IN THE COURT OF APPEAL [1996] QCA 493

SUPREME COURT OF QUEENSLAND

Appeal No. 6923 of 1996

Brisbane

[Pollentine v. Attorney-General]

BETWEEN:

EDWARD POLLENTINE
(Applicant) Appellant

AND:

THE HONOURABLE JOAN MARY SHELDON - ATTORNEY-GENERAL
(Respondent) Respondent

Fitzgerald P.
Thomas J.
White J.

Judgment delivered 6 December 1996

Separate reasons for judgment of each member of the Court; all concurring as to the orders made.

APPEAL DISMISSED; NO ORDER AS TO COSTS.

CATCHWORDS: **CIVIL - application for judicial review of a decision of the Governor-in-Council refusing the appellant's application for conditional release for indeterminate detention - appellant convicted for sexual offences (12) and 2 counts of abduction in 1984 - risk of the appellant re-offending and whether it is expedient to release the appellant - statistical recidivism rates - considerations personal to the appellant - community and other considerations.**

Cypressvale Pty Ltd v. Retail Shop Leases Tribunal (Appeal No. 158 of 1994, unreported, 19 May 1995)

In re Findlay [1985] A.C. 318

Mott v. Queensland Community Corrections Board [1995] 2 Qd.R. 261
Pollentine v. Attorney-General [1995] 2 Qd.R. 912
South Australia v. O'Shea (1987) 163 C.L.R. 378

Acts Interpretation Act 1954, s. 27B
Criminal Law Amendment Act 1945, s. 18
Judicial Review Act 1991, s. 34
Mental Health Act 1974, ss. 26A and 46A
Penalties and Sentences Act 1992

Counsel:	Mr D. Kent for the appellant. Mr R. Hanson Q.C., with him Mr B. Thomas for the respondent.
Solicitors:	Prisoners Legal Service for the appellant. Crown Solicitor for the respondent.
Hearing Date:	20November1996

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REASONS FOR JUDGMENT - FITZGERALD P.

Judgment delivered 6 December 1996

This is an appeal from a judgment in the Trial Division on 25 July 1996 dismissing an application for judicial review of a decision of the Governor-in-Council on 25 January 1996 refusing the appellant's application for conditional release from indeterminate detention pursuant to sub-s. 18(5) of the Criminal Law Amendment Act 1945 and s. 46A of the Mental Health Act 1974. The appellant seeks orders that his appeal be allowed, that the decision of the Governor-in-Council be set aside, and that the Attorney-General tender advice to the Governor-in-Council with respect to the release of the appellant formulated according to law within a reasonable time and pay the appellant's costs.

The appellant was born on 25 January 1959, and is aged 37 years. On 24 July 1984, when he was 25, he was sentenced to be detained at Her Majesty's pleasure pursuant to s. 18 of the Criminal Law Amendment Act, after pleading guilty to 14 offences, two of attempted rape, four of sodomy, two of indecent dealing with a girl under the age of 14 years, two of abduction, and four of indecent dealing with a boy under the age of 14 years. He has served 12 years and four months' imprisonment without any indication concerning whether, and if so when, he will or might be released, and it was accepted by the Attorney-General that, had he been sentenced to a specified term of imprisonment, the likely period has now elapsed.

Under sub-s. 18(5)(b) of the Criminal Law Amendment Act, the appellant's release is prohibited "until the Governor in Council is satisfied on the report of 2 legally qualified medical practitioners that it is expedient to release [him]". The letter from the Attorney-General dated 25 January 1996, which communicated the decision not to release the appellant listed the "evidence and other material" before the Governor-in-Council, and stated "findings ... on material questions of fact" and the "Reasons for Decision".[1] The "findings ... on material questions of fact" referred to the offences of which the appellant had been convicted and the declaration made by the sentencing judge that the appellant was incapable of exercising proper control over his sexual instincts, stated that he was being treated for his lack of sexual control and described the treatment, referred to the opinions of a psychiatrist, Dr P.J. Edwards, concerning the statistical probability of re-offending by persons with the appellant's "type of sexual deprivation" and that the appellant's recent serum testosterone

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[1] See the Judicial Review Act 1991, s. 34 and the definition of "reasons" in s. 3; cf. Acts Interpretation Act 1954, s. 27B.

levels were within the normal range for post-pubertal males, and noted that Dr Edwards had recommended an increase in the appellant's medication. The "Reasons for Decision" were as follows:

> "Dr Edwards rates the likelihood of persons such as Mr Pollentine re-offending at 15% even after a treatment program is undertaken and even while the relevant person is maintained on anti-androgen medication.
>
> In making a determination on the release of Mr Pollentine regard must be had to both the rights of Mr Pollentine and the principle that society must be protected. After carefully considering the evidence detailed above it is considered that society would not be adequately protected if Mr Pollentine was released either conditionally or unconditionally at this time.
>
> Finally, I would indicate that today I have referred to the Queensland Community Corrections Board, the above material concerning Mr Pollentine. I have requested the advice of the Board:
>
> (a) Generally in respect of Mr Pollentine's case, bearing in mind the terms of s. 18 of the Criminal Law Amendment Act 1945 and s. 46A of the Mental Health Act 1974; and
>
> (b) On the basis that in the future the Governor in Council may determine to grant Mr Pollentine leave of absence under s. 46A of the Mental Health Act 1974, what terms and conditions would the Board suggest as appropriate bearing in mind the statutory and management regimes presently in place.
>
> Given that further medical reports will be prepared in respect of Mr Pollentine, I considered that the receipt of such advice from the Queensland Community Corrections Board may also be of assistance to me in any further considerations of this matter."

The appellant's grounds of appeal are that the judge below "was wrong in law" in three conclusions, namely, that:

(a) the Governor-in-Council did not apply a rule or policy without regard to the merits of the appellant's application;

(b) the Governor-in-Council's decision could have been reasonably arrived at; and

(c) the Governor-in-Council's decision did not constitute an abuse of power.

The appellant accepted that, under sub-s. 18(5)(b) of the Criminal Law Amendment Act, it is the Governor-in-Council, not the two legally qualified medical practitioners referred to in that sub-section, who was required to be satisfied that it is expedient to release the appellant, and that the Governor-in-Council is entitled to have regard to the risk of recidivism "by persons such as the Appellant", but submitted that the refusal of release solely by reference to statistical recidivism rates with respect to such persons involved the application of a rule or policy without consideration of the appellant as an individual and matters personal to him. The proposition that that has occurred, which provides the cornerstone of the appellant's case, is said to follow from the refusal of the appellant's application by the Governor-in-Council despite expert reports "consistently favouring [his] conditional release", the terms of the "findings ... on material questions of fact", and the absence there and in the "Reasons for Decision" of any indication that conditions for the appellant's release were considered.

Apart from the legal impermissibility otherwise of reliance solely upon a rule or policy without consideration of his particular circumstances, the appellant submitted that a decision solely by reference to statistical recidivism rates in circumstances such as the present was totally unreasonable because the question whether he is likely to re-offend was not considered.

Such a decision was also said to be not only unreasonable but unfair, and given the weight of material supporting conditional release, an abuse of power.

Under s. 18 of the Criminal Law Amendment Act, examination has been and is required at

least once every three months by a qualified medical practitioner appointed by the Director of Mental Health who reports to the Director-General, and there were numerous medical reports in the "evidence and other material" before the Governor-in-Council. The appellant relied upon these reports,[2] which, it was submitted, demonstrated his improvement and suitability for managed release, and his participation, and apparently satisfactory performance, in a year-long Sexual Offenders' Treatment Program. He has also voluntarily been taking anti-androgen medication for some years, which Dr Edwards considered has brought his testosterone level within the normal range for post-pubertal males. The Trial Division Judge said that, "[s]o far as the material reveals, the [appellant] has continued with recommended programs and treatments and will abide any conditions upon which he might be released". It seems that that statement needs some qualification, in that the appellant refused to take part in a follow-up program to the Sexual Offenders' Treatment Program.

His Honour also stated:

> "In recent times, the reports pursuant to s. 18 of the *Criminal Law Amendment Act* have suggested that the applicant should be considered for release, although the opinions are qualified in varying degrees. The reports are not uniform in the evaluation of, or the weight given to, various aspects of the [appellant's] behaviour and condition. This apparently reflects differences in accounts given by the [appellant], of behaviour observed, and in the evaluation (in terms of the exercise of professional judgment) of various considerations identified."

Counsel for the Attorney-General informed the Court in their written outline of argument that, according to the reports, inconsistencies in the appellant's accounts relate to the number of his victims, his age when he first fantasised about sexually molesting children, and whether

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[2] Especially reports dated 18 September and 17 October 1995 from psychiatrists, Dr C.R. Wareing and Dr J.G. Reddan, which are referred to further below.

he had been the victim of sexual abuse by an older girl and an older man when he was a child. Reference has been made above to Dr Wareing's report dated 18 September and Dr Reddan's report dated 17 October 1995. Dr Wareing considered that it would be appropriate for the appellant to be given conditional release for a trial period with mandatory psychiatric and psychological treatment and periodic reviews of the conditions, and set out a "Provisional Management Plan". The appellant also emphasised the opinion expressed in the final paragraph of Dr Reddan's report, which was in the following terms:

> "It is my opinion that there have been some changes in Mr Pollentine's psychological functioning since I last saw him in 1989. As previously reported he has manifested behaviour and thinking patterns consistent with two paraphilias namely paedophilia and sadism. He has some antisocial traits in his personality however on this examination he appeared to have displayed some maturing of his personality in that I believe he was more honest about his previous deviant sexual interests and the likely problems he will experience in any return to the community. There are other matters that have changed over the years as well. He is now on the drug Androcur and this drug is quite effective in reducing sexual fantasy and the ability to enact or act upon such fantasies. I do not know whether he has the degree of family support that he claims and this would need to be investigated prior to any release plan being instituted. But if he does have family support this would suggest a lowered risk of recidivism. Although no guarantees that he will not offend again can be given, the chances of him offending are low if he remains on Androcur. It is my view that his behaviour in prison and the changes that he has made would justify an attempt to rehabilitate him into the community. It is my view that the best options for the future would be continued management under a courts' authority by the Queensland Corrective Services Commission. The supervision of his Androcur could be done through the City Forensic Mental Health Clinic and he would benefit from supervision by an appropriate Senior Community Corrections Officer with a clear framework in place for such supervision. In view of his concerns which I think are entirely realistic about his degree of institutionalisation, I would recommend that his return to the community be a graduated process."

It was pointed out that the "findings ... on material questions of fact" made no mention of Dr Wareing's recommendation or Dr Reddan's favourable comments, and that there was no reference in either the "findings ... on material questions of fact" or the "Reasons for Decision" to conditions on which the appellant's release would or might be appropriate. It

was argued that, in the circumstances, the statement in the "Reasons for Decision" that "the evidence detailed above 'had been considered' carefully" could not be supported and should not be accepted.

It is unnecessary in the present case to discuss at length the nature of the Governor-in-Council's function under sub-s. 18(5)(b) of the Criminal Law Amendment Act, or whether, as the Attorney-General submitted, it might be considered "expedient" not to release the appellant even if he was "fit" for release: see sub-s. 18(6A)(b) of the Act. Expediency is materially related not to the decision-maker's or advice-giver's personal or party political interests but to the public interest, material aspects of which can be seen in the Preamble and Governing Principles stated in the Penalties and Sentences Act 1992. In my opinion, when a decision is made under sub-s. 18(5)(b) of the Criminal Law Amendment Act and, where appropriate, s. 46A of the Mental Health Act, it is necessary to take into account not only the applicant's claim to liberty, whether conditional or unconditional, but also factors which bear upon community safety and the risk to potential victims. It will be legitimate to bear in mind the number, nature and seriousness of the offences which an applicant has committed and might again commit, the class of likely victims - for example, the appellant's crime involved children - the conditions which are or might be required - perhaps ongoing medical treatment necessitating the applicant's cooperation - and their practicality, and even the uncertainties involved in the science of psychiatry and any forecast concerning an individual's likely future behaviour, especially if there are differences in the expert opinions available. The Attorney-General submitted that it is also permissible to take into account likely, or perhaps even possible, community reaction, and reference was made to In re Findlay [1985] A.C. 318, South Australia v. O'Shea (1987) 163 C.L.R. 378, and Mott v. Queensland

Community Corrections Board [1995] 2 Qd.R. 261. However, consideration of community reaction could only be legitimate to the extent that anticipated adverse community reaction was seen to have a rational basis; for example, justifiable community concern at the risk presented by the release of an offender or if the release might reasonably diminish public confidence in the criminal justice system. There might, and perhaps frequently will be, other matters which may legitimately be considered, and it is unnecessary and undesirable to attempt an exhaustive list.

Although the statistical rate of recidivism could not properly be the only matter considered, it is unobjectionable that it should be placed at the forefront of deliberations for the purpose of any decision under sub-s. 18(5)(b) of the Criminal Law Amendment Act, or that the Governor-in-Council should look to be satisfied by other material that, despite the statistical risk, release (conditional or otherwise) would in all the circumstances be "expedient". It does not follow that it would be routinely appropriate to refuse release despite the period of imprisonment served unless a "nil risk" was established; such a test might deprive the relevant portions of the statutory schemes of the Criminal Law Amendment Act and the Mental Health Act of any practical operation. Conversely, it might not be "expedient" to release an offender such as the appellant unless the risk of re-offending is very small. It is unnecessary to discuss these issues further on this occasion.

In the present case, I consider that neither the decision nor the reasons for decision reveal error. The desirability of adequate reasons, and the differences of possible opinions concerning what is adequate can be seen in many cases, including the decision of this Court in Cypressvale Pty Ltd v. Retail Shop Leases Tribunal (Appeal No. 158 of 1994, unreported, 19 May 1995), but there is no justification for reading "reasons" such as those of the

Governor-in-Council "minutely and finely with an eye keenly attuned to the perception of error": Politis v. Federal Commissioner of Taxation (1988) 16 A.L.D. 707, 708; Minister for Immigration & Ethnic Affairs v. Wu Shan Liang (1996) 70 A.L.J.R. 568, 575; Brown v. The Black Community Housing Service (Qld.) Ltd (Nos. 170, 174 and 175 of 1995, White J., 15 July 1996). The "findings ... on material questions of fact" could have been stated more comprehensively, with further reference included to the matters relied on by the appellant, including any rejection of matters favourable to him which were not accepted. However, on a fair reading, the reasons include not only the "findings" stated in the "findings ... on material questions of fact" but a factual conclusion, in the "Reasons for Decision", that "society would not be adequately protected if Mr Pollentine was released either conditionally or unconditionally at this time". That conclusion follows not only from the risk of recidivism according to Dr Edwards, but also, it is said in the Attorney-General's letter, from a careful consideration of the "evidence detailed above", i.e. listed in the "evidence and other material", an assertion which is supported by the indication that additional information is being sought to enable a further opportunity for the appellant's release to be considered.

It follows, in my opinion, that, contrary to the appellant's argument, his particular claim to release, including matters personal to him and other factors favouring the grant of his application, were considered. Once this point is reached, his appeal must fail.

The appeal should be dismissed, but there is no purpose in an order for costs.

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REASONS FOR JUDGMENT - THOMAS J

Judgment delivered 6 December 1996

I agree with the reasons of the President. I wish to add comments on two matters.

1. Information before the Governor-in-Council showed that there was a statistical risk of fifteen percent that such an offender might reoffend. It was submitted that reliance upon this factor demonstrates that the Governor-in-Council "blindly" applied that factor as a policy, and that on the application of such a policy, no offender will ever be released. There is however no reason to think that this is what happened. It is difficult to see the statistical factor as anything other than a highly relevant consideration.

It was further submitted that upon the conditions proposed, the Governor-in-Council was bound to grant release. The proposed conditions were:

"1. To reside at 20 Burke Street, Wynnum with his twin sister Ms Susan Pollentine, and her defacto.

2. That a telephone be installed at that address.

3. That Mr Pollentine refrain from consumption of socially unreasonable quantities of alcohol.

4. That Mr Pollentine continues to receive Cyprotosterone Acetate (Androcur) and necessary biochemical investigations.

5. That Mr Pollentine be visited weekly for two years and then subsequently as relevant to his condition but not less than monthly.

6. That followup be for many years and that he should not be discharged from Community Forensic Mental Health Services oversight and care without the express recommendation of the treating psychiatrist.

7. That as he requests, he have leave of absence to adjust to community life which should take place during the week so he can be visited by Community Forensic Mental Health Services.

8. That social and work rehabilitation be undertaken to find him gainful employment.

9. That he should not possess pornographic material except as vetted by Community Forensic Mental Health Services.

10. That there be a regular report on progress and any changes in management provided to the Director of Forensic Psychiatry, including a risk management statement and Individual Programme Plan.

11. That a police liaison officer be designated at Queensland State Headquarters, Roma Street, so that should there be a relapse of behaviour or refusal to cooperate with conditions of release, that he may be returned to custody or if missing sought as a priority. This is essential for the public credibility of his community management.

12. That his relationship with his father be closely monitored.

13. That Queensland's Mental Health Services agree to provide the infrastructure necessary to implement these recommendations, with the availability of secure inpatient, open inpatient and community management services as they are clinically deemed to be necessary by the treating psychiatrist who must also approve any subsequent changes in his management plan.

It is suggested that he sign an agreement to these conditions which should be countersigned by his twin sister and the responsible psychiatrist at Community Forensic Mental Health Services"

Such conditions are not in my view necessarily of such a protective character that they remove any possible reasonable objection to the granting of release at this stage.

The fact that the Governor-in-Council referred the relevant material to the Community Corrections Board, seeking advice as to terms and conditions that the Board might suggest as appropriate ones, and the indication that such material may be of assistance in further consideration of the matter, does not suggest a closed door approach, and in my view tends to negate the submission that this was a blind policy decision.

2. There remains however a matter of concern. Since 1989, when the former regulatory system for the release of persons detained under s.18 of the *Criminal Law Amendment Act* 1945 was repealed, there has been no regulatory system in force to enable a regime to be enforced upon the release of such persons. If a person who is released on conditions breaches a condition there is no existing regulation that authorises revocation of the release, or a warrant of apprehension. There are simply no relevant regulations either under the *Corrective Services Act* or under the *Mental Health Act* dealing with the control of such persons after release. This unsatisfactory position has now existed for seven years. The task is surely not particularly difficult. Even the reenactment of the old prisons regulations would be better than nothing. Two years ago

in *Pollentine v. Attorney-General* [1995] 2 Qd.R. 412, 418-421, I drew attention to this deficit, but nothing has been done.

The absence of a proper regime is a factor capable of compromising decisions by the Governor-in-Council in these matters. It might be seen as a factor adding to the very uncertainty upon which the decision to refuse release is based. To rely, directly or indirectly, upon its own failure to provide regulations as a ground for refusing release would of course be a ground for setting aside a decision. While this position remains, courts will need to look very closely at such decisions.

The present case again draws attention to what was described two years ago as "the urgent need of a system of regulations for the prescription of standard terms and conditions under s.26A of the *Mental Health Act* to cover the apprehension and return to detention of persons for breach of conditions, and to permit a determination of the question whether a condition has been breached".3

3 *Pollentine v. Attorney-General* above, p 421.

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REASONS FOR JUDGMENT - WHITE J.

Judgment delivered 6 December 1996

I have read the draft reasons of the President and Thomas J. and agree, for the reasons expressed by them, that the appeal ought to be dismissed.

I also agree with the concerns expressed by Thomas J. that there is an urgent need for a regulatory system to be established to govern the apprehension and return to detention of persons detained under section 18 of the Criminal Law Amendment Act 1945 and who have breached a condition subject to which they have been released.

I agree that the absence of such a regime has the potential to compromise a decision by the Governor-in-Council in these matters.