

# MENTAL HEALTH COURT

CITATION: *In the matter of SAL* [2019] QMHC 3

PROCEEDING: Appeal

DELIVERED ON: 19 March 2019

DELIVERED AT: Brisbane

HEARING DATE: 4 February 2019

JUDGE: Dalton J

ASSISTING  
PSYCHIATRISTS: Dr E N McVie and  
Dr A E Simpson

DETERMINATION: **1. Appeal allowed.**  
**2. Set aside the order below.**  
**3. Impose a Forensic Order Community.**

COUNSEL: SAL in person  
A K Lossberg for the Attorney-General  
S J Hamlyn-Harris for the Chief Psychiatrist

SOLICITORS: Crown Law for the Attorney-General  
The Office of the Chief Psychiatrist

NOTE: This judgment is published pursuant to s 790 of the *Mental Health Act 2016*. It has been anonymised and one redaction has been made to preserve anonymity.

- [1] This is an appeal from a decision of the Mental Health Review Tribunal (MHRT) of 26 October 2018. The reasons of the Tribunal were given on 28 November 2018.
- [2] [Redacted]. From age 18 he began using alcohol and cannabis. By 2001 he had six convictions for driving under the influence of alcohol. He reports that from the age of 20 years he began hearing “the voices of demons”. Notwithstanding the fact that he almost completed an apprenticeship as a chef, he had to cease work in 1998 when he became preoccupied with such matters. In the middle of that year (16-30 July 1998) SAL had his first mental health admission at the Nambour General Hospital. He was diagnosed with schizophrenia.
- [3] The MHRT decision confirmed a Forensic Order, category Inpatient, with no limited community treatment (LCT).
- [4] The Forensic Order to which SAL is currently subject was made by Justice Boddice on 31 October 2012. Justice Boddice described him as a 38 year old who was at that time

-serving a 22 year sentence for multiple rape offences.<sup>1</sup> SAL was before Justice Boddice in relation to eight offences alleged to have been committed between 9 January 1995 and 14 February 2012. They were: deprivation of liberty (two); entering a dwelling and committing an indictable offence; entering a dwelling with intent; rape (two); assault with intent to rape, and serious assault of a Corrections Officer. The medical evidence before Justice Boddice was that SAL was suffering from schizophrenia at the time of that offending. However, in relation to all of it but the assault on the Correctional Officer, he was not deprived of any relevant capacity, but had engaged in “purposive predatory behaviour”.<sup>2</sup> In relation to the assault on a Corrections Officer, the evidence was that SAL was deprived of capacity.

- [5] When SAL was before Justice Boddice he was suffering an exacerbation of his schizophrenia and Justice Boddice found the defendant temporarily unfit for trial in relation to the seven offences for which he did not have the defence of insanity.
- [6] Justice Boddice explained that simply considering the assault on a Corrective Services Officer alone, he thought that a Forensic Order was necessary to protect the community, notwithstanding the defendant would be imprisoned for a long time.<sup>3</sup> As well, because of his finding of temporary unfitness, Justice Boddice was required to make a Forensic Order. Accordingly he made a Forensic Order and detained SAL to The Park High Secure Authorised Mental Health Service.
- [7] Dr Tie’s report of 13 September 2018 records that on 18 January 2013 the MHRT found SAL fit for trial and I was told from the bar table by counsel for the Attorney-General that he received a further three years cumulative to his existing sentence, so that his current sentence is one of 25 years, with a final release date in 2027.
- [8] SAL said he wanted to be off a Forensic Order because:
- (a) Forensic Orders were only for murderers;
  - (b) Forensic Orders are understood only to be for murderers, and therefore there is a stigma attached to him in jail;
  - (c) he is eligible for parole (there was no independent evidence of this) and if he received parole the existence of a Forensic Order would mean that he had to be taken to The Park, rather than be allowed to live in the sex offenders’ precinct (where he aims to live);

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<sup>1</sup> The history of that offending is contained in Dr Tie’s report of 13 September 2018. The rape charges were referred to the Mental Health Court and on 23 April 2004 the Mental Health Court found that SAL was not of unsound mind and was fit for trial. He was convicted of eight charges of rape on 25 August 2004 and sentenced to 22 years imprisonment.

<sup>2</sup> Page 5 of the Reasons for judgment, 31/10/2012.

<sup>3</sup> The assault on the Corrections Officer was serious. SAL approached a Corrective Services Officer, apparently at random, in an agitated state. He made nonsensical demands of her before punching her repeatedly in the face. He later gave a psychotic explanation for his behaviour.

- (d) the Forensic Order now attaches only to one offence, which in the context of his offending, is relatively minor. He has been punished by a jail term for the other offences and it is therefore unfair if he is also “punished” by being on a Forensic Order for the one relatively minor offence;
- (e) he could be equally well managed on an Involuntary Treatment Order.

- [9] The first point raised by SAL is of course wrong. He is properly on a Forensic Order for the assault on the Corrections Officer.
- [10] In the context of SAL’s offending and his severe mental health problems, the second point he raises is not one with which I have any sympathy.
- [11] The other points raised by SAL are related. To consider them it is necessary to have regard to the medical evidence which was before the MHRT. That was Dr Tie’s report of 13 September 2018. It gives the history of SAL’s illness developing and then his being diagnosed in 1998. It gives a history that SAL suffers from very severe schizophrenia which has not responded well to medication. In addition, it is clear that SAL from time to time stops co-operating with his treating doctors and refuses his medication.
- [12] To take up the narrative from paragraph [7] above, on 25 August 2004 SAL was transferred from The Park High Secure Authorised Mental Health Service to jail. In 2009 he had to be admitted to the High Secure Inpatient Service for a month. He was transferred to The Park High Secure Service again and remained there between 20 September 2012 and 27 February 2013. He was returned to jail on 27 February 2013. He has remained there except for admissions to The Park High Secure Service between 18 March 2015 and 2 February 2016; 21 June 2016 and 7 September 2016 and 9 March 2017. He was returned to custody in March 2017.
- [13] Dr Tie says that “there have been persistent concerns about his brittle mental state”. He still reports bizarre hallucinations even though he is now medicated with Clozapine, a medication of last resort. Dr Tie concludes:
- “[SAL] has numerous convictions for extreme violence against women. He has previously assaulted a Correctional Officer and nursing staff at the High Secure Inpatient Service.
- [SAL] has a past history of ceasing prescribed psychotropic medications in custody. He demonstrates poor insight into his psychiatric illness and only passively accepts psychiatric management.
- [SAL] requires a Forensic Order to ensure continued assertive psychiatric management of his chronic psychiatric illness, to prevent deterioration in his brittle mental state, which would occur rapidly if he were to discontinue treatment.”
- [14] As well as the report of September 2018 which was before the MHRT, I have an update report from Dr Tie dated 14 January 2019. Dr Tie reports that in November 2018 SAL

experienced a deterioration in his mental state in which he voiced persecutory themes and once again had to be managed assertively as an inpatient with an increase in his dose of Clozapine.

- [15] Dr Tie points out that even in the absence of a relapse of his psychotic illness, SAL has offended very violently. In fact, I would recast that a little; his offending has all taken place in the absence of illness which deprived him of capacity (except for one assault Corrective Services Officer). Dr Tie goes on to say that when psychotically unwell, SAL manifests physical aggression. Further, he has a history of alcohol and cannabis dependence. While in a controlled custodial environment, this is in remission but is definitely a risk factor in the community. As well, “[SAL] has persistently demonstrated minimal insight into his chronic severe and psychotic illness”.
- [16] I might record that Dr Tie is a very experienced forensic psychiatrist and he gives his opinions having been treating SAL since the middle of 2012 (at least).
- [17] In all these circumstances, it is quite clear that SAL ought to remain on a Forensic Order and that any other form of Involuntary Treatment Order, such as a Treatment Authority, is inappropriate. That was certainly the only medical evidence before the Court and was the advice of my Assisting Psychiatrists.
- [18] The question then becomes whether a Forensic Order Inpatient, with no LCT is appropriate. In my view it is not.
- [19] The decision of the MHRT was that the order needed to be inpatient because it was inappropriate for SAL to be living “at his mother’s place or the houses at Wacol”. The reasons go on to say, “Given [SAL] is incarcerated, the Tribunal considers it prudent that [SAL] should undergo risk assessment upon release prior to any leave in the community. For that reason, the Tribunal has not approved any limited community treatment.”
- [20] It seems to me that the decision of the MHRT, and the submissions of the Attorney-General on this appeal, fundamentally misunderstand the scheme of the legislation so far as it involves interaction between the *Corrective Services Act 2006* (Qld) and the *Mental Health Act 2016* (Qld).
- [21] Section 6(1) of the *Corrective Services Act 2006* provides that a person sentenced to a period of imprisonment must be detained for the period in a Corrective Services facility. Section 6(3)(d) of the same Act provides that is subject to the provisions of the *Mental Health Act 2016*.
- [22] In my opinion, that latter provision allows the transfer of a prisoner to a Secure Authorised Mental Health Facility as a classified patient – see chapter 3 of the *Mental Health Act 2016*, “Persons in custody”, and the detailed provisions there for the circumstances in which a person in jail may be transferred out of jail and into an Authorised Mental Health Service. It will be noted from the recitation of SAL’s history above, that on several occasions since his incarceration in jail in 2004, his illness has become so severe that he is unable to be treated in jail and requires an inpatient stay.

On those occasions he has been a classified patient, and for the duration of the stay in hospital has been in the custody of the Authorised Mental Health Service rather than in the custody of the Chief Executive of the Department of Corrective Services – see s 7 of the *Corrective Services Act*.

- [23] The advice of my Assisting Psychiatrists was that SAL will likely continue in this way. In fact, apart from the obvious need to protect the community, including the community in jail – t 1-24 – the Assisting Psychiatrists advised that, “... looking at the potential long-term trajectory for this man, I think having a Forensic Order in place is going to be of benefit to him and to other people who are involved in his management and will assist his long-term management well into the future.” Most of the time he needs to be overseen by a psychiatrist, and needs to be taking psychotropic medication, but he does not need to be in The Park; he can remain in jail. From time to time his illness is likely to worsen, as it has in the past, and he will need inpatient admissions to The Park High Secure Mental Health Service.
- [24] The Chief Psychiatrist’s submission on this matter was that I ought to allow the appeal and make a Forensic Order Community to allow SAL to remain in jail until he is lawfully released either on parole; at his full-time release date, or as is likely, after a period of detention and review under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld).
- [25] The Chief Psychiatrist submitted that I ought to take a similar approach to that which I took in *Florey*.<sup>4</sup> That is, I ought to interpret the *Mental Health Act 2016* as I interpreted the *Mental Health Act 2000* in *Florey*, as meaning that on a Forensic Order with full LCT the prisoner would remain in prison custody subject to his lawful release, but receiving ongoing treatment under the Forensic Order. The Forensic Order should provide that the Authorised Psychiatrist has power to change the category of the order so that, should SAL’s illness relapse, the Authorised Psychiatrist can make the order an inpatient order and have SAL transferred to The Park High Secure Service. Lastly, for the protection of the community, the Forensic Order should provide that before SAL’s lawful release from prison custody he is to be reviewed by the Authorised Psychiatrist who would consider at that time whether or not the category of Forensic Order ought to be changed to inpatient (with or without some LCT) on SAL’s release from prison. I accept this submission.
- [26] *Florey* was a significant decision in the sense that it took a different view of the Act from that taken in the case of *Re M (No 2)*.<sup>5</sup> In *M (No 2)* Justice Ann Lyons had interpreted the *Mental Health Act 2000* as meaning that a person in prison could not be regarded as being in the community and that therefore if a prisoner was to be on a Forensic Order the only option was that it be an inpatient order. For reasons which I explain in *Florey*, I do not interpret the 2000 Act that way. However, both *Re M (No 2)* and *Florey* proceed on the common basis that someone who is on a Forensic Order as an inpatient must be kept in hospital, not in prison. The result of *Re M (No 2)* was not that M remained in jail on an inpatient Forensic Order; it was that he could not be in jail – arrangements had to be made for him to go to hospital.

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<sup>4</sup> [2018] QMHC 12.

<sup>5</sup> This was a decision of Justice Ann Lyons made on 30 September 2010. It remains unpublished because M has not yet been dealt with in the criminal courts for the offences which were the subject of that reference.

- [27] The decisions of *Re M (No 2)* and *Florey* were both decisions made about the provisions of the *Mental Health Act 2000*. I do not believe the *Mental Health Act 2016* should be interpreted any differently. If anything the provisions of the *Mental Health Act 2016* make it clearer than those in the 2000 Act that this is how the legislature intended persons such as SAL to be managed.
- [28] The defined meaning of community has not changed. The definition of inpatient under the 2016 Act still makes it very clear that someone who is on a Forensic Order which is an Inpatient Order “must be detained in an inpatient unit”, although they may receive LCT.
- [29] Section 66 of the *Mental Health Act 2016* provides at (1) that it applies to a person in custody who is subject to, *inter alia*, a Forensic Order. Section 66(2) provides that that person may be taken to an inpatient unit of an Authorised Mental Health Service to receive treatment and care. Subsection (4)(a) provides that when the person is admitted to the inpatient unit of an Authorised Mental Health Service the person’s Forensic Order, if categorised as Community, becomes categorised as Inpatient. This is a clear indication that persons in jail on a Forensic Order will be on a Forensic Order Community.
- [30] I do not think the fact that the 2016 Act does not contain an equivalent provision to s 540(1)(b)(i) of the *Mental Health Act 2000* has any bearing on the matters for determination in this case.
- [31] Section 199 subsections (2) and (3) of the 2016 Act tend to show that the result I reached in *Florey* is intended to apply under the 2016 Act. Although, I must acknowledge that the Explanatory Notes to s 199 do not give any particular indication that that is so.
- [32] The Chief Psychiatrist made reference to the objects of the Act – s 3 of the *Mental Health Act 2016*, and submitted:
- “In terms of the objects of the *Mental Health Act 2016*, the protection of the community and [SAL’s] own health, wellbeing, and prospects of recovery are best served by orders which allow for his assertive treatment while in prison and in the community in the event of his lawful release from prison. A Forensic Order means that treatment can be enforced if necessary. A construction of the *Mental Health Act 2016* which allows him to be treated under a Forensic Order while he remains in prison is the one that best achieves the Act’s purpose.”
- [33] I agree with those submissions. As outlined above, SAL, like Mr Florey, can be managed for the most part by Prison Mental Health Services in prison. He will from time to time, like Mr Florey, need to return to hospital as an inpatient, as his illness fluctuates. When that happens he can be returned to The Park Authorised Mental Health Service, High Secure Division, for the time such treatment is necessary. As I commented in *Florey*, “The High Secure facility at The Park has very restrictive detention facilities designed to manage and confine very dangerous patients. Life in a low secure part of a jail is no doubt less restricted than such confinement; indeed I

suspect life in other parts of a jail is also less restricted.”<sup>6</sup> SAL definitely needs to be on a Forensic Order but it would be a waste of mental health resources at The Park High Secure Service were he to be detained there full-time. If he were on a Forensic Order Inpatient he would have to be detained there full-time. As I say, I suspect that life in a jail is less restrictive than life at the High Secure part of The Park. It is certainly in SAL’s interests in terms of him obtaining parole (perhaps), or at least supported accommodation in the Wacol precinct (when the time comes), that he be in prison on a Forensic Order Community, rather than in The Park High Secure Service on a Forensic Order Inpatient.

- [34] The Attorney-General’s submissions rest on the assertion that there is a well understood and longstanding practice that “warrants for imprisonment override any Forensic Order detaining a patient to [an Authorised Mental Health Service]”. This is said to be the effect of s 6 of the *Corrective Services Act*. I must say that my experience on the Mental Health Court is that a Forensic Order Inpatient is inconsistent with detention in jail. This was the basis for the decision in *M (No 2)* and the decision in *Florey*. Both the *Mental Health Act 2000* and the *Mental Health Act 2016* require persons subject to inpatient orders to be in an Authorised Mental Health Service. If there has been a practice in the MHRT consistent with the order under appeal in the current case, that practice has ignored these provisions. It has also ignored the position as set out in *Re M (No 2)*. The assertion that in some way making a Forensic Order Community for someone in SAL’s position detracts from the authority of a warrant for imprisonment, or is inconsistent with ss 6 and 7 of the *Corrective Services Act*, is not logical.
- [35] I am satisfied that here the Forensic Order ought be a Forensic Order Community. This would allow SAL to remain in custody. If I made a Forensic Order Inpatient he would be required to be taken to the High Secure section of The Park. In jail SAL is not an inpatient, he is living in the community, albeit a restricted part of the community. As counsel for the Chief Psychiatrist submitted, and as my Assisting Psychiatrists advised in this matter, while SAL is in jail a Forensic Order is necessary to protect other prisoners, and Corrective Services officers. In a very real sense they are the community which must be considered for the purpose of determining whether or not there ought to be a Forensic Order.
- [36] When SAL eventually comes to be lawfully released from jail, it is appropriate that the question of whether or not his Forensic Order should remain a Community Order with full LCT be revisited. He will be in a very different community upon release and there will be very different concerns as to the protection of the community in which he will find himself. The terms of the Forensic Order which I make will be that the Authorised Psychiatrist at the time of SAL’s lawful release from jail must consider whether or not to change the category of the order to Inpatient. Such a term does not (as was submitted by the Attorney-General) contradict a recent unpublished decision of Justice Flanagan in this Court.
- [37] I will ask counsel to bring in minutes of order.

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<sup>6</sup> [2018] QMHC 12, [11].