SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General (Qld) v Lawrence* [2014] QCA 103
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **MARK RICHARD LAWRENCE** (respondent)
FILE NO/S:	Appeal No 4117 of 2014 SC No 7468 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Application for Stay of Execution
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 May 2014
DELIVERED AT:	Brisbane
HEARING DATE:	2 May 2014
JUDGE:	Gotterson JA
ORDER:	**The order made in the trial division on 2 May 2014 concerning the respondent, Mark Richard Lawrence, be stayed until the completion of the hearing of the applicant's appeal against those orders.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL- PRACTICE AND PROCEDURE – QUEENSLAND – STAY OF PROCEEDINGS – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL – where an order was made rescinding the respondent's continuing detention order – where pursuant to s 30(3) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) the trial judge released the respondent from custody subject to a supervision order – where the applicant filed a notice of appeal and applied to the Court of Appeal for a stay of execution of the order – where arrangements have been made for an earlier than usual hearing of the appeal – whether there are substantial grounds to the appeal – whether the appellant will lose the benefit of a successful appeal if the primary judgment is not stayed – whether the order ought to be stayed until the hearing and determination of the appeal *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 16, s 30 *Uniform Civil Procedure Rules* 1999 (Qld), r 761(2) *Attorney-General (Qld) v Beattie* [2007] QCA 96, cited

Attorney-General for the State of Queensland v Fardon [2011] QCA 111, applied
Attorney-General for the State of Queensland v Lawrence [2011] QCA 301, cited
Attorney-General (Qld) v Lawrence [2011] QCA 347, cited
Attorney-General (Qld) v Lawrence [2014] QSC 77, related
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited

COUNSEL: P Dunning QC SG, with J Rolls, for the applicant
J Allen for the respondent

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

[1] **GOTTERSON JA:** The applicant, Attorney-General for the State of Queensland, has applied for a stay of orders made by a judge of the trial division on 2 May 2014. Those orders concern the respondent, Mark Richard Lawrence. They are as follows:

1. The decision made on 3 October 2008 that the respondent is a serious danger to the community in the absence of an order pursuant to Division 3 Part 2 of the Act be affirmed;
2. The continuing detention order made on 8 October 2008 be rescinded; and
3. The respondent be released from custody on 2 May 2014 and from that time be subject to the requirements which are set out in the reasons for judgment for a period of 15 years from the date of his release.[1]

The Act to which order 1 is reference is the *Dangerous Prisoners (Sexual Offenders) Act* 2003 ("the Act"). Jurisdiction to grant an order in terms of a stay is conferred by Rule 761(2) of the UCPR.

[2] After these orders were made, the applicant filed a notice of appeal against them and an application for a stay of them until the determination of the appeal. The application was heard late in the afternoon on 2 May. I then made an interim order staying the orders until determination of the application.

[3] The material filed in support of the application consisted of an affidavit of Ms R H Berry to which were exhibited the reasons for judgment under appeal and an affidavit of Ms R Embrey, the manager of the High Risk Offender Management Unit within Queensland Corrective Services. No material was filed on behalf of the respondent.

The respondent's offending and detention

[4] The respondent's offending has been summarised in earlier proceedings as follows:[2]

Date	Description of Offence	Sentence
09.05.78 Ipswich Childrens Court	• Aggravated assault on a male child under the age of 14 years (on 4.05.78)	Admonished and discharged
02.11.78 Ipswich Magistrates Court	• Aggravated assault on a male child under the age of 14 years (on 20.12.78) (*sic*)	Probation for a period of 2 years

1 *Attorney-General (Qld) v Lawrence* [2014] QSC 77.
2 *Attorney-General for the State of Queensland v Lawrence* [2011] QCA 301 per Fraser JA at [7].

23.02.79 Ipswich Magistrates Court	• Aggravated assault on a female child under the age of 17 years (on 22.02.79)	Probation for a period of 3 years To undergo any psychiatric treatment as directed by probation officer, including necessary institutional treatment
23.12.80 Ipswich Magistrates Court	• Aggravated assault on a male child under the age of 14 years (on 21.12.80)	Fined $75.00
03.09.81 Brisbane District Court	• Conspiracy to commit a crime (on 11.04.81) • Assault with intent to steal and threatened to use actual violence whilst armed with a dangerous weapon and in company (on 11.04.81)	On each charge: 4 months imprisonment, concurrent. In addition to the 2nd charge: probation 3 years.
07.02.85 Brisbane Supreme Court	• Unlawful killing on grounds of diminished responsibility (on or about 26.12.83)	15 years imprisonment
03.09.91 Beenleigh Magistrates Court	• Found in an enclosed yard without lawful excuse (on 2.09.91) • Escape legal custody (on 31.08.91)	Convicted and sentenced 2 months imprisonment Convicted and sentenced 1 year imprisonment
04.04.02 Brisbane District Court	• Rape (on or about 14.10.99) • Sexual assault including a circumstance of aggravation (on or about 14.10.99)	Imprisonment 7 years Imprisonment 3 years, to be served concurrently. Recommended not to be eligible for PPCBR. Declared to be a serious violent offender. Time spent in pre-sentence custody deemed as already served (07.02.01 – 04.04.02)

[5] That summary was elaborated by the following further remarks:

> "[The respondent] committed the first four offences between May 1978 and December 1980, a period which commenced shortly before his 17th birthday and which concluded some months after his 19th birthday. By far the most serious offences were committed in December 1983 and in October 1999. [The respondent] committed the 1983 offence whilst he was a patient at Wolston Park Hospital and in company with another male patient. The victim was also a patient. According to one account in the evidence, [the respondent] planned to rape and kill his victim. [The respondent] in fact killed her by cutting her throat when she continued screaming after he and his co-offender had grabbed her, dragged her down to a river bank

> and choked her, and [the respondent] had hit her with a bottle which broke. [The respondent's] most recent offences were committed in 1999 whilst he was in prison. …"[3]

[6] The respondent's imprisonment for the 1999 offending expired on 7 February 2008. He has since remained in custody pursuant to orders made under the Act. He appealed against a detention order made under Division 3 of the Act on 3 October 2008. The appeal was dismissed and special leave to appeal to the High Court of Australia was refused. An order for his release under supervision was made on 4 October 2011 but set aside on appeal to this Court on 2 December 2011. An order continuing the detention order was made on 6 December 2012. Through no fault of any party, the review of the respondent's continuing detention which was due to occur in December 2013, was not heard until February 2014.

[7] Under the orders which are subject to appeal, the respondent would be released from custody subject to a supervision order made pursuant to s 30(3)(b) of the Act. There are some 31 conditions to the supervision order including conditions that meet the requirements necessitated by s 16(1) of the Act. The learned primary judge noted that there had been no argument before him to the effect that those requirements could not be reasonably and practicably managed by corrective services officers: Act s 30(4)(b)(ii).

The judgment under appeal

[8] The reasons of the learned primary judge traversed the respondent's history, relevant provisions of the Act and reasons for recent decisions of this Court and of a judge of the trial division with respect to the respondent's detention. His Honour then summarised aspects of the evidence of each of three psychiatrists by way of reports and oral testimony. They were Dr Madsen, the respondent's treating psychiatrist, Dr Lawrence who has had a long history of assessing the respondent and Dr Grant who also had assessed the respondent.

[9] His Honour concluded on the threshold issue posed by s 30(1) of the Act that he was satisfied by acceptable and cogent evidence to a high degree of probability that the Court should affirm its previous decision that the respondent is a serious danger to the community in the absence of a Division 3 order. He then turned to the issue posed by s 30(3) of the Act, namely, whether the detention order should be continued or whether the respondent should be released from custody subject to a supervision order. Upon an analysis of the issue which is set out in paragraphs 42 to 52 inclusive of the reasons under the heading "Detention on supervised release", his Honour concluded that the continuing detention order should be rescinded and a supervised release order made. Specifically, his Honour was persuaded that on the evidence he had discussed, adequate protection of the community could reasonably and practicably be managed by such an order for the purposes of s 30(4)(b)(i) of the Act.

The grounds of appeal

[10] The notice of appeal lists some four grounds of appeal. Ground (a) is that the discretion to be exercised by the learned primary judge under s 30(3) miscarried by reason of his failing to take into account some nine matters in assessing as he was required to do by s 30(4)(b)(i) of the Act, whether the adequate protection of the

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3 *Ibid* at [8].

community could be reasonably and practicably managed by a supervision order. Ground (b) adds a further matter said not to have been taken into account in that assessment, namely, the extent of the risk to the community of a release from custody having regard to the "catastrophic consequences" that would ensue if the risk of harm on release were to materialise. Ground (c) asserts that there was no basis upon which his Honour could have found that the supervision order would adequately protect the community. Ground (d) attacks the evidential basis for the decision and contends that the decision is unreasonable.

The issues on this application

[11] In *Attorney-General for the State of Queensland v Fardon*,[4] Chesterman JA identified the criteria applicable to a stay application in this context. After referring for guidance to statements of principle applicable to the grant of stays for civil remedies his Honour observed:

> "[15] Applying these criteria to the present application the result is that the respondent's release on supervision should not be delayed pending appeal unless the applicant shows that his appeal is arguable on substantial grounds *and that* the appellant may well lose the benefit of a successful appeal if the primary judgment is not stayed. In applications under the Act the Attorney-General is only likely to lose the benefit of a successful appeal if the prisoner commits a serious sexual offence in the period between judgment at first instance and on appeal. If that should happen the community would not have been adequately protected and the means of ensuring that protection will have been lost.
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> [16] The magnitude of the risk that a prisoner might commit a serious sexual offence before an appeal against his release on supervision can be heard is therefore the critical factor on an application for a stay of judgment.
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> [17] Also relevant is the consideration that the respondent has the benefit of a judgment ordering his release on supervision made after a contested hearing in which all the relevant evidence the parties wished to adduce was tendered. While the order severely limits the respondent's liberty and independence of living, he prefers that limited freedom to incarceration. In addition the principle of individual liberty, of even the meanest citizen, is basic and important in a democratic society underpinned by the rule of law, and is not to be taken away without good cause.
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> [18] The determination of the application for the stay must balance these competing considerations. The greater the risk the less important is the right to freedom. The converse is true."[5]

[12] I would accept his Honour's observations for present purposes, subject to the reservation that any assessment of the prospects of the appeal can by reason of the exigencies of this application, be no more than a preliminary one.

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4 [2011] QCA 111.

5 At [15]-[18].

Assessment of prospects

[13] The structure of the grounds of appeal implicitly acknowledge that in order to succeed in challenging the exercise of the discretion by the learned primary judge, an error within the categories described in *House v The King*[6] must be established. Grounds (a) and (b) are referenced to error by way of a failure to take into account a relevant consideration.

[14] His Honour had stated that each of the three psychiatrists believed that the level of risk attending release of the respondent from custody was "moderate".[7] Counsel for the applicant referred to this and then cited the following passage from the judgment of Keane JA in *Attorney-General for the State of Queensland v Beattie*:[8]

> "For the appellant, it was argued that the expert description of the risk of the appellant's re-offending as 'moderate' meant that the risk fell short of 'unacceptable'. But this argument overlooks the point that whether or not a moderate risk is unacceptable must be gauged by taking into account the nature of the risk and the consequences of the risk materialising. In this regard, the appellant's likely targets are children, and especially street children: vulnerable members of the community who are likely to be peculiarly susceptible to his seduction techniques. The focus of consideration must, therefore, be upon the likely effect of a supervision order in terms of reducing the opportunities for the appellant to engage in acts of seduction of children to an acceptably low level."

[15] It was submitted that the matters listed in Grounds (a) and (b) had not been taken into account by his Honour in determining whether the risk was "acceptable". It was acknowledged by counsel for the applicant that whereas some matters had been taken into account in that exercise, those identified in the grounds of appeal had not. It was also suggested that rather than taking into account all relevant considerations, his Honour had been overly reliant upon what he described as a "marked shift in the opinions of Dr Lawrence and Dr Grant" away from the opinions that they had expressed for the purposes of the December 2012 review of the respondent's detention.

[16] Counsel for the respondent, who opposed the stay application, pointed out that each of the nine matters was either a quotation or a paraphrase of the evidence of one or other of the psychiatrists as summarised by the learned primary judge. He submitted that whilst each of those matters was not, in terms, referred to by his Honour in his analysis, he must have been conscious of them and therefore had regard to them. In particular, with respect to matter (ix), it was submitted that in light of the express reference to Dr Grant's view that if the respondent were to act upon sadistic sexual fantasies the results could be "quite catastrophic",[9] it was not reasonably arguable that his Honour did not take those risks into account, especially having regard to his description of them as "as earlier discussed" in paragraph 46 of his analysis.

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6 (1936) 55 CLR 499 at 505; adopted in *Attorney-General for the State of Queensland v Lawrence* [2011] QCA 347 per Muir JA at [27], Fraser and White JJA concurring.

7 Reasons [48].

8 [2007] QCA 96 at [19], Holmes JA and Douglas J concurring.

9 Reasons [36].

[17] There is considerable force in the respondent's submissions, not only in respect of matter (ix) but also in respect of many of the other matters listed in Ground (a). The applicant will face a significant challenge in persuading an appellate court that they were not considered by his Honour.

[18] However, I would not regard matter (i) as necessarily within that category. That matter is that it would be difficult to assess whether the respondent would experience deviant sexual fantasies if and when released into the community. I understand this matter to be referable to oral evidence given by Dr Grant that a supervisor could not tell whether the respondent was experiencing sadistic sexual fantasies and that to a large extent, there would be reliance upon honest and consistent reporting by the respondent about those matters.[10] Dr Madsen had also spoken of the difficulty in assessing whether the respondent would experience such fantasies on release.

[19] Relevantly, his Honour said in the analysis:

> "[44] In particular, the psychiatrists have now expressed views which are favourable to the respondent's prospects of managing his sexual behaviour. It remains doubtful whether the respondent does not experience any deviant sexual fantasies now. Dr Lawrence said that it was unlikely that the occurrence of these fantasies had been eliminated entirely. The important point in her view was that the respondent now appeared to be genuinely minded to control the risk from those fantasies and was developing the means to do so. Therefore, the unknown is not so much whether the respondent will experience the onset of these fantasies but rather whether he will remain willing and able, outside the custodial environment, to avoid their development and their potentially dangerous consequences. It is that uncertainty which results in some ongoing risk that the respondent would commit a serious sexual offence and perhaps a life threatening offence.
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> [45] Relevant also is the fact, as the witnesses explained, that there is no means for reading the respondent's mind as to the extent to which he experiences the onset and controls of the influence of deviant fantasies. It is possible that even his treating psychologist would be unable to detect some dangerous development in that respect. Rather the importance of ongoing therapy as provided by Dr Madsen is just that: it would be therapeutic for him to develop or further develop strategies for managing this risk."

[20] These observations are focused upon self-management by the respondent of his behaviour as it is relevant to risk of harm to members of the community. Apart from the reference to the impossibility of reading the respondent's mind, there is no reference to the fact noted by Dr Grant that a supervisor could not detect by observation of the respondent and his behaviour, whether he was experiencing a deviant sexual fantasy and, moreover, if he was, whether he was taking any step to self-manage it. It is, I think, arguable, firstly, that as much as self-management was

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10 Reasons [40].

a factor to be taken into account in assessing the risk to the community, so also was the inability of his immediate supervisors to detect such matters, and, secondly, that by reason of its not having been expressly mentioned and balanced in context, this latter matter was not, or not properly, taken into account in the assessment undertaken by his Honour.

[21] For this reason, I am of the preliminary view that the applicant does have a point that is reasonably arguable on appeal. I express no view on the prospects of Grounds (c) and (d), except to say that I would regard the challenge based upon *Wednesbury* unreasonableness as having dim prospects. Nor do I consider the suggestion to the effect that his Honour, in effect, abnegated the judicial function by adopting the opinions of the psychiatrist as in any way persuasive.

Loss of benefit of an appeal

[22] The evidence of Ms Embrey is that under a supervision order, the respondent would be housed for three months in contingency accommodation at a facility at Wacol. The facility area is fitted with closed circuit TV cameras but there is no locked fence and no regular security patrols. The respondent would be subject to a 24 hour curfew, that is to say, he would not be lawfully entitled to leave the accommodation except for sanctioned appointments.

[23] On release, the respondent would be fitted with an electronic monitoring device. The device enables the wearer to be located but, of course, does not identify who might be with the wearer or what the wearer is doing. Six offenders are known to have deliberately removed devices fitted to them.[11]

[24] There is therefore some risk that the respondent while at the facility, might begin to experience one or more deviant sexual fantasies and that he might not appropriately self-mange it or them. Such occurrence or occurrences could not be detected by supervisory staff. The respondent might then quit the facility minded to offend. The prospect of harm to a third party would be heightened if he removed his electronic monitoring device. Actuarially, the level of risk of such events happening might be regarded as slight, but the gravity of such a risk, is graphically informed by the catastrophic harm that could befall a victim if it eventuated.

Conclusion

[25] I am of the view that the availability to the applicant of an arguable ground of appeal together with the nature and degree of the risk of harm to others combine to warrant the grant of a stay of the orders made on 2 May. The applicant has requested a stay until the determination of the appeal. I consider that any stay should be until the completion of the hearing of the appeal only, leaving it to the court that hears the appeal to decide whether the orders ought to be stayed further. Inevitably, this stay will impact upon the respondent. Arrangements made for an earlier than usual hearing of the appeal will lessen the impact.

Order

[26] I order that the orders made in the trial division on 2 May 2014 concerning the respondent, Mark Richard Lawrence, be stayed until the completion of the hearing of the applicant's appeal against those orders.

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[11] Affidavit of Roberta Embrey at [11].