SUPREME COURT OF QUEENSLAND

CITATION:	*Queensland Parole Board v McGrane* [2014] QCA 193
PARTIES:	**QUEENSLAND PAROLE BOARD** (appellant) **v** **JAMES PATRICK McGRANE** (respondent)
FILE NO/S:	Appeal No 2695 of 2014 SC No 7255 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	12 August 2014
DELIVERED AT:	Brisbane
HEARING DATE:	29 July 2014
JUDGES:	Muir and Morrison JJA and North J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal be allowed.** **2. The order of the primary judge be set aside.** **3. The respondent's application for judicial review be dismissed.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – WHAT IS – GENERALLY – where the respondent was 17 when he raped and murdered his 21 year old sister – where the respondent was sentenced to 15 years imprisonment for the offence of rape and to life imprisonment for the offence of murder – where the respondent has made a number of unsuccessful applications for parole, including his latest application dated 8 April 2011 – where the appellant decided on 25 May 2012 not to grant the respondent's application for parole – where the respondent sought judicial review of the appellant's decision – where the primary judge ordered that the decision to refuse to grant parole to the respondent be set aside and the matter be remitted to the appellant to be reconsidered according to the primary judge's judgment – where the appellant appeals against that decision – whether the primary judge erred in finding that the appellant had to consider whether possible conditions

of parole could be imposed in order to make an appropriate assessment of the respondent's risk to the community and the merits of the respondent's case for release on parole

Corrective Services Act 2006 (Qld), s 181(3), s 200, s 227(1)
Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)
Judicial Review Act 1991 (Qld), s 33

McGrane v Queensland State Parole Board [2014] QSC 17, considered

COUNSEL: M Hinson QC, with S A McLeod, for the appellant
M Black for the respondent

SOLICITORS: Crown Solicitor Brisbane for the appellant
Prisoners Legal Service for the respondent

[1] **MUIR JA**: **Introduction** The respondent was 17 when he raped and murdered his 21 year old sister.

[2] The respondent, who was staying at the victim's home for her protection in the absence of her male friend, bound and gagged her. He used a knife to cut away her clothes, rubbed his hands over her naked body and raped her. After stabbing her once in the front of her chest penetrating her heart, he rolled her over onto her stomach and stabbed her 10 or more times in the back with substantial force. Four of the knife wounds in the back also penetrated the victim's heart. The respondent pleaded guilty to rape but not guilty to murder on the ground of diminished responsibility.

[3] In June 1986, the respondent was sentenced to 15 years imprisonment for the offence of rape and to life imprisonment for the offence of murder. He has been in prison since April 1986.

[4] Since the respondent became eligible to apply for parole on 1 April 1999 pursuant to s 181(3) of the *Corrective Services Act* 2006 (Qld) (the CSA) he has made a number of unsuccessful applications for parole. His latest such application was dated 8 April 2011. After obtaining psychiatric and psychological assessments respectively from Dr Moyle, psychiatrist, and Dr Palk, psychologist, affording the respondent opportunities to make further submissions and seeking and obtaining further opinions from Dr Moyle and Dr Palk, the appellant decided, on 25 May 2012, not to grant the respondent's application. On 16 July 2013, the appellant provided a statement of reasons for its decision pursuant to s 33 of the *Judicial Review Act* 1991 (Qld) (the JRA).

[5] The reasons for the decision were stated as follows:

> "Based on the findings listed above, including the nature of the [respondent's] offences, the conclusions provided by both Dr Moyle and Dr Palk, the [respondent's] inadequate release plan including lack of community supports, proposed psychological treatment, suitable accommodation and sponsor, the Board considered the [respondent] poses an unacceptable risk to the community and decided to refuse his application for parole."

[6] In reaching its decision, the appellant relied on a great many documents including:

- a report of Dr Moyle dated 12 December 2011;
- a supplementary report of Dr Moyle dated 20 March 2012;
- a report of Dr Palk dated 16 December 2011; and
- a supplementary report of Dr Palk dated 14 April 2012.

[7] The content of those reports is discussed below.

[8] The respondent sought judicial review of the appellant's decision. On 24 February 2014 the primary judge ordered that the decision to refuse to grant parole to the respondent be set aside and the matter be remitted to the appellant to be reconsidered according to the primary judge's judgment. The appellant appeals against that decision.

The ground of appeal

[9] The ground of appeal is that the primary judge erred in finding that the appellant had to consider whether possible conditions of parole, made pursuant to s 200(2) of the CSA could be imposed in order to make an appropriate assessment of the respondent's risk to the community and, by extension, the merits of the respondent's case for release on parole.

The primary judge's reasons

[10] The primary judge rejected the grounds relied on by the respondent in his application for a statutory order of review but, during the hearing, raised for consideration the question whether the appellant "could and should have considered … the potential for a set of conditions to be attached to a grant of parole, which would significantly reduce the relative risk to the community".[1] The primary judge referred to the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) (the DPSOA) and acknowledged the important differences between a prisoner such as the respondent seeking the privilege of parole under a life sentence and a prisoner subject to an order under the DPSOA who had completed the full term of his sentence. Nevertheless, he considered the DPSOA to be "instructive for a parole board in the assessment and management of the risk of reoffending by a released prisoner".[2] His Honour said that the operation of the DPSOA "… fortifies what ought to be apparent from the terms of s 200 of the [CSA], which is that the particular conditions of parole in an individual case could be of critical importance".[3]

[11] The primary judge continued:[4]

> "[37] The [appellant's] assessment of an unacceptable risk to the community was made without reference to the possible imposition of relevant conditions of parole pursuant to s 200(2) of the [CSA]. The opinions of Dr Moyle and Dr Palk demonstrate

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1 *McGrane v Queensland State Parole Board* [2014] QSC 17 at [33].
2 *McGrane v Queensland State Parole Board* [2014] QSC 17 at [36].
3 *McGrane v Queensland State Parole Board* [2014] QSC 17 at [36].
4 *McGrane v Queensland State Parole Board* [2014] QSC 17 at [37]–[38].

> the potential relevance of a particular regime under which the [respondent] might be paroled. In my view, that possible regime, or put another way a possible set of conditions of parole, was something which the [appellant] had to consider in order to make a logical and appropriate assessment of the relevant risk and in turn of the merits of the [respondent's] case for release.
>
> [38] Had that matter been considered by the [appellant], it may or may not have made any difference to the [appellant's] ultimate decision. But the [appellant] was obliged to consider it and for that reason, the evidence and in particular the [appellant's] statement of reasons, reveals a ground for a statutory order of review under s 20(2)(e) and s 23(b) of the JRA. During the hearing I raised with the [appellant's] counsel the potential for relief under this ground and it was not suggested that relief should be refused because the ground was not specified in the application as filed."

Dr Moyle's reports

[12] In his December 2011 report, Dr Moyle gave these opinions:

> "My conclusions are that, in my opinion, **[the respondent] has made some advances in earning the right to stay in Residential accommodation**, having a prolonged period of employment while studying successfully for degrees, and shutting himself away from antisocial peers in the prison. He remains emotionally detached and indifferent to the crime and emotionally detached from relationships with others. He has a negative view towards authority, and has not yet been able to make the emotional steps of changing from an adolescent with lots of fantasies and hopes to a man fully capable of living in the real world with all its frustrations without feeling a sense of resentment and without dealing with that resentment by brooding and hostile fantasies. While we have no evidence of hostile fantasies currently, this would require an act of faith…
>
> **I would see his risk remains as moderately high of committing serious violent crime or sexual abuse in the future**, but that he is moving towards building some protective factors. The key factors that need change are his attitudes towards authority, moving from a conflictual distrust and resentful attitude to a positive attitude that they are trying to go with him to help him to survive in the real world with all its frustrations but, more importantly, limitations on personal freedoms that are inherent in our laws, mores and folkways that allow us to live pro-social lives. He may need help to make connections so he can enjoy leisure activities, to continue his education and training to have meaningful employment, and all of this would need a gradual development of a pathway with clear and stated actual contracts and endeavours. Ideally, the old style of imprisonment would suit a gradual reintroduction to society that may not be available to him. **The Board might be interested in asking the correctional services to provide it with a plan for his moves towards lower security**

> **and increasing responsibility. Hopefully, this will allow the authorities in the prison to meet with [the respondent] and together work towards a plan that they will both implement constructively.**
>
> The uncertainty whether [the respondent] will ever be released from jail is frustrating to him and other life sentenced inmates. However, **he would go a long way to earning the trust of authorities as well as meeting some of his own emotional needs and learning to trust authority figures as being able to help him advance in his personal development if he could work together with authority**. While this makes clinical sense, there is no literature that it would lower the risk sufficiently for a Parole Board to make decisions, as far as release on parole. **If he and the QCS can achieve these goals and he can manage the frustrations of prison life without recourse to violence he would move forward in lowering his risk of reoffending on release**. I rate the risk of serious violent reoffending as moderately high." (emphasis added)

[13] Asked by the appellant to review his report, Dr Moyle produced a supplementary report of 20 March 2012 in which he stated:

> "**My assessment of the risk he poses i.e. moderately high risk of future violence, stands for as long as he is not given any opportunity to adapt to lower security levels and show he is trustworthy**. I don't think anyone can say whether he will or not reoffend with sexually sadistic violence in the future. We can only advise on risk factors and how to manage them. **Eventually, assuming no worrying behaviours occur at lower levels of security he could be seen by community agencies with a view to moving to a supported community location from which he can seek employment or education in his interests and make moves towards enjoying adaptive pursuits in the community**, limiting contact with women until he has engaged with counselling targeting rape." (emphasis added)

[14] Dr Moyle did not deviate from his December 2011 opinion that the respondent remained a moderately high risk of committing serious violent crime or sexual abuse. He was not of the opinion that the respondent should be released into the community on parole. In his opinion, before the respondent could be considered an acceptable risk, he would need to move to an environment where he could "adapt to lower security levels and show he is trustworthy". Dr Moyle noted in this regard:

> "If the processes established by Correctional Services are only available to people under DPSOA and there are no similar services available to those who need this process and he is unable to work cooperatively with staff of Queensland Corrective Services then I despair he may not earn parole."

Dr Palk's evidence

[15] In his December 2011 report, Dr Palk assessed the respondent's risk of recidivism as "low to moderate". Having given that opinion, Dr Palk set out "key factors … likely to increase [the respondent's] risk of re-offending". They included: "Limited

social supports" and a "Tendency to have a quick temper and act impulsively". Summarising his opinions, Dr Palk said:

> "Although [the respondent] has matured over the years and learnt skills to manage his emotional and communication difficulties as evidence by reduced prison breaches in recent times **he is still vulnerable to impulsive verbal and physical aggression and the writer suspects he will always be a moderate risk for these outbursts**. However, in regards to committing further acts of rape and murder the writer believes the prisoner falls in the low risk range. **In terms of managing [the respondent's] eventual release to the community, the Parole Board could consider releasing [the respondent] to the Wacol prison housing precinct with appropriate curfews and restricted liberty as an initial step. The prisoner's behaviour could be monitored over a 12 month period and he could be provided with psychological support to assist him with ongoing mindfulness techniques and reintegration issues. If [the respondent] exhibits any unreasonable signs of verbal or physical aggression he should be returned to secure custody**." (emphasis added)

[16] In his supplementary report given in response to the appellant's request for an updated parole recommendation "in light of the fact that the Wacol High Risk Offender release centre is considered unsuitable", Dr Palk said:

> "The writer also noted in his psychological report that although [the respondent] has matured over the years and learnt skills to manage his emotional and communication difficulties as evidence by reduced prison breaches in recent times he is still vulnerable to impulsive verbal and physical aggression and the writer suspects he will always will be a moderate risk for these outbursts. However, in regards to committing further acts of rape and murder the writer believes the prisoner falls in the low risk range.
>
> **In terms of managing [the respondent's] eventual release to the community, the writer is of the opinion that his release should be managed in a very structured manner due to the length of imprisonment, institutionalisation and his vulnerability to impulsive verbal and physical outbursts**. While the writer appreciates that [the respondent] does not fit the category of prisoner considered suitable for the Wacol High Risk Offender Housing precinct [the respondent] initially requires an environment that will provide structure, close monitoring and reintegration support. The Ozcare parole support facility will not be able to provide the kind of initial close monitoring that is required. The writer also believes that it is inappropriate for [the respondent] to reside with his mother or any of his relatives having regard to the nature of his offence (the rape and murder of his natural sister).
>
> **The writer believes that Corrective services has a number of prisoners in a similar situation to [the respondent] and that consideration should be given to developing some houses close to**

> **the Wacol prison environment in order to provide closer monitoring and supports. In the writer's opinion, [the respondent] will require appropriate curfews and restricted liberty as an initial step. His behaviour should then be monitored over a 12 month period as a step prior to open release in the community**. During the 12 months [the respondent] should be provided with psychological support to assist him with ongoing mindfulness techniques and reintegration issues. **It is also the writer's opinion that if [the respondent] exhibits any unreasonable signs of verbal or physical aggression he should be returned to secure custody**. The writer believes that this process provides the best opportunity for the safety of the community and to assist [the respondent] to live an offence free lifestyle." (emphasis added)

[17] Although Dr Palk regarded the respondent as posing a low risk of committing further acts of rape and murder, he considered that there would always be a moderate risk of the respondent succumbing to "impulsive verbal and physical aggression". His "tendency to have a quick temper and act impulsively" was a matter which Dr Moyle identified as likely to increase the respondent's risk of reoffending. His supplementary report did not advocate the respondent's release into the community before undergoing to an initial period of less secure incarceration where his behaviour could be monitored and from which he could be returned to secure custody should he display any unreasonable signs of "verbal or physical aggression".

The appellant's reasons

[18] The appellant's reasons recorded the respondent's criticisms of the Moyle and Palk reports and rejected them. The reasons stated:

> "Although the [respondent] challenged the findings of both Dr Moyle and Dr Palk's reports, including believing that Dr Moyle 'generally overemphasizes issues to warrant an unreasonably high risk assessment of reoffending' and that 'he dissects factors to such a degree that he loses perspective on the practical issues', and Dr Palk 'exaggerated the level of structure' the [respondent] required for a 'graduated release' and 'overemphasize' the [respondent's] 'impulsivity to outbursts', **the Board** did not accept those submissions and accepted the findings contained in both reports and **considered the [respondent] an unacceptable risk of committing further serious violent offences at this time. Both Dr Moyle and Dr Palk emphasised that any release to the community would need to be managed in a very structured manner due to the length of imprisonment, institutionalisation and the [respondent's] vulnerability to impulsive verbal and physical outbursts**." (emphasis added)

[19] The reasons then referred to the release plan submitted by the respondent. Reference was made to the lack of identification of suitable accommodation and an appropriate sponsor "who would provide the initial close monitoring required should he be released to Parole". The reasons continued:

> "The Board has concerns that the [respondent's] inability to create an appropriately detailed release plan demonstrates that he does not appreciate the challenges that parole may pose and that the aspects of his plan identified above need to be more fulsomely addressed before the Board can consider the [respondent] to be an appropriate candidate for Parole."

[20] Earlier in the reasons, reference had been made to the respondent's "extensive breach and incident history", the most recent breach being in February 2009. The reasons remark:

> "This breach history gave the Board cause for concern as it indicated to the Board that even in a highly structured environment, the [respondent] was unable to control his behaviour and comply with directions given by Prison Management and Corrective Services Officers. This led the Board to have concerns about how the [respondent] would be able to cope in the community without the constant supervision that incarceration provides. The Board was concerned that the [respondent] would be a greater risk of re-offending and pose an unacceptable risk to community safety if released into the community at this time."

[21] The reasons continued:

> "However, the Board did note that the [respondent] achieved a low security classification in December 2011. As the [respondent] has been convicted of sex offences, the Parole Board is aware (due to Corrective Services policies) that the [respondent] cannot progress to a low security facility. However, the Board would be satisfied with the [respondent] maintaining a period of breach free custodial time while maintaining his low security classification in the Residential area of the prison instead of a progression to the low security facility. The Board is of the opinion that remaining in the residential area of the correctional centre will enable the [respondent] to demonstrate his ability to behave in a less structured environment."

Relevant legislative provisions

[22] Section 200(1) of the CSA prescribes a number of mandatory parole order conditions. Sub-section (2) provides:

> "(2) A parole order granted by a parole board may also contain conditions the board reasonably considers necessary—
>
> (a) to ensure the prisoner's good conduct; or
>
> (b) to stop the prisoner committing an offence.
>
> *Examples—*
>
> - a condition about the prisoner's place of residence, employment or participation in a particular program
> - a condition imposing a curfew for the prisoner
> - a condition requiring the prisoner to give a test sample"

[23] The primary judge observed in relation to sub-section (2) that it recognises that, at least in some cases, the risk to the community from a prisoner's release can be reduced to an acceptable level by the imposition of appropriate conditions.

[24] Ministerial guidelines to the appellant made under s 227(1) of the CSA relevantly provide:

> "**SECTION 1 – GUIDING PRINCIPLES FOR THE QUEENSLAND PAROLE BOARD**
>
> 1.1 Section 227(1) of the *Corrective Services Act 2006* (the Act) allows the Minister to make guidelines regarding the policy to be followed by the Queensland board in performing its functions. In following these guidelines, care should be taken to ensure that decisions are made with regard to the merits of the particular prisoner's case.
>
> 1.2 When considering whether a prisoner should be granted a parole order, the highest priority for the Queensland Parole Board ('the Board') should always be the safety of the community.
>
> 1.3 The Board should consider whether there is an unacceptable risk to the community if the prisoner is released to parole; and whether the risk to the community would be greater if the prisoner does not spend a period of time on parole.
>
> **SECTION 2 – SUITABILITY**
>
> 2.1 When deciding the level of risk that a prisoner may pose to the community, the Board should have regard to all relevant factors, including but not limited to, the following –
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> a) the prisoner's prior criminal history and any patterns of offending;
>
> b) the likelihood of the prisoner committing further offences;
>
> c) whether there are any other circumstances that are likely to increase the risk the prisoner presents to the community;
>
> …
>
> g) any medical, psychological, behavioural or risk assessment report relating to the prisoner;
>
> …
>
> j) whether the prisoner has access to supports or services that may reduce the risk the prisoner presents to the community; and …"

[25] Section 200(2) is permissive in terms. It does not require the imposition of terms additional to those in sub-section (1).

The respondent's contentions

[26] Counsel for the respondent contended initially that in his 2012 report Dr Palk had raised the possibility of the respondent being granted parole. The passage from the report relied on to support this argument was:

> "The writer believes that Corrective services has a number of prisoners in a similar situation to [the respondent] and that consideration should be given to developing some houses close to the Wacol prison environment in order to provide closer monitoring and supports. In the writer's opinion, [the respondent] will require appropriate curfews and restricted liberty as an initial step. His behaviour should then be monitored over a 12 month period as a step prior to open release in the community."

[27] That interpretation is not open when the passage is read in context with bordering passages which referred to: "managing [the respondent's] **eventual release** … in a very structured manner"; the monitoring of the respondent's behaviour over a 12 month period "as a step prior to open release in the community"; and the return of the respondent to "secure custody" in the event that he "exhibits any unreasonable signs of verbal or physical aggression".

[28] Dr Palk, whilst recognising the need for suitable custodial accommodation as part of a graduated release programme, implicitly acknowledged that none was available.

[29] Counsel for the respondent argued that, even if the type of custodial accommodation envisaged by Dr Palk and Dr Moyle was not available, and it was conceded that it was not, the appellant was obliged to turn its mind to a set of conditions of the nature of those discussed by Dr Palk "to live somewhere, to have curfews, to have the restricted liberty, to have perhaps, the electronic monitoring that the guidelines talk about as a possibility." Seemingly, the need to consider such conditions was thought necessary to enable the appellant to determine whether the respondent, if released on parole, would pose an unacceptable risk of re-offending.

[30] In developing these arguments counsel for the respondent submitted that if the appellant had considered such matters the respondent's application might have had a different outcome: the appellant's view of the existence of an unacceptable risk of re-offending may have been changed. It was further submitted that the material before the appellant, in the form of the Moyle and Palk reports and the respondent's submissions, required the appellant to give such matters due consideration.

Consideration

[31] The respondent's arguments must be rejected. It is clear from the appellant's reasons that the matters raised by Dr Palk and the respondent in relation to "graduated release" were considered by the appellant. It was not submitted that the appellant could and should have formulated parole conditions, the application of which would have caused the appellant to accept that the respondent was no longer an unacceptable risk.

[32] Under s 2 of the guidelines, the appellant, in deciding the level of risk posed by a prisoner to the community, must have regard to "all relevant factors": in other

words, matters relevant to the subject determination. This was properly conceded by counsel for the respondent. The conclusion reached by the appellant, supported by the opinions of Dr Moyle and Dr Palk, was that the respondent posed an unacceptable risk to the community if released from prison at present, without the respondent having had a graduated release through a low security custodial facility. Failing the respondent's ability to access such a facility, the appellant was of the view that the respondent, over time, may be able to demonstrate his ability to behave in a less structured environment by remaining breach free with his existing low security classification in the residential area of the prison. As well as these considerations the appellant concluded that the respondent's inability to create an appropriately detailed release plan rendered him an unsuitable candidate for parole.

[33] Having regard to these opinions, which it was not suggested were not open to the appellant, any parole conditions which may have been imposed with a view to reducing the risk of re-offending were irrelevant to the appellant's determination. The appellant did not need to undertake the task of fashioning conditions for parole which, guided in part by the evidence of experienced professional experts, it had decided against granting.

[34] The appellant's argument was put quite narrowly. The contention was that in this case the occasion for the appellant to consider conditions of supervised release was not reached. Consequently, whether, pursuant to s 200(2), conditions which might reduce the risk of offending could or should be imposed was not a matter that required consideration. Accordingly, it was unnecessary and undesirable for this Court to consider whether and in what circumstances the appellant may be obliged to consider "a possible set of conditions for parole"[5] formulated by reference to experiences gained by the Corrective Services Department in relation to DPSOA matters or otherwise which would "reduce the relative risk to the community".[6]

[35] Any such question should be answered by reference to the facts and circumstances of the case in which it arises. In which case, regard may be had to matters such as; the expertise, knowledge and experience of the appellant; discretionary considerations, business exigencies and practicalities and to any policies which do not conflict with the appellant's statutory obligations.

[36] For the above reasons I would order that:

1. The appeal be allowed.

2. The order of the primary judge be set aside.

3. The respondent's application for judicial review be dismissed.

[37] **MORRISON JA:** I agree with the orders proposed by Muir JA and with the reasons given by his Honour.

[38] **NORTH J:** I agree with the orders proposed by Muir JA and with the reasons given by his Honour.

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5 *McGrane v Queensland State Parole Board* [2014] QSC 17 at [37].

6 *McGrane v Queensland State Parole Board* [2014] QSC 17 at [34].