SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v CCJ* [2019] QSC 267
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **CCJ** (respondent)
FILE NO:	BS 3242 of 19
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	1 November 2019
DELIVERED AT:	Brisbane
HEARING DATE:	30 October 2019
JUDGE:	Davis J
ORDERS:	**Orders made on 30 October 2019** **1. The interim detention order made on 27 September 2019 is dissolved.** **2. The application for orders under s 13 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 is dismissed.**
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 was convicted of "serious sexual offences" and proceedings were commenced against him under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 – where the convictions were later quashed by order of the Court of Appeal – whether the prisoner is still a "prisoner" for the purposes of the legislation – whether proceedings under the legislation can continue given the quashing of the convictions *Corrective Services Act* 2006, dictionary *Dangerous Prisoners (Sexual Offenders) Act* 2003, s 3, s 5, s 8, s 9A, s 13, s 16, s 16C, s 19, s 19A, s 21, s 22, s 30, s 43, s 43A *Uniform Civil Procedure Rules* 1999, r 668

Youth Justice Act 1992, s 227

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT) (2009) 239 CLR 27, cited
Attorney-General for the State of Queensland v Kanaveilomani [2015] 2 Qd R 509, cited
Attorney-General for the State of Queensland v Newman [2019] 2 Qd R 1, cited
Attorney-General for the State of Queensland v Phineasa [2013] 1 Qd R 305, followed
Dodge v Attorney-General for the State of Queensland (2012) 226 A Crim R 31, cited
Federal Commissioner of Taxation v Consolidated Media Holdings Ltd (2012) 250 CLR 503, cited
Lee v New South Wales Crime Commission (2013) 251 CLR 196, cited
Potter v Minahan (1908) 7 CLR 277, followed
The Queen v A2; The Queen v Magennis; The Queen v Vaziri [2019] HCA 35, followed
R v Independent Broad-Based Anti-Corruption Commissioner (2016) 256 CLR 459, cited
SZTAL v Minister for Immigration and Border Protection (2017) 262 CLR 362, cited
X7 v Australian Crime Commission (2013) 248 CLR 92, cited

COUNSEL:	J Rolls for the Applicant S Robb for the Respondent
SOLICITORS:	G R Cooper Crown solicitor for the Applicant Legal Aid Queensland for the Respondent

[1] The respondent was the subject of proceedings under s 5 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (the DPSOA).

[2] On 30 October 2019, I made the following orders:

1. The interim detention order made on 27 September 2019 is dissolved;

2. The application for orders under s 13 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 is dismissed.

Background

[3] The respondent is an Indigenous man born on 17 April 1998.

[4] In 2005, 10 days before his seventeenth birthday, he allegedly committed a number of offences including three counts of rape for which he was subsequently charged.

[5] In September of 2016, after entering pleas of guilty, he was sentenced in the Children's Court sitting in Townsville to an effective sentence of four years detention. By force of

s 227 of the *Youth Justice Act* 1992 he would be released on a conditional release order after serving 70 percent of the period of detention.

[6] On 26 March 2019 the Attorney-General filed an application for orders under the DPSOA.

[7] On 4 April 2019, Burns J, pursuant to s 8 of the DPSOA, made orders:

1. Setting a date for the final hearing of the application;
2. Appointing Psychiatrists, Doctors McVie and Harden, to examine the respondent; and
3. Placing the respondent on an interim detention order pending finalisation of the proceedings under the DPSOA.

[8] Further interim detention orders[1] were made, the last being made on 27 September 2019 to expire at 4.00 pm on 8 November 2019.

[9] In addition to examinations by Doctors McVie and Harden, the respondent was examined, upon instructions from his lawyers, by Psychiatrist Dr Bala and Neuropsychologist Ms Bryant.

[10] The medical evidence obtained in the course of the proceedings under the DPSOA raised questions as to whether the respondent was fit to plead when he entered his pleas of guilty in the Childrens Court in 2016.

[11] Relying on that medical evidence, the respondent sought an extension of time to appeal against his convictions. That application was granted by the Court of Appeal on 2 September 2019.

[12] On 29 October 2019, the Court of Appeal quashed the convictions and ordered a retrial.

[13] It is likely that the respondent's criminal case will now be referred to the Mental Health Court, but at the moment, he remains in custody without bail.

[14] As the convictions upon which the Attorney-General relied to bring the proceedings under the DPSOA have now fallen, the respondent sought an order for the dismissal of the DPSOA proceedings.

[15] A point of law arose as to whether, on a proper construction of the DPSOA, the jurisdiction of the court to make final orders is removed by the quashing of the convictions upon which the Attorney-General relied to commence the proceedings.

Statutory context

[16] Section 5 of the DPSOA provides authority for the making of an application by the Attorney-General. That section is in these terms:

> "**5 Attorney-General may apply for orders**

[1] *Dangerous Prisoners (Sexual Offenders) Act* 2003, s 9A.

(1) The Attorney-General may apply to the court for an order or orders under section 8 and a division 3 order in relation to a prisoner.

(2) The application must—

(a) state the orders sought; and

(b) be accompanied by any affidavits to be relied on by the Attorney-General for the purpose of seeking an order or orders under section 8; and

(c) be made during the last 6 months of the prisoner's period of imprisonment.

(3) On the filing of the application, the registrar must record a return date for the matter to come before the court for a hearing (preliminary hearing) to decide whether the court is 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) The return date for the preliminary hearing must be within 28 business days after the filing.

(5) A copy of the application and any affidavit to be relied on by the Attorney-General must be given to the prisoner within 2 business days after the filing.

(6) In this section—

prisoner means a prisoner detained in custody who is serving a period of imprisonment for a serious sexual offence, or serving a period of imprisonment that includes a term of imprisonment for a serious sexual offence, whether the person was sentenced to the term or period of imprisonment before or after the commencement of this section."

[17] Section 5 of the DPSOA authorises the making of an application against a "prisoner". Section 5(6) defines "prisoner" by reference to a person "detained in custody who is serving a period of imprisonment for a serious sexual offence". The term "serious sexual offence" is defined as:

"***serious sexual offence*** means an offence of a sexual nature, whether committed in Queensland or outside Queensland—

(a) involving violence; or

(b) against a child; or

(c) against a person, including a fictitious person represented to the prisoner as a real person, whom the prisoner believed to be a child under the age of 16 years."

[18] Perhaps obviously, a person cannot be "serving a period of imprisonment for a serious sexual offence" unless the person has been convicted of a "serious sexual offence".

[19] Section 8 of the DPSOA provides for a preliminary hearing and the appointment of psychiatrists to examine a respondent to an application filed under the authority of s 5. Section 8 is in these terms:

> "**8 Preliminary hearing**
>
> (1) If the court is satisfied there are reasonable grounds for believing the prisoner is a serious danger to the community in the absence of a division 3 order, the court must set a date for the hearing of the application for a division 3 order.
>
> (2) If the court is satisfied as required under subsection (1), it may make—
>
> (a) an order that the prisoner undergo examinations by 2 psychiatrists named by the court who are to prepare independent reports; and
>
> (b) if the court is satisfied the application may not be finally decided until after the prisoner's release day—
>
> (i) an order that the prisoner's release from custody be supervised; or
>
> (ii) an order that the prisoner be detained in custody for the period stated in the order. (statutory note deleted)

[20] If orders are made under s 8 then a hearing is had to determine whether orders should be made under Division 3 of Part 2. Section 13 provides, relevantly here, as follows:

> "**13 Division 3 orders**
>
> (1) This section applies if, on the hearing of an application for a division 3 order, the court is satisfied the prisoner is a serious danger to the community in the absence of a division 3 order (a serious danger to the community).
>
> (2) A prisoner is a serious danger to the community as mentioned in subsection (1) 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) If the court is satisfied as required under subsection (1), the court may order—
>
> (a) that the prisoner be detained in custody for an indefinite term for control, care or treatment (continuing detention order); or
>
> (b) that the prisoner be released from custody subject to the requirements it considers appropriate that are stated in the order (supervision order) …"

[21] Application of the definition of "prisoner" in s 5(6) is confined to s 5. That definition does not apply in relation to either ss 8 or 13[2]. For the purposes of those sections, the definition in the Dictionary to the DPSOA applies. That definition is:

> "***prisoner*** means a prisoner within the meaning of the Corrective Services Act 2006.
>
> Note—
>
> Also see section 43A."

[22] Section 43A of DPSOA is in these terms:

> "**43A Persons who remain prisoners for particular purposes**
>
> (1) This section provides for the application of this Act to a person.
>
> (2) A person who is subject to a continuing detention order or interim detention order remains a prisoner.
>
> (3) A person who is subject to a supervision order or interim supervision order remains a prisoner for the purposes of any relevant application, appeal or rehearing.
>
> (4) A person who is released from custody, without an interim supervision order having being made, after the court sets a date for the hearing of an application for a division 3 order relating to the person remains a prisoner for the purposes of the application.
>
> (5) A person who is released from custody, without an interim supervision order having being made, after the Court of Appeal makes an order under section 43(2)(d) relating to the person remains a prisoner for the purposes of the rehearing.
>
> (6) A person who is released from custody after the hearing of any application under this Act, without an interim supervision order having being made, remains a prisoner for the purposes of any appeal against the decision and for any subsequent appeal."

[23] The *Corrective Services Act* 2006 defines "prisoner" relevantly here as:

> "***prisoner***—
>
> (a) means a person who is in the chief executive's custody."

[24] Section 43(2) of the DPSOA, referred to in s 43A(5), concerns appeals from orders made under the DPSOA and is irrelevant to these present issues.

[25] On a literal reading of s 13 with the definition of "prisoner", the jurisdiction of the court to make orders has not been removed by the quashing of the conviction. That is because the respondent remains a "prisoner" as he is "in the chief executive's custody". He was also the subject of an interim detention order.[3]

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[2] *Attorney-General for the State of Queensland v Newman* [2019] 2 Qd R 1.

[3] Section 43A(2).

Consideration

[26] The applicant was content that the application be dismissed but did not submit that the dismissal could be done by consent. The parties proceeded on the basis that the proceedings ought be dismissed only upon the court determining that as the appropriate outcome.

[27] Both parties submitted that after the convictions were quashed:

1. The respondent was a "prisoner" as defined for the purposes of s 13 of the DPSOA;

2. The respondent was not a "prisoner" as defined for the purposes of s 5(6);

3. An order should be made under r 668 of the *Uniform Civil Procedure Rules* 1999 (UCPR) setting aside the orders made under s 8 on 4 April 2019;

4. That then naturally leads to dismissal of the application.

[28] Rule 668 of the of the UCRP is in these terms:

> "**668 Matters arising after order**
>
> (1) This rule applies if—
>
> (a) facts arise after an order is made entitling the person against whom the order is made to be relieved from it; or
>
> (b) facts are discovered after an order is made that, if discovered in time, would have entitled the person against whom the order is made to an order or decision in the person's favour or to a different order.
>
> (2) On application by the person mentioned in subrule (1), the court may stay enforcement of the order against the person or give other appropriate relief.
>
> (3) Without limiting subrule (2), the court may do one or more of the following—
>
> (a) direct the proceedings to be taken, and the questions or issue of fact to be tried or decided, and the inquiries to be made, as the court considers just;
>
> (b) set aside or vary the order;
>
> (c) make an order directing entry of satisfaction of the judgment to be made.

[29] The parties submitted that the conviction for a "serious sexual offence" brought the respondent within s 5 of the DPSOA. The quashing of the conviction is a "fact" which arose after the orders under s 8 were made and that fact is one "entitling [the respondent] to be relieved from [the s 8 orders]"

[30] There are difficulties with that submission. The definition of "prisoner" under s 5(6) of the DPSOA does not apply to s 8. An order may be made under s 8 against a "prisoner", being a person who is in the chief executive's custody. It is only s 5(6) which defines "prisoner" by reference to a respondent "serving a period of imprisonment for a serious sexual offence".[4]

[31] The real issue here is whether the term "prisoner" used in ss 8 and 13 includes "a person who is in the chief executive's custody" but whose convictions for the offences relied upon to qualify the respondent under s 5 have been quashed. That is a question of construction. Ms Robb who appeared for the respondent submitted in addition to her reliance upon r 668, that the intention of the DPSOA was not to catch "prisoners" other than those convicted of a "serious sexual offence". On a proper construction then of the DPSOA, jurisdiction to make further orders fell when the convictions fell.

[32] Construction of a statute involves consideration of the context and purpose of the relevant provision to determine the meaning of the words actually used.[5]

[33] In *The Queen v A2; The Queen v Magennis; The Queen v Vaziri*,[6] being the latest statement by the High Court on the approach to construction, this was said by Kiefel CJ and Keane J:

> "31 At issue in these appeals is the scope and operation of s 45(1) and in particular whether the words 'otherwise mutilates' may be taken as intended to encompass the procedure upon which the Crown case was based.
>
> 32 The method to be applied in construing a statute to ascertain the intended meaning of the words used is well settled. It commences with a consideration of the words of the provision itself, but it does not end there. A literal approach to construction, which requires the courts to obey the ordinary meaning or usage of the words of a provision, even if the result is improbable, has long been eschewed by this Court. It is now accepted that even words having an apparently clear ordinary or grammatical meaning may be ascribed a different legal meaning after the process of construction is complete. This is because consideration of the context for the provision may point to factors that tend against the ordinary usage of the words of the provision.
>
> 33 Consideration of the context for the provision is undertaken at the first stage of the process of construction. Context is to be understood in its widest sense. It includes surrounding statutory provisions, what may be drawn from other aspects of the statute and the statute as a whole. It extends to the mischief which it may be seen that the statute is intended to remedy. 'Mischief' is an old expression. It may be understood to refer to a state of affairs which to date the law has not addressed. It is in that sense a defect in the law which is now sought to be remedied. The

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4 *Attorney-General for the State of Queensland v Newman* [2018] 2 Qd R 1 at [10]-[20].

5 *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14] and [35]-[40]; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 and *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503.

6 [2019] HCA 35.

mischief may point most clearly to what it is that the statute seeks to achieve.

34 This is not to suggest that a very general purpose of a statute will necessarily provide much context for a particular provision or that the words of the provision should be lost sight of in the process of construction. These considerations were emphasised in the decisions of this Court upon which the Court of Criminal Appeal placed some weight.

35 The joint judgment in Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue rejected an approach which paid no regard to the words of the provision and sought to apply the general purpose of the statute, to raise revenue, to derive a very different meaning from that which could be drawn from the terms of the provision. The general purpose said nothing meaningful about the provision, the text of which clearly enough conveyed its intended operation. Similarly, in Saeed v Minister for Immigration and Citizenship the court below was held to have failed to consider the actual terms of the section. A general purpose of the statute, to address shortcomings identified in an earlier decision of this Court, was not as useful as the intention revealed by the terms of the statute itself. In Baini v The Queen, it was necessary to reiterate that the question of whether there had been a 'substantial miscarriage of justice' within the meaning of the relevant provision required consideration of the text of the provision, not resort to paraphrases of the statutory language in extrinsic materials, other cases and different legislation.

36 These cases serve to remind that the text of a statute is important, for it contains the words being construed, and that a very general purpose may not detract from the meaning of those words. As always with statutory construction, much depends upon the terms of the particular statute and what may be drawn from the context for and purpose of the provision.

37 None of these cases suggest a return to a literal approach to construction. They do not suggest that the text should not be read in context and by reference to the mischief to which the provision is directed. They do not deny the possibility, adverted to in CIC Insurance Ltd v Bankstown Football Club Ltd , that in a particular case, 'if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance'. When a literal meaning of words in a statute does not conform to the evident purpose or policy of the particular provision, it is entirely appropriate for the courts to depart from the literal meaning. A construction which promotes the purpose of a statute is to be preferred." (citations omitted)

And, by Bell and Gageler JJ:

"124 The principles of interpretation were not in issue on the hearing of the appeals. In assigning legal meaning to the words of a provision, the

> court starts with consideration of the ordinary and grammatical meaning of the words taking into account both context and legislative purpose. Consideration of context in its widest sense and the purpose of the statute informs the interpretative task throughout. That consideration, and the consequences of giving a provision its literal, grammatical meaning, may lead the court to adopt a construction that departs from the ordinary meaning of the words. Purposive construction, however, does not extend to expanding the scope of a provision imposing criminal liability beyond its textual limits." (citations omitted)

[34] The DPSOA operates to impose significant restrictions upon a respondent. A respondent may be imprisoned upon a continuing detention order[7] or be subjected to supervision and control of Corrective Services while in the community.[8]

[35] In *Potter v Minahan*[9] the principle of construction which later came to be known as the "principle of legality" was described in these terms:

> "It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used."[10] (citations omitted)

[36] The DPSOA is a statute which attracts the application of the principle of legality.[11]

[37] Section 3 of the DPSOA provides as follows:

> "**3 Objects of this Act**
>
> The objects of this Act are—
>
> (a) to provide for the continued detention in custody or supervised release of a particular class of prisoner to ensure adequate protection of the community; and
>
> (b) to provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation.

[38] The "particular class of prisoner"[12] contains only ones who have been convicted of a "serious sexual offence". That must be so because no proceedings under the DPSOA can be commenced by the Attorney-General against anyone except a person "who is serving

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7 Sections 13(5)(a).
8 Sections 13(5)(b) and s 16.
9 (1908) 7 CLR 277.
10 At 132; and see *X7 v Australian Crime Commission* (2013) 248 CLR 92, *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, *R v Independent Broad-Based Anti-Corruption Commissioner* (2016) 256 CLR 459.
11 *Attorney-General for the State of Queensland v Phineasa* [2013] 1 Qd R 305, *Dodge v Attorney-General for the State of Queensland* (2012) 226 A Crim R 31 at [22].
12 Section 3(1).

a period of imprisonment for a serious sexual offence, or serving a period of imprisonment that includes a term of imprisonment for a serious sexual offence".[13]

[39] Throughout the DPSOA, there is reference to "protection of the public".[14] That term refers to protection from the commission of serious sexual offences by the "particular class of prisoner" to whom the DPSOA applies.[15]

[40] Because of the definition of "prisoner" in s 5(6), proceedings under the DPSOA must be commenced by the Attorney-General before the expiry of the respondent's term of imprisonment being served "for a serious sexual offence".

[41] Because of the definition of "prisoner" in the Dictionary, proceedings may be continued and orders made under ss 8 and 13 notwithstanding that the term of imprisonment has expired and notwithstanding that at the time of the hearings under ss 8 and 13, the respondent is not "a prisoner detained in custody who is serving a period of imprisonment[16] for a serious sexual offence" which is the s 5(6) definition. In practice a prisoner's sentence may have expired but the prisoner will remain in custody under an interim detention order.[17]

[42] The obvious intention behind the adoption of different definitions of "prisoner" in s 5 on the one hand and ss 8 and 13 on the other, is to ensure that any application for orders must be filed and served while the respondent is serving his sentence for the qualifying "serious sexual offence" but that the proceedings may continue after the expiration of that term.

[43] If the term "prisoner" as defined in ss 8 and 13 is read literally then ss 8 or 13 orders may be made against a "prisoner" who does not stand convicted of a "serious sexual offence" but is in custody coincidentally for other matters even though the conviction for any "serious sexual offences" which founded the application under s 5 has fallen.

[44] It is contrary to the context and purpose of the DPSOA to read s 13 and the definition of "prisoner" literally, so as to effectively extend the "particular class of prisoner" to which the DPSOA applies to include persons other than those who have been convicted of a "serious sexual offence". The clear intention of the DPSOA is to establish a regime of preventative detention and supervision over a "particular class of prisoner" being those convicted of a "serious sexual offence". The purpose of the wider scope of the term "prisoner" for the purposes of ss 8 or 13 is not to extend the class of prisoner to whom the DPSOA applies, but to preserve applications commenced under s 5 so they might be pursued notwithstanding the expiry of a respondent's sentence.[18]

[45] It follows then that upon the appeal being allowed and the convictions being quashed, the respondent is not a "prisoner" for the purposes of either ss 8 or 13 and the court has no jurisdiction to make orders under s 13 of the DPSOA. If the applicant is retried and convicted and sentenced to a term of imprisonment, then s 5 would again be enlivened entitling the Attorney-General to bring a further application.

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13 Section 5(6).
14 Sections 3, 13, 16, 16C, 19, 19A, 21, 22, 30.
15 Section 13(2).
16 Emphasis added.
17 Section 9A.
18 See generally *Attorney-General for the State of Queensland v Kanaveilomani* [2015] 2 Qd R 509 at [97] - [110], [124] - [134], [168] - [169].

[46] For those reasons, I dismissed the application and dissolved the interim detention order.