# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Attorney-General (Qld) v GBE* [2024] QCA 6 |
| PARTIES: | **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND**<br>(appellant)<br>**v**<br>**GBE**<br>(respondent) |
| FILE NO/S: | Appeal No 10894 of 2022<br>SC No 6114 of 2020 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal |
| ORIGINATING COURT: | Supreme Court at Brisbane – (2022) 11 QR 462 (Hindman J) |
| DELIVERED ON: | 2 February 2024 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 17 October 2023 |
| JUDGES: | Mullins P, Bond JA and Martin SJA |
| ORDERS: | **1. Appeal allowed.**<br>**2. Set aside orders 1 and 2 made by the primary judge on 11 August 2022.**<br>**3. Remit the originating application filed on 8 June 2020 to the Trial Division for rehearing.** |
| CATCHWORDS: | CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – GENERALLY – where the primary judge made a supervision order against the respondent under division 3 of part 2 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) (Act) for a period of five years to take effect on the day of the respondent's release on parole – where the application of the division 3 order was heard after the respondent had been fully discharged from the period of imprisonment that included the sentence for a serious sexual assault but while the respondent was subject to another period of imprisonment for general offences – where the primary judge held that the definition of "release day" in schedule 1 to the Act did not apply to s 15(a) of the Act – where using the definition of "release day" would have the effect of the supervision order commencing the day after the end of the respondent's period of |

imprisonment for the general offences – where the primary judge construed "release day" in s 15 of the Act on its ordinary meaning as the day the respondent is released on parole – whether context required "release day" in s 15(a) of the Act not to be given its defined meaning in schedule 1 to the Act

*Acts Interpretation Act 1954* (Qld), s 32A
*Corrective Services Act 2006* (Qld), s 200, s 211, s 215
*Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), s 3, s 5, s 8, s 13, s 13A, s 14, s 15, s 22, s 23, s 24, s 43, s 51
*Penalties and Sentences Act 1992* (Qld), s 4

*Attorney-General (Qld) v Kanaveilomani* [2015] 2 Qd R 509; [2013] QCA 404, considered
*Attorney-General for Queensland v CCJ* (2019) 2 QR 543; [2019] QSC 267, cited
*Attorney-General for the State of Queensland v A* (2020) 4 QR 668; [2020] QSC 178, related
*Attorney-General for the State of Queensland v A* [2020] QSC 279, related
*Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; [2004] HCA 46, cited
*R v A2* (2019) 269 CLR 507; [2019] HCA 35, considered

COUNSEL: G J Del Villar KC SG, with J B Rolls, for the appellant
K Prskalo KC for the respondent

SOLICITORS: G R Cooper, Crown Solicitor for the appellant
Legal Aid Queensland for the respondent

[1] **THE COURT:** On 11 August 2022 the primary judge upon being satisfied that the respondent was a serious danger to the community in the absence of an order under division 3 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) (Act) made a supervision order for a period of five years to take effect on the respondent's release from custody: *Attorney-General for State of Queensland v GBE* (2022) 11 QR 462 (the reasons). The primary judge also made a declaration that pursuant to s 15(a) of the Act, the respondent's release will occur at the end of his period of imprisonment. The primary judge held that the definition of "release day" in schedule 1 to the Act did not apply to s 15(a) of the Act. The primary judge construed "release day" in s 15 of the Act as including release on parole. The effect of this declaration, in conjunction with the primary judge's reasons, is that the period of five years for the supervision order could commence on the respondent's release on parole before the end of the period of imprisonment that the respondent was serving at the time the order was made.

[2] The appellant appeals against the declaration made pursuant to s 15(a) of the Act on the ground that the primary judge erred in holding that the definition of "release day" contained in schedule 1 to the Act did not apply to s 15(a) of the Act. The appellant also appeals against the primary judge's exercise of the discretion to make a supervision order.

**Relevant facts**

[3] The respondent was born in March 2000. On 7 November 2016, he was sentenced in the Children's Court of Queensland for several offences, including to a period of detention of four years for rape (which was a serious sexual assault for the purpose of the Act). Whilst in custody, he was convicted of various offences including riot and sexual assault and was sentenced to a further period of detention of three years. (That sexual assault was not a serious sexual offence for the purpose of the Act. Before the primary judge the parties referred to the rape as the "index offence" and that terminology will also be used in these reasons.) On 12 April 2018, the respondent was transferred from youth detention to a correctional centre. He was released on parole in December 2018 but returned to custody a few days later and his parole was cancelled on 5 September 2019.

[4] The respondent's custodial end date in respect of the offence that enabled the application for division 3 orders under the Act to be filed on 8 June 2020 was 16 June 2020. On 16 June 2020, orders were made releasing the respondent from custody subject to an interim supervision order until 28 August 2020: see *Attorney-General for the State of Queensland v A* (2020) 4 QR 668 (*Attorney-General v A [No 1]*). In that decision, Davis J determined (at [64]) that the respondent was a prisoner for the purpose of s 5 of the Act. The respondent failed an alcohol test and on 19 August 2020 a warrant under s 20 of the Act was obtained and subsequently executed. On 21 August 2020, the respondent was ordered to be detained pending resolution of the contravention application filed on that date pursuant to s 22 of the Act. On 4 September 2020 the Court ordered that the respondent be released from custody subject to the requirements of the interim supervision order to which he had been previously subject: see *Attorney-General for the State of Queensland v A* [2020] QSC 279. The respondent did not comply with that order in that he failed an alcohol test and removed his electronic monitoring device on 28 October 2020. He also committed numerous non-sexual offences. On 29 October 2020 he was again arrested pursuant to a warrant under s 20 of the Act. By order made on 29 October 2020, he was detained in custody pending a final decision of the Court under s 22 of the Act. The related contravention application was filed on 6 November 2020.

[5] On 29 September 2021 the respondent pleaded guilty to the offences of wilful damage, robbery armed in company, unlawful use of a motor vehicle and dangerous operation of a motor vehicle that were all committed on 28 October 2020. He also pleaded guilty to several summary offences. He was sentenced to imprisonment that ends on 23 April 2025 (the general offending sentences). He has a parole eligibility date of 22 April 2022 but up until the date of the hearing before the primary judge no application for parole had been made as s 51 of the Act precluded such an application whilst he was the subject of the interim detention order.

**Relevant statutory provisions**

[6] The categories of prisoners in respect of whom the Attorney-General may apply for a division 3 order are specified in the definition of "prisoner" found in s 5(6) of the Act. The respondent fell within paragraph (c) of that definition which provides:

> "(c) includes a person who—
>
> (i) was serving a period of detention, in a detention centre under the *Youth Justice Act 1992*, for a serious sexual offence; and

(ii) under part 8, division 2A, subdivision 1 of that Act, has been transferred to a corrective services facility and is being held in custody in the facility; and

(iii) is liable, under section 276E of that Act, to serve a term of imprisonment for the offence equal to the period of detention the person remains liable to serve for the offence; and …"

[7] There was power pursuant to s 8(3) of the Act in the terms in which it was enacted for an interim detention order to be made, if the application for a division 3 order had not been finalised before the prisoner's period of imprisonment ended. The Act was amended in 2005 by part 11 of the *Justice and Other Legislation Amendment Act 2005* (Qld) (the 2005 Act) to give the Court under s 8 of the Act the option of also making an interim supervision order, if the Court had set the date for the hearing of the application for the division 3 order.

[8] Sections 13A, 14 and 15 of the Act provide:

"**13A Fixing of period of supervision order**

(1) If the court makes a supervision order, the order must state the period for which it is to have effect.

(2) In fixing the period, the court must not have regard to whether or not the prisoner may become the subject of—

(a) an application for a further supervision order; or

(b) a further supervision order.

(3) The period can not end before 5 years after the making of the order or the end of the prisoner's period of imprisonment, whichever is the later.

**14 Effect of continuing detention order or interim detention order**

(1) A continuing detention order has effect in accordance with its terms—

(a) on the order being made or at the end of the prisoner's period of imprisonment, whichever is the later; and

(b) until rescinded.

(2) An interim detention order has effect in accordance with its terms—

(a) on the order being made or at the end of the prisoner's period of imprisonment, whichever is the later; and

(b) for the period stated in the order, unless earlier rescinded.

**15 Effect of supervision order or interim supervision order**

> A supervision order or interim supervision order has effect in accordance with its terms—
>
> (a) on the order being made or on the prisoner's release day, whichever is the later; and
>
> (b) for the period stated in the order."

[9] Section 13A was inserted into the Act by the *Dangerous Prisoners (Sexual Offenders) and Other Legislation Amendment Act 2010* (Qld) (the 2010 Act), one of the purposes of which was to enable the Attorney-General to apply for a further supervision order for the released prisoner within the last six months of effect of the current supervision order: see s 19B of the Act. To facilitate that amendment, some of the provisions relating to division 3 orders had to be adapted, including by s 19D(1)(d) which applies to an application for a further supervision order "as if a reference in the provisions to a prisoner's release day were a reference to the day that the current order expires".

[10] The definition of "release day" was inserted into the Act by the 2005 Act and has only been amended since by updating the reference to the *Corrective Services Act 2006* (Qld) (CSA). The definition in schedule 1 to the Act is as follows:

> "***release day***, in relation to a prisoner, means the day on which the prisoner is due to be unconditionally released from lawful custody under the *Corrective Services Act 2006*."

[11] This definition of "release day" therefore incorporates into the Act for determining the prisoner's release day the regime for release of prisoners under the CSA.

[12] The term "period of imprisonment" is defined in schedule 1 to the Act as follows:

> "***period of imprisonment***—
>
> (a) generally—see the *Penalties and Sentences Act 1992*, section 4; and
>
> (b) for part 2, division 1, 3, 3A or 5—see also section 5(6)."

[13] Section 15(a) of the Act is found in division 3A of part 2.

[14] Section 4 of the *Penalties and Sentences Act 1992* (Qld) (PSA) provides:

> "***period of imprisonment*** means the unbroken duration of imprisonment that an offender is to serve for 2 or more terms of imprisonment, whether—
>
> (a) ordered to be served concurrently or cumulatively; or
>
> (b) imposed at the same time or different times;
>
> and includes a term of imprisonment."

[15] For consistency in the application of legislation that affects prisoners, it is relevant that the definition of "period of imprisonment" for the purpose of the Act is based on the definition of "period of imprisonment" in the PSA. Likewise, the definition

of "period of imprisonment" in schedule 4 to the CSA is the same definition as found in s 4 of the PSA. See *Attorney-General v A [No 1]* at [58]-[64].

[16] The definition of "period of imprisonment" that is found in s 4 of the PSA that otherwise applies to the Act is extended by the definition in s 5(6) of the Act to accommodate certain prisoners to which the definition of "period of imprisonment" in s 4 of the PSA may not apply. The respondent is an example of a prisoner caught by the extended definitions of "prisoner" and "period of imprisonment" in s 5(6), as his sexual offending was committed as a youth in respect of which he was sentenced to a period of detention and transferred to a prison on turning 18 years to complete the sentence.

[17] The definition of "period of imprisonment" that is found in s 5(6) of the Act affects the timing of the filing of the application for a division 3 order. Pursuant to s 5(2), the application must be made during the last six months of the prisoner's period of imprisonment. For the respondent, that was the period set out in paragraph (b) of the definition of "period of imprisonment" in s 5(6), namely "a term of imprisonment a person is liable to serve as mentioned in the definition *prisoner*, paragraph (c)(iii)".

[18] Division 6 of part 2 of the Act which has the heading "Return to Custody of Released Prisoner" comprises s 23 and s 24:

> "**23 Application of division**
>
> This division applies if, after being released from custody under a supervision order or interim supervision order, a released prisoner is sentenced to a term or period of imprisonment for any offence, other than an offence of a sexual nature.
>
> **24 Period in custody not counted**
>
> (1) The released prisoner's supervision order or interim supervision order is suspended for any period the released prisoner is detained in custody on remand or serving the term of imprisonment.
>
> (2) The period for which the released prisoner's supervision order or interim supervision order has effect as stated in the order is extended by any period the released prisoner is detained in custody."

[19] Subsections (1) and (2) of s 51 of the Act which deals with parole provide:

> "(1) This section applies if –
>
> (a) under section 8(1), the court has set a date for the hearing of an application for a division 3 order in relation to a prisoner and the application has not been discontinued or finally decided; or
>
> (b) a prisoner is subject to a continuing detention order or interim detention order, whether or not the order has taken effect.

> (2) The prisoner is not eligible for parole under the *Corrective Services Act 2006* or the *Penalties and Sentences Act 1992* and can not be issued a parole order under those Acts."

[20] It was the operation of s 51 of the Act that motivated the respondent to request the appellant to bring on the hearing of the application for a division 3 order that had been filed on 8 June 2020 but where the final hearing had not taken place due to the contraventions of the interim supervision order alleged to have been committed by the respondent in August and October 2020 and the imposition of the general offending sentences. The respondent was therefore seeking a supervision order before the primary judge which would enable the respondent to apply for parole in respect of the general offending sentences. To the extent that the interim detention order made in respect of the respondent on 29 October 2020 also remained operative, s 51(1)(b) and (2) of the Act also precluded the respondent from applying for parole in respect of the general offending sentences.

**The reasons**

[21] At the outset of the reasons, the primary judge made the finding (at [3]) (that was noted as being consistent with the decision in *Attorney-General (Qld) v Kanaveilomani* [2015] 2 Qd R 509 at [124]) that the respondent was a serious danger to the community in the absence of a division 3 order as at 16 June 2020 "being the date that the respondent would have otherwise been released from custody in respect of the index offence".

[22] The disputed issue before the primary judge was the date on which a supervision order would take effect, if the primary judge were satisfied that a supervision order was the appropriate order. The appellant had submitted to the primary judge that any order that was made by the primary judge would take effect from 23 April 2025 when the respondent had completed the general offending sentences and was due to be released unconditionally.

[23] Before considering the proper construction of the Act, the primary judge expressed preliminary concerns arising from the submissions made by the appellant:

> "[12] The Attorney-General does not submit that a supervision order made by me today, only having effect from 23 April 2025, would prevent the respondent from applying for and obtaining parole. No prohibition on eligibility for parole would arise from s 51 of the Act if the respondent were the subject of a final supervision order under the Act, as distinct from an interim supervision order. That would seem, therefore, to permit the possibility that parole might be granted to the respondent by the Parole Board prior to 23 April 2025, releasing the respondent into the community, but any supervision order made by me would only become operative on 23 April 2025.
>
> [13] That seems to me, on first glance, to be an extraordinary proposition. The underlying interaction of the various Acts, as can be seen, for example, in s 51 of the Act, presumes that this Court's powers under the Act trump parole and trump the respondent's rights to otherwise be released without conditions

> under the Act at the end of the index offence sentence. If the respondent is to be in the community, my initial reaction is that it must be subject to the supervision requirements that this Court imposes under the Act. Parole conditions might be supplementary to that.
>
> [14] One might also be concerned that if the Attorney-General's submissions are correct, that the Parole Board, knowing the Supreme Court has imposed a supervision order under the Act, which could only take effect at the end of the respondent's full sentence, might be hesitant to grant parole as there may be a perception that granting parole would undermine the purpose of the Court's orders under the Act."

[24] The primary judge set out the usual operation of the Act at [16]-[22] of the reasons. The primary judge noted (at [24]) that the relevant principles of statutory interpretation were set out in *R v A2* (2019) 269 CLR 507 at [32]-[37] and [148]. The primary judge also noted (at [24]) that s 32A of the *Acts Interpretation Act 1954* (Qld) (AIA) provided that definitions in or applicable to an Act apply, except so far as the context or subject matter otherwise indicates or requires.

[25] The primary judge accepted (at [25] of the reasons) that giving the words "release day" in s 15(a) of the Act their defined meaning would result in the outcome for which the Attorney-General had submitted with the consequence that any supervision order made at the date of the hearing would not take effect until 23 April 2025.

[26] The primary judge then proceeded to deal with the construction of "release day" in s 15(a) of the Act at [26]-[29]:

> "[26] However, I consider on the proper construction of the Act, in line with the principles in the High Court decision I referred to, that one of two positions is the correct position, each with the same outcome and contrary to the submissions made by the Attorney-General. Either:
>
> first,
>
> the words "prisoner's release day" in s 15(a) do not have their defined meaning and instead have their ordinary plain English meaning – what is contemplated by those words in s 15(a) of the Act is the date that the prisoner is released from prison, including, if applicable, on parole; or
>
> second,
>
> the definition of "prisoner's release day" should be construed as referring to the date that the prisoner was due to be unconditionally released from lawful custody under the *Corrective Services Act* 2006 in respect of the index offence.
>
> I prefer the first position for reasons I will explain.
>
> [27] To construe the provisions as the Attorney-General submits results in perverse outcomes inconsistent with the purpose and

> objectives of the Act. That is, because there is no prohibition on a person the subject of a final supervision order, who is otherwise eligible for parole applying for parole, it would mean that in two circumstances there is a possibility of a person applying for and obtaining parole when the Court has already ordered a final supervision order under the Act, but with the supervision order not coming into effect until a time after the person has been granted parole.

[28] The two circumstances are:

> first,
>
> where the person's original index offence sentence is not complete and a final supervision order is made, if the person then obtains parole, the supervision order will not take effect until the full sentence date for the index offence is served; or
>
> second,
>
> the situation here, which is where there is a new sentence which is not complete and a final supervision order is made, if the person then obtains parole, the supervision order will not take effect until the full sentence date of the new sentence.
>
> I would not conclude that is how the Act operates, unless the terms of the Act compel me to that conclusion, and I do not consider myself compelled to that conclusion.
>
> Here, on the first construction I prefer, I consider that the definition of "release day" does not apply in s 15 of the Act. Section 32A *Acts Interpretation Act* 1954 permits that outcome. …

[29] Here, in my view, the context and the subject matter otherwise indicates or requires that the prisoner's release date in s 15(a) of the Act means the day that the prisoner is released from custody. Reading s 15(a) in that way: avoids the impractical result mentioned above; is consistent with s 16, which contemplates that the prisoner's release from custody is to be supervised with particular conditions; and is consistent with s 51, not prohibiting a person on a final supervision order being eligible to apply for parole."

[27] The primary judge noted (at [30] of the reasons) the language difference between s 14 and s 15 of the Act and then observed:

> "Under s 14, the continuing detention order has effect at the end of the prisoner's period of imprisonment, the definition for which confirms that it is concerned with actual imprisonment."

[28] The primary judge did not explain how the definition of "period of imprisonment" which is ultimately found in s 4 of the PSA was concerned with actual imprisonment when, on its terms, it is the unbroken duration of imprisonment that a prisoner has to serve for two or more terms of imprisonment whether ordered to be

served concurrently or cumulatively or imposed at the same time or different times (and includes a term of imprisonment). The focus of the definition is on the terms of imprisonment imposed or ordered to be served.

[29] The primary judge then noted (at [30] of the reasons) that the construction which the primary judge preferred had the effect of reading "prisoner's release day" in s 15 of the Act as if it accorded with "prisoner's period of imprisonment" found in s 14 but that difference in language for the same construction did not dissuade the primary judge from the conclusion that was reached about the construction of "release day" in s 15(a). The primary judge noted (at [33]) that the difference in language was as a result of an amendment made to s 15(a) of the Act by s 9 of the 2010 Act.

[30] The primary judge dealt with that amendment at [34]-[36] of the reasons. In the Bill that was enacted subsequently as the 2010 Act, s 13A originally provided that the period of the supervision order "can not end later than 5 years after the prisoner's release day". Ultimately the 2010 Act provided for the supervision order to be for a minimum of five years "after the making of the order or the end of the prisoner's period of imprisonment, whichever is the later". The amendment made by s 9 of the 2010 Act to s 15(a) to substitute "on the prisoner's release day" for "at the end of the prisoner's period of imprisonment" proceeded, even though the same expression of "the prisoner's release day" was not maintained in s 13A, as enacted. The primary judge observed at [36] of the reasons:

> "Despite those changes in the proposed language of s 13A, the proposed change to the language of s 15 occurred, even though it did not reflect what was ultimately enacted in s 13A."

[31] The primary judge considered (at [37] of the reasons) that the difference in language between s 13A and s 15 of the Act also supported her Honour's preferred construction and "avoids what would otherwise be a curious operation of s 13A in conjunction with s 15".

**Summary of the parties' submissions**

[32] There were several aspects of the primary judge's reasons that were challenged by the appellant. First, the primary judge attributed (at [13] of the reasons) a "purpose" to the Act that was not apparent from the language of the Act and used that purpose to decide whether the defined meaning for "release day" applied to s 15(a) of the Act rather than considering the language of the provision. Secondly, the primary judge's concern expressed (at [14]) that the Parole Board might be reluctant to grant parole in respect of the general offending sentences was speculation and no basis for refusing to give effect to the defined term of "release day" in s 15(a). Thirdly, the primary judge was mistaken in attributing a "curious operation" to s 13A and s 15 as the definitions of "period of imprisonment" and "release day" in schedule 1 to the Act result in a consistent operation of both provisions. Lastly, the primary judge was in error in concluding (at [30]) that her Honour's preferred construction would read "release day" in s 15, as if it accorded with the "period of imprisonment" in s 14.

[33] The respondent embraces the primary judge's construction of s 15 of the Act. The respondent submits that the primary judge's construction is consistent with the reasoning of Morrison JA in *Kanaveilomani* at [115]-[116] and [123]-[128] and that

both s 14 and s 15 are concerned with the imposition of orders under the Act which are intended generally to take effect at the expiration of the period of imprisonment for the index offence. Morrison JA stated at [123]-[124]:

> "[123] Section 9A provides a mechanism whereby the prisoner can be detained in custody if the final hearing may occur "after the prisoner's release day". Since an application has to be made within the last six months of the prisoner's period of imprisonment, and brought on with some speed it seems clear that the reference to the prisoner's release day in s 9A(2) is to the release day in respect of the custody under the period of imprisonment referred to in s 5(6).
>
> [124] Section 13(2) defines when a prisoner is a serious danger to the community for the purposes of s 13(1). That is so if there is an unacceptable risk that the prisoner will commit a serious sexual offence if the prisoner is released from custody, or released from custody without a supervision order being made. In my opinion the reference to being "released from custody" refers to the custody resulting from the period of imprisonment referred to in s 5(6) of the Act, as extended by any interim custody the product of an order under s 9A(2)(b), that is to say the period of imprisonment which relates to the serious sexual offence, or that which includes a term of imprisonment for a serious sexual offence, as extended by any detention order (pending the hearing of the application) under s 9A(2)(b). A term of imprisonment for another offence which does not form part of the "period of imprisonment" for the purposes of s 5(6) of the Act does not result in custody for the purposes of s 13(2)." (*footnotes omitted*)

[34] The respondent accepts that it is a complication that he is serving the general offending sentences that he submits are not regulated by the Act. The respondent submits that the construction given to s 15(a) of the Act in those circumstances should be aligned with the purpose of the Act in relation to the respondent's sexual offending and that the supervision order should commence when he is released from custody in respect of the general offending sentences, even though that will be release on parole. The respondent submits that the primary judge's construction of s 15(a) is consistent with the effect that s 23 and s 24 have in relation to a prisoner's return to custody in relation to other offending whilst on a supervision order, where the period of the supervision order is extended by the period for which the released prisoner was held in custody for the other offending.

**Should "release day" in s 15(a) of the Act be given its defined meaning?**

[35] The primary judge's construction of s 15(a) of the Act turned on the primary judge's conclusion that the defined meaning for "release day" did not apply to s 15(a) of the Act.

[36] As the objects of the Act set out in s 3 show, the Act sets up a regime to provide for the continued detention in custody or supervised release of a particular class of prisoner to ensure adequate protection of the community and to provide continuing control, care or treatment of a particular class of prisoner to facilitate their

rehabilitation. As observed by Callinan and Heydon JJ in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [217], "[i]ts proper characterisation is as a protective rather than a punitive enactment". The condition precedent to the filing of the application to invoke the regime is that the prisoner is serving a period of imprisonment that includes a term of imprisonment for a serious sexual offence as defined in schedule 1 to the Act. As indicated above, the definition of "period of imprisonment" in s 5(6) of the Act is critical to the commencement of the application for a division 3 order.

[37] There is a different regime that applies to release of prisoners on parole orders before the period of imprisonment has ended. This is regulated by division 3 of part 9 of the PSA and chapter 5 of the CSA. A parole order results in the release of the prisoner into the community under supervision of a community corrections officer and enables the prisoner to complete the period of imprisonment under supervision in the community. Provided the parole order is not suspended or cancelled, the time during which a prisoner is released on parole counts as time served under the period of imprisonment: see s 200, s 211 and s 215 of the CSA.

[38] The release of the respondent on the interim supervision order after the expiry of the period of imprisonment on 16 June 2020 provided the opportunity for the respondent's general offending in the community for which he was subsequently sentenced and resulted in a new period of imprisonment under the PSA for the respondent after his return to custody on remand for that further offending.

[39] As the respondent's circumstances show, there can be an intersection between the operation of the Act and the operation of the parole provisions of the CSA. The Legislature has addressed that intersection expressly in s 51 of the Act and also in the definition of "prisoner" in schedule 4 to the CSA. That definition of prisoner includes an all-encompassing definition that covers "a person who is in the chief executive's custody, including a person who is released on parole". The definition then excludes the application of some provisions of the CSA from certain persons who fall within the broad definition of prisoner. It is by that device in the definition of "prisoner" that certain provisions of the CSA are excluded from application to a "supervised dangerous prisoner (sexual offender)" and chapter 5 is expressly stated as not applying to a "detained dangerous prisoner (sexual offender)" who is defined in schedule 4 as meaning "a prisoner subject to a continuing detention order or interim detention order" under the Act.

[40] The observations made by Morrison JA in *Kanaveilomani* must be understood in the context of the facts, and what was decided, in that case. When the Attorney-General made the application for a division 3 order against Mr Kanaveilomani he was serving sentences for two counts of rape that were due to expire on 19 November 2010. The application for a division 3 order was made within the requisite period of six months before the expiry of those sentences. Mr Kanaveilomani had earlier in 2008 been released on parole but had been returned to custody in 2009 after he had been charged with non-sexual offences. He was remanded in custody for those offences, so that when the sentences for the rapes expired on 19 November 2010, his subsequent sentences for the non-sexual offences were backdated to commence on 20 November 2010. It was held by all members of the Court (Margaret McMurdo P at [15]-[16], Morrison JA at [68]-[72] and Philippides J at [167]) that meant that the period of imprisonment under the definition in s 4 of the PSA that included the terms of imprisonment for the rape

offences then became the period of imprisonment that also incorporated the sentences for the non-sexual offences that were imposed after Mr Kanaveilomani had completed the sentences for the rapes, as the duration of the imprisonment was unbroken. His new full time discharge date was 20 November 2023. At first instance, the primary judge had dismissed the application for a division 3 order on the basis that, it was so far into the future when the sentences would expire, the Attorney-General had not discharged the onus of showing that one or other of the orders specified in s 13(5) of the Act should be made. On appeal, the Court held (at [16], [70] and [169]) that, in terms of s 5(6) of the Act, the original application for a division 3 order had become otiose, as the time for making the application was now six months prior to the expiry of the period of imprisonment on 20 November 2023. It was neither necessary nor relevant for the Court to consider the operation of s 15(a) of the Act.

[41] *Kanaveilomani* illustrates that the period of imprisonment applicable to a prisoner for the purposes of the Act may alter as events transpire after an application was made for a division 3 order. To the extent that other observations were made by the members of the Court in *Kanaveilomani* about the operation of the Act, they were not necessary for the decision in that case that turned on the determination of the requisite period of imprisonment for the purpose of the Act at the time the application for the division 3 order was heard which had been extended from the period of imprisonment that applied to Mr Kanaveilomani when the application for the division 3 order was made. The observations otherwise made in the course of the judgments, including those at [123]-[124], were made in the context of the operation of the Act in the circumstances that applied to Mr Kanaveilomani and, although expressed in general terms, are not necessarily apposite to the variety of circumstances that may arise, when an application for a division 3 order is not finalised before a prisoner has committed further offences that may not necessarily have the same consequence for the application of the definition of "period of imprisonment" as happened in *Kanaveilomani*.

[42] Where an application for a division 3 order has not been finalised, the regime under the Act continues to apply to a prisoner even after the prisoner has completed the period of imprisonment that includes the relevant sexual offence that triggered the commencement of the application for a division 3 order. See the discussion in *Attorney-General for Queensland v CCJ* (2019) 2 QR 543 at [40]-[44]. The respondent's circumstances also show that a prisoner may have been completely discharged from the period of imprisonment that included the term of imprisonment for the relevant serious sexual offence before the application for a division 3 order had been finalised under the Act.

[43] Consistent with *A2* (at [32]-[37]), the approach to the construction of s 15(a) of the Act must start with the text and consider the context of the provision and also the purpose of the provision and, if appropriate, the purpose of the Act. It is relevant that s 15(a) uses a defined term in the Act.

[44] Section 13A of the Act prescribes that when the Court makes a supervision order, the order must state the period for which it is to have effect. Section 13A also directs the matters to which the Court must not have regard in fixing the period and specifies the minimum period of the supervision order as five years after the making of the order or the end of the prisoner's period of imprisonment, whichever is the later. Section 14 of the Act then deals with the effect of a continuing detention

order or interim detention order and that both take effect "on the order being made or at the end of the prisoner's period of imprisonment, whichever is the later". It deals with the timing of the commencement of the continuing detention order or interim detention order. Similarly, s 15 deals with the effect of a supervision order or interim supervision order and, relevantly, that it has effect "on the order being made or on the prisoner's release day, whichever is the later" and for the period stated in the order. Section 15 of the Act regulates the timing of the commencement of the supervision order or interim supervision order.

[45] In considering the possible constructions of s 15(a) of the Act, the primary judge identified two constructions (at [26] of the reasons) but rejected a third construction proposed by the appellant to construe s 15(a) by applying the definition of "release day" in schedule 1 to the Act on the basis that (at [27]) it resulted "in perverse outcomes inconsistent with the purpose and objectives of the Act". This third construction for "release day" meant the respondent's release day was the day when the period of imprisonment under which he was then serving the general offending sentences was due to end by his being fully (and unconditionally) discharged from the period of imprisonment.

[46] It follows from chapter 5 of the CSA the effect of which is made relevant by the definition of "release day" that release on parole is not an unconditional release of a prisoner.

[47] When the different purposes of the respective regimes for protection of the community under the Act or release of prisoners under supervision on parole during the remainder of their period of imprisonment are considered, it does not follow that the outcomes set out at [28] of the reasons were "perverse". Dealing with the first circumstance set out in [28] of the reasons, if the period of imprisonment that covered the sentence for the serious sexual assault that was the trigger for the application for a division 3 order had not been completely served, before a supervision order were made, s 51 of the Act would not preclude an application for parole being made after the application for a division 3 order had been finalised by the making of the supervision order. No doubt the Parole Board would take into account that a supervision order under the Act would take effect at the end of the prisoner's period of imprisonment in considering whether and, if so, on what terms, parole would be granted in the meantime. The second circumstance referred to in [28] of the reasons accords with the respondent's circumstances and depends on the application of the Act in accordance with its terms.

[48] To the extent that the primary judge was influenced by the view her Honour expressed (at [13] of the reasons) that the powers under the Act "trump parole", such a general statement was unhelpful in applying the respective provisions under the Act and the CSA to the variety of circumstances that may apply to a prisoner in respect of whom an application for a division 3 order has been made but not finalised. This general statement was inconsistent with s 51 of the Act that dealt with parole and did not exclude parole for a prisoner who would be subject to a supervision order that would take effect at the conclusion of the prisoner's period of imprisonment. Apart from reliance on this general statement, the primary judge did not explain why the context of s 15(a) did not permit the use of the definition of "release day" in construing s 15(a).

[49] As submitted by the appellant, the primary judge was in error (at [30] of the reasons) by considering that the definition of "period of imprisonment" for the purpose of the Act was concerned with "actual imprisonment". The period of imprisonment is the unbroken duration of imprisonment from an accumulation of the terms of imprisonment imposed on a prisoner. There is nothing in the definition in the Act which relevantly accords with the definition in the PSA (and the CSA) that reduces the period of imprisonment from what is ordered to be served or imposed to what is actually served. It is apparent from the incorporation into the Act of the definition of "period of imprisonment" found in s 4 of the PSA and that the different steps under the Act take place over a period of time, that the reference throughout the Act to "period of imprisonment" may, subsequent to the filing of the application for a division 3 order, be to a different period of imprisonment than the period of imprisonment under s 5 of the Act that was the trigger for the application for a division 3 order.

[50] The primary judge's view (at [36] of the reasons) that the difference in language between s 13A and s 15 of the Act supported the construction preferred by the primary judge overlooked the purpose of the use of "release day" in s 15(a) to facilitate one of the purposes of the 2010 Act to make a further supervision order after the expiry of the current order by s 19D(1)(d) of the Act deeming "release day" to be the day the current supervision order expires.

[51] The respondent's argument based on s 23 and s 24 of the Act does not assist in the construction of s 15(a). Those provisions apply in specified circumstances and the extension of the period of the supervision order by the period during which the prisoner is in custody is dealt with expressly by describing that the period of the supervision order will be extended by any period the released prisoner is detained in custody on remand or serving the term of imprisonment.

[52] When it is understood that s 15 is concerned with timing of the supervision order coming into effect and not regulating other sentences that may constitute the relevant prisoner's existing period of imprisonment, the context of s 15(a) of the Act does not require that the defined term of "release day" not be used in construing s 15 of the Act. At the time of the hearing before the primary judge, the respondent's period of imprisonment comprised the general offending sentences. Under the Act, any supervision order that was made in respect of the respondent as a result of the application for a division 3 order filed on 8 June 2020 could not take effect until the end of that period of imprisonment, as even if the respondent were granted parole in the meantime in respect of the general offending sentences, the period of imprisonment would remain extant whilst the respondent was on parole.

[53] The appellant has succeeded on ground 1 in showing error on the part of the primary judge in the construction of s 15(a) of the Act.

**Appeal against the exercise of the discretion to make a supervision order**

[54] At the hearing of the appeal, the appellant was given leave to rely on the affidavit of Ms McLean sworn on 17 October 2023 that dealt with the respondent's current participation in the Strong Solid Spirit Program which is a sexual offender treatment program specifically designed for indigenous males. When the affidavit was sworn, the respondent had completed the assessment module of the program and it was anticipated that he would complete all modules required for the program in April

2024 and that an exit report about the respondent's participation, identified risk factors and recommendations for risk management and any future treatment would be available within four weeks of completion of the program.

[55] The appellant relies on three grounds of appeal to challenge the primary judge's exercise of discretion pursuant to s 13(5) of the Act. Ground 2 asserts that the discretion miscarried because the primary judge proceeded on wrong principle, namely that "prisoner's release day" within the meaning of s 15(a) of the Act meant the day the prisoner was released from prison, even if the respondent were released on parole.

[56] As the appellant has succeeded on ground 1 of the appeal, the question of whether a supervision order should be made should have been determined on the construction given to s 15(a) of the Act in these reasons. This means the appellant also succeeds on ground 2 of the appeal.

[57] It was not the subject of a specific ground of appeal, as the primary judge had made the substantive finding pursuant to s 13(1) of the Act that both parties had agreed should be made. The primary judge purported, however, to follow *Kanaveilomani* at [124] and make the finding as at the date that the respondent would have otherwise been released from custody in respect of the index offence which was 16 June 2020 and therefore more than two years prior to the hearing of the application for a division 3 order. As explained above, the comments in *Kanaveilomani* at [124] must be understood in the context of the facts in that case. The primary judge was in error in making the finding as at 16 June 2020, as the finding for the purpose of s 13(1) of the Act must be made on the hearing of the application for the division 3 order: see *Kanaveilomani* at [21]. This error did not affect the outcome before the primary judge.

[58] The parties made submissions on the basis that this Court would proceed to consider whether a supervision order or a continuing detention order should be made. This Court on appeal has the usual powers that apply to the exercise of its civil jurisdiction in addition to the powers expressly conferred by s 43(1) of the Act: see s 43(2) of the Act.

[59] In light of the further evidence that was available by the time the appeal was heard and the approach of the primary judge to the exercise of the discretion under s 13(5) of the Act was affected by the primary judge's construction of s 15(a) of the Act, the application should be remitted to the Trial Division for rehearing. There is no reason why the rehearing could not proceed before the primary judge but that is a matter for the Trial Division. It is not necessary to consider grounds 3 and 4 of the appeal.

[60] Order 1 made by the primary judge was the declaration in respect of s 15(a) of the Act. Order 2 was the supervision order. Orders 3 and 4 were the orders dismissing the contravention applications filed respectively on 21 August and 6 November 2020. Those dismissals were made at the request of the appellant, as it was the fact of the contraventions that was relevant to the hearing of the application for a division 3 order and it was not necessary in dealing with the application for a division 3 order for any orders to be made on those contravention applications. Orders 3 and 4 should therefore be maintained.

**Orders**

[61] The orders which should be made are:

1. Appeal allowed.

2. Set aside orders 1 and 2 made by the primary judge on 11 August 2022.

3. Remit the originating application filed on 8 June 2020 to the Trial Division for rehearing.