeks that a continuing detention order be imposed on the respondent (Mr Harvey).

[2] There is a cross-application by Mr Harvey for an order that, so far as the Attorney-General's application alleges a breach of condition 12 of the supervision order made on 3 December 2007, the application be dismissed.

[3] On 20 December 2011 Byrne SJA ordered that this trial be limited to a trial of the breach of the supervision order.

[4] Mr Harvey seeks:

(a) a declaration that condition 12 of the supervision order is unconstitutional;
(b) an order severing condition 12 from the supervision order;
(c) the dismissal of the Attorney-General's application;

or, in the alternative,

(d) an order under s 98 of the *Evidence Act* 1977 excluding the evidence of Dianne Hawkins from the hearing of the substantive application.

Background

[5] On 7 August 2006 Byrne SJA ordered that Mr Harvey be detained in custody for an indefinite period for controlled care and treatment pursuant to Division 3 of the Act. Part 3 of that Act requires that a prisoner's continued detention be subject to regular reviews. Such a review took place on 3 December 2007. On that occasion Atkinson J ordered that Mr Harvey be released from custody subject to a series of conditions which were to apply until 3 December 2014. One of the conditions of supervision was that Mr Harvey must:

> "(12) Not commit an indictable offence during the period of the order."

[6] On 28 March 2008 Mr Harvey was arrested and charged with several offences. He was returned to custody, and the Attorney-General has filed an application seeking that the order made on 3 December 2007 be rescinded and that a continuing detention order be imposed. The basis for the application is the allegation by the Attorney-General that Mr Harvey has contravened the requirements of his supervision order in a number of respects. They are that:

> "1. On 24 January 2008 the respondent provided a urine sample which tested positive to Tetrahydrocannoabinol - 9 - carboxylic acid and thereby breached Clause 17 of the order of Atkinson J by not abstaining from the use of illicit drugs during the duration of the order.
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> 2. On 4 December 2007 the respondent was directed by a Corrective Services Officer to abide by a curfew and to be in and remain at his Wacol residence between the hours of 10pm and 6am. On 5 January 2008 the respondent did not return to his residence until 10.08pm and was in breach of Clause 23 of the order of Atkinson J by not complying with a curfew direction.
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> 3. On 4 December 2007 the respondent was directed by a Corrective Services Officer to abide by a curfew and be in and remain at his Wacol residence between the hours of 10pm and 6am. On 14 February 2008 the respondent did not return to his residence until 10.04pm in breach of Clause 23 of the order of Atkinson J by being in contravention of a curfew direction.
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> 4. On 24 January 2008 the respondent was directed by a Corrective Services Officer not to have a person under the

> age 18 years at his residence at Wacol. On 20 February 2008 the respondent had a male child 2 years of age at his residence contrary to that direction in breach of Clause 13 of the order of Atkinson J that he failed to comply with a reasonable direction of an authorised Corrective Services Officer.
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> 5. On 22 February 2008 the respondent failed to attend the appointment of a psychologist, Lars Madsen, as directed and was in breach of Clause 20 of the order of Atkinson J by failing to attend upon and submit to assessment and/or treatment by a psychiatrist as directed by an authorised Corrective Services Officer.
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> 6. On 28 March 2008 the respondent attended premises at 1/53 Heel Street, New Farm and assaulted Dianne Hawkins causing her grievous bodily harm in breach of Clause 12 of the order of Atkinson J by committing an indictable offence during the period of the order."

[7] It is the last allegation which has been the subject of this proceeding.

[8] Mr Harvey was originally charged with attempting to murder Dianne Hawkins and with assaulting her and causing her grievous bodily harm. The attempted murder charge was dismissed at the committal stage.

[9] An indictment charging Mr Harvey with assault occasioning grievous bodily harm was presented in the District Court in July 2009. On 15 June 2010 the complainant was found dead in her home unit. The Crown made an application to the District Court that a transcript of the evidence she gave at the committal proceedings be admitted in evidence at the trial of Mr Harvey pursuant to s 111 of the *Justice Act* 1886. That application was successful.

[10] Further evidence was then obtained which cast doubt on the evidence of the deceased complainant. An application was made on behalf of Mr Harvey for the exclusion of her evidence. That application was successful with the result that at any trial there would be no evidence from the complainant.

[11] On 24 November 2010 the Director of Public Prosecutions discontinued the proceeding against Mr Harvey by way of a nolle prosequi on all charges against him relating to Dianne Hawkins.

[12] On 13 April 2011 I refused an application by Mr Harvey for release on an interim supervision order.[1] That decision was upheld by the Court of Appeal on 27 September 2011.[2]

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1 [2011] QSC 82

2 [2011] QCA 256

Unlawfulness

[13] In the application and outline of submissions presented on behalf of Mr Harvey it was argued that condition 12 was unlawful. That was abandoned on the first day of this hearing.

Constitutional argument

[14] Mr Smith submitted that, in the circumstances of this case, the detention of Mr Harvey while awaiting determination of the breach hearing has been punitive and, because it has been punitive, the detention has been unlawful.

[15] He further submitted that the detention of an individual under a civil order which is punitive in nature may breach the principle enunciated in *Kable v Director of Public Prosecutions (NSW).*[3] In particular, the circumstances of this case may result in Mr Harvey being detained on the basis of the commission of an offence by him for which he has not been convicted but which has been established by proof on the civil standard.

[16] In *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*,[4] the Court of Appeal of Western Australia considered the application of the *Kable* principle to s 76 of the *Corruption and Crime Commission Act* 2003 (WA). Martin CJ identified the question to be considered in the following way:

> "The critical question in this case is whether s 76(2) compromises the institutional integrity of the [Supreme Court] to such an extent that it is no longer a court of the kind contemplated by Ch III of the *Commonwealth Constitution* (the *Constitution*), and would not therefore be an appropriate repository of federal judicial power. If so, the legislation exceeds the legislative power of the Parliament … as constrained by the *Constitution* (*Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51)."[5]

[17] The question of whether or not the Act is incompatible with the position of the Supreme Court as an appropriate repository of federal judicial power was considered in *Fardon v Attorney-General for the State of Queensland.*[6] In that case, the suggested ground of invalidity was that the Act, contrary to the requirements of Chapter III of the Constitution, involves the Supreme Court in the process of deciding whether prisoners who have been convicted of serious sexual offences should be the subject of continuing detention orders, on the ground that they are a serious danger to the community. It was argued that the function conferred on the Supreme Court by Parliament of imposing continuing detention orders was incompatible with the court's position under the Constitution.

[18] The principle which emerges from *Kable* is a narrow one. It is important to bear in mind that the legislation being considered in *Kable* was most unusual. It was described by Gleeson CJ in *Fardon* in this way:

> "[16] The New South Wales legislation in question in that case provided for the preventive detention of only one person, Mr Kable.

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3 (1996) 189 CLR 51.
4 (2007) 33 WAR 245.
5 Ibid 248.
6 (2004) 223 CLR 575.

> As was pointed out by Dawson J, the final form of the legislation had a number of curious features, because of its parliamentary history. It was originally framed as a law of general application, but an amendment confined its application to the appellant. The object of the statute in its final form was said to be to protect the community by providing for the preventive detention of Gregory Wayne Kable. Toohey J said that the extraordinary character of the legislation and of the functions it required the Supreme Court to perform was highlighted by the operation of the statute upon one named person only. In that respect, he said, the statute was virtually unique. Senior counsel for the appellant in the case argued that the legislation was not a carefully calculated legislative response to a general social problem; it was legislation ad hominem. That argument was accepted. The members of the Court in the majority considered that the appearance of institutional impartiality of the Supreme Court was seriously damaged by a statute which drew it into what was, in substance, a political exercise."[7] (footnotes omitted)

[19] That should be compared with the nature of the Act which authorises the making of the condition under attack. It was described by Gleeson CJ in this way:

> "[19] The Act is a general law authorising the preventive detention of a prisoner in the interests of community protection. It authorises and empowers the Supreme Court to act in a manner which is consistent with its judicial character. It does not confer functions which are incompatible with the proper discharge of judicial responsibilities or with the exercise of judicial power. It confers a substantial discretion as to whether an order should be made, and if so, the type of order. If an order is made, it might involve either detention or release under supervision. The onus of proof is on the Attorney-General. The rules of evidence apply. The discretion is to be exercised by reference to the criterion of serious danger to the community. The Court is obliged, by s 13(4) of the Act, to have regard to a list of matters that are all relevant to that criterion. There is a right of appeal. Hearings are conducted in public, and in accordance with the ordinary judicial process. There is nothing to suggest that the Supreme Court is to act as a mere instrument of government policy. The outcome of each case is to be determined on its merits."[8]

[20] The substantial differences between the legislation considered in *Kable* and the Act were highlighted by McHugh J in this way:

> "[34] The relevant provisions of the Act for the purpose of this case are set out in Gummow J's reasons. The differences between the legislation considered in *Kable* and the Act are substantial. First, the latter Act is not directed at a particular person but at all persons who are serving a period of imprisonment for "a serious sexual offence". Secondly, when determining an application under the Act, the Supreme Court is exercising judicial power. It has to determine whether, on application by the Attorney-General, the Court is

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7 Ibid 591.

8 Ibid 592.

satisfied that "there is an unacceptable risk that the prisoner will commit a serious sexual offence" if the prisoner is released from custody. That issue must be determined in accordance with the rules of evidence. It is true that in form the Act does not require the Court to determine "an actual or potential controversy as to existing rights or obligations." But that does not mean that the Court is not exercising judicial power. The exercise of judicial power often involves the making of orders upon determining that a particular fact or status exists. It does so, for example, in the cases of matrimonial causes, bankruptcy, probate and the winding up of companies. The powers exercised and orders made by the Court under this Act are of the same jurisprudential character as in those cases. The Court must first determine whether there is "an unacceptable risk that the prisoner will commit a serious sexual offence". That is a standard sufficiently precise to engage the exercise of State judicial power. Indeed, it would seem sufficiently precise to constitute a "matter" that could be conferred on or invested in a court exercising federal jurisdiction. Thirdly, if the Court finds that the Attorney-General has satisfied that standard, the Court has a discretion as to whether it should make an order under the Act and, if so, what kind of order. The Court is not required or expected to make an order for continued detention in custody. The Court has three discretionary choices open to it if it finds that the Attorney-General has satisfied the "unacceptable risk" standard. It may make a "continuing detention order", a "supervision order" or no order. Fourthly, the Court must be satisfied of the "unacceptable risk" standard "to a high degree of probability". The Attorney-General bears the onus of proof. Fifthly, the Act is not designed to punish the prisoner. It is designed to protect the community against certain classes of convicted sexual offenders who have not been rehabilitated during their period of imprisonment. The objects of the Act expressed in s 3 are:

> ‘(a) to provide for the continued detention in custody or supervised release of a particular class of prisoner to ensure adequate protection of the community; and
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> (b) to provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation.’”[9]
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> (footnotes and references to legislation omitted)

[21] In the reasons of McHugh J, under the subheading “Does the Act compromise the institutional integrity of the Supreme Court of Queensland?”, his Honour said:

> “[35] With great respect to those who hold the contrary view, nothing in the Act or the surrounding circumstances gives any ground for supposing that the jurisdiction conferred by the Act compromises the institutional integrity of the Supreme Court of Queensland. Nothing in the Act gives any ground for concluding that it impairs the institutional capacity of the Supreme Court to exercise federal jurisdiction that the federal Parliament has invested or may invest in that Court. Nothing in the Act might lead a reasonable person to conclude that the Supreme Court of Queensland, when exercising federal jurisdiction, might not be an impartial tribunal free

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[9] Ibid 596.

> of governmental or legislative influence or might not be capable of administering invested federal jurisdiction according to law."[10]

[22] In his argument, Mr Smith identified what he called the exception to the decision in *Fardon* which he identified as being contained in [113] of the reasons of Gummow J. That paragraph appears in the section of his Honour's reasons described as "Conclusions".[11] The conclusions his Honour reached include the following:

- The particular preventative detention regime established by the Act cannot be said to bestow upon the Supreme Court a function which "is an integral part of, or is closely connected with, the functions of the Legislature or the Executive Government" (at [107]).
- The factum upon which the attraction of the Act turns is the status of the appellant to an application by the Attorney-General as a "prisoner" who is presently detained in custody upon conviction for an offence of the character of those offences of which there is said to be an unacceptable risk of commission if the appellant be released from custody. A legislative choice of a factum of some other character may well have imperilled the validity of s 13 (at [108]).
- The purpose of Pt 3 "is to ensure that a prisoner's continued detention under a continuing detention order is subject to regular review". That statement of purpose guides the construction of the balance of Pt 3 (see [112]).

[23] In [113], Gummow J referred to s 30(2) of the Act. That section deals with the hearing of reviews and the requirements for affirming a decision that a prisoner is a serious danger to the community. His Honour said:

> "[113] Section 30(2) may permit refusal by the court of an order for further detention, by reason of failure by the appropriate authorities to implement the earlier order. An example would be an order for treatment of the prisoner to facilitate rehabilitation, an objective of the Act (s 3(b)). It is unnecessary to decide that question here. **However, what is vital for Pt 3, and thus to the validity of the Act, is the requirement that the regular "review" does not, with the passage of time, become no more than a periodic formality; if the exercise in which the court was involved had been permitted by the legislation to lose its requirement for deeply serious consideration upon specified criteria and to a high degree of satisfaction, then invalidity of such legislation may well result**."[12]

[24] Finally, Gummow J said:

> "[116] It also should be emphasised that the Supreme Court performs its functions under the Act independently of any instruction, advice or wish of the legislative or executive branches of government. Further, the grounds upon which the Supreme Court exercises its powers conferred by the Act are confined to those prescribed by law; there is no scope for the exercise of what in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* was classed as a 'political discretion'."[13] (footnotes omitted)

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10 Ibid 598.
11 Ibid 620.
12 Ibid 620-621.
13 Ibid 621.

[25] The exception, or possible exception, relied upon by Mr Smith was identified by Gummow J as being a situation where the regular review required by the Act became no more than a mere formality. In other words, if the procedures involved degenerated to the extent that the requirements for serious consideration upon specified criteria to a high degree of satisfaction were no longer in place then, in Gummow J's opinion, invalidity of the legislation *may* result.

[26] The description of the nature of the Act by Gleeson CJ[14] and what was regarded as "vital" by Gummow J[15] leads to the conclusion that the imposition of a condition such as condition 12 is not in conflict with the principle in *Kable*. But Mr Smith argued that a consequence of the insertion of such a condition, that is, where a breach of the condition might lead to detention, could result in conflict with the *Kable* principle because the detention would occur pursuant to an order arrived at after breach was established on the civil standard.

[27] So far there have been only five occasions on which legislation has been struck down through application of the principle in *Kable.*[16] They are:

(a) The *Community Protection Act* 1994 (NSW) in *Kable* itself. In that case the New South Wales Parliament had enacted legislation which applied only to Mr Kable and which effectively sought to detain him legislatively.

(b) The *Criminal Proceeds Confiscation Act* 2002 (Qld) which was held to be unconstitutional in *Re Criminal Proceeds Confiscation Act 2002*[17] because it obliged the court to hear the State's application for a restraining order ex parte.

(c) In *International Finance Trust Company Limited & anor v New South Wales Crime Commission & ors*,[18] the *Criminal Assets Recovery Act* 1990 (NSW) was held to be invalid as offending the *Kable* principle to the extent that it compelled the court to proceed ex parte with respect to a restraining order.

(d) In *State of South Australia v Totani*,[19] that part of the *Serious and Organised Crime (Control) Act* 2008 (SA) which effectively required the Magistrates Court to be engaged in "an essentially executive process" was inconsistent with its fundamental characteristics as a court.

(e) In *Wainohu v State of New South Wales*[20] the *Crimes (Criminal Organisations Control) Act* 2009 (NSW) was invalid because, by generally exempting eligible judges from any duty to give reasons in connection with the making or revocation of a declaration that a particular organisation was a declared organisation, that Act was repugnant to or incompatible with the court's institutional integrity.

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14 At [19] of *Fardon*

15 At [113] of *Fardon*

16 Other attempts to engage the *Kable* principle have failed: see *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; *Gypsy Jokers Motor Cycle Club Inc v Commissioner of Police* (2008) 234 CLR 532; *K-Generation Pty Ltd v Liquor Licensing Court* (2008) 237 CLR 501 and *Thomas v Mowbray* (2007) 233 CLR 307.

17 [2004] 1 Qd R 40.

18 (2009) 240 CLR 319.

19 (2010) 242 CLR 1.

20 (2011) 243 CLR 181.

[28] Those authorities require consideration of the legislative framework which, in this case, can lead to detention. The earlier decision of the Court of Appeal in this matter did consider this point, albeit in the absence of any submission that the *Kable* principle might have application.

[29] In *Harvey v Attorney-General for the State of Queensland*,[21] McMurdo P said:

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

[30] To similar effect, Boddice J (with whom White JA agreed) said:

> "[32] A party to civil proceedings may prove in those proceedings that the other party was guilty of a crime, even where that other party has been acquitted of the criminal offence in prior criminal proceedings. The respondent contends that, similarly, it may prove a breach of condition 12 in contravention proceedings notwithstanding that the Director of Public Prosecutions has determined that criminal proceedings against the appellant for the offence said to constitute the breach of condition 12 will not proceed. Whether that contention is correct requires a consideration of whether proof that the appellant has "committed an indictable offence" requires proof that the appellant has been convicted of an indictable offence.
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> [33] Central to the determination of any contravention of condition 12 is a consideration of the words "commit an indictable offence". Neither the appellant nor the respondent has been able to identify any occasion when these words have been the subject of judicial interpretation in the context of corresponding legislation.

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21 [2011] QCA 256.

> [34] Condition 12 required that the appellant "not commit an indictable offence". The word "commit" means, in context, to "perpetrate, do". An "indictable offence" is an offence prosecuted upon indictment. An "offence" is an act or omission which renders the person doing that act or making the omission "liable for punishment". Considered together, the words "not commit an indictable offence" suggest a requirement that the appellant not perpetrate or do any act or omission which would render him liable to punishment under the criminal law.
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> [35] Such a conclusion suggests that for there to be a breach of condition 12, it must be proven that the appellant perpetrated or did an act or omission which amounts to a criminal offence prosecutable on indictment. However, s 22 of the Act expressly provides that in contravention proceedings, it is only necessary for the respondent to establish a contravention of the supervision order "on the balance of probabilities". Accordingly, a court may make orders in respect of an alleged contravention of condition 12 if satisfied, on the balance of probabilities, that the appellant has committed the indictable offence of assaulting Dianne Hawkins, causing her grievous bodily harm. It is not necessary, in order to establish a breach of condition 12, to prove that the appellant has been convicted of an indictable offence. A conviction of an indictable offence would require proof beyond reasonable doubt.
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> [36] That a breach of condition 12, properly understood, does not require proof of a conviction of an indictable offence, is made plain by a consideration of other aspects of s 22 of the DPSO Act. That section empowers the Court to make further orders if the Court is satisfied, on the balance of probabilities, that the released prisoner "is likely to contravene, is contravening, or has contravened, a requirement of the supervision order …" The distinction between "likely to contravene", "is contravening" or "has contravened" indicates the legislation covers present contraventions, past contraventions and potential future contraventions. The words "likely to contravene" envisage the Court's jurisdiction may be invoked in circumstances where there is evidence that a dangerous prisoner is, by reason of his or her conduct, "likely" to commit an indictable offence. Such a scenario is inconsistent with a conclusion that the words "commit an indictable offence" requires proof of a conviction for an indictable offence."

[31] It has been held in *Fardon* and *Thomas v Mowbray*[22] that legislation which provides that a court may, in exercising its civil jurisdiction, curtail personal freedoms for the purpose of protecting the community does not offend the *Kable* principle. In this case the court is not hearing a matter for the purposes of deciding whether to punish someone. The court's function is to determine whether a breach has occurred and, in doing so, to take into account the well known principles in *Briginshaw v Briginshaw*,[23] *Rejfek v McElroy*,[24] and *Neat Holdings Pty Ltd v Karajan Holdings*

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22 (2007) 233 CLR 307.

23 (1938) 60 CLR 336.

Pty Ltd.[25] If a breach is found, then orders may be made in the exercise of the protective jurisdiction. In those circumstances, neither the condition nor the exercise of jurisdiction in the event of a finding of a breach conflicts with the *Kable* principle.

[32] Mr Harvey has been incarcerated for some time. It was argued that that detention was punitive and therefore engaged the *Kable* principle. The time that has elapsed since Mr Harvey was charged with the offence concerning Ms Hawkins has been taken up by several matters. First, he was on remand for that alleged offence. Secondly, since he was discharged on that indictment he brought an application before me (which failed), then appealed that decision (which failed), and has now brought this cross-application. It cannot be said that his detention so far has been attributable solely to the consequences of the allegation of breach of the supervision order.

Exclusion of Ms Hawkins' evidence

[33] The Attorney-General seeks to tender a written statement made by Ms Hawkins and the record of her evidence at the committal proceedings. In doing so, he relies upon s 92 of the *Evidence Act* 1977. It provides:

> **"92 Admissibility of documentary evidence as to facts in issue**
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> (1) In any proceeding (not being a criminal proceeding) where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, subject to this part, be admissible as evidence of that fact if—
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> (a) the maker of the statement had personal knowledge of the matters dealt with by the statement, and is called as a witness in the proceeding; or
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> (b) the document is or forms part of a record relating to any undertaking and made in the course of that undertaking from information supplied (whether directly or indirectly) by persons who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the information they supplied, and the person who supplied the information recorded in the statement in question is called as a witness in the proceeding.
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> (2) The condition in subsection (1) that the maker of the statement or the person who supplied the information, as the case may be, be called as a witness need not be satisfied where—
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> (a) the maker or supplier is dead, or unfit by reason of bodily or mental condition to attend as a witness; or
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> (b) the maker or supplier is out of the State and it is not reasonably practicable to secure the attendance of the maker or supplier; or
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> (c) the maker or supplier can not with reasonable diligence be found or identified; or

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24 (1965) 112 CLR 517.

25 (1992) 67 ALJR 170.

(d) it can not reasonably be supposed (having regard to the time which has elapsed since the maker or supplier made the statement, or supplied the information, and to all the circumstances) that the maker or supplier would have any recollection of the matters dealt with by the statement the maker made or in the information the supplier supplied; or

(e) no party to the proceeding who would have the right to cross-examine the maker or supplier requires the maker or supplier being called as a witness; or

(f) at any stage of the proceeding it appears to the court that, having regard to all the circumstances of the case, undue delay or expense would be caused by calling the maker or supplier as a witness.

(3) The court may act on hearsay evidence for the purpose of deciding any of the matters mentioned in subsection (2)(a), (b), (c), (d) or (f).

(4) For the purposes of this part, a statement contained in a document is made by a person if—

(a) it was written, made, dictated or otherwise produced by the person; or

(b) it was recorded with the person's knowledge; or

(c) it was recorded in the course of and ancillary to a proceeding; or

(d) it was recognised by the person as the person's statement by signing, initialling or otherwise in writing."

[34] The term "document" is defined in the *Evidence Act*, so far as is relevant, as:

"***document*** includes, in addition to a document in writing—

(a) any part of a document in writing or of any other document as defined herein; and

…

(e) any disc, tape, soundtrack or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and

..."

[35] Mr Harvey objects to the reception of either document and relies upon s 98 of the *Evidence Act*, which provides:

"**98 Rejection of evidence**

(1) The court may in its discretion reject any statement or representation notwithstanding that the requirements of this part are satisfied with respect thereto, if for any reason it appears to it to be inexpedient in the interests of justice that the statement should be admitted.

(2) This section does not affect the admissibility of any evidence otherwise than by virtue of this part."

[36] The statement made by Ms Hawkins falls within s 92(4)(a) and (d). The evidence which she gave at the committal was tape recorded. That, therefore, comes within s 92(4)(c) because paragraph (e) of the definition of document allows that.

[37] As Ms Hawkins is deceased, s 92(2)(a) of the *Evidence Act* is engaged.

[38] The evidence is, therefore, admissible under s 92 and it follows that the only issue to be determined is whether the evidence should be excluded in the exercise of the discretion referred to in s 98. The test to be applied is whether it is "inexpedient in the interests of justice that the statement should be admitted". That phrase was considered by Davies JA in *R v D.*[26] At [17] and [18] Davies JA said:

> "[17] Section 98 of the *Evidence Act* permits a court to reject a statement such as the evidence given pursuant to s 93A if 'it appears to it to be inexpedient in the interests of justice that the statement should be admitted'. Section 130 provides that:
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> > "Nothing in this Act derogates from the power of the court in a criminal proceeding to exclude evidence if the court is satisfied that it would be unfair to the person charged to admit that evidence."
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> [18] In my opinion it would be a rare case in which a court will exclude a statement, otherwise admissible pursuant to s 93A, pursuant to either the discretion conferred by s 98 or that conferred by s 130. It is most unlikely that it will ever be excluded on the basis that its prejudicial effect exceeds it probative value because in almost all cases the probative value of such a statement is very high. And the mere fact that, as may have been the case here, the witness, though available to give evidence in the trial, is unable, for one reason or another, to be effectively cross-examined, will not, without more, ordinarily be sufficient to attract the exercise of that discretion." (footnotes omitted)

[39] In the same decision, Jerrard JA said:

> "[60] With respect to s 98, the term "inexpedient" can mean "not suitable, advisable, or judicious" (Collins English Dictionary, Australian Edition); or "disadvantageous in the circumstances, unadvisable, impolitic." (Shorter Oxford English Dictionary). Either construction might mean it was "inexpedient" to admit video statements pursuant to s 93A where there is a reason for concluding the truth will not be ascertained if evidence is received in that manner.
>
> [61] In *R v F.A.R* [1996] 2 Qd R 49 Davies JA, (at page 61) with whom Pincus JA agreed on this point, wrote that the question whether the discretion under s 98 (or s 130) should be exercised to exclude a statement otherwise satisfying the

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26 [2003] QCA 151.

> requirements of s 93A would almost always turn on its reliability. He added that there would be many factors which might affect that question. In *R v Morris* [1996] Qd R 68 Dowsett J, whose judgment was that of the court, wrote (at page 75) that:
>
> > 'I do not imply that inherent unreliability may not be a basis for the exercise of the discretion under s 98. Circumstances may arise in which the statement itself appears to be so unreliable, either because of its contents or because of the way in which it was obtained, that it ought not to be received for reasons directly related to the interest of justice.'"

[40] Mr Smith made a number of submissions that concerned the "interests of justice" as used in contexts other than s 98 of the *Evidence Act*. I accept the submission on behalf of the Attorney-General that I should proceed consistently with the decisions of the Court of Appeal which have considered s 98 of the *Evidence Act*.

[41] While it will always be necessary to consider the "reliability" of the evidence proposed to be admitted, it must also be acknowledged that there is a spectrum of reliability along which statements of evidence and evidence given in other places can fall. In considering the issue of reliability, I take into account the fact that Ms Hawkins was cross-examined at the committal by experienced counsel and that she was subject to significant challenge on aspects of her evidence. In doing so, the respondent Mr Harvey had every opportunity to fully test her evidence. The admission of her evidence at the committal will, of course, include all the evidence, whether in examination in chief or cross-examination.

[42] The disadvantages to a respondent in circumstances such as this are obvious. I will not be able to assess Ms Hawkins' credit and the respondent will not have the opportunity to put to her matters which he might regard as relevant and to explore the inconsistencies which were highlighted by Mr Smith. Of course, these are matters which can be argued before me (and they were) and this is a situation in which, to put it colloquially, it "cuts both ways". The alleged inconsistencies cannot be the subject of re-examination, which might demonstrate that the inconsistencies either do not exist or are not as important as might otherwise be thought.

[43] Another matter which I take into account is that Ms Hawkins' evidence is not the only evidence upon the Attorney-General relies. If one excludes her evidence, there is still a circumstantial case which needs consideration.

[44] I am not satisfied that the respondent has demonstrated that the high barrier erected by s 98 has been surmounted. I will admit the evidence of Ms Hawkins' statement and the evidence she gave in the committal.

Did Mr Harvey assault Ms Hawkins?

[45] There is direct evidence, in the statement of Ms Hawkins, that Mr Harvey assaulted her. There is no doubt that she was savagely beaten at some time in the morning of 28 March 2008. Mr Harvey was well known to her. When ambulance officers arrived at her unit, she told them that she knew her assailant and she later identified her assailant as Mr Harvey to those ambulance officers. She was interviewed by the

police at the hospital and she told the police that the respondent was the person who had attacked her. She later swore a statement for police in which she said that Mr Harvey was the assailant.

[46] Against that evidence, ignoring for the moment questions of Ms Hawkins' credibility, there is the evidence of Kelly Philipoom. She gave evidence that she had been told by Ms Hawkins that she was uncertain as to whether Mr Harvey had been the assailant. It was put by the respondent that she had not gone to the police but that the police had spoken to her and that she had not been shaken in her evidence concerning the nature of her conversation with Ms Hawkins. I found Ms Philipoom to be a singularly unconvincing and unreliable witness. The recording of her conversation with the police officer demonstrated to me that she was severely intoxicated and I infer had been at the time of the conversation she had with Ms Hawkins. The statements she made in the recorded conversation were completely inconsistent with her having been told, only a short time before that, that Ms Hawkins had some doubt as to the identity of her assailant. I do not accept her evidence.

[47] While I have admitted the statements of Ms Hawkins, the issue of their weight has to be taken into account. There was evidence that she suffered from schizophrenia, that she had been the subject of many other assaults, that the evidence she gave at the committal was contradicted by other witnesses, that she gave varying accounts of the circumstances of the assault, and that when she made the initial emergency call she did not say that she knew the offender.

[48] Further, in her evidence, she said that she scratched her assailant along the assailant's arms. There was no evidence that this occurred. While she did have long nails, there was no evidence of any skin or, indeed, DNA of another person under those nails. There is also no evidence to suggest that Mr Harvey displayed any signs of having been scratched. It may be that Ms Hawkins attempted to scratch her assailant but failed to do so.

[49] Mr Smith pointed to Ms Hawkins' statement that a walking stick had been smashed during the assault and that there was no evidence of the stick or any fragment of it in the unit. That stick could have been disposed of by the assailant in any number of locations other than the unit.

[50] Some of the most important evidence was constituted by close circuit television footage showing the position of Mr Harvey at various times on the morning of 28 March 2008.

[51] Mr Harvey left the Wacol train station at 6.16am on 28 March and travelled to Brunswick Street station, where he arrived at about 7.15am. Surveillance cameras then show him walking through the train station into Brunswick Street and down Brunswick Street towards New Farm. Other cameras then show him on the corner of Brunswick Street and Kent Street. He was walking in the direction of Heal Street which was the street in which Ms Hawkins' unit was situated.

[52] At about 9.15 am he is shown on security footage at Valley Metro. He is then known to have arrived at Wacol train station at about 10.33am.

[53] Ms Hawkins, in the statements she gave to police, said that her assailant was wearing a white tee shirt, blue jeans and a blue coat. The surveillance cameras show that Mr Harvey was wearing that combination of clothing when he arrived at Brunswick Street station. When he returns to the Valley Metro he is wearing shorts, a singlet and the same blue coat – the clothes he was wearing when he later arrived at Wacol train station.

[54] An important piece of evidence is that when Ms Hawkins was being treated in hospital a nurse noticed that a piece of paper had been wedged between her buttocks. In her statement she said that she had felt her assailant interfering with her buttocks. The piece of paper recorded allegations by her against the respondent. Those allegations included an assertion by her that Mr Harvey had stolen money from her through the use of her ATM card.

[55] Mr Harvey gave evidence. He was not a convincing witness. He appeared to be moulding his answers as cross-examination proceeded in a way which must have seemed to him to be advantageous. He accepts that he left Wacol and travelled by train to Brunswick Street station. He said his intention was to attend at hotels (which do not open until 8.30am) in order that he might be let into the premises early to play poker machines. He said that he did this. To say the least, this evidence smacked of confabulation. No witnesses were called to corroborate that evidence.

[56] He also said that the reason for walking past Kent Street was to visit a person he knew who operated a shop in that area. The shop was named by Mr Harvey as "Pru's Hairdressing Place" but its location was not identified nor was anybody associated with the shop called to give evidence.

[57] Mr Harvey was unable to remember, he said, his movements between 7.15am and 8.30am. He accepted that he walked along Brunswick Street and he said that he walked back to the train station on the same side of the street. This is inconsistent with the evidence of police officer Brown who stated that the first time the respondent was picked up by cameras on the walk from Brunswick Street was at Valley Metro or McWhirter's.

[58] Evidence was called by the respondent from Howard Posner. Mr Posner is a solicitor who took instructions from Mr Harvey in February 2009 and April 2010. The accounts which were given to Mr Posner varied from the version which he now gives. The variation relates to the relationship he had with Ms Hawkins, why he went to the Wickham Hotel, and not making any mention of trying to visit the hairdresser. This threw further doubt on the respondent's evidence.

[59] The respondent was picked up by police later that day at about noon. He did not tell them the truth as to his movements earlier that day. He said that he had not gone to Fortitude Valley, rather, he said he had been shopping at Goodna with his brother all day.

[60] The evidence against the respondent must be assessed in accordance with the principles referred to above and which are outlined in *Briginshaw v Briginshaw*.[27] As Dixon J said:

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[27] (1938) 60 CLR 336.

> "The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved.
>
> The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Every one must feel that when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency."[28] (footnotes omitted)

[61] In *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*,[29] Mason CJ, Brennan, Deane and Gaudron JJ adopted substantially the same analysis in terms of the 'balance of probabilities' test. In doing so, they placed emphasis on the fact that the ordinary standard of proof in civil litigation is proof on the balance of probabilities even where the matter to be proved involves criminal conduct or fraud. They acknowledged that the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. They explained, however, that authoritative statements to the effect:

> "[T]hat clear or cogent or strict proof is necessary 'where so serious a matter as fraud is to be found' … should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct."[30] (footnotes omitted)

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28 Ibid 361-362.

29 (1992) 110 ALR 449.

30 Ibid 450.

[62] The matters which are relevant to the issue of whether Mr Harvey assaulted Ms Hawkins were addressed in detail by counsel. I have not attempted to set them all out but I have considered them. They include:

(a) The statements made by Ms Hawkins;
(b) The weight which should be given to those statements;
(c) The inconsistencies which have been identified in those statements;
(d) The incontrovertible video evidence of the respondent's presence near the deceased's home unit;
(e) The motive that Mr Harvey had to attack her, namely, the assertions she had made that he had stolen from her;
(f) The change in clothing he made at a time after he was last seen on the surveillance cameras when he was heading towards the direction of Heal Street and when he was next seen; and
(g) The untruths he told to the police after being picked up at Goodna.

[63] I do not accept Mr Harvey's account of his actions on that morning. His evidence was inconsistent with earlier statements and inherently unbelievable.

[64] I acknowledge that Ms Hawkins' evidence was susceptible to criticism on a number of fronts. It was, though, consistent with other circumstantial evidence and to prefer Mr Harvey's version would have required the acceptance of a number of coincidences involving him which, in turn, would necessitate a level of credulity inconsistent with the appropriate standard of proof.

[65] I should record that there were submissions made as to the accuracy of the surveillance camera footage with respect to the variations shown in time on the camera and whether or not there had been all relevant footage disclosed. I was satisfied after consideration of the evidence given that all relevant surveillance footage had been disclosed and that the variations in times etc were explicable by reason of the manner in which the cameras were operated.

[66] I am satisfied that Mr Harvey did assault Ms Hawkins in the way that has been described. The evidence of Ms Hawkins establishes that and it is supported by the other circumstantial evidence. It follows, then, that I find that he has breached condition 12 of the supervision order.

[67] I dismiss the respondent's application and adjourn the Attorney-General's application to a date to be fixed.