

SUPREME COURT OF QUEENSLAND

CITATION: *Attorney-General for the State of Queensland v Mow* [2016] QSC 171

PARTIES: **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND**
(applicant)
v
AARON DANIEL MOW
(respondent)

FILE NO/S: BS No 10496 of 2012

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 1 August 2016

DELIVERED AT: Brisbane

HEARING DATE: 1 August 2016

JUDGE: Peter Lyons J

ORDER: **The respondent be released from custody and continue to be subject to the supervision order made on 15 December 2014.**

CATCHWORDS: CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – DANGEROUS SEXUAL OFFENDER – GENERALLY – where respondent contravened a supervision order – whether adequate protection of the community can be ensured for the purposes of s 22(a) of the *Dangerous Prisoners (Sexual Offenders) Act 2003 (QLD)* by releasing the respondent from custody subject to the supervision order

Attorney-General for the State of Queensland v Francis [2007] 1 Qd R 396, cited

Harvey v Attorney-General for the State of Queensland [2014] QCA 146, cited

COUNSEL: J Rolls for the applicant
J Lodziak for the respondent

SOLICITORS: Crown Law for the applicant

Legal Aid Queensland for the respondent

- [1] The applicant has alleged that the respondent has breached a condition of a supervision order made under the *Dangerous Prisoners (Sexual Offenders) Act 2003 (DPSOA)* and to which the respondent is subject. That allegation is not contested. The contentious issue was whether the respondent should be released from custody subject to a supervision order, and if so its terms: or whether a continuing detention order should be made. At the hearing, I determined that the respondent had breached a requirement of the supervision order; but ordered that he be released from custody, and continue to be subject to it. These are my reasons for doing so.

Breach

- [2] On 15 April 2013, a continuing detention order was made, resulting in the respondent's detention and custody. On 15 December 2014, Flanagan J ordered the respondent's release from custody under a supervision order under the DPSOA. Requirement 21 of the supervision order was that the respondent "abstain from the consumption of alcohol and illicit drugs for the duration of the order". The order was made for a period of four years.
- [3] The respondent breached that order by using cannabis, detected in a sample of urine obtained on 13 April 2015. He was detained in custody shortly before 1 June 2015. On 11 January 2016, Daubney J ordered that the respondent be released from custody, subject to the conditions of the supervision order made by Flanagan J, which was to remain in force until 15 December 2019.
- [4] A urine sample obtained from the respondent on 3 March 2016 tested positive for cannabis. In relation to this, the respondent informed QCS officers that he was offered a cigarette by someone in the Flinders Street Mall. He soon realised that it contained cannabis, but continued to smoke it. He believed that the presence of cannabis in his system would not be detected, as he did not expect to be tested again immediately, and he intended to "flush" the drug from his system by consuming a large amount of alcohol. He also said that he was disappointed with the choice he made, as his family members would be disheartened by his behaviour, knowing it would result in his return to custody.
- [5] By virtue of s 22 of the DPSOA it was necessary for me to determine whether I was satisfied, on the balance of probabilities, that the respondent has breached a requirement of the supervision order. The breach is evidenced both by the urine analysis, and the respondent's admission. I have already mentioned that this issue was not contested. Accordingly, I found that the respondent breached requirement 21 of his supervision order, by using cannabis at some time between 29 February and 3 March 2016.

The present issue

- [6] Under s 22(2), I was required to rescind the respondent's supervision order, and make a continuing detention order, unless the respondent satisfied me, on the balance of probabilities, that the adequate protection of the community can, despite the contravention of the supervision order, be ensured, whether by that order in its present form, or as amended under s 22(7).

- [7] In considering that question, it was necessary to identify the particular nature of the risk which the respondent presents to the community¹. The extent to which monitoring of the respondent's conduct would be likely to prevent circumstances arising which would make the appellant a danger to the community was relevant². While the risk that the respondent might breach requirements of the order was also relevant, the question which I had to determine was whether, if the respondent were released subject to an appropriate supervision order, adequate protection of the community would be ensured³.

Some background matters

- [8] The applicant was born on 21 June 1980. He is thus 36 years of age. He has a South Sea Islander background. He had an unstable, dysfunctional childhood, aggravated by maternal neglect and abandonment⁴.
- [9] The respondent has committed two offences of particular significance for these proceedings. In January 1997 he attempted to murder a woman at night. He was then 16 years of age. He was intoxicated by alcohol to a significant extent. There is also some evidence that he had taken cannabis in the time prior to the commission of this offence. There is also some suggestion that the respondent contemplated raping this woman (though it is not clear) at the time of the attack.
- [10] The respondent's second significant offence was committed on 3 November 2009, when the respondent attempted to rape a woman, again at night. He pleaded guilty to this offence on 8 June 2010, and was sentenced to a term of imprisonment of three years and six months, with a parole eligibility date after 14 months. Again, the respondent was significantly affected by alcohol⁵.
- [11] The respondent otherwise has a somewhat extensive criminal history, much of which is of little direct significance for present purposes.
- [12] The respondent has completed in custody a Medium Intensity Sexual Offender Programme (*MISOP*)⁶. He also undertook the "Getting Smart" substance abuse programme⁷.
- [13] The respondent said that he used cannabis in April 2015 with the intention that he be returned to custody. There is no similar explanation for the second breach, save, perhaps, in the report of Ms Lavers of 26 June 2016⁸.

Experts' reports

- [14] The respondent was interviewed by Dr Beech for the purpose of these proceedings. Dr Beech recorded that, after the respondent's most recent release from custody, he resided in "the Precinct", where accommodation is provided for persons subject to a supervision

¹ *Attorney-General for the State of Queensland v Francis* [2007] 1 Qd R 396 at [38].

² *Francis* at [38].

³ *Francis* at [39]; and see *Harvey v Attorney-General for the State of Queensland* [2014] QCA 146 at [43].

⁴ Report of Dr Michael Beech dated 20 June 2016 (*Beech*) 1 60.

⁵ See the Sentencing Remarks of Harrison DCJ of 8 June 2010 p 2.

⁶ *Beech* 1 70.

⁷ Report of Dr Scott Harden dated 17 September 2014, p 17.

⁸ See p 8.

order⁹. There are a number of positive matters recorded by Dr Beech relating to this period, including that the respondent was seen by ATODS, that he saw Ms Lavers (a psychologist) weekly, and that the respondent had also sought employment. He also undertook a maintenance course for sexual offenders¹⁰. The respondent also attended a Men's Group¹¹. Dr Beech, however, reported some conflict between the respondent and younger males in the Precinct, with the respondent indicating that he would resort to violence against these people if they continued to request him to provide them with things¹². Dr Beech recorded a preference by the respondent to remain in custody¹³.

- [15] Dr Beech reported that the respondent has an Anti-Social Personality Disorder associated with an unstable childhood, maternal abandonment, and early entry into juvenile delinquency¹⁴. The respondent has a number of positive skills, and a reasonable work ethic¹⁵. The respondent is able to manage relatively well logistically in the community¹⁶. The respondent responds poorly to stress, and bristles at supervision¹⁷. The respondent gave inconsistent and contradictory accounts of his thoughts, feelings, and intentions¹⁸. He tended to say what he thought others wanted to hear¹⁹. The current breach was a "remarkably quick return to contravention by the use of illicit substances"²⁰, and there was evidence of emotional collapse. There is a risk that, when the respondent is very stressed, he might "simply take off"²¹.
- [16] Dr Beech considered that, without a supervision order, the respondent was at high risk of further sexual offending. However, this risk "is not imminent but would be the end point of a slow process of substance use, anger, grievance, and ruminations about the past"²². Dr Beech recommended that the respondent be subject to "psychiatric oversight in the community"²³. Dr Beech was uncertain about "what could be done in the immediate circumstances to reduce (the respondent's) risk of return to illicit substances"²⁴.
- [17] Dr Sundin has provided a report dated 29 March 2016. She considered the current breach to be "consequent upon another observed decline in (the respondent's) mental state and recurrence of the brittle grandiosity and narcissistic self-focus that had preceded the 2015 breach"²⁵. However she observed that, in his most recent period in the community, the respondent was not demonstrating "any prolonged disturbance of mental state and (there was) nothing to suggest that he developed either hypomania or psychosis"²⁶.

⁹ Beech l 90.

¹⁰ Beech l 95.

¹¹ Beech l 150.

¹² Beech ll 100-115.

¹³ Beech l 238.

¹⁴ Beech l 405.

¹⁵ Beech l 411.

¹⁶ Beech l 414.

¹⁷ Beech l 415.

¹⁸ Beech l 424.

¹⁹ Beech l 425.

²⁰ Beech l 438.

²¹ Beech l 452.

²² Beech l 457.

²³ Beech l 460.

²⁴ Beech l 466.

²⁵ Sundin l 136.

²⁶ Sundin l 165.

- [18] Dr Sundin considered that the respondent has over the years struggled with “low self-esteem, low sense of self-worth and that these vulnerabilities have become manifest in very high levels of hostility towards women”; and he has sought to overcome his feelings of inadequacy by exerting power and control over others²⁷. She also considered that the respondent’s “level of insight into the psychological underpinnings of his recurrent violent and abuse of substances remains nascent²⁸; and that his recurrent breaches suggested “a high ongoing risk for regression into dysfunctional coping patterns and relapse into anti-social and violent behaviours²⁹. Dr Sundin recommended that he undertake a Pathways Programme (a high intensity substance abuse programme³⁰), before the respondent is released into the community³¹. Dr Sundin considered it a positive matter that, as a result of the supervision order, the respondent has been engaging with QCS officers and his psychologist (Ms Lavers)³². She considered that the supervision order was “serving its purpose in protecting the community”; and that he was adequately being managed under the current order, so that he could be returned to the community once he has repeated an appropriate drug education programme³³. In the circumstances, his level of risk to the community was reduced from high to moderate under such an order³⁴.
- [19] At the hearing, I was told, without objection, that Dr Sundin considered a medium intensity substance abuse course, which would be available to the respondent if released from custody, together with the safeguards of the supervision order, should be sufficient to ensure adequate protection of the community.
- [20] Ms Lavers has provided a report. It generally records difficulties in interacting with the respondent. She considered that the respondent had not made any treatment progress in respect of a number of treatment goals, in the eight sessions which he attended prior to his most recent return to custody.
- [21] The doctors expressly recorded an absence of evidence of sexual preoccupation³⁵. Ms Lavers recorded that the respondent’s failure to take his medication was related to the fact that he enjoyed sitting up on a Friday night with others at the Precinct to have a “yarn”³⁶. Dr Beech recorded statements from the respondent to the effect that he preferred to be in prison than at large³⁷.

Contentions

- [22] For the respondent, it was submitted that the supervision order was effective in guarding against issues which have been identified as heightening the risk that he might commit a serious sexual offence. Compliance with recommendations of Ms Lavers would further reduce the risk (those recommendations included recommendations that the respondent be tested for drugs several times a week; that his taking of prescribed medications be

²⁷ Sundin l 191.

²⁸ Sundin l 196.

²⁹ Sundin l 201.

³⁰ See the Affidavit of Hogarth sworn 21 July 2016 para 13.

³¹ Sundin l 210.

³² Sundin l 243.

³³ Sundin l 258.

³⁴ Sundin l 261.

³⁵ Beech l 334; and see ll 190-196; Sundin l 144.

³⁶ Lavers p 3.

³⁷ Beech l 238 ff.

monitored; and that he undertake sessions with a psychologist twice weekly for an initial period³⁸).

- [23] The submissions pointed out that there was no evidence that the respondent had taken alcohol when he was in the community. He had not committed a sexual offence during his period of release. The supervision order provided adequate protection for the community. Accordingly, the respondent should be released, subject to it.
- [24] The submissions for the applicant helpfully referred to authorities and to the material. They also identified the issue to be determined. It was submitted that the risk of intoxication from cannabis use “is likely to substantially elevate the risk of committing a violence sexual offence”.

Consideration

- [25] As the evidence from Dr Sundin points out, the supervision order has been effective to prevent the respondent from committing a serious sexual offence. That is consistent with Dr Beech’s opinion that, even without a supervision order, the risk of his committing such an offence is not imminent, but would be the result of a slow process. The respondent’s likely offending is not opportunistic and spontaneous; and the events which have occurred strongly suggest, therefore, that supervision is likely to prevent such offending occurring.
- [26] The evidence shows that the respondent is prone to emotional collapse. Such a collapse, and intoxication resulting from the use of drugs or alcohol, would result in a very real risk that the respondent would commit a serious sexual offence. It is to be hoped that continued counselling with Ms Lavers would help to prevent the respondent from suffering such a collapse, particularly with the benefit of appropriate psychiatric intervention, and adequate safeguards to ensure that the respondent takes suitable anti-depressant medication. Moreover, such counselling and supervision are likely to assist in the early detection of the risk of such a collapse. Frequent testing is also likely to make known whether the respondent has been taking alcohol or drugs. In those circumstances, it seemed to me, the respondent has established that, if he were released from custody, a supervision order would ensure the adequate protection of the community.
- [27] In her report, Dr Sundin recommended that the respondent undergo a substance abuse programme before he is released. There is likely to be benefit in the respondent undergoing such a programme, although he has participated in one in the past. On the evidence, it seemed to me that adequate protection of the community can be ensured, without requiring the respondent to undergo such a programme in custody. Accordingly, I was not prepared to make an order to rescind the present supervision order, and make a detention order, on the basis of that recommendation. I also noted the further information about Dr Sundin’s view, communicated to me at the hearing.
- [28] In particular, I was conscious of the availability of other programmes relating to substance abuse to the respondent in the community. While Dr Sundin records that previous diagnoses for the respondent included Alcohol Use Disorder and Cannabis Use Disorder³⁹, his significant offences were associated with alcohol intoxication, and the material to which I have been referred does not suggest that the respondent suffers from

³⁸ Lavers p 10.

³⁹ Sundin l 153.

a drug addiction. On one view, the matters which might increase the risk that the respondent would commit a serious sexual offence might be more effectively addressed by treatment directed to his personality issues.

Conclusion

- [29] For these reasons, I made an order that the respondent be released from custody, subject to the supervision order.