SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v Nemo* [2018] QSC 202
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **WINSTON JOHN NEMO** (respondent)
FILE NO/S:	BS No 2341 of 2018
DIVISION:	Trial Division
PROCEEDING:	Hearing
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	30 April 2018
DELIVERED AT:	Brisbane
HEARING DATE:	30 April 2018
JUDGE:	Martin J

ORDER:

1. **The application for a Division 3 Order be set for final hearing on 16 July 2018;**

2. **Pursuant to section 8(2)(a) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), the respondent undergo examinations by two psychiatrists being, Dr McVie and Dr Beech, who are to prepare reports in accordance with section 11 of the Act; and**

3. **Pursuant to section 39PB(3) of the *Evidence Act* 1977 (Qld), the Court directs that Dr McVie and Dr Beech give evidence to the court other than by audio visual link or audio link.**

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 Applicant seeks orders under section 8 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) – where those orders sought would subject the Respondent to assessment by

	two psychiatrists under section 11 of that Act – where psychiatric evidence was adduced to suggest that the Respondent represented a moderate risk for sexual offending into the future, with the risk escalating to high if he were to relapse into using intoxicants – whether the index offence fell within the category the subject of the Act – whether the test of high probability in section 13(3) of the Act should be applied in determining whether the Court is reasonably satisfied within the terms of section 8(1) of the Act – whether there was material sufficient to satisfy the Court that there were reasonable grounds for believing the prisoner was a serious danger to the community in the absence of a Division 3 order
CASES AND LEGISLATION:	*Attorney-General v Fardon* [2003] QSC 331
	Attorney-General for the State of Queensland v SBD [2010] QSC 104
	George v Rockett [1990] 170 CLR 104
	Prior v Mole [2017] 91 ALJR 441
	Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld) ss 8, 11 and 13
	Evidence Act 1977 (Qld) s 39PB(3)
COUNSEL:	J Tate for the Applicant C R Smith for the Respondent
SOLICITORS:	Crown Solicitor for the Applicant Legal Aid Queensland for the Respondent

[1] The Attorney-General seeks orders under section 8 of the *Dangerous Prisoners Sexual Offenders Act* 2003 (Qld) ("the Act"). The orders sought would subject the respondent to assessment by two psychiatrists under section 11 of the Act.

[2] The respondent has been interviewed by a psychiatrist, Dr Sundin, who has provided a report. In that report, she says that the respondent's ongoing unmodified risk of reoffending in the community is unacceptable and at the moderate to high range compared to the recidivism rate of sex offenders generally. In her opinion:

> "The future with Mr Nemo is quite uncertain. In my opinion, he represents a moderate risk for sexual offending into the future with the risk escalating to high if he relapses into using intoxicants."

[3] Dr Sundin was cross-examined, and her opinion was skilfully explored by Ms Smith who appeared for the respondent. Some of the matters upon which Dr Sundin had based her opinion were later clarified so that she became aware that the offences committed by the respondent at a young age, they being offences of violence, were not as serious as she had originally understood. She took that into account and maintained her view.

[4] She also was cross-examined with respect to the respondent's current circumstances and medical condition, and while she was willing to accept that some of the matters upon which she relied were not completely accurate, the only major shift in her view was with respect to whether or not the respondent was going through a major depressive episode. Ms Smith contended that I should take into account the nature of the index offence. This was the first offence of a sexual nature committed by the respondent and described by Dr Sundin in this way in her report:

> "…this was a single event, occurring at a time when it is likely that Mr Nemo was highly intoxicated. Whist the event was undoubtedly unpleasant for the victim, she was able to effect her escape, and the violence accompanying the offence rose to the level of pushing and restraint rather than a more serious physical assault, assault with weapons or completed rape."

[5] I accept that such a description of the offence would tend to indicate that the violence involved was at the lower end of the spectrum for these kinds of offences; nevertheless, the offence does fall within the category the subject of this Act.

[6] It was also argued on behalf of the respondent that nothing less than the test of high probability set out in section 13(3) of the Act should be applied in determining whether the Court is reasonably satisfied within the terms of section 8(1) of the Act. Reliance was placed on statements made in *Attorney-General v Fardon* [2003] QSC 331 at paragraphs 19 to 24 and *Attorney-General for the State of Queensland v SBD* [2010] QSC 104 at 49 to 51.

[7] In *Attorney-General for the State of Queensland v SBD* [2010] QSC 104, Justice Lyons referred to section 13 (3) and said that it seemed to him to be possible that the subsection has some indirect relevance to an application for orders under section 8. He went on to say that in determining whether there are reasonable grounds for believing

that the respondent is a serious danger to the community in the absence of a Division 3 order, it seemed to him that one could bear in mind the standard in section 13 (3) which will apply in the final determination of the question. I understand his Honour there to be tentatively exploring the possibility without coming to a conclusion with respect to any connection between the two sections.

[8] For my part, I prefer to read the Act as creating two separate procedures, one under Part 2, Division 1 of the Act and one under Part 2, Division 3 of the Act. Section 8 does not require any conclusion that the prisoner is a serious danger to the community. What an applicant must demonstrate in order to obtain an order under section 8 is material sufficient to satisfy the Court that there are reasonable grounds for believing the prisoner is a serious danger to the community. It is not the time for a Court to embark upon a consideration of the material with a view to forming even a tentative view as to the final conclusion.

[9] Similar phraseology can be found in other statutes where the exercise of a power is conditioned on the existence of reasonable grounds for belief. Such was the case in the High Court decision in *George v Rockett* [1990] 170 CLR 104. More recently, that case was considered by the High Court in *Prior v Mole* [2017] 91 ALJR 441 where, in paragraph 4, Justices Kiefel and Bell said with respect to the formation of such a belief:

> "…Proof of the latter requires that those facts and circumstances be sufficient to induce in the mind of a reasonable person a positive inclination towards acceptance of the subject matter of the belief. This is not to say that it requires proof on the civil standard of the existence of that matter. Facts and circumstances that suffice to establish the reasonable grounds for a belief may include some degree of conjecture."

[10] That reasoning, which I respectfully adopt, applies to section 8. As such, it removes section 8 from any consideration that there needs to be established to the high degree set out in section 13 the matters necessary to ground the belief.

[11] In this case, Dr Sundin has examined the respondent and in a lengthy and detailed opinion has formed a clinical view that he represents a moderate risk for sexual offending into the future and further that the risk could escalate in the presence of intoxicants. As was said in *George v Rockett*, the acceptance of belief is given on more

slender evidence than proof.[1] In this case, I am satisfied that the material advanced by the Attorney-General consisting of, amongst other things, Dr Sundin's report, is sufficient to satisfy me that there are reasonable grounds for believing that the prisoner is a serious danger to the community in the absence of a Division 3 order. I will therefore make an order under section 8.

ORDERS

[12] Being satisfied that there are reasonable grounds for believing that the respondent is a serious danger to the community in the absence of an order made under Division 3 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), I order that:

1. The application for a Division 3 Order be set for final hearing on 16 July 2018;

2. Pursuant to section 8(2)(a) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), the respondent undergo examinations by two psychiatrists being, Dr McVie and Dr Beech, who are to prepare reports in accordance with section 11 of the Act; and

3. Pursuant to section 39PB(3) of the *Evidence Act* 1977 (Qld), the Court directs that Dr McVie and Dr Beech give evidence to the court other than by audio visual link or audio link.

[1] [1990] 170 CLR 104 at 116.