SUPREME COURT OF QUEENSLAND

CITATION:	*Dodge v Attorney-General for the State of Queensland* [2012] QCA 280
PARTIES:	**MARTIN FRANCIS DODGE** (appellant) **v** **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (respondent)
FILE NO/S:	Appeal No 8627 of 2012 SC No 6735 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 October 2012
DELIVERED AT:	Brisbane
HEARING DATE:	10 October 2012
JUDGES:	Muir and Gotterson JJA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal be allowed.** **2. The orders made on 12 September 2012 be set aside.** **3. The respondent's application filed on 30 July 2012 be dismissed.**
CATCHWORDS:	STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – PARTICULAR WORDS AND PHRASES – GENERALLY – where appellant the subject of an order made under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 ('the Act') – where Act allows Attorney-General to apply for an order in relation to a "prisoner" – where "prisoner" defined as "a prisoner … serving a period of imprisonment for a serious sexual offence …" – where "serious sexual offence" defined to include "an offence of a sexual nature … against children" – where appellant convicted of offence of using an electronic communication with intent to expose a person he believed was under the age of 16 years to indecent matter – where that person was a police officer – where no actual child involved in the offence – whether offence was committed "against children" – whether offence was a "serious sexual offence" – whether appellant, at relevant times, was a "prisoner" within the meaning of s 5(6) of the Act

Acts Interpretation Act 1954 (Qld), s 32C(b)
Corrective Services Act 2006 (Qld), schedule 4
Criminal Code (Qld), s 218A(1)(b)
Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), division 3, s 3, s 5, s 8, s 13, schedule

Al-Kateb v Godwin (2004) 219 CLR 562; [2004] HCA 37, cited
Attorney-General for the State of Queensland v Phineasa [2012] QCA 184, considered
Attorney-General for the State of Queensland v SBD [2010] QSC 104, cited
Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri (2003) 126 FCR 54; [2003] FCAFC 70, cited
Plaintiff S157/2002 v The Commonwealth (2003) 211 CLR 476; [2003] HCA 2, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, considered
R v McGrath [2006]2 Qd R 58; [2005] QCA 463, distinguished
Williams v The Queen (1986) 161 CLR 278; [1986] HCA 88, cited
Yeo v Attorney-General for the State of Queensland [2012] 1 Qd R 276; [2011] QCA 170, considered

COUNSEL: J J Allen for the appellant
P J Davis SC, with J M Horton, for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Crown Law for the respondent

[1] **MUIR JA**: I agree that the appeal should be allowed, the order made on 12 September 2012 be set aside and the originating application filed on 30 July 2012 be dismissed for the reasons given by Atkinson J.

[2] **GOTTERSON JA**: I agree with the orders proposed by Atkinson J and with the reasons given by her Honour.

[3] **ATKINSON J:** On 12 September 2012, a Supreme Court Judge made orders with regard to the appellant, Martin Dodge, under s 8 of *Dangerous Prisoners (Sexual Offenders) Act* 2003 ("DPSOA"). Section 8 provides:

> "**8 Preliminary hearing**
>
> (1) If the court is satisfied there are reasonable grounds for believing the **prisoner** is a serious danger to the community in the absence of a division 3 order, the court must set a date for the hearing of the application for a division 3 order.
>
> (2) If the court is satisfied as required under subsection (1), it may make—

> (a) an order that the prisoner undergo examinations by 2 psychiatrists named by the court who are to prepare independent reports; and
>
> (b) if the court is satisfied the application may not be finally decided until after the prisoner's release day—
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> (i) an order that the prisoner's release from custody be supervised; or
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> (ii) an order that the prisoner be detained in custody for the period stated in the order.
>
> *Note—*
>
> If the court makes an order under subsection (2)(b)(i), the order must contain the requirements for a prisoner stated in section 16(1)." (emphasis added)

[4] Orders were made by the court pursuant to ss 8(1) and 8(2)(a), that the application for a final order under Division 3 of the DPSOA be set for hearing on a specified date and that the appellant be examined by two named psychiatrists who were to provide independent reports to the Court.

[5] The issue on this appeal is whether or not the appellant falls within the definition of the word "prisoner" as found in the DPSOA. If the appellant does not fall within the definition of "prisoner" then no orders under the DPSOA can properly be made against him.

[6] The definition of "prisoner" is found in the Schedule of the DPOSA where prisoner is defined to mean a prisoner within the meaning of the *Corrective Services Act* 2006.[1] However, the Attorney-General may only apply for orders under the DPSOA in relation to certain types of prisoners. Those prisoners are defined in s 5(6) of the DPSOA where "prisoner" is further restricted to mean "a prisoner detained in custody who is serving a period of imprisonment for a serious sexual offence, or serving a period of imprisonment that includes a term of imprisonment for a serious sexual offence …".

[7] "Serious sexual offence" is in turn defined in the Schedule to mean:

> "an offence of a sexual nature, whether committed in Queensland or outside Queensland —
>
> (a) involving violence; or
>
> (b) against children."

[8] There is no suggestion that the offence committed by the appellant involved violence. The orders were made because the learned primary judge was satisfied that the offence committed by the appellant was committed "against children".

[9] The facts relied upon to constitute that offence were set out in the decision of the primary judge. On 6 January 2009, a police officer from Taskforce Argos pretended to be a 14 year old boy and began chatting to the appellant online. During the

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1 See *Corrective Services Act* 2006 (Qld) Schedule 4.

course of the conversation, the appellant discussed details of oral sex and masturbation, indicating that it was "really good when someone else is doing it for you." This behaviour by the appellant constituted an offence under s 218A(1)(b) of the *Criminal Code*. No actual child was involved in the offence.

Appellant's submissions

[10] The appellant submitted that whether any particular offence prescribed by the *Criminal Code* is a "serious sexual offence" cannot always be determined merely by reference to the elements of the offence. When considering an offence against s 218A, consideration must be given to whether or not the offence was committed against a child or, on the other hand, did not involve any child in its commission.

[11] It was submitted that in construing the definition of "serious sexual offence" it is presumed that "in the absence of unmistakable and unambiguous language, the legislature has not intended to interfere with basic rights, freedoms or immunities."[2]

[12] By virtue of s 32C(b) of the *Acts Interpretation Act* 1954 the plural term, "children", in the definition of "serious sexual offence" includes the singular term, "child". A consideration of the application of the definition to count 3 required consideration as to whether or not such offending was "against" a child.

[13] A belief that a state of things exists does not, it was submitted, equate to the fact that the state of things exists. The appellant's belief that he was communicating with a child did not alter the reality that he was not. He did not, in fact, commit an offence against a child. Stretching the definition of "serious sexual offence" to encompass such conduct is contrary to the strict approach to construction required of legislation such as the DPSOA.[3]

Respondent's submissions

[14] The respondent submitted that notwithstanding the fact that the offence committed by the respondent was not actually committed against any child, it should nevertheless be considered an offence against children for the purposes of the DPSOA. The gravamen of s 218A of the *Criminal Code* is the intention to expose children to indecent matter by use of the internet and this offence is committed whether or not the person so exposed is in fact a child. It was submitted that s 218A of the *Criminal Code* makes it an offence for a person to use the internet to find and corrupt children. An offence of using the internet to corrupt children must be therefore an offence against children.

[15] In oral submissions the respondent conceded that this court's decision in *R v McGrath*,[4] which was heavily relied upon in his submissions to the primary judge, was about the relationship between s 218A of the *Criminal Code* and s 9 of the *Penalties and Sentences Act* and was construing different wording in different legislation for a different purpose and could only be relied upon as supporting his submissions about the elements of the offence.

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2 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384, fn 56; see also *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 and *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476, 493, both cited in *Attorney-General for the State of Queensland v Phineasa* [2012] QCA 184, [40]-[41].

3 *A-G (Qld) v SBD* [2010] QSC 104 at [69].

4 [2005] QCA 463.

Discussion

[16] The concession by the respondent as to the limited utility of the decision of *R v McGrath* was correctly made. That case involved a consideration of the phrase "in relation to" in the *Penalties and Sentences Act* which is a phrase of wide import and in its legislative context was intended to capture behaviour criminalised in s 218A of the *Criminal Code* whether or not a person under 16 was exposed to indecent matter by means of electronic communication.

[17] This matter requires a consideration of the precise words used in the DPSOA: i.e., an offence of a sexual nature committed against children.

[18] The offence committed by the appellant which was relied upon to found the jurisdiction to make an order under the DPSOA was an offence under s 218A(1)(b) of the *Criminal Code*. Section 218A(1)(b) provides that any adult who uses electronic communication with intent to expose, without legitimate reason, a person under the age of 16 years, or **a person the adult believes is under the age of 16 years**, to any indecent matter, commits a crime. The crime may be committed against a child or children but, as can be seen from the emphasised words, this crime may also be committed against an adult whom the offender believes to be a child. It is accordingly a question of fact in the particular case whether the crime has been committed against a child or children.

[19] In this case, the appellant was sentenced on his own plea of guilty to 18 months imprisonment for his offence against s 218A(1)(b). It was count 3 on the indictment. It was conceded that the other two counts could not form the basis for an application under DPSOA. Count 3 does not allege that the offence was committed against a child. It was "that on the sixth day of January, 2009 at Brisbane in the State of Queensland, [he] used an electronic communication with intent to expose a person [he] believed was under the age of 16 years to indecent matter." It is apparent that he was not charged with using an electronic communication with intent to expose a person actually under the age of 16 years to indecent matter.

[20] He was not charged with committing an offence against a child or children. The facts on which he was sentenced when he pleaded guilty showed that he had not committed an offence against a child or children. Only by an extraordinarily wide reading of the definition of "serious sexual offence" could he be thought to fall within the definition of prisoner within the meaning which it is ascribed for the DPSOA, i.e., a person who is serving a term of imprisonment for an offence of a sexual nature committed against children. On the plain and unambiguous meaning of the DPSOA, his offence does not place him within that definition.

[21] There is no warrant for extending the meaning of "prisoner" within the DPSOA to include a person such as the appellant. The right to personal liberty is the most basic and fundamental of human rights recognised by the common law.[5] As a result, the rules of statutory construction require courts to give effect to a presumption that fundamental rights have not been abolished or curtailed unless the plain words of a statute specifically do so.

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[5] *Yeo v Attorney-General for the State of Queensland* [2011] QCA 170 at [54] per McMurdo P; *Williams v The Queen* (1986) 161 CLR 278 at 292 per Mason and Brennan JJ; *MIMIA v Al Masri* [2003] FCAFC 70 at [86]-[95].

[22] As Gleeson CJ held in *Plaintiff S157/2002 v The Commonwealth*[6] cited by McMurdo P in *Yeo v Attorney-General for the State of Queensland* and Muir JA in *Attorney-General for the State of Queensland v Phineasa*:[7]

> "courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakeable and unambiguous language. General words will rarely be sufficient for that purpose. What courts will look for is a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment."

[23] In this case, the meaning of the statute is plain and, for the reasons given, it should not be given an extended meaning. The appellant does not fall within the definition of "prisoner" in s 5(6) of the DPSOA. No orders could or should have been made under s 8 of the DPSOA. The appeal should be allowed. The order made on 12 September 2012 should be set aside. The application filed on 30 July 2012 should be dismissed.

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6 (2003) 211 CLR 476 at 492.

7 [2012] QCA 184 at [41].