

# SUPREME COURT OF QUEENSLAND

CITATION: *Attorney-General for the State of Queensland v Waghorn*  
[2016] QSC 118

PARTIES: **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND**  
(applicant)  
v  
**SHANE CHARLES WAGHORN**  
(respondent)

FILE NO/S: BS No 1358 of 2006

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 30 May 2016

DELIVERED AT: Brisbane

HEARING DATE: 30 May 2016

JUDGE: Peter Lyons J

ORDER: 1. That the supervision order made on 22 December 2011 be rescinded.

2. That the respondent be detained in custody for an indefinite term for control, care or treatment.

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 seeks a Division 3 order under the Dangerous Prisoner (Sexual Offenders) Act 2003 (QLD) – where the court may order a continuing detention order or a supervision order pursuant to s 13(5) – whether a supervision order would ensure the adequate protection of the community pursuant to s 13(6) of the Dangerous Prisoner (Sexual Offenders) Act 2003 (QLD).

COUNSEL: J Rolls for the Applicant  
K Prskalo for the Respondent

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

- [1] The applicant has applied for a detention order against the respondent under s 22 of the *Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld) (DPSOA)*, on the basis that the respondent has breached conditions of a supervision order made under the Act. The effect of s 22(2) of the DPSOA is that, in those circumstances, the supervision order must be rescinded, and a continuing detention order must be made, unless the respondent satisfies the Court, on the balance of probabilities, that the adequate protection of the community can, despite the contravention, be ensured by a supervision order.

### **Previous offending**

- [2] Apart from the contraventions of the supervision order, the respondent has not committed an offence since 1992. Nevertheless, his earlier offending is of some relevance. Since it is more fully set out in other decisions<sup>1</sup>, it will be sufficient to only to make some brief reference to it.
- [3] The earliest recorded offence occurred in 1976, when the respondent was about 16 years of age. It was an offence of indecent assault on a female. He subsequently committed a number of offences of indecently exposing himself to young girls, and on one occasion to a young woman. In 1981 he was sentenced to 12 months imprisonment for sexual intercourse with a 14 year old girl (when he himself was about 20). The 12 month prison sentence was wholly suspended. The next year he sexually molested a seven year old girl.
- [4] In 1984, the respondent abducted an eight year old girl, putting her in the boot of his car and driving off as she screamed. He subsequently sexually assaulted her. He later told police that he had the intention of taking the girl somewhere and raping her and then killing her. He was sentenced to eight years' imprisonment as a consequence of this offending.
- [5] On 4 June 1992 the respondent was convicted on four counts relating to his treatment of a young girl earlier that year. The counts were unlawful deprivation of personal liberty, unlawful and indecent assault with circumstances of aggravation (two counts), and attempted rape. The complainant was 10 years of age at the time. She too had been seized and forced into the back of the respondents' car. She was taken to a lonely area in the bush where the respondent tied her hands behind her back, and committed sexual offences. The arrival of police saved the child from further harm. The respondent was sentenced to terms of imprisonment, the longest being 14 years. The sentences were the result of a successful appeal, the Court of Appeal expressing concern about the respondent's release on parole, prior to the conclusion of the terms of imprisonment.

### **Proceedings under DPSOA**

- [6] On 14 July 2006, Philip McMurdo J made a continuing detention order under the DPSOA. On 22 December 2011, Martin J made a supervision order, resulting in the respondent's release from custody on 9 January 2012. On 14 December 2012, the respondent was arrested for contravening the supervision order by attending shopping centres during the hours prohibited by the order.

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<sup>1</sup> *R v Waghorn* [1993] QCA 196; *Attorney-General for the State of Queensland v Waghorn* [2006] QSC 171 at [5].

[7] On 26 August 2013, the respondent was again released on his supervision order subject to 48 requirements. Those requirements include the following

- “14. not commit an indictable offence during the period of the order;
- 39. not collect or retain any material that contains images of children, and the respondent must dispose of such material if directed to do so by an authorised Corrective Services officer;
- 43. not access pornographic images that display photographs or images of children on a computer or in the internet or in any other format;
- 47. not access pornographic images on a computer or on the internet or purchase or obtain pornographic material in any other format without the prior written approval of an authorised Corrective Services officer in consultation with the treating psychiatrist or psychologist.”

[8] A factor apparently significant in the decision that led to the respondent’s release was that he had been receiving counselling from a psychologist, Dr Gavin Palk.

### **Contravention**

- [9] The respondent was released subject to the supervision order on 26 August 2013. A few days later, with the approval of Queensland Corrective Services (*QCS*) the respondent purchased a mobile phone. The mobile phone was inspected by a QCS officer on 3 September 2013, and by the respondent’s case manager on 5 September 2013.
- [10] On 23 September 2013, the respondent attended a session with his assigned senior case manager. When the mobile phone was inspected, a folder was found with a number of still images of female children in their underwear, including a photograph of a young female child performing sexual acts upon an adult male. The respondent denied having stored the images on the phone, and having seen them before. He denied knowing how to use the internet.
- [11] It was subsequently established that there were 17 still images of female children stored on the respondent’s phone. There were also 11 video files, four of which were of young females. One was clearly sexual in nature. Another showed a female bound to a bed, and in a distressed state when a male person approached her, but did not show any sexual acts. A third involved a female seated on a male, who was holding her as she struggled to break free. She too appeared distressed. The male lifted her and carried her to another room. This video did not record any sexual acts.
- [12] On 26 September 2013, the respondent was arrested. He has remained in custody since then.
- [13] The breaches of the supervision order are established, if not by other evidence, by the respondent’s pleas of guilty to four charges of contravening the order on 8 August 2014. He was sentenced for these contraventions at the same time that he was sentenced on a count of possessing child exploitation material, being the images on the mobile phone. Notwithstanding his time in custody, on the count of possessing child exploitation material the respondent was sentenced to a term of 15 months’ imprisonment, and on the other four charges to terms of three months’ imprisonment, the sentences to be served concurrently. The learned sentencing judge, who has extensive experience in the criminal

jurisdiction, described the images the subject of the possession charge as being “very much at the lower end of the scale”; the significant factor in the sentencing being the respondent’s criminal history.

- [14] The present application came before Applegarth J on 26 September 2013. His Honour’s orders included an order that the respondent undergo examination by two psychiatrists.

### **Reporting by Professor Nurcombe**

- [15] Professor Nurcombe was one of the psychiatrists who provided a report for these proceedings, which he has supplemented on two occasions. He had provided reports (including supplementary reports) relating to the respondent on four previous occasions.
- [16] It would appear from his report for these proceedings that the respondent made a not unfavourable impression on Professor Nurcombe. He described him as co-operative during the interview and considered his history to be reliable. He noted the respondent’s dominant mood as “gloomy and self-critical”.<sup>2</sup>
- [17] The respondent told Professor Nurcombe that he obtained the images as a result of (apparently a search using the terms) “rape porn” in the internet. He did this because he wanted to see if the images would “turn him on”. He did this “for three days”. He said that he was not sexually aroused by the images; rather “it horrified me ... twenty-five years ago it would have turned me on. Now it didn’t.” He also said that the images made him feel sad and angry. He had downloaded and later deleted some images, but absent-mindedly failed to delete the folder on which the images were discovered.<sup>3</sup>
- [18] Professor Nurcombe recorded the respondent’s expressing guilt about his offences against children. He had been suicidal in 1992, and in the same year, when first in prison, attempted to amputate his penis. He lacerated his arm in 1997.
- [19] Professor Nurcombe recorded positive plans by the respondent, if released. They included the recommencement of treatment with Dr Palk.<sup>4</sup>
- [20] Professor Nurcombe provided a complex diagnosis of the respondent. The elements of it which appear to me to be most significant are the following: Paraphilia (Paedophilia/Abduction/Bondage/Rape/Exhibitionism, heterosexual, non-exclusive); Developmental Learning Disability (possibly dyslexia); Schizoid Personality; Social Phobia; Dysthymic Disorder with recurrent depression; and Short-Term Memory Defect of uncertain origin, possibly secondary to rupture of a cerebral artery.
- [21] Professor Nurcombe also recorded that the respondent had a severe learning disorder when at school. He noted that the respondent had never been able to form a successful heterosexual relationship. He also recorded the respondent as describing the offences and contraventions “without minimisation, denial, rationalisation, or projection of blame.”<sup>5</sup> Professor Nurcombe also described the respondent as being “very alone”.<sup>6</sup>

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<sup>2</sup> Affidavit of Professor B Nurcombe affirmed 06 October 2015 p 5 (*4 Nurcombe*).

<sup>3</sup> *4 Nurcombe*, pp 6-7.

<sup>4</sup> *4 Nurcombe*, p 8.

<sup>5</sup> *4 Nurcombe*, p 9.

<sup>6</sup> *4 Nurcombe*, p 10.

[22] Professor Nurcombe made the following observation of the respondent<sup>7</sup>:

“Mr Waghorn has a serious, complex sexual deviance which is under some degree of conscious control. He has a need to dominate underage females in a sexual manner, probably in an attempt to cope with erectile dysfunction and inability to form and sustain a heterosexual relationship.”

[23] With respect to the risk that the respondent would offend if released to the community, Professor Nurcombe said<sup>8</sup>,

“The most likely scenario is as follows: after an experience involving loneliness, rejection, disappointment or failure to cope in the community, he will once again entertain violent sexual fantasies toward female children or adult women. If these fantasies are enacted, he could be involved in the abduction, bondage, and sexual molestation of a female child or the rape of an adult female. The likelihood of psychological or physical harm to victims is high. There is a chance that the sexual violence could become life-threatening. The most likely warning sign would be increasing truculence toward, or the failure to attend, supervision and psychotherapy. If sexual violence were to occur, it would probably occur on one occasion only. The risk of sexual violence is chronic though, in my opinion, less than before. The best way to monitor warning signs would be continued supervision by a correctional officer together with psychotherapy provided by a qualified psychologist. Dropping out of treatment or resistance to supervision would be the primary warning of sadistic fantasy enactment.”

[24] Professor Nurcombe considered that, without supervision and treatment, the respondent would be at a high to very high risk of reoffending sexually, with the risk to the community, if he were to reoffend, being very high. In his report, Professor Nurcombe expressed the opinion that if the respondent were released under the existing supervision order, his risk of reoffending “with a hands-on sexual offence” could be reduced to moderate or below.”<sup>9</sup>

[25] Professor Nurcombe provided a further brief noted dated 16 May 2016. In it he expressed the view that it was a pity that the respondent had rejected anti-androgenic hormone treatment from Dr Arnold, and said that anti-depressant medication (as referred to in Dr Arnold’s report) “is a less certain alternative but could be helpful.”<sup>10</sup>

[26] In a further short note dated 22 May 2016, Professor Nurcombe stated<sup>11</sup>,

“I am not confident that a combination of anti-depressant treatment, correctional supervision, and psychotherapy would reduce the likelihood of his reoffending sexually to moderate or below. If he were to reoffend, the risk to the community would be very serious.”

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<sup>7</sup> 4 Nurcombe, p 10.

<sup>8</sup> 4 Nurcombe, p 10.

<sup>9</sup> 4 Nurcombe, p 11.

<sup>10</sup> Affidavit of Professor Nurcombe affirmed 19 May 2016 Exhibit BN-3.

<sup>11</sup> Affidavit of Liang Chai Ling sworn 23 May 2016 Exhibit LCL-1.

### Reporting by Dr Sundin

- [27] Dr Sundin provided a report for this hearing, and a further note dated 16 May 2016<sup>12</sup>. She has also provided three previous reports relating to the respondent. In her current report, she recorded that the efforts of Dr Palk had been of substantial benefit in progressing the respondent to the point where he could be released on a supervision order, but expressed concern about his failure to tell Dr Palk that he had been accessing pornographic material, at the time of the contraventions.<sup>13</sup>
- [28] Dr Sundin recorded the respondent as giving a similar explanation for obtaining material as that which he gave to Professor Nurcombe. However, she said that he commenced obtaining the material around 16 September 2013, and that he was devoting a couple of hours each night to looking at it. He had been considering doing this for under two weeks prior to 16 September. He described to Dr Sundin a similar reaction to that recorded by Professor Nurcombe.<sup>14</sup>
- [29] Dr Sundin recorded a positive attitude by the respondent to future compliance with a supervision order, and to resuming sessions with Dr Palk. She also regarded it as positive that, during the brief period of his release from custody, the respondent did not commit a serious sexual offence, did not abuse illicit substances, and did not use alcohol.<sup>15</sup>
- [30] Dr Sundin considered the respondent to be suffering from a Mixed Personality Disorder with both schizoid and anti-social personality traits. She could not exclude, as an explanation for the respondent's contraventions, "the pervasive and irresistible nature of (his) paraphilic cognitions"; and referred to his "past history of fairly rapid escalation from fantasies to behaviours".<sup>16</sup>
- [31] Dr Sundin concluded this report by saying<sup>17</sup>,
- "I am very hesitant in recommending to the Court that Mr Waghorn could be safely returned to the community. I am not confident that a Supervision Order is sufficient to guarantee that Mr Waghorn will not commit a serious sexual offence against either an adult or a child into the future."
- [32] Dr Sundin provided a further note dated 16 May 2016. She remained "very hesitant in recommending to the Court that Mr Waghorn could be safely returned to the community." Nor was she confident that a supervision order would be sufficient "to guarantee that Mr Waghorn will not commit a serious sexual offence against either an adult or a child into the future. I am of the opinion that he represents an unsatisfactory risk to the general public if released into the community even if released under the auspices of a supervision order."<sup>18</sup>

### Dr Palk

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<sup>12</sup> Affidavit of Dr JJ Sundin sworn 19 May 2016 Exhibit JJS-3 (*5 Sundin*).

<sup>13</sup> Affidavit of Dr JJ Sundin, sworn 06 October 2015, pp 6, 7 & 12 (*4 Sundin*).

<sup>14</sup> *4 Sundin*, pp 7, 10.

<sup>15</sup> *4 Sundin*, pp 12, 13.

<sup>16</sup> *4 Sundin*, p 12.

<sup>17</sup> *4 Sundin*, p 13.

<sup>18</sup> *5 Sundin*, p 2.

- [33] Dr Palk is a psychologist who has been treating the respondent since 2011. He has provided two reports for these proceedings. In his first report<sup>19</sup>, he described the respondent as having “a mixed personality disorder with anti-social and schizoid features.” Dr Palk referred to the respondent’s history of deviant sexual arousal and deviant sexual fantasies with preference for pre-pubescent and young pubescent girls. Dr Palk also referred to other mental health concerns, namely paranoid and persecutory thinking, social withdrawal; negative affect; suicidal ideation and anger outbursts<sup>20</sup>.
- [34] Nevertheless, Dr Palk recorded what can be described as a quite positive response by the respondent to treatment<sup>21</sup>. He also considered the respondent to be a man of average intelligence, with indications of a low average memory and minor cognitive impairment. He described the respondent’s demeanour as being “generally unhappy, withdrawn and introverted”<sup>22</sup>.
- [35] With respect to the risk of reoffending, Dr Palk said<sup>23</sup>
- “Serious lapses can be avoided if (the respondent) can learn to discuss with his psychologist the ramifications of any sexual thoughts with the view to managing them appropriately. If (the respondent) is not able to be honest with his psychologist about his sexual thoughts and desires, whatever they may be, then he will be at high risk of committing a further sexual offence if the opportunity to do so occurs.”
- [36] Dr Palk expressed concern about the fact that the respondent accessed pornography in a public place when young girls could potentially pass by. He considered this behaviour to be reminiscent of the respondent’s previous offending pattern.<sup>24</sup> He considered that the respondent should never be allowed to have access to a motor vehicle; and that accessing pornographic material was another key risk factor.
- [37] An addendum report from Dr Palk<sup>25</sup> recorded his continuing treatment of the respondent, and the respondent’s positive response. He also recorded the respondent’s explanation for his failure to tell Dr Palk about his access to pornographic material, which was, that Dr Palk would then be required to report that to QCS. Dr Palk considered that that presented “an ongoing dilemma for both the prisoner and the psychologist”<sup>26</sup>. Otherwise, Dr Palk’s conclusions reflected those expressed in his earlier report.

### **Dr Arnold**

- [38] The respondent was referred to Dr Arnold for the purpose of treatment by medication. The assessment of his condition is generally consistent with that of the other medical experts. She recorded his opposition to using Androcur<sup>27</sup>. The next best option was an anti-depressant, serotonin, which she described as having been used successfully in

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<sup>19</sup> Report of Dr Palk dated 1 February 2016 (*1 Palk*).

<sup>20</sup> 1 Palk p 11.

<sup>21</sup> 1 Palk pp 11-12.

<sup>22</sup> 1 Palk p 13.

<sup>23</sup> 1 Palk p 14.

<sup>24</sup> 1 Palk p 14.

<sup>25</sup> Report of Dr Palk dated 7 May 2016 (*2 Palk*).

<sup>26</sup> 2 Palk p 3.

<sup>27</sup> Report of Dr Arnold dated 19 February 2016 (*1 Arnold*) p 16; report of Dr Arnold dated 12 April 2016 (*2 Arnold*) p25.

addictions, impulsivity, and paraphilias. However, she noted that there was no means objectively to assess its effectiveness, and reliance would accordingly have to be placed on reporting by the respondent which might not be reliable<sup>28</sup>.

### **Contentions**

- [39] For the applicant, it was submitted that the evidence did not establish that adequate protection of the community could be achieved by the respondent's release on a supervision order. Reference was made to the very serious nature of some of the earlier offences; and the fact that the contravention occurred very shortly after the respondent's release subject to the supervision order.<sup>29</sup>
- [40] The submissions for the respondent accepted that "the evidence does not presently support the release of the respondent on a supervision order"<sup>30</sup>.

### **Consideration**

- [41] There is some discrepancy in the periods of time recorded by Professor Nurcombe and Dr Sundin over which the respondent was obtaining pornographic material by the use of his mobile phone. I do not attribute much significance to that discrepancy, particularly in view of the fact that the respondent has a short-term memory disorder. However, on either account, the respondent's conduct was persistent. That is a matter of considerable concern. It does not sit comfortably with the respondent's explanation for seeking out pornographic material on the internet. While it might, at best for the respondent, account for his initial use of the internet to obtain such material, it does not account for his continuing to do so. In any event, access to such material was described as a "key risk factor" by Dr Palk; and accordingly the fact that the respondent persistently accessed such material is a significant concern, regardless of the explanation for it.
- [42] Also troubling is the respondent's deliberate decision not to discuss this conduct with Dr Palk. In my view, that reflects a recognition that the conduct would be of concern. It also deprived the respondent of assistance which would reduce the risk of his committing further sexual offences.
- [43] I am conscious that it is now a long time since the respondent has committed a sexual offence which directly involves another person, including in the period when he was not in custody. However, the nature of the more serious offending is a matter of grave concern, particularly since, on at least one occasion, he gave consideration to killing a victim.
- [44] Professor Nurcombe's first report suggests there is a real prospect that there would be warning signs of any impending serious sexual offending by the respondent. It is not inevitable that these would be detected or appreciated by someone in a position to take steps to prevent the respondent from carrying out such offending. Given its serious nature, it seems to me that I would need greater reassurance about the protection of the community before I could refuse the application. In any event, the relatively consistent view of the experts, which I accept, is that at present, even with the safeguards of a

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<sup>28</sup> 1 Arnold p 16; 2 Arnold p 25.

<sup>29</sup> Amended Outline of Submissions of applicant dated 23 May 2016, p 24.

<sup>30</sup> Respondent's Outline of Submissions dated 24 May 2016, para 13.

supervision order, there is a substantial risk that the respondent would commit further sexual offences.

- [45] The reports refer to the risk that the use of alcohol or drugs might reduce the respondent's inhibitions, thereby increasing his risk of offending. While that is likely to be true, it does not seem to me a matter of much weight. There is no history of such use by the respondent for many years; and in particular no suggestion of it in connexion with the contravention.
- [46] One matter which in particular provides encouragement is the respondent's relationship with Dr Palk, and his positive approach to, and involvement in, therapy. Another is his recent decision to undertake treatment using Androcur.
- [47] In the end, I am not satisfied that the adequate protection of the community can, despite the contraventions of the existing supervision order, be ensured by that order, whether or not it is amended.

### **Conclusion**

- [48] I am prepared to grant the application; and accordingly to rescind the existing supervision order, and to make a continuing detention order.