SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney General for State of Queensland v Solomon* [2015] QSC 199
PARTIES:	**ATTORNEY GENERAL FOR STATE OF QUEENSLAND** (Applicant) **v** **DARRELL JOHN SOLOMON** (Respondent)
FILE NO/S:	No 5943 of 2015
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	16 July 2015
DELIVERED AT:	Brisbane
HEARING DATE:	25 June 2015
JUDGE:	Boddice J
ORDER:	**1. I make orders in terms of the draft, which I initial and place with the papers.**
CATCHWORDS:	CRIMINAL LAW – PARTICULAR ISSUES – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – RAPE AND SEXUAL ASSAULT – where the respondent was convicted of two counts of rape, committed on a 39 year old female complainant; five counts of rape, and one count of attempted rape, committed on a female complainant who was 11 to 12 years of age; one count of recording an indecent visual image of a child under 16; one count of wilfully exposing a child under 16 to an indecent video tape; one count of making child exploitation material; one count of wilfully exposing a child under 16 to an indecent film; one count of attempting to procure a child under 16 to commit an indecent act; and one count of exposing a child under 16 to an indecent act – where, by originating application, the Attorney-General for the State of Queensland sought orders for the hearing of an application for a *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) Division 3 order in relation to the respondent *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld)
COUNSEL:	B H Mumford for the Applicant

J J Allen QC for the Respondent

SOLICITORS: Crown Law for the Applicant
Legal Aid Queensland for the Respondent

[1] **BODDICE J:** By originating application, filed 17 June 2015, the Attorney-General for the State of Queensland sought orders, pursuant to the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) ("the Act"), for the hearing of an application for a Division 3 order. The respondent opposes the making of any orders. At issue is whether the material is sufficient to establish there are reasonable grounds for believing the respondent is a serious danger to the community, in the absence of such an order.

Background

[2] On 23 March 2007, the respondent was sentenced to an effective head sentence of 9 years imprisonment after pleading guilty to two counts of rape, committed on a 39 year old female complainant; five counts of rape, and one count of attempted rape, committed on a female complainant who was 11 to 12 years of age; one count of recording an indecent visual image of a child under 16; one count of wilfully exposing a child under 16 to an indecent video tape; one count of making child exploitation material; one count of wilfully exposing a child under 16 to an indecent film; one count of attempting to procure a child under 16 to commit an indecent act; and one count of exposing a child under 16 to an indecent act.

[3] The respondent was born on 4 August 1943. He is 71 years of age. The offences were committed between 31 August 2004 and 2 October 2005, at which the time the respondent was 61 to 62 years of age. Whilst the respondent had previous convictions, he had no prior convictions for like offences. The respondent's parole eligibility date was set at 3 August 2009. The appellant's full-time release date is 5 August 2015.

Offences

[4] The offending in relation to the 39 year female complainant concerned an incident involving a family friend. She recalled waking in the respondent's bed after a night of drinking with him. A subsequent search of the respondent's computer revealed six images of the complainant in various stages of undress. One photograph depicted the respondent digitally penetrating the complainant. A second photograph depicted the respondent using a can or cylinder to penetrate the complainant. The Crown case was that the complainant was either unconscious or incapacitated to such a degree that the respondent took advantage of that state and committed the acts without her consent.

[5] The offending in relation to the child complainant also involved digital images located on the respondent's computer. The offences of rape involved digital penetration. On two occasions, the respondent recorded the act on his web camera. The respondent also showed the child complainant pornographic material and gave her alcohol. While the complainant was unconscious, the respondent recorded images of her in various stages of undress and in various poses.

[6] The count of attempted rape involved an attempt at penile intercourse with the child complainant. On the following day, the respondent showed the child complainant pornographic material and asked the child to hold his penis. The final counts related to an occasion when the child complainant was taken to a waterhole. Whilst there the respondent digitally penetrated her and showed her his erect penis.

[7] At sentence, the Crown contended the respondent had taken advantage of his friendship with the adult complainant and violated her in a degrading manner, which he recorded for his own sexual gratification. The Crown contended, in respect of the child complainant, the respondent had corrupted the child, sexualised her and taken advantage of the relationship between two families. He had also degraded the child by recording images of his offending behaviour.

Psychiatric evidence

[8] The respondent was interviewed by Professor Barry Nurcombe on 26 February 2015. During that interview, the respondent disputed all of the convictions. He asserted he was innocent. He claimed the charges had been motivated by revenge, in the case of the child complainant, and to save embarrassment, in the case of the adult complaint. Professor Nurcombe noted the respondent's denial of his guilt and unwillingness to discuss the matter rendered it difficult to precisely assess the circumstances of the respondent's offending behaviour.

[9] After considering all of the available material, Professor Nurcombe opined that whilst it was possible the respondent harboured a paraphilia involving scopophilia (an obsession with and collection of moving and still sexual images of sexual scenes) and an interest in underage females, there was insufficient information to make a diagnosis in respect of such conditions. Further, whilst the respondent exhibited oppositional and defiant features in his personality, they were insufficient to support a diagnosis of a personality disorder.

[10] After using a number of risk assessment tools to assess the respondent's risk of sexual re-offending, Professor Nurcombe opined the respondent's risk of future sexual offending was low. Any re-offending was most likely to occur against adult females, in an attempt to relieve tension and cope with stress. There was little chance the offending would escalate to a serious or life-threatening level. However, it could cause serious psychological harm to the victim. The risk of re-offending was not imminent and was most likely to occur if the respondent was rejected or felt rejected in an intimate relationship. Correctional supervision and supportive psychotherapy would be the best means of preventing and monitoring the risk of sexual offending.

[11] Professor Nurcombe concluded:

> "This is an unusual case. A man with virtually no previous anti-social history, a successful army career, and a consistent occupational career has apparently become involved in serious sexual offending at the age of 62 years. Because of Mr Solomon's dense denial concerning what happened, his unwillingness to explore the matter, the precise nature of what occurred is not clear. The likelihood is, however, that he took moving and still sexual photographs of a

number of women, one of them a female minor, when some were unconscious. There is a possibility, unproven, that some women were rendered unconscious by the use of a hypnotic drug, in combination with alcohol.

Actuarial assessment suggests that the risk of sexual re-offending is low or at the most low to moderate. I question whether it reaches a level sufficiently high to justify the application of the DPSOA 2003."

Legislative scheme

[12] The Act provides a regime for the continued detention or supervision of prisoners who represent a serious danger to the community in the absence of continued detention or supervision. Where a supervision order is appropriate, the Act provides strict conditions for the control, care and treatment of those prisoners. The central issue for consideration by the Court is what conditions are necessary to ensure the adequate protection of the public whilst those prisoners are living in the community.

[13] Section 8 of the Act provides:

"(1) If the court is satisfied there are reasonable grounds for believing the prisoner is a serious danger to the community in the absence of a division 3 order, the court must set a date for the hearing of the application for a division 3 order.

(2) If the court is satisfied as required under subsection (1), it may make –

(a) an order that the prisoner undergo examinations by 2 psychiatrists named by the court who are to prepare independent reports; and

(b) if the court is satisfied the application may not be finally decided until after the prisoner's release day –

(i) an order that the prisoner's release from custody be supervised; or

(ii) an order that the prisoner be detained in custody for the period stated in the order.

Note –

If the court makes an order under subsection (2)(b)(i), the order must contain the requirements for the prisoner stated in section 16(1)."

[14] In undertaking an assessment of whether there are reasonable grounds for believing a prisoner is a serious danger to the community, for the purposes of the preliminary hearing under s 8, it is relevant to have regard to the matters set out in s 13(4) of the Act. Those matters are:

(a) reports prepared by psychiatrists under s 11 and the extent of prisoner co-operation during the examination;

(b) other medical, psychiatric, psychological assessments relating to the prisoner;

(c) information indicating whether or not there is a propensity on the part of the prisoner to commit serious sexual offences in the future;

(d) the pattern of offending behaviour on the part of the prisoner;

(e) efforts by the prisoner to address the cause or causes of the offending behaviour and his participation in rehabilitation programs;

(f) whether or not the prisoner's participation in rehabilitation programs has had a positive effect on him or her;

(g) the prisoner's antecedents and criminal history;

(h) the risk of the prisoner committing another serious sexual offence if released into the community;

(i) the need to protect members of the community from that risk; and

(j) any other matter.

[15] Whilst those matters, with any necessary changes, are relevant for the preliminary determination, the determination on the preliminary hearing only requires the Court to consider whether it is satisfied there are reasonable grounds for believing the prisoner is a serious danger to the community. The Court does not have to be satisfied the prisoner is a serious danger.

[16] In considering the relevant test at a hearing of the preliminary question, P Lyons J in *Attorney-General for the State of Queensland v SBD*[1] observed:

> "[48] It therefore seems to me to be correct to say that matters for consideration on an application for orders under s 8 include whether there are reasonable grounds for believing that there is an unacceptable risk that the person in question will commit a serious sexual offence if released from custody, or if released from custody without a supervision order being made. The range of considerations set out in s 13(4), save for that in paragraph (a), are accordingly relevant. Those conclusions are, I understand, consistent with the contentions made by Counsel for both parties.
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> [49] A question arises whether, when considering the issues raised by s 8, I should bear in mind the provisions of s 13(3):
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> > '(3) On hearing the application, the court may decide that it is satisfied as required under subsection (1) only if it is satisfied-

[1] [2010] QSC 104 at [48], [49], [51].

> (a) by acceptable, cogent evidence; and
>
> (b) to a high degree of probability;
>
> that the evidence is of sufficient weight to justify the decision.'
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> …
>
> [51] It seems to me to be possible that s 13(3) has some indirect relevance to an application for orders under s 8. That is to say in dealing with such an application, the court does not need to be satisfied that a person is a serious danger to the community in accordance with the standard set out in s 13(3). But in determining whether there are reasonable grounds for believing that a person is a serious danger to the community in the absence of a Division 3 order, it seems to me that one can bear in mind the standard in s 13(3) will apply in the final determination of the question whether a person is a serious danger to the community in the absence of such an order."

Applicant's submissions

[17] The applicant submits there are reasonable grounds for believing the respondent is a serious danger to the community, in the absence of a Division 3 order. The respondent has been convicted of sexual offences on two separate complainants. The offences occurred over a 14 month period. The offending involved the digital rape of a child complainant as well as an attempted rape of that child involving penile penetration. The respondent recorded some of the acts. Further offending included making child exploitation material and exposing a child to indecent material, attempting to procure that child to commit an indecent act and exposing that child to an indecent act.

[18] The offending in respect of the second complainant involved the digital penetration of an unconscious or incapacitated adult woman, including the insertion of an object into her vagina. Again, the respondent recorded this behaviour.

[19] The applicant submits that while the actuarial assessments of the respondent place his future risk of sexual offending in the low to moderate range, Professor Nurcombe expressly recognised the possibility the respondent harbours a paraphilia and an interest in underage females. Further, the respondent's denials, in the face of pleas of guilty and a refusal to discuss matters, rendered a proper assessment difficult.

Respondent's submissions

[20] The respondent submits the evidence is insufficient to satisfy the Court there are reasonable grounds to believe the respondent represents a serious danger to the community, in the absence of a Division 3 order. Serious danger to the community is defined in s 13 of the Act. A prisoner represents a serious danger only if there is an unacceptable risk the prisoner will commit a serious sexual offence if released from custody or released from custody without a supervision order being made.

[21] The respondent further submits the making of a finding at the preliminary hearing has substantial consequences. It places the prisoner's further liberty at risk. That being so, a high probability is required before a Court could be reasonably satisfied within the requirements of s 8 of the Act. The risk assessment undertaken by Professor Nurcombe concluded the respondent's risk of future sexual offending is low. That being so, there is insufficient evidence to satisfy the test in s 8 of the Act.

Discussion

[22] The respondent was convicted of serious sexual offending against an adult complainant and a female child complainant when he was of advanced years. The offending included engaging in degrading acts which were recorded by the respondent. In the case of the child complainant, the offending occurred over an extended period of time and included digital penetration and an attempt at penile penetration. The sexual offending in respect of both complainants involved a violation of trust.

[23] Although the respondent does not have prior convictions for sexual offending, the nature of the index offences, which occurred over an extended period of time and involved engaging in degrading acts which were filmed, gives cause for serious concern as to the risk the respondent presents in relation to future sexual offending if released into the community.

[24] Whilst Professor Nurcombe, using actuarial assessments, concluded the respondent's risk of future sexual offending was low, Professor Nurcombe expressly noted the respondent's denial of any sexual offending and refusal to discuss that offending made it difficult for an accurate assessment to be undertaken at the time of the interview. That denial of any sexual offending, in the face of pleas of guilty to each of the sexual offences, is significant. It is relevant to the respondent's attempts to address the cause or causes of his offending behaviour. It also relevant to the extent of the prisoner's co-operation during the examination prepared by a psychiatrist.

[25] Without a proper assessment of the respondent, it is relevant for this Court to have regard to the nature of the respondent's past sexual offending, including the degrading aspects of it and the breaches of trust committed as a consequence of it. When those factors are considered, I am satisfied there is a significant risk the respondent will sexually re-offend in the future. Professor Nurcombe accepted any future sexual offending was likely to result in serious psychological harm to a victim.

[26] Having considered all of the information relevant to an assessment of the respondent, including his assessed propensity to commit serious sexual offences in the future; his offending behaviour, and his efforts to address the cause or causes of the offending behaviour; his antecedents and criminal history; his likely risk of committing another serious sexual offence if released into the community; and the need to protect members of the community from that risk, I am satisfied there are reasonable grounds for believing the respondent is a serious danger to the community, in the absence of a Division 3 order.

[27] In reaching this conclusion, I have had regard to the need for acceptable, cogent evidence and a high degree of probability. The evidence placed before me, including details of the

respondent's past sexual offending and his responses to Professor Nurcombe in the course of the examination, are sufficient to satisfy me to the requisite standard.

Conclusion

[28] The applicant has established there are reasonable grounds for believing the respondent is a serious danger to the community in the absence of a Division 3 order. I am satisfied it is appropriate to make orders for the hearing of an application for a Division 3 order, and for the respondent to undergo examination by two independent psychiatrists.

[29] I make orders in terms of the draft, which I initial and place with the papers.