

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

APPLEGARTH J

No 1812 of 2009

ATTORNEY-GENERAL FOR THE
STATE OF QUEENSLAND

Applicant

and

HARRIGAN DEAN FISHER

Respondent

BRISBANE

..DATE 06/11/2009

JUDGMENT

HIS HONOUR: The Attorney-General has applied to the Court for orders that the applicant be detained in custody until the final decision of the Court arising out of contravention proceedings brought pursuant to section 22 of the *Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)*.

The cross-applicant, who I will refer to as Mr Fisher, now applies to the Court pursuant to 21(3) of the Act to be released pending the final decision on the contravention proceedings. Mr Fisher bears the onus of satisfying the Court on the balance of probabilities that his detention in custody pending the final decision is not justified because exceptional circumstances exist.

The meaning of "exceptional circumstances" has been considered in a number of decisions of this Court. I have particular reference to a decision of P McMurdo J in *Attorney-General v Francis* [2008] QSC 69. I also had occasion to consider the matter in respect of a different person named Fisher in a case called *Attorney-General for the State of Queensland v Traven Lee Fisher* [2009] QSC 104. I shall not repeat what was said in those cases concerning the meaning of "exceptional circumstances."

The applicant was released under a supervision order made by Byrne SJA. It was a condition of the order that he abstain from illicit drugs for the duration of the order. He is alleged to have breached that condition, proof of which is advanced by reason of a positive urine test that detected the presence of cannabis from a sample taken on 26 October 2009.

Mr Fisher has been in custody since that by reason of a complaint issued under section 20 of the Act which resulted in his being placed in custody.

It is unlikely that there will be any dispute at the final hearing that he consumed cannabis. In fact, his affidavit today frankly admits to having done so. He says that he had not had any difficulty with cravings since his release on the supervision order but, in a moment of weakness after experiencing significant personal stress, he consumed some cannabis by taking a couple of drags on a joint of marijuana. He explains the stressful circumstances under which that arose. He shares a house at Wacol with two other men who do not assist with cleaning. He says his accommodation there is in poor shape. He found it stressful to live away from his wife. He has attempted to obtain alternative accommodation but disclosure of his supervision order has meant that there has not been any response from a real estate agent.

He has experienced some trouble coming to terms with the supervision order. I find that unremarkable but he has to come to terms with the supervision order. He has to appreciate that he is subject to a supervision order, that it is not a case of life-as-usual, and that he has to comply with the requirements of that order and the requirements of the officers who administer it. He has to accept that his movements will be the subject of surveillance and that he can be subjected to random drug tests, including when he is at his mother's or anywhere else.

I understand that he finds it stressful but he has to readily appreciate that those stressors are part of being permitted to live in the community under a supervision order rather than being subjected to a continuing detention order, which is the alternative.

I am presently concerned with a contravention that occurred in circumstances of particular stress. It is not alleged that there was gross consumption of cannabis or consumption over a prolonged period. It is not suggested that the consumption of cannabis on the occasion in question led the applicant to being intoxicated or on that occasion was at a heightened risk of committing a further offence. However, the requirement for total abstinence from illicit drugs is there for a reason. Those reasons were articulated by Byrne SJA in his Honour's reasons for making a supervision order. This included evidence that there should be a total prohibition on the consumption of alcohol and other intoxicants.

There was a concern that there had been drug offending in the past and that the serious sexual offence for which the applicant Mr Fisher received a long period of imprisonment occurred because of an opportunistic sexual offence that took place during a robbery. It appears from the decision that drugs or alcohol were involved in that offence.

The applicant has had a problem with using cannabis since the age of 13 and it appears that from the age of 16 onwards he was drinking alcohol to great excess and regularly using cannabis.

Although, as the proverb says, "One swallow doth not maketh a Summer", the sad fact is that a return to use of cannabis or alcohol carries the ever-present risk that the use will escalate, will exceed a few drags and may lead to the commission of an offence.

Byrne SJA observed in his judgment: "If the respondent can remain abstinent from alcohol and illicit drugs he has good prospects of becoming a useful member of the community. He has substantial incentives to do so. He has a young child and a fiancé waiting for him. If, therefore, he can find the strength to stay away from drugs and alcohol his prospects are reasonable. If he cannot, he faces the near certainty of return to prison."

That written judgment apparently was not brought home strong enough to Mr Fisher and that is why I have repeated it in his presence here today.

The period that he has spent back in custody since being breached should serve as a reminder to him that any further breach of this or any other requirement of the supervision order will be met by an immediate return to custody.

I note that Mr Fisher has otherwise complied with directions from officers of the Department during his period of supervision. He is in the process of seeking employment. He is willing to undertake psychological counselling sessions which would no doubt be of assistance to him.

It was fairly acknowledged by Mr Ryan of counsel on behalf of Mr Fisher that the breach in this case cannot be characterised as a trivial breach for the reason that cannabis is one of the substances which contributed to the applicant's intoxication at the time of the original offence.

In the case of *Attorney-General v Traven Lee Fisher* [2009] QSC 104 at 8 I observed:

"A critical issue is whether the circumstance of the alleged breach indicates an increased risk of re-offending and whether the conditions of the supervision order and general circumstances are apt to address that level of risk."

In that regard, I consider that a high level of close monitoring of the applicant under the supervision order, including frequent tests for illicit substances, is apt to address the level of risk. I also have regard to the fact that Mr Fisher has every incentive to remain drug-free because, if he does not, at the hearing on 1 February 2010 the outcome may be very different to the outcome that would apply if he commits further breaches. As it were, there is a sword hanging over his head.

I consider that testing, along with supervision and monitoring, adequately addresses the risk of his offending again.

The circumstances of the present case resemble those of *Attorney-General v Francis* [2008] QSC 69 although, as Ms Maloney of counsel helpfully pointed out, in the case of *Francis* the circumstances of the original offences involved the use of amphetamine and alcohol whereas the relevant breach involved a use of cannabis. That said, the observations of P McMurdo J are apt in this case. What is involved at this stage is quite different to the matters that will need to be addressed by the Court at the pending contravention hearing. My role is to determine whether the applicant has established exceptional circumstances and that involves an assessment of the extent of the risk over a relatively short period of a few months in circumstances in which the applicant will have every incentive to not breach any of the conditions again.

I consider that the facts of this case are not materially distinguishable from those of *Francis* and that the applicant has established exceptional circumstances. Accordingly, I propose to make an order pursuant to section 21(2) of the Act that he be released from custody subject to the existing supervision order imposed by Byrne SJA on 3 July 2009.

I'm told that a hearing date is available on 1 February 2010 and so I'll make a further order that the contravention hearing pursuant to section 22 be set for hearing on 1 February 2010 and I'll make provision for liberty to apply.

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