SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Qld v Harvey* [2013] QSC 125
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **SHANE EDWARD HARVEY** (respondent)
FILE NO/S:	BS1736 of 2006
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	15 May 2013
DELIVERED AT:	Brisbane
HEARING DATE:	22, 23 April 2013
JUDGE:	Martin J
ORDER:	**I rescind the supervision order and will make a continuing detention order.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – DANGEROUS SEXUAL OFFENDER – GENERALLY – where the respondent had been subject to a supervision order on 3 December 2007 – where the Attorney-General alleges the respondent has 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of the supervision order in a number of respects – where the Attorney-General seeks that the supervision order be rescinded and a continuing detention order be imposed – whether a continuing detention order should be imposed *Attorney-General for the State of Queensland v Ellis* [2012] QCA 182, cited *Attorney-General for the State of Queensland v Francis* [2007] 1 Qd R 396, cited *Attorney-General for the State of Queensland v Harvey* [2012] QSC 173, considered *Attorney-General for the State of Queensland v Harvey* [2007] QSC 366, cited

COUNSEL: P J Davis SC with B Mumford for the applicant
C F C Wilson with K Hillard for the respondent

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

[1] This is the second part of the hearing of an application by the Attorney-General in which he seeks findings that a supervision order made under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 ("the Act") has been breached by the respondent and that, as a consequence, the respondent should be subjected to a continuing detention order. Last year[1] I found that the Attorney-General had established on the balance of probabilities that the respondent had breached the supervision order by committing an indictable offence, namely, that he had assaulted Dianne Hawkins and caused her grievous bodily harm.

[2] The Attorney-General also alleges that the respondent has breached the supervision order made by Atkinson J in December 2007[2] by:

(a) Testing positive to cannabis on 24 January 2008 – a breach of condition 17.
(b) Returning late, in breach of his curfew on two occasions – once by eight minutes (on 5 January 2008) and once by four minutes (14 February 2008) – a breach of condition 23.
(c) Having a two year old male child at his residence at Wacol – breach of condition 13.
(d) Failing to attend upon and submit to assessment by a psychologist – breach of condition 20.

[3] Apart from the alleged positive cannabis test, the other contraventions are admitted by the respondent. The applicant submits that the contraventions referred to at (b), (c) and (d) are at the lesser end of the scale of contraventions. I accept that. The circumstances surrounding them are such that, standing alone, they would not be of substantial concern.

[4] As part of the usual supervision of the respondent under the supervision order, he was required to provide a sample of his urine for testing. When analysed, the sample revealed a positive reaction for cannabinoids. In accordance with the standard procedure, a further test was undertaken which produced a finding of 24 nanograms per millilitre of Tetrahydracannabinol. This confirmed the ingestion of cannabis by the respondent. The senior chemist who provided an affidavit deposing to the results of these tests was not cross-examined. In his affidavit he referred to studies which showed that Tetrahydracannabinol can be absorbed by passive smoking. The studies referred to by the senior chemist appear to demonstrate that readings of the level found in the respondent might be caused by passive smoking in specific circumstances.

[5] The respondent denies having consumed any cannabis himself and, in his affidavit filed 22 December 2010 said:

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1 *Attorney-General for the State of Queensland v Harvey* [2012] QSC 173
2 *Attorney-General for the State of Queensland v Harvey* [2007] QSC 366

> "All I know is that I have been abstaining from the use of illicit drugs during the entire duration of my order and that is the highest that I can put it. It may be I was present when others were using drugs."

[6] Notwithstanding that the senior chemist was not cross-examined, the respondent did not accept that the test had shown trace elements of cannabis in his system. He said the test could be false but he had no idea how that might have occurred. He was cross-examined on the possibility of having ingested cannabis through passive smoking. He said:

> "Well, you explain – you explain to me – to us, please, this incident when you were in Dianne Hawkins' place and people were smoking cannabis? Do you actually remember an incident like that or do you think just think that could have happened? - - I think that could have happened.
> But you can't specifically remember it? - - No
> You can't remember being in a room where there was lots of cannabis smoke about you? - - No
> …
> Can't remember being in a room which wasn't ventilated properly, so the smoke may have been irritating, for instance? Nothing like that? - - No
> So, the highest you can put it is that your blood tests is [sic] explained by the fact that you may have been at Dianne Hawkins' house at some stage when someone was smoking cannabis in the house. That's as high as you can put it? - - Yes, yes.
> No other details you can give us about that? - - No."

[7] Where there is no evidence to support a finding that the respondent was at a time near the time he was tested in the type of circumstances referred to by the senior chemist, then the conclusion that the level of cannabinoids found was as a result of "passive smoking" cannot be justified. I am satisfied that the test demonstrates that the respondent did ingest cannabis and that it was not due to "passive smoking" and that his denial cannot be accepted.

[8] It follows, then, that the applicant has demonstrated five separate breaches of the supervision order. The most serious are, of course, the assault causing grievous bodily harm and the use of cannabis.

Psychiatric evidence

[9] The respondent was examined most recently by Dr Lawrence, Dr Moyle and Professor Morris. Each of them conducted the risk assessment on the basis that the respondent had assaulted Ms Hawkins. The respondent maintained that he had not committed that offence and would say no more about it.

Dr Lawrence

[10] The following matters emerge from Dr Lawrence's assessment:

(a) The respondent plans, if released, to live with Joanne Lindley (known as Jodie). Dr Lawrence observes that, to a large extent, his future seems to be predicated on his relationship with Jodie as he has no other support and his ability to adjust is limited.

(b) His responses revealed a paranoid stance as well as considerable rigidity of thought. This was based on a restricted belief system together with difficulty in planning and thinking through consequences and a degree of impulsivity.
(c) The respondent is of borderline intellectual functioning with consequential difficulty in learning new behaviours and in adjusting to circumstances.
(d) A number of risk assessment instruments were used. On the Hare PCL-R Psychopathy Checklist, the respondent scored 25 out of 40. The generally accepted cut-off for psychopathy is 30.
(e) The assessment on VRAG and SORAG increased the probability of reoffending to at least greater than 50% compared to the test conducted in 2006.
(f) The current scores on HCR-20 indicate a high risk of reoffending.
(g) The Static-2002 and SVR-20 tests indicate a high risk of reoffending.
(h) The respondent displays a rigidity of thought process, he is prone to responding impulsively to an emotional reaction to a circumstance and has difficulty in thinking through the consequences of his actions.
(i) When the consequences of his wrongdoing are put before him he is prone to self-justification, denial or other forms of avoidance or responsibility, including projecting blame onto others.
(j) Importantly, he remains at risk of disinhibited behaviour after the consumption of alcohol or other intoxicants.

[11] Dr Lawrence's opinion is that the respondent is at high risk of reoffending if released without a supervision order but that such an order with appropriate conditions might reduce the likelihood of serious reoffending, particularly of a sexual kind.

Dr Moyle

[12] Dr Moyle interviewed the respondent under the same conditions, that is, that it was assumed that Ms Hawkins had been assaulted by the respondent. Once again, the respondent denied assaulting Ms Hawkins and asserted his right to silence on that issue. He also denied using cannabis.

[13] Dr Moyle's view about the respondent's impulsivity and rigidity of thought coincided with those of Dr Lawrence.

[14] He observed that the respondent:

> "…seems to see freedom as an absolute right to do as he pleases. In this way, he is narcissistic. He seems entitled, self-absorbed, and speaks as if I am speaking in a foreign language when I talk about issues of responsibility, paying his way and finer emotion."

[15] Dr Moyle administered tests of the same nature as Dr Lawrence. On the HARE PCL-R Psycopathy Checklist, he arrived at a score of 29 out of 40.

[16] Other tests he administered resulted in the following conclusions:

(i) The respondent has high needs in the areas of self-regulation out of custody.

(ii) He is at least a moderately high risk for violence to vulnerable women and that may extend to rape, especially if he feels mistreated. The level of violence can be severe.
(iii) He is at a high risk of reoffending violently.
(iv) He has limited internal factors which would lower the risk and has low motivational factors which leave only modest externally protective factors.

[17] Dr Moyle is of the opinion, based upon his examination and the clinical instruments which had been previously used, that there is little to suggest that the respondent has significantly lowered his risk from a high risk of violent offending, and that includes sexual offending, should he be released into the community before he makes changes to his attitude.

[18] Dr Moyle opines that if he is released from custody he is at risk of committing a serious sexual offence. If he is released from custody without a supervision order being made, that risk is high.

[19] Dr Moyle predicts that, if he is released, the respondent will continue to cause problems to those charged with monitoring and supervising his release in the community. Any supervision order would need to involve very tight monitoring and control and would not allow any flexibility outside the strict rules of any supervision order.

Professor Morris

[20] Professor Morris had not interviewed the respondent previously.

[21] Professor Morris used a number of approaches to assess the respondent's risk of recidivism to violent offending and violent sexual offending. He also used the Hare PCL-R and scored him at 22 out of 40. This score indicates a moderate risk of reoffending.

[22] Other tests administered resulted in Professor Morris forming the view that his risk of violent reoffending was moderate (HCR-20) and his risk of violent sexual reoffending was also moderate (SVR-20).

[23] His view was that if the respondent was released then the risk of his returning to serious sexual offending was moderate and that risk could be further reduced if he was placed on a supervision order.

[24] He also said that, as a result of his antisocial disorder, the respondent blames others when things go wrong. As a result, it will be difficult for him to comply with a very strict supervision order – which is what Professor Morris says is needed. It was suggested that the respondent be treated by a clinical psychologist so that he can seek assistance if placed under a supervision order.

[25] Professor Morris agreed that if Mr Harvey has to deal with the pressures of day-to-day life in the community the risk of him not complying with a supervision order will increase.

Ms Joanne Lindley

[26] An important part of the respondent's proposed post-release plans involves Ms Lindley. He intends, if released, to reside with Ms Lindley and to seek employment.

[27] Ms Lindley has not seen the respondent for some years. She attempted to visit him in prison on a few occasions but was denied entry by the prison authorities. Ms Lindley said that she has been diagnosed with a personality disorder but she cannot remember what type it is. She also said that she suffers from stress and depression, that she takes or has taken anti-depression medication, and that she had attempted suicide on at least two occasions.

[28] It was clear from her evidence that she didn't accept that the respondent had raped women in the past and that she did not believe that the respondent had assaulted Dianne Hawkins.

[29] It is not possible to form a final opinion about Ms Lindley in the absence of any psychiatric evidence and after only relatively brief cross-examination, but I have been able to conclude that she did not present as a stable person. Of course, the stresses of giving evidence can cause many people to appear nervous and uncertain. Even when that is taken into account I remain of the view that she is not a person who could be relied upon to assist the respondent, or to provide an environment which would assist him, to comply with any supervision order.

Shane Harvey

[30] On the last occasion this matter was before me, Mr Harvey also gave evidence. I observed then:

> "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."

[31] Little changed in this hearing. Mr Harvey refused to accept the unchallenged evidence concerning the level of cannabinoids in his system and his attempt to explain it away through passive smoking smacked of a deliberate and deceitful exercise to excuse his behaviour.

Consideration

[32] The onus rests on the respondent to satisfy the court, on the balance of probabilities, that notwithstanding the contraventions found, the community can adequately be protected by a suitably drawn supervision order.

[33] Of the five contraventions, the applicant concedes that those concerning the curfew, the child at the residence (given the circumstances of that event) and the failure to attend upon a psychologist are at the lesser end of the scale of contravention.

[34] The other two contraventions cannot be said to be minor.

[35] The ingestion of cannabis was very serious. The risk of offending behaviour by the respondent is magnified by the disinhibiting influence of an intoxicant like cannabis. His use of that drug only two months after being released into the community is a confirmation of the opinion of Dr Moyle of his lack of control.

There was evidence, and there were submissions, about the use of electronic devices which would alert authorities if the respondent entered into areas which had been identified for the purposes of a supervision order as high risk in that they contained the hotels which he might frequent. While that is accepted, such a device cannot be used to determine when the respondent might enter into an area where cannabis is available. While it is common knowledge that cannabis can be obtained in many hotels and nightclubs, it is also well known that it can be obtained in many other places.

[36] It was conceded by Mr Wilson – properly in my view – that the assault on Dianne Hawkins was a very serious breach and that reoffending in a violent way is relevant to the risk of reoffending in a sexual way. The assault on Ms Hawkins occurred only four months after the release of the respondent on the last occasion. He engaged in an act of great violence and that conduct fits with the views of both Dr Lawrence and Dr Moyle.

[37] The respondent has been detained now for a substantial period of time. The reasons for that have been referred to elsewhere.

[38] The principles which are to be applied have been examined in a number of cases. I particularly bear in mind what was said by Jerrard JA in *Attorney-General for the State of Queensland v Francis*:[3]

> "… if supervision of the prisoner is apt to ensure adequate protection, having regard to the risk to the community posed by the prisoner, then an order for supervised release should, in principle, be preferred to a continuing detention order on the basis that the intrusion of the Act upon the liberty of the subject are exceptional, and the liberty of the subject should be constrained to no greater extent than is warranted by the statutes which authorises [sic] such constraints."[4]

[39] Dr Lawrence and Dr Moyle were in broad agreement about the prospects of the respondent and the likelihood of reoffending. Professor Morris had a more generous view of his prospects. I have given more weight to the opinions of Drs Lawrence and Moyle because they have observed the respondent for a much longer time and have provided other opinions. Professor Morris has only seen the respondent once and did not have the advantage that the other two psychiatrists had. They were both of the view that if he was to be released from custody without a supervision order then he would be a high risk of reoffending. While both accept that the imposition of a supervision order would reduce that risk, both Dr Lawrence and Dr Moyle place a caveat on that opinion because of their judgment as to the respondent's capacity to comply with such an order.

[40] Dr Moyle was of the view that the respondent's problems with authority would continue to cause difficulties for those charged with monitoring and supervising his release in the community. He drew a distinction between the circumstances of release subject to a supervision order and incarceration. The environment of a prison works to control impulsiveness and, of course, does not offer the opportunity for such impulsive behaviour to the respondent. Dr Lawrence refers to the difficulty he

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3 [2007] 1 Qd R 396

4 Referred to in *Attorney-General for the State of Queensland v Ellis* [2012] QCA 182

has in planning and thinking through consequences, his impulsivity and his considerable rigidity of thought and opines that he would not be able to move beyond his self-justification and the denial of responsibility which he has exhibited in the past.

[41] I accept the submission of the applicant that the respondent would be likely to resent and to resist the constrictions of a supervision order. The plan which he has presented, should a supervision order be made, was lacking in detail and did not provide any comfort for a conclusion that his plans would work to assist him in complying with a supervision order. He remains a high risk of reoffending sexually if released and a lesser risk if released under supervision.. The proposals for electronic monitoring would not necessarily operate to prevent him from engaging in conduct which would disinhibit him, namely, the sort of conduct he engaged in within two months of release on the previous occasion.

[42] Those matters lead me to the view that there is a substantial likelihood that if released under a supervision order the respondent would breach it in important conditions. In other words, supervision is not apt to ensure adequate protection of the community. The respondent has not discharged the onus upon him

[43] The supervision order is rescinded. I will make a continuing detention order.