SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General v Foy* [2005] QSC 001
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) v **MARK ANTHONY FOY** (respondent)
FILE NO:	BS8990/04
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	6 January 2005
DELIVERED AT:	Brisbane
HEARING DATE:	22 December 2004
JUDGE:	Douglas J
ORDER:	**THE COURT IS SATISFIED TO THE REQUISITE STANDARD THAT MARK ANTHONY FOY IS A SERIOUS DANGER TO THE COMMUNITY IN THE ABSENCE OF AN ORDER PURSUANT TO DIVISION 3 OF THE *DANGEROUS PRISONERS (SEXUAL OFFENDERS) ACT 2003*.** **FURTHER CONDITIONS AS SET OUT IN THE JUDGMENT.**
CATCHWORDS:	CRIMINAL LAW - PARTICULAR OFFENCES - OFFENCES AGAINST THE PERSON – OTHER OFFENCES AGAINST THE PERSON - SEXUAL OFFENCES - SENTENCING - INDEFINITE SENTENCE LEGISLATION - Detention orders - Against prisoners - Application for detention order against respondent prisoner - Respondent having completed sentence - Whether court satisfied reasonable grounds for believing prisoner serious danger to community in absence of order – Psychiatric evidence of conditions of treatment likely to reduce risk of re-offending. CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – OTHER MATTERS – QUEENSLAND – SEXUAL OFFENDERS – APPLICATION FOR

DETENTION ORDERS- Against prisoners - Application for detention order against respondent prisoner - Respondent having completed sentence - Whether court satisfied reasonable grounds for believing prisoner serious danger to community in absence of order – Psychiatric evidence of conditions of treatment likely to reduce risk of re-offending.

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – STATUTORY POWERS AND DUTIES – EXERCISE – GENERAL MATTERS – Where respondent convicted of 13 counts of indecent dealing – Where respondent's sentence expired – Application to have respondent detained indefinitely or released subject to conditions - *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s. 13 – Whether respondent is a "serious danger to the community" – Whether custody is preferable over release subject to restrictive conditions – Sufficiency of proposed conditions.

Dangerous Prisoners (Sexual Offenders) Act 2003, ss. 13, 15, 16, 19 & 22(c)

Attorney-General v Fardon [2003] QSC 379, applied

COUNSEL:	Mr M T O'Sullivan for the applicant Mr G M McGuire for the respondent
SOLICITORS:	C W Lohe, Crown Solicitor for the applicant Legal Aid Office for the respondent

[1] DOUGLAS J: The respondent, Mark Anthony Foy, has recently been released from prison after having served a 4½ year period of imprisonment for 13 counts of indecent dealing committed on 2 separate occasions in 1999 and 2000. The offences involved 9 different children aged between 6 and 12 years. His history of sexual offences is significant, commencing with obscene exposure in 1986, and covers many counts of indecent assaults or indecent acts in the presence of children. He was born on 28 July 1961 and is now aged 43. This is an application by the Attorney-General to detain him indefinitely under s. 13 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003. Alternatively the Attorney-General asks that he be released under a supervision order.

[2] In June 1997 he was sentenced in respect of 9 counts of wilful exposure, one count of permitting indecent dealing and one count of indecent dealing. Later that year he was sentenced in respect of 6 counts of wilful exposure of a child under the age of 12 years to an indecent act, 2 counts of unlawful exposure of a child under the age of 16 years to an indecent act, 1 count of indecent dealing with a child under the age of 12 years and 1 count of permitting himself to be dealt with indecently by a child under the age of 12 years. For those offences he was sentenced in the District Court in 1997.

[3] Apart from one offence dealt with before the District Court in 2001 by his Honour Judge Hoath, the offences did not involve any significant violence to the children victims. Many of the offences occurred in public toilets in parks. Generally speaking, Foy would masturbate in front of children, ask them to touch his penis or grab the hand of a child and put it on his penis or touch girls in the area of the vagina. On one occasion he licked a young girl in that area and on another occasion procured a young boy to perform oral sex on him. He also performed oral sex on that boy. One of the offences dealt with by his Honour Judge Hoath, however, involved Mr Foy grabbing an 11 year old boy by the arms putting him on his lap and saying to him "you can either stick it in your mouth or up your bum". He was sentenced to 3 years' imprisonment in respect of that count.

[4] He has a significant criminal history apart from these offences and has on several occasions breached parole, probation orders and community based orders. In 1999 he sent a letter to another prisoner giving explicit details about a fantasy he had which involved paying 3 young children $10.00 to expose themselves and allow themselves to be touched by him.

[5] He was involved in the sex offender treatment program for 13 months between 24 October 2001 and 20 November 2002 but appears to have made little progress during that period, perhaps partly because of his lack of the intellectual ability to appreciate the seriousness of his conduct. While on that course he revealed that, although his criminal record dated back to 1989 when he was aged 28, he began to offend when he was about 25 and said that he would locate parks and areas of bushland and reconnoitre those areas days or weeks in advance of loitering there in the hope of making contact with potential victims. He was assessed by the course coordinators of that program to have a relatively high risk of sexual reoffending. It was also recommended that he avoid being alone with children under any circumstances.

[6] Dr Moyle in his report of 6 April 2004 diagnosed him as having an antisocial personality disorder. He believed that he was highly dependent and that he would function best in an environment where he was supervised closely. He also said that he has displayed features historically that would make him likely to offend in the future but considered that his lack of a significant history of violence made it less likely that he would commit offences involving serious violence. Mr Foy had requested the use of anti-androgen drugs to curb his sexual desires which Dr Moyle thought was sensible from his point of view and said that they should be supplied to him. He concluded that he was far more likely than not to offend sexually in the future but that there was only a moderate risk of his being so physically violent as to cause serious harm to others. He also believed that many of the risk factors related to his ongoing impulsivity and poor judgment may have lessened during his time in prison but that they had not yet been tested in a more open environment. At page 21 of his report he concluded as follows:-

> "If he was able to get employment and stable accommodation (prior to leaving prison), not in an environment where he is close to children or schools or where he is not going to be noticed if he is missing (while under the control of Corrective Services), this would be helpful. A support network would also be helpful. With all this in place, I think we can clinically minimise the serious risk factors he posed for re-offending."

[7] He also said that if Mr Foy was able to obtain psychological and/or psychiatric treatment while living in the community the risk of sexual offending was likely to be lower.

[8] Professor Nurcombe and Dr Lawrence have also given opinions. Professor Nurcombe's view was that there was no benefit in keeping him in custody where he was receiving no treatment and spent his time "isolating himself from other paedophilic inmates or mimicking rooster calls to divert the intimidation of inmates who are not sex offenders". He also said that without community treatment and support he was highly likely to commit further sexual offences against children which were most likely to involve exhibitionism and the fondling of children of both sexes. He recommended that he receive anti-androgen treatment, regular extended counselling and assistance with employment.

[9] Dr Lawrence diagnosed him as suffering from paedophilia. She said that he was sexually attracted to both males and females and that it was only with children that he felt more powerful and confident. She said that he had a 30 to 40 year life expectancy. During most of that period she thought he would still have sexual interest leading to a high risk of reoffending against children during that period because of his limited ability to control his sexual impulses. She concluded however that he was most likely to respond to an intensive supervision and correction order as judged by his past history and behaviour.

[10] Neither Dr Lawrence nor Professor Nurcombe advocated his continuing detention.

[11] This application pursuant to Division 3 of the Act requires me to be satisfied that he is a serious danger to the community if an order is not made under that provision. According to s. 13 of the Act he is a serious danger to the community if there is an unacceptable risk that he will commit a serious sexual offence if he is released from custody or if he is released from custody without a supervision order being made. A serious sexual offence is an offence of a sexual nature involving violence or against children. In assessing that risk I have to have regard to reports prepared by psychiatrists under s. 11 of the Act and the extent of the prisoners' cooperation during those examinations, other medical, psychiatric and psychological assessments relating to him, information indicating whether or not he has a propensity to commit serious sexual offences in the future, his pattern of offending behaviour, efforts by him to address the cause or causes of his offending behaviour and his participation in rehabilitation programs, whether or not his participation has had a positive effect on him, his antecedents and criminal history, the risk of him committing another serious sexual offence if released and the need to protect members of the community from that risk. I can only be satisfied by acceptable cogent evidence and to a high degree of probability. I should also judge those matters against the fundamental legal principle that a person's right to liberty is the most significant of all common law rights; see *Attorney-General v Fardon* [2003] QSC 379 at [23], [25] per White J.

[12] The views of both psychiatrists appointed under s. 11 support the view that there is no utility in keeping him in prison but that community treatment and support involving intensive supervision and correction is the treatment most likely to be effective in trying to prevent reoffending by him. It seems to me that, based on that evidence, I should not order that he be imprisoned indefinitely but should impose a supervision order for a significant period with restrictive conditions attaching to it.

I have reached these conclusions partly because of the lack of serious violence associated with his offending so far, partly because of the psychiatric evidence that a supervisory order of this nature is more likely to have a beneficial result than his continuing imprisonment in respect of his risk of further offending, coupled with the importance of his right to liberty, and partly because what little evidence there is of the effectiveness of such supervision of him in the past supports the conclusion that it is helpful; see page 26 of the report of Dr Moyle ex. RJM 3 of his affidavit filed 15 October 2004.

[13] The proposed conditions were the subject of debate in several respects. The period proposed by Mr O'Sullivan for the Attorney-General was fifteen years. It was criticised as being far too long by Mr McGuire. The medical evidence suggests that the risk of Mr Foy re-offending will continue for most of his life. The conditions of a supervision order may be amended under s. 19 but there is an argument that the length of the period is not one of those conditions because s. 16, which allows conditions to be imposed, is separate from s. 15 which provides that the order has effect for the period stated in it. That was why Mr O'Sullivan submitted that a longer period is appropriate.

[14] There is a wide power under s. 22(c), however, to make other orders necessary to ensure adequate protection of the community where a supervision order has been contravened. If Mr Foy were to contravene the conditions of his supervisory order I expect that s. 22(c) could be used in the appropriate circumstances to extend the term of the order. My view is that, given his history, a significant period for the operation of the order is required but that 10 years of such supervision should be enough to deal with the problems he poses to himself and the community. That seems to me to be a period long enough either to confirm that his chances of re-offending have become low or to show that he has not taken the opportunity of responding appropriately to the conditions of the order.

[15] Another contentious issue related to the distance he should keep from school grounds. The alternative proposals were 100 metres and 200 metres. Mr McGuire urged the shorter distance because Mr Foy could inadvertently be within 200 metres of a school's boundary in ignorance of the fact that a school was nearby. There seems to be some merit in that argument and I have fixed the distance in conditions (d) and (e) as 100 metres.

[16] The proposed condition (i) that Mr Foy comply with every reasonable direction of an authorised corrective services officer was criticised as too broad. It may require a Court to decide whether a direction was reasonable in the circumstances but that is similar to many tasks that courts have to perform. Because of the difficulty of framing an order like this to cover all possible eventualities it seems to me to be a useful order designed to cope with things unforeseeable at this stage. I shall let it stand.

[17] The proposed conditions (p) and (q) were also criticised as too broad. Condition (p) reads: "not visit public parks or other public places containing children's playgrounds". Mr McGuire criticised it as impractical and ambiguous; impractical because it may be convenient to cross a public park on the way to another place and ambiguous because it was not clear whether the words "containing children's playgrounds" qualified "public parks" as well as "other public places". He argued that the words "loiter in" should be substituted for the word "visit" and that limiting

Mr Foy's access to public places containing children's playgrounds would put, for example, many McDonald's "restaurants" out of bounds. When one considers the way in which Mr Foy has operated before in seeking his victims and his limited intelligence, it seems to me, however, that the clearer the rule the better in regulating his access to parks and public places. If that leads to some practical difficulties in the way he lives his life it is a small price to pay. I propose to leave the condition in the suggested form with the addition of the word "any" before "public parks" and a slight change in the layout of the condition to make it clear that the words "containing children's playgrounds" qualify only "public places" but that all public parks are out of bounds to him.

[18] The original form of condition (q) was "not make contact with children under 16 years of age". That was too broad and could very easily be infringed innocently and unintentionally simply by a child approaching Mr Foy with no encouragement by him. I have amended it to read "not establish and maintain contact with children under 16 years of age other than for the purpose of employment".

[19] Accordingly it seems to me that the appropriate form of order is a supervisory one in the following terms:

1. The Court is satisfied to the requisite standard that Mark Anthony Foy is a serious danger to the community in the absence of an order pursuant to Division 3 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003.

2. The respondent be subject to the following conditions until 31 December 2014.

   The respondent must:

   (a) Be under the supervision of a corrective services officer ("the supervising corrective services officer");
   (b) move from Coulson Lodge, at 180 Eric Street, Goodna before 1 February 2005 to a place of residence within the State of Queensland, provided a suitable alternative place of accommodation has been found that has received prior approval by the supervising corrective services officer;
   (c) after that time, reside at a place within the State of Queensland that has received prior approval from a corrective services officer by way of a suitability assessment;
   (d) after 1 February 2005, provided a suitable alternative place of accommodation has been found, not be in the area within 100 metres of the boundary of any school grounds between 7.30am and 4.30pm on school days without reasonable excuse;
   (e) Between 22 December 2004 and 31 January 2005 must not be in the area within 100 metres of the boundary of any school grounds between 7.30am and 4.30pm on school days without reasonable excuse;
   (f) report to his supervising corrective services officer on Monday and Friday every week, such visits to occur at the Area Office closest to Mr Foy's residence;
   (g) report to the officer in charge of police at Goodna or Roma Street between the hours of 8am and 4pm on a weekly basis, on either Saturday or Sunday or at such police station as otherwise directed by the supervising corrective services officer;

(h) notify the supervising corrective services officer of any affiliation with any club or organisation that has child membership or child participation in its activities;
(i) comply with every reasonable direction of an authorised corrective services officer;
(j) notify the supervising corrective services officer of the make, model, colour and registration number of any motor vehicle owned by, or generally driven by him;
(k) notify the supervising corrective services officer of the nature of his employment, the name of his employer and the address of the premises where he is employed;
(l) notify the supervising corrective services officer of every change of his name, place of residence or employment at least two business days before the change happens;
(m) not leave or stay out of Queensland without the written permission of the supervising corrective services officer;
(n) not commit an offence of a sexual nature during the period for which these orders operate;
(o) not be on the premises of shopping centres between 8.00am to 9.30am and between 2.30pm and 4.30pm on school days other than for the purpose of his employment;
(p) not visit either:
(i) any public parks, or;
(ii) other public places containing children's playgrounds;
(q) not establish and maintain contact with children under 16 years of age other than for the purpose of his employment;
(r) abstain from alcohol and non-prescribed drugs for the duration of this order and take prescribed drugs as directed by a medical practitioner;
(s) submit to alcohol and drug testing as directed by a corrective services officer;
(t) not access pornographic images containing photographs of children on the Internet;
(u) attend the Sex Offender Maintenance Program which commences in January 2005;
(v) take part in counselling and satisfactorily attend other programs, the expense of which is to be met by the Department of Corrective Services, and as directed by the supervising corrective services officer during the period of the order;
(w) permit any psychiatrist treating or consulting with the respondent to disclose details of medical treatment and opinions relating to the respondent's level of risk of re-offending and compliance with this order to the Department of Corrective Services if such request is made in writing and for the purposes of updating or amending the supervision order;
(x) The Court further orders that the frequency of reporting as stated in clauses (f) and (g) contained herein may be changed after 1 June 2005, providing the reporting conditions are not more onerous to the respondent, if the supervising corrective services officer considers that in all the circumstances, such a change is warranted.