

SUPREME COURT OF QUEENSLAND

CITATION: *Attorney-General for the State of Queensland v Gray* [2014] QSC 241

PARTIES: **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND**
(applicant)
v
MAXWELL EDWARD GRAY
(respondent)

FILE NO: BS No 7877/10

DIVISION: Trial

PROCEEDING: Application

DELIVERED ON: 29 September 2014

DELIVERED AT: Brisbane

HEARING DATE: 29 September 2014

JUDGE: Peter Lyons J

ORDER: **The Court being satisfied to the requisite standard that the respondent, Maxwell Edward Gray, has contravened requirements of the supervision order made by Peter Lyons J on 2 December 2010 orders that:**

- 1. The respondent, Maxwell Edward Gray, be released from custody by 4.00pm on 29 September 2014 and continue to be subject to the supervision order made by Peter Lyons J on 2 December 2010.**

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 contravened a condition of the supervision order to which he was subject – where the respondent has a history of contravening the same condition – where psychiatrist reports supported the release of the respondent on the existing supervision order – whether the adequate protection of the community can be ensured if the respondent is released on the existing supervision order

Dangerous Prisoners (Sexual Offenders) Act 2003, s 22

COUNSEL: K Philipson for the applicant
J Lodziak for the respondent

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

- [1] On 2 December 2010, I made an order for the release of the respondent on a supervision order under Division 3 of the *Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld) (DPSOA)*. This matter comes before me by reason of a contravention of a condition of that order. The principal question is whether, by reference to the provisions of s 22 of the DPSOA, the order is to be rescinded.

Background

- [2] The respondent is now 52 years of age.
- [3] The offence for which the respondent was in custody prior to the supervision order was the rape of a 70 year old woman in 1996. It involved entry into her home at night, and resulted in a sentence of 14 years imprisonment.
- [4] The respondent had a difficult and unfortunate childhood¹. He may have been the subject of some sexual abuse. He was said to have been drawn into deviant sexual behaviours through members of a bikie gang. He was involved in a range of offending.
- [5] The respondent's criminal history includes an earlier offence of rape, committed in 1984, of a 17 year old female. That offence also involved entering a house at night². On another occasion the respondent committed an offence of breaking and entering, at a time when he may well have had sexual motivations³.
- [6] The respondent has a history of heavy past consumption of alcohol, and very significant drug abuse, principally marijuana or cannabis. In 2004, he developed a psychotic disorder. A diagnosis of possible schizophrenia was made; but the alternative diagnosis was that of a drug induced psychosis⁴. He continued to be treated for the psychotic disorder until 2009, but since then there has been no evidence of psychotic symptomatology.
- [7] During his term of imprisonment, the respondent underwent the Indigenous Sex Offender Treatment Program, with positive reports⁵.
- [8] Condition (xxiii) of the supervision order requires the respondent to "abstain from illicit drugs for the duration of this order", the order being in force until 16 January 2021. The respondent breached that condition in May 2011, on 10 May 2012, on 15 October 2013, and again on 30 October 2013, on each of which occasions he tested positive for the presence of cannabis in his system. He was returned to custody after each of the first two occasions, and after the last occasion. He has also breached other conditions of the order on some four other occasions.

¹ See the report of Dr Grant of 27 August 2014, p 4.

² Report of Dr Grant p 3.

³ Report of Dr Grant pp 3-4.

⁴ Report of Dr Grant p 4.

⁵ Report of Dr Grant p 4.

- [9] The respondent is married. His wife was working as a health worker when they met. She is reported as being opposed to drugs. The relationship is regarded as a positive factor, although Dr Grant has raised a question as to whether the respondent's wife is as supportive of the DPSOA processes, as he had previously been led to believe⁶.
- [10] The reports of both psychiatrists refer to some recent conflict associated with the respondent's supervision under the conditions of the order.

Dr Grant's report

- [11] Dr Grant provided a report for these proceedings dated 27 August 2014. He had previously reported on the respondent on 11 September 2010, 1 August 2012, and 27 December 2013. He did not see the respondent for the purpose of his current report. The use of formal risk assessment instruments indicated the respondent to be in a high risk group for sexual re-offending. Dr Grant considered that the risk had reduced to moderate-to-high, by virtue of the lapse of time, the education the respondent has undergone, the treatment programs which he has completed, and the supportive nature of his current marriage. Dr Grant considered that the supervision order had been effective in detecting breaches of the requirements of the order, reducing the risk of sexual re-offending from moderate-to-high, to low-to-moderate whilst the respondent remains on the order⁷. The principal concern expressed by Dr Grant related to the respondent's risk of future breaches by the use of marijuana, a risk which he said was "clearly high"⁸.
- [12] Dr Grant considered abstinence from cannabis to be a continuing and important aspect of risk management for the respondent. One reason was that the use of cannabis could cause a recurrence of a psychosis, in the course of which the respondent might become more behaviourally disturbed, increasing the possibility of the commission of a sexual offence⁹. This concern is heightened because of the continued use of marijuana by the respondent, despite the support and counselling that had been arranged for him, and despite his relationship with his wife¹⁰. However, Dr Grant recorded that there was no clear connection between the respondent's psychotic symptoms and his previous sexual offending, which did not appear to have had any psychotic motivation¹¹. Nevertheless, Dr Grant expressed concern that the respondent might become more behaviourally disturbed, increasing the possibility of the commission of a sexual offence.
- [13] Dr Grant recommended, if the respondent is to be released into the community, that he have ongoing treatment from his psychologist and psychiatrist; as well as assistance with any social and employment issues that arise¹².

⁶ Report of Dr Grant p 6.
⁷ Report of Dr Grant p 8.
⁸ Report of Dr Grant p 8.
⁹ Report of Dr Grant p 8.
¹⁰ Report of Dr Grant p 8.
¹¹ Report of Dr Grant p 5.
¹² Report of Dr Grant p 8.

Report and evidence of Dr Beech

- [14] Dr Beech provided earlier reports relating to the respondent, dated 8 November 2011, and 19 March 2014. He interviewed the respondent on 25 July 2014, and produced his current report, dated 3 September 2014.
- [15] Dr Beech, too, recorded that assessment by reference to formal instruments indicated that the respondent was in the group considered to be at high risk of violent sexual re-offending¹³. That assessment included reference to the respondent's return to substance abuse, and his difficulties with supervision. Dr Beech considered that the respondent's advancing years acted as a mitigating factor. He also noted that the respondent had been for the most part fairly compliant with, and for the most part not overtly hostile to, supervision. He also recorded that there was no evidence of sexual preoccupation, nor had the respondent resorted to sex as a coping mechanism when stressed.
- [16] Dr Beech's overall assessment was that the risk of further sexual violence in the community without supervision remained in the moderate range¹⁴.
- [17] Dr Beech considered that the respondent's talk was shallow, and his plan for release appeared superficial. He tended to minimise his personal responsibility for his breaches of the supervision order, projecting blame on others¹⁵.
- [18] Dr Beech expressed concern about the respondent's use of cannabis as: "a factor in his general recidivism, it was likely to effect general adjustment in the community, it provided a risk of psychosis relapse, and it had been a factor in his earlier sexual violence"¹⁶. He considered that there was a high risk that the respondent would continue to breach the order by using cannabis¹⁷.
- [19] Dr Beech noted possible neuro-cognitive dysfunction, there having been evidence of some executive dysfunction on testing. He recommended further testing, and a possible treatment program. He also recommended some attempt to resolve the respondent's expressed confusion about the roles of those involved in his management¹⁸.
- [20] In oral evidence, Dr Beech stated that the risk that the respondent would re-offend if released from custody subject to a supervision order was low. The risk that the respondent would re-offend was declining with the passage of time. Although the respondent may not have been identified as displaying symptoms of a psychotic condition since 2009, some of his disorderly behaviour in that time may have been related to such symptoms. The use of cannabis by the respondent did not itself mean that offending was imminent. Rather it was a pathway which, together with other factors, might lead to re-offending. The major concern would be a loss of the respondent's stable lifestyle.

¹³ Report of Dr Beech p 9.

¹⁴ Report of Dr Beech p 9.

¹⁵ Report of Dr Beech p 8.

¹⁶ Report of Dr Beech p 9.

¹⁷ Report of Dr Beech p 10.

¹⁸ Report of Dr Beech p 10.

Submissions

- [21] The applicant's submissions referred extensively to the reports of psychiatrists. The submissions acknowledged that the reports supported the release of the respondent on the existing supervision order; but in the alternative maintained the application for the respondent's continued detention. They pointed out that under s 22, the onus was on the respondent to satisfy the Court that adequate protection of the community could be ensured if the respondent were released, despite the contravention.
- [22] In oral submissions for the applicant it was pointed out that attempts are being made to arrange a Low Intensity Substance Intervention program in which the respondent could participate, if released from custody. In view of the apparent conflict between the respondent and the psychologist who has been treating him, arrangements have been made for another psychologist, Dr Madsen, to treat him, and in particular to carry out the tests of executive function recommended by Dr Beech. Future treatment is intended to be tailored more closely to the respondent's specific needs in light of the reports of the psychiatrists, and the results of testing. The meeting to clarify roles, recommended by Dr Beech, was under consideration at the time when the respondent was returned to custody, and is likely to take place if the respondent is released.
- [23] The respondent's submissions conceded the breach of the order on 29 May 2014, and that accordingly he had the onus to establish that adequate protection of the community could be ensured if he were released subject to the supervision order. In addition to reliance on the reports of the psychiatrists, the respondent's submissions emphasised that there was no indication of sexual preoccupation on the part of the respondent; and there was no suggestion of any imminent threat of serious sexual offending by him; nor of a contravention of the other 36 requirements of the existing supervision order. It was orally submitted that the respondent's past conduct makes it likely that he would participate in the Low Intensity Substance Intervention program, if offered the opportunity to do so.

Consideration

- [24] There is a substantial likelihood that, if released, the respondent will breach the order by using cannabis.
- [25] Although both the psychiatrists identify some link between the use of cannabis, and the respondent's previous sexual offending, that link does not appear to me to be particularly strong. The respondent has a history of very significant drug abuse. There have obviously been many occasions in his life when he had used cannabis, but not committed a serious sexual offence. The use of cannabis, of itself, cannot be regarded as an event relatively likely to trigger the commission of a sexual offence by the respondent. This conclusion is confirmed by Dr Beech's oral evidence.
- [26] The medical evidence shows that the use of cannabis might provide a risk of a relapse of the psychotic condition experienced by the respondent earlier. The significance of that risk, it seems to me, is to be assessed bearing in mind that the respondent has not been identified as displaying any psychotic symptoms since 2009, notwithstanding that he has on occasion used cannabis since that time. In light of Dr Beech's evidence, that fact might not be so significant; but nevertheless,

the evidence did not suggest that the respondent was in this period close to re-offending. The evidence does not indicate that a psychotic condition directly contributed to the respondent's past offending; rather, it is seen as possibly leading to disorganisation and disinhibition, in turn contributing to the possible commission of a sexual offence.

- [27] In any event, as Dr Grant notes, supervision seems to have been effective in identifying the use of cannabis by the respondent. There is no suggestion that on the occasions when this has been detected, there was evidence of the imminent onset of a psychotic condition; or of any conduct which might have progressed to the commission of a sexual offence.
- [28] These observations are not intended to diminish the importance of compliance with condition (xxiii). They are made for the purposes of considering whether adequate protection of the community can be ensured under the supervision order, despite the respondent's use of cannabis. It remains important for the respondent to comply with the condition, for the reasons stated in the reports to which I have referred.
- [29] On Dr Beech's evidence, the risk that the respondent would re-offend is more likely to be associated with a breakdown in his stable lifestyle. Factors which lead to optimism about his maintaining such a lifestyle on release include his relationship with his wife, the fact that he has suitable accommodation, ongoing supervision, and his proposed treatment. It should be relatively easy to detect a breakdown in this lifestyle; and one would think, easier to detect this than some use of cannabis. In this context, the risk that the respondent would re-offend does not seem to me to be a matter of great present concern.
- [30] In my view, the concession on behalf of the applicant that the reports of the psychiatrists support the release of the respondent under the current order is correctly made. On the evidence, I am satisfied that adequate protection of the community can be ensured if the respondent is released under that order, despite his previous contravention of it, and the likelihood of future contraventions.

Conclusion

- [31] I proposed to order the respondent be released from custody, subject to the provisions of the order of 2 December 2010, without amendment.