SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v WTA* [2020] QSC 300
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **WTA** (respondent)
FILE NO/S:	[redacted] Indictment No 3870 of 2014 Indictment No 5473 of 2014
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	Orders made on 18 September 2020, reasons delivered on 2 October 2020
DELIVERED AT:	Brisbane
HEARING DATE:	11 and 18 September 2020
JUDGE:	Davis J
ORDERS:	**On [redacted file number]:** **Pursuant to r 668(2)(b) of the *Uniform Civil Procedure Rules* 1999, the supervision order for [the respondent], made on 11 April 2017, pursuant to Division 3 Part 2 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003, is set aside.** **On IND 3870 of 2014 and IND 5473 of 2014:** **The release notice issued by the Townsville District Court on 20 May 2020 to be amended as follows:** **a. Page 1, dot point 1, be amended to read:** **Under s 11A(2)(a) *Bail Act*, the person released at large is [the respondent] , whose address is [an address appears in the order].** **b. Page 3, dot point 1, be amended to read:** **Under s 11A(2)(c) *Bail Act*, the entity whose custody [the respondent] is released for care is the Office of the Public Guardian, Townsville whose address is 8 Black Hawk Blvd, Thuringowa Central.**

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 subject to a supervision order made in 2017 pursuant to the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (the DPSOA) – where the convictions which formed the basis of the application for orders under the DPSOA have been set aside by the Court of Appeal because the respondent lacked capacity to plead to the offences – where the respondent is no longer a prisoner for the purposes of the DPSOA – whether the supervision order should be set aside

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – AMENDING, VARYING AND SETTING ASIDE JUDGMENTS AND ORDERS – ACTIONS TO REVIEW OR SET ASIDE JUDGMENT OR ORDER – GENERALLY – where the respondent is subject to a supervision order made in 2017 pursuant to the DPSOA – where the convictions which formed the basis of the application for orders under the DPSOA have been set aside by the Court of Appeal – where the pleas were not validly entered – where, had those facts been discovered before the supervision order was made, the respondent would have been entitled to resist the making of the order – where there is no longer jurisdiction to make orders under the DPSOA – whether the supervision order should be set aside

CRIMINAL LAW – PROCEDURE – BAIL – REVOCATION, VARIATION, REVIEW AND APPEAL – where, following an order that he be retried, the respondent was released pursuant to s 11A(2)(a) of the *Bail Act* 1980 under a release notice issued under s 11B – where the respondent applied to vary the release order to remove the reference to Corrective Services in the event that the supervision order under the DPSOA was set aside – where, if the supervision order was set aside, Corrective Services no longer exercised any powers of supervision over the respondent – whether the release order ought to be amended – whether the Supreme Court has power to vary a release order made in the District Court pursuant to ss 11A and 11B of the *Bail Act*

Bail Act 1980, s 10, s 11, s 11A, s 11B, s 16
Dangerous Prisoners (Sexual Offenders) Act 2003, s 13, s 16, s 22, s 43AA
Uniform Civil Procedure Rules 1999, r 668

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27, applied

Attorney-General for the State of Queensland v CCJ [2019] 2 Qd R 543, followed
Attorney-General (Qld) v Fardon [2011] QCA 155, cited
Attorney-General (Qld) v Fardon [2013] QCA 299, cited
Attorney-General (Qld) v Fardon [2018] QSC 193, cited
Attorney-General for the State of Queensland v Nemo [2020] QSC 140, cited
Fardon v Attorney-General (Qld) (2004) 223 CLR 575, cited
Project Blue Sky Inc & Others v Australian Broadcasting Authority (1998) 194 CLR 355, applied
R v Presser [1958] VR 45, cited
Re WTD [2018] QSC 196, cited
SZTAL v Minister for Immigration and Border Protection (2017) 262 CLR 362, applied
The Queen v A2; The Queen v Magennis; The Queen v Vaziri (2019) 93 ALJR 1106, applied

COUNSEL: M Maloney for the applicant
J Briggs for the respondent
A Fritz for the Crown in IND 3870 of 2014 and IND 5473 of 2014

SOLICITORS: GR Cooper, Crown Solicitor for the applicant
Legal Aid Queensland for the respondent
Office of the Director of Public Prosecutions for the Crown in IND 3870 of 2014 and IND 5473 of 2014

[1] The respondent has been the subject of a supervision order made in April 2017 under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (the DPSOA). As and from 20 May 2020, he was also the subject of a release notice pursuant to s 11B of the *Bail Act* 1980.

[2] On 18 September 2020, I made the following order in relation to the supervision order:

> "Pursuant to r 668(2)(b) of the *Uniform Civil Procedure Rules* 1999, the supervision order for [the respondent], made on 11 April 2017, pursuant to Division 3 Part 2 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003, is set aside."

[3] On the same day, I made orders under the *Bail Act* in these terms:

> "The release notice issued by the Townsville District Court on 20 May 2020 to be amended as follows:
>
> a. Page 1, dot point 1, be amended to read:
>
> Under s 11A(2)(a) *Bail Act*, the person released at large is [the respondent], whose address is [redacted address].
>
> b. Page 3, dot point 1, be amended to read:
>
> Under s 11A(2)(c) *Bail Act*, the entity whose custody [the respondent] is released for care is the Office of the Public Guardian, Townsville whose address is 8 Black Hawk Blvd, Thuringowa Central."

[4] These are my reasons for making the orders.

Background

[5] The respondent is an Indigenous man born in Mount Isa in 1972. He is presently 48 years of age.

[6] When he was 18 years of age, the respondent was placed on probation by order of the District Court in November 1990. On that day, he pleaded guilty to two counts of carnal knowledge against the order of nature, one count of permitting carnal knowledge against the order of nature with a child under the age of 16 and three counts of permitting carnal knowledge against the order of nature (the 1990 offences). That offending concerned sexual activity with a number of boys who all, like the respondent, were living on Mornington Island.

[7] In 1993, the respondent was placed on a recognisance in relation to a charge of assault occasioning bodily harm. That was not an offence of a sexual nature.

[8] Significantly, in December 2014, the respondent pleaded guilty in the District Court at Townsville to a number of offences of a sexual nature against children (the 2014 offences). It is the conviction for those offences which formed the basis of the applicant's application for orders under the DPSOA. In making the supervision order, Burns J recorded the circumstances of the offending, which involved various forms of sexual misconduct against a group of young boys who were in the respondent's home.

[9] Psychiatrists, Doctors Beech, Grant and McVie, all examined the respondent in 2016 for the purposes of the applicant's application for orders under the DPSOA. Diagnosis and assessment of the respondent was difficult. He was diagnosed with schizophrenia in 1999. He was a long term abuser of alcohol and other substances. Dr Beech thought it was likely that the respondent was suffering paedophilia of a homosexual orientation but was unable to confirm the diagnosis. Dr Grant was prepared to diagnose paedophilia.

[10] Burns J found that the respondent was a serious danger to the community in the absence of an order under Division 3 of Part 2 of the DPSOA but further found that the risk could be adequately managed by a supervision order, provided that the respondent was housed in supported accommodation.

[11] Such accommodation was found, but unfortunately, the supervision order was contravened. In June 2017, the respondent failed to comply with curfew and monitoring directions and he also consumed alcohol. He was returned to custody. Pursuant to s 22 of the DPSOA, he was released back into the community on the supervision order by Dalton J on 3 November 2017. The respondent consumed intoxicating inhalants in April 2018 and was returned to custody. He was again released back onto the supervision order on 15 October 2018 by Boddice J.

[12] The third contravention occurred in April 2019. The respondent assaulted a co-resident of the accommodation facility in which he was housed. As a result of that incident, he was effectively evicted from the facility. He was returned to custody on 8 April 2019. The third contravention proceedings came before Dalton J

on 18 June 2019 and her Honour released the respondent back onto the supervision order.

[13] Over the period during which the respondent has been on supervision, questions began to arise as to his capacity to comply with the supervision order because of his intellectual deficits. In the course of argument on the first contravention proceedings in 2017, Dalton J said:

> "This is the third Indigenous man from North Queensland I've had in about two months who has an IQ of around 50 and is caught in the system. And they're forever caught in it, because they can't understand the supervision order except in the most basic terms, and then they usually can only understand it while it's being explained to them and then for a little while after. These people – I don't know how they've pled guilty, but they've not got capacity to plead. They should – this man should never have pleaded. At an IQ of 48, he's not fit for trial. So he should have – and as I say, this is the third one I've had in two months. They should have been referred to the Mental Health Court. They would be in pretty much the same care situation – that is, between NDIS[1] and whatever remnants is left of the Department of Disabilities. They would be in 24/7 care, but they would not be in the system. So what can we do?" (emphasis added)

[14] During the second contravention proceedings, Dr Sundin opined that the respondent was unfit for trial "… and has been permanently unfit for many decades".[2]

[15] On 6 September 2019, the Queensland Civil and Administrative Tribunal appointed the Office of the Public Guardian to the respondent in relation to the following areas:

(a) accommodation

(b) health care;

(c) provision of services, including the National Disability Insurance Scheme; and

(d) legal matters not relating to his financial or property matters.

[16] Further medical reports were obtained which then led the respondent to appeal both the 1990 and 2014 convictions on the basis that he was not fit to enter pleas. Those convictions were quashed by the Court of Appeal on 18 May 2020.[3]

[17] After the successful appeal:

(a) by order of the District Court at Townsville, the respondent was released pursuant to s 11A(2)(a) of the *Bail Act* under a release notice issued under s 11B; and

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1 The National Disability Insurance Scheme.
2 Report, 16 August 2018.
3 By consent; no reasons given.

(b) the respondent's case was referred to the Mental Health Court with a view to him being declared unfit for trial in relation to the 1990 and 2014 offences.

[18] The respondent is presently living back in supported accommodation funded by the National Disability Insurance Scheme (NDIS). His affairs continue to be managed by the Office of the Public Guardian. The earliest the matter can be heard by the Mental Health Court is 13 October 2020.

Hearing on 11 September 2020

[19] The matter of the supervision order was mentioned before me on 11 September 2020.

[20] Unfortunately, the respondent's case is not the first where, during proceedings under the DPSOA it has been discovered that a respondent was not fit to plead to the charges which formed the basis of the proceedings under the DPSOA. As I explained in *Attorney-General for the State of Queensland v CCJ*,[4] once the conviction falls, the appropriate course is to dissolve the supervision order.

[21] On 11 September, concerns were expressed to me that if the supervision order was dissolved, the respondent may become homeless, or at least would lose some of the support structures he had in place, in the period up to the time the Mental Health Court hears and determines the referral. The concerns were raised because without the supervision order Corrective Services cease to have any control over, or involvement with the respondent.

[22] While it might be convenient in some respects for the supervision order to subsist until determination of the Mental Health Court referral, such a situation is completely inappropriate.

[23] The effect of the decision of the Court of Appeal is that the respondent did not have the capacity to enter pleas of guilty to the 2014 offences.[5] He is, therefore, presumed innocent of those charges. It follows that he ought not to have been convicted, ought not to have been imprisoned and ought not to have been the subject of any proceedings under the DPSOA.

[24] In those circumstances, the respondent continuing to be the subject of the supervision order is inappropriate. The supervision order renders him liable to the exercise of considerable powers vested in Corrective Services.[6] Further, any contravention of the supervision order renders the respondent liable to be imprisoned, prosecuted for breaching the order, and potentially being made subject of a continuing detention order.[7] While it is unlikely that the executive would take action upon a contravention in the present circumstances, that is very much beside the point.

[25] In *Attorney-General for the State of Queensland v Fardon*,[8] a supervision order was described as a "compact"[9] between the prisoner and the community, so

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4 [2019] 2 Qd R 543.
5 The 1990 offences were not the foundation for the supervision order.
6 *Dangerous Prisoners (Sexual Offenders) Act* 2003, s 16.
7 *Dangerous Prisoners (Sexual Offenders) Act* 2003, ss 22 and 43AA.
8 [2011] QCA 155.

contravention constituted a breach of an agreement rendering the prisoner liable to have the supervision order rescinded and a continuing detention order made. However, in other judgments contravention of a supervision order has been viewed as a consideration in the assessment of risk of reoffending rather than as a breach of a covenant which has ramifications in itself.[10]

[26] Even if the respondent was properly convicted (the Court of Appeal has ruled he was not), he now seems not to have the capacity to understand and comply with the supervision order. It is difficult to see how, in those circumstances, the supervision order can be expected to operate so as to provide adequate protection to the community against the commission by the respondent of a serious sexual offence.[11]

[27] It does not follow that where a prisoner, through unsoundness, or impairment of mind, cannot comply with a supervision order, a continuing detention order should be made. Even when there is a finding that a person is a serious danger to the community in the absence of an order, there is discretion to make no order,[12] and in the respondent's case that might be appropriate, leaving his management to some other regime.

[28] Notwithstanding all these considerations, it was important not to jeopardise the respondent's supported accommodation so I ordered the matter be mentioned again on 18 September 2020 by which time appropriate arrangements to accommodate him could be investigated.

Hearing on 18 September 2020

[29] The matter came before me again on 18 September 2020.

[30] Material was read which showed that if the supervision order was dissolved, the respondent could continue to reside in his current supported accommodation funded by the NDIS. That situation could be maintained at least until the Mental Health Court has determined the referral to it.

[31] The power to dissolve the supervision order arises from r 668 of the *Uniform Civil Procedure Rules* 1999. That rule provides:

> "**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

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9 At [29] per de Jersey CJ.

10 *Attorney-General (Qld) v Fardon* [2011] QCA 111 at [29]; *Attorney-General (Qld) v Fardon* [2013] QCA 299 at [21]; *Attorney-General (Qld) v Fardon* [2018] QSC 193 at [76]. All considered in *Attorney-General for the State of Queensland v Nemo* [2020] QSC 140 at [19]-[26].

11 *Dangerous Prisoners (Sexual Offenders) Act* 2003, s 13.

12 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 596-598, [34].

(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."

[32] The relevant facts for the purposes of r 668(1)(b) are:

(a) The pleas entered to the 2014 offences were not validly entered because the respondent did not have the relevant capacity,[13] or at least there was such doubt as to his capacity that the pleas should not have been accepted.

(b) He was therefore wrongly convicted on the basis of the pleas.

(c) The convictions were liable to be set aside and were set aside.

(d) Therefore, there would be no jurisdiction to make orders under the DPSOA.

[33] Had those facts been discovered before the supervision order was made, the respondent would have been entitled to resist the making of the order.

[34] It was therefore appropriate to dissolve the supervision order and I did so.

[35] The *Bail Act* provides that upon a grant of bail, an accused will be released upon his undertaking.[14] The undertaking of an accused is primarily to appear and face the criminal charges, but may also contain conditions relevant to the risk of failing to appear, committing an offence on bail, endangering the safety and welfare of persons while on bail, interfering with witnesses or obstructing the course of justice while on bail.[15] Various consequences flow from a breach of an undertaking, including liability to criminal sanction.[16]

[36] The undertaking is effectively an agreement by the accused to do certain things and to refrain from doing other things. Where an accused has an impairment of the mind such as to render him incapable of understanding the nature and effect of the

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13 *R v Presser* [1958] VR 45.
14 *Bail Act* 1980, s 20(1).
15 *Bail Act* 1980, ss 11 and 16(1).
16 *Bail Act* 1980, ss 28, 29, 31 and 33.

undertaking, it is inappropriate to grant the person bail. However, it would be intolerable if the law was that a person incapable of entering into an undertaking had to remain in custody pending trial. That problem is addressed by ss 11A and 11B of the *Bail Act*. They are as follows:

> "**11A Release of a person with an impairment of the mind**
>
> (1) This section applies if a police officer or court authorised by this Act or the *Youth Justice Act* 1992 to grant bail considers—
>
> (a) a person held in custody on a charge of or in connection with an offence is, or appears to be, a person with an impairment of the mind; and
>
> (b) the person does not, or appears not to, understand the nature and effect of entering into an undertaking under section 20; and
>
> (c) if the person understood the nature and effect of entering into the undertaking, the person would be released on bail.
>
> (2) The police officer or court may release the person without bail by—
>
> (a) releasing the person into the care of another person who ordinarily has the care of the person or with whom the person resides; or
>
> (b) permitting the person to go at large.
>
> (3) A person's release is on condition the person will surrender, at the time and place stated in the notice under section 11B, into the custody of the court stated in the notice.
>
> (4) If the person surrenders into the custody of the court stated in the notice, the court may release the person again under subsection (2).
>
> (5) A court authorised by this Act or the *Youth Justice Act* 1992 to grant bail may revoke a release.
>
> (6) A person's release by a police officer discharges any duty to take the person before a justice to be dealt with according to law.
>
> (7) In this section—
>
> ***person with an impairment of the mind*** means a person who has a disability that—
>
> (a) is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these; and
>
> (b) results in—

(i) a substantial reduction of the person's capacity for communication, social interaction or learning; and

(ii) the person needing support.

11B Release notice

(1) This section applies if a person is released under section 11A, whether for the first time or because of section 11A(4).

(2) The police officer or court releasing the person must give the person a notice in the approved form stating—

(a) the person's name and place of residence; and

(b) the charge on which or the offence in connection with which the person was in custody; and

(c) if the person is released into the care of another person, the other person's name and place of residence; and

(d) the court into whose custody the person is required to surrender as a condition of release; and

(e) the time and place the person is required to surrender into the court's custody.

(3) The notice must also include a warning that a warrant will be issued for the person's arrest if the person fails to surrender into the court's custody at the time and place stated.

(4) If the person is released into the care of another person, the police officer or court must also give the other person a copy of the notice."

[37] These sections are not without difficulty.[17] It is unnecessary to analyse the provisions.

[38] The orders I made on 18 September 2020 varied the release notice. In particular, I varied the text of dot point 1 on page 1 and dot point 1 on page 3. That variation was not opposed by Ms Fritz who appeared for the Office of the Director of Public Prosecutions.

[39] Before variation, they provided as follows:

"• Under s 11A(2)(a) *Bail Act*, the person released at large is [the respondent], whose address is the place approved by a corrective services officer pursuant to the supervision order

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17 See *Re WTD* [2018] QSC 196 at [16].

made by the Supreme Court of Queensland on 28 March 2017, in relation to [the respondent]."

And:

"• Under s 11A(2)(c) *Bail Act*, the entities into whose custody [the respondent] is released for care, are the Queensland Corrective Services Commission, whose address is 303 Ross River Rd, Aitkenvale and the Office of Public Guardian, Townsville, whose address is 8 Black Hawk Blvd, Thuringowa Central."

[40] It was appropriate to make the first amendment because, upon dissolution of the supervision order Corrective Services exercise no powers of supervision over the respondent. Therefore, they will not approve any accommodation for him. The notice was amended so as to nominate the address at which the respondent currently resides.

[41] The second amendment was necessary so as to release the respondent, not into the care of the Queensland Corrective Services Commission, but to the Office of the Public Guardian. Again, this was necessary because Corrective Services are no longer involved with the respondent.

[42] Section 10 of the *Bail Act* gives this court power to grant bail. It provides, relevantly:

"**10 General powers as to bail**

(1) The Supreme Court or a judge thereof may, subject to this Act, grant bail to a person held in custody on a charge of an offence, or in connection with a criminal proceeding, or enlarge, vary or revoke bail granted to a person in or in connection with a criminal proceeding whether or not the person has appeared before the Supreme Court in or in connection therewith. …"

[43] The order made under s 11A is not a grant of bail. There might be doubt whether this court has power to vary the order of the District Court made under s 11A. However, if the powers under s 10(1) did not extend to the making of orders under s 11A, it would mean that this court could grant bail in relation to a charge pending in the District Court, but could not make an order under ss 11A in relation to a charge pending in the District Court. It must be, having regard to the *Bail Act* as a whole and the scheme thereby established, that the term "grant bail" in s 10(1) includes making an order under ss 11A.[18] It therefore follows that the power to "enlarge, vary or revoke bail" would include a power to vary an order made under s 11A even though it was made in the District Court. The release notice issued under s 11B must comply with the terms of the order made under s 11A. It is therefore part of the order for the purpose of s 10 of the *Bail Act*.

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18 *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 368, [14] and 374-375, [35]-[40]; *Project Blue Sky Inc & Others v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384, [78]; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47, [47]; and *The Queen v A2; The Queen v Magennis; The Queen v Vaziri* (2019) 93 ALJR 1106 at 1117, [32].

[44] Being satisfied that I had jurisdiction to vary the order of the District Court by varying the release notice, I did so.

[45] For those reasons, I made the orders which I did.