

SUPREME COURT OF QUEENSLAND

CITATION: *Attorney-General for the State of Qld v Liverton* [2011] QSC 277

PARTIES: **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND**
(applicant)
v
GARRY LESLIE LIVERTON
(respondent)

FILE NO/S: BS6623/11

DIVISION: Trial Division

PROCEEDING: Dangerous prisoner application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 16 September 2011

DELIVERED AT: Brisbane

HEARING DATE: 13 September 2011

JUDGE: Ann Lyons J

ORDER:

- 1. The application for a Division 3 Order be set for hearing on 22 November 2011.**
- 2. Pursuant to s 8(2)(a) of the *Dangerous Prisoners (Sexual Offenders) Act 2003*, the respondent undergo examinations by two psychiatrists named by this Honourable Court, being Dr Joan M Lawrence and Dr Scott Harden who are to prepare independent reports, which are to be prepared in accordance with s 11 of the Act.**
- 3. Liberty to apply granted.**

CATCHWORDS: CRIMINAL LAW – SENTENCE – SENTENCING ORDERS - ORDERS AND DECLARATIONS RELATING TO VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – DANGEROUS SEXUAL OFFENDER – REGISTRATION, REPORTING AND LIKE MATTERS – where the applicant seeks an order under s 8 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) for the appointment of two psychiatrists to examine the respondent and related orders - whether there are reasonable grounds for believing that the respondent is a serious danger to the community absent an order made under Division 3 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* – whether reasonable grounds for believing the prisoner is a serious danger to the community in

the absence of a Division 3 order

Dangerous Prisoners (Sexual Offenders) Act 2003, s 8, s 13
A-G v Fardon [2003] [QSC] 331

COUNSEL: J M Sharp for the applicant
 J J Allen for the respondent

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

ANN LYONS J:

This Application

- [1] Pursuant to an application filed on 1 August 2011 the applicant seeks an order pursuant to s 13(5)(a) or s 13(5)(b) of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) (the Act) that the respondent be (a) detained in custody for an indefinite term for control, care or treatment (a continuing detention order); or (b) released from custody subject to the requirements the court considers appropriate and that are stated in the order (a supervision order).
- [2] In advance of the final hearing the applicant seeks an order under s 8 of the Act for the appointment of two psychiatrists to examine the respondent and related orders.
- [3] Before the court may make such an order it must be satisfied that there are reasonable grounds for believing the prisoner is a serious danger to the community in the absence of a Division 3 order.
- [4] “Serious danger to the community” is defined by reference to s 13 of the Act which provides that:
 - “A prisoner is serious danger to the community ... if there is an unacceptable risk that the prisoner will commit a serious sexual offence –
 - (a) if the prisoner is released from custody; or
 - (b) if the prisoner is released from custody without a supervision order being made.”
- [5] The respondent however submits that the court would not be satisfied that there are reasonable grounds for believing that he is a serious danger to the community in the absence of such orders. The respondent submits that the court should dismiss the application. A full list of the factors to be taken into account when determining whether there is such an unacceptable risk is set out in s 13(4).
- [6] The standard of proof is a civil standard, to a high degree of probability. It is clear that the court is not required to have the requisite belief but rather that there “exist reasonable grounds for the court which hears the final application to have that belief”.¹

The respondent’s criminal history

¹ *A-G v Fardon* [2003] [QSC] 331 per Atkinson J at [33].

- [7] In relation to the index offences the respondent pleaded guilty to two counts of rape and one count of grievous bodily harm, all of which occurred on 4 December 2003, on 18 February 2005. For these offences he was sentenced to a total of eight years' imprisonment and the convictions were declared to be serious violent offences. His full time release date is 5 December 2011.
- [8] In relation to those offences the respondent had been living with the complainant for about six weeks and they were in a sexual relationship. They had had some consensual violent sex on previous occasions but the complainant had never consented to anal intercourse. The offences involved the respondent drugging the complainant by putting some Alprazolam in a glass of wine. He then used bondage, which she consented to. He then commenced using a dildo on her vagina and she indicated he was hurting her and she asked him to stop and untie her. The respondent refused to stop and the complainant bit him on the testicles. As a result he became angry with the complainant and started punching and slapping her. He completely lost control and slammed the dildo into her anus repeatedly. She was bleeding and in pain.
- [9] The following day the respondent took the complainant to hospital where she required surgery. She sustained injuries to her anus, bowel, colon and vagina. Her colon was perforated and severe damage was inflicted on her anal sphincter muscle. She required a colostomy bag for 12 months after the incident. She also had a split lip and bruising to her face, throat and the left side of her body. Her jaw was dislocated and she could not speak for four days after the attack.
- [10] Judge Forde in sentencing the respondent in February 2005 noted that the respondent had a criminal history that involved previous violence. In particular he noted that he had been sentenced to six months for assaulting a police officer in 2002. There was a further count of unlawful assault in July 2000.
- [11] In terms of his other offences it is clear that the respondent's criminal history commenced in 1992 when he was a minor. In January 1996 he had been sentenced to four months' imprisonment for stalking. In 1998 he had convictions for breaching intervention orders, criminal damage, burglary theft, unlawful assault and assault by kicking. In 1998 he grabbed his then girlfriend by the throat during an argument. In 2000 he assaulted his mother after she attacked him with a baseball bat and he was sentenced to prison for two months.
- [12] Dr Donald Grant prepared a report dated 9 December 2010 based on an interview he had with the respondent at the Wolston Correctional Centre on 3 December 2010.

Dr Grant's report

- [13] Dr Grant considered the history of the respondent's offending, including the index offence. He also reviewed his past medical history and noted that he had had a number of involuntary mental health admissions in the context of several suicide attempts. Dr Grant also noted the respondent's complex and disturbed family history and indicated that the respondent had been sexually abused and introduced to drugs at a very young age. It would appear that his own mother prostituted him from the age of 7 or 8. She not only sexually abused him herself but allowed others to sexually abuse him as well.

- [14] The respondent told Dr Grant that from an early age he came to realise he could get money by having sex with men and that they would pay him \$10 for oral sex. He then started pursuing sex for gain. By the age of 15, the sex that he had with men moved from oral sex to sodomy. The respondent told Dr Grant that from the age of 15 he started prostituting himself more frequently in his country town of Echuca. He apparently started as a street worker going to local homosexual beats. The homosexual community gradually knew of his availability. At the age of 19 and the age of 25 he worked again for periods of time with sex agencies in Bendigo, Melbourne, Adelaide and Perth. The respondent indicated that this work was never constant but he used it whenever he became broke.
- [15] Dr Grant outlined a long and complex drug history which included the use of intravenous heroin at the age of 18 or 19. He has also noted the use of LSD, amphetamines, and prescription pills such as Valium. He noted that at the age of 20 he was jailed for four months for a stalking offence with respect to a woman he was obsessed with. The stalking offence arose out of a breach of a restraining order. Dr Grant noted that in addition to the respondent's complex sexual history he had only had one sustained relationship when he was in a relationship for four years with the mother of his son. There was however increasing hostility and aggression in that relationship and he was jailed after assaulting her by putting his hands around her throat.
- [16] Dr Grant noted that the index offences occurred after the respondent left a rehabilitation unit in Victoria and travelled to Queensland with a friend.
- [17] In terms of his progress in prison Dr Grant noted in his report that the respondent had now served seven years in prison and is due for full time release on 5 December 2011. Dr Grant stated that during the early stages of his involvement in the Getting Started Program sex offenders program his contributions were frank and forthright with "some possibility of belligerence" but that this was dealt with within the group where he was considered at times to be "aggressive and judgemental". It was subsequently recommended that he undertake the medium intensity program (MISOP) and the respondent indicated to him that he had been undergoing the MISOP which he found difficult and was yet to complete. He agreed with Dr Grant that he had been reported to be belligerent and confronting to other group members during the course.
- [18] In terms of his overall assessment Dr Grant stated that the outcome of the MISOP would be relevant to assessing future risk and that he would comment further once the exit report had been obtained.
- [19] In terms of the formal risk assessment instruments Dr Grant indicated that the STATIC -99 which uses purely static factors puts him in the moderate to high risk group. The HARE PCL-R psychopathy checklist indicated that he was well below the cut off point for psychopathy and the HCR-20 indicated that he was in the moderate to high risk group for future violence but with a greater risk for violence rather than sexual offences.
- [20] In terms of the RSVP assessment, which uses both static and dynamic factors, Dr Grant indicated that he was a low to moderate risk of sexual violence in the future. Dr Grant noted:

“Since he has only offended on one occasion it is difficult to know whether any such future sexual offence will ever occur. If it does it would likely take the form of rape and sodomy directed against a current sexual partner. His motivation would be sexual desire and the expression of anger...the imminence of any such re-offending is unpredictable and it may never occur.”

[21] Dr Grant stated that in terms of an overall risk assessment:

“The above risk assessments instruments would indicate at least a low to moderate risk and possible moderate to high risk of future violence but the respondent's history would indicate that there would be a higher risk of non-sexual violence than sexual violence. **Given that the index offence was his first sexual offence, and the salutary effects of his eight year prison sentence and the courses which he has undergone, it is difficult to predict whether a future sex offence will ever occur.** If such a sexual offence does occur it would be likely to occur in the context of a current relationship and be an expression of his conflict, ambivalence and rage about his very abused background and early sexual experiences.

The evidence would suggest that the respondent is more likely, after the completion of this prison sentence and the presumed satisfactory completion of the MISOP, to be more self aware, more aware of his emotions and more able to set and maintain limits on his behaviour. He would therefore be less likely to offend sexually.

Overall my opinion would be that the likelihood of a future sexual offence is moderate or perhaps less. The relevant risk factors would be a resumption of drug abuse (especially the abuse of amphetamines), social instability and the lack of social supports. To counteract these risk factors the respondent would benefit from future psychological assistance, appropriate social supports, alcohol and drug counselling as indicated and possibly a maintenance sexual offender treatment program, depending on the outcome of the MISOP. **If the MISOP is satisfactorily completed there would be no further treatment in prison that would be indicated.**

The respondent has demonstrated some degree of emotional instability during the last two years in prison for some relatively brief periods of time. It is of some concern that he is currently taking quite a large dose of an opiate analgesic for his dental problems and it would be reassuring if he could undergo dental treatment urgently so that he could be withdrawn from any such medication prior to release from prison.” (my emphasis)

Non completion of the MISOP

[22] At the hearing of this application the affidavits of Christine Tunbridge sworn 20 June 2011, Roberta Embrey sworn 8 September 2011, Claire Evans sworn 9 September 2011 and Christine Castro sworn 12 September 2011 were relied upon. Those affidavits all address the respondent's progress in the MISOP.

- [23] In particular, Ms Tunbridge's affidavit exhibits a memorandum dated 5 April 2011 which summarises his participation. The memo notes that when the respondent commenced in the program on 3 June 2010 staff were made aware of numerous responsibility issues for him. On 4 October 2011 the memorandum indicates that the respondent was interviewed regarding the possibility of suspension due to inconsistent attendance, inappropriate behaviour during sessions and non engagement during sessions. The memo records that he had missed two full sessions in July and September 2010 and four half sessions in July, two in August, two in September and one in October 2010.
- [24] The memo indicates that the respondent was suspended from MISOP on 7 October 2010 for a period of approximately two weeks in relation to a highly inappropriate and offensive comment he made in group on that day. Following the suspension he recommenced with the program on 26 October 2010. During the subsequent session he demonstrated satisfactory behaviour, however, it was noted that he was not highly engaged. In particular, it was noted that he stated that he found the group a complete waste of time and indicated his intention to withdraw from the program permanently and stated he did not want further contact from program staff.
- [25] The memo indicates that whilst the respondent returned to the group for a session on 2 November and then a following further two sessions he was then unable to attend for five sessions due to a separate breach. On 2 December he returned for one session and completed a presentation model. The memo then noted that after 2 December 2010 he was unable to attend the subsequent three sessions fully due to illness. When interviewed on 21 January in relation to his attendance the respondent indicated he was having deteriorating health problems.
- [26] There is no doubt that the respondent has severely impacted wisdom teeth and experiences ongoing pain for which he receives morphine based medication three times a day. The memorandum indicated that on 11 February 2011 Queensland Health indicated that whilst the respondent was on medication that medication and his pain level should not restrict his ability to participate in programs.
- [27] The respondent was interviewed again on 24 February in regard to his non-attendance at MISOP and he declined an immediate return to the program stating that he required 24 hours notice to return to a session. He agreed to attend on 1 March 2011. However he did not attend on that date. On 3 March the respondent indicated he was still unwell due to ongoing medical issues and that was the reason he did not attend on 1 March or 3 March.
- [28] The memo then notes that when asked if he wanted to return he indicated he would and stated that he would return the next week. On 4 March 2011 he was interviewed and agreed to attend on 8 March. On 8 March he did not attend MISOP but informed staff that he would go to work instead. It was confirmed that the respondent attended work on that date. On 15 March staff telephoned the respondent to remind him to attend MISOP, however the respondent went to work instead.
- [29] On 16 March the respondent indicated that he had not attended as he would be having an operation in a few weeks and wanted to avoid disrupting the group. He stated he was willing to attend the group but would rather recommence following his operation. On 18 March 2011 Queensland Health staff were once again

contacted regarding the respondent's capacity to attend the courses. On 24 March a response was received from Queensland Health stating that there was no reason why he could not attend classes.

- [30] The memo further outlined that on 28 March 2011 a formal warning letter was given to the respondent that his attendance at MISOP was to recommence on 29 March 2011 or an indefinite suspension would be enacted. The respondent read and signed the letter. After attending half the session on 29 March 2011 it was recorded that the respondent discarded his program documentation into a waste basket and did not return for the second half of the program. Subsequently an indefinite suspension was enacted and Mr Liverton was interviewed and informed of the suspension. He was advised that should he wish to recommence treatment and engagement he needed to make a formal request.

The respondent's arguments

- [31] Counsel for the respondent argues that the respondent's failure to complete the MISOP, having previously successfully completed the preparatory course, was specifically related to his health issues which prevented him being able to participate fully in the program as required. In particular it is argued that he was experiencing the effects of narcotic analgesia to alleviate the pain caused by impacted wisdom teeth.
- [32] It is also argued that the respondent attempted to return to the program after surgery in April 2011 and that the failure to recommence the program is not due to him as he has endeavoured to return.

Is the failure to complete the MISOP due to his health issues?

- [33] Having reviewed the respondent's prison records which carefully set out his interactions with the Programs Staff I do not consider that his non attendance at the MISOP and in particular his choice of attending work on many occasions prior to April 2011 can be explained simply in terms of him suffering from the combined affects of pain and analgesia which prevented him from meaningfully participating.
- [34] It is clear that Queensland Health Staff specifically assessed him for that purpose on 2 occasions and concluded that there was no difficulty with respect to him meaningfully participating.
- [35] Dr Grant also noted that the respondent was on analgesia and suffering painful wisdom teeth when he saw him and he did not consider that it would affect his ability to participate in the program. It is also clear that a review of the file entries indicates a preference to participate in his work activities rather than to take part in a course. If he was fit for work one would assume he was fit for participation in a program.
- [36] Accordingly in my view the failure to complete the MISOP cannot be attributed solely to health issues.

Is the current non participation due to the respondent's non compliance?

- [37] During a clinic meeting on 4 May 2011 the prison notes record that prior to his return to the group the respondent had to demonstrate ownership for the behaviours

that resulted in his suspension. He was also required to outline strategies he would use to manage this behaviour in future and provide a written overview of what he had learnt from the program to date.

- [38] It is clear that he was provided with additional written work on 13 May 2011 which required him to explore his behaviours and outline the gains he had made from the program. He was advised he had one week to complete the work.
- [39] On 20 May a discussion between the program facilitators and Criminogenic Programs Unit Principle Advisor determined that the respondent should be provided with additional worksheets that specifically required him to provide information on his problematic behaviours in group and to consider the links between these behaviours and his offending behaviours. The Criminogenic Programs Unit further recommended that his reintroduction into group be suspended until completion of the written work to a satisfactory standard. In addition, it was recommended that a clear case formulation on how to manage his behaviours was to be implemented prior to him returning him to group.
- [40] The respondent was provided with a second lot of additional work on 31 May 2011. On 2 June 2011 the respondent advised that he had not completed the additional paperwork. The respondent was advised he needed to complete both sets of written work. On 28 June the respondent advised that he had not completed the paperwork but a subsequent assessment indicated he had completed the work but to a minimum standard.
- [41] It is clear that the respondent made a request to return to the MISOP on 1 August 2011. He was then interviewed in relation to this request whereupon it was determined to administer a Personality Assessment Inventory (PAI). Those results did not display anything clinically significant. Whilst a case conference was convened on 26 August 2011 to discuss the respondent's return to MISOP it would seem that no real decision was made in relation to that request. It would seem that "further enquiries needed to be made by Criminogenic Program Unit regarding the availability of resources to assist in the management of prisoner Liverton's responsivity issues and to address his treatment needs. The outcome of the case conference is still pending the receipt of additional recommendations from Criminogenic program unit."
- [42] It would seem to me therefore that up until 1 August 2011 the failure to return to the MISOP was clearly due to the respondent's failure to complete the paperwork which was required of him. The available inference is that he simply will not comply with the course requirements. Whilst I consider there has been a delay since 1 August 2011 of a period of 6 weeks which is not entirely of the respondent's making I consider that the delay is a result of the need to implement strategies to manage the respondent's difficult behaviours within the group and to the program facilitators. Consequently I consider that the failure to re-engage in the MISOP is due to the respondent's difficult behaviours but that strategies need to be expeditiously put in place to give the respondent a further opportunity to complete the MISOP.
- [43] The behaviours which have prevented the respondent's reengagement are significant and in fact they impact on the assessment ultimately of his risk to the community.

Dr Grant explained the significance of those behaviours in his oral evidence at the hearing.

Dr Grant's further evidence

[44] Dr Grant gave evidence at the hearing of the application after reading the further affidavit material in relation to the respondent's progress in the course. He stated that having considered that further information he considered that the risk was now more severe than that stated in his report. In that report he had said that the overall risk was moderate depending on the outcomes of the MISOP he continued:

“Now, that's because the account that Mr Liverton gave me of his progress through the course was clearly not correct and he hadn't completed the course and been excluded from it. Now, that indicates to me that he hasn't satisfactorily come to terms with his sexual offending behaviour and his sexual issues and that he has not been able to, for whatever reason, confront those issues and deal with them and - and [indistinct] them. Now, the research evidence suggests that people that do not - that start a course and drop out are more at risk of re-offending than people that don't do a course at all, so I think they're the reasons why, I think, the risk would be higher. And I think if you take his failure to complete the course in conjunction with his current history of non-sexual violence to women, stalking behaviour to women and his failure to comply with community orders, or apprehended violence orders and so on, it all adds to the risk. And the fact that he hasn't prepared for this course means that, I think, the risk is higher than I estimated at the time.”

[45] Dr Grant was asked by counsel for the respondent to consider the affect the medication and his painful wisdom teeth would have had on him. Dr Grant replied:

“If he was in extremely severe pain that might be so, ...but he was taking that medication when I saw him, he was having the same problem. I don't believe that the pain that he would have been suffering would have been sufficient to have prevented his participation, and that wasn't the reason that was always presented when he didn't go to the group.”

[46] Dr Grant considered that there were serious grounds for believing that the respondent was a serious danger to the community in the absence of a supervision order.

[47] It is clear that Dr Grant's initial assessment presumed that the respondent would satisfactorily complete the MISOP and that the future risk was heavily dependent on that successful completion. Having considered all of the factors I am required to consider pursuant to s 13(4) I am satisfied that there are reasonable grounds for believing that the respondent is a serious danger to the community in the absence of such an order.

[48] I am therefore satisfied that an order should be made that the respondent undergo examinations by two psychiatrists who are to prepare independent reports in accordance with s.11 of the Act in advance of the final hearing. Pursuant to s 8 (1)

of the Act a date should also be set for the hearing of the application for a Division 3 Order.

ORDERS

1. The application for a Division 3 Order be set for hearing on 22 November 2011.
2. Pursuant to s 8(2)(a) of the *Dangerous Prisoners Sexual Offenders) Act 2003*, the respondent undergo examinations by two psychiatrists named by this Honourable Court, being Dr Joan M Lawrence and Dr Scott Harden who are to prepare independent reports, which are to be prepared in accordance with s 11 of the Act.
3. Liberty to apply granted.