

SUPREME COURT OF QUEENSLAND

CITATION: *A-G for the State of Qld v Gray* [2016] QSC 141

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

FILE NO/S: BS No 7877 of 2010

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 20 June 2016

DELIVERED AT: Brisbane

HEARING DATE: 20 June 2016

JUDGE: Ann 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 Justice P. Lyons on 2 December 2010 ORDERS THAT:**

1. The respondent, Maxwell Edward Gray, be released from custody on 6 July 2016 and continue to be subject to the supervision order made by Justice P. Lyons on 2 December 2010, with the following additional requirements:

(xxxviii): comply with any reasonable direction under s16B of the Act given to the respondent; and

(xxxix): not have any direct or indirect contact with either or both of the two persons named as aggrieved persons in the Protection Order made pursuant to the *Domestic and Family Violence Protection Act 2012* on 6 January 2016;

2. The requirements of the supervision order made by Justice P. Lyons on 2 December 2010 be amended as follows:

a. amend requirement (xiii) and insert the following underline words to read:

“Comply with every reasonable direction of an authorised Corrective Services Officer that is not directly inconsistent with a requirement of this Order”.

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 makes an application for relief pursuant to s 22 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) – where respondent has contravened a supervision order – whether the supervision order should be rescinded and a continuing detention order made or whether the adequate protection of the community can be insured with amendments to existing supervision order

Dangerous Prisoners (Sexual Offenders) Act 2003

COUNSEL: B H P Mumford for the applicant
C Morgan for the respondent

SOLICITORS: GR Cooper, Crown Solicitor for the applicant
Legal Aid Queensland for the respondent

This application

- [1] On 2 December 2010 the respondent was placed on a Supervision Order pursuant to the provisions of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (the Act) by Peter Lyons J. The duration of that order was until 16 January 2021.
- [2] The respondent has breached that Supervision Order on a number of occasions by taking illicit drugs and breaching condition (xxiii) of the Order. He has been the subject of Contravention Proceeding on 23 November 2011, 22 October 2012, 7 April 2014 and 29 September 2014.
- [3] On 29 September 2014 the Court was satisfied that the respondent had breached Condition (xxiii) of that order which required that he abstain from illicit drugs for the term of the order when he tested positive for the presence of cannabis in his system on four occasions namely in May 2011, 10 May 2012, 15 October 2013 and 30 October 2013. Despite the contraventions the Court was satisfied that he should continue to be subject to the Supervision Order made on 2 December 2010.

- [4] The applicant Attorney-General now seeks an order under s 22 of the Act. The applicant alleges that the respondent has contravened requirement (xiv) of the Supervision Order made by this Court on 2 December 2010 in that he committed an indictable offence during the period of the Supervision Order.

The Current contraventions

- [5] The applicant's submissions outline the circumstances of the current contravention in the following terms:

“9. On 7 January 2016, Mr Gray pleaded guilty in the Rockhampton Magistrates Court to:

- (a) One offence contrary to Section 474.17(1) of the *Commonwealth Criminal Code* (using a carriage service to menace, harass or cause offence) between 1 September 2015 and 5 January 2016;
- (b) One offence contrary to Section 43AA of the Act (contravention of a relevant order) on 7 January 2016.¹

10. The prosecution case² was that on 5 January 2016, the complainant's former de facto spouse complained to police that, between 31 August 2015 and 5 January 2016, the respondent had contacted her by phone and text message up to 25 times a day, leaving messages that were abusive and threatening violence. She received messages from the respondent of a photograph of ammunition with the words:

“I have these sitting here waiting for you. They've got your name on them.”

11. During the same month, she received a message saying:

“I'm going to cut my ankle bracelet off. I'm coming to get you both and I'm going on the run and no one will ever find me.”

12. On 5 January 2016, the complainant received a recorded message from the respondent, in which he said:

“I'll do it like me at the meat works. I'll put it behind your ear and make it quick.”

13. The respondent was questioned by police. In that interview, he said that he made the threats only because her new partner had threatened him. In a recorded interview with police, he admitted sending the messages, stating that he had gone too far, but he had just had enough. He said that it was excessive, and in some cases, the text messages were intended to intimidate the victim.

14. The maximum penalty for an offence under Section 474.17(1) under the *Commonwealth Criminal Code* is three years imprisonment. Section 4G of the *Crimes Act 1914* (Cth) provides that an offence punishable by more than 12 months imprisonment is an indictable offence, unless the

¹ Affidavit of Stephanie Cooper, CFI 141, “SNC 3”, pg 4.

² Cooper, “SNC 3”, pg.5.

contrary intention appears. Therefore, Section 474.17(1) of the *Commonwealth Criminal Code* is an indictable offence.

15. It was said on behalf of the respondent, that, although he sent the photograph of the ammunition, he did not in fact have any guns.”³

Has the respondent contravened a requirement of his Supervision Order?

- [6] On 7 January 2016, the Respondent pleaded guilty in the Rockhampton Magistrates Court to:
- (a) An offence contrary to s 474.17(1) of the *Criminal Code* (Cth) of using a carriage service to menace, harass or cause offence between 1 September 2015 and 5 January 2016;
 - (b) An offence contrary to s 43AA of the Act, namely a contravention of his supervision order, on 7 January 2016.
- [7] The respondent was sentenced as follows:
- (a) For the offence against s 474.17(1) of the *Criminal Code* (Cth) – six months imprisonment, to be released after serving two months upon giving security by recognisance of \$1000.00, conditioned that he be of good behaviour for two years;
 - (b) For the offence against s 43AA of the Act – six months imprisonment, with parole eligibility on 7 March 2016.
- [8] Both terms of imprisonment were made concurrent with one another. It would also seem that the Court made an order under the *Domestic and Family Violence Protection Act* 2012 in favour of the complainant. Her partner is a “named person” in that order, which remains in force until 6 January 2018.
- [9] The respondent also accepts that he has contravened a requirement of the Supervision Order dated 2 December 2010 and that the provisions of s 22 of the Act therefore apply.
- [10] I am therefore satisfied on the basis of the evidence that the respondent has breached condition (xiv) of the Supervision Order dated 2 December 2010.
- [11] The respondent’s full time release date for those offences is 6 July 2016.

The legislation

- [12] Section 22 of the Act essentially requires that the Court must rescind the Supervision Order and make a Continuing Detention Order unless the respondent satisfied the Court on the balance of probabilities that the adequate protection of the community can be ensured by the existing order or by the existing order together with any amendments under s 22(7) of the Act.
- [13] The requirements of s 22 of the Act are as follows;

22 Court may make further order

³ “SNC 3”, pg.6, T4.15.

(1) The following subsections apply if the court is satisfied, on the balance of probabilities, that the released prisoner is likely to contravene, is contravening, or has contravened, a requirement of the supervision order or interim supervision order (each the *existing order*).

(2) Unless the released prisoner satisfies the court, on the balance of probabilities, that the adequate protection of the community can, despite the contravention or likely contravention of the existing order, be ensured by the existing order as amended under subsection (7), the court must—

(a) if the existing order is a supervision order, rescind it and make a continuing detention order; or

(b) if the existing order is an interim supervision order, rescind it and make an order that the released prisoner be detained in custody for the period stated in the order.

(3) For the purpose of deciding whether to make a continuing detention order as mentioned in subsection (2)(a), the court may do any or all of the following—

(a) act on any evidence before it or that was before the court when the existing order was made;

(b) make any order necessary to enable evidence of a kind mentioned in section 13(4) to be brought before it, including, for example, an order—

(i) in the nature of a risk assessment order, subject to the restriction under section 8(2); or

(ii) for the revision of a report about the released prisoner produced under section 8A;

(c) consider any further report or revised report in the nature of a report of a type mentioned in section 8A.

(4) To remove any doubt, it is declared that the court need not make an order in the nature of a risk assessment order if the court is satisfied that the evidence otherwise available under subsection (3) is sufficient to make a decision under subsection (2)(a).

(5) If the court makes an order in the nature of a risk assessment order, the psychiatrist or each psychiatrist examining the released prisoner must prepare a report about the released prisoner and, for that purpose, section 11 applies.

(6) For applying section 11 to the preparation of the report— (a) section 11(2) applies with the necessary changes; and (b) section 11(3) only applies to the extent that a report or information mentioned in the subsection has not previously been given to the psychiatrist.

(7) If the released prisoner satisfies the court, on the balance of probabilities, that the adequate protection of the community can, despite the contravention or likely contravention of the existing order, be ensured by a supervision order or interim supervision order, the court—

(a) must amend the existing order to include all of the requirements under section 16(1) if the order does not already include all of those requirements; and

(b) may otherwise amend the existing order in a way the court considers appropriate—

(i) to ensure adequate protection of the community; or

(ii) for the prisoner's rehabilitation or care or treatment.

(8) The existing order may not be amended under subsection (7)(b) so as to remove any requirements mentioned in section 16(1).

The Index Offences

- [14] The Index Offence, for which the respondent was serving a term of imprisonment at the time the Supervision Order was made, was the rape of a 70 year old woman in 1996. It involved entry into her home at night. He was sentenced to a period of 14 years imprisonment.
- [15] 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 night. On another occasion the respondent committed an offence of breaking and entering, which may also have had a sexual motivation.
- [16] The respondent has a history of heavy past consumption of alcohol, and very significant drug abuse, principally of 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 psychosis. He continued to be treated for the psychotic disorder until 2009, but since then there has been no evidence of psychotic symptomatology.
- [17] During his term of imprisonment, the respondent underwent the Indigenous Sex Offender Treatment Program, with positive reports.

The Reports of the Psychiatrists

- [18] The report of Dr Grant, dated 24 April 2016, is based on his interview with the respondent on 13 April 2016. Dr Grant has previously provided reports in relation to the respondent in September 2010, August 2012, December 2013, August 2014 and July 2015.
- [19] Dr Harden also interviewed the respondent on 20 April 2016 and prepared a report dated 30 May 2016. He had also provided reports in 2010, 2011 and 2012.

Dr Grant's report

- [20] Dr Grant noted that in his 2010 report the formal risk assessment's instruments indicated that Mr Gray fell into a high risk group for future sexual reoffending. Dr Grant considered that over the years since that initial assessment, the static historical factors have not altered, however the lapse of time, the courses undergone and the respondent's current remission from alcohol and drugs indicate some moderation in the risk. Dr Grant also noted that the respondent had aged which also tended to lower the risk. Whilst he

considered that there had been some improvements in insight, Dr Grant had continuing concerns overall about the respondent's judgment and life skills.

[21] Dr Grant noted however:

“Mr Gray has not seriously reoffended until his most recent breach when he committed an indictable offence. There has been no sexual reoffending. He does not describe recent sexual preoccupations. He has also not used alcohol recently and appears to have been abstinent from marijuana for some time.

Taking these ameliorating factors into account, in my opinion the current level of risk for a sexual reoffence would be reduced from the original estimate of high down to a current level of moderate.

The recent indictable offence arose in the situation of conflict between his ex-wife and her new partner. Mr Gray was clearly inappropriate and aggressive in his telephone calls and texting but this did not appear to be arising from any psychotic thinking or motivation. I believe that the behaviour is more reflective of his underlying antisocial personality traits. That situation of conflict would have raised the risk for possible violent offending but it is unclear whether it would have affected the risk of sexual reoffending in any way.”⁴

[22] Ultimately, Dr Grant considered that the Supervision Order that Mr Gray has been on has “proven effective in detecting breaches of his Order at a relatively early stage and thus has been effective in preventing deterioration into significant drug and alcohol abuse and social instability that might have produced a sexual re-offence”.⁵

[23] Dr Grant considers that Mr Gray would benefit from some ongoing psychiatric monitoring from a treating psychiatric and that it would be helpful to have some detailed psychometric testing to assess his cognitive functions given his failure to progress with rehabilitation in the community.

[24] Overall, Dr Grant considers the risk for a sexual re-offence in Mr Gray's case is moderate. He considers that a supervision order will continue to be effective in reducing the risk down to low to moderate. He notes that there have been six breaches of his Supervision Order and on that basis, future breaches might be expected but that the order is currently effective in detecting breaches and containing the risk of sexual reoffending.

Dr Harden's report

[25] Dr Harden also noted in his report that he had previously administered a number of risk assessment instruments in relation to Mr Gray and that he considers that his future risk of sexual re-offence is high. He noted that with increasing age but with ongoing breaches of his supervision order it is most likely that his risk of sexual recidivism actually lies in the moderate to high range when unmodified by external constraints, such as the Supervision Order.

⁴ Dr Grant's report pg. 12.

⁵ Dr Grant's report pg. 14.

- [26] Dr Harden also noted that Mr Gray has breached his Supervision Order on many occasions since he has been released and that those breaches have usually been associated with marijuana use. In relation to the current breach, Dr Harden stated the following:

“The current breach is more concerning. It is likely that there was an acute increase in his violence risk during the most recent period in the community. Given his past history this would probably also increase his risk of sexual violence. It is not clear whether this acute increase in risk has entirely resolved as Mr Gray is not a reliable historian at interview. It is possible there is some increased risk persistent currently associated with his upset at being left by his previous partner.

However, in my opinion his risk continues to be similar to previously, in that the risk of sexually violent recidivism without modifying factors in the community remains moderate- high.

Continuation of his supervision program in the community still reduces his risk to moderate in my opinion as the supervision program interferes with a number of his risk factors quite effectively.”⁶

- [27] Ultimately, Dr Harden considered that if the respondent was released into the community he should continue to be monitored by means of a supervision order and that the order should specifically prohibit any contact with his previous partners, her new partner or the environment that they reside in and that there should also be a requirement that he continue to be abstinent from alcohol and substance use. Dr Harden also considered that Mr Gray should continue to have individual psychological therapy in the community and also endorsed the need for further neuropsychological evaluation and an MRI of his brain to assess his cognitive and brain function more effectively.

- [28] Dr Harden also considered that Mr Gray should be clinically reviewed by a psychiatrist. Dr Harden further considers that there could be some low grade persistence of Mr Gray’s psychotic disorder and that a trial of low dose antipsychotic medication should be implemented to see if that improves Mr Gray’s overall function.

- [29] Dr Harden continued:

“It is unlikely that his risk to others in the community is going to improve in the near future. If he is released into the community he should not be released from the strictures on a supervision order in in the next few years.”⁷

Dr Lars Madsen report dated 21 January 2016

- [30] Dr Madsen is a psychologist and he prepared an update report on the respondent’s progress. Dr Madsen had provided an earlier report of 15 July 2016. Dr Madsen ultimately concluded:

“The results from the neuropsychological testing seems to support the hypothesis that Mr Gray has suffered (and continues to suffer) brain compromise/injury. This may explain the noted difficulties he appears to have with regards to managing his self care, problem solving obstacles to gaining

⁶ Dr Harden’s report pg. 33.

⁷ Dr Harden’s report pg. 34.

work, impulse control and generally being compliant with the conditions of his order. Obviously additional testing would need to be completed to clarify the nature of these problems.”⁸

- [31] Dr Madsen also recommends neuropsychological testing to clarify the nature and extent of his cognitive difficulties.

Conclusion

- [32] I am satisfied, as I have previously indicated, that Mr Gray has contravened the supervision order. As s 22 of the Act provides, in the circumstances the court must rescind a supervision order and make a continuing detention order unless the respondent can satisfy the court on the balance of probabilities that the adequate protection of the community can be insured by the existing order or with amendments to the existing order.
- [33] I note that this is the sixth time that the respondent has been subject to a contravention proceeding. It is clear however that the earlier contraventions involved the use of intoxicants, particularly the use of marijuana. I endorse the concerns of the reporting psychiatrists that this contravention is quite concerning and serious because it involved threatening conduct over a protracted period.
- [34] It is clear however as both psychiatrists have noted that the present contravention did not result in a return to sexual reoffending. Both the psychiatrists consider that the risk that the respondent will commit a sexual offence involving violence can be managed on the conditions in the supervision order. I am satisfied that the respondent has satisfied the onus on him to establish that, on the balance of probabilities, the adequate protection of the community can be insured by the existing order with appropriate amendments. I consider that there should be two additional conditions:
- (xxxviii): comply with any reasonable direction under s16B of the Act given to the respondent; and
- (xxxix): not have any direct or indirect contact with either or both of the two persons named as aggrieved persons in the protection order made pursuant to the *Domestic and Family Violence Protection Act 2012*, on 6 January 2016.
- [35] I also consider that the requirements of the supervision order made by Justice P Lyons on 2 December 2010 should be amended at condition (xv) and that the words underlined should be inserted. “Comply with every reasonable direction of an authorised corrective Services Officer that is not directly inconsistent with a requirement of this Order.”

⁸ Dr Madsen’s report, para 22.