SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v Foy* [2014] QSC 304
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) v **MARK ANTHONY FOY** (respondent)
FILE NO/S:	BS 8990 of 2004
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	16 December 2014
DELIVERED AT:	Brisbane
HEARING DATE:	1 December 2014
JUDGE:	Boddice J
ORDER:	**I make orders in terms of the Applicant's draft which I initial and place with the papers.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – DANGEROUS SEXUAL OFFENDER – GENERALLY– where the respondent has been the subject of a supervision order pursuant to the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) – where the Attorney-General makes application for a further supervision order – where the respondent opposes the making of a further supervision order – whether the respondent is an unacceptable risk of reoffending – whether the Court ought, in the exercise of its discretion, to make a further supervision order *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 13, s 19D *Fardon v Attorney General* (2004) 223 CLR 575, cited
COUNSEL:	J B Rolls for the applicant J Fenton for the respondent
SOLICITORS:	Crown Law for the applicant Fisher Dore Lawyers for the respondent

[1] **BODDICE J:** The Attorney-General for the State of Queensland makes application for a further supervision order in respect of the Respondent Mark Anthony Foy. The Respondent opposes a further supervision order. At issue is whether the Respondent is an unacceptable risk of sexually reoffending in the future, and whether the Court ought, in the exercise of its discretion, to make a further supervision order.

Background

[2] The Respondent was born on 28 July 1961. He was placed on a supervision order under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) ("the Act") on 6 January 2005. His past criminal history, circumstances and risk factors were conveniently summarised by Douglas J when making that supervision order:

> "[1] DOUGLAS J: The Respondent, Mark Anthony Foy, has recently been released from prison after having served a 4½ years 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.
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> [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.
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> [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.
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> [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.
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> [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."

[3] The Respondent contravened that supervision order on four occasions. The first contravention, on 14 June 2006, and the second contravention, on 5 June 2007, involved breaches of the condition he abstain from alcohol and non-prescribed drugs for the duration of the order. The Respondent was released subject to amended supervision orders on both occasions.

[4] The third contravention, on 15 July 2008, involved a failure to abstain from alcohol and non-prescription drugs and a failure to comply with the reasonable directions of

an authorised corrective services officer. The supervision order was further amended, and the Respondent was released subject to that amended order.

[5] The fourth contravention, on 14 April 2009, involved the contravention of a clause which required the Respondent not to have any unsupervised contact with children under the age of 16, other than with the consent of a supervising corrective services officer. The breach of that clause occurred on 17 December 2008, when the Respondent was located at a swimming hole with two juvenile males aged 16 and 13 years. The Respondent was released subject to the supervision order, as amended, until 31 December 2014.

The statutory scheme

[6] Section 13 of the Act provides that if the Court is satisfied a prisoner is a serious danger to the community in the absence of a Division 3 Order, the Court may order the prisoner be detained in custody for an indefinite term for control, care or treatment, or that the prisoner be released subject to the requirements of a supervision order. A prisoner is a serious danger to the community if there is an unacceptable risk the prisoner will commit a serious sexual offence if released from custody or released without a supervision order. Section 13(4) lists factors a Court must have regard to when deciding whether a prisoner is a serious danger to the community.

[7] Section 19B of the Act provides the Attorney-General may apply for a further supervision order in respect of a prisoner released subject to a supervision order. The application must state the period of supervised release sought, and is to be determined as if the provisions relevant to a Division 3 Order were a reference to a further supervision order with any necessary changes. Those provisions include s 13 of the Act.

Evidence

[8] Professor Barry Nurcombe assessed the Respondent on 25 August 2014. He opined the Respondent suffers from paraphilia, exhibitionism, paedophilia, substance abuse disorder, dysthymic disorder and antisocial personality disorder. Professor Nurcombe assessed the Respondent's risk of sexual offending as high but noted the Respondent had not been charged with a sexual offence since 2000, and had been free of alcohol and illicit substances for several years. Although the risk remained chronic there did not appear to be a risk of physical coercion.

[9] Professor Nurcombe opined that if the Respondent was to reoffend, it was likely to involve genital exhibitionism and fondling of minors, potentially both female or male. Warning signs included depression, hopelessness, loneliness, social withdrawal, increased sexual activity or attendance at sex shops, and reversion to alcohol or illicit drugs. The likelihood of recidivism was not imminent and there was little chance sexual violence would escalate to serious or life threatening levels.

[10] Whilst Professor Nurcombe opined the Respondent's risk of sexual recidivism was high, with no supervision order in place after the expiration of the existing order, he opined the presence of a supervision order after the expiry of the current order would render the risk moderate. Professor Nurcombe opined there was a need for a further supervision order. Its duration should be three years. Professor Nurcombe recommended the Respondent receive anti-androgenic medication, anti-depressant medication and psychotherapy.

[11] In his oral evidence, Professor Nurcombe agreed the development of a stable relationship and the obtaining of employment were significant mitigating factors in respect of ongoing risks of sexual reoffending in the future. Professor Nurcombe noted adverse publicity in the past had led to the Respondent being rendered an outcast in a small community where he had been responding well to the supervision order, and undertaking gainful employment without adverse consequences. The Respondent had been forced to leave the community, with the loss of his employment. Against a background of difficulty establishing intimate and non-intimate relationships, and limited social support within the community, this event had significantly increased his risk factors.

[12] Owen Pershouse, a psychologist, opined the Respondent did not currently represent a significant risk of reoffending but noted idleness and isolation within the community placed him at risk of non-compliance and subsequent relapse into the abuse of alcohol or drugs. Such a scenario significantly increased his risk factors.

Applicant's submissions

[13] The Attorney-General submits there is compelling evidence the Respondent still presents as an unacceptable risk to the community in the absence of a Division 3 Order. Whilst any further sexual offending may be in the nature of exhibitionism, it is likely such offending would be of a sexual nature against children. Such offending is an unacceptably high risk. The risk could be appropriately reduced to moderate by the imposition of a supervision order with appropriate conditions. The Attorney-General submits any further supervision order should be for three years from the expiration of the existing order.

Respondent's submissions

[14] The Respondent submits he does not represent an unacceptable risk of serious sexual reoffending in the future. Any risk of sexual reoffending is likely to initially involve exhibitionism, and the Respondent's prominence meant any act of exhibitionism is likely to result in his prompt detection and detention. On that basis, the risk of reoffending relates to the lowest type of sexual offence, and did not involve touching of a victim.

[15] The Respondent further submits that even if the Court is satisfied he represents an unacceptable risk of serious sexual reoffending in the future, the Court has a discretion whether to make a further supervision order. That discretion is to be

exercised judicially having regard to the subject matter, scope and purpose of the Act. The Court should give great weight to the fact the Respondent has not committed a sexual offence during the supervision order, is not alleged to have committed a sexual offence since 19 February 2000, and when employed has performed well on a supervision order.

[16] Further, any past offending has related to opportunistic acts which are unlikely to be prevented by a supervision order. The Respondent also submits it was through no fault of his own he was driven from a community where he had been residing without any adverse behaviour, and where he had been functioning well in employment.

Discussion

[17] Section 19D of the Act gives this Court a discretion to make a further supervision order in respect of an offender subject to an existing supervision order. The discretion to be exercised is to make a further supervision order, or to decline to make that further supervision order. Unlike s 13 of the Act, the discretion does not involve a consideration whether to make a continuing detention order.[1]

[18] In exercising the discretion under s 19D of the Act, all relevant factors must be considered by the Court. Those factors include not only the matters specified in s 13 of the Act but also factors since the making of the initial supervision order, such as the Respondent's performance on the existing supervision order, and the impact of the imposition of a further supervision order on the Respondent.

[19] Whilst the Respondent submits the factors set out in s 13 cannot operate in the same way as when being considered in making the original order, there is no reason why the legislation should not be given its clear legislative intent, which was that those factors operate except where there are necessary changes. The fact an application under s 19D does not involve consideration of whether a continuing detention order should be made, does not render the factors relevant to a consideration of whether a supervision order ought to be made, and on what terms, as set out in s 13 of the Act, inoperable when exercising the discretion under s 19D of the Act.

[20] The Respondent's current risk factors have been carefully considered by Professor Nurcombe. That consideration included the significant impact on the Respondent of adverse publicity in the past. Professor Nurcombe also gave careful consideration to the type of sexual reoffending that may occur in the future.

[21] After considering all of the circumstances, Professor Nurcombe opined the Respondent presents as a high risk of reoffending without a further supervision order. I have no hesitation in accepting Professor Nurcombe's opinion. I found his evidence highly persuasive. He gave proper consideration to the mitigating factors

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1 For a discussion of the discretion under s 13 of the Act see *Fardon v Attorney General* (2004) 223 CLR 575.

in the Respondent's favour, including the fact he has not sexually reoffended since 2000, whilst recognising the significant risk posed by the Respondent by his longstanding sexual and other disorders.

[22] The risk of sexual offending in the future posed by the Respondent is high, in the absence of conditions. Whilst it may be that any initial reoffending would involve exhibitionism, it is not appropriate to consider the risk factors on the assumption any person confronted with that exhibitionist behaviour will report it to the police. Further, a clear and relevant risk factor is that any exhibitionist behaviour will quickly extend to fondling of a male or female child complainant. Such conduct may have devastating consequences for that child complainant.

[23] Whilst it is to the Respondent's credit he has not committed a further sexual offence whilst on the supervision order or, indeed since 2000, his behaviour must be considered in the context that he has been subject to a supervision order containing strict conditions since 2006. Professor Nurcombe acknowledged that the existence of that supervision order was a significant factor when considering the fact the Respondent had not committed any sexual offences in the past five years. He opined that the absence of such strict conditions may increase the Respondent's risk to the community in the future.

[24] It is unfortunate the Respondent, as a result of adverse publicity, lost stable accommodation and employment. However, the imposition of a future supervision order ought not to be refused on the ground such an order will place the Respondent in jeopardy for further adverse publicity and its consequences. Professor Nurcombe's opinion is clear. The Respondent, in the absence of a supervision order, poses a high risk of sexual reoffending in the future. A further supervision order will render that risk moderate.

Conclusions

[25] It is essential, for the adequate protection of the community, that the risk of sexual reoffending posed by the Respondent be minimised in the future. The making of a further supervision order will ensure the risk the Respondent will commit a serious sexual offence in the future, is not an unacceptable risk.

[26] I am satisfied, in the exercise of my discretion, that a further supervision order ought to be made for a period of three years from the expiry of the existing order.

Orders

[27] I make orders in terms of the draft which I initial and place with the papers.