SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v Black* [2015] QSC 302
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (Applicant) **v** **STEPHEN ANTHONY BLACK** (Respondent)
FILE NO/S:	Brisbane No 10014 of 2015
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	30 October 2015
DELIVERED AT:	Brisbane
HEARING DATE:	21 October 2015
JUDGE:	Boddice J
ORDER:	**1. The application for a Division 3 Order be set for final hearing on 8 February 2016.** **2. Pursuant to s 8(2)(a) of the Act, the respondent undergo examinations by two psychiatrists named by this Honourable Court, being Dr Michael Beech and Dr Donald Grant, who are to prepare independent reports, which are to be prepared in accordance with s 11 of the Act.** **3. Pursuant to s 8(2)(b)(ii) of the Act, the respondent be detained in custody until such time as the application for a Division 3 Order pursuant to the Act is finally determined.** **4. Being satisfied that it is in the interests of justice, pursuant to s 39PB(3) of *Evidence Act* 1977 (Qld), the Court directs that Professor Barry Nurcombe, Dr Michael Beech and Dr Donald Grant give oral evidence to the Court other than by audio-visual link or audio link.** **5. Liberty to apply.**
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 applicant applied for orders, pursuant to section 8 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) for the assessment of the respondent by two psychiatrists, on the grounds that there are reasonable grounds for believing the respondent, being a person who is serving a period of imprisonment for a serious sexual offence, is a "serious danger to the community" in the absence of orders made under the Act for his ongoing detention or supervision – where the respondent had been convicted of multiple offences relating to the receipt and transmission of child pornographic images – whether the respondent was a prisoner within the meaning of the Act, as he was serving a period of imprisonment for a serious sexual offence, namely, an offence of a sexual nature against children

Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s 8
Attorney-General for the State of Queensland v Dodge [2012] QSC 277, applied
Dodge v Attorney-General for the State of Queensland [2012] QCA 280, applied

COUNSEL:	M Maloney for the applicant B H P Mumford for the respondent
SOLICITORS:	Crown Solicitor for the applicant Legal Aid Queensland for the respondent

[1] The Attorney-General for the State of Queensland seeks orders, pursuant to section 8 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) ("the Act"), for the assessment of the respondent by two psychiatrists, on the grounds that there are reasonable grounds for believing the respondent, being a person who is serving a period of imprisonment for a serious sexual offence, is a "serious danger to the community" in the absence of orders made under the Act for his ongoing detention or supervision.

[2] At issue is whether the respondent is a person serving a period of imprisonment for "a serious sexual offence" and, if so, whether there are reasonable grounds for believing he is a "serious danger to the community", in the absence of such orders.

Background

[3] The respondent was born on 28 August 1974. He has been convicted of internet crimes on multiple occasions in Queensland, Victoria and South Australia.

[4] The respondent's previous offences of a sexual nature extend as far back as 1999. All relate to child pornography. The material involved included hard-core child pornographic

images. On each occasion there were many, many such images. The respondent's criminal history includes both sexual and non-sexual offending.

[5] The respondent has previously been sentenced to community based orders which he has breached on numerous occasions. He has breaches of probation, a breach of an intensive correction order, breaches of suspended sentences and breaches of bail. He has also been ordered to serve periods of imprisonment in the past.

[6] The respondent is currently serving periods of imprisonment as a consequence of having pleaded guilty, on 1 March 2013, to two counts of using a carriage service for child pornography material, one count of using a carriage service for child pornography material with a circumstances of aggravation (being that the conduct occurred on three or more occasions and involved two or more people) and one count of using a carriage service to cause child pornography to be transmitted to himself. Each of those counts were Commonwealth offences. The respondent also pleaded guilty to one State offence, namely, knowingly possessing child exploitation material. The respondent was sentenced to an effective head sentence of five years imprisonment. After allowing for a significant period of pre-sentence custody, his full term release date is presently 16 February 2016.

Index offences

[7] The offences were detected following a controlled covert operation targeting persons committing internet crimes against children. The first count, of using a carriage service to access child pornography, pertained to images which had been accessed on 19 separate occasions. The quantity of material accessed was approximately 933 images and 226 movie files. They covered all categories of child pornography.

[8] The second count, of using a carriage service to make available child pornography, related to various occasions on which child pornography was made available in a shared folder. The respondent was connected on five separate occasions. Twenty-four items were made available, comprising 23 movies or video files and one image file. The images covered various categories of child pornography.

[9] The count of using a carriage service to make available child pornography material with circumstances of aggravation pertained to the sharing of the contents of three folders, two of which contained child pornography material. Again, multiple items of child pornography were made available.

[10] The count of using a carriage service to cause child pornography to be transmitted to himself related to an occasion in which the respondent, using a profile depicting himself as a 14 year old boy, made email contact with a 12 year old female child. During this email contact, the respondent requested that 12 year old female child send him pornographic images of herself. The female child sent him four images, one depicting her breasts, one of her full naked body and two close up images of her vagina.

[11] The count of knowingly possessing child exploitation material related to some 972 files containing child exploitation material. They comprised 796 images and 176 videos.

Legislative scheme

[12] The Act establishes a scheme for the continued detention or supervision of persons convicted of a serious sexual offence if there is cogent and compelling evidence establishing that they represent a serious danger to the community in the absence of orders requiring that continued detention, or release subject to a supervision order.

[13] As part of that scheme, section 8 of the Act permits an application to be made seeking orders requiring that such a prisoner undergo psychiatric examination for the purposes of a risk assessment. Such an order can only be made if the person against whom it is sought is a "prisoner". A "prisoner" is defined as someone who is serving a period of imprisonment for a serious sexual offence. Relevantly, a "serious sexual offence" is defined as an offence of a sexual nature, either involving violence or against children.

[14] If that aspect be established, an order can only be made if a further requirement is met, namely, that the Court is satisfied there are reasonable grounds for believing the prisoner is a "serious danger to the community" in the absence of orders being made under the Act. Cogent, compelling evidence is required to establish such reasonable grounds. The Court may take a variety of matters into account in determining whether it is satisfied that there are such reasonable grounds.[1]

Psychiatric evidence

[15] Professor Nurcombe interviewed the respondent on 18 June 2015. Professor Nurcombe noted that the respondent's prior criminal history contained a substantial number of offences involving child pornography, and that the images and videos found on his computer were predominantly of female children ranging in age from infancy to about 12 years. He also noted the respondent was making his files available to others and that a high proportion of his shared files depicted penetrative sex and/or sadistic sex.

[16] Professor Nurcombe set out the circumstances of the alleged offences. The offence involving the receipt of child pornographic images from a 12 year old girl arose in circumstances where the girl believed she was conversing with a 14 year old boy who had asked her to send him photographs of her vagina, breasts, buttocks and body. The child described the respondent, who had made this request on two occasions, as "demanding" and said she took the photographs as requested and sent them to him because she thought it was the only way to get rid of him. Professor Nurcombe noted the respondent admitted he had used his computer to chat online to children, and that in doing so he had portrayed himself as a 13 year old male and that he would get children to email him images of their breasts and genitalia.

[17] Professor Nurcombe undertook a risk analysis using a number of tools. These tools revealed the respondent was in a group of offenders whose risk of violent sexual re-offending was moderate to high. Professor Nurcombe noted that the respondent's previous sexual violence could be regarded as chronic, but there had been no escalation of sexual violence, and no physical coercion (although psychological coercion had been

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[1] See Act 13(4).

used to have the 12 year old female send pornographic images of herself to the respondent). Professor Nurcombe further noted that the respondent initially minimised and/or dismissed the seriousness of sexual exploitation of children, and displayed attitudes consistent with support or condoning sexual exploitation imagery.

[18] Professor Nurcombe opined that the respondent had clear sexual deviance: paedophilia, hebophilia and scoptophilia. Whilst the respondent did not have psychopathic personality disorder, he had a high level of psychopathic traits. If he were to re-offend, the most likely outcome would be a return to accessing and distributing moving and still images of females aged between 11 and 13 years.

[19] In Professor Nurcombe's opinion, it is less likely the respondent would once again make internet contact with a female adolescent with the purpose of inducing her to forward erotic photographs to him. However, Professor Nurcombe could not discount this possibility. If such contact did occur, the adverse psychological effect of such direct contact would be considerable, and such contact would be directly dangerous to the victim.

[20] Professor Nurcombe concluded:

> "… Although the risk of residivism is moderate to high or high, and could be reduced to below moderate by a supervision order, I question whether the outcome to the community would be sufficiently dangerous to warrant the imposition of a DPSOA order. If such an order is imposed, the risk of re-offending would be reduced to low to moderate by a correctional supervision and individual psychotherapy. In the absence of supervision order, the risk of residivism will remain moderate to high or high."

Applicant's submissions

[21] The Attorney-General submits the two requirements for orders pursuant to s 8 of the Act are established in the present case. First, the respondent is a prisoner within the meaning of the Act. He is serving a period of imprisonment for a serious sexual offence, namely, an offence of a sexual nature against children.

[22] The Attorney-General further submits there is cogent, compelling evidence that there are reasonable grounds for believing the respondent is a "serious danger to the community" in the absence of orders being made under the Act for his ongoing detention or supervision. Professor Nurcombe opined the respondent could be classified with the group of offenders whose risk of sexual re-offending is moderate to high or high. That risk includes the probability of email contact with underage girls seeking pornographic images of that child.

Respondent's submissions

[23] The respondent submits the requirements of s 8 of the Act are not met in the present case. First, the respondent is not a "prisoner" within the meaning of the Act. None of the offences for which he is serving a period of imprisonment involved an offence of a sexual

nature against a child. Offences of possessing, accessing or making child pornography available to others are not offences of a sexual nature against a child.

[24] The respondent further submits the offence of causing child pornography material to be transmitted to himself was not an offence of a sexual nature against a child. The behaviour in question was an offence "in relation to a child", but that is insufficient to satisfy the requirements of s 8 of the Act.

[25] Alternatively, the respondent submits there are not reasonable grounds for believing he is a serious danger to the community in the absence of an order under the Act. Professor Nurcombe opines that whilst the respondent is a moderate to high risk or high risk of re-offending, that is in relation to accessing or distributing movie and still images of females aged between 11 and 13 years. Professor Nurcombe did not think the respondent was likely to make personal contact with such a victim. In the circumstances, there are no reasonable grounds for believing that the respondent, in the absence of an order under the Act, is likely to commit another offence of a sexual nature involving violence or against a child.

Discussion

A prisoner

[26] In *Attorney-General for the State of Queensland v SBD*,[2] in relation to an offence of obtaining and disseminating child pornography images for sexual gratification, Peter Lyons J observed:

> "[71] … the question whether an offence involving child pornography is an offence of a sexual nature 'against children' would depend upon the facts said to constitute the offence. Where, for example, a person charged with the offence of the indecent treatment of a child under the age of 16, had procured the child to engage in sexual activity which was then photographed, it may well be the case the offence is an offence against that child, and that it comes within the definition of a serious sexual offence.
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> [72] On the other hand, … where a person obtains pornographic material involving children, in the production of which that person has played no role, and that person uses the material to obtain sexual gratification from that person's dealings with another adult, it does not seem to me that that involves the commission of a serious sexual offence, as defined in the DPSOA. The connection between the offending conduct and any particular child seems to me to be too remote to come within the statutory provision."

[27] In *Attorney-General for the State of Queensland v Dodge*,[3] Ann Lyons J discussed the requirement that a "serious sexual offence" be a sexual offence "against" a child:

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2 [2010] QSC 104.
3 [2012] QSC 277.

"[25] … the word 'against' requires a stronger connection between an offender and a child than the words 'in relation to' implies. In this regard I note that the various definitions of 'against' in the Oxford Dictionary almost invariable require a temporal connection, as follows:

(a) Directly opposite; facing, in front of, in full view of.

(b) In the sight of, in presence of; with.

(c) Towards, with respect to, in regard to.

(d) More generally: Towards the front of, near, adjoining.

(e) In a direction facing; towards, forward to, to meet.

(f) Of motion into contact; pressure upon.

(g) Of motion or action in opposition to.

(h) In the opposite direction to the course of anything, counter to.

(i) Implying adverse motion or effect.

[26] Having considered those definitions, I consider that a person on a computer directly communicating with a child in a sexual way is actually 'directly opposite' or 'in the presence of the child' in such a way that they must be considered to be committing offences which are offences against that child. They are not simply sexual offences generally but rather there is an offence *against* that particular child at the end of the computer in the full sense of the word. In my view, the actual child has been affected or corrupted by the adult's action and has been exposed to an indecent matter. The actions of the adult perpetrator are having an impact on the child victim. They have in the very least been sexualised or corrupted in some way by the adult.

[27] Accordingly, I consider that if the Respondent asked the sexually explicit questions of a real child instead of a covert police officer then there would no doubt that he had committed a sexual offence against that child. The Respondent would have exposed a child under 16 to an indecent matter. That is quite different to simply possessing a whole range of images of children he has never met and never had any contact with. Those who possess or disseminate items of child pornography may never make an actual approach to a child. They may simply obtain gratification from looking at images of children."

Whilst that decision was ultimately overturned on appeal,[4] the appeal succeeded on a factual finding that the offender in that case had not been charged with committing an offence against a child or children.

[28] Whether a sexual offence has been committed against a child or children is a question of fact.[5] It may be accepted that the counts of using a carriage service for child pornographic material including the count with a circumstance of aggravation, and the count of

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4 *Attorney-General for the State of Queensland v Dodge* [2012] QCA 280.

5 *Dodge v Attorney-General for the State of Queensland* [2012] QCA 280 at [18].

knowingly possessing child exploitation material, whilst offences involving or in relation to children, were not offences against a child. There was nothing in the particulars relied upon in support of each of those counts which established that the respondent had actual contact with the child or engaged with that child sufficient to support a conclusion that that offence was committed against a child or children.

[29] The offence of using a carriage service to cause child pornography to be transmitted to himself is, however, in a totally different category. The particulars of that count were that the respondent had used the internet to exchange emails with a female child of 12 residing in Western Australia. He did so using a profile depicting himself as a 14 year old boy. In the course of those emails, the respondent coerced the 12 year old girl to send him four child pornography images of herself. That offence involved an actual child. It involved having the child forward pornographic images of herself to the respondent after direct communication by the respondent with that child. Such an offence, factually, is an offence against that child. The child was affected or corrupted by the respondent's actions. The respondent is properly to be described as being "directly opposite" that child having regard to their direct communication via email.

[30] I am satisfied the respondent is a "prisoner" within the meaning of the Act. He is serving a period of imprisonment for a serious sexual offence, namely, a sexual offence against a child.

A serious danger to the community

[31] Professor Nurcombe's report sets out various aspects of his interview with the respondent. It is apparent the respondent views his offending behaviour as a matter of pride. Further, he has a clear ongoing interest in underage females. Formal risk assessments supported a conclusion that the respondent is properly to be classified as having a moderate to high or high risk of sexual re-offending in the future. Whilst the respondent has participated in sexual offender treatment programs, Professor Nurcombe considered they had not been more than marginally effective, if at all.

[32] Importantly, whilst Professor Nurcombe considered the most likely form of re-offending by the respondent would be a return to accessing and distributing moving and still images of females aged between 11 and 13 years, he could not discount the possibility the respondent would make contact with a female adolescent via internet communication for the purpose of inducing her to forward to him erotic photographs. As Professor Nurcombe observed, such conduct would be directly dangerous to the victim.

[33] A consideration of the respondent's past offending reveals that sentences of imprisonment have not deterred him. Of particular concern is that his most recent offending involved actual contact with a 12 year old female, which resulted in the exchange of pornographic images of her genitalia. It is apparent from a consideration of Professor Nurcombe's report that engaging in sexual offender treatment programs have not changed the respondent's views as to the acceptability of such behaviour.

[34] Having considered Professor Nurcombe's report, I am satisfied there are reasonable grounds for believing that the respondent is a serious danger to the community in the

absence of orders under the Act. He represents a moderate to high or high risk of further sexual offending in the future. That risk includes actual contact with underage females for the purposes of exchanging pornographic images.

[35] In reaching this conclusion, I have had regard not only to the results of Professor Nurcombe's risk assessments and his opinion as to likely future risks. I have had regard to the clear indication that the respondent, despite having undertaken programs to address such behaviour, is resistant to ceasing engaging in such conduct in the future.

[36] I have also had regard to the risk that the respondent will commit another serious sexual offence if released into the community. Whilst Professor Nurcombe opines that the most likely risk is one which does not relate to having any direct contact with young females, he cannot discount the risk it will include direct contact with young females. If that occurred, it will have direct adverse consequences to such a female child. I have had regard to the need to protect members of the community from that risk.

Conclusions

[37] I am satisfied the respondent is a "prisoner" within the meaning of the Act. I am further satisfied there are reasonable grounds for believing that the respondent represents a serious danger to the community, in the absence of an order under the Act.

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